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OF
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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

HAROLD G. HAMILTON, PATRICIA PERRONE SANDERS, AND ALL OTHERS SIMILARLY SITUATED v. MEMOREX TELEX CORPORATION

No. 9310SC1081

(Filed 21 February 1995)

1. Limitations, Repose, and Laches § 113 (NCI4th)— pay for unused vacation days—change in policy—action not time barred

Plaintiffs' action was not barred by the statute of limitations where plaintiffs brought the action under the Wage and Hour Act to recover the value of vacation days they had not taken before they were terminated where defendant had changed its vacation policy on 21 December 1988 from earning vacation days one year for use in the next to advancing days on 1 January for use in that year and plaintiffs filed their action on 3 April 1991. Plaintiffs suffered no injury until the defendant failed to pay them for vacation days they had allegedly earned in 1988; defendant's policy did not require it to pay cash for any unused vacation days until the employment was terminated and no individual plaintiff had a cause of action until next pay day after termination. The trial court correctly found that only those plaintiffs whose pay date next following termination preceded 3 April 1989 (two years prior to the filing of this action) were barred by N.C.G.S. § 95-25.22.

Am Jur 2d, Limitation of Actions §§ 107 et seq.

2. Labor and Employment § 56 (NCI4th)— unused vacation days—change in policy—termination of plaintiffs

The trial court properly found that defendant's refusal to pay plaintiffs for vacation days earned under defendant's old policy prior to 1 January 1989 was a violation of the Wage and Hour Act where defendant changed its policy on 21 December 1988 from earning vacation days one year for use in the next to advancing days on 1 January for use in that year, subject only to working for the company for six months before using vacation days; defendant terminated plaintiffs after changing the policy; and defendant refused to pay plaintiffs for vacation days accrued under the old policy. Once the employee has earned wages and benefits under the Wage and Hour Act the employer may not rescind them, except that certain benefits including vacation pay may be made subject to forfeiture so long as the employer notifies the employee of the conditions of such a forfeiture prior to the time he or she earns such benefits. N.C.G.S. § 95-25.1 *et seq.*

Am Jur 2d, Master and Servant § 80.

3. Labor and Employment § 56 (NCI4th)— unused vacation days—unilateral contract

The trial court did not err in an action to recover payment for unused vacation time lost when defendant changed its vacation accrual policy and then terminated plaintiffs by finding, as an alternative basis for its judgment, that defendant had breached a unilateral contract with plaintiffs. Defendant's old policy constituted a unilateral promise to grant an employee vacation in the next year if he worked in the previous one, which all of the plaintiffs accepted by working in 1988 and continuing to work through 1 January 1989.

Am Jur 2d, Master and Servant § 80.

4. Labor and Employment § 56 (NCI4th)— unused vacation days—employees terminated after change

The trial court erred by holding defendant liable for unused vacation time for employees terminated after 31 December 1989 (some plaintiffs were terminated before that time) where defendant changed its vacation policy from accumulating vacation days one year for use in the next to advancing vacation days on 1 January for use that year, with no carryover without permission, subject only to working for the company for six months, and with

the change announced in a memorandum on 21 December 1988. Defendant's policies concerning the carryover of vacation were valid and enforceable under the Wage and Hour Act; each policy was in place before the employees earned the vacation days thereby affected; none of the employees still employed after 31 December 1989 had any vacation days to carry over; and those employees suffered no loss when defendant paid them only for the days they had accrued in the year of their termination.

Am Jur 2d, Master and Servant § 80.

5. Labor and Employment § 56 (NCI4th)— unused vacation days—determination of damages during liability phase of trial

The trial court did not err in an action to recover the value of unused vacation days for which defendant refused to pay plaintiffs when they were terminated by making determinations of damages during the liability phase of the trial. Defendant offers no theory of how it was prejudiced by the court's consideration of these matters during the liability phase; moreover, these matters all concern defendant's liability to the class and do not involve defendant's liability to any particular plaintiff.

Am Jur 2d, Master and Servant § 80.

6. Labor and Employment § 56 (NCI4th)— unused vacation days—pay rates—date of termination

The trial court did not err in an action to recover the value of unused vacation days by concluding that plaintiffs were entitled to recover payment for their unused days at their respective pay rates on the date of termination, rather than the rates at the earlier date when defendant's policy on vacation accrual was changed. Plaintiffs' injury was defendant's failure to pay them for those days upon their termination and their action accrued on their respective dates of termination. Also, defendant's policy explicitly provided that vacation days would be paid "at the current base rate."

Am Jur 2d, Master and Servant § 80.

7. Labor and Employment § 56 (NCI4th)— unused vacation days—six month employment limitation

The trial court did not err in an action by terminated employees to recover the value of unused vacation days by awarding

damages to employees who had begun their employment within six months of 1 January 1989 but who had been employed by defendant for at least six months prior to their termination, where defendant's new vacation policy advancing leave for the year conditioned on six months employment took effect on 1 January 1989. Although the court may have erred in drafting its finding of fact regarding the policy, the plain meaning of defendant's policy is that an employee may not take vacation until he has worked for six months.

Am Jur 2d, Master and Servant § 80.

8. Parties § 80 (NCI4th)— failure to pay for unused vacation days—class action—notice

The trial court did not err by including in its judgment in a class action to recover the value of unused vacation days those class members whose notices were returned undelivered. Considering the number of plaintiffs involved and the availability of the plaintiffs' addresses from the company file, in addition to the fact that it is the defendant who disputed the notice, the notice was in accord with applicable class action law, providing for the best notice practical under the circumstances and being reasonably certain to inform those involved, affording each member the chance to opt out of the class. The form of the notice was not substantially less likely to bring home notice than any other feasible alternative.

Am Jur 2d, Parties §§ 50 et seq.

9. Labor and Employment § 56 (NCI4th)— failure to pay for unused vacation days—liquidated damages—interest

The trial court did not err by awarding liquidated damages to plaintiffs in an action to recover the value of unused vacation days lost when defendant changed its vacation policy and subsequently terminated plaintiffs where defendant argued that there was evidence to show that it changed the vacation policy solely for the purposes of accounting and that the change was an utterly proper, prospective alteration to its benefit scheme, so that it should not have to pay liquidated damages under N.C.G.S. § 95-25.22. However, the act that constituted the violation was the failure to pay plaintiffs for their vacation upon their termination, not the change in policy. Defendant pointed to no evidence to show that the failure to pay plaintiffs for their vacation days was

done in good faith or in the belief that it was not a violation of the Wage and Hour Act and N.C.G.S. § 95-22 mandated that the trial court award liquidated damages. The trial court erred, however, in awarding interest on the liquidated damages. While N.C.G.S. § 95-25.22 states that interest may be recovered on unpaid wages, it does not provide that interest is payable on liquidated damages.

Am Jur 2d, Master and Servant § 80.

10. Labor and Employment § 56 (NCI4th)— class action—unused vacation days—terminated employees—common law contract claim—attorney fees

The trial court did not err in allowing attorneys' fees for parties who recovered in a class action on common law contract claims but not on Wage and Hour Act claims for unused vacation days for which they were not paid on termination. The attorneys' work was not divisible between Wage and Hour claims and contract claims; the two claims were based on the same fundamental legal theory and, because the claims were similar, time spent litigating the contract claim directly benefitted those whose Wage and Hour claims were not time-barred.

Am Jur 2d, Master and Servant § 80.

11. Discovery and Depositions § 55 (NCI4th)— class action—discovery—defendant ordered to produce information

The trial court erred in a class action seeking compensation for vacation days lost when plaintiffs were terminated by compelling discovery when there was no outstanding discovery request. Plaintiffs had sent an interrogatory to defendant seeking information on all members of its class which was a continuing request, but plaintiffs did not contend that defendant failed to provide any information concerning members of the class as it was defined in the 18 November 1991 order certifying the class. Therefore, so long as the class continued to be defined as it was in the 18 November 1991 order, there were no unsatisfied discovery requests and the trial court erred by ordering defendant to produce information regarding people who were terminated. N.C.G.S. § 1A-1, Rule 37.

Am Jur 2d, Depositions and Discovery §§ 361 et seq.

12. Labor and Employment § 56 (NCI4th)— unused vacation days—measure of damages

The trial court erred in an action to recover the value of unused vacation days after defendant changed its vacation policy and terminated plaintiffs by failing to order defendant to pay employees terminated prior to 1 January 1990 the vacation leave pay promised under the old and new policies. By working in 1988, plaintiffs earned an allotment of vacation that could only be taken in 1989 and, under the new policy, plaintiffs earned vacation days that could be taken in that year. The two allotments were separate awards for separate periods of work, performed pursuant to two separate contracts.

Am Jur 2d, Master and Servant § 80.

Appeal by defendant from order entered 25 November 1991 by Judge Dexter Brooks, from order entered 18 December 1992 by Judge F. Gordon Battle, and from order and judgment entered 27 July 1993 by Judge Wiley Bowen, and appeal by plaintiffs from order entered on 18 December 1992 by Judge F. Gordon Battle, and from order and judgment entered 27 July 1993 by Judge Wiley Bowen in Wake County Superior Court. Heard in the Court of Appeals 26 May 1994.

Plaintiffs instituted this class action on 3 April 1991, to recover vacation pay defendant had allegedly failed to pay each of them upon the termination of their employment with defendant. Judge Brooks certified the class in an order entered 18 November 1991. The class consisted of individuals who: (1) were employed by defendant before 21 December 1988; (2) were terminated after 31 December 1988; and (3) were not paid for vacation time they allegedly earned in 1988, prior to the implementation of a new vacation policy. Upon a joint motion of the parties, the case was bifurcated as to issues of liability and damages.

Following a trial on 2 and 3 December 1992, Judge F. Gordon Battle entered an order finding defendant liable for compensatory and liquidated damages, interest and attorneys' fees. Plaintiffs filed a motion for summary judgment on damages and a motion for entry of judgment on 8 July 1993. Following a hearing on the matter, Judge Bowen granted the motions and entered judgment against defendant for $753,006.32 in damages and interest and $50,550.08 for attorneys' fees and expenses. On that same day the court entered an order to

compel defendant to provide information concerning employees terminated after 31 July 1992.

Defendant and plaintiffs appeal.

Patterson, Harkavy & Lawrence, by Donnell Van Noppen, III, and Gulley and Calhoun, by Michael D. Calhoun, for plaintiff-appellees.

Poyner & Spruill, L.L.P., by Cecil W. Harrison, Jr., and Robin T. Morris, for defendant-appellant.

Thomas A. Harris and Attorney General Michael F. Easley, by Associate Attorney General John A. Greenlee, for Commissioner of Labor Harry E. Payne, Jr., amicus curiae.

ARNOLD, Chief Judge.

Defendant presents eleven arguments based upon thirty assignments of error and plaintiffs offer one argument based upon two assignments of error.

Plaintiffs are all former employees of defendant who had been employed by defendant at any time prior to 21 December 1988 and were terminated after 31 December of that year. Prior to 21 December 1988, the defendant's vacation policy (the old policy), which had been adopted in 1986, provided as follows: If an employee was hired prior to 1 August of a given year, the employee was entitled to five days of paid vacation during that year. However these days could not be taken until the employee had completed three months of continuous employment. If an employee was hired on or after 1 August, the employee was entitled to no vacation days in that year, but would be entitled to take ten days of vacation the next year, after completing six months of continuous employment. If an employee was terminated after completing six months of service, he would be paid for any unused vacation that was earned and payable on 1 January of that year.

On 21 December 1988, defendant notified all of its employees that, as of 1 January 1989, the vacation policy (the new policy) would be as follows: Vacation would be advanced on 1 January for use in that year. Vacation days were available for immediate use, but were "earned" over the course of the year. Upon termination, employees would be paid for the unused days they had earned up to that point in the year.

Plaintiffs contend that under the old policy they earned vacation in each year for use in the next. Thus, they contend that by working in 1988 they had earned their vacation for 1989, which would have vested on 1 January 1989. The change in policy meant that in 1989 they were entitled to those days they had earned in 1988, in addition to whatever days they earned in 1989 under the new policy. Plaintiffs contend that the defendant failed to pay them for the days they had accrued under the old policy when they were terminated.

On the other hand, defendants maintain that under the old policy the employees earned the vacation for each year merely by being in its employ on 31 December of one year and working on the first day in January of the next year. Under that interpretation, vacation was advanced at the beginning of each year, not earned in the previous one. The change in policy reflected only an accounting change, allowing the defendant to take the charges on its accounts over the course of the year, rather than on 1 January of each year.

Defendant's Appeal

I.

[1] First, defendant argues that the trial court erred in failing to determine that the statute of limitations barred plaintiffs' claim under the North Carolina Wage and Hour Act (the Act), N.C. Gen. Stat. §§ 95-25.1 to -25.25 (1989). We disagree.

Plaintiffs brought this action, at least partly, under the Act to recover for vacation days they had not taken before they were terminated. The Act provides:

> No employer is required to provide vacation for employees. However, if an employer provides vacation for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Employees shall be notified in accordance with G.S. 95-25.13 of any policy or practice which requires or results in loss or forfeiture of vacation time or pay.

N.C.G.S. § 95-25.12. "Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday. . . ." N.C.G.S. § 95-25.7. Vacation pay is included within the definition of "wage." N.C.G.S. § 95-25.2. Claims for unpaid wages and benefits under the Act are subject to a two year statute of limitations. N.C.G.S. § 95-25.22(f).

Defendant contends that the statute started to run on 21 December 1988 when it gave notice of the change in the vacation policy in accordance with section 95-25.12.

As was recently made plain in *Glover v. First Union National Bank*, 109 N.C. App. 451, 428 S.E.2d 206 (1993), defendant's argument is meritless. In that case the plaintiff sued the defendant to recover retirement benefits he was allegedly owed. The defendant argued that the statute of limitations barred his claim because any loss the plaintiff had suffered had occurred over twenty years previously when the retirement plan was amended. This Court rejected that argument, stating: "The statute begins to run on the date the promise is broken. In no event can the limitations period begin to run until the injured party is at liberty to sue." *Id.* at 455, 428 S.E.2d 208 (citation omitted).

In this case, the plaintiffs suffered no injury until the defendant failed to pay them for the vacation days they had allegedly earned in 1988. Defendant's policy did not require it to pay cash for any unused vacation days until the employment was terminated. Therefore, no individual plaintiff had a cause of action until the next pay day after termination. The trial court correctly found that only those plaintiffs whose pay date next following termination preceded 3 April 1989 (two years prior to the filing of this action) were barred by section 95-25.22. We reject defendant's first argument.

Secondly, defendant argues that the Act displaces all other remedies in this situation so that its statute of limitations, which is shorter than those for plaintiffs' common law actions, bars the entire action. Having found that the Act's statute of limitations does not bar this action, we need not address the defendant's preemption argument.

II.

[2] Defendant next argues that the trial court erred in concluding that it had breached any obligation to the plaintiffs, because the old policy unambiguously provided that employees did not earn vacation in one year for use in the next. We disagree.

Defendant's old vacation policy provided:

First Year of Employment

If you are hired prior to August 1, you are eligible for five (5) days of vacation during the current calendar year after you have completed three (3) months of continuous service. You may take ten (10) days of vacation during the following calendar year.

> If you are hired on or after August 1, you are eligible for ten (10) days of vacation to be taken during the following calendar year after you have completed six (6) months of continuous service.
>
> . . . .
>
> In the event your employment is terminated . . . you will be paid for any untaken vacation that was earned and payable on January 1 of that calendar year.

First, the trial court properly found that the defendant violated the Act by failing to pay plaintiffs for vacation days they had earned in 1988. Interpreted in its natural and ordinary meaning:

> [T]he Wage and Hour Act requires an employer to notify the employee in advance of the wages and benefits which he will earn and the conditions which must be met to earn them, and to pay those wages and benefits due when the employee has actually performed the work required to earn them.

Narron v. Hardee's Food Systems, Inc., 75 N.C. App. 579, 583, 331 S.E.2d 205, 208, *disc. review denied*, 314 N.C. 542, 335 S.E.2d 316 (1985). However, once the employee has earned the wages and benefits under this statutory scheme the employer may not rescind them, except that certain benefits, including vacation pay, may be made subject to forfeiture so long as the employer notifies the employee of the conditions of such a forfeiture prior to the time he earns such benefits. *Id.*

We believe that *Narron* controls our analysis in this situation. Like the trial court, we construe defendant's old policy to mean that by working for any time in one year, an employee earned the right to a full year's vacation in the next year, subject only to the requirement that he work six months before actually using the vacation days. Once the employees met the conditions, *i.e.* working in the previous year and being employed on 1 January of the next year, defendant could not rescind the benefits. The trial court properly found that defendant's refusal to pay plaintiffs for vacation days they earned under the old policy on 1 January 1989 was a violation of the Act.

[3] As an alternative theory for its judgment, the trial court found that the defendant breached a unilateral contract with plaintiffs when it refused to pay them for all of their unused vacation days. Again, we agree with the trial court's construction of defendant's policy.

As our Supreme Court established in *Roberts v. Mays Mills*, 184 N.C. 406, 114 S.E. 530 (1922), when an employer represents to an employee that he will receive a benefit after working a certain period of time, the employee may accept by entering or maintaining employment, and the employer cannot thereafter disavow the promise once the employee has started to work in reliance thereon. It matters not that the benefit is earned in the present but to be enjoyed in the future. Defendant's old policy constituted a unilateral promise to grant an employee vacation in the next year if he worked in the previous one. All of the plaintiffs accepted defendant's offer by working in 1988 and continuing to work through 1 January 1989, and they could not thereafter be divested of the promised vacation days.

Defendant argues that the interpretation we have adopted leads to the absurd conclusion that a person could start to work on 31 December of one year and then be entitled to a full year's vacation 1 January of the next year merely because he worked a single day in the previous year. While that might seem impractical, and even nonsensical, any absurdity is due solely to the method defendant chose to extend its benefits to its employees. As the Supreme Court noted in *Roberts*, "it is the employer, not the employee, who makes the offer, and who continues or discontinues it as he may find it to his interest." *Id.* at 412, 114 S.E. at 533. We dismiss defendant's third argument.

III.

[4] Defendant next argues that the trial court erred in holding defendant liable to employees terminated after 31 December 1989 because they suffered no harm. We agree.

The old policy provided that: "Vacation time must be taken by the end of the appropriate calendar year or it will be lost. However, up to five [5] days of vacation time may be carried over to the following calendar year with the written approval of your supervisor and manager." The trial court found as fact that "[a]ny request by an employee to carry over the January 1, 1989 lump sum grant to 1990 would have been denied."

In its 21 December 1988 memorandum to employees regarding the change in vacation policy, defendant stated:

> [E]ffective January 1 1990, and beyond, *vacation carryover will be eliminated.* Any rare exceptions must be approved by the Executive VP of your organization no later than November 1,

1989. It is the company's strong belief that your vacation time is an important benefit and must be taken on a current basis.

We believe that defendant's policies concerning the carryover of vacation days were valid and enforceable under the Act. Each policy was in place before the employees earned the vacation days thereby affected. *See Narron*, 75 N.C. App. at 583, 331 S.E.2d at 208. None of the plaintiffs who were still employed after 31 December 1989 had any vacation days to carry over to 1990, and thus suffered no loss when the defendant paid them only for the days they had accrued in the year of their termination. After 31 December 1989, employees forfeited the lump sum grant vacation days they had earned in 1988 under the old policy, and forfeited any unused days of vacation they had earned in 1989 under the new policy, unless they sought and obtained permission to carry those days over into 1990. We hold that the trial court erred in allowing any employees terminated after 31 December 1989 to recover for the lump sum grant under the old policy, and any unused days which were earned under the new policy, unless they sought and obtained permission to carry such days forward into the next year.

IV.

[5] In its fifth argument, defendant argues that the trial court erred in making determinations of damages during the liability phase of the trial. We disagree.

Specifically, defendant takes exception to the trial court's determining: 1) which plaintiffs were entitled to recover damages; 2) what the damages formula was to be; 3) the rate of pay to be used in calculating damages; 4) the plaintiffs' right to recover liquidated damages; and 5) the amount of liquidated damages. Defendant cites no authority for its assertion that this constituted reversible error. Indeed, defendant offers no theory of how it was prejudiced by the court's consideration of those matters during the liability phase. Absent such an allegation, we can find no error in the trial court's consideration of those issues. Moreover, we believe that those matters were properly included in the liability phase as they all concern defendant's liability to the class and do not involve the defendant's liability to any particular plaintiff. Defendant's fifth argument is rejected.

V.

[6] Next, defendant argues that the trial court erred in concluding that the plaintiffs were entitled to recover payment for their unused vacation days at their respective pay rates on the date of their termination. Instead, defendant asserts the measure should have been the plaintiffs' pay rates on 1 January 1989, which was the day they were to receive the vacation they had earned in 1988. We disagree.

As discussed previously, plaintiffs' causes of action accrued on their respective dates of termination. The injury they suffered was not the deprivation on 1 January 1989 of the vacation days, but the defendant's failure to pay them for those days upon their termination. Moreover, defendant's policy explicitly provided that vacation days would be paid "at the current base rate." The trial court did not err in calculating the plaintiffs' damages using their respective pay rates as of the date of termination.

VI.

[7] Defendant's seventh argument also lacks merit. Defendant argues that the trial court erred in awarding damages to 1) any plaintiff not employed at least six months prior to 1 January 1989 and 2) class members who did not receive actual notice of the lawsuit.

The trial court found as fact that defendant's vacation policy "unconditionally promised an allotment of paid leave would be irrevocably granted on January 1 provided the employee had worked at least six months before that January 1." Defendant contends that the trial court then erroneously concluded that employees who had not met the proviso, *i.e.* employees less than six months prior to 1 January 1989, were entitled to recover.

While the trial court may have erred in drafting its finding of fact, we find no reversible error because the court achieved the correct result. The plain meaning of the policy is that an employee may not take the vacation until he has worked for six months: "If you are hired on or after August 1, you are eligible for ten (10) days of vacation *to be taken the following year after you have completed six (6) months of continuous service.*" The trial court refused to allow any employee who had worked less than six months to recover. Accordingly, we find that the trial court did not err in allowing employees who had commenced their employment within six months of 1 January 1989, but who had been employed by defendant for at least six months, to recover.

[8] Likewise, we believe that the trial court did not err in including employees who had not received actual notice of the action in the judgment. Defendant contends that those whose notices were returned undelivered should not have been included.

Although Rule 23(a) does not specifically address notice to the members of a class, N.C. Gen. Stat. § 1A-1, Rule 23(a) (1990), the North Carolina Supreme Court has held that fundamental fairness and due process require that adequate notice be given to the members of the class. *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 283, 354 S.E.2d 459, 466 (1987). The Supreme Court has left the manner and the form of notice to the discretion of the trial court but has held that the court should require the best notice practical under the circumstances, including notice to all members who can be identified through reasonable efforts, although it need not comply with the formalities of service of process. *Id.* at 283-84, 354 S.E.2d at 466.

Considering the number of plaintiffs involved and the availability of the plaintiffs' addresses from the company file, in addition to the fact that it is the defendant who is disputing the notice, we conclude that notice was in accord with applicable class action law, providing for the best notice practical under the circumstances and being reasonably certain to inform those involved, *see Crow*, and affording each member the chance to opt out of the class. The form of notice chosen was not substantially less likely to bring home notice than any other feasible alternative, and therefore satisfies due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865 (1950). We conclude that it was not error for the trial court to include in its judgment those class members whose notices were returned undelivered.

VII.

[9] The next two arguments concern the imposition by the trial court of liquidated damages against defendant. Defendant argues that the trial court erred in awarding such damages, and that the court erred in allowing plaintiffs to recover interest on those damages. We find no reversible error in the imposition itself, but reverse the award of interest on the liquidated damages.

N.C.G.S. § 95-25.22, which addresses the recovery of unpaid wages, provides that:

> (a) Any employer who violates the provisions of . . . G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee

> or employees affected in the amount of . . . their unpaid amounts due under G.S. 95-25.6 through 92-25.12, as the case may be, plus interest at the legal rate set forth in G.S. 24-1, from the date each amount first came due.
>
> (a1) In addition to the amounts awarded pursuant to subsection (a) of this section, the court *shall* award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

(Emphasis added).

Thus, the employer bears the burden of demonstrating that liquidated damages should not be imposed. However, even if an employer shows that it acted in good faith, and with the belief that its action did not constitute a violation of the Act, the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages. When the employer cannot make such a showing, the trial court has no discretion and must award liquidated damages.

Here, defendant argues that there was evidence to show that it changed the vacation policy solely for the purposes of accounting, and that the change was an utterly proper, prospective alteration to its benefits scheme, under *Narron*. This is, however, irrelevant. The trial court found that "defendant's failure to pay each plaintiff and class member (except those whose Wage and Hour claims are barred) a full year's lump sum grant of vacation upon their termination violated" the Act. As we have previously discussed, the act that constituted the violation was the failure to pay the plaintiffs for their vacation upon termination, not the change in policy. Defendant has pointed to no evidence to show that the failure to pay plaintiffs for their vacation days was done in good faith or in the belief that it was not a violation of the Act. Thus, N.C.G.S. § 95-22 mandated that the trial court award liquidated damages.

However, we do agree with defendant that the trial court erred in ordering it to pay interest on the liquidated damages. The trial court concluded that plaintiff class members were "entitled to an award of interest at the legal rate from the pay date next following termination, when these amounts came due, with such interest to be applied to both the unpaid wages and the liquidated damages."

Subsection (a) of N.C.G.S. § 95-25.22 provides that interest may be awarded on the amounts due under that subsection, which in this case is "all vacation time off or payment in lieu of time off in accordance with the company policy or practice." N.C.G.S. § 95-25.12. Liquidated damages, on the other hand, are provided for in subsection (a1). While section 95-25.22 states that interest may be recovered on the unpaid wages, it does not provide that interest is payable on liquidated damages. Liquidated damages are not part of the "amounts due" under subsection (a) and are, therefore, not to be subject to interest. We conclude that plaintiffs were not entitled to interest on the liquidated damages award.

VIII.

[10] Next, defendant argues that the trial court erred in allowing attorneys' fees for non-prevailing parties, *i.e.* those plaintiffs who recovered on a common law contract claim but not under the Act. We disagree.

The parties have cited no North Carolina cases on the subject, and our research has disclosed none. However, federal courts have considered similar issues, and their reasoning, though not binding on us, is instructive. *See House v. Hillhaven, Inc.*, 105 N.C. App. 191, 412 S.E.2d 893, *disc. review denied*, 331 N.C. 284, 417 S.E.2d 251 (1992).

Defendant relies on the case *Hensley v. Eckerhart*, 461 U.S. 424, 76 L. Ed. 2d 40 (1983). In that case, the plaintiff class members had not won on all of their claims and the Supreme Court held that where the plaintiff class "has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Id.* at 440, 76 L. Ed. 2d at 54-55. However, we believe that the case *Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169 (6th Cir. 1990), which relied upon *Hensley*, is more apt in this instance. In *Wooldridge*, the issue was whether attorneys' fees could be recovered for individual class members who did not prevail. The court held that the attorneys' fee award should be reduced by the time spent litigat-

ing those unsuccessful claims. The court was careful to state, however, that to the extent such time aided the claims of successful claimants, it was compensable. *Id.* at 1175.

In this instance, the attorneys' work was not divisible between the Wage and Hour claims and the contract claims. As discussed in part II, *supra*, the Wage and Hour claims and the contract claims were based upon the same fundamental legal theory: that the old vacation policy constituted an offer or inducement which plaintiffs accepted by working in 1988, thereby earning their 1989 vacation. Any class member who did not prevail on the Wage and Hour claim did so only because his action was barred by the statute of limitations. Because the claims were so similar, time spent litigating the contract claim directly benefitted those plaintiffs whose Wage and Hour claims were not time-barred. Thus, we conclude that the trial court did not err in refusing to reduce the attorneys' fee award to account for those class members who prevailed only on the contract claim.

IX.

[11] Finally defendant argues that the trial court erred in compelling discovery when there was no outstanding discovery request. We agree.

On 27 July, 1993, the trial court ordered:

> [P]laintiffs are entitled to obtain through discovery the names, addresses, social security numbers, service dates, termination dates and rates of pay at termination for all persons whose employment with the defendant terminated after July 31 1992. The defendant shall provide to plaintiffs' attorneys such information regarding persons terminated from August 1, 1992, through July 1, 1993, within 15 days of the date of this Order, and thereafter shall continue to provide the plaintiffs' attorneys, on a monthly basis, such information on additional persons whose employment with the defendant is terminated, until further order of the Court.

If "a party fails to answer an interrogatory submitted under Rule 33 . . . the discovering party may move for an order compelling an answer." N.C.G.S. § 1A-1, Rule 37. On 8 May 1992, plaintiffs sent an interrogatory to defendant seeking information on all the members of the class "as it was defined in the order." The request was a continuing one, so that defendant was obligated to provide information as it became available until the date of trial. However, plaintiffs do not

contend that defendant failed to provide any information concerning members of the class as it was defined in the 18 November 1991 order. Therefore, so long as the class continued to be defined as it was in the 18 November 1991 order, there were no unsatisfied discovery requests. The trial court erred in ordering defendant to produce the information.

Plaintiffs' Appeal

[12] Relying on two assignments of error, plaintiffs argue that the trial court adopted an erroneous measure of damages by failing to order defendant to pay its former employees the vacation leave pay promised under both the old and the new policies. With respect to employees terminated prior to 1 January 1990, we agree.

As stated previously, the trial court properly concluded as a matter of law that the old policy constituted a unilateral and unconditional promise to the employees that, upon acceptance by the employees by the commencing of service with the company, became an irrevocable promise.

The court, however, allowed each plaintiff to recover only for the vacation allotment he was to have earned under the old policy. This was error. The court apparently confused the time when vacation was earned with the time in which it could be used. By working in 1988, plaintiffs earned an allotment of vacation that could only be taken in 1989. Under the new policy, plaintiffs earned vacation days that could be taken in that year. The two allotments were separate awards for separate periods of work, performed pursuant to two separate contracts.

Any plaintiffs who were terminated prior to 1 January 1990 were entitled to receive their full allotment of vacation under the old policy in addition to any days they had earned under the new policy prior to termination. *See Narron*; *Mays Mills*. The trial court erred in deducting the vacation earned in the year of termination from the lump sum grant.

In summary, we reverse the trial court's entry of judgment in favor of any plaintiffs terminated after 31 December 1989, reverse its award of interest on the liquidated damages portion of the award, reverse its order compelling defendant to produce information concerning employees terminated after 31 July 1992, and reverse its deci-

sion to deduct the vacation plaintiffs earned in the year of their termination from the lump sum grant. We affirm the balance of the trial court's actions and remand the case.

Affirmed in part, reversed in part.

Judges GREENE and JOHN concur.

AUDREY DALE McGEE, PLAINTIFF, BUNCOMBE COUNTY CHILD SUPPORT ENFORCEMENT AGENCY, STATE OF NORTH CAROLINA, ET. AL., PLAINTIFF/INTERVENORS v. WALTER T. McGEE, DEFENDANT

No. 9328DC224

(Filed 21 February 1995)

1. Divorce and Separation § 430 (NCI4th)— child support—modification of foreign decree

Upon registration of a foreign child support order pursuant to N.C.G.S. § 52A-24, the courts of this state have subject matter jurisdiction to modify the foreign support order on the basis of changed circumstances.

Am Jur 2d, Divorce and Separation §§ 1078 et seq.

2. Divorce and Separation § 445 (NCI4th)— modification of child support—changed circumstances—involuntary income reduction

A significant involuntary decrease in a child support obligor's income satisfies the necessary showing of substantial changed circumstances which justifies a reduction in the support obligation without any findings of any change affecting the child's needs.

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.

3. Divorce and Alimony § 445 (NCI4th)— modification of child support—changed circumstances—involuntary income reduction—sufficiency of findings

The trial court's findings were sufficient to support its conclusion of changed circumstances warranting a reduction in

defendant father's child support obligation based on a substantial involuntary reduction of income without any findings concerning the actual past expenditures of the children where the court found that the father's income had decreased from $24,000 per month in 1986 to $2,083 per month at the time of hearing; the father had been involuntarily terminated from his employment in late 1987 or early 1988 as a result of a substantial decline in the time-share resort industry with which he was associated; he has continuously sought employment since being terminated, but those efforts have been impaired due to criminal nonsupport actions instituted in Florida and in North Carolina; and his estate has been substantially depleted.

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.

4. Divorce and Separation § 392 (NCI4th)— child support—modification of order—temporary support—stipulation of arrearage amount

The trial court did not err by finding that the temporary child support amounts defendant father was ordered to pay during the pendency of this action to modify a child support order constituted the total child support obligation during such time, even though the father's payment under the temporary order was $150 per week while his payment under the prior order was $150 per week per child, where the parties entered into a stipulation as to the amount of the father's child support arrearage that included the period of time during which the temporary child support order was in effect.

Am Jur 2d, Divorce and Separation §§ 1035 et seq.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 864.

5. Parent and Child § 45 (NCI4th)— child support—mandatory income withholding—applicability to arrearages

Statutory provisions for mandatory income withholding for child support when services are being provided by a child support

enforcement agency (IV-D cases) apply with equal force to orders for current support and orders directing payment of an arrearage.

Am Jur 2d, Parent and Child §§ 69 et seq.

6. Parent and Child § 47 (NCI4th)— child support—failure to order mandatory income withholding—moot question

Where a child support enforcement agency was providing services to the mother, the trial court erred by allowing the father's child support arrearages to be satisfied by two payments of $5,000 and $40,000 over a two-year period rather than requiring income withholding to ensure payment of the arrearage. However, the issue of the court's failure to impose income withholding has become moot where the deadlines for the payments have passed.

Am Jur 2d, Parent and Child §§ 69 et seq.

7. Divorce and Separation § 385 (NCI4th)— child support not conditioned upon visitation

The trial court's recommendation in a child support modification order that the father be allowed visitation with the children did not condition the receipt of child support upon visitation and was thus not improper.

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

Violation of custody or visitation provision of agreement or decree as affecting child support payment provision, and vice versa. 95 ALR2d 118.

Appeal by plaintiff/intervenors from judgment entered 28 July 1992 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 8 December 1993.

Attorney General Michael F. Easley, by Assistant Attorney General T. Byron Smith, for plaintiff-appellants.

Prince, Youngblood, Massagee & Jackson, by Sharon B. Alexander, and Mullinax & Alexander, by William M. Alexander, Jr. for defendant-appellee.

JOHN, Judge.

Plaintiff/Intervenors (the State) appeal modification of a pre-existing Florida child support order. The State contends the trial

court erred by (1) failing to make findings of fact and conclusions of law regarding the needs of the minor children; (2) considering its temporary support order entered prior to the modification order as constituting defendant's total support obligation during the pendency of this action; (3) failing to require defendant to liquidate support arrearage through periodic payments and to transfer certain stock within a reasonable time; and (4) intermingling the issues of visitation and support.

Pertinent facts and procedural information are as follows: Audrey Dale McGee (Audrey) and Walter T. McGee (Walter) were married 24 January 1966, separated 27 December 1984, and were divorced 27 April 1987 by order of the Florida court. In the divorce decree, Walter was directed *inter alia* to pay child support of $150.00 per week per child for the parties' four minor children.

In July 1987, Walter set up residence in Asheville, North Carolina. He subsequently filed an action in this State seeking to modify the Florida divorce decree with respect to alimony and child support (90 CVD 2775).

As a result of Audrey's receipt of public assistance, the State of Florida Department of Health and Rehabilitative Services caused Notice of Registration of a Foreign Support Order in North Carolina to be issued to Walter 26 February 1991 (91 CVD 737). *See* N.C. Gen. Stat. § 52A-24 *et. seq.* Florida records indicated Walter had accumulated "adjudicated" alimony and child support arrearage in the amount of approximately $212,574.50 as of 16 January 1991 and that his most recent payment was $390.00 on 25 June 1990.

On 22 April 1991, the North Carolina Department of Human Resources, Child Support Enforcement Section and the Buncombe County Child Support Enforcement Agency (the State) moved to intervene in case 91 CVD 737 and further moved that Walter be held in contempt for failing to comply with the Florida order. Case 90 CVD 2775 and case 91 CVD 737 were consolidated 12 June 1991 and a temporary support order was entered.

The matter came on for hearing 11 December 1992 before the Honorable Gary S. Cash, and the proceedings were reconvened 19 February to accommodate conclusion of the evidence. The trial court took the matter under advisement and on 28 July 1992 entered an order containing the following pertinent findings of fact:

13. The Defendant's income in 1986 was $24,000.00 per month, with the Defendant's living expenses being paid by his employer. This income was used by the Florida Court in determining the child support and alimony obligations of the Defendant in 1987. This income was earned by the Defendant's employment through a corporation known as McGee Collins Associates, which corporation sub-contracted the services of the Defendant in Europe in time-share development resorts. The time-share resort industry in which this Defendant was employed suffered a substantial decline in 1987 and years following, and the employment of this Defendant was involuntarily terminated in late 1987 or early 1988. The Defendant continued to have some income from his previous services, which income decreased over the next several years.

. . . .

19. The Defendant's current income at the time of trial is approximately $25,000.00 per year or $2,083.33 per month. From this income, Defendant must pay his reasonable living expenses.

. . . .

27. The Defendant has continuously sought gainful employment since the termination of his European employment. The Defendant's efforts to obtain employment have been adversely affected by felonious criminal non-support actions instituted by the Plaintiff against the Defendant, both in the State of Florida and in the State of North Carolina.

. . . .

39. There has been a substantial change of circumstances in the facts surrounding the parties, including both the ability of each parent to pay support and the reasonable needs of the minor children such as justifies this Court in entering an order modifying the child support provisions of the divorce judgment.

. . . .

41. The changes of circumstance which the Court finds, based upon the facts set forth above and produced at trial, are as follows:

(a) The current income of the Defendant has been decreased by $22,000.00 per month since the time of the original judgment.

. . . .

(c) The Defendant's estate has been substantially depleted.

(d) The Defendant has incurred indebtedness to his current wife in excess of $116,000.00, which indebtedness did not exist in 1987.

(e) The Defendant's current earned income is $2,083.33 per month and his earning capacity is $50,000.00 per year.

42. The Defendant, being unable to travel to the State of Florida, has not seen his minor children in five years. The Defendant has attempted to communicate with his children unsuccessfully, including having gifts sent by him to his children returned by the Plaintiff. The Defendant loves his minor children and desires to see his minor children.

The trial court thereupon entered conclusions of law as follows:

BASED UPON the foregoing findings of fact, the Court concludes the following as a matter of law:

1. The Defendant, Walter T. McGee, is in contempt of the Florida judgment for his wilful failure to comply with said judgment.

2. The Defendant is able to satisfy the currently existing arrearages [in] alimony by transfer of personal properties.

3. There has been a substantial change of circumstances in the facts surrounding these parties such as justifies this Court in concluding as a matter of law that the child support judgment should be modified.

. . . .

Based upon its findings and conclusions, the court ordered:

2. The Defendant is ordered to transfer all common stock which he owns in Collins Investments, Inc., free and clear of the current security interest held therein by his wife, Linda Rebol McGee, to the Plaintiff in full satisfaction of the periodic alimony arrearage of $180,000.00 as stated herein.

. . . .

5. That, in order for Defendant to satisfy his child support arrearage of $45,000.00, he shall pay said sum to Plaintiff through the Office of the Clerk of Superior Court in the following manner:

> Defendant shall pay $5,000.00 on the 1st day of October, 1992, and the remaining balance of $40,000.00 on the 1st day of October, 1994.
>
> 6. The temporary child support amounts which the Defendant was ordered to pay by this Court during the pendency of this action shall constitute the total child support obligation of the Defendant during the pendency of this action. If any arrearage exists in said temporary child support, the same shall be immediately satisfied by the Defendant.
>
> . . . .
>
> 12. Though issues of custody and visitation are beyond the scope of this Court's authority to proceed, it is the belief of this Court that financial factors have prevented the Defendant, Walter T. McGee, from seeing his minor children for a period in excess of five years. In view of efforts made by the Defendant to support his children, particularly as the same shall be satisfied in compliance with this judgment, and further in view of the expressed love and affection of the Defendant for his minor children, it is the Court's recommendation to the Circuit Courts for the State of Florida that the Defendant be allowed to freely travel to and in the State of Florida and that he be allowed to see his minor children.

The State filed notice of appeal to this Court 31 July 1992.

I.

The primary focus of the State's first assignment of error is the contention that a child support modification order must include findings, based upon competent evidence, relative to the actual past expenses of the minor children. The absence of such findings in the order *sub judice*, the State insists, renders erroneous the trial court's conclusion that a substantial change of circumstances had occurred, and its order must be vacated. We disagree.

We begin by noting the State's argument in its brief does not conform to its assignments of error listed in the record on appeal which state:

> 1. The trial court erred in modifying the child support order because the needs of the minor children had not decreased, nor had Defendant's ability to pay decreased.
>
> . . . .

> 4. The trial court's finding of fact to support its determination that there has been a change of circumstances is not supported by the evidence.

These assignments of error in actuality pertain to sufficiency of the evidence, and not sufficiency of the findings as argued in the State's brief. Our scope of review on appeal is limited to a consideration of those assignments of error set out in the record on appeal. N.C.R. App. P. 10(a). Upon careful review of the record, we find ample evidence to support the court's findings.

We nonetheless in our discretion also elect to consider the merits of the State's argument regarding sufficiency of the findings, *see* N.C.R. App. P. 2, in particular, whether the trial court herein was required to make findings concerning the past expenses of the minor children prior to entry of its conclusion that a substantial change of circumstances had occurred.

[1] Registration of a foreign support order pursuant to N.C. Gen. Stat. § 52A-24 (1992) *et. seq.* results in treatment of the order as if issued by a court of this State. N.C. Gen. Stat. § 52A-30 (1992). Following registration, the order may be modified pursuant to N.C. Gen. Stat. § 50-13.7(b) (1987) which states:

> When an order for support of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support which modifies or supersedes such order for support, ...

North Carolina courts are thus conferred subject matter jurisdiction to modify support orders entered in another state. *Morris v. Morris*, 91 N.C. App. 432, 434, 371 S.E.2d 756, 758 (1988).

The burden of demonstrating changed circumstances rests upon the moving party. *Davis v. Risley*, 104 N.C. App. 798, 800, 411 S.E.2d 171, 173 (1991). Once "the threshold issue of substantial change in circumstances has been shown" by a preponderance of the evidence, the trial court then "proceeds to follow the [North Carolina Child Support] Guidelines and to compute the appropriate amount of child support." *Id.* The Guidelines apply to modification of child support orders as well as to initial orders. *Greer v. Greer*, 101 N.C. App. 351, 354, 399 S.E.2d 399, 401 (1991) (citing 1989 N.C. Sess. Laws ch. 529, § 9). Thus modification of a child support order involves a two-step process. The court must first determine a substantial change of cir-

cumstances has taken place; only then does it proceed to apply the Guidelines to calculate the applicable amount of support. *Davis*, 104 N.C. App. at 800, 411 S.E.2d at 173.

[2] The State relies upon *Fischell v. Rosenberg*, 90 N.C. App. 254, 257, 368 S.E.2d 11, 14 (1988), in asserting that evidence of "child-oriented expenses" must be presented and considered in the decision as to whether a substantial change of circumstances has occurred. However, it now appears settled that a significant involuntary decrease in a child support obligor's income satisfies the necessary showing even in the absence of any change affecting the child's needs. *Pittman v. Pittman*, 114 N.C. App. 808, 811, 443 S.E.2d 96, 97-98 (1994); *see also* C.P. Jhong, Annotation, *Change in financial condition or needs of parents or children as ground for modification of decree for child support payments*, 89 A.L.R.2d 7 (1963).

In *Pittman*, there was no evidence presented that the needs of the children had changed. Nonetheless, this Court held "a substantial and involuntary decrease in the income of a non-custodial parent [may], as a matter of law, constitute a substantial change of circumstances authorizing the court to modify a prior order by reducing child-support payments." *Pittman*, 114 N.C. App. at 810, 443 S.E.2d at 97; *see also Springs v. Springs*, 25 N.C. App. 615, 616, 214 S.E.2d 311, 312-13 (1975) (sufficient showing of changed circumstances to support child support reduction where obligor's net income decreased because of lowered V.A. benefits and added deductions for social security and income taxes, and where obligee's net income had increased), and *O'Neal v. Wynn*, 64 N.C. App. 149, 152, 306 S.E.2d 822, 823-24, *aff'd*, 310 N.C. 621, 313 S.E.2d 159 (1983) (determination of changed circumstances and reduction of child support affirmed absent change in children's needs where obligor's income decreased as a result of losing job and borrowing money to start new business).

This Court in *Pittman* further noted "that the ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the [obligor] to meet the needs." *Pittman*, 114 N.C. App. at 810, 443 S.E.2d at 97 (citing *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E.2d 522 (1975)). However, we remanded the case for determination of whether defendant had undergone a substantial and involuntary decrease in income sufficient to warrant reduction of child support payments. (We point out that neither *Pittman* nor our decision herein affect established law that a change of circumstances sufficient to modify a

child support order may also be shown by a substantial increase in the children's needs, *Craig v. Kelley*, 89 N.C. App. 458, 462-63, 366 S.E.2d 249, 252 (1988), or by a substantial decrease therein, *Koufman v. Koufman*, 330 N.C. 93, 99, 408 S.E.2d 729, 732 (1991)).

[3] We therefore examine whether the trial court's findings in the case *sub judice* were sufficient under *Pittman* to uphold a determination of changed circumstances. The court's findings numbered 13, 19, 27, 39 and 41(a)(c)(d) and (e) quoted above bear upon this question. The court found therein that Walter's income had decreased from $24,000.00 per month in 1986 to $2083.33 per month at the time of hearing, that he had been involuntarily terminated in late 1987 or early 1988 from his employment with McGee Collins Associates as a result of substantial decline in the time-share resort industry with which he was associated, that he had continuously sought employment since being terminated, but that those efforts had been impaired due to criminal non-support actions instituted both in Florida and in North Carolina, and that his estate had been "substantially depleted." Thus, while the court failed to use sequentially the words "substantial involuntary reduction" in income, its findings as a whole and read *in pari materia* indisputably reflect precisely that.

We therefore hold, under *Pittman*, that the court's effective determination of a "substantial involuntary reduction" in Walter's income was adequate to support its conclusion that there had been a change of circumstances sufficient to warrant modification of the previous child support order. The trial court thus did not err in failing to make findings concerning the actual past expenditures of the minor children prior to reaching its change of circumstances decision.

II.

[4] The State next maintains the trial court erred when it determined the 12 June 1991 temporary child support order constituted Walter's total child support obligation during the pendency of this action. The State points out Walter's payment under the temporary order was $150.00 per week while the Florida order required payments of $150.00 per week *per child*. Therefore, the argument continues, Walter owes the difference between the two orders because the Florida decree was not modified by the temporary order. This contention fails.

Regardless of whether the temporary order modified the existing order, we note the parties entered into a stipulation as to the amount of Walter's arrearage. As this Court has previously discussed:

> Courts in this State look with favor upon stipulations designed to simplify and shorten litigation. *Thomas v. Poole*, 54 N.C. App. 239, 282 S.E.2d 515 (1981), *disc. review denied*, 304 N.C. 733, 287 S.E.2d 902 (1982). Where stipulations have been entered of record and there is no contention that the attorney for either party was not authorized to enter into such stipulations, the parties are bound and cannot take a position inconsistent with their stipulations. *Id.*

Bertie-Hertford Child Support ex. rel. Souza v. Barnes, 80 N.C. App. 552, 553, 342 S.E.2d 579, 580 (1986).

The record discloses the parties stipulated before trial that on 19 February 1992 Walter's "current arrearage in child support and alimony payments" was in the amounts of $45,000.00 and $180,000.00 respectively. These stipulations were accepted by the trial court and entered into evidence. These totals included the period of time during which the temporary child support order was in effect. Accordingly, the parties are bound thereby, *id.*, and the State may not take a position in this Court contrary to its stance in the trial court. *See Akzona, Inc. v. Am. Credit Indem. Co.*, 71 N.C. App. 498, 507-08, 322 S.E.2d 623, 630 (1984) (citation omitted).

III.

The State's next assignment of error concerns the manner in which the court permitted payment of defendant's child support and alimony arrearage. The State specifically finds error with that part of the court's order which, after finding Walter in contempt, allowed the child support arrearage to be satisfied by two payments of $5,000.00 and $40,000.00 over a two year period. Further, the State contends the court erred by not ordering Walter to transfer stock in satisfaction of his alimony arrearage within a reasonable time. For the reasons set forth, we believe the trial court erred by failing to direct income withholding to ensure payment of Walter's child support arrearage; however, the court's error has become moot.

A.

Regarding the payment of child support arrearage, the trial court has broad discretion under N.C. Gen. Stat. § 50-13.4(e) (1987 and Cum. Supp. 1994), and it is not limited to directing any one designated

method of payment. *Griffin v. Griffin*, 103 N.C. App. 65, 66, 404 S.E.2d 478, 479 (1991). However, the court's discretion is curtailed to some degree in IV-D cases, that is, those cases "in which services . . . are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act . . . ." N.C. Gen. Stat. § 110-129(7) (1991).

In the case *sub judice*, it is uncontroverted that the State of Florida Department of Heath and Rehabilitation Services, from whom Audrey was receiving public assistance, caused registration in our state of the Florida court order under which Walter's arrearage had accumulated. It is further uncontroverted that the State, through the Buncombe County Child Support Enforcement Agency, prosecuted that case, 91 CVD 737 herein, against Walter, which was consolidated by consent of the parties with case 90 CVD 2775 filed by Walter. Accordingly, the trial court's subsequent order was entered in a "IV-D case."

N.C. Gen. Stat. § 110-136.3 (1991), entitled "Income withholding procedures; applicability," read as follows at the time of the hearing herein:

> (a) Required contents of support orders. All child support orders, civil or criminal, entered or modified in the State beginning October 1, 1989 *shall*:
>
> . . .
>
> (2a) In IV-D cases, include a provision ordering income withholding to take effect immediately;
>
> . . .
>
> (b) When obligor subject to withholding. (1) In IV-D cases in which a new or modified child support order is entered . . . an obligor is subject to income withholding *immediately* upon entry of the order. . . .

(emphasis added).

N.C. Gen. Stat. § 110-136.4 (1991), entitled "Implementation of withholding in IV-D cases," provided in pertinent part on the hearing date as follows:

> (b) Immediate income withholding. When a new or modified child support order is entered, the district court judge *shall*, after hearing evidence regarding the obligor's disposable income, place the obligor under an order for immediate income withholding.

(emphasis added).

These provisions for income withholding establish no independent action, but are "merely a remedy to enforce an underlying [child support] order." *See Sampson Co. Child Support Enforcement ex rel. Bolton v. Bolton*, 93 N.C. App. 134, 138, 377 S.E.2d 88, 91 (1989). The purpose is "to assure 'that all children in the United States who are in need of assistance in securing financial support from their parents will receive assistance regardless of their circumstances.' " *Griffin*, 103 N.C. App. at 68, 404 S.E.2d at 480 (quoting S. Rep. No. 387, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 2397).

[5] In view of the foregoing stated purpose of our child support enforcement legislation, this Court in *Griffin* saw "no distinction between a parent who owes both arrearages and current support payments and one whose total support obligation consists of arrearages." *Id.* at 68, 404 S.E.2d at 480. We therefore hold that the above statutory provisions for mandatory income withholding in IV-D cases apply with equal force to orders for current support and to orders directing payment of arrearage.

[6] In the order under review, the court instructed defendant to make two separate payments to clear his child support arrearage, a $5,000.00 payment 1 October 1992 and "the remaining balance of $40,000.00" 1 October 1994. While we believe the mandatory statutory provisions applicable to IV-D cases cited above required the trial court to direct income withholding for purposes of satisfying this debt, we note the trial court's deadlines for Walter's payments have passed. The court's failure to impose income withholding thus has become moot. In the event the payments ordered have not been made at the time of certification of this opinion to the trial court, the State may then seek such remedies as are available at law.

B.

The State also asserts the court erred in not putting a reasonable time limit on the conveyance of stock in compensation of alimony arrearage. The State argues "[t]here is no time frame set on this transfer, and again allows defendant to further avoid his lawful duties," and asks this Court to order the transfer to take place immediately. Defendant responds by stating he "does not resist Plaintiff's request that his stock in Collins Investments, Inc. be immediately transferred," and "has no objection to this [C]ourt directing immediate transfer." Accordingly, we direct the trial court upon certification of

this opinion to enter an order providing for immediate transfer by Walter to Audrey of his Collins Investments, Inc. stock.

IV.

[7] Finally, the State argues the trial court impermissibly intermingled the issues of child support and visitation by using the child support order to "bring pressure to bear on the McGee's [sic] to resolve their visitation problems—clearly beyond the scope of the trial court under North Carolina law."

The State is correct in its assertion that the duty to pay child support is wholly independent of the non-custodial parent's right to visitation. We have previously held that conditioning payment or receipt of child support upon allowance of visitation is contrary to the best interests of the children. *Appert v. Appert*, 80 N.C. App. 27, 41, 341 S.E.2d 342, 350 (1986); *Pifer v. Pifer*, 31 N.C. App. 486, 489, 229 S.E.2d 700, 703 (1976).

In *Appert*, the trial court ordered that:

> support payments shall continue . . . but in the event that the minor children fail or refuse except for medical reasons to abide by the visitation privileges allowed the Defendant, the next monthly payment for the support and maintenance of the minor children will be placed in the escrow with the Clerk of Superior Court . . . and remain there until further orders of this Court.

Id. at 32, 341 S.E.2d at 344-45. We rejected the court's "money-for-visits solution," *id.* at 40, 341 S.E.2d at 349, and concluded that "visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and that one is not, and may not be made, contingent upon the other." *Id.* at 41, 341 S.E.2d at 350.

However, *Appert* is distinguishable from the case *sub judice*. Review of the language utilized by the trial court herein reveals no conditioning of the receipt of child support upon visitation. Rather, the court merely set forth its recommendation that visitation by Walter with the minor children be allowed. This was not inappropriate, particularly in the circumstance where Audrey was not in court and therefore was not available to be addressed personally. As the court imposed no direct economic deprivation tied to visitation, we find this assignment of error unfounded.

Affirmed.

Judges ORR and LEWIS concur.

Judge Orr concurred prior to 5 January 1995.

STATE OF NORTH CAROLINA v. MICHAEL ANDERSON THOMPSON

No. 9318SC1062

(Filed 21 February 1995)

1. Assault and Battery § 112 (NCI4th)— aggravated and misdemeanor assaults with vehicle—defendant's hearsay statements—instruction on accident not required

Hearsay statements by defendant, who struck the victims with his vehicle as they ran along the side of an apartment building, that he didn't "mean" to injure the victims and that he "accidentally" ran over them did not constitute substantial evidence that required the trial court to instruct the jury on the defense of accident where the State offered uncontradicted evidence that defendant intentionally drove his vehicle directly toward the victims; after striking them, the vehicle struck the building with such force as to leave it inoperable; and there were no skid marks or other signs indicating that defendant attempted to brake the vehicle and no evidence that the vehicle suffered some mechanical defect.

Am Jur 2d, Trial § 1259.

2. Criminal Law § 468 (NCI4th)— closing argument—defendant's failure to plead guilty—improper comment on exercise of right to jury trial

The prosecutor's argument that a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof constitutes an improper comment on the defendant's exercise of his Sixth Amendment right to a jury trial.

Am Jur 2d, Trial §§ 554 et seq.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

3. Criminal Law §§ 427, 468 (NCI4th)— closing argument—exercise of right to jury trial—failure to testify—improper comments—absence of curative actions—harmless error

The prosecutor's comments during his closing argument that defendant was "hiding behind the law" and that he was "sticking the law in somebody's eye" were improper references to defendant's exercise of his right to a jury trial, defendant's failure to testify, or both, and the trial court committed error violating defendant's constitutional rights by failing to take curative measures at the time of the remarks and defendant's objection thereto. However, this error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt.

Am Jur 2d, Trial §§ 554 et seq., 577 et seq.

Violation of federal constitutional rule (*Griffin v. California*) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

4. Criminal Law § 431 (NCI4th)— closing argument—reference to defendant as coward—harmless error

Assuming that the prosecutor's reference to defendant as a "coward" in his closing argument was not based upon any evidence introduced at trial, it was improper, but the effect of the remark was *de minimis* in light of the overwhelming evidence of defendant's guilt and the isolated nature of the remark.

Am Jur 2d, Trial §§ 681, 682.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.

Appeal by defendant from judgments entered 8 July 1993 by Judge Russell G. Walker in Guilford County Superior Court. Heard in the Court of Appeals 23 August 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Robin W. Smith, for the State.

Assistant Public Defender Stanley Hammer for defendant-appellant.

JOHN, Judge.

Defendant appeals convictions of assault with a deadly weapon inflicting serious injury and of misdemeanor assault with a deadly weapon. He contends the trial court erred by: (1) refusing to instruct the jury on the defense of accident and (2) overruling his objections to certain statements of the prosecutor during closing argument. We determine the trial court committed no prejudicial error.

The State presented evidence tending to show the following: On the evening of 23 November 1991, Cindy Lou Howard (Howard), Alphonso Santiago (Santiago), and Tracy Sturdivant (Sturdivant) were patrons at the Esquire Lounge. Around 2:00 a.m., Sturdivant engaged in a verbal altercation with another woman named Alma. Howard, Santiago, and Sturdivant subsequently left and drove to Santiago's apartment. They noticed that two automobiles and a truck had followed them. Howard testified the occupants began "running out and wanting to fight and everything." Alma was in the group and resumed the dispute with Sturdivant.

As that argument intensified, defendant, who had driven one of the three vehicles, pulled a knife on Howard as she exited her automobile. Santiago stepped between them and fought with defendant. Howard was hit during the struggle and fell to the cement. After defendant was struck in the jaw and the fight subsided, he returned to his vehicle while Santiago walked in the direction of his residence. Howard then heard a motor cranking and decided to run towards the apartment building. At that point Howard and Santiago were alongside the apartment, approximately one foot away from the building's brick wall. Defendant then drove his station wagon directly towards the two, striking both Howard and Santiago before colliding with the building. Defendant was unable to restart the vehicle and left the area on foot. As a result of being struck, Howard suffered a compound fracture of her left leg which subsequently required amputation.

Defendant was apprehended by police shortly thereafter in a nearby wooded area and transported back to the scene. He was subsequently identified to law enforcement officers as the individual

operating the station wagon at the time it struck Howard and Santiago. Officers then searched defendant and found keys which fit the station wagon in his coat pocket. Upon being detained by officers, defendant gave a false name. Howard, Santiago, and Sturdivant named defendant in court as the assailant.

Defendant presented no evidence. Upon his convictions, he was sentenced to a total of twelve years imprisonment.

I.

[1] Defendant first contends the trial court erred by failing to instruct the jury on the defense of accident. *See* N.C.P.I., Crim. 307.11. We disagree.

Where an alleged assault is *unintentional* and the perpetrator acted without wrongful purpose in the course of lawful conduct and without culpable negligence, a resultant injury will be excused as accidental. *See State v. Faust*, 254 N.C. 101, 112, 118 S.E.2d 769, 776, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961). Culpable negligence is such gross negligence or carelessness as "imports a thoughtless disregard of the consequences" or a "heedless indifference to the rights and safety of others." *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977).

"It is well established that when a defendant requests a special instruction which is correct in law and supported by the evidence, the trial court must give the requested instruction, at least in substance." *State v. Tidwell*, 112 N.C. App. 770, 773, 436 S.E.2d 922, 924 (1993) (citations omitted). If a requested instruction is refused, defendant on appeal must show the proposed instruction was "not given in substance, and that substantial evidence supported the omitted instruction." *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792, *cert. denied*, 315 N.C. 189, 337 S.E.2d 864 (1985) (citations omitted). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Gray*, 337 N.C. 772, 777-78, 448 S.E.2d 794, 798 (1994) (citation omitted).

The trial court in the case *sub judice* declined to charge the jury on the defense of accident, and our review of the record discloses the requested instruction was not supported by substantial evidence. Defendant relies almost exclusively upon the following testimony by Howard, offered over defendant's objection:

> Q: After [defendant] was arrested did you go to see him in the jail?
>
> A: Yes, I did.
>
> . . .
>
> Q: Did you ask him about what happened at that time?
>
> A: No, I didn't have—I asked him—I walked up to the window and I seen him, and I told him, I asked him if he knew who I was, and he said no, and I backed up to where he could see. We was looking through this little window and I backed up to where he could see my leg, and he knew then who I was, and he told me that he was sorry that— . . . He told me that he was sorry, that he didn't mean to hurt me and if he could he would take his leg off and give it to me, and that he just didn't mean to do it.

Defendant also notes the third-hand hearsay testimony of investigating officer Kim Soben who talked with a Ms. Robs who had spoken with a passenger in the station wagon. Robs reported to Soben that the passenger had stated defendant said he had "accidentally" run over Howard and Santiago. The evidence relied upon by defendant is attenuated at best and therefore insufficient to warrant submission to the jury of an instruction on accident.

Defendant cites *State v. Garrett*, 93 N.C. App. 79, 376 S.E.2d 465, *disc. rev. denied*, 324 N.C. 338, 378 S.E.2d 802-03 (1989), in support of his contention. In *Garrett*, this Court awarded a new trial upon concluding the trial court erred by not instructing the jury on the defense of accident. *Id.* at 82, 376 S.E.2d at 467.

In *Garrett*, the testimony of both the mother and sister of the defendant that he didn't mean to shoot his brother was elicited by the State, "apparently in an effort to show defendant actually shot his brother . . . ." *Garrett*, 93 N.C. App. at 82, 376 S.E.2d at 467. Yet, *Garrett* is distinguishable in that the prosecution therein offered no eyewitness testimony and presented evidence largely circumstantial. *Id.*

In the case *sub judice*, on the other hand, the State offered substantial uncontradicted testimony of three eyewitnesses that defendant acted intentionally in driving the station wagon directly towards the two victims, with headlights on, as they ran along the side of an apartment building. Upon striking Howard and Santiago, the vehicle struck the building with such force as to crack the wall, smash a gas

meter and drain pipe, and leave the automobile inoperable. The first police officer on the scene further testified he observed no skid marks or other signs indicating defendant had attempted to brake the vehicle, and no evidence suggested the brakes on the automobile failed or that it suffered some other mechanical defect.

Contrary to *Garrett*, therefore, no substantial evidence in the case *sub judice* supports submission of the defense of accident to the jury. Rather, all the evidence demonstrates defendant's act in striking Howard and Santiago with his automobile at the very least involved culpable negligence and, save for the minimal hearsay testimony defendant didn't "mean" to injure Howard, all the evidence indicated an intentional act. Therefore, the defense of accident was not a "substantial factor" in the case and the trial court acted within its discretion in refusing to give the instruction. *State v. Barbour*, 104 N.C. App. 793, 797, 411 S.E.2d 411, 413 (1991).

Accordingly, we reject this assignment of error.

II.

Defendant next alleges the trial court erred by overruling his objections to statements of the Assistant District Attorney during closing argument which defendant maintains impermissibly criticized his exercise of the right to a jury trial and commented upon his failure to testify. Additionally, defendant insists the remarks improperly assailed his character which was not in issue. For the reasons which follow, we find no prejudicial error.

Defendant highlights the following prosecutorial assertions as error:

> Why are we having to hear this case? If it was anything else, if there was anything else amiss, if he wasn't really driving or something else like that there would be some questions—
>
> . . . .
>
> All the evidence you heard in this case came from the State. So why do you have to hear it? Everybody in the State in North Carolina that's charged with a crime has a right to a jury trial and they are innocent until proven guilty. Every person who is charged with any crime, whether it be murder, rape, robbery, whatever, is entitled to have twelve people hear their case. They can plead not guilty. Anyone can plead not guilty.
>
> . . . .

> It is up to the District Attorney's office to prove to twelve people that don't know anything about [the] case beyond a reasonable doubt that the man did what they're charging him with. And that will always be the law and nobody wants to change that. Because see, those two things are great. They protect everybody in this State. It's like this pen right here. You know, this is a great idea right here. It writes and draws and whatever you want to do with it. If I take it and stick it in somebody's eye it's a bad thing. Ladies and gentlemen, if you let the law be like this pen, if a guilty person hides behind that law it's like sticking the law in somebody's eye.
>
> . . . .
>
> Only, ladies and gentlemen, the only way that people can plead not guilty are is if there's some mistake about it or you can plead not guilty and say all right, Mr. D.A., put your witnesses up there and prove it to these twelve people. But just because you plead not guilty doesn't mean you didn't do it. You can plead not guilty and say State, prove it. Well, ladies and gentlemen, we've proved it. The point about that is if you allow a guilty person like that man there to hide behind the law and use it—
>
> . . . .
>
> —it's like a coward's way out. It's like a person who says well, you know, maybe I did it, but who cares, maybe a jury won't convict me. Don't let that man take the coward's way out.

A.

Defendant's first two contentions regarding the foregoing statements allege violations of constitutional dimension, that is, impermissible commentary upon a criminal defendant's exercise of his right to a jury trial and upon his failure to testify.

Proceeding in reverse order, we note our Supreme Court has recently reiterated the well settled principle that a criminal defendant may not be compelled to testify, and that "any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent." *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994) (citing *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, *reh'g denied*, 381 U.S. 957, 14 L. Ed. 2d 730 (1965)). *See also* N.C. Const. art. I, § 23 and N.C. Gen. Stat. § 8-54 (1986). The purpose behind this rule is that reference by the prosecution would nullify the

policy that failure to testify should create no presumption against a defendant. *State v. Bovender*, 233 N.C. 683, 689-90, 65 S.E.2d 323, 329 (1951), *overruled on other grounds, State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989). "To permit counsel . . . to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution and create a situation the statute was intended to prevent." *Id.*

However, prejudicial commentary upon a criminal defendant's exercise of his right to a jury trial has not previously been addressed in this jurisdiction. The question was considered by the federal court in *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991). In that case, the prosecutor at trial had made the following statements during closing argument:

> [I]t's offensive to me to sit here and I don't say this for any personal reason, but to be in this courtroom having asked for recesses to get my body in shape to try a case for several days, when a man sits up here and tries to mislead you first of all, into believing he's not guilty. That's offensive, to me. That's trifling with the processes of this court. I personally dislike that, and I don't mind publicly saying it, and I will say it next time I feel it. This system we have is too precious. It took too many lives to bring it here, to let somebody come in here and take his chances on killing a man, robbing a man, trying to escape and then beg and ask the jury, not him himself, but through cross-examination and casting reflections and dispersions on witnesses. . . . The case here, Ladies and Gentlemen of the Jury, is, "Find me guilty first, and then I'll take the stand and beg you to save my life."
>
> . . .
>
> He's had a trial of people in Lincoln County, . . . he's had the right to have witnesses face. He's had the right to cross-examination. He's had the right to have His Honor charge the jury correctly. He's had every right afforded a human being, although sometimes I wonder if they're really entitled to it.

Id. at 1019 n.22, 23.

The *Cunningham* court observed the prosecutor's comments, *inter alia*, improperly implied the defendant had in some way abused the judicial system by exercising his Sixth Amendment right to a jury trial. *Id.* at 1020. However, the court resolved the issue by determining these comments were violative of a prosecutor's obligation not to

"make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law." *Id. See also U.S. v. Smith*, 934 F.2d 270, 275 (11th Cir. 1991) (prosecutor's argument that defendant had " 'not taken responsibility for his actions' " because he refused to plead guilty like co-defendants was "improper, but . . . the error was harmless" when curative instruction immediately given and there "was ample evidence to convict [defendant]"), and *People v. Guyon*, 117 Ill. App. 3d 522, 536, 453 N.E.2d 849, 861 (1983) (prosecutor's argument that presumption of innocence is ripped off "like any shroud that cowards hide behind" upon the case against defendant being proven implies the presumption is "a shield or refuge for the guilty"; such argument "demeans our criminal justice system" and is "an affront to the law" not to be tolerated).

In this context, we observe the right to a jury trial is not only guaranteed by the Sixth Amendment to the United States Constitution, but under our North Carolina Constitution the right also can not be waived by a defendant who pleads not guilty. *See* N.C. Const. art. I, § 24; *State v. Hudson*, 280 N.C. 74, 80, 185 S.E.2d 189, 193 (1971), *appeal after remand*, 281 N.C. 100, 187 S.E.2d 756 (1972), *cert. denied*, 414 U.S. 1160, 39 L. Ed. 2d 112 (1974). Further, a criminal defendant possesses an *absolute* constitutional right to plead not guilty and be tried before a jury, and "should not and [can] not be punished for exercising that right." *State v. Langford*, 319 N.C. 340, 345, 354 S.E.2d 523, 526 (1987).

[2] The exercise of the right to a jury trial is thus considered no less fundamental in our jurisprudence than reliance upon the right to remain silent. Accordingly, prosecutorial argument complaining a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof is no less impermissible than an argument commenting upon a defendant's failure to testify. Indeed, we discern no distinction between the two in terms of intrusion upon a criminal defendant's constitutional rights. We therefore hold that reference by the State to a defendant's failure to plead guilty is violative of his Sixth Amendment right to a jury trial.

In the case *sub judice*, defendant contends the prosecutor impermissibly commented upon his failure to plead guilty as well as upon his failure to testify. Because both allegations involve constitutional error, our decision whether to award a new trial involves an identical inquiry in either event. N.C. Gen. Stat. § 15A-1443(b) (1988).

We obviously must first determine whether the State in actuality commented improperly upon the defendant's exercise of a constitutional right; if so, constitutional error has occurred. *Baymon*, 336 N.C. at 758, 446 S.E.2d at 6. The error is not cured by later instruction in the court's jury charge upon the rights impermissibly referred to. *State v. Reid*, 334 N.C. 551, 556, 434 S.E.2d 193, 197 (1993). However, the error may be cured by " 'withdrawal of the remark or by a[n immediate] statement from the court that it was improper, followed by an instruction to the jury not to consider [it]' ". *Id.* (quoting *State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975)). Absent effective remedial measures, automatic reversal is not necessarily mandated, but the State must demonstrate to the appellate court that the error is harmless beyond a reasonable doubt. *Id.* at 557, 434 S.E.2d at 198; G.S. § 15A-1443(b). Overwhelming evidence of guilt may render constitutional error harmless. *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 259 U.S. 1080, 74 L. Ed. 2d 642 (1982) (citing *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284 (1969)).

[3] We begin by observing that the prosecutor's comments asserting defendant was "hiding behind the law" and "sticking the law in somebody's eye," even construed in the light most favorable to the State, *Baymon*, 336 N.C. at 758, 446 S.E.2d at 6, may only be interpreted as referring directly either to defendant's exercise of his right to a jury trial or to his failure to testify, or indeed to both. Upon defendant's objections to the portions of the Assistant District Attorney's argument quoted above, the trial court overruled each objection and offered no curative instruction (although later in its jury charge instructed upon both the presumption of innocence and the defendant's privilege not to testify). By failing to take the required curative measures at the time of the remarks and the objection thereto, the trial court committed error violating defendant's constitutional rights. *Reid*, 334 N.C. at 557, 434 S.E.2d at 197.

We therefore examine whether the State has met its burden of showing the error was harmless beyond a reasonable doubt. Defendant asserts a new trial is required under *Reid* (Court unable to conclude the error "had no bearing on the jury's inference of the requisite intent for the felony" charged). *Id.* at 558, 434 S.E.2d at 198; *see also Baymon*, 336 N.C. at 758-59, 446 S.E.2d at 6 (in view of conflicting medical evidence, Court could not conclude error was harmless beyond a reasonable doubt). The State counters that the evidence of defendant's guilt was overwhelming.

Our reading of the record in the case *sub judice* leaves no doubt the trial court's error was harmless, *Brown*, 306 N.C. at 164, 293 S.E.2d at 578, in that the evidence against defendant was substantial, cumulative and compelling. As previously noted, three witnesses provided a detailed description of defendant's actions in striking the two victims with his automobile. We reiterate the evidence showed that defendant, immediately following an altercation with Santiago, drove directly at Howard and Santiago as they proceeded no more than a foot away from an apartment building wall. After hitting the two, defendant's station wagon struck the building with such force as to crack the brick wall, crush the drain pipe and gas meter, and to render the vehicle inoperable despite defendant's attempts to restart it. He then left the scene without inquiring of the victims or seeking assistance for them, was located by police officers standing in some woods a half mile from the scene, possessed the keys to the station wagon, and gave a false name to investigating officers.

In summary, although the trial court erred by overruling defendant's objections to the prosecutor's arguments and by failing immediately thereon to give curative instructions to the jury, the error was harmless beyond any reasonable doubt given the overwhelming evidence of defendant's guilt.

B.

[4] Defendant's final contention is that the Assistant District Attorney inappropriately commented upon defendant's character which was not in issue in this case.

A prosecutor should refrain from making characterizations relating to a defendant which are calculated to cause prejudice before the jury "when there is no evidence from which such characterizations may legitimately be inferred." *State v. Britt*, 288 N.C. 699, 712, 220 S.E.2d 283, 291 (1975). However, whether counsel has abused the wide latitude accorded closing argument is a matter ordinarily left to the sound discretion of the trial judge. *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980). The exercise of this discretion will not be reviewed on appeal "unless there be such gross impropriety in the argument as would likely influence the verdict of the jury," *id.*, and a new trial will be awarded only in cases of extreme abuse. *State v. Bailey*, 49 N.C. App. 377, 384, 271 S.E.2d 752, 756 (1980), *disc. review denied*, 301 N.C. 723, 276 S.E.2d 288 (1981).

In the case *sub judice*, defendant points out the assistant district attorney referred to him as a "coward." Assuming *arguendo* this characterization was not based upon any evidence introduced at trial, it constituted error. *See State v. Davis*, 45 N.C. App. 113, 115, 262 S.E.2d 329, 330 (1980) (prosecutor's statement calling defendant "S.O.B." is error). However, in view of the substantial evidence of defendant's guilt reviewed above and given the isolated nature of this remark, we conclude the effect could only have been *de minimis*. *State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903, *cert. denied*, — U.S. —, 130 L. Ed. 2d 429 (1994) (calling defendant "liar" non-prejudicial error due to overwhelming evidence of guilt). This assignment of error therefore fails.

No error.

Judges GREENE and McCRODDEN concur.

Judge McCRODDEN concurred prior to 15 December 1994.

MARCUS RALPH LEDFORD, PLAINTIFF/APPELLANT v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT/APPELLEE

No. 9327SC266

(Filed 21 February 1995)

1. **Judgments § 649 (NCI4th)— prejudgment interest—damages rather than costs**

Where defendant Nationwide tendered to plaintiff in an action arising from an automobile accident a figure which exceeded Nationwide's limits of liability for damages unless the portion of damages awarded as prejudgment interest was found to constitute a cost, the trial court did not err in a subsequent declaratory judgment action by granting plaintiff's motion for summary judgment and stating that the prejudgment interest constituted a portion of the judgment and was not a cost. The North Carolina Supreme Court held in *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, that interest paid to compensate a plaintiff for loss of use of the money during the pendency of a lawsuit is an element of damages. *Lowe v. Tarble*, 313 N.C. 460, which held that prejudgment interest is a cost within the meaning of the contract is distinguishable on its facts. Unless the policy of insurance

provides to the contrary, prejudgment interest constitutes a portion of a plaintiff's damage award.

Am Jur 2d, Interest and Usury §§ 59 et seq.

2. Insurance § 690 (NCI4th)— automobile accident—prejudgment interest—no ambiguity in policy

The court did not err by granting summary judgment for defendant insurance company in a declaratory judgment action to determine the applicability of prejudgment interest where plaintiff contended that language in the insurance policy created an ambiguity, but *Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, construed identical language and held that the clause defining prejudgment interest as damages was controlling. Because the endorsement in this policy contained a definition expressly including prejudgment interest as an element of damages, that definition is determinative.

Am Jur 2d, Automobile Insurance § 428.

3. Judgments § 649 (NCI4th)— automobile accident—insurance policy—prejudgment interest

In an action arising from an automobile accident in which the question of whether prejudgment interest was a cost or a part of the judgment arose in a subsequent action for a declaratory judgment, the inclusion of an assessment of prejudgment interest in the trial judge's order on plaintiff's bill of costs did not affect the Court of Appeals holding that prejudgment interest constituted a portion of the damage award because the Court of Appeals was construing all parts of the insurance contract and because there was language in the trial judge's order indicating that the trial judge was not equating "costs" with "prejudgment interest" but was simply using his order as a vehicle to set forth the amount of prejudgment interest.

Am Jur 2d, Interest and Usury §§ 59 et seq.

4. Judgments § 649 (NCI4th)— automobile accident—prejudgment interest as costs or judgment—trial court order and subsequent declaratory judgment—res judicata

In an action arising from an automobile accident in which the question of whether prejudgment interest was a cost or a part of the judgment arose in a subsequent action for a declaratory judgment, the declaratory judgment judge did not impermissibly over-

rule the trial judge because the trial judge was not rendering a judgment on the issue when he included prejudgment interest in his order on plaintiff's bill of costs and because there was no identity of issues in that the trial judge was only addressing the amount to be taxed against the defendants in that action and did not decide which entity would ultimately be responsible for paying the amounts he assessed as "costs and interest," seeking neither to define prejudgment interest nor to construe the insurance policy; the declaratory judgment judge's ruling that prejudgment interest constitutes a portion of the judgment and is not a cost is not inconsistent with and does not overrule the trial court's taxing of that figure to a particular party; and, having brought the declaratory judgment action, which was the proper avenue for resolution of the questions regarding construction of the insurance policy, plaintiff cannot now be heard to complain that the court had no authority to decide the questions he presented for consideration.

Am Jur 2d, Interest and Usury §§ 59 et seq.

Judge ORR concurred prior to 5 January 1995.

Appeal by plaintiff from summary judgment entered 12 November 1992 by Judge C. Walter Allen in Gaston County Superior Court. Heard in the Court of Appeals 6 January 1994.

Bailey, Patterson, Caddell, Hart & Bailey, P.A., by Walter L. Hart, IV, for plaintiff.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by J. Merritt White, III, for defendant.

JOHN, Judge.

In this declaratory judgment action, plaintiff contends the trial court erred by granting summary judgment to defendant Nationwide Mutual Insurance Company (Nationwide) on the issue of the latter's obligation for prejudgment interest on a judgment entered against Nationwide's insured in an underlying negligence action.

Plaintiff alleges the court's ruling was erroneous in that it represents: (1) a misapplication of our case law with respect to prejudgment interest and construction of insurance contracts; (2) an incorrect reading of the insurance policy in question; and (3) an

improper overruling of a prior judgment issued by another superior court judge in the matter *sub judice*. Several recent decisions issued by our courts compel us to disagree with plaintiff's arguments.

A brief summary of pertinent factual and procedural information is as follows: On 6 April 1989, plaintiff suffered serious personal injuries when the automobile in which he was a passenger was involved in a collision. The second vehicle was being operated by Kevin Ernest Dalton (Dalton), but was owned by Millie Hughes Dalton (Ms. Dalton). Ms. Dalton's vehicle was covered by a personal automobile insurance policy issued her by Nationwide—Policy Number 61 32 B 099-541, which contained liability limits of $100,000.00 per person and $300,000.00 per accident for personal injury.

On 14 June 1990, plaintiff filed a tort action against Dalton and Ms. Dalton. Following a jury trial in October 1991, a verdict was returned on 25 October 1991 finding, *inter alia*, that plaintiff was injured by the negligence of both defendants and that he was entitled to recover the sum of $225,000.00 as compensatory damages. Plaintiff was also awarded punitive damages of $10,000.00 against Dalton individually.

After entering judgment on the verdict, the trial judge, the Honorable Zoro J. Guice, Jr. (Judge Guice), filed an "Order on Plaintiffs' Bill of Costs," detailing the division and distribution of costs in the underlying tort action. Included in the court's order, dated 16 December 1991, was a provision calculating prejudgment interest and ordering the Daltons to pay same in the amount of $24,675.29.

Upon plaintiff's subsequent demand for payment of the judgment, prejudgment interest, postjudgment interest, and court costs, Nationwide tendered to him the sum of $106,188.94 (representing the $100,000.00 per person policy limit for personal injury, plus the costs of court taxed pursuant to N.C. Gen. Stat. § 6.1 (1986), minus a credit for previously advanced funds).

However, a dispute thereafter arose between the parties concerning Nationwide's obligation to pay plaintiff the amount of prejudgment interest calculated by the court. Accordingly, on 8 May 1992, plaintiff filed the instant action for declaratory relief against Nationwide seeking a resolution of the issue. More particularly, he alleged in his complaint that "the insurance policy specifically includes coverage for prejudgment interest, or, in the alternative, the

provisions in the policy are ambiguous and must, therefore, be construed in favor of coverage." Plaintiff requested the court "to construe [Ms. Dalton's] policy[,] . . . to determine the liability of defendant for pre-judgment interest . . . [and to] [d]eclar[e] that the insurance policy requires the defendant to pay pre-judgment interest on the Judgment entered against the defendant's insured."

In its answer filed 22 July 1992, Nationwide responded that "the relevant insurance policy does not provide for the payment of pre-judgment interest under the circumstances existing in this case."

Pursuant to N.C.R. Civ. P. 56 (1990), on 17 September 1992, plaintiff and Nationwide each sought summary judgment. Following a hearing, the Honorable C. Walter Allen (Judge Allen) denied plaintiff's motion for summary judgment and allowed that of defendant. The court's 12 November 1992 order stated:

> IT APPEARING to the Court . . . that as a matter of law, the pre-judgment interest on the judgment in favor of Ledford against [Ms.] Dalton, Nationwide's insured in the civil action . . . constitutes a portion of the judgment and not a cost, and that the Defendant is entitled to a judgment as a matter of law.

Plaintiff brings forth essentially three separate analyses under which he argues the court's order was erroneous.

I.

A.

[1] Plaintiff first contends our General Assembly and case law have established that prejudgment interest constitutes a *cost* as opposed to *an element or portion of damages*. Accordingly, because the insurance policy at issue in the case *sub judice* provides that Nationwide will "pay . . . all costs taxed against the insured," plaintiff argues he is entitled to recover the contested amount of $24,675.29 from Nationwide. We disagree.

The relevant sections of the insurance policy at issue are contained in Endorsement 2096 (effective 1 January 1987) which provides:

> II. LIABILITY COVERAGE
>
> A. . . . Insuring Agreement . . . :
>
> 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.* . . .

B. . . . Supplementary Payments . . . :

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.

(Italics supplied). The Declarations page of the policy reveals that Nationwide's limit of liability is $100,000.00 per person for personal injury.

We note at the outset that determination of whether prejudgment interest is considered part of plaintiff's damages or an additional cost taxed to Nationwide's insured is of concern to plaintiff because Nationwide has previously tendered to him $106,188.94. As that figure concededly exceeds Nationwide's limits of liability for *damages*, unless the $24,675.29 awarded as prejudgment interest is found to constitute a *cost*, plaintiff has no claim against Nationwide for recovery of that amount.

"Prejudgment interest in negligence cases is a statutory creature in this state," *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 7, 430 S.E.2d 895, 899 (1993); the specific statute allowing for and governing prejudgment interest is N.C. Gen. Stat. § 24-5 (1991), which provides in pertinent part:

> In an action other than contract [e.g., a negligence action, as here], 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.

G.S. § 24-5(b). Plaintiff suggests that by enacting the above-quoted section, our General Assembly "has codified and defined prejudgment interest as a cost . . . in addition to, and to be separate from" an award of compensatory damages.

To the contrary, observing that G.S. § 24-5(b) appears to reflect a legislative intention "to . . . treat[] [prejudgment interest] as an element of compensatory damages," our Supreme Court recently expressly held that "interest paid to compensate a plaintiff for loss of use of the money during the pendency of a lawsuit [i.e., prejudgment interest] is *an element of that plaintiff's damages.*" *Baxley*, 334 N.C. at 8, 430 S.E.2d at 900; *see also Nationwide Mutual Ins. Co. v. Mabe*,

115 N.C. App. 193, 201, 444 S.E.2d 664, 669 (citations omitted), *disc. review allowed*, 337 N.C. 802, 449 S.E.2d 748, 450 S.E.2d 485 (1994); *see also Watlington v. North Carolina Farm Bureau*, 116 N.C. App. 110, 113-14, 446 S.E.2d 614, 617 (1994); *see also Hartford Acc. & Indem. Co. v. U.S. Fire Ins. Co.*, 710 F. Supp. 164, 167 (E.D.N.C. 1989) ("[P]re-judgment interest should be considered an element of damages on the basis that the plaintiff should be made whole from the date of the loss.") (citation omitted), *aff'd*, 918 F.2d 955 (4th Cir. 1990).

As support for his position, plaintiff relies upon *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985), wherein our Supreme Court determined that "[prejudgment] interest is a cost *within the meaning of the contract of insurance*." *Id.* at 464, 329 S.E.2d at 651 (emphasis added); *see also U.S. Fire Ins. Co. v. Nationwide Mut. Ins. Co.*, 735 F. Supp. 1320, 1325 (E.D.N.C. 1990). Although *Lowe* at first blush may appear to be supportive of plaintiff's position, the facts and circumstances therein are distinguishable from those in the case *sub judice*. *See Sproles v. Greene*, 329 N.C. 603, 611-12, 407 S.E.2d 497, 501-02 (1991); *see also Hartford*, 710 F. Supp. at 167. Moreover, it is significant that the *Lowe* Court viewed its task as "determining what are 'costs' *within the meaning of the contract*," *Lowe* at 463, 329 S.E.2d at 651 (emphasis added), demonstrating a "clear intent on the part of the Supreme Court to decide the issue based on the specific policy before it . . . ." *Mabe*, 115 N.C. App. at 201, 444 S.E.2d at 669; *see also Sproles*, 329 N.C. at 611-12, 407 S.E.2d at 502.

Under *Baxley*, therefore, unless the policy of insurance provides to the contrary, prejudgment interest constitutes a portion of a plaintiff's damage award.

B.

[2] Focusing on the contract of insurance at issue, plaintiff urges us to reverse the trial court's grant of summary judgment for Nationwide on grounds that Endorsement 2096 creates an ambiguity in the insurance policy. While plaintiff accurately states the general principles regarding construction of insurance contracts, we disagree with the conclusion he draws from application of those principles to the policy in question.

"[T]he most fundamental rule [in interpreting insurance policies] is that the language of the policy controls." *Mabe*, 115 N.C. App. at 198, 444 S.E.2d at 667 (citation omitted). Plaintiff correctly notes,

however, that when an insurance policy contains ambiguous provisions, this Court will resolve the ambiguity against the insurance company-drafter, and in favor of coverage. *See, e.g., Grant v. Insurance Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978) (citations omitted). On the other hand, if a contract of insurance is *not* ambiguous, "the court must enforce the policy as written and may not reconstruct [it] under the guise of interpreting an ambiguous provision." *Mabe*, 115 N.C. App. at 198, 444 S.E.2d at 667 (citation omitted). As this Court has explained, "language in an insurance contract is ambiguous only if the language is 'fairly and reasonably susceptible to either of the constructions for which the parties contend.' " *Watlington*, 116 N.C. App. at 112, 446 S.E.2d at 616 (1994) (quoting *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)).

Plaintiff asserts the insurance contract herein contains ambiguities because: (1) in Subsection A. of the Liability Coverage section of the policy, "damages" are defined as including prejudgment interest; (2) Subsection A. also provides that "[i]n addition to our limit of liability, we will pay all defense costs we incur"; (3) Subsection B. states that in addition to its limit of liability, Nationwide will pay "all costs taxed against the insured"; and (4) Judge Guice assessed the amount of prejudgment interest to which plaintiff was entitled within his "Order on Plaintiff['s] Bill of Costs."

We believe this Court's recent decisions *Mabe* and *Watlington* govern our resolution of this issue. In *Mabe*, when construing *identical* language contained in another Nationwide policy (indeed, Endorsement 2096 itself), we held that the "additional clause [in Subsection A.] defining prejudgment interest as part of damages . . . is controlling." *Mabe*, 115 N.C. App. at 201, 444 S.E.2d at 669. Further, after observing that "[i]f a policy defines a term, then that definition is to be applied," *id.* at 198, 444 S.E.2d at 667 (citation omitted), the *Mabe* Court implicitly declined to impart an additional meaning to prejudgment interest by including it within the term "costs" in Subsection B. Additionally, in summarizing our decision in *Watlington*, we stated:

> In the policy before us, the "Insuring Agreement" expressly provides that prejudgment interest is calculable as a part of damages and is therefore included under the liability limits of the policy. Although the "Supplementary Payments" provision does not repeat the definition of damages, defendant is not obligated to

> pay prejudgment interest above the policy limit of liability. . . . By defining damages to include prejudgment interest, the policy *intended* to prevent the inclusion of prejudgment interest as a cost charged to defendant *above* the stated liability of the policy. As we recently explained in . . . *Mabe*, a definition clause expressly including prejudgment interest as an element of damages controls the determination whether prejudgment interest is payable beyond the policy limit.
>
> . . . .
>
> . . . Therefore, we find that the policy at issue is not ambiguous . . . .

Watlington, 116 N.C. App. at 113-14, 446 S.E.2d at 617 (citations omitted).

In similar fashion, we conclude the policy in the case *sub judice* is not ambiguous. Because Endorsement 2096 contains a definition clause "expressly including prejudgment interest as an element of damages," *id.* at 114, 446 S.E.2d at 617, that definition is determinative. *See Baxley*, 334 N.C. at 7, 430 S.E.2d at 899 (Court said, "Where the insurance contract does not limit the definition of the word [damages], this Court certainly should not step in to do so." By implication, therefore, if the policy *does* indeed restrict the definition of the term damages, we should not interject a more expansive meaning.).

C.

[3] Lastly, plaintiff makes much of Judge Guice's inclusion of an assessment of prejudgment interest in his "Order on Plaintiff['s] Bill of Costs." However, our holding is completely unaffected by that order.

First, in interpreting the terms of Nationwide Policy Number 61 32 B 099-541, any label affixed in Judge Guice's order to prejudgment interest is entirely irrelevant. Our task is to construe harmoniously all parts of *the contract itself* so as to give effect to each of its provisions. *Mabe*, 115 N.C. App. at 198, 444 S.E.2d at 667 (citation omitted).

Additionally, in summarizing the various portions of his order, Judge Guice decreed "[t]hat the total *costs and interest, excluding the post-judgment interest which continues to accrue* . . . to be taxed in favor of . . . plaintiff[], and against . . . Dalton and [Ms.] Dalton . . . are . . . $26,081.70." This language indicates Judge Guice was not equating "costs" with "prejudgment interest," but rather simply was

using his order as a vehicle by which to set forth the amount of prejudgment interest.

II.

[4] Plaintiff's final assignment of error concerns the following language contained in Judge Allen's order granting Nationwide's motion for summary judgment: "[A]s a matter of law, the pre-judgment interest on the judgment in favor of [plaintiff] against [Ms.] Dalton, Nationwide's insured . . . , constitutes a portion of the judgment and not a cost." Plaintiff contends Judge Allen by so ruling impermissibly overruled Judge Guice's order which, plaintiff asserts, labelled prejudgment interest as a "cost." He argues that the principle of *res judicata* ordinarily forbids "one Superior Court Judge . . . [from] review[ing] the judgment of another Superior Court Judge." *Hayes v. Wilmington*, 239 N.C. 238, 245, 79 S.E.2d 792, 797 (1954), *rev'd on other grounds*, 243 N.C. 525, 91 S.E.2d 673 (1956). While plaintiff properly characterizes the general rule, we hold it inapplicable to the circumstances *sub judice* for several reasons.

First, we do not believe that by including prejudgment interest in his "Order on Plaintiff['s] Bill of Costs" Judge Guice was rendering a "judgment" with respect to this issue.

Next, Judge Guice's treatment of prejudgment interest as a cost in his order would not constitute *res judicata* with respect to the subsequent declaratory judgment suit unless there were: (1) identity of parties; (2) identity of subject matter; (3) identity of issues; and (4) identity of relief demanded, between the prior and later actions. *See, e.g., Mason v. Highway Comm.*, 7 N.C. App. 644, 647, 173 S.E.2d 515, 516 (1970) (citing *Shaw v. Eaves*, 262 N.C. 656, 138 S.E.2d 520 (1964)). We agree with Nationwide's contention that Judge Guice and Judge Allen were not faced with an "identity of issues." To the contrary, the only issue addressed in Judge Guice's order was *how much* was to be taxed against Dalton and Ms. Dalton (the insured); he did not decide *which entity* would ultimately be responsible for paying the amounts he assessed (explicitly) as "costs *and* interest." (Emphasis added). Judge Guice neither sought to define "prejudgment interest," nor to construe Ms. Dalton's insurance policy with respect to the issue.

Further, Judge Allen's ruling that "pre-judgment interest . . . constitutes a portion of the judgment and not a cost" is not inconsistent with, and does not expressly or impliedly overrule, Judge Guice's taxing of that figure against Mrs. Dalton.

Finally, the instant action for declaratory relief was the proper avenue for resolution of plaintiff's questions regarding construction of the insurance policy. *See, e.g., Insurance Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 656-57 (1964) (citations omitted). Having brought this action, he cannot now be heard to complain, in essence, that the trial court had no authority even to decide the very questions he presented for its consideration. We reject this assignment of error.

For all the reasons discussed herein, we affirm the court's grant of summary judgment in favor of Nationwide.

Affirmed.

Judges ORR and LEWIS concur.

Judge ORR concurred prior to 5 January 1995.

ASSOCIATED MECHANICAL CONTRACTORS, INC. v. HARRY E. PAYNE, JR., COMMISSIONER OF LABOR OF NORTH CAROLINA

No. 9410SC362

(Filed 21 February 1995)

1. **Administrative Law and Procedure § 72 (NCI4th)— agency decision—sufficiency of findings—de novo review**

Where plaintiff's assignments of error were sufficient to raise only the issue of whether an order of the Safety and Health Review Board was supported by the findings of fact, appellate review of the Review Board's order was *de novo*.

Am Jur 2d, Administrative Law §§ 639 et seq.

2. **Labor and Employment § 33 (NCI4th)— serious OSHA violation—proof required**

To sustain a serious OSHA violation, the Commissioner of Labor must show (1) the violative condition created the possibility of an accident, (2) a substantial probability that death or serious physical harm could result if an accident did occur as a consequence of the violation, and (3) either the employer knew or a reasonably prudent employer would have known that the violation existed.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 94-119.

What constitutes "serious" violation under §§ 17 (b) and (k) of Occupational Safety and Health Act of 1970 (29 USCS §§ 666 (b) and (j)). 45 ALR Fed. 785.

3. Labor and Employment § 33 (NCI4th)— OSHA violation— willfulness

A determination of willfulness of an OSHA violation requires the application of a subjective standard to determine employer knowledge, that is, what the employer knew and not what a reasonable employer should have known.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 94-119.

What constitutes "willful" violation for purposes of §§ 17 (a) and (e) of Occupational Safety and Health Act of 1970 (29 USCS §§ 666 (a) and (e)). 31 ALR Fed. 551.

4. Labor and Employment § 33 (NCI4th)— repeated OSHA violations—combined designations

A repeated OSHA violation occurs when there is a subsequent violation by the same employer substantially similar to a prior violation or violations when the employer knew or should have known of the standard by virtue of one or more prior citations. Violations carrying a combination of designations, *i.e.*, willful-serious, are established by evidence supporting both designations.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 94-119.

When has employer "repeatedly" violated Occupational Safety and Health Act within meaning of § 17 (a) of Act (29 USCS § 666 (a)). 41 ALR Fed. 146.

5. Labor and Employment § 34 (NCI4th)— OSHA safety violation —conclusion of seriousness—insufficient findings

Findings by the Safety and Health Review Board supported its conclusion that plaintiff employer committed an OSHA violation by failing to adequately instruct its employees in the recognition and avoidance of unsafe conditions where the Review Board found that the employer conducted safety meetings with its employees and maintained safety manuals at the work site but that the training was "insufficient." However, the Review Board's findings were insufficient to support its conclusion that the vio-

lation was serious where there were no findings that the employer's failure to adequately instruct its employees created a substantial probability that death or serious physical harm could result if an accident did occur or that the violation actually caused its employee's death.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 94-119.

What constitutes "substantial evidence" within meaning of § 6 (f) of the Occupational Safety and Health Act (29 USCS § 655 (f)) providing that the Secretary of Labor's determinations shall be conclusive if supported by substantial evidence in the record considered as a whole. 25 ALR Fed. 150.

6. Labor and Employment § 34 (NCI4th)— trench sloping—OSHA violation—conclusion of willfulness—insufficient findings

Findings by the Safety and Health Review Board were insufficient to support its conclusion that plaintiff employer's serious violation of the OSHA sloping requirements for trench excavation was willful where there was no finding that the employer knew of the unstable soil condition at the site of the trench cave-in at issue.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 94-119.

What constitutes "substantial evidence" within meaning of § 6 (f) of the Occupational Safety and Health Act (29 USCS § 655 (f)) providing that the Secretary of Labor's determinations shall be conclusive if supported by substantial evidence in the record considered as a whole. 25 ALR Fed. 150.

Appeal by plaintiff from order entered 3 November 1993 in Wake County Superior Court by Judge Donald W. Stephens. Heard in the Court of Appeals 12 January 1995.

Patton, Boggs & Blow, L.L.P., by Richard D. Conner and Lawrence J. Gillen, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Ralf F. Haskell and Assistant Attorney General Ranee S. Sandy, for the State.

GREENE, Judge.

Associated Mechanical Contractors, Inc. (AMC) appeals from the trial court's order affirming the decision of the North Carolina Safety and Health Review Board (the Review Board) sustaining a citation for violating the sloping requirements for trench excavation set forth in 29 C.F.R. § 1926.652(b) as willful-serious and imposing an $8,000.00 penalty and sustaining a citation for violating safety/training requirements set forth in 29 C.F.R. § 1926.21(b)(2) as serious and imposing a $560.00 penalty.

Harry E. Payne, Jr., the Commissioner of Labor (Commissioner) cited AMC for three different violations of North Carolina's Occupational Safety and Health standards (OSHA standards) and imposed penalties on AMC for those violations. The citations at issue on this appeal are as follows:

a) Citation One, Item 1, for willful-serious violation of 29 CFR 1926.21(b)(2) for failure to instruct its employees in the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment (safety violation);

b) Citation One, Item 2, for willful-serious violation of 29 CFR 1926.652(b) for failure to slope, shore, sheet, brace, or otherwise support sides of trenches in soft or unstable material (trenching violation).

The citations arose out of a fatal accident, where Eddie Lemmons (Lemmons), an employee of AMC, was killed when a trench caved in on 24 April 1990, while AMC was constructing a water treatment facility for the city of Albemarle, North Carolina. In the course of the facility's construction, AMC was required to install an 18 inch gravity line to service the plant drains. In order to accomplish this, a piping crew dug several trenches, including the one that caved in which measured 12-13 feet deep, 5 feet wide at the bottom, 9 feet wide at the top, and 80 feet long. Lemmons was in this trench, making some final checks, when the sides of the trench caved in on him, killing him.

AMC denied the safety violation and denied the designation of the trenching violation as "willful," objected to the penalties and requested a hearing on its objection pursuant to N.C. Gen. Stat. § 95-137(b)(4). Hearing Examiner Koch (Koch) conducted this hearing, pursuant to N.C. Gen. Stat. § 95-135(i), and determined that the safety violation was not willful, but affirmed its designation as "serious," and further affirmed the trenching violation as willful-serious.

The Review Board granted AMC's petition for review, pursuant to N.C. Gen. Stat. § 95-135(i) and 24 NCAC 3 .0602(a).

Safety Violation

The Review Board entered the following pertinent findings of fact on the issue of the safety violation:

> 12(B). Miller [the pipe foreman], Schramm [the project manager] and Blankenship [the project superintendent] admitted to Officer Collins that the training was insufficient.
>
> 12(C). [AMC] furnished and maintained a safety manual at the project site which included a section on excavation, trenching and shoring under 29 CFR 1926.650.
>
> . . . .
>
> 12(E). [AMC] held safety meetings with a frequency of once a week to once every two weeks and these safety meetings included topics and training pertaining to trench operations.
>
> . . . .
>
> 21. There was the possibility of an accident: the hazardous condition of the unstable soil was observable to a reasonable and prudent employer discharging the duty of safety to its employees.
>
> 22. The fatal injury sustained in the accident constituted prima facie evidence of the probability of injury. [Citations omitted.]

Trenching Violation

The Review Board entered the following pertinent findings of fact on the issue of the trenching violation:

> 11(N). The soil in which this trench was dug was unstable soil.
>
> . . . .
>
> 11(P). [AMC] had dug other trenches on this project which went to depths of 12 feet. All of the trenches on this project had nearly vertical walls; . . . .
>
> 11(R). Approximately one month prior to the accident of April 24, 1990, one of [AMC's] employees, Doug Hatley, was covered up to his knees when a portion of the trench in which he was working caved in. This occurred on the same project. Hatley informed Blankenship about this incident. [AMC] became safety conscious

> for some period of time, and started sloping the trenches. [AMC] then returned to the procedure of excavating the trenches with near vertical walls.
>
> 11(S). Blankenship was present at another incident wherein Hatley and another employee were hit in the head by pieces of the trench wall which was falling off. Blankenship informed the employees to stay in the middle of the ditch. The walls of this trench were vertical.
>
> . . . .
>
> 11(Y). Mike Blankenship was present on the project during the times the trenches were dug.

[1] The Review Board finally sustained the trenching violation as willful-serious and the safety violation as serious. AMC appealed the Review Board's order to the Wake County Superior Court, pursuant to N.C. Gen. Stat. § 150B-43, which affirmed the Review Board's order. On appeal to this Court AMC entered two assignments of error and made several arguments in its brief in support of reversing the trial court. Because of the lack of specificity of the assignments of error, N.C.R. App. P. 10(c)(1) (assignments must state "plainly . . . the basis upon which error is assigned"), we read them as only raising the issue of whether the order of the Review Board is supported by the findings of fact, an argument made in AMC's brief. *See In re Morrison*, 6 N.C. App. 47, 49, 169 S.E.2d 228, 230 (1969) (appeal from order presents issue of whether it is supported by findings of fact). Accordingly, our review of the Review Board's order is *de novo*. *Brooks v. Ansco & Assocs.*, 114 N.C. App. 711, 717, 443 S.E.2d 89, 92 (1994). Our review is further limited in that AMC, in its brief, does not contest the seriousness of the trenching violation. N.C.R. App. P. 28(a) (review is limited to questions presented in brief).

The issues presented are whether the Review Board's findings of fact support its conclusion that (I) AMC committed a serious safety violation; and (II) AMC willfully violated the trenching standard.

The Commissioner may designate violations of the Occupational Safety and Health Act of North Carolina (OSHANC) as repeated, willful, serious, or nonserious or a combination of these designations. N.C.G.S. § 95-138 (1993); *see O.S. Steel Erectors v. Brooks, Comm'r. of Labor*, 84 N.C. App. 630, 637, 353 S.E.2d 869, 874 (1987) (affirming a "willful-serious" citation).

Although OSHANC only defines the term "serious," a nonserious violation exists where "there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." Mark A. Rothstein, *Occupational Safety and Health Law* § 312, at 332 (3d ed. 1990) (hereinafter *Rothstein*); Stephen A. Bokat & Horace A. Thompson III, *Occupational Safety and Health Law* 263 (1988) (hereinafter *Bokat*).

[2] A "serious violation" exists:

> if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

N.C.G.S. § 95-127(18) (1993); *Brooks, Comm'r of Labor v. Grading Co.*, 303 N.C. 573, 584, 281 S.E.2d 24, 31 (1981) (discussing the standard for serious violations in North Carolina). Thus, to sustain a serious violation, the Commissioner must show (1) the violative condition created the possibility of an accident, (2) "a substantial probability that death or serious physical harm could result if an accident did occur" as a consequence of the violation, *Id.* at 584-86, 281 S.E.2d at 31-32, and (3) that either the employer knew or a reasonably prudent employer would have known that the violation existed. *See Daniel Constr. Co. v. Brooks*, 73 N.C. App. 426, 430, 326 S.E.2d 339, 342 (1985).

[3] "[A] violation of an OSHA standard is willful if the employer deliberately violates the standard," which requires a voluntary act done with either " 'intentional disregard of or plain indifference' to the requirements of the standard." *Ansco & Assocs.*, 114 N.C. App. at 717, 443 S.E.2d at 92. "An employer's knowledge of the standard and its violation," although necessary to establish willfulness, is not conclusive evidence on this issue. *Id.; Bokat* at 271; *Rothstein* § 315, at 341-44. Employer knowledge can be constructive in that a supervisor's knowledge of the violative condition can be imputed to the company/employer. *Ansco & Assocs.*, 114 N.C. App. at 717, 443 S.E.2d at 92. Willfulness is not established by mere "[c]arelessness, lack of diligence in discovering a violation, [or] impotent efforts to eliminate a hazard," although "a conscious disregard for OSHA requirements,

and the substitution of other measures believed to be as safe as OSHA standards constitutes" willfulness. *Rothstein* § 315, at 344. Thus, the determination of willfulness requires the application of a subjective standard to determine employer knowledge, that is what the employer knew, and *not* what a reasonable employer should have known.

[4] A repeated violation exists where there is a "subsequent violation by the same employer substantially similar to a prior violation or violations" when the employer knew or "should have known of the standard by virtue of the prior citation or citations." *Grading Co.*, 303 N.C. at 590, 281 S.E.2d at 34. Violations carrying a combination of designations, i.e., willful-serious, are established by evidence supporting both designations. *See O.S. Steel Erectors*, 84 N.C. App. at 634, 353 S.E.2d at 873 (evidence supporting serious designation combined with evidence supporting willful designation to support willful-serious designation).

A hearing examiner, who is appointed by the chairman of the Review Board, hears evidence and makes determinations on proceedings instituted before the Review Board, including objections to citations issued by the Commissioner. N.C.G.S. § 95-135(i) (1993). If a petition for review of the hearing examiner's determination is made to the Review Board within 30 days of the hearing examiner's determination, the Review Board "shall schedule the matter for hearing, on the record, except the [Review] Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." *Id.*; 24 NCAC 3 .0602(d). Thus, on review the Review Board is not bound by either the findings of fact or conclusions entered by the hearing officer. *Cf. Robinson v. J. P. Stevens*, 57 N.C. App. 619, 627, 292 S.E.2d 144, 149 (1982) (Full Industrial Commission "upon reviewing an award by the hearing commissioner . . . may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner"); *compare* N.C.G.S. § 97-85 (1991) *with* N.C.G.S. § 95-135(i) (1993) (giving similar authority to The Safety and Health Review Board and The Industrial Commission).

I

Safety Violation

[5] The question here presented is whether the findings of the Review Board support its conclusion that the safety violation was

serious. This necessarily requires a two-part analysis: was there a safety violation by AMC and if so, was it serious. The findings indicate that AMC conducted safety meetings with the employees and maintained safety manuals at the project site. The findings also reveal, however, that the training was "insufficient." Thus the findings, taken together, support the conclusion that there was a safety violation in that the employer failed to adequately instruct the employees in the "recognition and avoidance of unsafe conditions." 29 C.F.R. § 1926.21(b)(2) (1994).

On the question of whether the violation was serious, we agree with AMC that the findings do not support such a conclusion. The finding that the pipe foreman, the project manager and the project superintendent "admitted . . . that the training was insufficient," satisfies the requirement that the employer know or should have known that a violation existed. *Ansco & Assocs.*, 114 N.C. App. at 717, 443 S.E.2d at 92 (supervisor's knowledge can be imputed to the company/employer). There are, however, no findings by the Review Board that the failure to adequately instruct the employees created a "substantial probability that death or serious physical harm could result if an accident did occur." The Review Board appears to have been of the opinion, as reflected in its finding of fact number 22, that if a death occurs on the job site, there is established a prima facie case of the "substantial probability" element. We disagree. The prima facie case is established only if it is shown that the violation "actually caused" the death. *Brooks, Comm'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 467, 372 S.E.2d 342, 347 (1988). In this case, there are no findings that suggest that the failure of AMC to adequately instruct its employees caused the death. Furthermore, there are no findings that there existed, as a consequence of the failure to instruct, a "substantial probability that death or serious physical harm could result if an accident did occur." We do not suggest that there is not some evidence in the record to support such a finding, but only that such a finding was not made.

Having determined that the Review Board was correct in determining that there was a safety violation and incorrect in its determination that that violation was serious, we reverse the trial court's affirmation of the Review Board's determination that the safety violation is serious. This matter is accordingly remanded to the trial court for remand to the Review Board for the entry of an order designating the safety violation as nonserious. The Board shall on remand enter a new sanction consistent with the redesignation of the violation.

II

Trenching Violation

[6] For the purpose of this analysis AMC does not dispute that it has committed a serious violation of the trenching standard which requires it to shore, sheet, brace, slope or otherwise support the sides of trenches in unstable or soft material if the trench is 5 or more feet in depth. 29 C.F.R. § 1926.652 (1994). The only question is whether the findings of the Review Board support its conclusion that the trenching violation was willful.

To support the conclusion that AMC's trenching violation was willful, the findings must show that AMC knew the soil in the trench which caved in was "unstable or soft" and that AMC failed to comply with the trenching standard for unstable soil. The cave-in which occurred one month prior to the accident at issue, of which the project superintendent was made aware, provided sufficient notice to AMC that the soil on the project site was, at least in places, unstable. There is not, however, a finding by the Review Board, nor can we infer from the notice provided by the earlier cave-in, that AMC knew the soil surrounding the trench which caved in on 24 April 1990 was unstable. Furthermore, we cannot infer AMC's knowledge that the soil was unstable at the site of the cave-in from the admission that AMC committed a serious violation of the trenching standard. As noted earlier, a serious violation can be sustained on either the knowledge by the employer of a violative condition or on the basis that a reasonably prudent employer would have known that the violative condition existed. Because there is no finding that AMC knew of the unstable soil condition at the site of the cave-in at issue, the Review Board's findings of fact cannot support its conclusion that the trenching violation was willful.

Having determined that the Review Board was incorrect in its conclusion that the trenching violation was willful, we reverse the trial court's affirmation of the Review Board's determination that the trenching violation was willful. Because AMC does not contest that a serious trenching violation occurred, we remand this matter to the trial court for remand to the Review Board for the entry of a new sanction consistent with a serious violation.

Safety Violation—Reversed and remanded.

Trenching Violation—Reversed and remanded.

Judges EAGLES and WALKER concur.

HARRY J. WEHRLEN AND BESSIE K. WEHRLEN v. AMICA MUTUAL INSURANCE COMPANY

No. 9413SC428

(Filed 21 February 1995)

Insurance § 436 (NCI4th)— automobile accident in New York —direct payment to medical providers—recovery of medical payments by plaintiffs

The trial court did not err by granting summary judgment for plaintiffs in an action to recover medical expenses resulting from an automobile accident where plaintiff Harry Wehrlen was driving in Utica, New York with plaintiff Bessie Wehrlen as his passenger when they were involved in an accident in which they were not at fault; their policy with defendant was in full force and effect at the time of the accident; there existed at that time in New York a mandatory no-fault insurance law requiring injured parties' insurance companies, regardless of fault, to pay first party benefits for basic economic loss incurred as a result of personal injuries arising out of an automobile accident, including medical services; that law applied to out-of-state insurance companies authorized to transact business in New York whose insureds were injured in New York; defendant paid plaintiff's medical providers directly; and plaintiffs filed an action against defendant under the medical payments coverage of the policy. Under New York law, there is no subrogation right because plaintiffs are not entitled to sue tortfeasors and recover for medical expenses incurred as a consequence of the collision, but it does not necessarily follow that permitting plaintiffs to recover under the medical payments provisions of the policy, even if it amounts to double recovery, is inconsistent with a proper construction of the policy. A reasonable person in the position of the insured would have understood the medical payments coverage of the policy to require defendant to pay the insured for medical expenses arising out of an automobile collision except in those

situations listed in the exclusions in the policy, which did not include incurring medical expenses in a state which required the insurer to pay medical expenses directly to the provider. If defendant had wished to provide only medical payments coverage in excess of medical coverage mandated by another state's law, it could and should have done so. The medical payments coverage in this policy, for which plaintiff paid an extra premium, was not included in the limitations for coverage in the section for out-of-state coverage concerning mandatory liability coverage, and New York's proposed no-fault endorsement does not mandate inclusion of the endorsement.

Am Jur 2d, Automobile Insurance §§ 287 et seq.

Appeal by defendant from order entered 25 January 1994 in Columbus County Superior Court by Judge William C. Gore, Jr. Heard in the Court of Appeals 24 January 1995.

William E. Wood for plaintiff-appellees.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Stuart L. Egerton, for defendant-appellant.

GREENE, Judge.

Amica Mutual Insurance Company (Amica) appeals from an order entered 25 January 1994 in Columbus County Superior Court, granting summary judgment in favor of Harry J. Wehrlen and Bessie K. Wehrlen (plaintiffs) in their action to recover from Amica medical expenses resulting from an automobile accident and ordering that plaintiffs recover $20,653.54 plus interest and court costs.

The undisputed facts are as follows: On 1 May 1992, plaintiffs purchased from Amica a North Carolina Personal Auto Policy (the Policy), No. 930532-3042. Part A of the Policy provides for liability coverage for bodily injury or property damage, and Part B of the Policy provides for medical payments coverage for which plaintiffs paid an additional premium. Part A for liability coverage contains an out-of-state coverage section which provides "[n]o one will be entitled to duplicate payments for the same elements of loss." Part B, the medical payments coverage, which has a limit of liability of $50,000.00 for each person per accident, and Part F, the general provisions addressing the entire Policy, provide in pertinent part:

PART B—MEDICAL PAYMENTS COVERAGE

We will pay reasonable expenses incurred for necessary medical and funeral services because of **bodily injury**:

1. Caused by accident; and

2. Sustained by an **insured**

. . . . .

PART F—GENERAL PROVISIONS . . .

A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right . . .

However, our rights in this paragraph do not apply under:

1. Parts B.; and

2. Part D. . . .

Part B for medical payments coverage also lists eleven exclusions, none of which are applicable in this case.

On 29 September 1992, Harry Wehrlen was driving in Utica, New York, with Bessie Wehrlen as his passenger, when they were involved in an automobile accident. It was determined plaintiffs were not at fault. Plaintiffs both suffered injuries from the accident and incurred medical expenses in the amount of $11,485.91 for Harry Wehrlen and $9,167.63 for Bessie Wehrlen. At the time of the accident, the Policy was in full force and effect, and plaintiffs had paid all premium payments due under the terms of the Policy.

At the time of the accident, there existed in New York the Comprehensive Motor Vehicle Insurance Reparations Act (the Act) which is a mandatory no-fault insurance law requiring injured parties' insurance companies, regardless of fault, to pay first party benefits for basic economic loss incurred as a result of personal injuries arising out of an automobile accident. *See* N.Y. Insurance Law [hereinafter N.Y. Law] §§ 5102, 5103, 5107 (McKinney 1985). Basic economic loss includes "up to fifty thousand dollars per person" for all necessary expenses incurred for "medical, hospital, surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services . . . ." N.Y. Law § 5102(a)(1) (McKinney Supp. 1995). The Act applies to out-of-state insurance companies authorized to transact business in New York, which includes Amica, whose insureds are injured in an automobile accident in New York. N.Y. Law § 5107.

Under the Act, the New York Insurance Department promulgated regulations approving use of a "Mandatory Personal Injury Protection (PIP) Endorsement." The proposed endorsement states "[i]f motor vehicle medical payments coverage . . . are afforded under this policy, such coverages shall be excess insurance over any Mandatory PIP . . . paid or payable . . . under this or any other motor vehicle no-fault insurance policy." N.Y. Ins. Dep't Regs. § 65.12. In other words, under the proposed endorsement, an insurance company issuing a policy of insurance containing medical payments coverage would be responsible under that particular coverage only to the extent the cost of the medical services exceeded payments made under the mandatory no-fault New York law.

Amica received billing from plaintiffs' medical providers and made payments directly to the medical providers in accordance with New York's mandatory no-fault law. Amica paid the medical providers a total of $11,485.91 for Mr. Wehrlen and a total of $9,167.63 for Mrs. Wehrlen. These payments were for basic economic loss as defined under New York law.

Plaintiffs pursued a bodily injury claim against the driver of the other vehicle involved in the accident, and that claim was settled. Such settlement did not include payment for plaintiffs' medical expenses. On 30 June 1993, plaintiffs filed an action against Amica in Columbus County Superior Court, alleging entitlement to $11,485.91 for Mr. Wehrlen and $9,167.63 for Mrs. Wehrlen under the medical payments coverage of the Policy. In its answer, Amica argued that the sums allegedly owed under the medical payments coverage of the Policy have "been fully paid and satisfied" by Amica "by payment of the medical services statements directly to the providers" as required by New York law.

On 10 January 1994, plaintiffs made a motion for summary judgment and submitted affidavits in support of their motion. On 25 January 1994, Amica made a motion for summary judgment and submitted the affidavit of Tracy S. Engelbert, a supervising adjuster in Amica's claims department, in support of its motion. The trial court granted summary judgment in favor of plaintiffs.

The issue presented is whether an insurance company which issues an automobile liability policy in North Carolina containing medical payments coverage is required to pay to its insured the cost of medical expenses incurred by the insured as the consequence of

the operation of the insured vehicle in another state even though the insurance company has previously paid, pursuant to the laws of that state, the medical providers for the insured's medical expenses.

Amica argues in its brief that to require it to pay to plaintiffs the amount of the medical expenses incurred by them as a result of the New York accident after it has already made payment to the providers of the medical services pursuant to New York law amounts to an "illogical windfall" or "double recovery" for plaintiffs and thus should not be allowed. Plaintiffs, on the other hand, argue that because Amica waived in the Policy its subrogation rights with regard to the medical payments coverage provision, the insured is entitled to recover the cost of medical expenses related to the accident both from the medical payments insurer and the tortfeasor. *See Carver v. Mills*, 22 N.C. App. 745, 207 S.E.2d 394 (insured not entitled to recover under medical payments provision of his own policy and from tortfeasor where policy specifically granted subrogation rights to insurance company), *cert. denied*, 285 N.C. 756, 209 S.E.2d 280 (1974).

There are problems with the arguments of both parties. The plaintiffs' argument is flawed because under New York law, where this collision occurred, there is no subrogation right because plaintiffs (the injured party) are not entitled to sue the tortfeasor and recover for medical expenses incurred as a consequence of the collision. N.Y. Law § 5104(a) (in action by covered person against another covered person for personal injuries arising out of negligence in use of automobile, there is no right of recovery for basic economic loss up to $50,000); *see Country-Wide Ins. Co. v. Osathanugrah*, 465 N.Y.S.2d 26 (except where law creates cause of action, no-fault legislation reflects public policy making insurer of first party benefits absorb economic impact of loss without resort to reimbursement from its insured or by subrogation, from tortfeasor), *aff'd*, 466 N.E.2d 163 (1983). Thus, even if Amica had not waived its subrogation rights under the medical payments provision, there could be no subrogation in this case. As for Amica's argument, it does not necessarily follow that permitting plaintiffs to recover under the medical payments provisions, even if it amounts to a "double recovery," *see Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993) (insurer not entitled to credit against uninsured motorist coverage for $10,000 it paid plaintiff under medical payments section of same policy because contract itself provides for recovery under both sections and

waives any right to subrogation), is inconsistent with a proper construction of the Policy.

In construing this contract, our objective is "to arrive at the insurance coverage intended by the parties when the policy was issued," *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970), and to the extent there are any ambiguities, provide a "construction which a reasonable person in the position of the insured would have understood it to mean." *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978). Any exclusions or limitations in the Policy are to be construed strictly to provide coverage which would otherwise be afforded by the Policy. *Trust Co.*, 276 N.C. at 355, 172 S.E.2d at 522-23.

In our opinion, a "reasonable person in the position of the insured" would have understood the medical payments coverage to require Amica to pay the insured for medical expenses arising out of an automobile collision except in those situations listed in the "exclusions" named in the policy. The incurring of medical expenses arising out of an automobile collision in a state which requires the insurer to pay the medical expenses, up to $50,000, directly to the provider is not within any of the listed exceptions. Furthermore, had Amica wished to only provide medical payments coverage in excess of medical coverage mandated by another state's law, it could and should have done so, *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 319 S.E.2d 217 (1984) (if insurer intended to exclude coverage for punitive damages, should have inserted provision stating "this policy does not include recovery for punitive damages"), and its failure to do so now bars its attempt to deny coverage.

Amica also argues that the statement "[n]o one will be entitled to duplicate payments for the same element of loss" contained in Part A, the liability coverage of the Policy, applies to Part B, the medical payments coverage of the Policy, to prevent double recovery for plaintiffs. Amica also argues in its brief that the terms contained in the endorsement form issued by the New York Insurance Department in its regulations becomes part of the Policy; therefore, the medical payments coverage in the Policy is excess coverage, and plaintiffs are not entitled to recover from Amica under the medical payments coverage provision of the Policy. We disagree.

Under the principles of construing an insurance policy which we have already stated, the limitations for coverage in the section for out-of-state coverage in Part A of the Policy do not apply to the sepa-

rate section of Part B for medical payments coverage. Part A is the liability coverage which is a mandatory portion of the Policy under N.C. Gen. Stat. § 20-279.1 et. seq., the Motor Vehicle Safety and Financial Responsibility Act. Part B, on the other hand, is a separate optional contractual coverage for which plaintiffs pay an extra premium. There is also no support for Amica's contention that the provisions in the New York Insurance Department's proposed endorsement are necessarily included in and made a part of plaintiffs' policy. New York's no-fault law simply mandates every insurer authorized to transact business within New York to include coverage to satisfy certain financial security requirements and provide mandatory coverage for non-resident motorists. It does not mandate inclusion of the endorsement in the policy of insurance. For these reasons, the decision of the trial court is

Affirmed.

Judges EAGLES and WALKER concur.

STATE OF NORTH CAROLINA, EX. REL. WILLIAM W. COBEY, JR. SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, PLAINTIFF V. FRANK H. COOK, DEFENDANT

No. 9430SC379

(Filed 21 February 1995)

1. Environmental Protection, Regulation, and Conservation § 124 (NCI4th)— violation of Sedimentation Pollution Control Act—claim for civil penalties—sufficiency of complaint

A complaint was sufficient to state a claim under N.C.G.S. § 113A-64(a)(2) to enforce civil penalties where it alleged that the Dept. of E.H.N.R. assessed civil penalties against defendant for violations of the Sedimentation Pollution Control Act, that notices of the penalties were received by defendant, and that defendant did not file a petition for a contested case hearing within the time allowed and refused to pay the penalty.

Am Jur 2d, Pollution Control § 288.

2. Environmental Protection, Regulation, and Conservation § 124 (NCI4th)— violation of Sedimentation Pollution Control Act—civil penalty—constitutional delegation of legislative power

The statutory authority of the Dept. of E.H.N.R. to assess civil penalties for violations of the Sedimentation Pollution Control Act remains a constitutional delegation of legislative power necessary to enforcement of the Act even though the Dept. of E.H.N.R. now is authorized by N.C.G.S. § 113A-65.1 to issue a stop-work order under certain circumstances.

Am Jur 2d, Pollution Control § 288.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute. 81 ALR3d 1258.

3. Environmental Protection, Regulation, and Conservation § 124 (NCI4th)— violation of Sedimentation Pollution Control Act—enforcement tools—no choice by polluter

Defendant polluter had no right to require the Dept. of E.H.N.R. to utilize a stop-work order rather than a civil penalty to enforce the Sedimentation Pollution Control Act.

Am Jur 2d, Pollution Control § 288.

Appeal by defendant from order entered 10 January 1994 by Judge James U. Downs in Cherokee County Superior Court. Heard in the Court of Appeals 12 January 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Sueanna P. Sumpter, for plaintiff-appellee.

Charles R. Brewer for defendant-appellant.

WALKER, Judge.

On 15 January 1993, the Attorney General instituted this action against defendant to enforce a $5,040.00 civil penalty assessed on defendant by the Department of Environment, Health and Natural Resources (DEHNR) for violations of the Sedimentation Pollution Control Act of 1973 (SPCA), N.C. Gen. Stat. § 113A-50 *et seq.* and implementing rules. Defendant answered and moved that the complaint be dismissed because (1) it fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), and (2) the SPCA as

applied to him is unconstitutional in that it violates the Fourteenth Amendment to the United States Constitution. The State filed a motion for summary judgment and both parties' motions were heard in the Macon County Superior Court on 1 November 1993.

By order entered 10 January 1994, the court denied defendant's motions to dismiss and allowed the State's motion for summary judgment. The court found that the complaint states a claim upon which relief may be granted and that "while this matter presents no genuine issue as to any material fact, it does present a sole justiciable issue of law, specifically regarding the constitutionality of [the SPCA] as applied to the defendant." The court concluded as a matter of law that "the statute, as applied to the defendant, is not violative of the Fourteenth Amendment to the United States Constitution and is not constitutionally infirm for any other reason advanced by the defendant." The court further concluded that defendant's motions to dismiss should be denied, that the State is entitled to judgment as a matter of law and that its motion for summary judgment should therefore be allowed. From this order, defendant appeals.

[1] We first addresss the denial of defendant's motion to dismiss for failure to state a claim upon which relief can be granted. The question for the court on a Rule 12(b)(6) motion to dismiss is whether, as a matter of law, the allegations of the complaint, when treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). "A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiff's claim so as to enable him to answer and prepare for the trial." *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 264, 257 S.E.2d 50, 54, *disc. review denied*, 298 N.C. 296, 259 S.E.2d 301 (1979).

Applying the foregoing analysis, we find the complaint sufficient to withstand defendant's motion to dismiss. The complaint alleges a cause of action under N.C. Gen. Stat. § 113A-64(a)(2) (1994), which provides:

> The Secretary [of DEHNR] . . . shall determine the amount of the civil penalty [pursuant to N.C. Gen. Stat. § 113A-64(a)(1)] and shall notify the person who is assessed the civil penalty of the amount of the penalty and the reason for assessing the penalty.

> The notice of assessment shall be served by any means authorized under G.S. 1A-1, Rule 4, and shall direct the violator to either pay the assessment or contest the assessment within 30 days by filing a petition for a contested case under Article 3 of Chapter 150B . . . . If a violator does not pay a civil penalty assessed by the Secretary within 30 days after it is due, [DEHNR] shall request the Attorney General to institute a civil action to recover the amount of the assessment . . . . An assessment that is not contested is due when the violator is served with a notice of assessment . . . .

The verified complaint alleges that on or about 24 August 1992, DEHNR, pursuant to its authority under N.C. Gen. Stat. § 113A-64, assessed civil penalties totalling $5,040.00 for violations of the SPCA. Notice and assessment, copies of which are attached as an exhibit to the complaint and incorporated by reference, were sent to defendant and received by him on 29 August 1992. The notice informed defendant that he must either pay the penalty amount or file with the Office of Administrative Hearings (OAH) a petition to commence a contested case hearing within sixty days of receipt. Defendant did not file a petition with the OAH within the time period allowed and refused to pay the penalty. These allegations were sufficient to state a cause of action under N.C. Gen. Stat. § 113A-64(a)(2), reveal no insurmountable bar to recovery, and give sufficient notice of the nature and basis of the State's claim.

[2] We next consider the denial of defendant's motion to dismiss on grounds that the SPCA as applied to defendant violates the Fourteenth Amendment to the United States Constitution. Defendant argues that his motion to dismiss should have been granted because the penalty provision of the SPCA, N.C. Gen. Stat. § 113A-64(a), is an unconstitutional delegation of judicial power in violation of Article IV, Section 3 of the North Carolina Constitution and because the SPCA, as applied to him, violates the Fourth and Fourteenth Amendments to the United States Constitution. Although defendant's answer only raised as both a defense and a motion to dismiss the issue of whether the SPCA, as applied to him, violates the Fourteenth Amendment, defendant submitted a brief in opposition to plaintiff's motion which raised these additional constitutional issues. Since these issues were raised and considered below, we elect to address them.

We find defendant's arguments that the SPCA, as applied to him, violates the Fourth and Fourteenth Amendments lacking in merit and

thus only address the issue of whether DEHNR's authority to assess civil penalties under N.C. Gen. Stat. § 113A-64(a) is a constitutional delegation of judicial power. In *In the Matter of Appeal From Civil Penalty*, 324 N.C 373, 379 S.E.2d 30 (1989), our Supreme Court held that the legislature's delegation of authority to DEHNR to assess civil penalties for violations of the SPCA was a constitutional delegation of judicial power since such authority was reasonably necessary in light of the agency's purpose and in light of the nature and extent of the judicial power conferred. The Court stated:

> There are several basic objectives in sedimentation control, including (1) identification of critical areas, (2) limiting the size of exposed areas, and (3) limiting the time of exposure. . . . *Perhaps the most critical concern is that time is of the essence, but the penalties section of the Act provides no form of "stop work" power in order to halt a violation in progress.* N.C.G.S. §§ 113A-64 to -66 (1983). Although NRCD [DEHNR's predecessor] has authority to seek injunctive relief in courts, N.C.G.S. § 113A-64, by the time an action is brought and an injunction issued, irreparable damage may have already occurred. The power to levy a civil penalty is therefore a useful tool, since even the threat of a fine is a deterrent. We conclude that the civil penalty power is reasonably necessary to the purposes for which NRCD was established.

In the Matter of Appeal From Civil Penalty, 324 N.C at 380-81, 379 S.E.2d at 35 (emphasis added).

Defendant argues that DEHNR's authority to assess civil penalties is no longer a constitutional delegation of judicial power because since *In the Matter of Appeal From Civil Penalty* was decided, the legislature enacted N.C. Gen. Stat. § 113A-65.1, which authorizes DEHNR to issue stop-work orders. We disagree. We reviewed both the penalty and stop-work order provisions and find that DEHNR's authority to issue a penalty is still reasonably necessary to the enforcement of the SPCA and hence to one of the purposes for which DEHNR was established. The stop-work order provision is merely an additional enforcement tool.

Under the stop-work order provision, a stop-work order is served on the person who is in operational control of the land-disturbing activity and becomes effective upon service of the order. N.C. Gen. Stat. § 113A-65.1 (c) and (d) (1994). While all violations of the SPCA or of any rules adopted or orders issued pursuant to the SPCA are

subject to a civil penalty under N.C. Gen. Stat. § 113A-64(a)(1) (1994), stop-work orders can only be issued upon findings that:

> a land-disturbing activity is being conducted in violation of this Article or of any rule adopted or order issued pursuant to this Article, that the violation is knowing and willful, and that either:
>
> > (1) Off-site sedimentation has eliminated or severely degraded a use in a lake or natural watercourse or that such degradation is imminent.
> >
> > (2) Off-site sedimentation has caused severe damage to adjacent land or that such damage is imminent.
> >
> > (3) The land-disturbing activity is being conducted without an approved plan.

N.C. Gen. Stat. § 113A-65.1(a). Thus, the authority to assess civil penalties under N.C. Gen. Stat. § 113A-64 is still necessary to the enforcement of the SPCA.

[3] Defendant also argues that DEHNR should have utilized the stop-work order provision instead of the penalty provision and that had it done so, the penalty assessed against him would have been smaller. Assuming arguendo that DEHNR could have issued a stop-work order, defendant cannot dictate the enforcement mechanism to be used by DEHNR. DEHNR, in electing its enforcement mechanism, had sent a notice of violation advising defendant to correct the violations by a certain date. Had he done so, the penalty would have been considerably less than that imposed.

Finally, defendant argues that we should reverse the order of summary judgment for plaintiff since there were genuine issues of material fact as to the constitutionality of the SPCA. For the reasons already discussed herein, we disagree. Summary judgment shall be rendered when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The movant has the burden of making a prima facie showing that no genuine issue of fact exists. When this burden is met, the opposing party must come forward with evidence in opposition. *State ex. rel. Grimsley v. Buchanan*, 64 N.C. App. 367, 368, 307 S.E.2d 385, 386 (1983). Plaintiff's verified complaint and accompanying exhibits were sufficient to make a prima facie showing

that it was entitled to recover the penalty. Defendant's affidavit in opposition to the motion for summary judgment fails to raise genuine issues of material facts and plaintiff was entitled as a matter of law to the relief granted. *See State ex. rel. Grimsley v. Buchanan*, 64 N.C. App. 367, 370, 307 S.E.2d 385, 387 (1983).

The State cross-appeals, assigning error to the trial court's finding that the constitutionality of the SPCA presented a justiciable issue of law and to the trial court's consideration of that issue. We need not address this assignment of error since we affirm the order.

Affirmed.

Judges EAGLES and GREENE concur.

DARLENE ALVA, EMPLOYEE-PLAINTIFF v. CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY, EMPLOYER-DEFENDANT SELF-INSURED, (CONSOLIDATED RISK MANAGEMENT SERVICES, SERVICING AGENT)

No. 9410IC450

(Filed 21 February 1995)

1. **Workers' Compensation § 109 (NCI4th)— nurse's assistant—lifting patient from bed to wheelchair—vaginal hernia, uterine and bladder prolapse—accident**

There was competent, credible evidence to support the Industrial Commission's findings of fact that plaintiff had sustained an accident within the meaning of the Workers' Compensation Act where plaintiff, a nursing assistant at defendant's nursing home, was supporting a patient in a bed-to-wheelchair transfer when the patient yelled and fell back toward the bed and plaintiff in response made a jerking lunge to support the patient's weight and to secure her from falling back onto the bed, immediately feeling pain and eventually requiring removal of the uterus, repair of a vaginal hernia, repair of the angle between the vaginal area and the bladder, and suffering permanent damage to the bladder. There was an unexpected interruption of the normal work routine of lifting patients which constituted an accident within the meaning of the North Carolina Workers' Compensation Act.

Am Jur 2d, Workers' Compensation §§ 245, 246.

2. Workers' Compensation § 118 (NCI4th)— nurse's assistant—lifting patient from bed to wheelchair—vaginal hernia, uterine and bladder prolapse—pre-existing condition

The Industrial Commission did not err in finding plaintiff's claim to be compensable where plaintiff, a nursing home nurse's aide, was injured while moving a patient from a bed to a wheelchair and defendant contended that plaintiff had a pre-existing condition that had been present prior to this incident. There was medical testimony that this incident caused the pelvic condition requiring the repair surgery, that the incident was the cause of plaintiff's condition, and that her problem arose in a work situation and that she had no pre-existing problem of any significance.

Am Jur 2d, Workers' Compensation §§ 317-320.

Sufficiency of proof that hernia resulted from accident or incident in suit rather than from pre-existing condition. 2 ALR3d 434.

Sufficiency of proof that urogenital condition resulted from accident or incident in suit rather than from pre-existing condition. 2 ALR3d 464.

3. Workers' Compensation § 246 (NCI4th)— nurse's assistant—lifting patient from bed to wheelchair—loss of uterus—amount of compensation

The Industrial Commission did not abuse its discretion by awarding plaintiff $15,000 for the loss of her uterus. Awards under N.C.G.S. § 97-31(24) are within the Commission's discretion and will not be overturned absent an abuse of discretion.

Am Jur 2d, Workers' Compensation §§ 400 et seq.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sexual organs and processes. 13 ALR4th 183.

4. Workers' Compensation § 246 (NCI4th)— nurse's assistant—lifting patient from bed to wheelchair—permanent bladder damage—amount of compensation

The Industrial Commission did not abuse its discretion by awarding plaintiff $11,000 for bladder damage where there was medical evidence that the bladder dysfunction is permanent and the result of this incident and the corrective surgery.

Am Jur 2d, Workers' Compensation §§ 400 et seq.

Excessiveness or adequacy of damages awarded for injuries to trunk or torso, or internal injuries. 16 ALR4th 238.

Appeal by defendant from opinion and award of Chief Deputy Commissioner Dianne C. Sellers, filed on behalf of the Full Industrial Commission on 21 January 1994 and amended 9 February 1994. Heard in the Court of Appeals 25 January 1995.

Tania L. Leon, P.A., by Tania L. Leon, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Mika Z. Savir and Paige E. Williams, for defendant-appellant.

JOHNSON, Judge.

Darlene Alva (plaintiff), a nurse's assistant at defendant's nursing home, was injured on 8 February 1991 while assisting a patient in a bed-to-wheelchair transfer. Plaintiff was supporting the patient in a position just off the bed, when the patient unexpectedly yelled out and fell back toward the bed. Plaintiff, in response, made a jerking lunge to support the patient's weight and to secure her from falling back onto the bed. Plaintiff immediately felt a pain in her lower back and experienced a sudden involuntary loss of urine. Plaintiff promptly reported to her supervisor that she sustained an injury while assisting the patient in the transfer. The next morning, she noticed when she bent over a heavy fullness in the groin, and felt that "everything was falling out." She examined herself with a mirror, observing what she believed to be her uterus extending out of the vaginal opening. Plaintiff called her gynecologist, Robert Shirley, M.D., and was seen in his office on 11 February 1991, on an emergency basis.

Upon examination, Dr. Shirley found that plaintiff had a marked cystocele with uterine descensus down into the vaginal opening and a substantial rectocele (a bulging of the bladder down into the vagina from the front, a collapse of the pelvic floor into the rear wall of the vagina, with the uterus descending into the vagina, and the cervix extending to the vaginal opening). Dr. Shirley recommended the removal of the uterus through an abdominal incision, a repair of the angle between the vaginal area and the bladder as well as the repair of the hernia in the back wall of the vagina. Plaintiff underwent surgical repair and returned to her former occupation with defendant-hospital.

The Industrial Commission in its opinion and award made the following findings of fact:

> 11. As a result of the incident on 8 February 1991 and the required surgery, plaintiff has permanent problems with bladder function.
>
> . . .
>
> 12. As a result of the incident on 8 February 1991, plaintiff has had a one hundred percent loss of her uterus, which is an important organ or part of plaintiff's body for which no compensation is payable under any other subdivision of N.C. Gen. Stat. § 97-31; equitable compensation for which is $15,000.00.
>
> 13. As a result of the incident on 8 February 1991, plaintiff has had permanent damage to her bladder, which is an important organ or part of plaintiff's body for which no compensation is payable under any other subdivision of N.C. Gen. Stat. § 97-31; equitable compensation for which is $11,000.00.

The Commission then concluded that plaintiff was entitled to temporary total disability compensation at the rate of $116.49 from 25 February 1991 to 20 April 1991; compensation for total loss of her uterus; permanent damage to her bladder; all medical expenses and attorney's fees.

[1] Defendant first argues that there is no competent, credible evidence to support the Commission's findings of fact that plaintiff sustained an "accident" on 8 February 1991 within the meaning of the North Carolina Workers' Compensation Act. We disagree.

Appellate review of an opinion and award of the Industrial Commission is limited to two questions of law: "(1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether . . . the findings of fact of the Commission justify its legal conclusions and decisions." *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990) (*quoting Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984)); *Gilbert v. Entenmann's Inc.*, 113 N.C. App. 619, 623, 440 S.E.2d 115, 118 (1994). On appeal, the Industrial Commission's findings of fact are conclusive if supported by competent evidence even though a contrary finding may be found. *Gilbert*, 113 N.C. App. 619, 440 S.E.2d 115. "[T]he Industrial Commission is the sole judge of the credibility

of the witnesses and the weight to be given their testimony." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982). In the case *sub judice*, there is competent evidence to support the Commission's findings of fact and conclusions of law.

In order for an injury to be compensable under the North Carolina Workers' Compensation Act, there must be a work-related "accident." Our Supreme Court has defined an "accident" as "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962). *See also Gunter v. Dayco Corp.*, 317 N.C. 670, 346 S.E.2d 395 (1986). Plaintiff is required to show that something unexpected and outside of her normal work duties occurred which interrupted her work routine and caused her injury. *Harding*, 256 N.C. 427, 124 S.E.2d 109.

In the instant case, the Industrial Commission accepted as competent, credible evidence that plaintiff was injured as a result of the unexpected yell of the patient and sudden weight shift, coupled with plaintiff's reflexive jerk to insure that the patient did not fall on the bed. This was an unexpected interruption of the normal work routine of lifting patients which constituted an accident within the meaning of the North Carolina Workers' Compensation Act.

[2] Defendant next argues that the Commission erred in finding plaintiff's claim to be compensable because there is no evidence of a causal connection between plaintiff's injury and the alleged accident. Defendant contends that plaintiff had a pre-existing condition that had been present for weeks or months prior to the 8 February 1991 incident. Symptoms indicated that there was some degree of uterine prolapse and bladder abnormality developing prior to 8 February 1991. Defendant, however, neglects to take into account the testimony of Dr. Shirley that in his opinion the 8 February 1991 incident described by plaintiff caused the pelvic condition requiring the repair surgery that was performed.

> In *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964), the Supreme Court held that an expert's opinion that a particular cause "could" or "might" have produced the result indicates that the result is capable of proceeding from the particular cause within the realm of reasonable probability. . . . [T]he Court [further] recognized that "[a] result in a particular case may stem from a number of causes." 262 N.C. at 668, 138 S.E.2d at 545. All

> that is necessary is that expert express an opinion that a *particular* cause was *capable* of producing the injurious result. *Id.*

Buck v. Procter & Gamble Co., 52 N.C. App. 88, 94-95, 278 S.E.2d 268, 272-73 (1981). In the instant case, Dr. Shirley testified that the 8 February 1991 incident was the cause of plaintiff's condition. Further, Dr. Shirley wrote that "her problem did arise in a work situation—that she had no pre-existing problem of any significance."

[3] Defendant also argues that the Commission abused its discretion in awarding plaintiff $15,000.00 for the loss of her uterus under North Carolina General Statutes § 97-31(24) (1991). North Carolina General Statutes § 97-31(24) provides:

> In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars ($20,000).

Awards under North Carolina General Statutes § 97-31(24) are within the Commission's discretion and will not be overturned on appeal absent an abuse of discretion. *Little v. Penn Ventilator Co.*, 317 N.C. 206, 345 S.E.2d 204 (1986). Abuse of discretion is determined by asking whether a decision is "manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

In the instant case, the Commission based its opinion and award on a rational basis. Plaintiff was permanently deprived of her uterus, an important organ. Thus, the Commission's award of $15,000.00 for plaintiff's permanent loss of her uterus was a proper exercise of discretion.

[4] Defendant's final argument is that the Commission abused its discretion in awarding plaintiff $11,000.00 for "permanent damage" to her bladder under North Carolina General Statutes § 97-31(24). This argument must also fail in that defendant has failed to show that the Commission abused its discretion. The evidence shows that Dr. Shirley testified that in his opinion the bladder dysfunction experienced by plaintiff is permanent in nature and a result of the 8 February 1991 incident and the corrective surgery. Thus, the Commission relying on credible and competent evidence found that plaintiff's bladder, an important organ, was permanently damaged.

Having reviewed the record, there is sufficient evidence to support the Commission's findings of fact and these findings support the conclusions of law. Having made their decision based on competent, credible evidence, the decision of the Commission is affirmed.

Affirmed.

Chief Judge ARNOLD and Judge MARTIN, MARK D. concur.

KATHLEEN HAMMILL, PLAINTIFF v. JAMES DENNIS CUSACK, DEFENDANT

No. 9319DC1196

(Filed 21 February 1995)

1. **Divorce and Separation § 430 (NCI4th)— child support—registration of foreign order—modification of order**

Registration of a foreign child support order pursuant to N.C.G.S. § 52A-24 *et seq.* results in treatment of the order as if issued by a court in this state, and a party may thereafter seek modification of the order under N.C.G.S. § 50-13.7(b).

Am Jur 2d, Divorce and Separation §§ 1078 et seq.

2. **Divorce and Separation § 445 (NCI4th)— child support—changed circumstances—involuntary income reduction**

A significant involuntary decrease in a child support obligor's income satisfies the necessary showing of changed circumstances for modification of the child support order even in the absence of any change affecting the child's needs.

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.

3. **Divorce and Separation § 392.1 (NCI4th)— child support guidelines—applicability to modification of order**

The child support guidelines apply to modification of child support orders as well as to the initial orders.

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.

4. Divorce and Separation § 445 (NCI4th)— modification of child support—involuntary income reduction—findings of reasonable needs not required

The trial court did not err by reducing a child support obligation based upon a substantial involuntary reduction in the obligor's income without making findings and conclusions concerning the child's needs and expenses absent a party's request in advance for deviation from the child support guidelines or for such findings of fact and conclusions of law. The amount of support set by the court pursuant to the guidelines was thus conclusively presumed to be adequate for the child's reasonable needs.

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.

Appeal by plaintiff from order entered 29 June 1993 by Judge Frank M. Montgomery in Rowan County District Court. Heard in the Court of Appeals 1 September 1994.

Attorney General Michael F. Easley, by Associate Attorney General Elizabeth J. Weese, for the plaintiff-appellant.

No brief filed for defendant-appellee.

JOHN, Judge.

Plaintiff contends the trial court, in reducing previously ordered child support, erred by failing to make findings regarding the minor child's past expenses or present needs. We disagree.

Pertinent procedural facts are as follows: Under an order of the Trumbull County, Ohio, Court of Common Pleas, defendant's child support obligation was set at $570.00 per month. In addition, he was required to pay $46.69 per month for health insurance as well as 77% of all non-covered medical, dental, and optical expenses incurred by the minor child.

Defendant, a podiatrist, relocated to North Carolina. For a brief period he was unemployed, received no income, and as of 31 October 1992 had accumulated arrearage in the amount of $1,798.47. Plaintiff gave notice of registration of the foreign support order pursuant to N.C. Gen. Stat. § 52A-29 (1992), and defendant thereafter moved for modification of the support payments decreed therein.

At the hearing on defendant's motion, he presented testimony concerning his current financial situation. Plaintiff did not appear or offer evidence, but was represented by counsel. In its order dated 2 July 1993, the court included the following dispositive findings of fact:

> 4. That at the time of the entry of the prior Order the Ohio Court found that Defendant's gross income was Seventy Three Thousand Four Hundred Fifty Five Dollars ($73,455.00) per year and the Plaintiff's gross income was Twenty Two Thousand Dollars ($22,000.00) per year.
>
> 5. That since the entry of the Ohio Order there has been a substantial and material change of circumstance to warrant a modification of the Prior Order regarding child support.
>
> 6. That the Defendant has had a substantial reduction in earnings as a result of closing his Ohio practice and moving from Ohio to Rowan County, North Carolina.
>
> 7. That in 1991 Defendant's gross income was Thirty Five Thousand Five Hundred Fifty Dollars ($35,550.00); that in 1992 Defendant's gross income was Twenty One Thousand Dollars ($21,000.00).
>
> 8. That since the entry of the Prior Order the Defendant has a new baby one year of age and his wife is pregnant with another child.

Based upon its findings, the court concluded there existed a "substantial and material change of circumstance to warrant a modification" of the Ohio support order. The court thereafter computed defendant's support obligation as $233.00 per month upon reference to Worksheet A of the North Carolina Child Support Guidelines (the Guidelines). Defendant was also directed to continue paying $46.69 per month for health insurance, but his share of all uninsured medical bills for the minor child was reduced to 47%.

The primary focus of plaintiff's argument is her contention that a child support modification order must include findings, based upon competent evidence, relative to the minor child's actual past expenses and present reasonable needs. The failure of the trial court to recite such findings in the order *sub judice*, plaintiff continues, and the subsequent conclusion that a substantial change of circumstances had occurred, based solely upon evidence of a decrease in defendant's income, constituted reversible error. We find plaintiff's assertions unpersuasive.

[1] Registration of a foreign support order pursuant to N.C. Gen. Stat. § 52A-24 (1992) *et seq.* results in treatment of the order as if issued by a court of this State. N.C. Gen. Stat. § 52A-30 (1992). Following registration, a party may thereafter seek modification under N.C. Gen. Stat. § 50-13.7(b) (1987), which states in pertinent part:

> When an order for support of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support which modifies or supersedes such order for support, ...

Id.

[2] The burden of demonstrating changed circumstances rests upon the moving party. *Davis v. Risley*, 104 N.C. App. 798, 800, 411 S.E.2d 171, 173 (1991) (citing *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977)). Plaintiff relies upon *Davis* for her contention that the changed circumstances must relate exclusively to "child-oriented expenses." *Id.* at 800, 411 S.E.2d at 172-73 (citing *Gilmore v. Gilmore*, 42 N.C. App. 560, 563, 257 S.E.2d 116, 118 (1979)). Nonetheless, it is now settled that a significant involuntary decrease in a child support obligor's income satisfies the necessary showing even in the absence of any change affecting the child's needs. *Pittman v. Pittman*, 114 N.C. App. 808, 810-11, 443 S.E.2d 96, 97-98 (1994); *see also Springs v. Springs*, 25 N.C. App. 615, 616, 214 S.E.2d 311, 312-13 (1975) (sufficient showing of changed circumstances to support child support reduction where obligor's net income decreased because of lowered V.A. benefits and added deductions for social security and income taxes, and obligee's net income had increased), and *O'Neal v. Wynn*, 64 N.C. App. 149, 151-53, 306 S.E.2d 822, 823-24 (1983), *aff'd*, 310 N.C. 621, 313 S.E.2d 159 (1984) (determination of changed circumstances and reduction of child support affirmed absent change in child's needs where obligor's income decreased as a result of losing job and

borrowing money to start new business). This is in recognition of "the ultimate objective in setting awards for child support[, that is,] to secure support commensurate with the needs of the children *and* the ability of the [obligor] to meet the needs." *Pittman*, 114 N.C. App. at 810, 443 S.E.2d at 97 (citing *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E.2d 522 (1975)) (emphasis added).

[3] Once a movant has met the burden of establishing changed circumstances, the trial court then "proceeds to follow the Guidelines and to compute the appropriate amount of child support." *Davis*, 104 N.C. App. at 800, 411 S.E.2d at 173. The Guidelines apply to modification of child support orders as well as to initial orders. *Greer v. Greer*, 101 N.C. App. 351, 354, 399 S.E.2d 399, 401 (1991) (citing 1989 N.C. Sess. Laws ch. 529, § 9).

Under the Guidelines, the trial court, unless requested in advance by a party, is not required either to receive evidence, make findings of fact, or enter conclusions of law " 'relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support.' " *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991) (quoting N.C. Gen. Stat. § 50-13.4(c) (Cum. Supp. 1990)). In *Browne*, we stated the rationale underlying the advance request requirement as follows:

> This requirement for advance notice eliminates needless evidentiary hearings and needless fact finding and conclusion making. The party required to give the advance notice is the party requesting a variance from the guidelines. . . . Absent a timely and proper request for a variance of the guidelines, *support set consistent with the guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education and maintenance.*

Id. (emphasis added).

[4] Upon review of the record herein, we find no request by any party for deviation from the Guidelines nor any request for findings of fact and conclusions of law. Accordingly, the child support amount ordered by the trial court is "conclusively presumed" to be adequate for the minor child's reasonable needs, *Browne*, 101 N.C. App. at 624, 400 S.E.2d at 740, and it was not error for the court to fail to make findings and enter conclusions concerning the child's needs and expenses.

Notwithstanding, plaintiff insists *Greer*, 101 N.C. App. 351, 399 S.E.2d 399, mandates such findings. Her reliance upon *Greer* is misplaced. The order reviewed therein was issued 14 November 1989. *Id.* at 352, 399 S.E.2d at 400. It was therefore considered in light of the Guidelines in effect at that time which provided that "a court determining a parent's child support obligation shall . . . from the evidence find the facts relating to the reasonable needs of the child for support . . . ." *Id.* at 354, 399 S.E.2d at 401 (citing A.O.C., Child Support Guidelines, AOC-A-162 (New 10/89). As a result, the *Greer* trial court was indeed obligated to "find the facts relating to the reasonable needs of the child for support . . . ." *Id.*

However, the order in the case *sub judice* was issued 29 June 1993. The Guidelines in effect as of that date do not contain the requirement cited above, and findings of fact are prescribed therein only to justify deviation from the presumptive amount of child support. A.O.C., Child Support Guidelines, AOC-A-162 (Rev. 8/91). Hence, *Greer* is inapposite and the trial court was under no obligation to make findings of fact absent a specific request therefor. G.S. § 50-13.4(c).

Affirmed.

Judges EAGLES and ORR concur.

Judge ORR concurred prior to 5 January 1995.

ALFRED F. TALTON, JR., AND WIFE, DAWN W. TALTON, PLAINTIFFS v. MAC TOOLS, INC. AND ALAN CALVERT, DEFENDANTS

No. 9410SC483

(Filed 21 February 1995)

Torts § 20 (NCI4th)— tool distributorship—action for fraud, breach of contract—prior release

The trial court did not err by granting summary judgment for defendants where plaintiffs filed an action for breach of contract, fraud, and various other causes of action based on the sale of a tool distributorship but plaintiffs had earlier signed a release. Although plaintiffs argue that a genuine issue of fact exists as to whether defendants fraudulently procured the release, plaintiffs'

affidavits allege fraud only in the underlying transaction rather than in the procurement of the release. Plaintiffs cannot rely on their ignorance of facts giving rise to a claim for fraud as a basis for avoiding the release since the language of the release was broad enough to cover all possible causes of action whether or not the possible claims are known. Moreover, plaintiffs admitted in depositions that they read and understood the release before signing it, that they never believed that they signed the release by mistake, or that they were defrauded into signing the release. Although plaintiffs argued that there was a genuine issue of fact as to whether the release was supported by consideration, an agreement to settle a bona fide dispute does not become unenforceable for lack of consideration upon discovery of facts which would constitute a complete defense to the dispute settled.

Am Jur 2d, Release §§ 21-25.

Appeal by plaintiffs from order entered 27 January 1994 by Judge Dexter Brooks in Wake County Superior Court. Heard in the Court of Appeals 26 January 1994.

Kirk, Gay, Kirk, Gwynn & Howell, by Joseph T. Howell, for plaintiffs-appellants.

Smith Helms Mulliss & Moore, L.L.P., by R. L. Adams and J. Donald Hobart, Jr., for defendants-appellees.

WALKER, Judge.

Defendant Mac Tools is an Ohio Corporation which manufactures and markets tools through its distributors. Its District Sales Manager in Wake County, defendant Alan Calvert, sold a distributorship to plaintiff in July 1988. Distributors enter into Distributor Agreements with Mac Tools which require them to purchase or lease a Mac van, fill it with tools purchased from Mac, and resell the tools to customers within a given territory.

Plaintiff's earnings from the distributorship were not what he expected and thus in approximately August of 1990, after two years of operation, plaintiff terminated his distributorship. Subsequently, in October 1990, Mac Tools sought to collect a balance of $23,590.83 which plaintiff owed for participation in its customer and distributor financing programs. Plaintiff disputed the actual balance owed on this account. After consulting with an attorney, plaintiffs offered, by

letter dated 19 November 1990, to pay $8,527.91 on the account and to release "any claims by or for the benefit of Alfred Talton and/or Dawn Talton arising before this date against Mac Tools, Inc." in settlement of "all claims of Mac Tools arising out of [the account]."

Thereafter, defendant drafted a "Mutual Release" which contained the above terms and included a release by Mac Tools of "any and all claims . . . arising out of or in any manner related to the operation by Alfred F. Talton, Jr. of a Mac Tools distributorship prior to the date hereof and all past and present agreements between [the parties]." Also, plaintiff would release "Mac Tools, Inc. and its . . . employees from any and all claims . . . arising out of or in any manner related to the previous purchases of goods, materials and services up to and including the date of the execution of this Mutual Release and in any manner related to the transaction which is the operation by Alfred F. Talton, Jr. of a Mac Tools distributorship, . . . whether direct or contingent, liquidated or unliquidated, including but not limited to any stated or unstated claims." The release further stated that "[i]t is the specific intent of this Mutual Release to release and discharge any and all claims and causes of action of any kind or nature whatsoever which may exist, might be claimed to exist, or could have been claimed to exist by Mac Tools, Inc. against [plaintiffs] and by [plaintiffs] against Mac Tools, Inc. . . ." Plaintiffs and Mac Tools executed said "Mutual Release" on 20 December 1990 and 21 January 1991, respectively.

Over two years later, on 9 March 1993, plaintiffs filed this action for breach of contract, fraud, and various other causes of action arising out of his operation of a Mac Tools distributorship. Plaintiffs alleged in their complaint that Mr. Talton did not know of the facts which would support the claims set out in the complaint or any facts which might have led to their discovery until after the Mutual Release was signed.

Defendants filed a joint motion for summary judgment on 13 September 1993, asserting that any claims alleged in the complaint were released in the "Mutual Release." To prove the release, defendants submitted the affidavit of Jim Conrad, a Mac Tools' collection representative who attempted to collect plaintiff's account of $23,590.83. Mr. Conrad's affidavit summarized his efforts to collect the balance from plaintiff and the events leading up to and including the execution of the mutual release. Copies of plaintiffs' settlement proposal and the signed mutual release were attached to his affidavit.

In opposition to defendants' motion, plaintiffs submitted affidavits which stated that after signing the mutual release they discovered that defendants had made false representations which induced Mr. Talton into entering the Distributor Agreement with Mac Tools. Specifically, Alfred Talton affied that after signing the release, he discovered that representations made by Alan Calvert about the level of risk involved in operating a distributorship, the effort required to make a profit, and the potential for financial success were misrepresentations and that Mr. Talton had been induced into entering the Distributor Agreement "based upon fraudulent statements and misprepresentations made by [defendants]."

On 13 September 1993 defendants made a motion for summary judgment. By order entered 27 January 1994, the court granted defendants' motion for summary judgment. Plaintiffs appeal.

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no geniune 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). Where the execution of a release based on valuable consideration is admitted or established by the evidence it provides a complete defense to an action for damages. In such a case, plaintiff must "prove the matter in avoidance of the release" in order to defeat defendants' motion for summary judgment. *Watkins v. Grier*, 224 N.C. 339, 342, 30 S.E.2d 223, 225 (1944). A release is subject to avoidance by a showing that its execution resulted from fraud or a mutual mistake of fact. *Cunningham v. Brown*, 51 N.C. App. 264, 269, 276 S.E.2d 718, 723 (1981).

Plaintiffs argue that summary judgment should not have been granted because a genuine issue of fact exists as to whether or not defendants fraudulently procured the release. We disagree. Plaintiffs' affidavits allege fraud only in the underlying transaction to which the release relates rather than fraud in the procurement of the release. Plaintiffs agreed to release defendants "from any and all claims" which are "in any manner related to the transaction which is the operation by Alfred F. Talton, Jr. of a Mac Tools distributorship, . . . whether direct or contingent, liquidated or unliquidated, including but not limited to any stated or unstated claims." Since this language was broad enough to cover all possible causes of action, whether or not the possible claims are all known, plaintiffs cannot rely on their

ignorance of facts giving rise to a claim for fraud as a basis for avoiding the release. *See Merrimon v. Telegraph Co.*, 207 N.C. 101, 105-06, 176 S.E. 246, 248 (1934) (language in a release may be broad enough to cover all possible causes of action whether or not the possible claims are all known).

Moreover, defendants submitted depositions of the plaintiffs in which plaintiffs admit that they read and understood the release before signing it. Plaintiffs also admit that they never believed that they signed the release by mistake, thinking the release was something else, or that they were defrauded into signing the release.

Plaintiffs further argue that the evidence tended to show that plaintiffs had a complete defense to Mac Tools' claims based upon defendants' fraudulent conduct and thus created a genuine issue of fact as to whether the release was supported by consideration. Assuming arguendo that the evidence tended to show a complete defense to Mac Tools' claims, we disagree that such evidence would create an issue of fact as to whether the release was supported by consideration. An agreement to settle a bona fide dispute does not become unenforceable for lack of consideration upon discovery of facts which would constitute a complete defense to the dispute settled. *See Carding Specialists v. Gunter & Cooke*, 25 N.C. App. 491, 495, 214 S.E.2d 233, 236 (1975) (agreement settling claim for patent infringement binding despite a court's decision that patent invalid where parties had a bona fide dispute over patent validity and infringement at the time of executing agreement).

Pursuant to Rule 10(d) of the North Carolina Rules of Appellate Procedure, defendants cross-assigned error to the court's denial of their motion to exclude plaintiffs' opposing affidavits and exhibits. Since we affirm the order granting summary judgment, we need not address this issue.

Affirmed.

Judges GREENE and LEWIS concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. QUEEN ANN ANDERSON, ADMINISTRATRIX, OF THE ESTATE OF KEVIN ANDERSON, DAVID WILEY, WAYNE ENOCH, AND KIM WILEY, DEFENDANTS

No. 9415SC245

(Filed 21 February 1995)

1. Insurance § 719 (NCI4th)— homeowners insurance—girlfriend's child "in care of" insured—coverage for tort

An eighteen-year-old child of insured's live-in girlfriend was "in the care of" the insured and was thus covered by the insured's homeowners policy, even though he had a full-time job and paid some of his own support, where he was a resident of the insured's household, the insured had participated in rearing the child since he was very young, and the child was still dependent on the insured and his mother for the basic necessities of food, clothing and shelter.

Am Jur 2d, Insurance §§ 475 et seq.

2. Declaratory Judgment Actions § 27 (NCI4th)— insurance coverage of tortfeasor—right of administratrix to appeal

The administratrix who filed a wrongful death action against the tortfeasor had a right to appeal a declaratory judgment that the tortfeasor was not insured by a homeowners policy where she was a proper party to the declaratory judgment action even though the tortfeasor did not appeal. To allow the insurance company to name her as a party, yet deny her the right to appeal, would open the door to collusion between a virtually judgment proof defendant and an insurer.

Am Jur 2d, Declaratory Judgments §§ 244, 245.

Appeal by defendant Anderson from order entered 6 December 1993 by Judge George R. Green in Alamance County Superior Court. Heard in the Court of Appeals 24 October 1994.

Brenda Knight and her son, Wayne Enoch, lived with John Gwynn in Gwynn's home. On 5 July 1988, Enoch visited with Kim Wiley and her cousin, Kevin Anderson, at David Wiley's home. While there, Enoch retrieved Wiley's shotgun to show Anderson how it works. As he turned to leave the room, the shotgun discharged and mortally wounded Anderson. Anderson's estate filed a wrongful death action against both Enoch and Wiley. Nationwide Mutual Insurance

Company (Nationwide) received notice of the claim and denied liability, contending that Enoch was not an insured under Gwynn's homeowner's policy. Regardless, Nationwide proceeded to defend Enoch while reserving its rights to deny coverage.

On 4 December 1990, Nationwide filed a declaratory judgment action against defendants seeking a determination of whether Enoch was an insured under the policy. The policy defines an insured as:

> 3. "insured" means you and residents of your household who are:
>
> a. your relatives; or
>
> b. other persons under the age of 21 and in the care of any person named above.

Nationwide moved for summary judgment and, on 5 July 1991, the court entered an order stating that Nationwide was not obligated to provide insurance coverage for Enoch because he was not an insured under the policy. Defendant Anderson appealed that order and on 20 July 1993, a panel of this Court vacated the order after concluding that it was entered out of county and out of term without consent of the parties. Plaintiff moved for summary judgment a second time in November of 1993 and, again, the trial court granted summary judgment for plaintiff on the ground that Enoch was not an insured under the policy. From this order, defendant Anderson appeals.

Harris & Iorio, by Douglas S. Harris, for defendant appellant.

Bryant, Patterson, Covington & Idol, P.A., by David O. Lewis, for plaintiff appellee.

ARNOLD, Chief Judge.

[1] Defendant argues that the trial court erred in granting summary judgment for plaintiff. She contends that because Enoch was under twenty-one and a resident of Gwynn's household, a jury question was presented as to whether he was "in the care of any person named above." Nationwide concedes that Enoch was a resident of Gwynn's household and under the age of twenty-one, but denies he was "in the care of" Gwynn.

When nontechnical words used in a policy are not defined, they "are to be given a meaning consistent with the sense in which they are used in ordinary speech." *Kruger v. State Farm Mut. Auto. Ins.* Co., 102 N.C. App. 788, 790, 403 S.E.2d 571, 572 (1991). If the words are

subject to more than one meaning, they should be given the meaning most favorable to the policyholder and provisions extending coverage must be construed liberally. *Id.* "Under the care of another" has been interpreted to mean persons who are "under the guidance, supervision, control, management or custody of another." 7A John A. Appleman, *Insurance Law and Practice* § 4501.04, at 257 (Walter F. Berdal, ed. 1979). We believe, however, that the phrase encompasses much more than control or supervision and extends to the realities of providing life's basic necessities.

We have found no North Carolina decisions interpreting this phrase, but decisions from two other jurisdictions provide some guidance. In *State Farm Fire & Casualty Company v. Odom*, a mother and her young child were living with the insured in his home. *State Farm Fire & Cas. Co. v. Odom*, 799 F.2d 247 (6th Cir. 1986). While the insured was watching the child, she slipped and fell into a bucket of scalding water, and eventually died from the injury. *Id.* After her mother brought a wrongful death action against the insured, his insurance company denied coverage based on a policy exclusion. *Id.* Unlike this case, the insurance company claimed the child *was* an insured under an identical definition. *Id.* The court did not believe the phrase "in the care of" was ambiguous, nor did it believe it was limited in meaning to legal care, and held that the child was in the care of the insured because they functioned as a family and the named insured provided housing, clothing, food, and care for the child. *Id.*

In *United States Fidelity & Guaranty Company v. Richardson*, the court reached a similar conclusion. *United States Fidelity & Guaranty Co. v. Richardson*, 486 So.2d 929 (La. App. 1986). In *Richardson*, a woman and her fourteen year old daughter lived with the insured. *Id.* Under essentially the same definition of insured, and under facts far less compelling than this case, the court concluded that the woman's daughter was in the care of the insured. *Id.* In so concluding, the court noted that the insured let the child stay in his home, paid for maintenance of the home and other expenses, and allowed the child's mother to devote more of her income to the child's needs. *Id.*

In this case, Enoch and his mother moved in with Gwynn when Enoch was very young and, although Gwynn did not "function" as his father, he talked to him like a father and participated in raising him. Gwynn provided a home for Enoch and his mother. Moreover, he bought Enoch clothes and fed him. Gwynn and Enoch's mother never

married but Enoch repeatedly referred to Gwynn as his step-dad. At the time of the accident, Enoch, who had dropped out of school after tenth grade, worked full-time, paid $20.00 rent every two weeks, paid the electric bill, maintained his own car insurance and performed some household chores such as mowing the lawn. Gwynn and Enoch's mother paid for all other expenses, including food and clothing.

We believe Enoch was in the care of the insured. While Gwynn never married Enoch's mother, they, along with Enoch's young half-brother by Gwynn, operated as a family. Appellee's attempts to distinguish the cases cited above on the basis that the children involved were minors at the time of the incidents is unavailing. Enoch was eighteen at the time of the incident and, while he did provide for his own support in some ways, he was still dependent on Gwynn and his mother for the basic necessities of food, clothing, and shelter. Furthermore, the policy itself does not make this distinction. Therefore, we hold that the court erred in granting summary judgment for Nationwide and in determining that Enoch was not an insured under the policy.

[2] Appellee argues that Enoch is not entitled to coverage because he did not contest this declaratory judgment action and did not appeal from the summary judgment order. Appellee contends that even though appellant was a party to the declaratory judgment action, she has no right to appeal the order because the judgment is final as to Enoch given his failure to appeal. Notably, appellee does not cite any authority in support of this argument and we strongly disagree with its position.

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." N.C. Gen. Stat. § 1-260 (1983). Clearly, appellant was a proper party to the declaratory judgment. Indeed, she was made a party by the appellee itself, as is often done in this type of case. "As a general rule a party or a privy to the record, or one who is injured by the judgment, or who will be benefited by its reversal, may appeal . . . . Any person may appeal or bring error, if he was a party to the action or proceeding below." 4 C.J.S. *Appeal and Error* § 156 (1993).

Appellant has more than an incidental or indirect interest in this matter, particularly since it will be conclusive on the issue of cover-

age, and as a party to the action this appeal presents her sole opportunity to contest the court's decision. Furthermore, to allow the insurance company to name her as a party, yet deny her the right to appeal, would open the door to collusion between a virtually judgment proof defendant and an insurer.

The order of the trial court is reversed and this case is remanded for entry of judgment for defendant Anderson.

Reversed and remanded.

Judges COZORT and LEWIS concur.

ROBBIN LYNN TAYLOR (HALL) v. THOMAS WALTER BRINKMAN

No. 9414SC435

(Filed 21 February 1995)

Automobiles and Other Vehicles § 452 (NCI4th)— automobile accident—family purpose doctrine—separated spouse

The trial court properly granted summary judgment for defendant in an action arising from an automobile accident where plaintiff sought to impute negligence to defendant under the family purpose doctrine where the driver of the automobile was defendant's daughter; defendant had separated from his wife and moved into an apartment; defendant's wife selected a new vehicle after the separation which was purchased with defendant's credit and with title in his name because she had no available credit in her name; his wife made the down payment, arranged for insurance coverage, took care of the maintenance and repairs, and made all payments of the car; defendant did not have keys, did not use the car, and did not know until after the accident that his daughter was driving the car on this occasion; and defendant's daughter lived with her mother and never lived with defendant or visited his apartment. Defendant's role in the acquisition of the automobile was incidental and secondary and he did not control the vehicle because he neither provided nor maintained the vehicle for his wife and children. Thus, an essential element of plaintiff's claim under the family purpose doctrine is missing.

Am Jur 2d, Automobiles and Highway Traffic §§ 658 et seq.

Appeal by plaintiff from judgment entered 26 January 1994 by Judge Gregory A. Weeks in Durham County Superior Court. Heard in the Court of Appeals 24 January 1995.

Elliot, Pishko, Gelbin & Morgan, P.A., by David C. Pishko, for plaintiff-appellant.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by James H. Johnson, III and Andrew T. Landauer, for defendant-appellee.

WALKER, Judge.

Plaintiff initiated this lawsuit against defendant and his daughter, Michelle Ann Brinkman (Michelle), to recover damages for personal injuries sustained as a result of an automobile accident on 17 May 1986. Plaintiff alleged that a 1986 Pontiac, driven by Michelle, ran a stop sign and collided with the vehicle in which plaintiff was a passenger and that the accident occurred as a result of Michelle's negligence. Plaintiff sought to impute that negligence to defendant under the family purpose doctrine.

Michelle asserted the affirmative defense of the statute of limitations and moved for summary judgment, which was granted by the Durham County Superior Court. On appeal, this Court affirmed that judgment. *Taylor v. Brinkman*, 108 N.C. App. 767, 425 S.E.2d 429, *disc. rev. denied*, 333 N.C. 795, 431 S.E.2d 30 (1993).

Defendant filed an answer admitting that Michelle was operating a 1986 Pontiac automobile with his consent and that title to this vehicle was registered in his name, but he denied that he was liable to plaintiff under the family purpose doctrine. Defendant subsequently moved for summary judgment and submitted his deposition in support of his motion. At the summary judgment hearing, plaintiff offered no materials in opposition to defendant's motion. The trial court granted summary judgment for defendant.

Rule 56 of the North Carolina Rules of Civil Procedure 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." N.C. Gen. Stat. § 1A-1, Rule 56 (c) (1994). The moving party 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 family purpose doctrine has been summarized as follows:

> Under the family purpose doctrine, the owner or person with ultimate control over a vehicle is held liable for the negligent operation of that vehicle by a member of his household. In order to recover under the doctrine, a plaintiff must show that (1) the operator was a member of the family or household of the owner or person with control and was living in such person's home; (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of the family; and (3) that the vehicle was being so used with the express or implied consent of the owner or person in control at the time of the accident.

Byrne v. Bordeaux, 85 N.C. App. 262, 264-65, 354 S.E.2d 277, 279 (1987).

This case requires us to apply the family purpose doctrine to a situation involving separated spouses. This Court has held that the family purpose doctrine can be extended to only one family member and that in determining which family member is liable under the doctrine, the issue is one of control and use of the vehicle. *Camp v. Camp*, 89 N.C. App. 347, 349, 365 S.E.2d 675, 676 (1988). In deciding who has control of a vehicle, ownership is not conclusive. Rather, the central inquiry is "who maintains or provides the automobile for the use by the family. That person is the party in 'control' of the vehicle." *Id.* at 349, 365 S.E.2d at 677 (citations omitted). Thus, the question in the instant case is whether defendant "maintained and provided" the 1986 Pontiac for his family's use and was therefore "in control."

Defendant's deposition revealed the following undisputed facts. At the time of Michelle's accident, defendant had separated from his wife, Norma, and had moved out of the family home into an apartment. Michelle continued to reside with Norma and never lived with defendant or visited his apartment. Sometime after the parties separated, Norma needed a new vehicle, and she selected the 1986 Pontiac. Because she had no available credit in her name, defendant's credit was used to purchase the car and title was registered in his name. Norma made the down payment, arranged for insurance coverage, took care of the maintenance and repairs, and made all payments on the car. Defendant did not have keys nor did he ever use the car. He did not know until after the accident that Michelle was driving the car on this occasion.

The first test to be met in order for plaintiff to recover under the family purpose doctrine is that "the operator was a member of the family or household of the owner or person with control and was living in such person's home." *Byrne, supra,* at 264-65, 354 S.E.2d at 279. We hold that these undisputed facts are insufficient to establish that defendant had control of the 1986 Pontiac.

We are guided by the decision in *Smith v. Simpson,* 260 N.C. 601, 133 S.E.2d 474 (1963). In that case, 18-year-old Wayne Simpson traded in an old car registered in his name and negotiated the purchase of a new car. Wayne made the down payment on the car from his own funds. Because Wayne was a minor, his father, Eddie, facilitated Wayne's purchase by executing the note and conditional sales contract on the car. Eddie took title to the car and procured the insurance, but Wayne made all of the car and insurance payments. Eddie neither drove the car nor had the keys to it. Wayne bought the gas and oil for the car and took care of repairs and maintenance. *Id.* at 604, 133 S.E.2d at 477. After Wayne was involved in an accident, the plaintiff sought to hold Eddie liable for damages under the family purpose doctrine. The Court said that Wayne was clearly the "owner" of the car, because he alone maintained, controlled, and used the car. The issue was whether Eddie provided the car and had the right to control it. *Id.* at 609-10, 133 S.E.2d at 481. The Court held that Eddie did not "provide" the car:

> Mr. Simpson did not pay one cent of the purchase and maintenance of the car. What he *provided* was credit. . . . Mr. Simpson did not provide the automobile. His part in the transaction was only incidental and secondary. His acts amounted to an accommodation, an extension of credit. . . .

Id. at 610-11, 133 S.E.2d at 481-82. *Accord, Dupree v. Batts,* 276 N.C. 68, 170 S.E.2d 918 (1969) (mother who took title to car in order to help son obtain loan but did not pay for, drive, or maintain car was not liable under family purpose doctrine).

In the instant case, defendant's role in the acquisition of the 1986 Pontiac was "incidental and secondary." Because he neither provided nor maintained the vehicle for his wife and children, he did not control the vehicle. Thus, an essential element of plaintiff's claim against defendant is missing. For this reason, we affirm the trial court's grant of summary judgment in favor of defendant.

Affirmed.

Judges EAGLES and GREENE concur.

STEPHFAN ALLEN v. RUTH BEDDINGFIELD

No. 943SC202

(Filed 21 February 1995)

Trial § 564 (NCI4th)— automobile accident—damages—additur—motion for new trial

There was no prejudice in an action arising from an automobile accident where the trial judge granted an additur and then denied plaintiff's motion for a new trial. In deciding a party's motion for a new trial under N.C.G.S. § 1A-1, Rule 59, the court is limited to a determination of whether the jury's award of damages is inadequate or the verdict is otherwise in error and it is not clear here that the court considered the merits of the plaintiff's motion on the basis of the jury award. However, plaintiff did not show that a different result would have likely occurred had the trial court properly based its ruling on the jury award.

Am Jur 2d, New Trial §§ 393 et seq.

Judge WALKER concurring in the result.

Appeal by plaintiff from order entered 17 September 1994 in Pitt County Superior Court by Judge Mark D. Martin. Heard in the Court of Appeals 10 January 1995.

Perry, Brown & Levin, by Cedric R. Perry and Charles E. Craft, for plaintiff-appellant.

Baker, Jenkins, Jones & Daly, P.A., by Roger A. Askew and R. B. Daly, Jr., for defendant-appellee.

GREENE, Judge.

Stephfan Allen (plaintiff) appeals from an order denying his motion for a new trial.

The plaintiff sued Ruth Beddingfield (defendant) alleging damages, in light of defendant's stipulation of negligence, for an injury to

plaintiff's right knee and pain and suffering as a result of a 1991 accident involving plaintiff's and defendant's cars. The plaintiff sought medical expenses in excess of $6,900 and lost wages in excess of $1,200.

The testimony of the four doctors who testified at trial reveals some injury by the plaintiff as a result of the accident with the defendant. The evidence also reveals a preexisting condition, which was characterized by two doctors as a type of arthritis. The doctors' opinions differed in regard to whether the plaintiff's injuries were related to his 1991 accident with defendant or the preexisting condition in his right knee.

Although the plaintiff and a co-worker testified that plaintiff had problems running and walking after the accident, a private investigator testified that he observed the plaintiff performing normal walking activities, like walking up and down bleachers in the gymnasium and standing up and down.

After the jury returned its verdict, the plaintiff moved for a new trial, pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, arguing that the jury's award reflects only approximately $2,300 for plaintiff's pain and suffering and therefore the jury disregarded the court's instructions, awarded inadequate damages due to influence of passion or prejudice, and returned a verdict that is contrary to the law. In denying the plaintiff's motion for a new trial, the trial court stated:

> [T]he Court having determined that an Additur, bringing the amount of the Jury verdict to TWELVE THOUSAND FIVE HUNDRED and no/100 DOLLARS ($12,500.00) would be fair and equitable, and the Defendant, through counsel, having consented to same as;
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion For A New Trial is DENIED, and the Jury having answered the issue as shown in the records, and the Court, with the consent of the Defendant, having increased said Jury verdict, by Additur, to the sum of TWELVE THOUSAND FIVE HUNDRED and no/100 DOLLARS ($12,500.00) . . . .

The issue is whether the trial judge abused his discretion by basing his Rule 59 order, denying the plaintiff's new trial motion, on a damages amount greater than the original jury verdict.

Orders under Rule 59 are within the trial court's sound discretion and should not be disturbed on appeal, unless it appears from the

record that "the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Burgess v. Vestal*, 99 N.C. App. 545, 550, 393 S.E.2d 324, 327, *disc. rev. denied*, 327 N.C. 632, 399 S.E.2d 324 (1990). In deciding a party's motion for a new trial under Rule 59, the trial court is limited to a determination of whether *the jury's award* of damages is inadequate or the jury's verdict is otherwise in error. *See* N.C.G.S. § 1A-1, Rule 59(6) (1990); *see also Circuits Co. v. Communications, Inc.*, 26 N.C. App. 536, 540, 216 S.E.2d 919, 922 (1975) (trial court's order denying a new trial motion, but alternatively reducing the jury verdict was based on the original jury verdict); *Redevelopment Comm'n v. Holman*, 30 N.C. App. 395, 397, 226 S.E.2d 848, 850 (no abuse of discretion where trial judge based his order denying a new trial motion on *the jury's verdict*), *disc. rev. denied*, 290 N.C. 778, 229 S.E.2d 33 (1976). Thus, because a motion for a new trial must be considered on the basis of the jury award, it is error to base an evaluation of the motion on an amount different from that award. *Cf.* 11 *Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure* § 2807 (1973) ("If the verdict is too low, [the trial court] may not provide for an additur as an alternative to a new trial.").

The trial judge's order, here, reveals that he first determined that the jury verdict, with the consent of the defendant, should be raised from $9,922 to $12,500 and only then did he determine that the plaintiff's new trial motion should be denied. Thus it is not clear that the trial court considered the merits of the plaintiff's motion for a new trial on the basis of the jury award. To the contrary, it appears that the motion was evaluated on the basis of the additur and this was error. The trial court's error, however, in this case does not require reversal because the plaintiff has not shown that a different result would have likely occurred had the trial court properly based its ruling on the jury award. *See Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *disc. rev. denied*, 314 N.C. 336, 333 S.E.2d 496 (1985).

Affirmed.

Judge EAGLES concurs.

Judge WALKER concurs in the result with separate opinion.

Judge WALKER concurring in the result.

I am not convinced the trial court committed error as set out in the majority opinion. *See Caudle v. Swanson*, 248 N.C. 249, 103 S.E.2d

357 (1958) (additur) *and Hanna v. Brady*, 73 N.C. App. 521, 327 S.E.2d 22 (1985) (remittitur) for practices approved by our courts; therefore, I believe it is acceptable for the trial court to order an additur or remittitur and then deny a new trial motion.

RICHARD L. HIX AND WIFE, JANE HIX v. WILLIAM HAROLD JENKINS

No. 9422SC378

(Filed 21 February 1995)

Workers' Compensation §§ 25, 65 (NCI4th)— volunteer fireman—employee for workers' compensation purposes—negligence action against fellow firemen precluded

Although volunteer firemen are not listed as "employees" in N.C.G.S. § 97-2(2), it is implicit that they are to be treated as employees under the Workers' Compensation Act because N.C.G.S. § 97-2(5) provides the specific calculation for the average weekly wage to be received by volunteer firemen, and N.C.G.S. § 58-83-1 provides that volunteer firemen responding to emergencies outside their normal territorial limits shall have all authority "including coverage under the Workers' Compensation Laws as they have when responding to a call and while working at a fire or other emergency inside the territorial limits normally served." Therefore, volunteer firemen are foreclosed from bringing a common law negligence action against a fellow member for injuries sustained in the course and scope of their duties as firemen unless the member seeking compensation was intentionally injured by the fellow member.

Am Jur 2d, Workers' Compensation §§ 62 et seq., 181.

Right to maintain direct action against fellow employee for injury or death covered by workmen's compensation. 21 ALR3d 845.

Judge WALKER concurring.

Appeal by plaintiffs from order entered 2 February 1994 in Iredell County Superior Court by Judge Jerry R. Tillett. Heard in the Court of Appeals 12 January 1995.

Teague, Campbell, Dennis & Gorham, by James B. Wheless, Jr. and J. Matthew Little, and Pressly & Thomas, P.A., by Edwin A. Pressly, for the plaintiff-appellants.

Willardson, Lipscomb & Bender, L.L.P., by William F. Lipscomb, for defendant-appellee.

GREENE, Judge.

Richard L. Hix and Jane Hix (plaintiffs) appeal from the trial court's order granting summary judgment in favor of William Harold Jenkins (defendant) in plaintiffs' negligence suit against defendant.

The evidence shows that Richard Hix (Hix) was riding with defendant on 4 November 1990, when the defendant's car was involved in an accident. Both men were volunteer firemen for the Iredell County Volunteer Fireman's Association and were responding to a fire call at the time of the accident. As a result of the accident, Hix sustained permanent injuries, including a compression fracture to his spine.

On 18 November 1992, Hix agreed with the Iredell County Volunteer Fireman's Association and CIGNA Insurance Company to accept $13,000 along with medical expenses as complete satisfaction of any and all claims under the North Carolina Workers' Compensation Act (the Act). On 19 October 1993, plaintiffs sued the defendant for his negligence in causing the accident and Hix's resulting injuries. The trial court granted defendant's motion for summary judgment on the grounds that Hix had received his exclusive remedy under the Act and plaintiffs are therefore barred from pursuing this negligence action against the defendant.

The issue is whether a volunteer fireman, injured by the negligence of a fellow volunteer fireman, at a time when both are acting in the course and scope of their duties, is barred from pursuing a negligence action against the fellow fireman.

Although the plaintiffs are correct in their statement that volunteer firemen do not receive compensation for their services and are not listed as "employees" in N.C. Gen. Stat. § 97-2(2), we reject their assertion that volunteer firemen should not be treated as "employees" under the Act. Because the Act provides the specific calculation for the average weekly wage to be received by volunteer firemen in section 97-2(5), it is implicit that volunteer firemen are to be treated as

employees under the Act. *See Board of Education v. Dickson*, 235 N.C. 359, 361, 70 S.E.2d 14, 17 (1952) (meanings are found in what statutes necessarily imply as much as in what they specifically express); *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 193, 347 S.E.2d 814, 815 (1986) (allowing recovery under the Act by a volunteer fireman). This legislative intent is further evidenced by N.C. Gen. Stat. § 58-83-1 which provides that firemen responding to emergencies outside their normal territorial limits "shall have all authority . . . including coverage under the Workers' Compensation Laws, *as they have when responding to a call and while working at a fire or other emergency inside the territorial limits normally served.*" [Emphasis added.] Finally, although section 97-2(2) does not specifically include volunteer firemen in the definition of "employee," neither does it exclude volunteer firemen from that definition. *See* N.C.G.S. § 97-2(2) (1991) (specifically excluding people "performing voluntary service as a ski patrolman" from the provisions of the Act).

Because volunteer firemen are treated as "employees" under the Act, volunteer firemen are foreclosed from bringing a common law negligence action against a fellow member, N.C.G.S. § 97-9 to -10.1 (1991), for injuries sustained in the course and scope of their duties as a volunteer fireman, unless the member seeking compensation was intentionally injured by the fellow member. *See Pleasant v. Johnson*, 312 N.C. 710, 712-13, 325 S.E.2d 244, 247 (1985). Accordingly, plaintiffs are barred from pursuing their action in negligence against defendant, and the trial court correctly granted summary judgment for the defendant.

Affirmed.

Judge EAGLES concur.

Judge WALKER concurs with separate opinion.

Judge WALKER concurring.

I agree with the majority that the legislature intended volunteer firemen to be treated as employees under the Workers' Compensation Act and to provide them with workers' compensation benefits even though a true employer-employee relationship does not exist between volunteer firemen and their volunteer fireman's association. However, I recognize that workers' compensation benefits may not

fully compensate plaintiff for his injuries but I believe it is for the legislature to address the circumstances in which a volunteer fireman can, as here, bring a negligence action against his fellow employee.

STATE OF NORTH CAROLINA v. ALFREDO F. SMITH, JR.

No. 9412SC419

(Filed 7 March 1995)

1. Searches and Seizures § 26 (NCI4th)— warrantless search of defendant—information from confidential informant—probable cause

Officers had probable cause to conduct a warrantless search of defendant at an intersection under the totality of the circumstances and exigent circumstances existed to make the warrantless search valid where the evidence showed that one officer received a phone call at 12:15 a.m. from an informant he had used on two prior occasions that had led to arrests; the informant told the officer what defendant would be driving and the license tag number, and that defendant would be picking up cocaine, taking it to a particular apartment, packaging it, and taking it to a particular house to sell it; the informant also stated that defendant would have the cocaine concealed in his crotch area; the officers independently corroborated the information received from the informant except that defendant had successfully concealed the cocaine on his person; the officers apprehended defendant at 1:30 a.m.; the officer was familiar with the drug area of the city and had received on numerous occasions from numerous sources information that defendant was operating houses out of which drugs were sold; and, had the officers taken the time to obtain a search warrant, the delay might have caused defendant's escape and disappearance or destruction of the controlled substances.

Am Jur 2d, Searches and Seizures § 69.

2. Searches and Seizures § 2 (NCI4th)— strip search at intersection—unreasonable search

A warrantless search of defendant was intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment where police searched defendant by pulling his pants down far enough that an officer could see the corner of a small

paper towel underneath defendant's scrotum, and this search took place in the middle of an intersection of two main thoroughfares at 1:30 a.m.

Am Jur 2d, Searches and Seizures § 5.

Law enforcement officer's authority, under Federal Constitution'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.

Judge WALKER concurring in part and dissenting in part.

Appeal by defendant from judgments entered 11 February 1993 in Cumberland County Superior Court by Judge E. Lynn Johnson. Heard in the Court of Appeals 24 January 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robin P. Pendergraft for the State.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Richard B. Glazier, for defendant-appellant.

GREENE, Judge.

Alfredo F. Smith, Jr. (defendant) appeals from judgments entered 11 February 1993 in Cumberland County Superior Court, after a jury found him guilty of one count of intentionally keeping and maintaining a vehicle used for the purpose of unlawfully keeping or selling controlled substances and one count of possession with intent to manufacture, sell and deliver a controlled substance. Defendant received fifteen years imprisonment.

Defendant was indicted for maintaining a vehicle to keep and sell controlled substances and for possession with intent to manufacture, sell and deliver a controlled substance on 27 July 1992. On 10 February 1993, defendant filed a pre-trial motion to suppress evidence and an affidavit supporting this motion, claiming the search and seizure of defendant on 12 May 1992 was illegal. Before trial, the trial court conducted a suppression hearing on defendant's motion.

The State's evidence tended to show the following: Officer Cook has known defendant for the two to three years prior to 12 May 1992 he has worked in the Bonnie Doone area of Fayetteville, an area

known to have a drug problem. Officer Cook described the Bonnie Doone area as a "large housing area with a main thoroughfare, Bragg Boulevard, running through it. . . . [F]rom Bragg Boulevard would be Johnson Street, Andy Street, Mike Street, the main thoroughfares." Prior to 12 May 1992, Officer Cook had been informed numerous times from different sources that defendant was operating a drug house and selling drugs in the Bonnie Doone area. Confidential sources told him defendant "had houses that he was selling drugs from" and "was in charge of some of the people who were staying in the houses, that he delivered the drugs to them, and they in turn sold them for him, and he received the profits."

At 12:15 a.m. on 12 May 1992, Officer Cook received a call from a source he had used two times in the past "where arrests had been made and narcotics were seized" and whom Officer Cook knew to be a reliable source. The informant told Officer Cook that defendant had approximately two thousand dollars in his possession, was operating a red Ford Escort with the license plate EVN7322, and was going to an unknown location to purchase cocaine. The informant said that once defendant had purchased the cocaine, he would be returning to an apartment, 617-D Johnson Street, which the informant described as the last apartment on the left. The informant also told Officer Cook that once defendant returned to 617-D, defendant would be packaging the cocaine in aluminum foil and going shortly thereafter to a house on Buffalo Street off of Bragg Boulevard to deliver the cocaine, where it would be sold. The informant stated when defendant "departed [617-D] Johnson Street that he would have the cocaine concealed in his crotch, or under his crotch."

Officer Cook immediately called his partner, Officer O'Briant and contacted his supervisor. He then met Officer O'Briant in the Bonnie Doone area, picked up the informant, and had him take the officers to Johnson Street. As they approached the last apartment on the left, the informant pointed out a red Ford Escort outside the apartment and stated "that's the vehicle" and that defendant "would be leaving quickly" and "wouldn't stay there long." The officers, in two separate vehicles, backed down the road to avoid detection and released the informant. It was approximately 1:15 a.m. on 12 May 1992.

At approximately 1:30 a.m. on 12 May 1992, the red Ford Escort pulled out of the dirt road onto Johnson Street and turned right on Johnson Street toward Bragg Boulevard. The license plate on this red Ford Escort was EVN7322. The officers turned on their blue lights

and stopped defendant in "the center lane, the left turn lane" where Johnson Street "came to Bragg Boulevard." After they identified themselves and told defendant they had information he was transporting cocaine in his vehicle, Officer Cook conducted a weapons search or pat-down search of defendant and of his vehicle. Officer Cook then informed defendant he was going to search him completely using his flashlight and hands. He asked defendant "to step behind the car door of [defendant's] vehicle, which was open, and [Officer Cook] stood in between him and the car door on the outside." Officer Cook then informed defendant he believed defendant had concealed cocaine inside his underwear and asked him to open his trousers. Officer Cook stood between defendant and the "doorway" because he "didn't want to expose him to other cars, the public, to embarrass him, that sort of thing." Because Officer Cook could not see underneath defendant's scrotum and testicles and could not see anything to the back or front of defendant, he asked him to pull his underwear down further. Because defendant resisted to pulling his underwear down further, Officer Cook testified, "I walked to the front of [defendant] and held open his underwear . . . and slid it down. At which point with my flashlight I could see the corner of a small paper towel underneath his scrotum. I then pulled his underwear farther. [Defendant] resisted a little bit. I pushed him back into the door and reached into, uh—underneath his scrotum and removed the paper towel" which contained crack cocaine. After the police executed a search warrant, they found out the last apartment on the left which the informant had pointed out was actually 617-F Johnson Street. They did not find anything in 617-D.

Defendant testified that on 12 May 1992, he had been at 617-F Johnson Street prior to 1:15 a.m. He stated that Johnson Street is a one-lane road, "but as you approach Bragg Boulevard, it become [sic] a two-lane road towards the intersection." After he was stopped by Officers Cook and O'Briant, he asked them what the probable cause was for stopping him and refused search of the car. Defendant testified that he agreed to the search of his vehicle after Officer O'Briant threatened to hit him. After searching the vehicle, Officer Cook asked defendant to pull his underwear down, and defendant pulled out his "short set, along with the underwear, and show[ed] him [his] testicles." Officer Cook then asked defendant to turn around. Defendant refused, stating "[y]ou are not searching me in my rear, in my butt, in the middle of the street. . . . We [sic] standing in the middle of the intersection of Bragg Boulevard and Johnson Street. He wants to

search my rear." Officer Cook grabbed defendant's "short set" and underwear, "pulled it down, and shined his flashlight in [his] butt."

Officer Cook then instructed defendant to stand next to Officer O'Briant while he conducted a second search of the car. When he finished, he told defendant he wanted to search him again, but defendant refused. The officers each grabbed one of defendant's hands and searched defendant again, which resulted in finding the cocaine.

Based on the testimony received at the suppression hearing, the court made the following pertinent findings of fact:

> 2. That Mr. Cook is familiar with the way drugs are sold in the Cumberland County community. And that prior to May 12, 1992, that Deputy Sheriff Cook had worked the Bonnie Doone area for approximately a two to three year period prior to that date and time.
>
> 3. That prior to May 12th, 1992, Mr. Cook had known the defendant for a substantial period of time prior thereto and was familiar with the way drugs were sold in the Bonnie Doone community, being through various street dealers and inside various residences located in that community. . . .
>
> 4. That over a period of time preceding May 12, 1992, Mr. Cook and other members of the Special Operations Unit had received numerous pieces of information concerning the way the defendant operated a drug organization in the Bonnie Doone community, operating through various drug houses, selling drugs from various street—selling drugs through various street dealers, and operating houses where prostitutes also operated. . . .
>
> 6. . . . the confidential source of information had at least on two prior occasions furnished very specific information concerning drugs and that such information furnished to Deputy Sheriff Cook had lead [sic] to at least two arrests; that at least one other officer had also used the same informant on a prior date and time and that the information furnished by the informant had always proved to be reliable.

The court also found that the informant had told Officer Cook defendant would be driving a red Ford Escort with license plate number EVN7322 on 12 May 1992, would be returning to an apartment on Johnson Street, identified as the last apartment on the left, and that defendant would be packaging cocaine and leaving the apartment

with the packaged cocaine concealed in his crotch area. The court found that thereafter, Officers Cook and O'Briant observed the red Ford Escort outside the last apartment on the left on Johnson Street, informant stated "that's the vehicle," and the officers observed the Escort leave. After the officers stopped the Escort, they identified defendant as the driver, searched him and found cocaine in a paper towel concealed in defendant's scrotum area. Based on these and other findings, the trial court concluded there was probable cause "for the stop and search of the red Ford Escort automobile and the subsequent search of the defendant," "[t]hat none of the defendant's rights under the Fourth Amendment of the United States Constitution or the equivalent provision of the North Carolina Constitution have been violated," and "[t]hat none of the defendant's statutory rights under the laws of the State of North Carolina have been violated." The court therefore denied defendant's motion to suppress to which defendant objected.

The issues presented are whether (I) under the totality of the circumstances, there was probable cause and an exigency for a warrantless search of defendant; and (II) the search was reasonable in scope.

I

[1] In reviewing the denial of a motion to suppress, we are limited to determining whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact in turn support legally correct conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Although defendant had the burden of producing a supporting affidavit under his motion to suppress, the State "still has the burden of proving that the evidence was lawfully obtained." *State v. Gibson*, 32 N.C. App. 584, 586, 233 S.E.2d 84, 86 (1977); *see also State v. McCloud*, 276 N.C. 518, 173 S.E.2d 753 (1970) (one who seeks to justify warrantless search has burden of showing exigencies of situation made search without warrant imperative). Defendant concedes in his brief that "reasonable suspicion existed to justify a Terry stop and frisk"; however, he argues "this suspicion clearly did not rise to the level of probable cause" to justify a warrantless search of defendant. We disagree.

If probable cause to search exists and the exigencies of the situation make a warrantless search necessary, it is lawful to conduct a warrantless search. *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d

193, 196 (1991). " 'Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' " *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (*quoting Brinegar v. United States*, 338 U.S. 160, 175-76, 93 L.Ed. 1879, 1890, *reh'g denied*, 338 U.S. 839, 94 L.Ed 513 (1949)). "Probabilities . . . are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Id.*

The United States Supreme Court determined that when deciding whether information received from a confidential informant properly forms the basis of probable cause to search or arrest, courts must review the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983); *see State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (North Carolina Supreme Court has accepted *Gates* as appropriate standard for showing probable cause under both federal and state constitutions). The Court emphasized that "[o]ur decisions applying the totality-of-the-circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work." *Gates*, 462 U.S. at 241, 76 L. Ed. 2d at 550. The Court emphasized that "probable cause does not demand the certainty we associate with formal trials." *Id.* at 246, 76 L. Ed. 2d at 553. Therefore, it is enough if there is a "fair probability" that a confidential informant obtained his entire story either straight from a defendant or from someone he trusted, and corroboration of "major portions of the [informant]'s predictions provides just this probability." *Id.*

Based on these principles, the officers in this case had probable cause to search defendant on Bragg Boulevard under the totality of the circumstances. The State's evidence shows Officer Cook received a phone call at 12:15 a.m. on 12 May 1992 from an informant he had used on two prior occasions that had led to arrests. The informant told Officer Cook that defendant would be driving a red Ford Escort with license plate EVN7322, would be picking up cocaine, would be arriving at the last apartment on the left on Johnson Street to package the cocaine in aluminum foil, would be going to a house on Buffalo Street off of Bragg Boulevard to deliver the cocaine, where it would be sold, and would have the cocaine concealed in his crotch or

under his crotch. Based on this information, Officer Cook met Officer O'Briant at approximately 1:30 a.m. and picked up the informant. Once they were near the last apartment on the left on Johnson Street, the informant pointed out a red Ford Escort outside the apartment and stated "that's the vehicle." At approximately 1:30 a.m. on 12 May 1992, the red Ford Escort with license plate EVN7322, with defendant driving, pulled out of the dirt road onto Johnson Street and turned right on Johnson Street toward Bragg Boulevard.

Officers Cook and O'Briant independently corroborated the information received from the confidential informant except that defendant had successfully concealed the cocaine on his person. The informant in this case provided detailed predictions of defendant's future actions ordinarily not easily predicted. Furthermore, Officer Cook was familiar with defendant, familiar with the drug area of Fayetteville, and had received on numerous occasions from numerous sources information that defendant was operating houses out of which drugs were sold. The officers therefore had reasonable grounds to believe the remaining unverified information, that defendant did conceal drugs in his underwear for transport, was likewise true. Considering all these facts and circumstances together, "a man of reasonable caution" would believe that "an offense has been or is being committed."

Exigent circumstances also existed to make the warrantless search of defendant valid. In this case, the information received by Officer Cook revealed that defendant was going to obtain drugs and then deliver them to another location. If the officers had "taken the time to obtain a search warrant, the delay might have caused a 'probable absence of the purported drug violator' " and also the probable disappearance or destruction of the controlled substances. *Mills*, 104 N.C. App. at 731, 411 S.E.2d at 197. Accordingly, the officers conducted a lawful search of defendant based upon probable cause and the existence of exigent circumstances, and there was competent evidence to support the trial court's findings of fact and conclusions of law in denying defendant's motion to suppress. *See Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (because drug agents independently corroborated anonymous letter that defendants were drug dealers and traveled to Florida from Indiana to transport drugs, probable cause existed); *Draper v. United States*, 358 U.S. 307, 3 L. Ed. 2d 327 (1959) (information of Draper's clothing, that he would be walking fast, that he would be arriving on a train from Chicago, and that he would be carrying heroin supplied probable cause because officer had verified

every facet of information given him except whether Draper had heroin on him or in his bag which officer could accept as true).

II

[2] Defendant also argues that even if probable cause existed, the search of defendant nevertheless "violated the Fourth Amendment through its intolerable intensity and scope." We agree.

Initially, we note the trial court did not make specific findings of fact regarding the reasonableness of the actual search of defendant, but concluded "none of the defendant's rights under the Fourth Amendment of the United States Constitution or the equivalent provision of the North Carolina Constitution have been violated"; however, because there is no material conflict in the evidence regarding the actual search of defendant, findings on this issue are not necessary, though the better practice is to find facts. *State v. Edwards*, 85 N.C. App. 145, 148, 354 S.E.2d 344, 347, *cert. denied*, 320 N.C. 172, 358 S.E.2d 58 (1987). We therefore determine whether the State has met its burden of proving the search of defendant was reasonable in its scope, thereby supporting the trial court's conclusion none of defendant's Fourth Amendment rights were violated. *Gibson*, 32 N.C. App. at 586, 233 S.E.2d at 86.

The Fourth Amendment's prohibition against unreasonable searches and seizures is "broad and unqualified," "makes no differentiation between persons and property," and "should be construed 'liberally to safeguard the right of privacy.' " *Blackford v. United States*, 247 F.2d 745, 750 (9th Cir. 1957), *cert. denied*, 356 U.S. 914, 2 L. Ed. 2d 586 (1958). A "search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 17, 20 L. Ed. 2d 889, 903-04 (1968). In determining whether or not conduct is unreasonable, "[t]here is no slide-rule formula," and "[e]ach case must turn on its own relevant facts and circumstances." *Blackford*, 247 F.2d at 751. In determining reasonableness, courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979). As such, the necessary scope of a search may vary depending on whether the search is conducted before police have effected an arrest, at the time and place of arrest, or at the station house.

> Police conduct that would be impractical or unreasonable—or embarrassingly intrusive—on the street can more readily—and

> privately—be performed at the station. For example, the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him, although that step would be rare.

Illinois v. Lafayette, 462 U.S. 640, 645, 77 L. Ed. 2d 65, 71 (1983). "[T]he presence of probable cause to arrest, when the police have not effected an arrest, permits a more limited search than that permitted incident to arrest." *United States v. Alexander*, 755 F. Supp. 448, 454 (D.D.C. 1991), *aff'd*, 961 F.2d 964, *cert. denied*, — U.S. —, 121 L. Ed. 2d 117 (1992). Furthermore, "[s]earches akin to strip searches can be justified in public places if limited in scope and required by unusual circumstances." *United States v. Bazy*, 1994 WL 539300 (D. Kan. 1994) (because defendant was not required to disrobe or submit to visual body cavity search and public view was blocked by defendant's clothes, troopers, and the patrol cars, and unusual circumstances for immediate search existed, trooper's reaching into defendant's underwear to remove crack cocaine was reasonable). Under these principles and in balancing the scope of the search against exigent circumstances in determining reasonableness, courts have allowed highly intrusive warrantless searches of individuals where exigent circumstances are shown to exist, such as imminent loss of evidence or potential health risk to the individual. *See Bazy*, 1994 WL 539300 (where officers knew defendant was concealing drugs in rear of his pants, there was danger of imminent destruction of evidence, and there was health risk to defendant, search of defendant by loosening his pants and removing drugs resting against defendant's buttocks was reasonable without search warrant); *Alexander*, 755 F. Supp. 448 (search of defendant's person by reaching inside underwear on public sidewalk reasonable in view of exigent circumstances that delay in search could enable defendant to dispose of drugs in private in bathroom).

Based on these factors for determining reasonableness, the State has not produced evidence to show that the police in this case, although having probable cause to search defendant without a warrant, were reasonable in the manner in which they conducted the search of defendant. The State's evidence shows the police searched defendant by pulling his pants down far enough that Officer Cook could see the corner of a small paper towel underneath defendant's scrotum. The State's evidence also shows that Officer Cook stood between defendant and the doorway to defendant's car when con-

ducting the search in the middle of an intersection of two main thoroughfares at 1:30 a.m. The State's evidence does not show, however, that where Officer Cook stood or the time the search occurred somehow protected defendant from the view of passing drivers. Furthermore, the State's evidence does not show whether the area was well-lit or dimly lit or whether there were passing cars, if any. We realize that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means," *Lafayette*, 462 U.S. at 647, 77 L. Ed. 2d at 72, and that the government has an interest in stopping drug trafficking; however, the officers in this case could have easily employed other means of conducting their search of defendant which would have been more protective of defendant's privacy interests. For example, the officers could have searched defendant in the patrol car or effected an arrest and searched defendant at the stationhouse. *See Mills*, 104 N.C. App. 724, 411 S.E.2d 193 (factors establishing probable cause to arrest also establish probable cause to search where facts within officers' knowledge and of which they had reasonably trustworthy information sufficient to warrant man of reasonable caution in belief offense has been committed). The search of defendant in this case was akin to a strip search in a public place and was not "limited in scope" nor "required by unusual circumstances." There is nothing under the facts of this case to suggest that defendant could have disposed of the drugs before being placed in the patrol car or taken to the station. Under these circumstances, the search of defendant was intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment. For these reasons, the trial court erred in denying defendant's motion to suppress, and defendant is entitled to a new trial.

Reversed and remanded.

Judge EAGLES concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I concur in the majority opinion that there was probable cause and an exigency for a warrantless search of defendant. However, I respectfully dissent from the Court's holding that the search of

defendant was "intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment."

The majority cites *United States v. Bazy* for the proposition that "[s]earches akin to strip searches can be justified in public places if limited in scope and required by unusual circumstances." *Bazy*, 1994 WL 539300, at 8 (D. Kan.). I believe the facts and holding of *Bazy* suggest that such a search was justified under the circumstances of the instant case. In that case, officers stopped Bazy and a companion on the Kansas Turnpike at 8:30 A.M. A search of both men followed, during which "[t]he troopers unbuckled Bazy's pants and pulled them away from his waist and checked his underwear for drugs." A plastic bag containing cocaine was found lodged between Bazy's buttocks. A trooper then reached into Bazy's pants and pulled out the bag. The search occurred "on the grassy edge of the roadway between [Bazy's] car and a patrol car" and Bazy "was not exposed to the view of oncoming traffic, as the view was obstructed by the patrol car and by a trooper standing in front of him." *Id.* at 3. The defendant contended that the search was overly intrusive and not justified at the time and place, and that the public location of the search was embarrassing and humiliating. *Id.* The court found that the search, "[w]hile plainly more than a pat-down search," was nonetheless still limited in scope and intensity such that it did not violate the Fourth Amendment. *Id.* at 7. The court recognized that other less intrusive means for searching Bazy may have been available but said that " '[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of' " these less intrusive means. *Id.* (citations omitted). The court refused to "second guess the troopers on this procedure. The court [was] satisfied . . . that the troopers took the necessary and reasonable precautions to prevent the public exposure of the defendant Bazy's private parts." *Id.*

The search in the instant case took place at approximately 1:30 A.M. at the intersection of two streets in Fayetteville. The record does not reveal the conditions at the time, and defendant's objection was that he did not want the officer to "search [his] rear" in "the middle of the street."

Here the evidence does show that prior to the search Officer Cook asked defendant to step behind the open car door of his vehicle and that he positioned himself between defendant and the car door on the outside. Officer Cook said he took these steps "because [he] didn't want to expose [defendant] to other cars, the public, to embar-

rass him, that sort of thing." Defendant did not dispute this testimony. Considering the totality of the circumstances, I believe that the officers here, like the trooper in *Bazy*, took "the necessary and reasonable precautions to prevent the public exposure of defendant['s] . . . private areas." While there may have been other less intrusive means of conducting the search, I agree with the *Bazy* court that the availability of those less intrusive means does not automatically transform an otherwise reasonable search into a Fourth Amendment violation.

Just as the court in *Bazy* was unwilling to second guess the procedures used by the officers in that case, I am unwilling to second-guess the trial court's finding here that the officers' conduct during the search did not violate defendant's Fourth Amendment rights. The trial court in ruling on defendant's motion to suppress had the arguments of both parties before it and was in a superior position to evaluate the reasonableness of the search. I do not believe defendant is entitled to a new trial, and I would affirm the trial court in all respects.

AIR-A-PLANE CORPORATION, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, RESPONDENT

No. 9410SC480

(Filed 7 March 1995)

1. **Sanitation and Sanitary Districts § 8 (NCI4th)— failure to determine whether solid waste hazardous—burden on petitioner—assessment of penalty proper**

   The Dept. of E.H.N.R. could appropriately assess a penalty against petitioner for failing to determine whether a solid waste was hazardous under 40 C.F.R. § 262.11 even though testing subsequent to the penalty period showed the solid waste was nonhazardous, since petitioner had the burden of determining whether its solid waste shipped to North Carolina in drums was hazardous by either testing the material or by applying knowledge of the process used.

   Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 455 et seq.

2. Sanitation and Sanitary Districts § 8 (NCI4th)— showing waste nonhazardous—method of compliance with regulation—no exceeding of authority by Dept. of E.H.N.R.

There was no merit to petitioner's contention that the Dept. of E.H.N.R.'s actions exceeded its statutory authority because it did not allow petitioner to choose the means of compliance under 40 C.F.R. § 262.11, since petitioner was given an opportunity to provide the Dept. of E.H.N.R. with a proper waste determination; petitioner neither performed a chemical analysis on the waste nor applied knowledge of the characteristics of the waste, *i.e.*, its components, in light of the processes used to produce the waste; and 40 C.F.R. § 262.11(c)(2) requires more than just general statements made by petitioner that its barrels contained paint residues and similar materials which it "just knew" were nonhazardous or that petitioner received information of the paints' constituents from some paint companies but not all of the companies which supplied paints and similar materials to petitioner.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 455 et seq.

3. Sanitation and Sanitary Districts § 8 (NCI4th)— nonhazardous waste—issuance of compliance order—assessment of penalty—no unlawful procedure

In issuing a compliance order and assessing a $225,000 penalty against petitioner, the Dept. of E.H.N.R. did not use unlawful procedure in its notification of violation or in its calculation of the amount of the civil penalty.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 455 et seq.

Appeal by petitioner from order entered 28 February 1994 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 26 January 1995.

Carol M. Schiller for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Judith Robb Bullock, for respondent-appellee.

GREENE, Judge.

Air-A-Plane Corporation (petitioner) appeals from an order signed and filed on 28 February 1994 in Wake County Superior Court,

affirming the decision of the North Carolina Department of Environment, Health and Natural Resources (DEHNR) which upheld the issuance of a compliance order and $225,000.00 administrative penalty by the Solid Waste Management Division of DEHNR (the Division) against petitioner for violating 40 C.F.R. § 262.11.

Petitioner, a Virginia corporation with its main plant in Norfolk, Virginia, operates a plant in Elm City, Wilson County, North Carolina, which assembles air support systems, such as air conditioners, as ground support equipment for aircraft. On 31 May 1991, William L. Meyer (Mr. Meyer), Director of the Division, issued a compliance order with an administrative penalty for $225,000.00 (the Order) against petitioner for violating 40 C.F.R. § 262.11, part of the federal Resource Conservation and Recovery Act (RCRA), codified at 15A N.C.A.C. 13A.0007, which provides that a "person who generates a solid waste, as defined in 40 CFR 262.2, must determine if that waste is a hazardous waste using the following method":

> (a) He should first determine if the waste is excluded from regulation under 40 CFR 261.4.
>
> (b) He must then determine if the waste is listed as a hazardous waste in subpart D of 40 CFR part 261.
>
> (c) For purposes of compliance with 40 CFR part 268, or if the waste is not listed in subpart D of 40 CFR part 261, the generator must then determine whether the waste is identified in subpart C of 40 CFR part 261 by either:
>
> (1) Testing the waste according to the methods set forth in subpart C of 40 CFR part 261, or according to an equivalent method approved by the Administrator under 40 CFR 260.21; or
>
> (2) Applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used.

40 C.F.R. § 262.11. The Order stated petitioner violated 40 C.F.R. § 262.11 "in that it did not determine if its waste is a hazardous waste." The penalty period was from 7 February 1991 until 18 March 1991, and the penalty was calculated at $5,000.00 per day plus a base penalty of $25,000.00. An informal conference between petitioner and the Division was held on 4 April 1991, but the Order was not changed. Petitioner contested the Order and filed a request for an administrative hearing with the Office of Administrative Hearings (OAH) on 3 July 1991. The Administrative Law Judge (ALJ) limited the hearing to

whether DEHNR erred in determining petitioner had not made a waste determination required by 40 C.F.R. § 262.11 as of 7 February 1991 and continuing through 18 March 1991 and limited testimony to those events that occurred during the penalty period from 7 February 1991 to 18 March 1991.

The evidence is as follows: On 7 February 1991, Larry David Perry (Mr. Perry), a compliance supervisor for DEHNR, and Mike Williford (Mr. Williford), a waste management specialist for DEHNR, met with David M. Shank (Mr. Shank), petitioner's Elm City plant manager, for an on-site visit and an investigation of a complaint that petitioner's plant site had approximately 150 to 160 abandoned and leaking drums on it. Some of the drums, which were shipped from petitioner's Virginia facility, were leaking, some were corroding and were not completely closed, some were bulging, material had run down the side of a drum, yellow material had leaked in front of and underneath a wooden pallet on which some of the drums were stored, one drum was labeled SOLV/H20, one drum was labeled with a DOT flammable label, and the remaining drums were not labeled. Mr. Shank informed Mr. Williford and Mr. Perry that he did not know what was in all the drums, but to the best of his knowledge, the kinds of materials that would be in the drums were paint thinners, paint residues, lubricating oils, engine oils, hydraulic oils, and similar materials. Mr. Perry and Mr. Williford informed Mr. Shank petitioner needed to do a chemical analysis on the contents of the drums and send the results to DEHNR because they "had to have laboratory analysis or some information to identify this material." Petitioner did not provide DEHNR with any information regarding the waste analysis of the drums between 7 February 1991 and 18 March 1991 and had not done a waste determination under 40 C.F.R. § 262.11 as of 4 April 1991, the date of the informal conference.

William Shepheard (Mr. Shepheard), the executive chief operating officer of petitioner, testified he "just knew" its industrial wastes were nonhazardous because DuPont and Sherwin Williams told him the components of the paints were nonhazardous; however, he admitted he might have received other paints and paint thinners from Exxon or "a house of similar nature." He also stated that because petitioner used recycled drums, any labels on the drums might not be what the drums contained. Mr. Shepheard testified he informed DEHNR at the 4 April 1991 informal conference about the nature of petitioner's business and that its wastes were nonhazardous; however, no one told DEHNR petitioner's wastes were nonhazardous

prior to 7 February 1991 because petitioner "[was]n't required to do it and [petitioner] did not do it."

Although Mr. Meyer was not present at the 7 February 1991 inspection, he reviewed the entire file on petitioner and spoke to his staff before deciding the amount of penalty to impose. He considered the mandatory factors to use in assessing a penalty such as the degree and extent of harm, the cost of rectifying the damage, past compliance history, any good faith efforts on the part of petitioner, whether other organisms were potentially threatened, and the potential threat to environmental media such as groundwater, surface water and soil. Mr. Meyer testified that the Environmental Protection Agency (EPA) drafted a policy which North Carolina adopted to determine whether violations were major or minor. Mr. Meyer testified this policy is only a guidance and "the statutes and rules" prevail.

In assessing the amount of the penalty, Mr. Meyer considered the violation to be major and a "continuing violation for forty days and a penalty of five thousand dollars ($5,000.00) per day was used for this forty-day noncompliance period, in addition to the initial penalty matrix, which was twenty five thousand dollars ($25,000.00)." Mr. Meyer testified he signed the Order on 31 May 1991, and that the enforcement meeting with his staff probably took place sometime in May of 1991.

DEHNR, in its final decision which adopted the ALJ's recommended decision, upheld the $225,000.00 penalty assessed against petitioner. DEHNR, in addition to finding there were approximately 150 to 160 drums at the Elm City plant, some leaking, some corroding, some bulging, most not labeled, but one labeled flammable, made the following relevant findings of fact:

> 23. Between February 7, 1991, the date of the initial inspection, and March 18, 1991, the closing date of the penalty period, neither Mr. Shank nor anyone else from Air-A-Plane provided Mr. Williford with any information regarding the waste analysis of the [approximately 150 to 160] drums at the site.
>
> 24. There is no evidence that any representative from the Petitioner provided any representative of the Respondent with specific information regarding the contents of the drums during the penalty period.
>
> . . . .

36. Mr. Meyer concluded that Air-A-Plane exhibited a total lack of knowledge as to what should have been done to identify the waste material and, therefore, there was a substantial (major) degree of non-compliance and deviation from the regulations.

37. Mr. Meyer decided that the violation was continuing in nature and he imposed a $5,000 daily penalty in addition to the $25,000 base penalty. The daily penalty ran from the date of the inspection, February 7, 1991 through March 18, 1991, the day after the penalty was computed.

. . . .

39. If Mr. Meyer had been provided with information prior to the penalty assessment that the material in the drums was not hazardous waste, this information would not have affected the imposition of or the amount of the penalty.

DEHNR concluded petitioner had produced a solid waste and failed to make a waste determination as required by 40 C.F.R. § 262.11, and DEHNR had properly followed statutory and regulatory guidelines in assessing the penalty.

Petitioner filed a petition for judicial review pursuant to Chapter 150B of the North Carolina General Statutes to Wake County Superior Court. By order filed 28 February 1994, the trial court, after "having fully reviewed [DEHNR]'s Findings of Fact, Conclusions of Law and Decision, the entire administrative record and the Petition for judicial review and having considered the brief and oral argument," affirmed the final contested case decision of DEHNR.

While our review of DEHNR's decision is limited to petitioner's assignments of error to the superior court's order, *Watson v. N.C. Real Estate Comm'n, Inc.*, 87 N.C. App. 637, 640, 362 S.E.2d 294, 296 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988), review is further limited by the issues raised in the petition for judicial review made to the superior court. Issues not raised in the petition for judicial review cannot be asserted as a basis in this Court for reversing the agency's decision. Furthermore, any issue properly raised but not discussed in the brief to this Court is deemed abandoned. N.C.R. App. P. 28.

Petitioner's petition for judicial review, assignments of error to the superior court's order, and brief raise the issues of whether (I) a penalty can be assessed for failing to determine whether a solid waste is hazardous or not under 40 C.F.R. § 262.11 where testing subsequent

to the penalty period shows the solid waste is nonhazardous; (II) DEHNR's actions exceeded its statutory authority; and (III) there was unlawful procedure (A) in DEHNR's notification of violation and (B) in DEHNR's calculation of the amount of the civil penalty.

N.C. Gen. Stat. § 150B-51(b) provides that this Court, in reviewing a final agency decision, may:

> 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:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1991); *Brooks v. Ansco & Assocs.*, 114 N.C. App. 711, 716-17, 443 S.E.2d 89, 91-92 (1994); *Teague v. Western Carolina Univ.*, 108 N.C. App. 689, 691, 424 S.E.2d 684, 686, *disc. rev. denied*, 333 N.C. 466, 427 S.E.2d 627 (1993). Where petitioner alleges the agency's decision is based upon an error of law, in excess of the agency's statutory authority, or made upon unlawful procedure, *de novo* review is required. *See Brooks*, *Comm'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 372 S.E.2d 342 (1988) (error of law); *Commissioner of Ins. v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (addressing excessive statutory authority and unlawful procedure), *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). Where petitioner alleges a constitutional violation by the agency, *de novo* review is also required because "the court is the final arbiter and is free to substitute judgment." *See* Charles H. Koch, Jr., *2 Administrative Law and Practice* 140 § 9.20 (1985 & Supp. 1995). Where, however, petitioner alleges the agency's decision is not supported by substantial evidence or is arbitrary and capricious, review of the whole record is required to determine if the agency's decision was supported by substantial evidence. *Walker v. N.C. Dep't of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

I

[1] Several of petitioner's arguments center around its contention that because the solid waste it produces is nonhazardous, there can be no violation of 40 C.F.R. § 262.11. Based on this contention, petitioner argues that because it was not allowed to introduce evidence that testing after 18 March 1991 showed its solid waste to be nonhazardous, it was denied a fair and adequate hearing in violation of due process, DEHNR exceeded its authority, DEHNR's decision was affected by an error of law, a penalty cannot be assessed under 40 C.F.R. § 262.11 if the waste is nonhazardous, and DEHNR's decision was arbitrary and capricious. We disagree.

DEHNR argues, and we agree that 40 C.F.R. § 262.11 requires **any person** who generates a **solid waste** to make a determination, by either testing the waste or applying knowledge in light of the materials or processes used, whether the waste is hazardous or not. 40 C.F.R. § 262.11; *see Carpenter v. N.C. Dep't of Human Resources*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992) (court should defer to agency's interpretation of statute as long as interpretation is reasonable and based on a permissible construction), *disc. rev. denied*, 333 N.C. 533, 427 S.E.2d 874 (1993). The purpose of this regulation is to arm a person with knowledge concerning the solid waste he or she produces, which may then be subject to RCRA or other permitting requirements. If the solid waste produced is hazardous, the person will be subject to RCRA with some enumerated exceptions; however, if the solid waste produced is nonhazardous, the person will not be subject to RCRA. EPA explained:

> The Agency believes that there are many people who suspect, but are not sure, that their activities are subject to control under the RCRA Subtitle C rules. This appendix is written for these people. . . .
>
> The first question which such a person should ask himself is: "Is the material I handle a solid waste?" If the answer to this question is "No", then the material is not subject to control under RCRA and, therefore, the person need not worry about whether he should comply with the Subtitle C rules. . . .
>
> If a person has determined that his material is a "solid waste", the next question he should ask is: "Is the solid waste I handle a hazardous waste?"

260 C.F.R. app. I. The agency continues to explain the steps to take if a person determines the solid waste is hazardous. Therefore, the burden is placed upon a person who generates a solid waste to make a determination whether that waste is hazardous or not and whether the person will be subject to special rules and regulations governing hazardous wastes. Thus, petitioner had the burden of determining whether its solid waste shipped to North Carolina in drums was hazardous or not by either testing the material or by applying knowledge of the processes used, and failure to do so can result in the assessment of a penalty against petitioner under N.C. Gen. Stat. § 130A-22(a).

DEHNR's compliance order stated that petitioner violated 40 C.F.R. § 262.11 from 7 February 1991 through 18 March 1991 and assessed a penalty for that time period. *See* 15A N.C.A.C. 13 (Solid Waste Management). Petitioner does not dispute that the materials contained in the barrels in question were solid waste as defined in 40 C.F.R. § 261.1 or that it is a "person" within the meaning of N.C. Gen. Stat. § 130A-290(22). *See* N.C.G.S. § 130A-290(22) (1989) (person means "an individual, corporation, company, association, partnership, unit of local government, State agency, federal agency or other legal entity"); 15A N.C.A.C. 13A.0002(b) (40 C.F.R. § 260.10, Definitions, has been incorporated by reference except that definition for "person" is defined by G.S. 130A-290). Because under 40 C.F.R. § 262.11, it is irrelevant whether petitioner's solid waste ultimately tested nonhazardous and because the subject matter of the compliance order was whether petitioner had been in violation of the requirements of 40 C.F.R. § 262.11 from 7 February 1991 through 18 March 1991, the period for which DEHNR assessed a penalty, the ALJ did not err in limiting the evidence to that occurring before 18 March 1991. For the same reasons, DEHNR did not act in excess of its statutory authority by assessing a penalty without hearing evidence after 18 March 1991, there was no error of law in excluding evidence that the contents of the barrel had been tested after 18 March 1991 and was determined to be nonhazardous, and the ALJ properly limited the hearing to one issue.

II—Exceeding Statutory Authority

[2] Petitioner argues DEHNR's actions exceeded its statutory authority because it did not allow petitioner to choose the means of compliance under 40 C.F.R. § 262.11 because petitioner had applied its

knowledge of the solid waste it produced sufficient to satisfy the requirements of 40 C.F.R. § 262.11(c)(2). We disagree.

In this case, the evidence shows that on 7 February 1991, petitioner was unable to provide DEHNR with a proper waste determination under 40 C.F.R. § 262.11 although given the opportunity to do so. 40 C.F.R. § 262.11 requires a producer of solid waste to either perform a chemical analysis on the waste or apply knowledge of the characteristics of the wastes, i.e., its components, in light of the processes used to produce the waste. 40 C.F.R. § 262.11. The evidence shows petitioner had not performed a chemical analysis as of 18 March 1991. Furthermore, we agree with DEHNR's interpretation of 40 C.F.R. § 262.11(c)(2) that it requires more than just the general statements made by petitioner that the barrels contained paint residues and similar materials which it "just knew" were nonhazardous or that petitioner received information of the paints' constituents from some paint companies but not all of the companies which supplied paints and similar materials to petitioner. 40 C.F.R. § 262.11(c)(2); *see Carpenter*, 107 N.C. App. 278, 419 S.E.2d 582 (court should defer to agency interpretation where interpretation is reasonable). The statements by Mr. Shank and Mr. Shepheard did not demonstrate the characteristics or exact chemical components of the paint residues and similar materials contained in the barrels and therefore were inadequate under 40 C.F.R. § 262.11(c)(2). The evidence therefore shows that petitioner did not make a proper waste determination prior to 7 February 1991 or from 7 February 1991 to 18 March 1991, the penalty period, sufficient to satisfy the requirements of 40 C.F.R. § 262.11. DEHNR, therefore, did not exceed its statutory authority in issuing the Order, and the trial court did not err in finding DEHNR did not exceed its statutory authority.

III—Unlawful Procedure

A

[3] Petitioner argues there was unlawful procedure because DEHNR "failed to provide notice of violation to Petitioner." We disagree.

40 C.F.R. § 262.11 places the burden on "any person" who generates solid waste to determine whether it is hazardous or not. Although DEHNR did not prepare an inspection report and did not issue a notice of violation, there is no statutory requirement to do such before issuing a compliance order pursuant to 40 C.F.R. § 262.11.

In any event, both Mr. Williford and Mr. Perry informed Mr. Shank on 7 February 1991 that the material would have to be tested to determine if it was hazardous waste or not because he had generated a solid waste. Therefore, petitioner was on notice on 7 February 1991 that it needed to identify the solid waste stored in the drums at the Elm City plant in order to determine whether or not it was a hazardous waste, and the trial court did not err in finding there was no unlawful procedure in notifying petitioner.

B

Petitioner next argues there was unlawful procedure because DEHNR "failed to follow its own guidelines for calculating the amount of the penalty." We disagree.

N.C. Gen. Stat. § 130A-22 provides that an agency

> may impose an administrative penalty on a person who violates Article 9 [Solid Waste Management Act] of this Chapter, rules adopted by the Commission pursuant to Article 9, or any order issued under Article 9. Each day of a continuing violation shall constitute a separate violation. The penalty shall not exceed five thousand dollars ($5,000) per day in the case of a violation involving nonhazardous waste. The penalty shall not exceed twenty-five thousand dollars ($25,000) per day in case of a first violation involving hazardous waste as defined in G.S. 130A-290.

N.C.G.S. § 130A-22(a) (1989) (amendments have not affected this portion of the statute). Our General Assembly recognized that a person may violate 40 C.F.R. § 262.11 even though he or she produces a nonhazardous solid waste by providing DEHNR may impose a penalty not to exceed $5,000.00 per day **in the case of a violation involving nonhazardous waste**. N.C. Gen. Stat. § 130A-22(a).

Under N.C. Gen. Stat. § 130A-22(d), DEHNR must, "[i]n determining the amount of the penalty . . . consider the degree and extent of the harm caused by the violation and the cost of rectifying the damage." N.C.G.S. § 130A-22(d). In addition to these two statutory standards, DEHNR promulgated the following standards pursuant to N.C. Gen. Stat. § 130A-22(f), which requires DEHNR to "adopt rules concerning the imposition of administrative penalties":

> In determining the amount of the administrative penalty, the Division shall consider the following standards:

(1) . . . (a) For a violation of the Solid Waste Management Act, Article 9 of Chapter 130A of the North Carolina General Statutes, and the rules adopted thereunder:

(i) type of violation;

(ii) type of waste involved;

(iii) duration of the violation;

(iv) cause . . .

(v) potential effect on public health and the environment;

(vi) effectiveness of responsive measures taken by the violator;

(vii) damage to private property.

15A N.C.A.C. 13B.0702(1)(a).

The evidence in this case shows that in assessing the administrative penalty, Mr. Meyer considered the mandatory factors under both statute and rules promulgated by DEHNR. Furthermore, in light of not knowing the contents of the drums when the assessment was made, the penalty was made based on the maximum of $5,000.00 per day for a nonhazardous material. The trial court, therefore, did not err in finding there was no unlawful procedure in DEHNR's calculation of the penalty against petitioner.

Petitioner argues DEHNR's decision was arbitrary and capricious. Because, however, petitioner bases this contention on arguments we have previously discussed and rejected in this opinion, we also reject petitioner's contention DEHNR's decision was arbitrary and capricious. For these reasons, the decision of the Superior Court, affirming DEHNR's final decision to assess a penalty against petitioner is

Affirmed.

Judges EAGLES and WALKER concur.

STATE OF NORTH CAROLINA v. BARBARA WHITTLE

No. 9427SC509

(Filed 7 March 1995)

1. Criminal Law § 37 (NCI4th)— misdemeanor more than two years before indictment—statute of limitations inapplicable

An indictment for a misdemeanor committed more than two years prior to the indictment is not outside the two-year statute of limitations period when the grand jury has, within two years of the crime, returned a presentment. N.C.G.S. §§ 15-1, 15A-641(c).

Am Jur 2d, Criminal Law §§ 223 et seq.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time. 32 ALR4th 840.

2. Criminal Law § 14 (NCI4th)— willful improperly defined—prejudice on misdemeanor but not felony counts

In a prosecution of defendant for the felony of malfeasance of a corporation agent and two misdemeanors of violating the North Carolina Medical Care Commission Rules, the trial court erred in instructing the jury that willful means intentional without also informing the jury that to be willful the act or inaction must also be purposely and designedly in violation of law. With regard to the felony, defendant was not prejudiced by the court's improper instruction, but with regard to the misdemeanors, failure to instruct properly was prejudicial.

Am Jur 2d, Criminal Law § 135.

Judge LEWIS dissenting in part and concurring in part.

Appeal by defendant from judgment entered 12 April 1993 in Gaston County Superior Court by Judge Claude S. Sitton. Heard in the Court of Appeals 1 February 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Charles H. Hobgood, for the State.

Stephen T. Gheen for defendant-appellant.

GREENE, Judge.

Barbara Whittle (defendant) appeals from a judgment imposing a suspended prison sentence after a jury returned verdicts of guilty to one felony charge, malfeasance of a corporation agent, in violation of N.C. Gen. Stat. § 14-254, and two misdemeanor counts, both for violations of the North Carolina Medical Care Commission Rules, under N.C. Gen. Stat. § 131E-109(d).

On 5 August 1991 the Gaston County Grand Jury returned a presentment requesting that "the District Attorney investigate" the matters alleged in the presentment and "if appropriate, submit a Bill of Indictment to the Grand Jury dealing with the subject matter of this Presentment." The allegations of the presentment were that the defendant had violated certain rules adopted by the North Carolina Medical Care Commission, in that she had failed "to cause the implementation of nursing procedures for the daily charting of . . . the development of decubiti on Horace O. Keller" and that she had failed "to cause the implementation of nursing procedures for the special skin care and decubiti care related to Horace O. Keller." On 2 March 1992 the grand jury indicted the defendant for the same rule violations alleged in the presentment, alleging that the defendant acted "unlawfully and willfully." These alleged offenses constitute misdemeanors under N.C. Gen. Stat. § 131E-109(d). Additionally, on that same date, the grand jury indicted the defendant for making "false entries in the books, reports, and statements" of the Royal Crest Health Care Center, Inc. (Royal Crest), alleging that the defendant acted "unlawfully, willfully, and feloniously." This alleged offense constitutes a felony under N.C. Gen. Stat. § 14-254.

On 8 January 1993 the defendant moved to dismiss the misdemeanor charges "on the ground that the Statute of Limitations ran before the Grand Jury returned the Indictment." This motion was denied by the trial court in a written order. In that order the trial court concluded that because the misdemeanor crimes charged "were presented by the Grand Jury within two years of the crimes" the Statute of Limitations did not bar their prosecution, even though the indictment was returned more than two years after the commission of the crimes.

The evidence offered at the trial shows that between July 1989 and June 1990 the defendant was the Director of Nursing at Royal Crest, a long term care facility licensed under the North Carolina

Division of Facility Services. The charges against the defendant arose from an investigation of the care received by Horace Keller (Keller) a patient at Royal Crest between 31 August 1989 and 21 September 1989. At some point between Keller's release from the hospital to Royal Crest and ultimate discharge from Royal Crest, Keller developed three decubitus ulcers (bedsores), one on each heel of his feet and one on his buttocks. The charges against the defendant allege that she falsified Keller's admission report by showing these bedsores existed at a Stage IV level (a high level, requiring surgery) at the time he was admitted to Royal Crest and that she failed to implement procedures for the daily charting of unusual conditions, like bedsores, and failed to implement procedures for special skin care and care of bedsores. The State presented evidence that these bedsores did not exist at the time Keller was admitted to Royal Crest, but formed thereafter, and the defendant changed Keller's admission records to reflect that the sores existed at the time he was admitted to Royal Crest.

At the conclusion of the evidence, the defendant requested the following special jury instruction:

> In each of these three cases against the defendant, she is alleged to have acted "willfully." Acting "willfully" means acting "voluntarily, intentionally, purposefully and deliberately, indicating a purpose to do it without authority, and in violation of law." The State is required to prove beyond a reasonable doubt that Barbara Whittle acted voluntarily, intentionally, purposefully and deliberately, indicating a purpose to act without authority and in violation of law.

The trial court denied the defendant's request and gave the following jury instruction on the element of "willful":

> *The word "willful" means intentionally. An act is done willfully when it is done intentionally.* I instruct you that intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

[Emphasis added.] Furthermore, the court provided the following jury instructions with regard to each offense:

Felony—Malfeasance of a corporate agent.

[T]he State must prove . . . beyond a reasonable doubt: . . . Fourth, that the entry was false. Fifth, that the defendant knew that the entry was false; and sixth, that the defendant willfully made the false entry regarding Horace Keller with the intent to deceive another person or corporation.

Misdemeanor—Charting.

[T]he State must prove . . . beyond a reasonable doubt: . . . and third that the defendant, Barbara Whittle, as director of nursing did willfully fail to cause the implementation of nursing procedures and policies for the daily charting of an unusual occurrence or acute episode relating to the development of decubiti on Horace O. Keller.

Misdemeanor—Special Care.

[T]he State must prove . . . beyond a reasonable doubt: . . . and third, that the defendant, Barbara Whittle, willfully failed to cause the implementation of nursing procedures for special skin care and decubiti care for Horace O. Keller . . . .

The issues presented are whether (I) an indictment for a misdemeanor committed more than two years prior to the indictment is outside the two year statute of limitations period, when the grand jury has, within two years of the crime, returned a presentment; and (II) the trial court committed reversible error in its instruction that "willful" means "intentional."

I

[1] The defendant argues that the misdemeanor indictments in this case must be dismissed because they were returned outside the two year statute of limitations. The State argues that although the indictment was returned more than two years after the commission of the crimes charged, the indictment must not be dismissed because the grand jury had, within two years of the crimes, returned a presentment. We agree with the State.

There is no dispute that North Carolina has adopted a two year statute of limitations for misdemeanors. Our legislature has specifically provided that:

> [A]ll misdemeanors except malicious misdemeanors, *shall be presented or found by the grand jury* within two years after the commission of the same, and not afterwards . . . .

N.C.G.S. § 15-1 (1983) (emphasis added). Our courts have consistently construed this language, which has not been altered since its adoption in 1826, to mean that either an indictment or a presentment issued by a grand jury within two years of the crime alleged "arrests the statute of limitations." *E.g., State v. Underwood*, 244 N.C. 68, 70, 92 S.E.2d 461, 463 (1956). A presentment is "a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses." N.C.G.S. § 15A-641(c) (1988). Upon the return of a presentment "the district attorney is obligated to investigate the factual background" and submit bills of indictment dealing with the subject matter only "when it is appropriate to do so." *Id.*

The defendant argues that when the legislature, in 1973, enacted the new Criminal Procedure Act and specifically N.C. Gen. Stat. § 15A-641(c), it necessarily changed the law that a presentment arrests the statute of limitations. In support of this argument, the defendant points to the language of Section 641(c) which states that a presentment no longer "institute[s] criminal proceedings."

To read N.C. Gen. Stat. § 15A-641 as the defendant suggests would require that we construe N.C. Gen. Stat. § 15A-641 as repealing N.C. Gen. Stat. § 15-1. That result is not required in this case. "A statute is not deemed to be repealed merely by the enactment of another statute on the same subject." *Person v. Garrett, Comm'r of Motor Vehicles*, 280 N.C. 163, 165, 184 S.E.2d 873, 874 (1971). Indeed, we are required to "give effect to statutes covering the same subject matter where they are not absolutely irreconcilable and when no purpose of repeal is clearly indicated." *Id.* at 165-66, 184 S.E.2d at 874.

In this case, there is no stated purpose in N.C. Gen. Stat. § 15A-641 that indicates the legislature intended to repeal N.C. Gen. Stat. § 15-1. Furthermore, N.C. Gen. Stat. § 15A-641 appears to be an effort by the legislature to codify the common law that permitted the use of presentments by grand juries but prohibited the arrest and trial of defendants on a presentment. *E.g., State v. Thomas*, 236 N.C. 454, 458, 73 S.E.2d 283, 286 (1952); *see* N.C.G.S. § 15A-641 official commentary (1988). Thus, Section 15-1 has not been repealed and remains

a part of the law of this state and supports the order of the trial court denying the defendant's motion to dismiss.

Defendant further argues that allowing a presentment by a grand jury to "arrest the statute of limitations" may possibly result in prejudicial and unreasonable delay in prosecutions, in that the district attorney could wait years before seeking an indictment on the crimes alleged in the presentment. It is unnecessary for us to address this argument because there is no indication of abuse in the present case where the defendant was indicted seven months after the presentment.

II

[2] The defendant next argues that the State was required to prove that she acted willfully, in both the felony and the misdemeanor charges, and that the instructions of the trial court were in error because the instructions improperly defined willfully. Without so deciding, we assume for the purposes of this opinion, that willfulness is an element of the felony charge. It is not disputed that willfulness is an element of the misdemeanor charges. N.C.G.S. § 131E-109 (1994) ("any person . . . who willfully fails to perform any act required by" rules adopted by the North Carolina Medical Care Commission). The question therefore is whether the trial court properly instructed the jury on the meaning of willfully.

The word "willfully" means "something more than an intention to commit the offense." *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940). "It implies committing the offense purposely and designedly in violation of law." *Id.* In this case, the trial judge instructed the jury that " 'willful' means intentionally. An act is done willfully when it is done intentionally." Because the instruction did not inform the jury that to be "willful," the act or inaction must also be "purposely and designedly in violation of law," it was not complete. This error requires a new trial if there "is a reasonable possibility that, [had the correct instruction been given,] a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1988).

With regard to the felony, the defendant argues that a different result would have occurred at trial because without the correct definition of "willfully" the jury could have found the defendant guilty based on an honest error of judgment. We disagree. As the State argues in its brief:

> [t]his argument ignores the trial court's instructions that the jury had to find that the defendant "knew the entry was false and that the defendant made the entry with the intent to deceive." The jury could not find that the defendant made an honest error and also that she knew the entry was false and acted with an intent to deceive. The two findings are mutually exclusive. If they believed she had made an honest error; they would have in effect found that the State failed to prove that she knew the entry was false or that she did not intend to deceive.

Thus, with regard to the felony, the defendant was not prejudiced by the failure of the trial court to correctly instruct the jury on the meaning of willfully.

With regard to the misdemeanors, we agree with the defendant that the failure to properly instruct on "willfully" was prejudicial. With the instructions given, a jury could have concluded that the defendant was guilty if they determined the defendant failed to act to ensure proper treatment and failed to ensure charting of unusual occurrences and acute episodes. With a proper instruction the jury would have understood that the defendant's decisions, even if intentional, were not necessarily a violation of the law. The jury should have been forced to consider whether these decisions were "purposely and designedly in violation of the law." This error requires a new trial.

Felony (92 CRS 5648, count 1)—No Error.

Misdemeanors (92 CRS 5648, counts 2 & 3)—New Trial.

Judge COZORT concur.

Judge LEWIS dissents in part and concurs in part.

Judge LEWIS dissenting in part and concurring in part.

I respectfully dissent as to the majority's conclusion that the trial court improperly instructed the jury on the meaning of "willfully" in the misdemeanor charges. As to the felony charge, I concur only with the majority's holding that there is no prejudicial error; I do not concur in the majority's reasoning; I therefore dissent. Since "willfully" does not appear in that part of N.C.G.S. § 14-254 that defines the felony of false entries by a corporation agent, it is not an element of

the offense. *See* N.C.G.S. § 14-254. In fact, "willfully" does not appear in the North Carolina pattern jury instruction for this offense. *See* N.C.P.I. Crim. § 218.22 (1992). Since defendant was not entitled to any instruction on willfulness, there was no prejudicial error to defendant in the instruction on willfulness that was given.

Furthermore, neither the felony statute (N.C.G.S. § 14-254) nor the misdemeanor statute (N.C.G.S. § 131E-109(d)) requires that "willfully" be defined in the jury instructions as "purposely and designedly in violation of law." In *State v. Stephenson*, that language appears but not in the context of mandated jury instructions. *See State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940). Neither *State v. Stephenson* nor *State v. Hales*, also relied upon by defendant, concerned jury instructions, and neither case dealt with the statutes at issue here. *See id*; *see State v. Hales*, 256 N.C. 27, 122 S.E.2d 768 (1961). The North Carolina pattern jury instruction for the G.S. § 14-254 felony charge does not require the instruction that defendant requests. *See* N.C.P.I. Crim. 218.22 (1992). No North Carolina pattern jury instruction for the misdemeanor charges has been identified by the parties nor have I found any.

I believe the jury could adequately understand the statutory language "willfully" without the addition of the term "purposely." In fact, we have held that the term "wilful" is common enough to be understood by a jury without being defined in the jury instructions. *State v. Flaherty*, 55 N.C. App. 14, 24, 284 S.E.2d 565, 572 (1981). Furthermore, by mandating the *Stephenson* language into instructions, the majority has amended the statutes to add as an additional element the requirement that the State prove defendants acted "purposely and designedly in violation of the law." These statutes do not require such proof and need neither to be amended nor complicated.

The majority say the "jury should have been forced to consider whether these decisions were purposely and designedly in violation of the law." Far from forcing the jury to consider anything, I would hold that the reasons for instructions are to assist the jury in finding the facts from the evidence in accord with the law.

"Willful" is an element in many crimes. E.g., N.C.G.S. § 5A-11 (1994) (criminal contempt); N.C.G.S. § 14-72.1 (1994) (concealment of merchandise in mercantile establishments); N.C.G.S. § 14-127 (1993) (willful and wanton injury to personal property); N.C.G.S. § 14-322 (1993) (abandonment and failure to support spouse and children). I do not believe that the language created by the majority has been

required by statute or case law to be a part of jury instructions for crimes with "willful" as an element.

I concur in the majority's holding that the trial court correctly denied defendant's motion to dismiss the misdemeanor counts of the indictment. N.C.G.S. § 15-1 (1983) clearly provides that either presentment or indictment tolls the statute of limitations for misdemeanors.

FLORA S. BRUNDAGE AND JAMES A. BRUNDAGE, PLAINTIFFS v. ROBERT L. FOYE AND WILMA FOYE, DEFENDANTS

No. 9311SC620

(Filed 7 March 1995)

Judgments § 396 (NCI4th)— consent judgment set aside as to one party only—error

Where a consent judgment was entered against two defendants without one defendant's consent, the trial court should have set aside the judgment as to both defendants, since a consent judgment which may be set aside for cause must be set aside in its entirety.

Am Jur 2d, Judgments §§ 688 et seq.

Judge JOHNSON dissenting.

Appeal by defendant from order filed 12 April 1993 by Judge Knox Jenkins in Johnston County Superior Court. Heard in the Court of Appeals 23 March 1994.

Hinton and Hewett, by Alan B. Hewett, for plaintiff-appellees.

Perry, Brown & Levin, by Cedric R. Perry and Charles E. Craft, for defendant-appellants.

JOHN, Judge.

Defendant Robert Foye (Robert) appeals the trial court's failure to set aside a consent judgment and the court's refusal to grant his attorney's motion to withdraw from the action. For the reasons set forth herein, we reverse the decision of the trial court.

Relevant procedural information is as follows: On 26 August 1991 Flora and James Brundage (plaintiffs) initiated suit against Robert and Wilma Foye (defendants) for breach of contract alleging that defendants failed to convey a lot to plaintiffs in violation of their prior agreement. Defendants answered 25 October 1991 admitting the lot had not been conveyed to plaintiffs, but asserted "said delay of conveyance was at the request of the plaintiffs."

The case came for trial 13 July 1992 at which time defendants' attorneys, N. Leo Daughtry and Luther D. Starling, Jr., announced in open court that defendants agreed to accept judgment against them in the amount of $110,000.00 plus interest. Robert was present in court; however, his wife Wilma was not. The trial court's judgment, signed 5 August 1992, stated "with the consent and authorization of the defendants that the plaintiffs have judgment against the defendants, Robert L. Foye and wife, Wilma B. Foye, jointly and severally, in the amount of One Hundred Ten Thousand and 00/100 Dollars ($110,000.00)."

On 3 September 1992, defendants moved to set aside the judgment based upon lack of consent. They were represented by Cedric R. Perry who entered Notice of Limited Appearance "for the purpose of filing a motion under Rule 60(b) for the Defendants."

At the hearing on defendants' motion, the trial court made the following findings of fact:

> 2. It is now undisputed that the female Defendant [Wilma Foye] was not present in Court on the hearing of this matter on 13 July 1992;
>
> 3. That a proposed Consent Judgment presented to the Defendants to be signed was not signed by the Defendants.

Accordingly, the court ruled:

> Based upon the foregoing findings of fact, it is ordered, adjudged and decreed that the Judgment signed on or about 5 August 1992 and subsequently entered be, and the same hereby is, set aside as to the female Defendant [Wilma Foye].

Further, at the close of the hearing, the following exchange took place between counsel and the trial judge:

MR. PERRY: May I make one point, Judge?

THE COURT: Yes, sir.

MR. PERRY: Notice of appearance indicates the limits of my representation——

THE COURT: No, sir. You've got the case. The Court, in it's discretion denies counsel's motion to withdraw, and Mr. Perry is counsel of record for the defendants in all further proceedings. Mr. Starling and Mr. Daughtry are allowed to withdraw as counsel of record.

Robert gave notice of appeal to this Court 5 November 1992.

I.

Robert first contends the trial court erred in failing to set aside the consent judgment as to him. We agree.

The dispositive issue on appeal is whether a consent judgment may be set aside for lack of consent with respect to but one of the parties. A consent judgment is a contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval. *King v. King*, 225 N.C. 639, 640, 35 S.E.2d 893, 894 (1945); *Keen v. Parker*, 217 N.C. 378, 386-87, 8 S.E.2d 209, 214 (1940). "The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment." *King*, 225 N.C. at 641, 35 S.E.2d at 895; *see also Highway Comm. v. Rowson*, 5 N.C. App. 629, 631, 169 S.E.2d 132, 134 (1969); *Ledford v. Ledford*, 229 N.C. 373, 376, 49 S.E.2d 794, 796 (1948); *Lee v. Rhodes*, 227 N.C. 240, 242, 41 S.E.2d 747, 748 (1947).

In *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963), a proceeding involving a dissent from a will, one of the respondent heirs moved to set aside the consent judgment signed by the trial court. She alleged she was neither *non compos mentis* nor had she consented to the judgment nor authorized anyone to consent for her. *Id.* at 33, 129 S.E.2d at 595. The trial court determined this respondent had in fact not consented to entry of judgment and ordered that "as to the movant . . . the judgment . . . is null and void and of no effect." *Id.* Petitioner thereafter claimed the consent judgment was valid and binding as to the other consenting parties, but our Supreme Court determined the argument was "not the correct interpretation of the law." *Id.* at 37, 129 S.E.2d at 597-98.

> "It is a general rule that in a case where a consent judgment may be set aside for cause, it must be set aside in its entirety." 30A Am. Jur., Judgments, s. 639, p. 612; . . . The court has the power to set aside a consent judgment, as a whole, but not to eliminate from it that part which affects some of the parties only. The agreements of the parties are reciprocal, and each is the consideration for the other. If that which affects one party is taken out, what is left is not what was agreed to by the others.

Id. at 37-38, 129 S.E.2d at 598 (citations omitted). The Court therefore held the trial court erred in setting aside the consent judgment solely as to the single moving respondent, and remanded for entry of "an order setting aside the consent judgment in its entirety." *Id.* at 38, 129 S.E.2d at 598.

Similarly, in the case *sub judice*, the trial court set aside the consent judgment only as to Wilma and under *Overton* thus erred by not vacating the judgment as a whole. Accordingly, the order of the trial court is reversed, and we remand with instructions that the trial court enter an order vacating the consent judgment in its entirety.

We point out that *Overton* is the only case uncovered in our research directly on point with the issue presented herein. The dissent cites *Owens v. Voncannon*, 251 N.C. 351, 111 S.E.2d 700 (1959). It is unnecessary to take issue with the dissent's assertion that dicta in *Owens* suggests that a consent judgment may be vacated as to only one of the parties in the circumstance of joint and several liability. We simply observe that our Supreme Court did not address that issue directly. *See Napowsa v. Langston*, 95 N.C. App. 14, 25, 381 S.E.2d 882, 889, *disc. review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby"). The precise issue in *Owens* was "whether the judgment of November 25, 1957, is valid *as a consent judgment*," *Owens*, 251 N.C. at 355, 111 S.E.2d at 703 (emphasis in original), and the focus was upon whether Doris Voncannon consented to have attorney Sam Miller act as her counsel. The case was remanded for a factual determination of Miller's authority to file an answer on her behalf and to consent to entry of judgment. As *Overton* is the only holding to address the dispositive issue herein, our responsibility is to follow established precedent set forth by our Supreme Court. *Eaves v. Universal Underwriters Group*, 107 N.C. App. 595, 600, 421 S.E.2d 191, 194, *disc. review denied*, 333 N.C. 167, 424 S.E.2d 908 (1992).

II.

Robert also contends the trial court erred by refusing to allow defense counsel's motion to withdraw. While "filing" of a Rule 60(b) motion may arguably include pursuit of an appeal from denial thereof, it appears counsel's limitation of his appearance may well have been effective to conclude his representation of defendants following the trial court's ruling. However, in view of our determination that the challenged consent judgment must be vacated, we decline at this juncture to address the merits of this assignment of error. Likewise, while we believe the trial court's denial of counsel's motion to be without prejudice to any subsequent similar motion upon remand now that "filing" of the Rule 60(b) motion has indisputably been concluded, we express no opinion as to the court's ruling should such motion be advanced by counsel.

Reversed and remanded.

Judge GREENE concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the first issue discussed in the majority's opinion. I believe the trial judge properly declined to set aside the consent judgment as to defendant Robert Foye.

The judgment which the trial court signed 5 August 1992, based on the representations of defendants' attorney in open court on 13 July 1992 during which time defendant Robert Foye was present, stated "that the plaintiffs have judgment against the defendants, Robert L. Foye and wife, Wilma B. Foye, *jointly and severally*, in the amount of One Hundred Ten Thousand and 00/100 Dollars ($110,000.00)." (Emphasis added.) As the majority notes, at the hearing on defendants' motion to set aside the judgment based upon lack of consent, the trial court found that defendant Wilma Foye was not present in court the day of the hearing of the matter, and the court concluded that the judgment as to her was set aside.

The law of joint and several liability is well-settled. (*See Kelly v. Muse*, 33 N.C. 182 (1850), where our Supreme Court generally discussed the evolving law of joint and several liability.) "[I]t is well established that the term 'jointly and severally' implies that one

[party] could pay for all of plaintiff's damages[.]" *Sheppard v. Zep Manufacturing Co.*, 114 N.C. App. 25, 35, 441 S.E.2d 161, 167 (1994).

In *Owens v. Voncannon*, 251 N.C. 351, 111 S.E.2d 700 (1959), the plaintiffs instituted an action to recover on a promissory note made by defendants Lonnie Voncannon and Doris Voncannon as makers and by defendants Lonnie Voncannon and Alma Brown as endorsers. An answer, signed by attorney Sam W. Miller, purporting to be on behalf of all of the defendants, was filed. At trial, judgment was entered "that the plaintiffs have and recover of the defendants, jointly and severally, the sum of Two Thousand Dollars[.]" *Id.* at 352, 111 S.E.2d at 701. Defendant Doris Voncannon averred that she had not retained Mr. Miller as her attorney and that no valid judgment had been entered against her; the trial court denied this motion. Upon appeal, our Supreme Court said that if defendant Doris Voncannon "did not authorize Mr. Miller, directly or through Lonnie Voncannon, to consent to said judgment of November 25, 1957, the judgment, *as to her*, is *void*[.]" *Id.* at 354, 111 S.E.2d at 702. (Emphasis added and retained.) (*Compare Nye, Mitchell, Jarvis & Bugg v. Oates*, 109 N.C. App. 289, 426 S.E.2d 291 (1993), where the defendant husband and defendant wife, under the terms of a consent judgment, agreed jointly and severally to pay money due the plaintiffs; the plaintiffs appealed the setting aside of a consent order against the defendant wife, and our Court reversed and remanded the decision of the trial court. Our Court stated that "the dispositive question is whether the attorneys who signed the consent judgment, representing themselves as the attorneys for [defendant wife], had the authority to appear and approve a judgment on behalf of [defendant wife]." *Id.* at 293, 426 S.E.2d at 294.)

Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963), which the majority relies upon, is distinguishable. The consent judgment therein pertained to a dissent of a will. The Court in *Overton* noted that "[w]here parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed or altered, or set aside without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake, or that consent was not in fact given[.]" *Id.* at 37, 129 S.E.2d at 598, *quoting Gardiner v. May*, 172 N.C. 192, 194, 89 S.E. 955, 956 (1916). In *Overton*, when the consent judgment was vacated as to the respondent heir, the Court noted that the consent judgment had to be set aside in its entirety because "[i]f that which affects one party is taken out, what is left is not what was agreed to

by the others." *Overton*, 259 N.C. at 37-38, 129 S.E.2d at 598. In the instant appeal, however, when the consent judgment was vacated as to defendant Wilma Foye, what was left was what defendant Robert Foye *had* agreed to; namely, that he would be "jointly and severally" liable to plaintiffs in the amount of $110,000.00.

For these reasons, I dissent from the majority and find that the trial judge properly declined to set aside the consent judgment as to defendant Robert Foye.

WACHOVIA BANK OF NORTH CAROLINA, N.A., TRUSTEE, PLAINTIFF v. SARA ANNE HANES WILLIS, MILDRED WILLIS PADEN, ELIZABETH WILLIS CROCKETT, ROSALIND SHEPPARD WILLIS, ROBERT MEADE WILLIS, ELIZABETH RAINS PADEN, A MINOR, ANNE MEADE PADEN, A MINOR, MARY CLAUDIA PADEN, A MINOR, BENJAMIN ROBERT PADEN, A MINOR, MILDRED MARCH CROCKETT, A MINOR, CHARLES LUCIAN CROCKETT, IV, A MINOR, ALBIONA KAI MALIE WILLIS, A MINOR, TAI WILLIS OLSON, A MINOR, LEIF HANS OLSON, A MINOR, MEADE HANES WILLIS, A MINOR, MARY KATHERINE WILLIS, A MINOR, ROBERT RUTHERFORD WILLIS, A MINOR, AND ALL OTHER UNBORN POTENTIAL LINEAL DESCENDANTS OF SARA ANNE HANES WILLIS, DEFENDANTS

No. 9421SC252

(Filed 7 March 1995)

Trusts and Trustees § 85 (NCI4th)— meaning of beneficiary's "issue"—trial court's interpretation correct

The trial court properly determined that a trust beneficiary's "issue," as used in the distributive provisions of the trust instrument, were the children of the beneficiary who were living at the time of her death and the then living issue of any deceased child, *per stirpes*, since this interpretation is consistent with the intent of the settlor as reflected by the entire trust instrument and the circumstances surrounding its execution.

Am Jur 2d, Trusts §§ 614 et seq.

Appeal by the minor and unborn defendants from judgment entered 21 December 1993 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 25 October 1994.

Petree Stockton, L.L.P., by J. Robert Elster, and Rodrick J. Enns, for plaintiff-appellee.

Smith & Murphrey, by W. Everette Murphrey, IV, for defendant-appellants.

Womble Carlyle Sandridge & Rice, by Dewey W. Wells, and George A. Ragland, for defendant-appellee Sara Anne Hanes Willis.

MARTIN, John C., Judge.

Plaintiff, as trustee, brought this declaratory judgment action seeking judicial interpretation of an irrevocable Living Trust Agreement executed by Robert M. Hanes on 16 March 1928 for the benefit of his daughter Sara Anne Hanes (Willis), who was then five years of age. The trust provided that the net income from the trust was to be applied for Sara's benefit until she attained twenty-one years of age, at which time the trustee was directed to distribute the income directly to Sara. Upon Sara's attaining the age of twenty-five, the trustee was directed to pay over the entire trust estate to her. The trustee was authorized, however, to withhold both the direct distribution of income and principal if, in its "sound judgment and sole discretion", pursuant to guidelines contained in the trust instrument, it was in Sara's best interests for the trust to continue. Exercising such discretion, the trustee did not distribute the trust's income to Sara until 1983, and has made no distribution of the principal. Sara Anne Hanes Willis is living; according to the allegations of the complaint, the trustee does not anticipate a termination of the trust during her lifetime.

The trust instrument provided for distribution of the trust estate upon the death of Sara Anne Hanes Willis as follows:

> (4) If the said Sara Anne Hanes shall die before receiving this trust estate leaving issue surviving, then and in that event the Trustee shall continue to hold the same in trust and pay or apply the income therefrom to or for the benefit of her issue until the youngest of such issue shall attain the age of twenty-one years, and then distribute said trust estate, principal and any accumulation, to or among such issue, in equal shares.
>
> (5) If the said Sara Anne Hanes shall die before receiving this trust estate without leaving issue surviving to take the same as above provided, then and in that event, upon the death of Sara

> Anne Hanes and the failure of such issue, the Trustee is directed to close the trust by paying over and delivering said trust estate to Mrs. Mildred B. Hanes, mother of Sara Anne Hanes, if she then survive, or if Mrs. Mildred B. Hanes be deceased, then the same shall be paid over and delivered to Wachovia Bank and Trust Company, Trustee for Frank Borden Hanes, under the provisions of a certain trust agreement made by the Grantor herein for the benefit of Frank Borden Hanes, dated March 16, 1928; provided, however, if any other child or children of the Grantor should then be living, or dead leaving issue surviving, the property and estate herein described and set up as a trust fund shall be held by the said Trustee and administered for the equal benefit of all the Grantor's children and distributed equally to them in accordance with the terms of any trust agreement made by the Grantor for them, and designated to receive this fund; and if no such trust agreement has been made for the benefit of any one or more of said children, then the distributive provisions of this trust agreement shall apply to the further administration and settlement of the said trust for and amongst all of the children of the said Grantor. But if neither Mrs. Mildred B. Hanes nor Frank Borden Hanes, nor other child of the Grantor or issue thereof shall then be living, the Trustee shall close the trust herein created by distributing all of the then property and assets of said trust estate to or among the heirs-at-law and next of kin of the said Sara Anne Hanes, who shall be of the blood of the Grantor's ancestors, according to the laws of intestacy now obtaining in the State of North Carolina.

Plaintiff sought judicial interpretation of the words "her issue" and "such issue" as used in Paragraph Four of the distributive provisions of the trust instrument recited above. Sara Anne Hanes Willis and her four adult children answered, joining in the prayer for a declaratory judgment. Upon motion of Sara Anne Hanes Willis, a guardian *ad litem* was appointed to represent the minor defendants, her grandchildren, and unborn persons whose interests could be determined in the action. The guardian *ad litem* answered, alleging that Robert Hanes had intended the word "issue" to mean all lineal descendants of Sara who are alive at the time of her death.

The trial court found the facts to be essentially as summarized above, and concluded that although the use of the words "her issue" and "such issue" were susceptible to a number of different interpretations, those terms as used in Paragraph Four of the trust instrument

meant that, upon the death of Sara Anne Hanes Willis, any remaining trust assets should be divided "into as many equal shares as shall be necessary to allocate one such share to each then living child of Sara Anne Hanes (Willis), and one such share to the issue of any then deceased child of hers with issue then surviving, per stirpes . . . ." The trial court entered its judgment accordingly and the guardian *ad litem* gave notice of appeal.

As recognized by plaintiff in seeking declaratory relief, and by the trial court in its judgment, Robert Hanes' use of the words "issue", "her issue", and "such issue", in Paragraph Four of the distributive provisions of the trust instrument is susceptible to differing interpretations. The words could include an indefinite line of lineal descendants of Sara Anne Hanes Willis, an interpretation which none of the parties urge, as it may void the trust for violation of the rule against perpetuities. The words could mean that the trust assets were to be distributed *per capita* to the lineal descendants of Sara Anne Hanes Willis who are living at the time of her death, which could result in a disproportionate distribution among the families of Sara's four children. This is the interpretation for which appellants contend. Finally, the words could have the meaning accorded them by the trial court, i.e., that the trust assets were to be distributed among the children of Sara Anne Hanes Willis who are living at the time of her death, and the then living issue of any deceased child, *per stirpes*.

It is a fundamental rule that, when interpreting wills and trust instruments, courts must give effect to the intent of the testator or settlor, so long as such intent does not conflict with the demands of law and public policy. *Bank v. Goode*, 298 N.C. 485, 259 S.E.2d 288 (1979). The intent which controls is that which is found by examining the entire instrument, giving each word and phrase a meaning that, wherever possible, agrees with or accommodates the other. *Id.*

The word "issue" is usually construed to mean more than children; its generally accepted meaning is "an indefinite succession of lineal descendants . . . ." *Edmondson v. Leigh*, 189 N.C. 196, 201, 126 S.E. 497, 499 (1925). But, when "issue" is used in a will or trust instrument, it is subject to the rule of construction that the intent of the testator or settlor, as ascertained from the document, is to be given effect rather than the technical meaning of the words which he used. *Id.* Thus, when the word "issue" is used in a will or trust agreement and is unexplained by the context, it may mean lineal descendants, but where other provisions in the instrument and the surrounding

facts evidence that the testator or settlor intended the word "issue" to be synonymous with the word "children" and be more limiting, that latter construction should govern. *Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963); *Edmondson v. Leigh, supra*; *Etheridge v. Realty Co.*, 179 N.C. 407, 102 S.E. 609 (1920).

In *Etheridge v. Realty Co., supra,* the testator made a devise of land: "To have and to hold unto the said Maud S. during her natural life, and after her death to her issue and their heirs." Maud S. had two children, both of whom were born before the death of the testator. In addition, one of her children had two minor children. Maud S. and her two children conveyed to the plaintiff the land described in the devise. The plaintiff thereafter contracted to convey said land to the defendant. The question before the Court was whether the plaintiff had good title to convey the land, assuming that Maud S., who was 65 years old at the time of the action, would have no other children. Resolution of the question depended upon a determination of whether the words "her issue" in the devise meant "her children" or "her lineal descendants." *Id.* at 407-08, 102 S.E. at 609.

While recognizing that the word "issue", "when used in a will and unexplained by the context, may mean descendants . . .", the *Etheridge* Court held that where other portions of the will indicated an intent on the testator's part to use "issue" synonymously with "children", such an intent would be given effect. *Id.* at 408, 102 S.E. at 609. Thus, the Court concluded that "her issue" meant the "children of Maud S." and, therefore, the deed made by them conveyed good title to the property. *Id.*

The Supreme Court applied a similar analysis in *Poindexter v. Trust Co., supra.* In *Poindexter*, the testatrix devised her property to be held in trust for her son, with the net income being distributed to him. The will provided further that if her son died "leaving issue," then his issue were to receive the income, but if he left no issue, then the trust property was to be divided between her surviving brothers and sisters. Her son brought suit asserting, *inter alia,* that the word "issue" meant a "perpetual succession of [his] lineal descendants," and that the clause therefore violated the rule against perpetuities. Because all of the testatrix's brothers and sisters were deceased, the son contended that he was entitled to the property free and clear of the trust. The trial court agreed with his position.

The Supreme Court reversed, concluding that the testatrix's will, considered in its entirety, indicated her intent to benefit her son dur-

ing his lifetime and, upon his death, to benefit his surviving children, rather than "an indefinite succession of lineal descendants." The court stated:

> If the clause is considered out of relation to the rest of the will, the ruling seems justified. The word "issue" in its strict technical sense includes an indefinite succession of lineal descendants. And a devise or bequest to "issue" in this sense violates the rule against perpetuities and is void . . . . But courts are not required to indulge the presumption of technical use of words against the testamentary intent from a contextual construction of the will . . . . The presumptions are contrary to plaintiff's interpretation . . . . "A limitation or gift over to issue does not offend the rule against perpetuities where the context or surrounding circumstances show that the word issue is used in a limited sense as meaning issue living at a date within the period specified by the rule . . . ." (Citations omitted.)

Id. at 377, 128 S.E.2d at 872.

In the present case, the trust instrument provides that the trust created is to be "administered for the benefit of Sara Anne Hanes . . . ." Paragraph Four of the distributive provisions of the Trust Agreement directs that any remaining trust estate after Sara's death be distributed directly to "her issue" when "the youngest of such issue shall attain the age of twenty-one years . . . ." It is clear from the instrument that Sara was the primary object of Robert Hanes' bounty and that he intended to benefit future generations only upon Sara's death before final distribution. There, however, is no indication of any intent to delay final distribution beyond the time when, after Sara's death, her youngest child reached the age of twenty-one. Had he intended otherwise, there is ample indication that Mr. Hanes knew how to distribute the trust estate to distant generations; in Paragraph Five of the distributive provisions, he directed an ultimate disposition of the trust estate "to or among the heirs-at-law and next of kin of the said Sara Anne Hanes . . . ."

Appellants contend, however, that the language of the distributive clause directing distribution to Sara's surviving issue "in equal shares" requires distribution, *per capita,* to a class composed of her lineal descendants living at the time of her death. It is true that the words "in equal shares" to persons designated by their relationship to some ancestor are ordinarily construed to direct a *per capita* distribution. *Ex Parte Brogden,* 180 N.C. 157, 104 S.E. 177 (1920). However,

this general rule does not apply when a contrary intent appears from other provisions of the document. *Id.* Such a contrary intent on the part of Robert Hanes is evident, and we reject appellants' argument. As recited in Paragraph Five of the distributive provisions of the trust established for Sara Anne Hanes Willis, Robert Hanes simultaneously established another trust for the benefit of his other child, Frank Borden Hanes. In the event of Sara's death without issue (after the death of her mother), Mr. Hanes directed that the assets of Sara's trust be transferred to the Frank Borden Hanes trust, unless there are other children of the grantor living, *or dead leaving issue surviving*, in which case Mr. Hanes provides for the administration and distribution of the trust assets "*for the equal benefit of all of the Grantor's children.*" (Emphasis added.) We believe these provisions establish Mr. Hanes' intent to benefit his children and their families equally, and consequently to benefit his grandchildren (or, if deceased, their representatives) only to the extent of their parents' share. Any other interpretation would result in the possibility of a disproportionate distribution of the trust estate among the families of Mr. Hanes' children, contrary to the distributive scheme which we believe he intended.

We hold that the interpretation given by the trial court to Paragraph Four of the distributive provisions of the Trust Agreement is consistent with the intent of the settlor, as reflected by the entire Trust Agreement and the circumstances surrounding its execution, and that such interpretation is in accord with well-established rules of construction and produces a reasonable and equitable result. Therefore, the judgment of the trial court will be affirmed.

Affirmed.

Judges JOHNSON and LEWIS concur.

RICHARD HOLBROOK, PLAINTIFF v. TOMMY GAYLE HENLEY, DEFENDANT

No. 9418SC417

(Filed 7 March 1995)

Automobiles and Other Vehicles § 766 (NCI4th)— failure to maintain proper lookout—submission of sudden emergency issue error

The trial court erred by submitting the issue of sudden emergency to the jury where the evidence tended to show that at the time of the accident the weather was clear, traffic was heavy, and the terrain was relatively flat; defendant had travelled this stretch of highway since the 1960's; plaintiff placed himself in a position from which he was unable to control his vehicle to avoid a collision when confronted with braking cars in his lane of travel; and thus the sudden emergency upon which defendant relied was brought about, at least in part, by his own inattention and failure to maintain a proper lookout.

Am Jur 2d, Automobiles and Highway Traffic §§ 1117, 1119.

Instructions on sudden emergency in motor vehicle cases. 80 ALR2d 5.

Modern status of sudden emergency doctrine. 10 ALR5th 680.

Appeal by plaintiff from judgment signed 6 November 1993 by Judge Thomas W. Seay, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 23 January 1995.

Max D. Ballinger for plaintiff-appellant.

Henson Henson Bayliss & Sue, L.L.P, by Daniel L. Deuterman, for defendant-appellee.

MARTIN, MARK D., Judge.

The question presented by this appeal is whether the trial court erred by submitting the doctrine of sudden emergency to the jury.

This action arose out of a motor vehicle collision which occurred on 28 March 1989. The site of the collision was U.S. Highway 29

South, near the East Lee Street exit, within the city limits of Greensboro, North Carolina.

The evidence at trial revealed the following: At the time of the accident, plaintiff, Richard Holbrook, and defendant, Tommy Gayle Henley, were operating their vehicles on Highway 29 South. Plaintiff was proceeding in the right hand lane and defendant was proceeding in the left hand lane. The weather was clear and the traffic was heavy.

The terrain was relatively flat with no obstructions to prevent defendant from seeing the cars travelling ahead of him in his lane of travel. When he observed cars in his lane of travel braking, defendant applied his brakes to avoid a collision with the cars ahead of him. While attempting to stop his vehicle, defendant's vehicle slid sideways into plaintiff's lane of travel without warning. Defendant's vehicle struck plaintiff's vehicle in the rear corner panel and knocked it 180 degrees into the guard rail. Defendant testified he had travelled up and down this stretch of Highway 29 since the 1960s.

On 23 February 1992 plaintiff filed his complaint in this action alleging the negligence of defendant was the proximate cause of his injuries and damages. Plaintiff gave notice to his underinsured motorist carrier, the Erie Insurance Group, and the Erie Insurance Group defended in the name of defendant. On 6 May 1992 defendant filed an answer denying plaintiff's allegations. The case was tried during the 1 November 1993 Civil Jury Session of Guilford County Superior Court. Issues of negligence, including an instruction on the sudden emergency doctrine, and damages were submitted to the jury. On 5 November 1993 the jury returned a verdict of no negligence in favor of defendant.

On appeal plaintiff contends the trial court erred by submitting the doctrine of sudden emergency within its instruction on defendant's negligence.

At the outset defendant contends the question of whether the sudden emergency doctrine was properly submitted to the jury has not been preserved for appellate review.

The North Carolina Rules of Appellate Procedure preclude an assignment of error arising from a challenged jury instruction absent an "[objection] thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection," N.C.R. App. P. 10(b)(2), and the "[identification of] the specific portion of the jury charge in question by setting it within

brackets or by any other clear means of reference in the record on appeal." N.C.R. App. P. 10(c)(2).

At the charge conference plaintiff specifically objected to the "submission to the jury of the issue in any way of the doctrine of sudden emergency," and later objected to the content of the sudden emergency charge. Likewise, plaintiff specifically referenced this portion of the transcript within his brief and included a copy of the trial court's instruction on the sudden emergency doctrine within the appendix thereto. We believe plaintiff substantially complied with our rules and therefore adequately preserved this question for appellate review.

We now address the merits of the question presented for review. It is well settled that the doctrine of sudden emergency provides a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others. As stated by this Court:

> An automobile driver, who, by the negligence of another and not his own negligence, is suddenly placed in an emergency and compelled to act instantly to avoid a collision or injury, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make, even though he made neither the wisest choice nor the one that would have been required in the exercise of ordinary care except for the emergency.

Hairston v. Alexander Tank & Equip. Co., 60 N.C. App. 320, 328-329, 299 S.E.2d 790, 795 (1983) (emphasis added) (*quoting Williams v. Jones*, 53 N.C. App. 171, 177-178, 280 S.E.2d 474, 477 (1981)), *rev'd on other grounds*, 310 N.C. 227, 311 S.E.2d 559 (1984).

Significantly, a party cannot by his own negligent conduct permit an emergency to arise and then excuse himself for his actions or omissions on the ground that he was called to act in an emergency. *Brunson v. Gainey*, 245 N.C. 152, 156, 95 S.E.2d 514, 517 (1956). In cases where the defending party requests the instruction on the issue of the defendant's negligence, the evidence must be considered in the light most favorable to the defendant. *E.g.*, *Hunt v. Carolina Truck Supplies, Inc.*, 266 N.C. 314, 317, 146 S.E.2d 84, 86 (1966); *Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 448-449, 386 S.E.2d 76, 79 (1989), *disc. review denied*, 326 N.C. 363, 389 S.E.2d 811, *aff'd*, 327 N.C. 464, 396 S.E.2d 323 (1990).

Pursuant to the two-step inquiry recently articulated by this Court in *Keith v. Polier*, 109 N.C. App. 94, 99, 425 S.E.2d 723, 726 (1993), we must first determine whether a sudden emergency did exist, and second whether the emergency was brought about by the negligence of the defendant.

"An 'emergency situation' has been defined by our courts as that which 'compels [defendant] to act instantly to avoid a collision or injury . . . .' " *Keith v. Polier*, 109 N.C. App. at 98-99, 425 S.E.2d at 726 (*quoting Schaefer v. Wickstead*, 88 N.C. App. 468, 471, 363 S.E.2d 653, 655 (1988)). In the instant action defendant noticed cars in his lane of travel were braking, and he applied his brakes to prevent a collision with the cars ahead of him. Clearly, defendant was faced with an emergency situation. Having answered the first question affirmatively, the only remaining inquiry is whether the emergency was brought about, at least in part, by defendant's own negligence.

"As a general rule, every motorist driving upon the highways of this state is bound to a minimal duty of care to keep a reasonable and proper lookout in the direction of travel and see what he ought to see." *Id.* at 99, 425 S.E.2d at 726, *citing Masciulli v. Tucker*, 82 N.C. App. 200, 205, 346 S.E.2d 305, 308 (1986); *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 239, 311 S.E.2d 559, 568 (1984). The law requires a motorist to take notice that "the exigencies of traffic may, at any time, [require] a sudden stop by him or by the motor vehicle immediately in front of him. . . . [T]he reasonably prudent operator will not put himself unnecessarily in a position which will absolutely preclude him from coping with an emergency." *Beanblossom v. Thomas*, 266 N.C. 181, 187-188, 146 S.E.2d 36, 41 (1966). Consequently, "[w]here a motorist discovers, or in the exercise of due care should discover, obstruction within the extreme range of his vision and can stop if he acts immediately, but his estimates of his speed, distance, and ability to stop are inaccurate and he finds stopping impossible, he cannot then claim the benefit of the sudden emergency doctrine." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. at 239, 311 S.E.2d at 568 (citations omitted). Stated alternatively, "[d]rivers are therefore required in the exercise of ordinary care to expect sudden stops when driving in heavy traffic. In accord, such stops do not constitute an unexpected or emergency situation." *Keith v. Polier*, 109 N.C. App. at 99, 425 S.E.2d at 726.

In *Hairston* the Supreme Court addressed whether the trial court properly refused to submit a sudden emergency instruction to the

jury. In that case an oncoming truck struck a van which had been stopped on a bridge for 90 seconds. 60 N.C. App. at 328, 299 S.E.2d at 794. The van was visible for a quarter of a mile, and could have been seen by the truck driver had he been keeping a proper lookout. The Supreme Court stated that the crucial question in determining the applicability of the sudden emergency doctrine was whether the truck driver, "when approaching the stopped vehicle, saw or by the exercise of due care should have seen that he was approaching a zone of danger." 310 N.C. at 239, 311 S.E.2d at 568. The court found that the evidence, taken in the light most favorable to the party seeking the sudden emergency instruction, was not sufficient to yield any inference that the truck driver faced a sudden emergency not of his own making or to which his own actions did not contribute. *Id.* at 241, 311 S.E.2d at 569. The Supreme Court concluded that, on the contrary, the evidence demonstrated the truck driver did not perceive any "emergency," and "any emergency existing on these facts was of the [truck driver's] own creation," and thus did not support an instruction on the sudden emergency doctrine. *Id.*

In *Bryant v. Winkler*, 16 N.C. App. 612, 192 S.E.2d 686 (1972), this Court addressed whether the trial court properly refused to submit a sudden emergency instruction to the jury. In *Bryant* plaintiff's vehicle was stopped in front of defendant at a narrow bridge, as everyone in the community knew was common practice, and defendant struck plaintiff's vehicle from the rear as plaintiff waited for an oncoming vehicle to clear the bridge. *Id.* at 612-613, 192 S.E.2d at 687. This Court held that defendant's conduct in "failing to bring her automobile under control as she proceeded onto a narrow bridge where two cars were meeting in front of her contributed to whatever emergency arose from the sudden stop by the Bryant vehicle," *Id.* at 613, 192 S.E.2d at 687, and upheld the refusal of the trial court to submit the sudden emergency doctrine to the jury.

Finally, in *Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993), this Court addressed whether the trial court erred by submitting the sudden emergency doctrine to the jury. In *Polier* the plaintiff had stopped suddenly at a traffic signal, and the defendant, who was directly behind the plaintiff, struck plaintiff's vehicle in the rear. *Id.* at 96, 425 S.E.2d at 725. At the time of the accident the traffic was very heavy, visibility was good and the weather was hot and sunny. *Id.* This Court concluded:

> The alleged emergency was not sudden, and if an emergency did in fact exist, the evidence indicates that it was brought about, at least in part, due to the defendant's potential failure to keep a proper lookout and failure to reduce his speed in time to avoid an accident. Defendant should not have been given the benefit of an instruction on the sudden emergency doctrine where the evidence was insufficient to support a finding that a sudden emergency did in fact exist.

Id. at 99-100, 425 S.E.2d at 727.

Like the defendants in *Hairston*, *Bryant*, and *Keith*, defendant here relies on a sudden emergency that was brought about, at least in part, by his own potential inattention and failure to maintain a proper lookout. At the time of the accident, the weather was clear, traffic was heavy, and the terrain was relatively flat. Having travelled this stretch of Highway 29 since the 1960s, defendant nevertheless placed himself in a position from which he was unable to control his vehicle to avoid a collision when confronted with braking cars in his lane of travel.

Having answered the second prong of our inquiry in the negative, we conclude that defendant was not entitled to the benefit of the sudden emergency doctrine. Since plaintiff is entitled to a new trial, we decline to address the remaining assignments of error.

New Trial.

Chief Judge ARNOLD and Judge JOHNSON concur.

JOBY J. RICH v. R.L. CASEY, INC.

No. 9418SC301

(Filed 7 March 1995)

Workers' Compensation §§ 46, 52 (NCI4th)— no workers' compensation insurance carried by subcontractor—coverage through principal contractor—statutory employer—exclusivity of workers' compensation benefits

Where plaintiff's employer, a subcontractor, did not have workers' compensation insurance and did not furnish evidence of such to defendant principal contractor, and plaintiff sought and

received workers' compensation benefits from defendant's carrier, defendant was plaintiff's statutory employer, and benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. N.C.G.S. § 97-19.

Am Jur 2d, Workers' Compensation §§ 62 et seq., 229.

Appeal by plaintiff from order entered 27 January 1994 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 27 October 1994; reconsidered and heard without oral argument per order dated 24 January 1995.

On 4 September 1991, plaintiff was injured during the construction of the Colonial Heritage Center in Greensboro, North Carolina. Plaintiff was installing roof trusses on the morning of the accident. Plaintiff's employer and supervisor, Mark Moore, instructed plaintiff to place a bundle of plywood and some additional trusses on top of the trusses that were already installed. While Moore and his crew, including plaintiff, were leaving to take a lunch break, Moore was told by defendant's site superintendent that there was too much weight on the roof trusses. After lunch, Moore and plaintiff climbed up on the roof and began spreading the plywood over the roof. While Moore and plaintiff were on the roof, several of the trusses broke and the roof collapsed. Plaintiff's left foot was crushed between two trusses and a rod from the collapsing wall pierced plaintiff's back between his spine and his kidney. Moore was trapped under the falling trusses and killed.

Plaintiff's employer, Mark Moore Construction Company (hereinafter Moore's Company), contracted with defendant as a subcontractor on the construction project. Moore's Company failed to furnish defendant with proof of workers' compensation insurance. In fact, Moore's Company did not have workers' compensation insurance for its employees. Defendant, the principal contractor of the building project, submitted plaintiff's claims for benefits to its workers' compensation carrier pursuant to G.S. 97-19. Plaintiff's claim for benefits was approved by defendant's carrier. Plaintiff accepted workers' compensation benefits from defendant's workers' compensation carrier.

On 25 November 1992, plaintiff filed suit against defendant seeking compensatory and punitive damages for his injuries. On 19 November 1993 defendant moved for summary judgment on the

grounds that plaintiff's exclusive remedies were provided by the Workers' Compensation Act. On 27 January 1994, the trial court granted summary judgment in favor of defendant. Plaintiff appeals.

Smith, Follin & James, by Norman B. Smith and Seth R. Cohen, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Ellen M. Gregg, for defendant-appellee.

EAGLES, Judge.

Plaintiff contends that the trial court erred in granting defendant's motion for summary judgment. After careful review of the record and briefs, we affirm.

We note initially that this appeal is interlocutory since plaintiff amended his complaint on 10 November 1993 to include as a defendant, Guy M. Turner, Inc. The trial court granted summary judgment to defendant but the claims against defendant Turner were not decided. G.S. 1A-1, Rule 54(b) deals with judgments involving multiple claims or parties. Under Rule 54(b), a judgment that is final as to one or more of the parties or claims, but not all, may be immediately appealable if the trial court makes an express determination that there is no just reason for delay. *N.C. Railroad v. City of Charlotte*, 112 N.C. App. 762, 769, 437 S.E.2d 393, 396 (1993). *See also*, Comment 1A-1, Rule 54(b). In its order granting defendant's motion for summary judgment, the trial court certified the judgment for immediate appeal pursuant to Rule 54(b). Accordingly, we address the merits.

The following facts are undisputed. Defendant was the principal contractor for the construction of the Colonial Heritage Center. Plaintiff's employer, Mark Moore Construction Company, was a subcontractor on the project responsible for completing all rough carpentry, finish carpentry and truss erection. Although Moore's Construction Company was required by statute, G.S. 97-19, to furnish defendant with proof of the company's workers' compensation insurance, at the time of the accident, Moore's Construction Company had not furnished the required proof and did not have workers' compensation insurance for its employees. Pursuant to G.S. 97-19, plaintiff applied for and received workers' compensation benefits through defendant's workers' compensation carrier.

The sole issue before us is whether defendant, as a principal contractor, is plaintiff's "statutory employer" pursuant to G.S. 97-19 and

entitled to benefit from the exclusivity provisions of the Workers' Compensation Act (hereinafter Act). G.S. 97-9, 97-10.1. We conclude that defendant is plaintiff's statutory employer and that the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constitutes plaintiff's exclusive remedy against defendant for plaintiff's injuries.

The "statutory employer" statute, G.S. 97-19, provides in pertinent part:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article . . . . If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any such subcontractor, any principal or partner of such subcontractor, or any employee of such subcontractor for compensation or other benefits under this Article. . . .
>
> Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this Article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons or corporation who independently of such provision, would have been liable for the payment thereof.

G.S. 97-19. G.S. 97-19 applies only when two conditions are met. First, the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor. Second, the subcontractor does not have workers' compensation insurance coverage covering the injured employee. *Zocco v. U.S. Dept. of Army*, 791 F.Supp. 595, 599 (E.D.N.C. 1992). When these two conditions are met, the principal contractor becomes liable to the subcontractor's employee for payment of workers' compensation benefits. It is undisputed that defendant was the principal contractor

on the building project and that Moore's Construction Company was a subcontractor hired by defendant. Moore's Construction Company did not have workers' compensation insurance coverage at the time of the accident. Defendant, pursuant to G.S. 97-19, submitted plaintiff's claims to its workers' compensation carrier. Plaintiff's request was approved and plaintiff received workers' compensation benefits from defendant's workers' compensation carrier. The issue is whether defendant is entitled to benefit from the exclusivity provisions of the Act since it has paid plaintiff his workers' compensation benefits. We conclude that defendant is so entitled.

Larson on Workers' Compensation Law states:

> Forty-four states now have "statutory-employer" or "contractor-under" statutes—i.e., statutes which provide that the general contractor shall be liable for compensation to the employee of a subcontractor under him, usually when the subcontractor is uninsured . . . doing work which is part of the business, trade or occupation of the principal contractor. Since the general contractor is thereby, in effect, made the employer for purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an employer from third-party suit when the facts are such that he could be made liable for compensation; and the great majority of cases have so held.

2A Larson, *Workmen's Compensation Law*, § 72.31(a). In *Zocco v. U.S. Dept. of Army*, 791 F.Supp. 595 (E.D.N.C. 1992), plaintiff was injured while operating a ride at the 1988 fair at the Fort Bragg Army Base. Plaintiff was employed by subcontractor Lawrence Brawley who was hired by the principal contractor, Deggeller Attractions, Inc., to assemble and operate two rides at the fair. Plaintiff filed suit against the Army, Deggeller, and Brawley alleging negligence. Although plaintiff's workers' compensation claims were still pending before the Industrial Commission, plaintiff chose to first pursue the civil lawsuit against the defendants. The United States District Court held that since Brawley was Deggeller's subcontractor and Brawley did not have workers' compensation insurance, G.S. 97-19 applied making Deggeller plaintiff's statutory employer. "As a statutory employer, Deggeller is immunized from civil liability by the Act's exclusivity provisions." *Id.* at 603.

The rationale behind the district court's holding and the holdings of other states following this rule is that the principal contractor as statutory employer "steps into the shoes" of the subcontractor, plaintiff's immediate employer. Since the general contractor is subjected

to no fault liability under G.S. 97-19 and is required to compensate the subcontractor's injured employee, the principal contractor becomes the injured employee's immediate employer for purposes of the Act and is entitled to the benefit of the Act's exclusivity provisions. The plaintiff is not harmed by this construction because he still receives the same workers' compensation benefits for his injuries, albeit, from the principal contractor or its carrier.

Even though plaintiff arguably may have alleged in his complaint that defendant Casey knowingly violated its non-delegable duty to ensure that safety precautions were followed when undertaking an inherently dangerous activity, we do not find any forecast of evidence in the record and no argument in plaintiff's brief that any of the well-established exceptions to the exclusivity rule for intentional conduct are applicable to the facts of the case.

Accordingly, we conclude that defendant contractor is entitled to the Act's exclusivity provisions for employers and may not be sued based on the subcontractor's employee's injuries. The judgment of the trial court is affirmed.

Affirmed.

Judges WALKER and MARTIN, MARK D., concur.

JUDITH QUALE STEWART, PLAINTIFF v. DOROTHY S. KOPP; CHRISTINE A. DAVIS; MARSHALL D. McCLURE, JR.; LOVIE E. DAVIS; AND JEANNE M. CASEY, INDIVIDUALLY AND IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF DIRECTORS OF THE CHALCOMBE COURT HOMEOWNERS ASSOCIATION, INC., DEFENDANTS AND CHALCOMBE COURT HOMEOWNERS ASSOCIATION, INTERVENOR

No. 9426SC359

(Filed 7 March 1995)

1. Housing, and Housing Authorities and Projects § 74 (NCI4th)— violation of condominium documents—authority of homeowners association to impose fine

A homeowners association, through its board of directors, had the power to impose a fine for each day that plaintiff continued to violate condominium documents by altering the appearance of the entrance to her unit. N.C.G.S. § 47C-3-102(a)(11).

Am Jur 2d, Condominiums and Co-operative Apartments §§ 45-47.

2. Conspiracy § 12 (NCI4th)— insufficiency of evidence

There was no merit to plaintiff's argument that the trial court erred in granting summary judgment for defendants (members of the board of directors of a homeowners association) on her claim for damages because the evidence showed that defendants engaged in a civil conspiracy against her and violated the North Carolina Civil RICO Act by threatening to impose an unlawful fine on her and then threatening to file a claim of lien on her property in order to coerce her into paying the fine, since plaintiff failed to show that an agreement existed among defendants to do an unlawful act or to do a lawful act in an unlawful way and that such agreement resulted in injury inflicted upon her by one or more of the defendants.

Am Jur 2d, Conspiracy §§ 68, 69.

Appeal by plaintiff from judgment entered 20 October 1993 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 January 1995.

Joseph F. Lyles for plaintiff-appellant.

Petree Stockton, L.L.P., by Sharon L. McConnell, for defendants-appellees.

Delaney and Sellers, P.A., by John F. Ayers III, for intervenor-appellee.

WALKER, Judge.

Chalcombe Court is a condominium community in Charlotte, North Carolina. The community is governed by its mandatory-membership Homeowners Association (the Association), acting through its Board of Directors (the Board). The community and the Association are further governed by the Declaration of Unit Ownership and Bylaws and the General Rules and Regulations (the condominium documents).

In May 1992 plaintiff purchased a unit at Chalcombe Court. In November 1992 plaintiff removed the solid panel front door of her unit and installed a 15-glass-pane French door. Over a period of time, she also installed wooden trellises, concrete planters and fountains, and numerous hanging plants and lights on her front entranceway and balcony. These changes violated provisions of the condominium documents which required residents to obtain prior written consent of

the Board before making any changes to the outside appearance of their units. Plaintiff had not sought such consent. In November 1992, defendant Kopp, the Board's chairperson, informed plaintiff of the violation involving the French door and asked plaintiff to remove the door, but plaintiff refused. Chalcombe Court's management company also notified plaintiff of this violation, but plaintiff persisted in her refusal to remove the door.

In March 1993 the Association formally notified plaintiff that it planned to conduct a hearing to discuss the unauthorized alterations and decorations and to determine whether to assess a fine against plaintiff's unit for non-compliance with the condominium documents. At the hearing on 15 March, the Association, through the Board, found plaintiff in violation of the condominium documents and voted to assess a fine against her unit of $100 for each day the violation continued. On 16 March, the Association notified plaintiff in writing that the fine would commence on 20 March 1993 if she did not restore her unit to compliance with the condominium documents. Plaintiff did not comply. On 19 March 1993, plaintiff for the first time filed a written request to keep the French door and the decorations to her unit, which the Board denied. On 20 April 1993, plaintiff received a monthly statement listing the amount of her fine as $2,900, or $100 per day from 20 March to 18 April 1993.

On 7 May 1993 plaintiff commenced this lawsuit against the members of the Board. Plaintiff asserted three claims: (1) a member's derivative action under the North Carolina Nonprofit Corporation Act, contending that the Board had no authority to assess a $100-per-day fine against her unit for continuing violations of the condominium documents and requesting a permanent injunction prohibiting defendants from collecting the fine; (2) a claim for damages on the ground that the Board members engaged in a civil conspiracy to commit an abuse of process by threatening to assess and then assessing a fine against her unit for her refusal to correct the unauthorized alterations; and (3) a claim for damages on the ground that the Board members violated the North Carolina Civil RICO Act by conspiring to commit the crime of extortion.

On 21 May 1993 the Association filed a claim of lien against plaintiff's property, pursuant to N.C. Gen. Stat. § 47C-3-116, to secure its right to payment of the amount of the fine.

On 6 August 1993 defendants answered denying all liability. The Association was allowed to intervene and filed an answer asserting a

claim for a permanent mandatory injunction against plaintiff's unauthorized changes to her unit. Defendants and the Association moved for summary judgment, and the day before the hearing, plaintiff filed a cross-motion for summary judgment. At the hearing, the trial court declined to hear plaintiff's motion because it had not been timely served. The court granted summary judgment in favor of defendants and in favor of the Association on all of plaintiff's claims and entered a permanent mandatory injunction against plaintiff's unauthorized alterations. Plaintiff appeals from both orders.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1994); *see also Stokes Co. Soil Conservation Dist. v. Shelton*, 67 N.C. App. 728, 731, 314 S.E.2d 2, 3 (1984) (summary judgment appropriate where no genuine issue of fact existed and plaintiff was entitled to injunctive relief as a matter of law).

[1] Plaintiff first argues that summary judgment in favor of defendants on her complaint for an injunction was improper because the evidence showed the Board was not authorized to levy a fine against her in any amount.

Article VI, Section 3 of the Condominium Declaration states:

> The duties and powers of the Condominium Association shall be those, and shall be exercised as, set forth in the [North Carolina Condominium] Act, this Declaration and the Bylaws, together with those implied as reasonably necessary to effect the purposes of the Condominium Association. . . .

The Declaration therefore incorporates the express statutory powers granted to the Association by the North Carolina Condominium Act, which allows the Association to "[i]mpose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines not to exceed one hundred fifty dollars . . . for violations of" the condominium documents. N.C. Gen. Stat. § 47C-3-102(a)(11) (1994). It is clear from reading these two provisions together that the Association, through its Board, had the power to fine plaintiff for her violations of the condominium documents.

Plaintiff claims that even if the Association had the power to fine her, N.C. Gen. Stat. § 47C-3-102(a)(11) does not permit the assess-

ment of a separate fine for *each day* of a continuing violation. With regard to this section, the Revisor of Statutes has stated: "There is nothing to prevent the imposition of separate fines for each violation." Defendants therefore assert that in the absence of any statutory or case law to the contrary, the Board reasonably interpreted its authority to allow assessment of such a fine for each day of a continuing violation of the condominium documents. They claim that since the purpose of such a fine is to induce compliance with the condominium documents, much as a fine for civil contempt is intended to induce compliance with a court order, a daily assessment of this fine is appropriate and is permitted by statute. Defendants also point out that if the maximum fine for any violation is in fact limited to $150, then an offending condominium owner could easily pay the fine, ignore the Association, and continue to violate applicable rules. We agree.

The Board did not exceed its authority in levying a fine of $100 for each day plaintiff continued in violation, and the trial court properly granted summary judgment for defendants on plaintiff's claim for an injunction. We note that even if the Board had exceeded its authority, a member's derivative action would not have been the appropriate cause of action, since plaintiff alleged no injury to the Association by the Board's action and was not seeking to recover on behalf of the Association. *See* N.C. Gen. Stat. § 55A-7-40 (1994).

[2] Plaintiff next argues that summary judgment in favor of defendants on her claim for damages was improper because the evidence showed that defendants engaged in a civil conspiracy against her and violated the North Carolina Civil RICO Act by threatening to impose an unlawful fine on her and then threatening to file a claim of lien on her property in order to coerce her into paying the fine. This argument is without merit.

To establish a civil conspiracy claim, plaintiff had to prove that an agreement existed among the defendants to do an unlawful act or to do a lawful act in an unlawful way and that this agreement resulted in injury inflicted upon her by one or more of the defendants. *Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987). Since we have determined that defendants acted within their authority to impose the fine, they can collect it by filing a claim of lien on plaintiff's property as authorized by the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-116 (1994). Because plaintiff's civil conspiracy claim is fatally flawed, it follows that her RICO claim cannot succeed,

and the court properly granted summary judgment in favor of defendants on both claims.

Finally, plaintiff contends that the trial court erred by requiring her to remove the unauthorized decorations to her unit. She claims that the decorations to her unit were reasonable and that the Association waived the prior written consent requirement for exterior changes by allowing other residents to make changes without first obtaining such consent. These arguments are without merit, and the trial court properly granted summary judgment in favor of the Association.

Affirmed.

Judges EAGLES and McGEE concur.

WIMPHREY W. JENKINS, PEGGY JOHNSON, RUBY J. BASKERVILLE, AND EMMA CLEMONS, PLAINTIFFS v. RICHMOND COUNTY, NORTH CAROLINA; LAT PURSER & ASSOCIATES, INC.; CORNERSTONE DEVELOPMENT COMPANY; FOOD LION, INC.; AND JOHN ALDEN LIFE INSURANCE COMPANY AND CHARLES L. FULTON, TRUSTEE, DEFENDANTS

No. 9420SC268

(Filed 7 March 1995)

Judgments § 523 (NCI4th)— 60(b) motion for relief—motion not timely

Plaintiffs' motion for relief pursuant to N.C.G.S. § 1A-1, Rule 60(b) was not made within a reasonable time where plaintiffs waited an entire year before filing it, and this motion followed not only the dismissal of their appeal from the judgment itself but also the dismissal of their appeal from the order dismissing their appeal from the judgment, both of which dismissals were the result of appellate rules violations involving lack of timeliness.

Am Jur 2d, Judgments §§ 699 et seq.

Appeal by defendants Cornerstone Development Company and Lat Purser & Associates, Inc., from order entered 14 December 1993 by Judge Thomas W. Ross in Richmond County Superior Court. Heard in the Court of Appeals 10 January 1995.

This case has come to us at an earlier stage in the proceedings, *see Jenkins v. Richmond County*, 99 N.C. App. 717, 394 S.E.2d 258 (1990), *disc. review denied*, 328 N.C. 572, 403 S.E.2d 512 (1991), and we decline to repeat the facts here. We remanded the case for determination of the value of plaintiffs' unimproved lot, the rental value and profits derived from the property in its unimproved condition during the time of defendants' occupation, and the value of improvements made by defendants. Our decision noted that plaintiffs would have to compensate defendants for the value of the improvements, but also "point[ed] out that plaintiffs may opt to relinquish their estate to defendants, who in turn must pay plaintiffs the value of the property in its unimproved condition . . . . If plaintiffs fail to exercise [this option], the value of the improvements becomes a lien and if not paid, a sale of the premises will be ordered. G.S. 1-347." *Id.* at 723, 394 S.E.2d at 262.

Upon remand, the above issues were tried before a jury at the 21 October 1991 regular session of Richmond County Superior Court, Judge James C. Davis presiding. At the close of plaintiffs' evidence, the trial court directed a verdict in favor of defendants on the issue of plaintiffs' alleged lost rents and profits on the lot in question during defendants' possession. By agreement of the parties at the close of all the evidence, the trial court directed a verdict for plaintiffs in the amount of $1,500 on the issue of the fair market value of the lot in its unimproved condition. Further, at the close of all the evidence and upon motion of defendants, the trial court granted a directed verdict in the amount of $248,500 on the issue of the fair market value of the permanent improvements. Judgment was entered 23 October 1991.

Plaintiffs gave notice of appeal from the judgment on 31 October 1991. Following apparently unsuccessful efforts to settle the matter, defendants moved, on 9 December 1991, to dismiss plaintiffs' appeal for their failure to submit a proposed record on appeal within the time prescribed by N.C.R. App. P. 11(a). Plaintiffs moved for an extension of time to serve the proposed record. After a hearing, Judge F. Fetzer Mills denied plaintiffs' motion for an extension of time and granted defendants' motion to dismiss plaintiffs' appeal by order dated 27 January 1992. Plaintiffs gave notice of appeal from this order on 4 February 1992.

Defendants began proceedings to execute on the judgment. On 12 March 1992, the day of the scheduled execution sale of the property, plaintiffs filed a motion to stay execution pending their appeal of the

27 January 1992 order. That same day, defendants moved to dismiss the second appeal for plaintiffs' failure to comply with the Appellate Rules. After a hearing, Judge Mills denied plaintiffs' motion for an extension of time to submit a proposed record, denied plaintiffs' motion for a stay, and granted defendants' motion to dismiss the appeal. Plaintiffs did not appeal from Judge Mills' second order.

The execution sale proceeded as scheduled and defendant Cornerstone Development Company purchased the property for $248,500. On 20 March 1992, plaintiffs petitioned this Court for a writ of supersedeas under N.C.R. App. P. 23 and moved for a temporary stay; the motion was denied on 25 March and the petition was denied on 30 March 1992. A final report and account of the execution sale was entered on 31 March 1992, and though defendants received full value for the improvements themselves, there remained outstanding pre-judgment interest and court costs. Defendants have sought to enforce the judgment as to the remaining balance by action in plaintiffs' home state of New Jersey.

On 23 October 1992, plaintiffs filed a motion for relief from the 23 October 1991 judgment pursuant to G.S. § 1A-1, Rule 60. On 31 August 1993, plaintiffs requested a hearing on their motion for the 25 October 1993 session of Richmond County Superior Court. An order granting plaintiffs relief from the judgment was entered by Judge Ross on 14 December 1993. Defendants appealed.

No brief filed for plaintiff-appellees.

Leath, Bynum, Kitchin & Neal, P.A., by Henry L. Kitchin and Stephan R. Futrell, for defendant-appellants.

MARTIN, John C., Judge.

G.S. § 1A-1, Rule 60(b) provides:

> (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;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1),(2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . . .

Plaintiffs did not specify in their motion the subsection of Rule 60(b) pursuant to which they sought relief; however, the trial court determined that plaintiffs were entitled to relief under both subsections (5) and (6). The trial court concluded that the 23 October 1991 judgment had been satisfied when plaintiffs' property was transferred to defendant Cornerstone Development Company to satisfy the lien on the value of the permanent improvements placed on the property. Judge Ross alternately concluded that defendants' attempt to collect interest on the value of the improvements constituted an extraordinary circumstance justifying relief pursuant to Rule 60(b)(6).

Under both Rule 60(b)(5) and (6), the motion for relief must be made within a reasonable time. We conclude that plaintiffs' motion was not made within a reasonable time, and we reverse the order of the trial court granting plaintiffs relief.

Plaintiffs waited literally an entire year before filing their motion for relief, and this motion followed not only the dismissal of their appeal from the judgment itself, but also the dismissal of their appeal from the order dismissing their appeal from the judgment. Both dismissals were the result of appellate rules violations due to plaintiffs' failure to file and serve their proposed records on appeal within the time prescribed by the North Carolina Rules of Appellate Procedure.

That which constitutes a reasonable time under Rule 60(b) is determined by examining the circumstances of the individual case. *Brown v. Windhom*, 104 N.C. App. 219, 408 S.E.2d 536 (1991). In *Brown*, the defendant's only explanation for a year-long delay in filing

his motion for relief was uncertainty as to his legal rights. This Court held such an explanation to be insufficient justification to award relief after a year's delay.

Here, plaintiffs have offered no explanation for the one-year delay in filing their motion for relief, or the subsequent additional year-long delay in prosecuting the motion. Under the circumstances present here, the motion simply cannot be considered as having been made within a reasonable time. (*See Nickels v. Nickels*, 51 N.C. App. 690, 277 S.E.2d 577, *disc. review denied*, 303 N.C. 545, 281 S.E.2d 392 (1981), where a twenty-three month interval between entry of a consent judgment and defendant's asking for relief from that judgment was considered an unreasonable delay.) The record shows that plaintiffs became aware of the judgment's inclusion of interest and costs beyond the value of the improvements upon the property no later than early February 1992, within four months of the date of judgment. Nevertheless, plaintiffs waited over eight more months before filing their motion for relief based on defendants' execution on the judgment, and another year before bringing the motion before the court for a decision.

We cannot help but observe that dilatory practices, amounting to violations of appellate rules designed to expedite the efficient handling of disputes to final resolution, have twice led to the dismissal of plaintiffs' appeals. We also note that plaintiffs did not appeal from Judge Mills' second order, which effectively ended their appeal in this matter. Thus, plaintiffs appear to have attempted to employ a motion for relief pursuant to Rule 60(b) as a substitute for appeal from the 23 October 1991 judgment after the proper avenues for that appeal had been closed to them through their own inaction. Motions pursuant to Rule 60(b) may not be used as a substitute for appeal. *Concrete Supply Co. v. Ramseur Baptist Church*, 95 N.C. App. 658, 383 S.E.2d 222 (1989). The order of the trial court is reversed.

Reversed.

Judges COZORT and JOHN concur.

JANET McCULLOUGH v. JAMES JOHNSON

No. 9426DC239

(Filed 7 March 1995)

Parent and Child § 37 (NCI4th)— retroactive child support— insufficiency of findings

An order for retroactive child support was not supported by sufficient findings where it did not include findings with regard to the actual expenditures made on behalf of the child for the period in question, nor was there a determination that the actual expenditures were reasonably necessary.

Am Jur 2d, Parent and Child §§ 69 et seq.

Appeal by defendant from judgment entered 25 August 1993 by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 30 January 1995.

Plaintiff and defendant are the parents of an illegitimate child born 23 February 1991. In August 1992 plaintiff instituted an action to establish paternity and child support. Defendant did not reply to the complaint. On 30 November 1992 a default judgment was entered against defendant on the paternity claim.

On 28 December 1992 defendant was served with notice of a hearing to establish child support payments. On 8 January 1993 the trial judge received evidence pertaining to the parties' expenses, debts, estates, and income. The trial judge entered an order in open court establishing the amount of prospective child support, retroactive child support, and the payment schedule. Subsequently an order was filed that contained the judge's findings of fact and conclusions of law. From this order defendant appeals.

Timothy M. Stokes for plaintiff appellee.

Michael S. Scofield and Mary V. Carrigan for defendant appellant.

ARNOLD, Chief Judge.

Defendant argues that the trial judge's sole finding related to retroactive child support is actually a conclusion of law, and, therefore, the order for retroactive child support is not supported by the findings.

The judge's only finding related specifically to retroactive child support was "6. A reasonable amount of past child support, for the period September 1, 1992, through December 31, 1992, is $500 per month." Defendant is correct in his contention that this finding is a conclusion and is therefore insufficient to support the order for retroactive child support. Determining what is reasonable requires an exercise of judgment and is therefore a conclusion of law. *Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985).

Findings in support of an award of retroactive child support must include the actual expenditures made on behalf of the child between September and December 1992. *See Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991). The judge must also determine that the actual expenditures were reasonably necessary. *Id.* Because the order for retroactive child support is not supported by sufficient findings we reverse and remand for a new hearing at which the parties may present additional evidence if necessary. Addressing defendant's lack-of-notice issue is unnecessary because defendant presumably will be properly served with notice of the new hearing.

Reversed and remanded.

Judges WYNN and MARTIN, JOHN C., concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS
FILED 21 FEBRUARY 1995

BARNHARDT v. WILLIAMS No. 94-486	Mecklenburg (93CVD556MRB)	Affirmed
CORL v. BUTLER No. 93-1030	Rowan (91CVS1842)	New Trial
CRATT v. PERDUE FARMS,INC. No. 94-429	Ind. Comm. (632855)	Affirmed
DISHER v. DISHER No. 94-357	Forsyth (90CVD5408)	Affirmed
ELLER v. NGUYEN No. 94-319	Rowan (92CVD1326)	Vacated & Remanded
GOLOMBISKY v. GOLOMBISKY No. 93-1022	Durham (87CVD674)	Affirmed
IN RE BECKER No. 94-267	McDowell (88J35) (88J36) (88J37) (88J38) (88J39)	Affirmed
IN RE EDGE No. 93-1300	Cumberland (93CVD2166)	Reversed
JONES v. UNITED PARCEL SERVICE No. 94-625	Ind. Comm. (009535)	Affirmed
LEA v. LEA No. 94-394	Wake (89CVD12297)	Reversed & Remanded with Instructions
McKENZIE v. NEWMAN No. 94-237	Cumberland (91CVS6469)	Appeal Dismissed
N.C. FARM BUREAU MUTUAL INS. CO. v. ALLSTATE INS. CO. No. 94-62	Wake (92CVD08843)	Affirmed
PALMER v. KILLENS No. 94-995	Davidson (93CVS2075)	Affirmed
POWERS v. UNC-CH No. 94-694	Alamance (93CVS2210)	Affirmed
ROSE v. ROSE No. 94-939	Durham (91CVD2279)	Affirmed

SCARLETT v. RILEY No. 94-836	Orange (89CVD964)	Dismissed
SIMS v. DRAVO CORP. No. 93-200	Ind. Comm. (902248)	Affirmed
STATE v. BARTS No. 94-678	Wake (94CRS19465)	No Error
STATE v. CHANEY No. 94-821	Cumberland (92CRS27866)	New Trial
STATE v. CHAPPELL No. 94-432	Dare (93CRS1118)	No Error
STATE v. CHINA No. 94-843	Durham (93CRS25027)	No Error
STATE v. EVANS No. 94-800	Granville (93CRS3026) (93CRS3843) (93CRS3844) (93CRS5945)	93CRS5945— Remanded for Resentencing 93CRS3843 & 93CRS3844, No Prejudicial Error
STATE v. FLORES No. 94-963	Guilford (91CRS65741) (91CRS65742)	No Error
STATE v. KAPALSKI No. 94-492	Wake (93CRS64078) (93CRS64080)	No Error
STATE v. McGEE No. 94-924	Mecklenburg (92CRS87256) (92CRS87257) (92CRS87258) (92CRS87259) (92CRS87260) (92CRS87261)	No Error
STATE v. McMILLAN No. 94-750	Cabarrus (92CRS11193)	No Error
STATE v. PITT No. 94-721	Pitt (93CRS25996) (93CRS25997)	Affirmed
STATE v. QUINN No. 93-400	Mecklenburg (92CRS3805)	No Error

STATE v. REVELS No. 94-822	Forsyth (94CRS8740) (94CRS8741) (94CRS8742) (94CRS8743)	No Error
STATE v. ROBBINS No. 94-744	Guilford (93CRS20722) (93CRS57303)	No Error
STATE v. SESSOMS No. 94-516	Guilford (92CRS43984) (92CRS43985)	No Error
STATE v. SMITH No. 94-1009	Watauga (93CRS3692)	Affirmed
STATE v. STEWART No. 94-907	Columbus (93CRS8502)	No Error
STEWART v. PARISH No. 94-508	Wake (93CVS03846)	Affirmed
TOWN OF WEAVERVILLE v. WOLHART No. 94-278	Buncombe (93CVS850)	Affirmed
WEINGARTZ v. WEINGARTZ No. 94-190	Transylvania (91CVD419)	Remanded
WIDENER v. RJR/NABISCO No. 94-532	Ind. Comm. (021636)	Affirmed

Filed 7 March 1995

BASTEDO v. CRAVEN No. 94-363	Cabarrus (92CVS781)	No Error
IN RE RAMSEY No. 94-411	Mecklenburg (9CVS63) (91J325) (91J326) (91J327) (91J328)	Affirmed
LOCKLEAR v. WILSON TREE CO. No. 94-906	Ind. Comm. (091728)	Dismissed
NAGY v. LIT No. 94-393	Mecklenburg (91CVS3315)	Affirmed
PHILIPS v. HALL No. 94-469	Edgecombe (92CVS1303)	Affirmed

STATE v. BARNWELL No. 94-861	Buncombe (93CRS6124) (93CRS59957)	No Error
STATE v. BOONE No. 94-958	Edgecombe (94CRS1231)	No Error
STATE v. CAMPOS No. 94-874	Yadkin (93CRS708) (93CRS709)	Reversed & Remanded
STATE v. CAVINESS No. 94-736	Moore (93CRS6744)	Vacated in Part & Remanded
STATE v. KING No. 94-909	Lenoir (93CRS5059)	No Error
STATE v. McCLELLAND No. 94-402	Guilford (93CRS20752) (93CRS20762) (93CRS22753) (93CRS20453)	No Error
STATE v. MURPH No. 94-864	Alamance (92CRS30558)	No Error
STATE v. SMITH No. 94-960	Lenoir (93CRS257)	No Error
STATE v. SMITH No. 94-489	Robeson (92CRS4985)	No Error
STATE v. STRAITE No. 94-439	Mecklenburg (93CRS46626)	No Error
STATE v. STROMER No. 93-1123	Pitt (92CRS1330) (92CRS1331) (92CRS1332)	No Error
THARPE v. FRIEDERMANN No. 94-347	Surry (92CVS766)	Affirmed
TORIK, INC. v. J.A. INDUSTRIES, INC. No. 93-1311	Alamance (93CVS510)	Reversed
TURBYFILL v. DEPT. OF HEALTH, ENVIR. & NAT. RES. No. 94-775	Avery (93CVS162)	Affirmed

WIGGINS v. TRIESLER CO. No. 94-76	Mecklenburg (93CVS4410)	Affirmed in in Part, Reversed in Part & Remanded
WINANS v. DENSON No. 94-90	Lee (92CVS192)	Affirmed

WALTER M. JAMES, NANCY A. JAMES, DEBRA A. EVERIDGE, AND SHARON D. JAMES, PLAINTIFFS-APPELLANTS v. DAVID CLARK, 1-STOP, INC. OR 1-STOP FOOD STORES, INC., AND YOCO, INC., DEFENDANTS-APPELLEES

No. 9421SC481

(FILED 21 MARCH 1995)

1. Compromise and Settlement § 9 (NCI4th)— settlement agreement—failure of defendant to meet obligations

Plaintiffs' claims for strict liability under the Oil Pollution and Hazardous Substances Control Act of 1978, negligence, nuisance, and trespass were not barred by the satisfaction of the terms of the parties' settlement agreement where the settlement was contingent upon payment of $15,000 and the drilling of a new well which provided "clean water"; defendant's tender of payment three years after the settlement agreement and only after plaintiffs reopened the case was not made within a reasonable time; and a new well which contained compounds commonly associated with gasoline at a level which exceeded the State standards did not meet defendant's obligation of providing a well which supplied "clean water."

Am Jur 2d, Compromise and Settlement §§ 1-6, 25.

2. Limitations, Repose, and Laches § 42 (NCI4th)— water contaminated by gasoline—knowledge of source of contamination—action not barred by statute of limitations

Plaintiff's OPHSCA and negligence claims were not barred by the statute of limitations where plaintiffs did not associate the bad taste in their well water with gasoline until 1986, several years after they stopped drinking it; in that same year they were officially informed that their water was contaminated with gasoline; and there was no reason why plaintiffs should have known that their well was contaminated with gasoline before 1986, which was within three years of the filing of this action.

Am Jur 2d, Limitation of Actions §§ 86, 87.

3. Limitations, Repose, and Laches § 42 (NCI4th)— gasoline leaking—recurrent trespass—actions not barred by statute of limitations

Where the evidence showed that plaintiffs' well was contaminated when this action was filed and indicated continuing gasoline leakage at that time, the trespass was recurrent, and thus

plaintiffs' trespass and nuisance claims were not barred by N.C.G.S. § 1-52(3) (1983).

Am Jur 2d, Limitation of Actions §§ 86, 87.

4. **Environmental Protection, Regulation, and Conservation § 84 (NCI4th); Trespass § 49 (NCI4th)— ground water contaminated by gasoline—defendant's storage tank system causing contamination—sufficiency of evidence**

In plaintiffs' action for OPHSCA violations, negligence, nuisance, and trespass arising from the contamination of their well water with gasoline, the evidence forecast by plaintiffs pointed to defendant's underground storage tank system as the source of the contamination and was thus sufficient to create a genuine issue of material fact as to whether defendant caused the contamination.

Am Jur 2d, Pollution Control §§ 182 et seq.; Trespass § 215.

Appeal by plaintiffs from order entered 10 January 1994 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 26 January 1995.

Allman Spry Humphreys & Leggett, P.A., by David C. Smith, and Linda L. Helms, for plaintiffs-appellants.

Francisco & Merritt, by George E. Francisco, for defendant-appellee Yoco, Inc.

WALKER, Judge.

On 9 December 1988, Walter M. James, Nancy A. James and their daughters, Debra A. Everidge and Sharon D. James, sued defendants David Clark, 1-Stop, Inc. (1-Stop) and Yoco, Inc. (Yoco) for strict liability under the Oil Pollution and Hazardous Substances Control Act of 1978 (OPHSCA), N.C. Gen. Stat. § 143-215.75 *et. seq.*, negligence, nuisance, and trespass arising from the contamination of the James' well water with gasoline. Plaintiffs have resided at 7210 Vance Road in Kernersville since before 1979. In 1979, David Clark purchased a gas station and convenience store located across the road from plaintiffs' home. Clark purchased the store from W.R. Shreve, who had operated the store and gas station since at least 1967. Since 1979, Clark has operated the store and the only gas station in the area under a lease to 1-Stop, his corporation. At the time of purchase,

there were three gasoline pumps and underground storage tanks (USTs) located on the property which belonged to Barrow Oil. Defendant Yoco purchased the pumps, lines, and USTs from Barrow Oil in 1979 and began supplying gas to 1-Stop. Since 1979 defendant has maintained the pumps, lines, and USTs at 1-Stop and has been 1-Stop's sole supplier of gas.

In their complaint, plaintiffs allege that during the last few years they began to notice problems with their well water, including bad taste and other physical signs which "are the result of contamination of the plaintiffs' well water supply by oil, gasoline or petroleum products" which have escaped from the USTs at 1-Stop. As a result of this contamination, plaintiffs allege that plaintiffs' well water is no longer safe for drinking or other household uses, causing them to incur various expenses, including expenses for alternative sources of water. Moreover, plaintiffs contend that they have experienced pain and suffering, increased likelihood of future disease or physical problems, fear of future disease, diminished quality of life, mental distress, and a devaluation of their property value.

On 15 March 1990, pursuant to a settlement agreement among the parties, an order was entered placing the case on inactive status without prejudice to any party placing the case back on active status should the contingency in the settlement agreement not be resolved. Approximately three years later, on 5 April 1993, the case was reopened upon plaintiffs' request.

Plaintiffs were granted leave to amend their complaint and an amended and supplemental complaint was filed on 14 May 1993. Defendant Yoco answered, alleging as defenses, among other things, the applicable statutes of limitations and accord and satisfaction. Defendant Yoco's motion for summary judgment was granted by order entered 10 January 1994. Plaintiffs voluntarily dismisssed the action against defendants David Clark and 1-Stop. (Hereinafter, defendant refers to Yoco only).

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . 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). A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. "A

defendant may meet this burden by: (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *reversed on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). In passing upon a motion for summary judgment, all materials filed in support or opposition to the motion must be viewed in the light most favorable to the party opposing the summary judgment and that party is entitled to the benefit of all inferences in his favor which may be reasonably drawn from that material. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-207, 210 S.E.2d 289, 291 (1974).

Defendant argues that plaintiffs' claims were barred by the satisfaction of the terms of the parties' settlement agreement and the applicable statutes of limitations and thus defendant was entitled to summary judgment. Defendant also argues that summary judgment was proper on each of plaintiffs' claims because plaintiffs failed to show that defendant's USTs were a source of the contamination. For the reasons discussed below, we hold that, as to each claim, defendant did not meet its burden of proving that there were no genuine issues of material fact and thus reverse.

I. Settlement Agreement

[1] We first consider whether plaintiffs' claims were barred by the satisfaction of the terms of the parties' February 1990 settlement agreement. The agreement, which is set forth in a letter written by plaintiffs' attorney at the time and addressed to defendant's attorneys, provided that defendant pay $15,000 to plaintiffs for damages and attempt to dig a new deep rock well on plaintiffs' property "in hopes that it will produce clean water." The agreement further provides that "[i]f [the new well] produces clean water, then the case is settled; if it does not produce clean water, then [the parties] negotiate again . . . or remove the case from inactive status and place it back on a trial calendar" and that if the new well "comes up clean now but becomes contaminated with gasoline at a later date, the plaintiffs will be able to file a new action seeking [a] new source of clean water, but . . . any claims for damages . . . have been settled." Thus, the settlement was contingent upon payment of $15,000 and the drilling of a new well which provided "clean water."

Defendant argues that each of these contingencies was met and thus plaintiffs were not entitled to reopen the case. We disagree. First, the record shows that defendant did not tender payment of $15,000 to plaintiffs until three years later, after plaintiffs reopened the case. Defendant interprets the agreement as requiring it to pay $15,000 within a reasonable time after a determination that the new well water is clean. We agree with this interpretation and note that defendant's three-year delay in tendering payment undercuts its contention that the new well provided clean water. Defendant further argues that at least since September 1992 the well provided clean water. Even if we assume the latter to be true, defendant's tender of payment in 1993 was not made within a reasonable time.

Second, after reviewing the evidence in the record, we cannot conclude that defendant has met its obligation of providing a well which supplies "clean water." The evidence shows that DEHNR tested the new well water on seven occasions from August 1990 through February 1993. On four occasions, the presence of organic compounds commonly associated with gasoline were below the detection limit and on one occasion no volatile organic compounds were detected. However, on two occasions, 11 October 1990 and 15 June 1992, the tests revealed the presence of benzene and other organic compounds commonly associated with gasoline. The benzene levels, which were 2.2 ug/L (micrograms per liter) and 2.0 ug/L, exceeded the State standard for benzene of 1 ug/L. *See* N.C. Admin. Code tit. 15A, r.2L.0202(g)(5) (June 1979). In an evaluation of the 11 October 1990 test results, Dr. Kenneth Rudo, a State toxicologist, stated that "the water is probably contaminated with a petroleum product that may be gasoline, fuel oil, kerosine, or other."

Plaintiffs also introduced evidence tending to show that the well was not constructed in a manner sufficient to protect the water supply from contamination. Plaintiffs submitted the affidavit of Stephen L. Whiteside, a civil engineer specializing in environmental site investigations. Whiteside stated that the casing in the new well should have been seated several feet into bedrock and then grouted from the bottom of the borehold to the ground surface before the well was advanced below the casing in order to seal off all aquifers or zones with water of a poorer quality and that the new well was not double or triple cased in order to prevent the contamination from travelling deeper into the aquifer during or after installation. Whiteside further stated that benzene and other gasoline-related compounds have reached a lower aquifer, causing the intermittent contamination of

the new well and opined that the threat of contamination at or above State groundwater and drinking standards was continuing and that it would be prudent to abandon the new well because of the potential threat it poses to the integrity of groundwater.

II. STATUTES OF LIMITATIONS

[2] We next consider whether plaintiffs' OPHSCA and negligence claims were barred by the applicable statutes of limitations. These claims are governed by the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(2) and (5) (1983). Unless otherwise provided by statute, a cause of action for personal injury or physical damage to claimant's property shall not accrue until "bodily harm to the claimant or physical damage to his property becomes apparent to the claimant or ought reasonably to have become apparent to the claimant, whichever event occurs first." N.C. Gen. Stat. § 1-52(16) (1983).

Defendant argues that the evidence, when considered in the light most favorable to plaintiffs, reveals that plaintiffs knew or should have known of the contamination for more than three years before filing the suit. Plaintiffs stopped drinking the water sometime between 1983 and 1985 because it tasted bad and stopped cooking with the water in 1984. The depositions of plaintiffs Sharon James, Debra A. Everidge, Nancy James, and Walter James indicate that they noticed something wrong with their water in late 1982, late 1985, and in 1986, respectively, but does not show that plaintiffs suspected that it was contaminated with gasoline until 1986, after Walter James' brother tasted the water and said that it "has gas in it." Plaintiffs did not know that the water was contaminated with gasoline until they had their water tested shortly thereafter and were informed that it was contaminated with benzene.

We find *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991), instructive on this issue. In *Wilson*, plaintiff families sued defendants in 1986 for gasoline contamination of their well water from leaking USTs, alleging causes of action for stict liability under OPHSCA, negligence, nuisance and trespass. Our Supreme Court affirmed the summary judgment against plaintiff White's OPHSCA and negligence claims and reversed the summary judgment against plaintiffs Hill and Wilson based on the statute of limitations. *Id.* at 511-512, 398 S.E.2d at 596. The evidence showed that plaintiff White discovered the contamination in 1979, when tests performed by the Alamance County Health

Department (ACHD) revealed the presence of gasoline in her well water, and that plaintiffs Hill and Wilson did not discover the contamination until 1984, when ACHD tests detected gasoline contamination. *Wilson*, 327 N.C. at 502, 511-512, 398 S.E.2d at 591, 596. The defendants in *Wilson* argued that the statute of limitations should begin to run against plaintiffs Hill and Wilson from 1982, the time these families first began to notice that their well water smelled like gasoline, rather than 1984, when plaintiffs were officially informed that their water was contaminated with gasoline.

In holding that the plaintiffs' claims were not barred by the statute of limitations, the court in *Wilson* noted that the forecast of evidence clearly showed that plaintiffs Hill and Wilson had the State test their water on several occasions prior to May 1984 and had been assured that their water was not contaminated by gasoline and that despite the negative test results, plaintiffs did everything they could do to get NRCD (DEHNR's predecessor) to continue to test their water for gasoline contamination. *Wilson*, 327 N.C. at 512, 398 S.E.2d at 596. The court stated "[p]rior to the determination by the ACHD that their water was contaminated, the [plaintiffs] did not know that they had a cause of action for contamination of their water." *Id.*

In the case *sub judice*, plaintiffs, unlike the plaintiffs in *Wilson*, did not even associate the bad taste in their well water with gasoline until 1986, several years after they stopped drinking it, and in that same year were officially informed that their water was contaminated with gasoline. After reviewing plaintiffs' depositions, we are not convinced that plaintiffs should have known that their well was contaminated with gasoline before 1986, more than three years before filing this action. Since the evidence is sufficient to support an inference that the limitations period has not expired, we hold that the summary judgment on plaintiffs OPHSCA and negligence claims was inappropriate. *See Hatem v. Bryan*, 117 N.C. App. 722, 453 S.E.2d 199 (1995).

[3] Defendant also argues that summary judgment was proper on plaintiffs' trespass and nuisance claims. A cause of action for nuisance is governed by the same statute of limitations as a cause of action for trespass. *Wilson*, 327 N.C. 491, 511, 398 S.E.2d 586, 596. Under N.C. Gen. Stat. § 1-52(3) (1983), a cause of action for a continuing trespass "shall be commenced within three years of the original trespass." Thus, the statute of limitations on claims for continuing trespass and nuisance begins to run from the first act of trespass. However, where the trespass is recurrent, as opposed to continuing,

the limitations period does not bar the claim. *See Roberts v. Baldwin*, 151 N.C. 407, 66 S.E. 346 (1909). Defendant argues that plaintiffs' trespass and nuisance claims are barred because the trespass is continuing, not recurrent, and the evidence shows the contamination from 1-Stop to plaintiffs' well occurred more than three years from the filing of this action.

We disagree. In *Wilson*, the Supreme Court resolved the same issue in plaintiffs' favor, holding that the release of gasoline from a UST into the groundwater of an adjoining property owner over a period of years was a " 'renewing rather than a continuing trespass.' " *Wilson*, 327 N.C. at 511, 398 S.E.2d at 596 (citation omitted). The court noted that "in the present case, tests revealed that [plaintiffs'] well remained contaminated with gasoline as of the filing of this action [and] [g]asoline was found in the dirt surrounding the [defendant's tanks] . . . indicating that the seepage from the [defendant's property] . . . had not stopped at the time this suit was filed." *Id.* at 510, 398 S.E.2d at 595. Since the evidence in this case likewise shows that plaintiffs' well was contaminated when this action was filed and indicates continuing gasoline leakage at that time, we likewise hold that the trespass was recurrent and thus plaintiffs' trespass and nuisance claims were not barred by N.C. Gen. Stat. § 1-52(3) (1983).

III. Causation

[4] Finally, we consider whether causation, an essential element of plaintiffs' claims, was lacking. Causation is a common element necessary in each of plaintiffs' claims. *See Ammons v. Wysong & Miles, Co.*, 110 N.C. App. 739, 745, 431 S.E.2d 524, 528, *cert. denied*, 334 N.C. 619, 435 S.E.2d 332 (1993) (stating that causation is a common element necessary in each of plaintiffs' claims in suit alleging violation of OPHSCA, negligence, nuisance and trespass arising out of contamination of plaintiffs' wells). In *Ammons*, this Court, relying on *Wilson v. McLeod Oil Co., Inc.*, affirmed summary judgment for defendant on plaintiff's OPHSCA, negligence, nuisance and trespass claims because plaintiff failed to show that the potential sources of contamination from defendant's property caused them damage. *Id.* at 745, 431 S.E.2d at 528. Defendant argues that plaintiffs, like plaintiffs in *Ammons* and *Wilson*, failed to show that defendant was a source of contamination.

The evidence shows that on 10 July 1986, Walter James contacted the Winston-Salem regional office of the North Carolina Division of Environmental Management (regional office) and reported that his well had a strong gasoline odor for the preceding five years. In

response to his complaint, Stephen Kay, an Environmental Engineer with the State of North Carolina, Department of Environment, Health and Natural Resources (DEHNR), performed an investigation on plaintiffs' property. Lab tests of plaintiffs' well water showed that plaintiffs' groundwater was contaminated by gasoline constituents. Defendant's USTs, located 150 feet upgradient from the well, were the only known potential source of contamination. Plaintiffs were instructed not to drink the water.

Plaintiffs deposed defendant's maintenance supervisor, Jerry Atkins. Since 1989, Atkins worked on the gasoline pumps at various stations to which defendant supplied gas. Atkins was involved in the investigation of defendant's equipment at 1-Stop and had some knowledge of defendant's inspection and tests preceding 1989. Atkins testified that in 1986, after the State notified defendants that plaintiffs' well water was contaminated and that 1-Stop was a potential source of the contamination, defendant hired Collins Petroleum to look for contamination in the soil around its USTs. Collins dug up the soil around the USTs and found no contamination. Three years later, in 1989, defendant dug up its UST's and tested the tanks and gas lines. No leaks were found. However, the soil surrounding the tanks was tested and showed contamination and a monitor well contained two to three feet of free product, indicating groundwater contamination. Although the monitor well had constituents of leaded gas, no soil contamination was found under the UST which stored leaded gas. Defendant replaced the tanks and remediated the soil. Tests performed on samples from the 1-Stop monitor well subsequent to the UST replacement continued to indicate groundwater contamination. Defendant kept inventory records of the gas it supplied to 1-Stop. To Atkins' knowledge, those records never showed any lost or missing product at 1-Stop.

In March 1988, the regional office drilled and collected water samples from five monitor wells and collected samples from domestic wells used by plaintiffs, 1-Stop, and two other neighboring properties. All except one well at plaintiffs' and 1-Stop's properties were highly contaminated by hydrocarbons. In August 1989, the regional office recommended that the site be included under the Federal Trust Fund Program. The site was designated as the Walter James Trust Fund Site. Subsequently, in 1990, DEHNR hired Geophex to conduct a remedial investigation of the site and to recommend appropriate remedial alternatives.

After its investigation, Geophex prepared a final report which mentioned 1-Stop as the only potential source of hydrocarbon leakage. The report suggested that the UST area on the east side of 1-Stop may have been one of the old leakage sources. Geophex found that an area "6,000 to 8,000 square feet, including the present and former UST areas and pump islands, contains contaminated soil down to the water table." Soil samples from 1-Stop and plaintiffs' property indicated that the fuel contaminating the soil is likely an unleaded product. Free product, most likely premium grade gasoline, was discovered in two co-located monitor wells at 1-Stop. Water samples were taken from monitor wells at 1-Stop, plaintiffs' property, and a neighboring property. Most of the parameters contained in gasoline were found in all of the water samples. Based on its study, Geophex concluded that: (1) 1-Stop is extensively contaminated by old and recent hydrocarbon products, that it believed the product leakage is recent and probably current and that the UST system (tank and/or lines) dispensing the premium gasoline may have leaked recently or continues to leak, (2) the site also contains old leaks or spills that are likely from a former multiple UST site to the east, (3) the contaminant plume is migrating eastward from 1-Stop and the dissolved groundwater contamination extends to properties of two households eastward across Kerner Road, and (4) the plaintiffs' well is heavily contaminated with gasoline contituents that originated from 1-Stop.

Pursuant to plaintiffs' request for admissions, defendant admitted that chemicals released from 1-Stop had contaminated the groundwater but stated that it had insufficient information to enable it to admit or deny that the contamination was caused by chemicals released from USTs.

Plaintiffs deposed Gary York, defendant's president and sole shareholder. In his deposition, York admitted that defendant purchased some tanks and lines at the 1-Stop property from Barrow Oil in 1979 and that defendant currently owns the USTs and equipment at 1-Stop but denies knowledge of exactly what existing equipment it purchased from Barrow Oil in 1979. Plaintiffs also deposed David Clark, who testified that in 1980 defendant removed one or more of the USTs previously owned by Barrow and located on the east side of the lot, replaced them, and moved the pump island and lines. Defendant did not check the area surrounding the USTs for contamination after it removed them.

In this case, unlike *Ammons*, the issue before us is not whether plaintiffs forecast evidence sufficient to show that the suspect property, 1-Stop, is the source of contamination, but whether they forecast evidence sufficient to create a genuine issue of fact as to whether defendant's UST system caused the contamination.

Although the evidence indicates that the USTs and lines at the new pump island were not leaking, the 1990 Geophex report, which finds old and new leakage, suggests as possible sources of contamination both the USTs which defendant removed in 1980 and the USTs which replaced them.

Moreover, the evidence suggests that the contamination may have been caused by other sources such as spillage from overfills of gas in defendant's USTs, for which defendant would be responsible. In his deposition, Clark recalled between one and three spills or overfills of gas in the years preceding 1986. Atkins recalled hearing about two or three spills at 1-Stop since 1985. Atkins also testified that when the USTs were removed in 1989, the soil above the top of the USTs was contaminated, suggesting that the USTs had been overfilled.

Defendant contends it has shown that its UST system could not have been the source of contamination. For support, defendant points to (1) the absence of any evidence showing that its USTs and lines leaked, (2) Geophex's finding of old and new contamination at 1-Stop, (3) the fact that prior to 1979, the USTs and lines were owned and operated by Barrow Oil, (4) the fact that defendant does not know what equipment it purchased from Barrow Oil in 1979, and (5) the fact that defendant replaced one or more of the existing USTs previously owned by Barrow in 1980.

However, in viewing the evidence in the light most favorable to plaintiffs and drawing all inferences which may be reasonably drawn in plaintiffs' favor, we find that the evidence forecast by plaintiffs points to defendant's UST system as the source of the contamination and was thus sufficient to create a genuine issue of fact as to whether defendant caused the contamination. *Cf. Masten v. Texas Co.*, 194 N.C. 540, 140 S.E. 89 (1927) (evidence that plaintiff's well was 130 feet downgradient from defendant's tank, that defendant's tank was the only gas tank within at least one-half mile of plaintiff's home, plaintiff's well water was fine until defendant installed tank, and excavated tank had leak sufficient to withstand motion for nonsuit in action to recover for pollution of plaintiff's well water).

Based on the foregoing, we reverse summary judgment in favor of defendant.

Reversed and remanded for trial.

Judges EAGLES and GREENE concur.

LINDA L. SNIPES, NOW LINDA LASHLEY, APPELLANT v. JOHN R. SNIPES, APPELLEE

No. 925DC1301

(Filed 21 March 1995)

1. **Divorce and Separation § 415 (NCI4th)— child support agreement—incorporation in court order—failure of plaintiff to fulfill obligation—no entitlement to arrearages**

Because plaintiff did not abide by her own obligations under a judgment which incorporated the parties' child support agreement, in particular the provision requiring that she give proper and timely notice of child support increases based on the consumer price index to the clerk of court, she cannot now be heard to complain of any alleged arrearage for the years she did not give notice or to assign as error the court's failure to order payment thereof.

Am Jur 2d, Divorce and Separation § 1075.

Court's power to modify child custody order as affected by agreement which was incorporated in divorce decree. 73 ALR2d 1444.

Divorce: power of court to modify decree for alimony or support of spouse which was based on agreement of parties. 61 ALR3d 520, sec. 1.

Divorce: power of court to modify decree for support of child which was based on agreement of parties. 61 ALR3d 657, sec. 1.

2. **Divorce and Separation § 417 (NCI4th)— child support increases—notice to clerk of court—increases not past due child support**

Plaintiff's act of notifying the clerk of court in January 1992 of claimed increases in child support affecting calendar years

through 1991 did not cause the alleged increased amounts to become past due child support and thus did not cause her right to payment to be vested at the time of the 3 August 1992 hearing, since, absent issuance of a court order directing increased payments following plaintiff's compliance with the terms of the judgment, the alleged arrearage affecting calendar years through 1991 did not accrue and thus was not vested.

Am Jur 2d, Divorce and Separation § 1081.

3. Divorce and Separation § 435 (NCI4th)— child support order—automatic increase based on consumer price index—order void

The provision of a judgment which ordered automatic child support increases based on the consumer price index was void because it gave no consideration to the needs of the child or the means or abilities of the parties.

Am Jur 2d, Divorce and Separation §§ 1082-1088.

Appeal by plaintiff from judgment entered 7 August 1992 by Judge Elton G. Tucker in New Hanover County District Court. Heard in the Court of Appeals 28 October 1993.

Robert U. Johnsen for plaintiff-appellant.

Shipman & Lea, by James W. Lea, III, for defendant-appellee.

JOHN, Judge.

Plaintiff contends the trial court erred by denying her motion to adjust and increase the amount of defendant's monthly child support obligation. We disagree.

Pertinent facts and procedural information are as follows: Plaintiff Linda Lashley (Linda) and defendant John Snipes (John) were previously married and had one child, John R. Snipes, Jr. (Jr.), born 17 March 1981. The parties eventually separated, entering into a "Separation Agreement and Property Settlement" (the Agreement) on 19 February 1987. Linda was given primary custody of Jr., and John agreed to pay the sum of $523.00 each month for Jr.'s support beginning 1 April 1987. The Agreement also specified:

> that on the anniversary date of this agreement, this child support payment shall be increased by a percentage equal to the increase, if any, in the consumer price index as published by the

> Department of Labor and existing on December 31, of the preceding year. Wife shall notify the Clerk of Court of the increase each January and the new figure for support shall be entered on the Court's records.

The parties agreed John's monthly child support payments were to be distributed to Linda by the New Hanover County Clerk of Superior Court. In furtherance of this arrangement and contemporaneously with execution of the Agreement, John filed with the Clerk a "Statement Authorizing Entry of Judgment by Confession" pursuant to N.C.R. Civ. P. 68.1 (1990).

Thereafter, the District Court entered Judgment by Confession (the Judgment) on 27 February 1987, incorporating in substance the entirety of the parties' child support arrangement and providing in relevant part as follows:

> IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:
>
> 1. That the defendant shall pay through the Clerk of Court to the plaintiff the sum of $523.00 per month to be used for the support and maintenance of their minor child, John R. Snipes, Jr., born March 17, 1981, and the sum shall be paid as follows:
>
> The sum of $523.00 per month beginning on the 1st day of April, 1986 [sic] and continuing thereafter in consecutive payments every month of a like amount until such time as plaintiff notifies the Clerk of a change in the amount of the support obligation, said sum shall change according to a percentage equal to the increase, if any, in the consumer price in[dex] as published by the Department of Labor and existing on December 31 of the preceding year. In January of each year plaintiff shall notify the Clerk of any increase due as a result of an increase, if any, in the consumer price index as published by the Department of Labor and existing on December 31 of the preceding year. Defendant shall continue to make monthly support payments until the minor child . . . shall attain the age of eighteen (18) years, or, if the minor child is still in primary or secondary school at the time he attains the age of eighteen (18) years, until the minor child graduates, ceases to attend school on a regular basis, or reaches the age of twenty (20), whichever comes first . . . .

John subsequently made $523.00 child support payments into the Clerk's office each month, commencing 1 April 1987 and continuing until April 1992 without interruption.

On 16 March 1988, Linda notified the Clerk of Court by letter of a 4.4% increase in the consumer price index (C.P.I.). Her letter included this paragraph:

> Effective February 19, 1988, please be advised that the monthly child support payment for John R. Snipes, Jr. (Jon-Jon) should increase by 4.4%, or $23.01, making the total monthly allotment $546.01.

No increase was noted in the court's records, however, and John continued to pay $523.00 per month. Linda accepted that sum for nearly four years without advising the Clerk of additional annual increases in the C.P.I. In addition, the record reflects no objection by Linda to continuation of the $523.00 monthly payments.

By letter dated 31 January 1992, Linda provided the Clerk with C.P.I. increases for the years 1988 through 1991 as well as the sum she calculated should actually have been paid by John. Specifically, she stated that in 1988, the C.P.I. increase was 4.4%; in 1989, 4.4%; 1990, 4.6%; and in 1991, 6.1%. The letter also contained an express waiver by Linda of the increase allegedly due for 1988, but claimed John should have paid $546.01 for each month in 1989; $570.03 per month in 1990; and $604.80 monthly in 1991.

Again no notation was subsequently made in the court's records indicating an increase in John's child support obligation, nor was he directed to pay any greater monthly amount. On 3 April 1992, Linda filed a Motion in the Cause requesting adjustment of John's child support obligation so as to reflect computation according to the formula set out in the Judgment. Specifically, she sought "adjust[ments] and increase[s] for each year since 1987" on the grounds that although she had informed the Clerk of the C.P.I. increases, she "ha[d] been unsuccessful in implementing increases . . . by this means."

John subsequently requested "amendment" of the Judgment by a Motion in the Cause filed 27 May 1992, alleging the provision for automatic increases in his child support obligation was void as against public policy. He further sought issuance of an order establishing his future obligation by reference to the North Carolina Child Support Guidelines (the Guidelines).

In his 10 June 1992 response to Linda's Motion in the Cause, John reiterated his contention that the child support increase provision of the Agreement (upon which the Judgment was based) was void as against public policy. He further claimed Linda should be equitably

estopped from requesting back child support because she had failed to comply with certain notice requirements provided in the Judgment. Additionally, by "countermotion," John asserted that his inability to pay the greater amount of child support sought by Linda constituted a substantial change in circumstances warranting a modification of the Judgment.

Hearing on the three motions was held 3 August 1992.Ultimately, the trial court granted John relief from the Judgment, and allowed his motion requesting that his child support obligation be established in accordance with the Guidelines, calculating the amount thereunder as $506.00 each month beginning 1 September 1992. Linda's motion for modification was expressly denied, as was her prayer to recover the difference between what she alleged John owed and what she had actually received.

The court's order, from which Linda's appeal is taken, includes the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

. . . .

3. The aforesaid Separation Agreement and Property Settlement provided . . . for an increase in the amount of support on the first anniversary date of this agreement and on each anniversary thereafter by reference to the Consumer Price Index as published by the Department of Labor.

4. The aforesaid provision as to child support was reiterated in a Statement Authorizing Entry of Judgment by Confession executed by the Defendant on February 19, 1987, and a Judgment by Confession which essentially restated the aforesaid agreement of the parties concerning child support and increases thereto was signed by the undersigned Judge and entered on February 27, 1987.

5. The aforesaid Judgment by Confession was entered by this Court without actual hearing by the Court to determine the needs of the child or the abilities of the parties to provide for those needs.

. . . .

CONCLUSIONS OF LAW

. . . .

2. This Court is not bound by the terms and provisions of the agreement of the parties as contained in the Separation Agreement and Property Settlement and the Statement executed by the Defendant and the Judgment by Confession entered herein because the same do not meet the requirements as set forth by the Court of Appeals of North Carolina in Falls v. Falls, 278 S.E.2d 546 (1981) and specifically, said Judgment did not contain the provisions set forth at page 556 thereof.

. . . .

5. Defendant is not in arrears in his obligation to pay child support.

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[1] Linda's sole argument is that the trial court erred by failing to enforce the Judgment which she contends entitled her to certain increases in child support *prior to* the 3 August 1992 hearing. She does not contest the amount of child support ordered derived by application of the Guidelines. She also does not dispute the legal theory underlying the court's refusal to allow prospective automatic annual increases in child support by reference to C.P.I. statistics; she therefore has not appealed the court's determination with respect to payments required of John in the future.

Instead, Linda's challenge to the trial court's order is based exclusively upon her contention that the Judgment constituted *res judicata* concerning increases in child support allegedly due before the 3 August 1992 hearing. As stated in Linda's appellate brief: "[P]laintiff's appeal is directed . . . at the effect of the Judgment by Confession entered in 1987 . . . and the trial court's ability to retroactively nullify its effect." Stated otherwise, "[t]he plaintiff asks for that which the law has already given her and cannot now take away." *See* Appellant's Brief, at 9, 12.

The rule allowing for judgments by confession is N.C.R. Civ. P. 68.1, which provides in pertinent part as follows:

> (a) *For present or future liability.*—A judgment by confession may be entered without action at any time in accordance with the procedure prescribed by this rule. Such judgment may be for money due or for money that may become due. Such judgment may also be entered for . . . support of minor children.
>
> . . . .

> (e) *Force and effect.*—Judgments entered in conformity with this rule shall have the same effect as other judgments except that no judgment by confession shall be held to be res judicata as to any fact in any civil action except in an action on the judgment confessed. When such judgment is for . . . support of minor children, the failure of the defendant to make any payments as required by such judgment shall subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders.

Linda correctly notes that upon entry of the Judgment incorporating the Agreement, she and John were constrained to seek relief from the court. *See Walters v. Walters*, 307 N.C. 381, 385-86, 298 S.E.2d 338, 341-42 (1983). Linda relies on Rule 68.1(e) above for her subsequent assertion that John was bound to pay child support as required in the Judgment until modified prospectively as a result of the court's order. *See* Appellant's Brief, at 6 ("By inference, a confession of judgment has *res judicata* effect as to any finding of fact contained therein in an action on the judgment confessed."). Therefore, she continues, the trial court exceeded its authority by implicitly finding the automatic increase provision to be void as against public policy and thus failing to enforce it.

However, even accepting *arguendo* Linda's questionable contention that the provision calling for annual increases in child support is properly considered a "fact" under Rule 68.1(e) such that *res judicata* by implication would apply, we decline to upset the trial court's ruling denying her motion to collect "arrearages."

First, a study of the language contained in the Judgment reveals no support for Linda's assertion that the provision for child support increase is automatic or self-executing. Pursuant to the parties' Agreement, as included in the Judgment, "[i]n *January of each year* plaintiff shall notify the Clerk of any increase due." (Emphasis added). It is undisputed that Linda first notified the Clerk of an increase in *March* 1988, well past the time provided in the Judgment. This notice was thus ineffective to activate an increase for 1988, and the Clerk properly did not alter John's support obligation. Moreover, although John continued to remit only the sum of $523.00 each month, Linda raised no objection to the failure to implement a higher payment for 1988 and in her 31 January 1992 letter to the Clerk waived any increase for that year.

Linda also failed to provide notice of an increase under the C.P.I. at any time during 1989, 1990 and 1991, much less in January of those years, and neglected to interpose any objection to the amount she received. Upon such failure and under the terms of the Judgment, no increase was activated for those years. Because Linda did not abide by her own obligations under the Judgment—in particular the provision requiring that she give proper and timely notice of increases to the Clerk, she cannot now be heard to complain of any alleged arrearage for those years or to assign as error the court's failure to order payment thereof. *See, e.g., First Union Nat. Bank v. Naylor*, 102 N.C. App. 719, 723, 404 S.E.2d 161, 163 (1991) (wife's duty to pay note owed to husband was a condition precedent under the parties' separation agreement to husband's duty to assume marital debts).

[2] Next, we also reject in similar vein Linda's argument that upon her act of notifying the Clerk of Court in January 1992 of claimed increases affecting calendar years through 1991, the alleged increased amounts became past due child support and her right to payment was thus vested at the time of the 3 August 1992 hearing. *See* N.C. Gen. Stat. § 50-13.10(a) (1987) ("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 . . . ."). Absent issuance of a court order directing increased payments (following Linda's compliance with the terms of the Judgment), the alleged arrearage affecting calendar years through 1991 did not accrue and thus was not vested. *See, e.g., Mackins v. Mackins*, 114 N.C. App. 538, 542-43, 442 S.E.2d 352, 355 (payments accrue and vest upon becoming "due and payable" pursuant to a child support *order*), *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994); *see also Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 145-46, 438 S.E.2d 417, 418-19 (1993).

[3] Finally, in his motion in the cause seeking "amendment" of the Judgment, John contended the provision therein calling for automatic increases in his child support obligation was void as against public policy. The trial court did not rule directly on the issue and, for purposes of this opinion, we consider such a specific holding unnecessary as well. However, we agree with the court's implicit determination that the foregoing provision was void *ab initio* and therefore unenforceable.

In the case of *Falls v. Falls*, 52 N.C. App. 203, 278 S.E.2d 546, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831 (1981), this Court

examined the propriety of the use of annual automatic increases in child support orders. Following a contested hearing and apparently on its own motion without request from the parties, *id.* at 215, 218, 278 S.E.2d at 555, 556, the trial court entered an order specifying that the father's monthly child support payments:

> [F]or each child shall be increased for the succeeding 12 months by such amount, if any, as may be necessary to keep the level of the payments, during those succeeding 12 months at a consistent level by comparison of the United States Consumer Cost of Living Index for the month of September, 1980, for the same month of the year 1981 and each year thereafter . . . it being the intent of the Court that said payments be increased annually, consistent with the increase of the cost of living, as reflected by the official statistics of the United States . . . .

Id. at 216, 278 S.E.2d at 555.

On appeal, after acknowledging several potentially worthwhile attributes of a system whereby child support payments escalate automatically based upon the Cost of Living Index, this Court agreed with a majority of other jurisdictions and commentators which reject such formulas when they "assume[] that no change will occur in other factors affecting child support." *Id.* at 216-18, 278 S.E.2d at 555-56 (italicized in original). We pointed out that the general reliability of C.P.I. statistics has not been established, and then disapproved "the attempt by the trial court to set up a self-adjusting, self-perpetuating support order . . . because the court ignored the relevant and changing circumstances surrounding the children and the parties," *id.* at 218, 278 S.E.2d at 556 (emphasis deleted), in contravention of North Carolina's statutory and case law. *Id.* at 219, 278 S.E.2d at 557. Specifically, we stated "[t]o put in effect an automatic increase in the future based on one factor, a cost of living index whose [sic] reliability is totally unsubstantiated by the record, violates G.S. 50-13.4(c) . . . ." *Id.*

Thereafter, we expressed our opinion that:

> an acceptable annual adjustment formula based on the percentage change in a generally accepted and accurate index of the cost of living should include, at a minimum:
>
> 1. Provisions focusing not only on the needs of the child, but also on the relative abilities of the . . . parent[s] to pay;

> 2. Provisions stating that if the non-custodial parent's income decreases, or increases by a lesser percentage than the percentage change in the index, then the child support payments shall decrease or increase by a like or lesser percentage;
>
> 3. Provisions stating that if the parties are unable to determine or stipulate to the correct adjustment, either party may request that the court determine the same; and
>
> 4. Provisions allowing either party to petition the court for modification due to a substantial and continuing change of circumstance.

Id. at 220, 278 S.E.2d at 557-58 (citations omitted).

Plaintiff correctly points out that the *Falls* opinion contains no holding that provisions for automatic cost-of-living increases are void as against public policy, and bolsters her position with the statement in *Falls* that "we do not seek to discourage parties who, 'with a spirit of fairness and concern for their children, stipulate to a COLA formula for child support [since such a stipulation would seem to minimize] the risks of yearly resistance to increased support, with attendant legal expense and animosity . . . .' " *Id.* at 221, 278 S.E.2d at 558 (quoting *In re Stamp*, 300 N.W.2d 275, 279 (Iowa 1980)).

However, the foregoing language from the *Falls* opinion was specifically interpreted in our subsequent case of *Frykberg v. Frykberg*, 76 N.C. App. 401, 333 S.E.2d 766 (1985) as referring only to agreements between parties which have *not* been incorporated into court orders or judgments. *Id.* at 409-10, 333 S.E.2d at 771. In *Frykberg*, the parties entered into a separation agreement providing for adjustment in the amount of child support by reference to the C.P.I., with increases to occur on a yearly basis. *Id.* at 404-05, 333 S.E.2d at 769. Thereafter, the trial court entered a consent judgment which provided, *inter alia*, that the agreement was "the operative document governing [the parties'] rights and liabilities arising from their former marital relationship," but that it was "not necessary that [the agreement] be incorporated as part of this Court Order." *Id.* at 402, 333 S.E.2d at 767.

Claiming her former husband had breached certain provisions of their separation agreement (which was "not . . . incorporated as part of th[e] [consent judgment]"), the plaintiff wife in *Frykberg* sought specific performance of the agreement, including the section calling for automatic annual increases based upon the C.P.I. The trial court,

relying on language similar to that in the *Falls* decision, held that particular provision to be unenforceable and void as a matter of public policy. *Id.* at 407, 333 S.E.2d at 770.

The consent judgment at issue in *Frykberg* was entered in 1981—prior to the decision of our Supreme Court in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), which held that "whenever the parties bring [a] separation agreement[] before the court for the court's approval," the agreement will thereafter be treated not as a contract but rather as a "court ordered judgment[]." *Id.* at 386, 298 S.E.2d at 342. In the *Frykberg* appeal, this Court observed that "[w]ere *Walters* applicable to the facts of the instant case, we would have no difficulty in affirming the order appealed from." *Frykberg*, 76 N.C. App. at 408, 333 S.E.2d at 771. However, because the holding in *Walters* was not to be applied retroactively, *Walters*, 307 N.C. at 386, 298 S.E.2d at 342, the *Frykberg* Court determined that even though the parties had brought the separation agreement before the court for approval, the agreement was not incorporated into the consent judgment, but was simply a contract between the parties. *Frykberg*, 76 N.C. App. at 408-09, 333 S.E.2d at 771.

We then examined the trial court's conclusion that the condition providing automatic child support increases based upon the C.P.I. was void in that it gave no consideration "to the needs of the child []or the means or abilities of the parties," *id.* at 407, 333 S.E.2d at 770, and remarked "[i]t was precisely for this reason" that the *Falls* court "refused to sustain a similar provision in a *court order* for child support." *Id.* at 409, 333 S.E.2d at 771. Noting the language from *Falls* quoted above, however, the *Frykberg* Court concluded the trial court had erred because the agreement at issue had not been incorporated into the court's judgment. *Id.* at 409-10, 333 S.E.2d at 771. Specifically, we held "that the provision for automatic increases in child support as a function of the Consumer Price Index, contained in the contractual agreement of the parties and *not incorporated into the consent judgment*, is not void as against public policy," and was thus enforceable. *Id.* (emphasis added). In the case *sub judice*, the Judgment by Confession is indisputably a court "order." Further, plaintiff concedes in her appellate brief that the Judgment does not contain the *Falls* requirements noted above for a valid annual adjustment formula and that "the trial court improperly awarded annual increases in child support based upon the Consumer Price Index . . . ." *See* Appellant's Brief, at 9. Under the directives of *Falls* and *Frykberg*, therefore, the

provision of the Judgement by Confession herein ordering automatic child support increases based upon the C.P.I. was void.

This Court has repeatedly observed that "[i]f a judgment is void, it is a nullity," *Burton v. Blanton*, 107 N.C. App. 615, 616-17, 421 S.E.2d 381, 383 (1992) (citation omitted), and "establishes no legal rights and may be vacated without regard to time." *Allred v. Tucci*, 85 N.C. App. 138, 141, 354 S.E.2d 291, 294 (citation omitted), *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987). Moreover, "[a] void judgment . . . binds no one and it is immaterial whether the judgment was . . . entered by consent." *Id.* at 144, 354 S.E.2d at 295 (citation omitted). The trial court thus did not err by refusing to enforce the Judgement by Confession provision directing automatic increases in child support based upon the C.P.I.

Affirmed.

Judges GREENE and MARTIN, John C. concur.

STATE OF NORTH CAROLINA v. GARY G. GILREATH

No. 9321SC1224

(Filed 21 March 1995)

1. Homicide § 220 (NCI4th)— voluntary manslaughter—gunshot as proximate cause of death—sufficiency of evidence

In a prosecution of defendant for voluntary manslaughter, the pathologist's testimony that the cause of death "all began with the bullet wound" was sufficient evidence from which the jury could find that the victim's gunshot wound caused or directly contributed to his death two years later, whatever complications may have arisen as a result of later surgery which the victim had against medical advice and did not survive.

Am Jur 2d, Homicide §§ 13-15, 19-21.

Necessity of expert testimony to show causal connection between medical treatment necessitated by injury for

which defendant is liable and allegedly harmful effects of such treatment. 27 ALR2d 1263, supp.

Homicide as affected by lapse of time between injury and death. 60 ALR3d 1323, supp sec. 1.

2. Homicide § 379 (NCI4th)— self-defense—issue properly submitted to jury

The State presented substantial evidence that defendant failed to act in self-defense, and the issue was therefore properly submitted to the jury for its resolution.

Am Jur 2d, Homicide §§ 139, 140, 457.

Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 ALR4th 983, sec. 1.

3. Arrest and Bail § 82 (NCI4th)— victim's right to detain defendant—sufficiency of evidence

The jury could find that a homicide victim had statutory authority to detain defendant, for purposes of determining whether defendant acted in self-defense in shooting the victim, where the State's evidence tended to show that the victim received a telephone call from his daughter that someone was breaking into her house; the victim saw a strange vehicle in the daughter's driveway; the victim interrupted defendant and another man as they attempted to remove components of an entertainment center in the home; the two men ran from the home; the victim commanded the men to stop and fired a warning shot before he was shot by one of the two men; and the victim was in the direct path of defendant's vehicle. The jury could infer from this evidence that the victim had cause to believe that the felony of burglary was being committed in his presence and that the burglars' vehicle posed a substantial threat of injury to him. N.C.G.S. § 15A-404.

Am Jur 2d, Arrest §§ 34, 35.

Private person's authority, in making arrest for felony, to shoot or kill alleged felon. 32 ALR3d 1078.

4. Burglary and Unlawful Breaking § 57 (NCI4th)— first-degree burglary—sufficiency of evidence

Evidence of first-degree burglary was sufficient to be submitted to the jury where it tended to show that defendant entered a home occupied by the victim and her daughter at 1:30 a.m.

Am Jur 2d, Burglary §§ 44, 45.

Sufficiency of showing that burglary was committed at night. 82 ALR2d 643.

What is "building" or "house" within burglary or breaking and entering statute. 68 ALR4th 425, sec. 1.

Appeal by defendant from judgments entered 25 February 1993 by Judge Preston Cornelius in Forsyth County Superior Court. Heard in the Court of Appeals 27 September 1994.

Attorney General Michael F. Easley, by Assistant Attorney General John J. Aldridge, III, for the State.

David F. Tamer for defendant-appellant.

JOHN, Judge.

Defendant appeals convictions of first degree burglary, felonious larceny, and voluntary manslaughter. He contends the trial court erred by (1) denying his motion to dismiss the charges of voluntary manslaughter and first degree burglary; and (2) denying his request that the lesser offenses of second degree burglary and involuntary manslaughter be submitted to the jury. Upon careful consideration of defendant's arguments, we determine his assignments of error cannot be sustained.

The State's evidence at trial tended to show that in the early morning hours of 4 July 1990, Kay Yokley (Yokley), whose husband was away on business, heard her kitchen door being kicked in. She observed two men moving through her house, walking from room to room. However, she was able to pick up her eighteen month old child and escape through the kitchen without being seen by the men. While leaving, she grabbed a cordless telephone and subsequently called her mother, Margaret Wall (Mrs. Wall), telling her someone had broken into the house and to call the police. Because the call was disconnected, Mrs. Wall apparently did not hear the latter portion of the conversation requesting that the police be notified. Yokley then went to a neighboring house and telephoned the authorities as well.

Yokley's parents, upon hearing someone was breaking into their daughter's home, immediately drove to her residence. Mr. Wall (Wall) brought a .22 caliber semi-automatic rifle with him. Upon arriving, the Walls noticed a truck in the driveway and parked directly behind it. Mrs. Wall entered the house and screamed for her daughter upon confronting two men, identified by her as defendant and his co-defendant David Bumgarner (Bumgarner), working at disconnecting components of an entertainment center. The two then ran from the dwelling while Mrs. Wall looked for her daughter and granddaughter.

Mrs. Wall then heard her husband yell, "stop, stop. If you don't, I'm going to shoot," followed by one gunshot and then a "whole bunch" of gunshots. When she next saw Wall, he was standing in the carport. He had been shot and the truck was gone. Mrs. Wall ran back into the house to call for help, but could not find the portable phone. She and her husband then returned to their vehicle, went to a neighbor's house for help, and found their daughter.

Lieutenant C.T. Chadwick, Jr. arrived at the Yokley home in response to a radio dispatch. He testified he found some broken glass, a rifle, and a number of spent .22 caliber shell casings at the scene. Upon searching the area, he observed a truck parked in some neighboring woods with broken glass on the passenger's side and four distinct bullet holes in the driver's side door. In the interior of the truck were personal items, as well as a pillow stained with blood. Entering a nearby residence later determined to belong to Bumgarner, Chadwick and other officers located defendant and Bumgarner, who had minor bullet wounds to his face and shoulder. Officers subsequently unearthed a Colt .22 caliber pistol buried in the backyard of the house.

Dr. Wayne Meredith testified as to Wall's injuries which included three gunshot wounds: one superficial wound to the scalp, a wound to the arm, and a serious wound to the chest which damaged many internal organs including Wall's lung, stomach, colon, spleen, pancreas, and kidney. Treatment included removal of portions of his colon and large intestine and removal of his entire spleen, as well as approximately one-third of his pancreas. The process involved several operations and Wall remained in the hospital in excess of one year.

In August 1992 and against medical advice, Wall determined to undergo colostomy removal surgery. He acknowledged the risk involved to his physicians, but stated he would rather be dead than

continue to endure his condition as it was. Wall did not survive the operation and died 1 September 1992.

Donald Jason, an expert in the field of pathology, testified as follows:

> Q: And in your opinion, sir, what was the cause of death of Bobby Lee Wall?
>
> A: Cause of death was Adult Respiratory Distress Syndrome—that's that injury to the lung that I mentioned—which was due to the operation for reconnection of his large intestine. And that was caused by the fact—by the injuries in his abdomen, particularly the injury to the large intestine, and that was caused by the bullet wound which had gone through the abdomen.
>
> Q: All of these complications were the result of that bullet wound that went through his chest and into his abdomen?
>
> A: That's right. It all began with the bullet wound.

Defendant offered the following testimony on his own behalf: During the afternoon of 3 July 1990, defendant went to visit Bumgarner at the latter's residence, but Bumgarner was not home. Defendant decided to wait for Bumgarner, and while doing so, consumed "a couple beers." When Bumgarner returned, he and defendant decided to take a ride and visit some friends.

Defendant admitted taking valium during the course of the evening. He remembered leaving a friend's house with Bumgarner driving the truck, and further claimed the next thing he remembered was being awakened by Bumgarner and being told to get out of the truck. They then walked through the back door of a home defendant assumed belonged to Bumgarner. Defendant could not recount exactly what happened in the house before seeing Mrs. Wall, but he realized upon seeing her that they were not at Bumgarner's residence.

Upon retreating from the house, defendant saw a man standing at the corner of the garage pointing a rifle. Defendant put his hands in the air, continued towards the truck, and told the man he just wanted to leave. As defendant shut the truck door after getting in, the man began shooting at the driver's side where defendant was seated. Because a vehicle was parked behind the truck, defendant pulled up

and back several times in order to turn and drive across the yard to leave. The man continued to shoot and defendant told Bumgarner there was a pistol under the seat. Bumgarner retrieved the pistol and fired it out the driver's side window into the air. Defendant did not recall taking anything from Yokley's house.

Bumgarner testified he stopped at Yokley's home to see if his dog would fight with her dog. He further stated he followed defendant into the house and that both immediately ran to the truck when they encountered Mrs. Wall. Further, he indicated it was defendant who asked for the pistol and fired from the truck.

In rebuttal, the State offered Bumgarner's statement to Deputy J.L. Mecum that he and defendant entered the Yokley residence for the purpose of stealing some VCR and radio equipment as well as a camcorder.

I.

Defendant first contends the trial court erred by denying his motion to dismiss the charges of voluntary manslaughter and first degree burglary. We disagree.

In ruling upon a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, which is entitled to every reasonable inference to be drawn therefrom. *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985) (citations omitted). If there is "substantial evidence" of each element of the charged offense and of defendant being the perpetrator of the offense, the motion should be denied, *State v. Riddick*, 315 N.C. 749, 759, 340 S.E.2d 55, 61 (1986) (citing *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982)). "Substantial evidence is that amount of evidence which a reasonable mind might accept as adequate to support a conclusion". *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citing *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981)). In addition, " '[t]he trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence . . . .' " *Riddick*, 315 N.C. at 759, 340 S.E.2d at 61 (quoting *State v. Powell*, 299 N.C. 95, 101, 261 S.E.2d 114, 118 (1980)).

A.

We first consider the charge of voluntary manslaughter. Defendant argues his actions were not the cause of Wall's death and that the State failed to prove he did not act in self-defense.

I.

[1] Proximate cause is an element of manslaughter, *State v. Sherrill*, 28 N.C. App. 311, 313, 220 S.E.2d 822, 824 (1976), that is, criminal responsibility arises only if a defendant's act has "caused or directly contributed" to the victim's death. *State v. Luther*, 285 N.C. 570, 573, 206 S.E.2d 238, 240 (1974). Further, "the act of the accused need not be the immediate cause of death. He is legally accountable if the direct cause is the natural result of [the] criminal act." *State v. Minton*, 234 N.C. 716, 722, 68 S.E.2d 844, 848 (1952) (citations omitted).

Despite testimony from the pathologist that Wall died as a result of complications from the bullet wound to his chest and abdomen, defendant insists the cause of death was Wall's decision against medical advice to undergo colostomy reversal surgery. However, "[t]he act complained of does not have to be the sole proximate cause of death, nor the last act in sequence of time. . . . It is enough if defendant['s] unlawful acts join and concur with other causes in producing the result." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925-26, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980) (citations omitted). The pathologist's testimony presented sufficient evidence from which the jury could find Wall's gunshot wound caused or directly contributed to his death, whatever complications may have arisen as a result of the later surgery.

In *State v. Jones*, 290 N.C. 292, 225 S.E.2d 549 (1976), the State's evidence tended to show the victim suffered from a chronic lung disease which left his lungs black, scarred, and fibrous. *Id.* at 298, 225 S.E.2d at 552. He was shot during a robbery, and shotgun pellets which entered his lungs caused the lungs to collapse and severe infection ensued. *Id.* Physicians administered antibiotics to combat the infection, including a drug called gantrisin. *Id.* Unfortunately, the victim was hypersensitive to the drug and developed myocarditis, inflammation of the heart, which was the immediate cause of his death. *Id.* Our Supreme Court held the evidence was sufficient to carry the question of proximate cause to the jury, stating "[w]here . . . gunshot wounds inflicted by the accused are a contributing cause of death, defendant is criminally responsible therefor." *Id.* at 299, 225 S.E.2d at 552-53.

In *State v. Penley*, 318 N.C. 30, 38, 347 S.E.2d 783, 788 (1986), the victim died of pneumonia. Testimony by the pathologist revealed the gunshot wound suffered by the victim had "compressed and damaged

his spinal cord" to the point that he was paralyzed from the waist down and rendered him immobile. *Id.* This immobility in turn resulted in the formation of infectious blood clots in his lungs which, in turn, caused pneumonia. *Id.* As such, there was a direct relationship between the gunshot wound and the victim's death since his immobility and the blood clot formation were secondary to the original gunshot injury to the spinal cord. *Id.* at 48-49, 347 S.E.2d at 794. The Court held the evidence sufficient to withstand a motion to dismiss on the issue of proximate cause. *Id.*

Finally, in *State v. Garcia-Lorenzo*, 110 N.C. App. 319, 430 S.E.2d 290 (1993), a voluntary decision by family members and attending physicians to remove the victim from life support systems did not absolve the defendant from criminal responsibility. *Id.* at 334-35, 430 S.E.2d at 298-99. Testimony of the medical examiner indicated the victim was not brain dead and that he could have remained alive indefinitely on a respirator. *Id.* at 334, 430 S.E.2d at 298. Defendant therefore argued his acts were not the proximate cause of the victim's death given the voluntary choice to remove the artificial support systems. *Id.* We rejected this contention, stating "but for defendant's act of hitting [the victim], he would not have been in this vegetative state, unable to breathe on his own or to regain consciousness, and subsequently he would not have died." *Id.*

Based on the foregoing authorities and viewing the evidence in the light most favorable to the State, we conclude there was substantial evidence tending to show Wall's gunshot wound directly contributed to his death. The issue of proximate cause was thus properly submitted by the trial court to the jury.

Defendant parenthetically interjects the alternative argument that, at a minimum, the jury should have been instructed it "must find from the evidence and beyond a reasonable doubt that Mr. Wall's death resulted proximately from the gunshot wounds inflicted by the Defendant." This contention is completely without merit.

In charging the jury, the court stated as follows:

> Now, I charge for you to find the defendant guilty of voluntary manslaughter, the State must prove three things beyond a reasonable doubt:
>
> . . . .

> Second, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a case without which the victim's death would not have occurred. The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the same time which in combination with it proximately caused the death to the victim.
>
> And third, that the defendant did not act in self-defense or, though acting in self-defense, was the aggressor or, though acting in self-defense, used excessive force.

Thus, the court instructed the jury precisely as defendant suggests was necessary, *i.e.*, that it was required to find beyond a reasonable doubt that defendant's act of inflicting a gunshot wound upon Wall proximately caused Wall's death.

2.

[2] Defendant further argues his motion to dismiss the charge of voluntary manslaughter was erroneously denied because "[t]he State failed to prove beyond a reasonable doubt that the [d]efendant did not act in self[-]defense." We do not agree.

It is established that the State in a homicide prosecution bears the burden of proving the defendant did not act in self-defense when that issue is raised by the evidence. *State v. Hamilton*, 77 N.C. App. 506, 513, 335 S.E.2d 506, 511 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986) (citing *State v. Herbin*, 298 N.C. 441, 445, 259 S.E.2d 263, 267 (1979)). However, as noted above, the test on a motion to dismiss is whether the State has presented substantial evidence which, taken in light most favorable to the State, is sufficient to convince a rational trier of fact the defendant did not act in self-defense. *Id.*

Defendant herein, relying solely upon his version of the incident, argues the fatal shot occurred in self-defense only after he and Bumgarner fled the premises and were fired upon by Wall. He further insists all the evidence shows Wall acted unreasonably in using deadly force to prevent the escape of defendant and his cohort.

In response, the State points to testimony by Mrs. Wall and to physical evidence which contradicts defendant's version of the shooting encounter. Specifically, the State notes the statement by Mrs. Wall that she heard a single shot fired followed by a "whole bunch" of gunshots, and that she heard her husband yell for the two men to stop or

he would shoot. The State contends this evidence tends to show Wall fired a warning shot "in an effort to detain [defendant and his companion] and to prevent any aggressive actions on their part," and that his shots into the truck were in response to being fired upon by the occupants.

Further, the State observes Wall was only eight to ten feet from the truck on the driver's side, and that defendant was required to move the vehicle back and forth in order to exit the driveway around the Wall automobile. The State argues this evidence "tends to indicate [Wall] reasonably feared for his safety from being hit by the escaping vehicle as it pulled up and back."

Suffice it to state the evidence of self-defense at best was in conflict. Accordingly, the circumstances permitted conflicting inferences which were for the jury to reconcile. *State v. Ataei-Kachuei*, 68 N.C. App. 209, 214, 314 S.E.2d 751, 754, *disc. review denied*, 311 N.C. 763, 321 S.E.2d 146 (1984). We thus conclude the State presented substantial evidence that defendant failed to act in self-defense and that the issue was properly submitted to the jury for its resolution.

[3] Defendant also argues Wall was prohibited from detaining defendant legally in that there was no evidence a felony had been committed in Wall's presence or that defendant and Bumgarner posed a significant threat of death or physical injury to others.

Concerning defendant's argument as to Wall's actions, we note N.C. Gen. Stat. § 15A-404 (1988) provides that a private citizen may use reasonable means to detain another person who the citizen has probable cause to believe has committed in his presence either a felony, a breach of the peace, a crime involving physical injury to another person, or a crime involving theft or destruction of property.

In the foregoing regard, the evidence at trial indicated that the Walls, at the time of their arrival at the Yokley residence, knew only that their daughter had telephoned at approximately 2:15 a.m. to report someone was breaking into her home and that the call was then cut off. They observed a strange vehicle in the driveway and two individuals were interrupted in the process of removing certain components of an entertainment center in the home. The two ran from the dwelling. The jury could thus reasonably conclude Wall had cause to believe the felony of burglary was being committed in his presence.

Wall also commanded the men to stop. The evidence further suggests Wall fired a warning shot followed by many successive gun-

shots. In addition to the foregoing, based upon the proximity of Wall to the maneuvering of defendant's truck as the men attempted to escape, the jury could reasonably determine Wall was in the direct path of the vehicle which posed a substantial threat of injury to him.

In sum, having determined the State presented substantial evidence as to the element of proximate cause and from which the jury could infer defendant did not act in self-defense, we hold the trial court did not err in denying defendant's motion to dismiss on the charge of voluntary manslaughter.

B.

[4] Concerning the charge of first degree burglary, defendant asserts the State failed to meet its burden of proving the Yokley residence was occupied at the time defendant entered and that his motion to dismiss the charge should have been allowed. This argument lacks merit.

First degree burglary is the breaking and entering of the presently occupied dwelling house of another, in the nighttime, with the intent to commit a felony therein. N.C. Gen. Stat. § 14-51 (1993). The question of whether or not the dwelling is actually occupied at the time of entry is for the jury. *State v. Simons*, 65 N.C. App. 164, 167, 308 S.E.2d 502, 503 (1983).

The uncontradicted evidence in the case *sub judice* reveals Yokley was asleep in her home at about 1:30 in the early morning of 4 July 1990. She was awakened by sounds of the kitchen door being kicked in. Going to the door of her bedroom, she saw a man enter her daughter's bedroom while another came into the house through the kitchen. Defendant himself acknowledged he and Bumgarner arrived at the residence together and entered the house through the back door. Once Yokley had an opportunity to escape from the house, she picked up a portable phone from the kitchen and contacted her mother to report the intruders.

In view of the uncontroverted evidence that the Yokley dwelling was indeed occupied at the time defendant entered, it was not error for the trial court to deny his motion to dismiss the charge of first degree burglary.

II.

A.

Defendant next insists no evidence corroborated Yokley's testimony that she was in her residence at the time defendant entered it. Therefore, he continues, the court erred by denying his request to submit the lesser offense of second degree burglary to the jury. This assertion is without merit.

Where *all* of the evidence presented shows the dwelling was occupied at the time of the breaking and entering, the court is not authorized to instruct the jury it may return a verdict of burglary in the second degree. *State v. Tippett*, 270 N.C. 588, 595, 155 S.E.2d 269, 274 (1967), *overruled on other grounds*, *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994) (emphasis added). Contrary to defendant's claim that "evidence was not conclusive on the question of occupancy," Yokley's testimony as noted above was that she heard "the sound of [the] kitchen door crashing up against the wall" and saw defendant and Bumgarner entering her home through the kitchen. There was no error in the trial court's refusal to instruct on second degree burglary.

B.

Finally, defendant argues the court erred by denying his request that the lesser offense of involuntary manslaughter be submitted to the jury. However, defendant fails to cite any authority in support of this proposition. Accordingly, pursuant to N.C.R. App. P. 28(b)(5) (1994), we deem this assignment of error abandoned. Further, even assuming defendant's argument on this point had been raised properly, our examination of the evidence reveals no error by the trial court in refusing to submit the charge of involuntary manslaughter to the jury.

No error.

Judges EAGLES and ORR concur.

Judge ORR concurred prior to 5 January 1995.

STATE OF NORTH CAROLINA v. MARLTON LEE PRICE

No. 948SC485

(Filed 21 March 1995)

11. Evidence and Witnesses § 2927 (NCI4th)— prior inconsistent statement—impeachment proper

The State did not violate the rule that impeachment by a prior inconsistent statement may not be permitted where it is used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible where it was not obvious that the prosecution called the witness in bad faith for an improper purpose; the State did not try to introduce any prior statement the witness may have given or call another witness to impeach the original witness; and the witness's testimony was not crucial to the State's case. N.C.G.S. § 8C-1, Rules 607 and 611.

Am Jur 2d, Witnesses §§ 986 et seq.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases. 30 ALR4th 414, supp sec. 1.

2. Evidence and Witnesses § 364 (NCI4th)— assault—defendant's conduct prior to assault—videotape—admissibility of evidence

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury and assault with a firearm on a governmental officer, the trial court did not err in allowing certain questions about defendant's conduct prior to a confrontation with two deputies and in admitting into evidence a videotape allegedly depicting this conduct, since the challenged evidence was part of the "chain of events" leading up to arrival of the deputies and was admissible to show defendant's state of mind immediately prior to the deputies being called to the scene.

Am Jur 2d, Evidence §§ 340 et seq.

3. Assault and Battery § 101 (NCI4th)— assaults with firearm—self-defense—defendant's prior conduct—failure to give requested instruction—harmless error

Any error by the trial court in failing to give defendant's requested instruction in a prosecution for assaults with a firearm

on two deputies that the jury should not consider defendant's conduct before the deputies arrived in determining whether defendant was the aggressor was harmless where the State's evidence of defendant's behavior immediately before the shooting allowed the jury to find that defendant was at fault and could not claim self-defense.

Am Jur 2d, Trial §§ 1258 et seq.

4. Criminal Law § 1144 (NCI4th)— assault—aggravating factors—findings proper

Where defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury and assault on a law enforcement officer with a firearm, and the court found as statutory aggravating factors that the offenses were committed to hinder the lawful exercise of a governmental function or enforcement of the laws and the offenses were committed against a law enforcement officer in the performance of his official duties, the evidence establishing the aggravating factors was not the same evidence necessary to prove an element of the offenses, and the two aggravating factors did not address the same conduct and therefore were not impermissibly duplicative.

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 1430 (NCI4th)— assault—restitution to victim for costs of van and medical expenses

The trial court in an aggravated assault prosecution did not err in recommending that defendant be required to pay restitution to the victim in the amount of $20,900 where the victim testified that, as a result of his injury and paralysis, he had to purchase a special van costing $19,900 and that he had incurred $1,000 in medical expenses which were not covered by workers' compensation.

Am Jur 2d, Criminal Law §§ 588 et seq.

Appeal by defendant from judgment entered 17 February 1993 by Judge W. Russell Duke, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 31 January 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General W. Dale Talbert, for the State.

Barnes, Braswell & Haithcock, P.A., by Glenn A. Barfield, for defendant-appellant.

WALKER, Judge.

On 27 May 1992, Wayne County Deputy Sheriffs Robert Morrison and Thomas Effler responded to a complaint involving "a man out in the yard brandishing a gun at the neighbors." Effler arrived first and spoke for five to seven minutes with the complainants, who lived in several trailers located across a dirt path from the subject of the complaint, defendant Marlton Lee Price. After Morrison arrived, the complainants were attempting to show the deputies a videotape of defendant when one of the complainants indicated that defendant had exited his home and was approaching them with a holstered pistol on his side.

The evidence was conflicting as to the events that followed. The State's evidence showed that defendant exited his home with a holstered pistol on his side. As defendant approached, Morrison walked away from the complainants and toward defendant. Morrison asked if he could help defendant; both Morrison and Effler heard defendant say something about "son of a bitching blue lights," and Effler heard the words "shoot you." Immediately defendant grasped his holster with one hand and reached toward his pistol with his right hand. The deputies yelled at defendant telling him not to draw his pistol. Defendant then pulled his pistol, fired a shot at Morrison, and continued to fire at Morrison. The two deputies returned fire, and there was an exchange of gunfire between them and defendant. Morrison was hit by the second or third shot fired by defendant and was paralyzed from the waist down. After Morrison fell, defendant continued to fire in Effler's direction, while Effler was firing toward defendant and yelling at him to drop his pistol. Defendant was ultimately downed by Effler's gunfire and Effler was able to disarm him. Both deputies testified that while defendant was yelling at Effler and threatening to kill him, defendant appeared to be in control of his physical and mental faculties and did not appear to be impaired or under the influence of alcohol.

Defendant presented evidence that prior to the shootings, he was planning to go outside to feed his dogs. He put his .357 pistol in his holster because he did not want to be intimidated on his own property by his neighbors, who were wearing guns and pointing and laughing at him. After the deputy sheriffs arrived at the neighbors' home, defendant decided to go out in his own yard to explain to the deputies the facts regarding the neighbors' complaint. As he was walking toward the dirt path at the edge of his property, the deputies, who

were about fifteen feet apart, started walking toward him. Defendant continued to approach the deputies but did not put his hand on his holster. When Deputy Morrison reached the edge of the dirt path, he pulled his pistol and raised it to waist level but did not point it at defendant. He told defendant to drop his pistol and defendant stopped walking. Defendant put his hands out in front of him and asked the deputy to put his weapon away, while the deputy continued to tell defendant to drop his pistol. Defendant did not drop his pistol because he feared that if he reached for it in order to drop it, the deputies might take that movement as an action against them and open fire. Defendant told the deputy he just wanted to explain what was going on, at which point the deputy's weapon discharged, and the bullet struck defendant in his right thigh. Defendant feared that if he did not return fire, the deputies would kill him. He remembered reaching for his pistol with that thought in mind but did not remember drawing or firing the pistol.

At trial defendant was convicted of one count of assault with a deadly weapon with intent to kill inflicting serious injury on Morrison, one count of assault with a deadly weapon on Effler, and two counts of assault with a firearm on a governmental officer (Morrison and Effler). The trial court arrested judgment on the count of assault with a deadly weapon on Effler and one count of assault with a firearm on a governmental officer (Morrison), and defendant was sentenced on the other two counts to consecutive prison terms of twenty years and five years.

I

[1] Defendant brings forward ten assignments of error on appeal. He first assigns as error the trial court's overruling of his objections to certain questions asked by the State of its rebuttal witness Randy Grady.

The prosecutor asked Grady if defendant had cut him with a knife six or eight years ago. When Grady replied that he did not remember, the prosecutor attempted to impeach Grady by asking, "[D]id you not tell the . . . SBI agent that you and [defendant] were drinking? . . . That you got cut by [defendant] and never saw the knife." Grady responded that he did not recall telling that to the agent. Defendant's objections during this line of questioning were overruled. Defendant argues that the State called Grady, knowing that he would not cooperate, so that the prosecutor could then ask impeaching questions about the alleged

knifing incident and thereby introduce otherwise inadmissible evidence that defendant had a propensity for violence.

North Carolina Rule of Evidence 607 allows a party to impeach its own witness, and Rule 611 allows the use of leading questions on direct examination of a hostile witness. N.C. Gen. Stat. § 8C-1, Rules 607 & 611 (1994). Furthermore, the State may attempt to impeach a hostile witness by asking him whether he previously made certain prior inconsistent statements. N.C. Gen. Stat. § 8C-1, Rule 607 (1994); *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989). However, impeachment by a prior inconsistent statement may not be permitted where it is used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible. *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757 (citations omitted) (State improperly attempted to impeach its own witness by calling the detective to whom the witness had made a prior inconsistent statement and having him read the entire statement into the record).

We conclude that the State in the instant case did not violate the above evidentiary principles in its questioning of Grady. We do not agree with defendant that "it was obvious" the prosecution called Grady in bad faith or for an improper purpose. Even though the prosecutor was persistent in his questions, Grady did not remember whether he had previously been cut by defendant or what he may have told the SBI agent or the prosecutor's office. Furthermore, unlike *Hunt*, the State did not try to introduce any prior statement Grady may have given, nor was the SBI agent to whom Grady allegedly made the statement called to testify. Finally, we note that the testimony of Grady was not crucial to the State's case; therefore, its admission was not unduly prejudicial and the trial court did not err.

Defendant next assigns as error the trial court's denial of his motion for a mistrial based on the State's final question of Grady. The prosecutor asked Grady, "Marlton Price come to see you last night?" Before defendant could object, Grady answered, "No." The trial court overruled defendant's objection, but after a bench conference, sustained the objection to the question and instructed the jury to disregard the answer. Defendant moved for a mistrial based on the improper question, claiming the State lacked a good faith basis for the question and was attempting to inflame and prejudice the jury by suggesting that defendant had intimidated or corrupted Grady into giving false testimony. The court inquired whether defendant wanted further

limiting instructions and none were requested. The trial court denied defendant's motion.

A motion for a mistrial is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable without a showing of abuse of discretion. *State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988). On these facts, the record does not disclose substantial or irreparable prejudice to defendant's case and the trial court correctly denied defendant's motion for a mistrial.

II

[2] Defendant's next assignment of error is that the trial court erred by overruling his objections to certain questions about defendant's conduct prior to the confrontation with the deputies and by admitting into evidence a videotape allegedly depicting this conduct. During cross-examination of defendant, the prosecutor asked defendant, over his objection, whether on the day of the incident or at any time he had urinated while on his back porch. Defendant denied he had done so on the day in question but admitted he might have done so at some other time. Thereafter, the State offered evidence in rebuttal from Mike Williams and Terry Stallings that on the day of the shooting before the deputies arrived, defendant had walked around his back yard waving a pistol and had walked to the corner of his porch and urinated in front of the witnesses and several children. For illustrative purposes, the State was then allowed to introduce a videotape of defendant's conduct on the day of the shooting.

The testimony regarding defendant's conduct prior to the shooting was properly admitted. Although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he acted in conformity therewith, such evidence may be admissible for other purposes. N.C. Gen. Stat. § 8C-1, Rule 404(b) (1994). In this case, the challenged evidence was part of the "chain of events" leading up to the arrival of the deputies and the ensuing confrontation, *see State v. Agee*, 326 N.C. 542, 547-48, 391 S.E.2d 171, 174 (1990) (citations omitted), and was admissible to show defendant's state of mind immediately prior to the deputies being called to the scene. The evidence was helpful to the jury in understanding the deputies' perception of the situation when they arrived and their response to defendant when he approached them with a loaded pistol on his side. We find that the probative value of this evidence outweighed any potential prejudicial effect; therefore, the trial court did not err by admitting the evidence. Because the witnesses' testimony

was properly admitted, the court properly admitted the videotape for the limited purpose of illustrating this testimony.

III

[3] At the charge conference, defendant requested an instruction that "a person has a Constitutional right to carry a firearm on his premises," which the court later gave. However, defendant claims the court erred by failing to give another of his requested instructions and by giving a special instruction requested by the State modifying the pattern jury instruction on self-defense to explain the term "aggressor." This instruction added the following language to the pattern jury instruction:

> This requirement [that defendant not be the aggressor] means that the defendant must be free from fault in bringing on, provoking, or engaging in the difficulty or confrontation before he can have the benefit of self-defense. Usually whether the defendant will be free from fault will be determined by his conduct at the time and place of the difficulty or confrontation. Yet the fault in bringing on the confrontation which will deprive him of the right of self-defense is not confined to the precise time of the encounter but may include fault so closely connected with the confrontation in time and circumstances as to be fairly regarded as operating to bring it about.

After the court charged the jury, it inquired whether there were any corrections or additions to the charge. Defendant then requested that the court give the following additional instruction:

> *[A]ny activities* of the *Defendant* which occurred *prior* to the arrival of the deputies could not be considered as bearing on "fault" as that term is used in the court's instruction on self-defense, including the special instruction adopted from the State's suggestion.
>
> And in addition, that merely exiting his home in order to speak to the deputies, without in any manner threatening the deputies, would not constitute "fault" nor be evidence that the defendant was the "aggressor" in the "difficulty or confrontation."

This request was denied. Defendant now contends that without his requested "clarifying" instruction, the State's instruction as given was error because the instruction allowed the prosecutor to argue to the jury in closing that the jury could consider defendant's behavior both

prior to the deputies' arrival and immediately before the shooting as "fault" or evidence that defendant was the aggressor, thereby nullifying his claim of self-defense.

The record does not include the prosecutor's closing argument nor any objections by defendant to the argument. Our resolution of defendant's contention is based on the evidence presented by the State, who had the burden of proving that defendant did not act in self-defense but was instead the aggressor and was "at fault" in bringing on the confrontation. The State's evidence showed that after the deputies arrived at the scene, defendant exited his home with a weapon on his side, approached the deputies directing loud, vulgar, and threatening words to them, reached toward his weapon, ignored repeated commands from the law enforcement officers to drop his weapon, and drew his weapon and discharged a shot in the direction of Deputy Morrison. This evidence of defendant's behavior immediately before the shooting, if believed, allowed the jury to properly find that defendant could not claim self-defense due to "fault so closely connected with the difficulty in time and circumstances as fairly operating to bring it about." Therefore, any purported error by the trial court in failing to instruct the jury not to consider defendant's conduct *before* the deputies arrived would be harmless error. Based on the foregoing, the trial court did not err in giving the State's requested instruction and in denying the additional instruction requested by defendant.

IV

[4] Defendant next assigns as error the trial court's findings of aggravating factors for the two charges on which he was sentenced. Defendant was convicted of four charges, as follows: assault (on Deputy Morrison) with a deadly weapon with intent to kill inflicting serious injury (Count I); assault on a law enforcement officer (Deputy Morrison) with a firearm (Count II); assault (on Deputy Effler) with a deadly weapon (Count III); and assault on a law enforcement officer (Deputy Effler) with a firearm (Count IV). Judgment was arrested on the convictions for Counts II and III. In sentencing defendant on Count I, the court found as statutory aggravating factors that (1) the offense was committed to hinder the lawful exercise of a governmental function or enforcement of the laws, and (2) the offense was committed against a law enforcement officer in the performance of his official duties. The court also found one mitigating factor which was outweighed by the aggravating factors.

Defendant first claims it was error for the court to find the two aggravating factors for Count I because (1) the evidence establishing them was the same evidence necessary to prove an element of the conviction in Count II, and (2) the two aggravating factors addressed the same conduct and were impermissibly duplicative.

In support of his argument defendant first cites *State v. Barnes*, 333 N.C. 666, 687, 430 S.E.2d 223, 234 (1993) and *State v. Westmoreland*, 314 N.C. 442, 449, 334 S.E.2d 223, 228 (1985) for the proposition that "a conviction for which the defendant is being sentenced may not be aggravated by the defendant's acts which form the gravamen of contemporaneous convictions of joined offenses." However, unlike *Barnes* and *Westmoreland*, the court here arrested judgment in Counts II and III, and these convictions were not joined with Counts I and IV for sentencing purposes. Therefore, we are guided instead by N.C. Gen. Stat. § 15A-1340.4(a)(1) (1994) which states that in sentencing a defendant on a particular offense, "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." The phrase "the offense" refers to "the criminal charge of which defendant is convicted" and for which he is being sentenced. *State v. Melton*, 307 N.C. 370, 374, 298 S.E.2d 673, 676 (1983) (holding that "[a]s long as they are not elements essential to the establishment of the offense [of] which the defendant [is found] guilty, all circumstances which are transactionally related to the . . . offense and which are reasonably related to the purposes of sentencing must be considered during sentencing)." The aggravating factors found by the trial court in the instant case were not elements essential to the establishment of the offense of assault with a deadly weapon with intent to kill charged in Count I for which defendant was being sentenced.

In further support of his argument, defendant cites the portion of N.C. Gen. Stat. § 15A-1340.4(a)(1) providing that "the same item of evidence may not be used to prove more than one factor in aggravation." Here, the "same item of evidence" has not been used to prove both aggravating factors. Defendant disrupted the enforcement of laws by interfering with the deputies' investigation of the complaint against him. He accomplished this interference by assaulting the deputies. As this Court stated in *State v. Brown*, 67 N.C. App. 223, 237, 313 S.E.2d 183, 192 (1984), "[t]he defendant cannot be allowed to benefit by having only one aggravating factor charged against him instead of two simply because the method in which he chose to dis-

rupt the enforcement of the law included [assaulting] two members of this statutorily protected class."

Finally, defendant argues that the trial court erred in finding as an aggravating factor for the offense in Count IV that the assault with a firearm on Deputy Effler was committed to disrupt the lawful exercise of a governmental function or the enforcement of laws. Because a conviction for the offense in Count IV required proof only that Deputy Effler was performing his official duties at the time of the shooting and did not require proof that defendant's motive was to disrupt a governmental function or the enforcement of laws, defendant's argument fails.

We find no error in the sentencing phase of defendant's trial.

V

[5] Defendant's final argument is that the trial court erred in recommending that he be required to pay restitution in the amount of $20,900 to Deputy Morrison. Defendant claims there was insufficient evidence to support such a recommendation. We disagree. Deputy Morrison testified that, as a result of his injury and paralysis, he had to purchase a special van costing $19,900 and that he had incurred $1,000 in medical expenses which were not covered by workers' compensation. Since there was competent evidence before the court to support restitution of $20,900, the trial court's recommendation was not error.

No error.

Judges EAGLES and McGEE concur.

STATE OF NORTH CAROLINA v. EVERETT MAURICE JAMES

No. 9310SC649

(Filed 21 March 1995)

1. **Searches and Seizures § 65 (NCI4th)— defendant's mental limitations—voluntariness of consent to talk and be searched**

Notwithstanding evidence of defendant's mental limitations and testimony regarding his tendency to cooperate unilaterally

with police officers, there existed ample competent evidence to support the trial court's findings that defendant voluntarily agreed to talk to police officers who boarded a bus on which defendant was a passenger, to a search of his person, and to a search of his luggage and its contents.

Am Jur 2d, Searches and Seizures § 83.

2. Searches and Seizures § 7 (NCI4th)— officers boarding bus—defendant passenger questioned—defendant escorted from bus—no seizure of defendant

Competent evidence supported the trial court's findings of fact, and those findings supported its conclusion that defendant was not involuntarily detained or seized when officers boarded a bus on which defendant was a passenger and questioned him or when they escorted defendant from the bus where the evidence tended to show that the officers identified themselves, spoke in low tones, did not display weapons, and were entirely non-threatening in appearance and demeanor; the officers did not interfere with the ingress and egress of passengers from their seats; the door of the bus remained open; defendant himself testified that he accompanied the officers of his own free will; and no one made any statement to defendant about being under arrest when he and the officers left the bus.

Am Jur 2d, Searches and Seizures §§ 10, 32.

Appeal by defendant from judgments entered 24 September 1992 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 March 1994.

Attorney General Michael F. Easley, by Assistant Attorney General John G. Barnwell, for the State.

A. Larkin Kirkman for defendant-appellant.

JOHN, Judge.

Defendant pled guilty to charges of trafficking in cocaine by transportation and trafficking in cocaine by possession and was sentenced to seven years imprisonment in addition to a fine of $50,000.00. He reserved the right to appeal denial of his previously filed motions to suppress.

Defendant contends the trial court erred by denying those prior motions in that (1) his purported consent to be searched was not voluntarily and intelligently given and (2) he was unconstitutionally "seized" by officers who had boarded the bus on which defendant was a passenger. For the reasons set forth herein, we find defendant's arguments unpersuasive.

The State's evidence on *voir dire* tended to show the following: On 28 March 1990, deputies of the Wake County Sheriff's Department and agents of the North Carolina State Bureau of Investigation (SBI) entered the Raleigh bus terminal for a joint "drug interdiction" operation. This involved investigation of buses originating in South Florida and New York for the purpose of detecting the possession and transportation of illegal substances.

Shortly after the officers' arrival, Special SBI Agent Bruce Black observed passengers leaving a bus which had originated in New York. He also noticed defendant standing outside the bus on the loading dock. Defendant seemed nervous and paced about until reboarding the bus. He then moved towards the rear of the vehicle, picked up a green and white duffel-type bag from the seat, and placed it in the overhead luggage bin. Defendant thereupon exited the bus and walked over to a pay telephone.

After defendant again boarded the bus, the officers commenced their "drug interdiction" procedures. In these efforts, neither weapons nor handcuffs are displayed (although the officers are armed with concealed weapons), the ingress and egress of passengers from their seats is not blocked, and the door of the bus remains open. The officers question each passenger about their name, point of origin and destination, speaking in quiet and pleasant tones.

Wake County Detective Ronnie Stewart and Agent Black entered the bus wearing jackets indicating their status as law enforcement officials and began talking with the passengers. Detective Stewart approached defendant. He displayed departmental identification and stated he was a police officer engaged in a routine check of the bus. Stewart asked if he could speak with defendant and defendant said, "yes." Defendant told the officer he was traveling from Newark to South Carolina. Following inquiry as to whether he had any luggage, defendant pointed to a green and white bag overhead on the luggage rack. Detective Stewart then informed defendant the officers were narcotics agents pursuing illegal drugs and weapons, and asked

defendant if he had "anything on him." Defendant answered "no," and gave permission for agents to look into the bag.

Agent Black opened defendant's satchel, removed a portable radio, and noticed that the battery compartment appeared worn and rusty. The compartment contained only a Phillips screwdriver. The screws on the radio also looked worn as if they had been screwed and unscrewed several times. At this point, Detective Stewart asked defendant if he would mind stepping off the bus so they could speak privately. Defendant did not respond verbally but exited the bus.

The officers escorted defendant to a non-public room in the terminal and obtained further consent from him to search defendant and his luggage. Agent Black opened the radio with a screwdriver and discovered that it contained several packages which he believed to be cocaine or crack cocaine. While Agent Black was opening the radio, defendant seemed very nervous and told the officers, "that's not my radio." A pair of pants in the bag also contained a tin foil package of white powder which appeared to be cocaine.

Agent Black then advised defendant he was under arrest, handcuffed him, and read him the Miranda warnings. Defendant indicated he understood his rights and agreed to be questioned without an attorney present.

According to Agent Black, defendant explained that a man named "Bogey" in South Carolina had paid him $1,200.00 to travel to New York. In New York defendant met a black male who opened the radio and placed the drugs inside. Defendant subsequently boarded a bus in Newark and was returning to South Carolina.

Detective Stewart also testified that he had worked with mentally retarded patients while employed at Dorothea Dix Hospital for approximately two years. Regarding defendant, Stewart observed "that he articulated well" and didn't "remember anything unusual about his demeanor or . . . him having any problems communicating." Stewart further emphasized he "didn't observe any problems that he had physically or mentally or any other thing. He seemed fairly normal to me."

Dr. Lily Oatfield, a psychologist specializing in the mentally handicapped, testified she met with defendant on 5 September 1990 and administered a battery of tests. The results revealed defendant's reading ability was confined to three or four letter words and that his math skills did not exceed a fifth grade level. She stated defendant

had been in classes for the mentally handicapped at school and that he had a verbal I.Q. of 70, performance I.Q. of 71, and full scale I.Q. of 70. Dr. Oatfield further testified concerning defendant's capacity to consent to a search as follows:

> Q: From what you have discovered about this young man, would you expect him to respond to the officers' questions for permission to search with a denial of that permission?
>
> . . . .
>
> A: With a denial from him? No, and particularly if the officers conducting themselves the way they said, seem to have done.
>
> Q: Would you explain why and then explain particularly—
>
> A: His whole posture towards me, or teachers, or others, he's been taught to be cooperative. Looking over the school records, you saw no indications of being a behavioral problem or being oppositional, and he's evidently been taught that if they're a cop, you're suppose [sic] to answer, a teacher you're suppose [sic] to be polite to. He's dependent, passive and doesn't likes [sic] friction or anything that would create a problem, and saying no to them might create a problem, certainly to a policeman.

Defendant's testimony contradicted that of Agent Black in certain respects and disavowed knowledge of the presence of cocaine in the bag. Defendant further testified he did not feel free to leave the officers' presence while on the bus and indicated the reason was the "cops had me." However, he also stated the officers treated him fairly, did not threaten or intimidate him, and did not pull or point a gun at him. He acknowledged exiting the bus and consenting to the searches on the basis of his own free will.

At the close of the *voir dire* evidence, defendant's motions to suppress evidence resulting from the search and arrest of defendant on 28 March 1990 were denied. The trial court made the following pertinent findings of fact:

> 45. When asked by his attorney why he did not hesitate to consent to the search, defendant testified that he thought he was doing the right thing.
>
> . . .
>
> 47. Defendant testified that the officers treated him fairly; that they were polite; and that they never did or said anything

threatening, coercive, or intimidating to force him to talk with them or to allow them to search his person or the bag he had with him. Until he was told he was under arrest, defendant said he was not afraid.

48. Defendant testified that when he agreed to talk with the officers, when he agreed to a search of his person, when he agreed to a search of the bag, and when he agreed to get off the bus to talk further with the officers he did so freely and voluntarily.

The trial court thereby concluded:

60. Under all the circumstances surrounding the defendant's interactions with the law enforcement officers on the bus on 28 March 1990, as described by Detective Stewart, Agent Black, and defendant, a reasonable person would have believed that he was free to refuse to talk with the officers, free to refuse to allow a search of his person and his belongings, and free to leave the bus if he chose to do so.

61. Under all the circumstances, the Court finds that defendant freely, knowingly, and voluntarily consented to talk with Detective Stewart, to a search of his person, to a search of the green and white-striped duffle bag and its contents, and to talk with Agent Black after being arrested and advised of his Miranda rights.

At the outset we note that in reviewing an order denying a motion to suppress, the appellate court must determine: (1) "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and [(2)] 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).

I.

[1] By his first assignment of error, defendant maintains the trial court erred by denying his motion to suppress evidence "result[ing] from the involuntary search of the defendant." He argues any consent to search he may have proffered was neither voluntarily nor intelligently given. We disagree.

Upon objection to the validity of a consent to search, the trial court must conduct a *voir dire* hearing to determine if consent was

voluntarily given. *State v. Fincher*, 309 N.C. 1, 5, 305 S.E.2d 685, 689 (1983). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973).

"[A] defendant's subnormal mental capacity is a factor to be considered when determining whether a knowing and intelligent waiver of rights has been made." *Fincher*, 309 N.C. at 8, 305 S.E.2d at 690 (1983) (citing *State v. Jenkins*, 300 N.C. 578, 585, 268 S.E.2d 458, 463 (1980); *State v. Thompson*, 287 N.C. 303, 318-19, 214 S.E.2d 742, 752 (1975), *death sentence vacated*, 428 U.S. 908, 49 L. Ed. 2d 1213 (1976)). A "lack of intelligence does not, however, standing alone, render an in-custody statement [or a consent to be searched] incompetent if it is in all other respects voluntary and understandingly made." *Id.*; *see also Jenkins*, 300 N.C. at 585, 268 S.E.2d at 463 (mental deficiency only one factor in determining validity of defendant's waiver of right to counsel and corresponding statement to police) and *Thompson*, 287 N.C. at 323-24, 214 S.E.2d at 755 (waiver of Miranda warnings and subsequent confession valid where mental capabilities were limited but where waiver knowingly and intelligently waived).

In *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991) police officers arrived at an apartment with an arrest warrant for the defendant. The officers obtained consent to search the residence without a search warrant from Karen Curtis, a twenty-two year old mentally retarded woman who shared the apartment with defendant. *Id.* at 376, 407 S.E.2d at 207. Evidence revealed that while Ms. Curtis may have been able to understand she had the right to refuse the search, she responded favorably to authority figures and did "not have the will to disagree with someone in authority." *Id.* at 377, 407 S.E.2d at 207-08. Our Supreme Court determined that, "[d]espite the testimony cited by defendant as indicative of Curtis' limited mental abilities," there existed sufficient evidence of her voluntary and knowing consent to the search of the apartment. *Id.* at 377, 407 S.E.2d at 208.

Similarly, notwithstanding evidence of defendant's mental limitations and testimony regarding his tendency to cooperate unilaterally with police officers, there exists ample competent evidence in the case *sub judice* to support the trial court's findings. For example, we note defendant's testimony itself reflected consent to search based upon his "own free will." Further, the evidence suggests no coercive

behavior by the police, and defendant acknowledged they were neither threatening nor intimidating, nor did they display weapons of any sort. The court's findings in turn support its conclusion that defendant voluntarily and intelligently consented to being searched by the law enforcement agents. The trial court therefore did not err by denying defendant's motion to suppress "resulting from the involuntary search of defendant."

II.

[2] Defendant also asserts the trial court erred by denying his motion to suppress grounded upon two alleged illegal seizures of defendant: first, when the officers boarded the bus and questioned defendant, and second, when they escorted defendant from the bus. Defendant's argument cannot be sustained.

Not every contact between a police officer and a citizen constitutes a "seizure." *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 20 L. Ed. 2d 889, 905 (1968). As the United States Supreme Court explained:

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.
>
> Moreover, characterizing every [] encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices.
>
> . . . .
>
> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

United States v. Mendenhall, 446 U.S. 544, 553-54, 64 L. Ed. 2d 497, 509, *reh'g denied*, 448 U.S. 908, 65 L. Ed. 2d 1138 (1980) (citation omitted). Therefore, the test of an unconstitutional seizure involves a determination of whether a reasonable person, in view of all the surrounding circumstances, would feel at liberty to decline law enforcement officials' requests and to withdraw from their presence.

In *State v. Christie*, 96 N.C. App. 178, 385 S.E.2d 181, two narcotics officers boarded a bus at the Charlotte bus terminal and began speaking with passengers. *Id.* at 180-81, 385 S.E.2d at 182. The officers observed that defendant looked back at them several times, and that he "exhibited some characteristics associated with the drug courier profile." *Id.* at 181, 385 S.E.2d at 182. After identifying themselves and their purpose, the police requested permission to search defendant and his suitcase; he responded, "Sure, go ahead." *Id.* at 181, 385 S.E.2d at 183. The search disclosed twenty-five (25) pounds of marijuana in defendant's luggage. *Id.* at 182, 385 S.E.2d at 183.

This Court determined the foregoing evidence revealed defendant Christie was not "seized" in the Fourth Amendment context until he was arrested. We stated:

> First, [defendant] was not seized when the officers boarded the bus. Only two officers boarded the bus; they did not display any weapons; they did not use threatening language or a compelling tone of voice; and they did not block or inhibit defendant in any way from refusing to answer their questions or leave the bus. While defendant may have felt restrained from leaving the bus by the officers' presence, he had no reason to feel such restraint.
>
> . . . .
>
> Second, defendant was not seized when the officers began questioning him. . . . Applying the reasonable person standard of *Mendenhall*, a reasonable person in defendant's position would not have felt that he was compelled to stay in his seat and answer the questions.
>
> Third, a seizure did not occur because the officers boarding the bus was not more intrusive than necessary.

Id. at 184-85, 385 S.E.2d at 184-85.

Christie is thus dispositive of the issue of whether defendant herein was "seized" when agents boarded the bus and began questioning him. Competent evidence supports the trial court's findings

indicating that the officers identified themselves, spoke in low tones, did not display weapons, and were entirely non-threatening in appearance and demeanor. Further, they did not interfere with the ingress and egress of passengers from their seats, and the door of the bus remained open. Under the *Mendenhall* test, we cannot say the court's findings do not support its conclusion that a reasonable person in such circumstances would have felt free to leave.

With respect to whether a "seizure" took place when defendant exited the bus, *State v. Bromfield*, 332 N.C. 24, 418 S.E.2d 491 (1992), controls. In *Bromfield*, officers performing drug interdiction work at the Raleigh bus station noticed a group of persons matching the description of those being sought in connection with the death of two women. *Id.* at 29-30, 418 S.E.2d at 493-94. After the police approached and inquired as to the identity of these individuals, defendant agreed to accompany officers from the terminal to the police station. *Id.* at 37, 418 S.E.2d at 498. He was specifically informed that no charges had been brought against him and his movements about the station were unattended and unconfined. *Id.* Our Supreme Court ruled that the evidence supported the trial court's conclusion that the defendant was neither seized nor involuntarily detained. *Id.*

Similarly, in the case *sub judice*, the record reveals no physical restraint was imposed upon defendant when he exited the bus. Defendant himself testified he accompanied the officers of his own free will, and that he went with them because he wanted to. Further, Agent Black indicated no one made any statement to defendant about being under arrest when defendant and the officers left the bus. Accordingly, as in *Bromfield*, competent evidence supports the trial court's findings of fact, and those findings support its conclusion reflecting that defendant was not involuntarily detained or seized. *See also State v. Howell*, 335 N.C. 457, 468, 439 S.E.2d 116, 122 (1994). The trial court therefore did not err by denying defendant's motion to suppress based upon the alleged unconstitutional seizure of defendant.

Based on the foregoing, the order of the trial court denying defendant's motions to suppress is in all respects affirmed.

Affirmed.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. ARTHUR FRANCIS GRAHAM

No. 9326SC1268

(Filed 21 March 1995)

1. Evidence and Witnesses § 1426 (NCI4th)— destruction of rape kit and clothing—evidence not exculpatory—no bad faith—no denial of due process

Defendant's due process rights were not denied by the destruction of the rape kit and all articles of clothing worn by the victim on the night of the rape after a computer printout indicated that the case had been voluntarily dismissed, where the evidence was not exculpatory and there was no evidence of bad faith.

Am Jur 2d, Evidence § 941.

2. Evidence and Witnesses § 1426 (NCI4th)— destroyed evidence—defendant's right to test evidence—failure to exercise right in timely fashion—suppression of evidence denied

The trial court did not abuse its discretion by failing to suppress expert testimony comparing body fluids and hairs contained in a rape kit with those of the defendant as a sanction under N.C.G.S. § 15A-910 for the State's destruction of the rape kit, thereby preventing defendant from invoking his right to inspect and test the evidence, where the State informed defendant that he could have access to or copies of any tests performed as well access to any physical evidence, but defendant made no attempt to test the evidence during the many months before trial during which the evidence was still in the State's possession.

Am Jur 2d, Evidence §§ 1005, 1006.

3. Evidence and Witnesses § 3022 (NCI4th)— pending charge—evidence not admissible to show bias of defense witness

Evidence of a pending charge or indictment may not be offered to show bias of a defense witness; therefore, the trial court erred in allowing the State to elicit testimony from a defense witness that he was in jail awaiting trial at the time of his testimony, but this error was not prejudicial since several wit-

nesses gave similar testimony and the jury was not told the nature of the pending charge.

Am Jur 2d, Witnesses §§ 862, 863.

Comment Note.—Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution. 20 ALR2d 1421.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity for which witness was arrested or charged, but not convicted—modern state cases. 28 ALR4th 505.

4. **Evidence and Witnesses § 124 (NCI4th)— pregnancy of rape victim—denial of request to cross-examine—defendant not prejudiced**

The trial court in a rape case did not err in denying defendant's request to cross-examine the victim about her pregnancy and whether she told defendant he was the father of the child, since evidence of the pregnancy was brought out during defendant's case in chief, and the court emphasized to defendant that he could recall the victim and question her about the pregnancy, but defendant chose not to do so.

Am Jur 2d, Rape §§ 59, 90, 100.

5. **Rape and Allied Offenses § 200 (NCI4th)— no submission of lesser offense—no error**

The trial court did not err in refusing to instruct the jury on attempted second-degree rape where the evidence unequivocally showed an act of penetration by defendant, and the only conflict presented by the evidence was whether intercourse was consensual or by force.

Am Jur 2d, Rape § 110.

Propriety of lesser-included-offense charge to jury in federal sex-crime prosecution. 100 ALR Fed. 535.

Appeal by defendant from judgment entered 13 May 1993 by Judge Donald W. Stephens in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 October 1994.

The State's evidence showed that at 10:30 p.m. on 28 July 1992 the victim left her home and walked to Trinity Shopping Center to use the

pay phone. Upon arriving, she went into a convenience store where she was approached by defendant, a man she knew from the neighborhood. Defendant followed her around the store and offered to buy her something. She declined and the store owner told him to leave her alone. After buying chips and a drink she went outside to use the pay phone. Defendant approached her twice while she was using the phone and took the phone from her hand.

While she was on the pay phone the convenience store closed and everyone but defendant left the area. Around 11:15 p.m. she started to walk home but defendant approached her and cut her off. After she tried to go around him and told him to move, he grabbed her and put her in a choke hold. She scratched and kicked at defendant, eventually falling into the street. Defendant pulled her up, threw her into a vine-covered fence, and took her behind a white building near the convenience store. He told her that if she did not shut up he would kill her, placed his hand over her mouth, and removed her shorts and underwear. He then attempted to penetrate her but was unable to and placed his finger inside her vagina. He then forced her to have intercourse as she cried and begged him to stop. After approximately ten minutes he stopped and both defendant and the victim put on their clothes and walked towards the street. Before she left, defendant told her to go ahead and call the police, but to do it before he went to work at 7:00 a.m. The victim walked to a neighbor's house and called the police. After talking with the police she was taken to the emergency room. The treating physician testified that she had superficial lacerations on her face and both knees. The victim testified that she also had a swollen neck and caught poison ivy from being thrown into the vine-covered fence.

Defendant testified that he and the victim had been having sexual relations for quite some time and that before the alleged rape she told him she was pregnant with his child. The emergency room physician confirmed that she was four to eight weeks pregnant at the time of the rape. Defendant also testified that he and his friend had cut grass at the victim's house earlier that day and, while there, defendant went inside the house and had consensual sex with the victim. According to defendant, the victim, he, and another friend then hung out at his house before going to Trinity Shopping Center.

When they arrived at the shopping center, defendant bought the victim a soda and some chips and gave her money to use the phone. He claimed that he had his hands all over her at the store and that the

store owner had yelled at them to quit doing that in front of his store. Defendant planned to walk the victim home but changed his mind when he discovered she was talking to another guy on the phone. She started hitting him and fell to her knees on the pavement. He told her that he was going to let the other guy take care of the baby, walked away, and was later arrested for rape. Several witnesses supported defendant's testimony.

The jury convicted defendant of second degree rape. Following his conviction, the trial court found one factor in aggravation and one factor in mitigation and, concluding that the factors in aggravation outweighed the factors in mitigation, sentenced defendant to twenty years imprisonment. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Ellen B. Scouten, for the State.

Ellis M. Bragg for defendant appellant.

ARNOLD, Chief Judge.

[1] Prior to defendant's trial, the Property Control Bureau of the Charlotte Police Department destroyed the rape kit and all articles of clothing the victim had been wearing the night of the rape after a computer printout indicated that the case had been voluntarily dismissed. Neither party knew of its destruction until the second day of trial. Upon learning of it defendant moved to suppress testimony by the State's experts in trace evidence and body fluids. He also moved for a mistrial. The trial court denied his motions.

Defendant contends on appeal that the trial court erred in (1) admitting testimony by the State's experts regarding comparisons of blood and hair from samples in the rape kit with defendant's blood and hair, (2) denying both his motion to dismiss and motion for a mistrial, and (3) denying his motion to suppress evidence of blood and hair samples after the State failed to give notice of its intention to use the evidence at trial. Defendant argues he has been prejudiced because he could not compare semen stains, conduct independent tests on the evidence, or confront the witnesses—all of which he contends denied him an effective defense.

Defendant's main contention, however, concerns testimony by the State's experts regarding their analyses of body fluids and hairs contained in the rape kit with those of defendant. He argues that allowing that testimony violated his due process rights under both the

United States and North Carolina Constitutions as explained in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), and *State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984).

The State contends that the destroyed evidence was not exculpatory or favorable to the defendant, thus avoiding any *Brady* or *Agurs* violations. It further contends that the United States Supreme Court's decision in *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281 (1988), controls this issue. We agree with both contentions.

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218. In *Agurs*, the Court recognized that due process may be deprived where the prosecution withholds material evidence favorable to the accused even in the absence of a specific request by defendant. *Agurs*, 437 U.S. 97, 49 L. Ed. 2d 342.

We fail to see nondisclosure of evidence favorable to defendant. Furthermore, we believe this case more closely resembles *Youngblood*. In *Youngblood*, a physician completed a sexual assault kit on a ten-year-old boy who had been repeatedly sodomized. *Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281. The kit and the boy's t-shirt and underwear were taken by the police who then refrigerated the kit but not the clothing. *Id.* The state criminologist examined the evidence in the kit solely to determine if there had been sexual contact and returned the kit to the refrigerator. *Id.* Some time later, the prosecution requested an ABO blood group test of the rectal swab. *Id.* That test detected no blood group substances. *Id.* More than a year later, the boy's clothes were examined by a criminologist for the first time. *Id.* The criminologist found two semen stains on the clothing but at that point tests were inconclusive. *Id.*

Defendant argued that his due process rights were violated by the State's failure to preserve the evidence. *Id.* The Court rejected this argument, noting that the State had provided defendant with relevant police reports containing information about the swabs and clothing. *Id.* In addition, the State sent defendant's expert lab reports and granted him access to the swabs and clothes. *Id.* After noting the irrelevance of good faith or bad faith on the part of the State under *Brady*, the Court held:

> we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. . . . We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

488 U.S. at 57-58, 102 L. Ed. 2d at 289.

In *State v. Mlo*, a first degree murder case, our Supreme Court was faced with a similar question after the police released an impounded car from custody, thereby denying defendant an opportunity to compare tire treads to casts made near the victim's body. *State v. Mlo*, 335 N.C. 353, 440 S.E.2d 98, *cert. denied*, — U.S. —, 129 L. Ed. 2d 841 (1994). Defendant argued this failure to preserve evidence violated his due process rights under the North Carolina and United States Constitutions. *Id.* Our Supreme Court disagreed and, in rejecting defendant's claims of *Brady* violations, stated that the evidence would have been marginally exculpatory at best. *Id.* The Court relied on the above-quoted language in *Youngblood* and stated that "[d]efendant in this case has not alleged or demonstrated any bad faith on the part of the police in the release of the automobile, nor does the record reveal any such conduct. The exculpatory value of any tests defendant wished to perform . . . was speculative at best." 335 N.C. at 373, 440 S.E.2d at 108.

In this case, we agree with the trial court's determination that the evidence was not exculpatory. Defendant does not deny having sexual relations with the victim on the day of the alleged rape and would gain nothing by having access to the evidence from the rape kit. Furthermore, we see no evidence of bad faith. The record clearly shows that the evidence was destroyed only after a computer printout indicated that the district attorney voluntarily dismissed the case. Defendant's argument is without merit.

[2] Defendant also contends the trial court erred in denying his motions for mistrial, dismissal, or suppression of the experts' testimony under N.C. Gen. Stat. § 15A-910 (1988). That statute provides sanctions when a party fails to comply with our criminal discovery provisions. Defendant argues the State violated N.C. Gen. Stat. § 15A-903(e) (1988) and that "to allow the State's expert witnesses to give opinion testimony based upon that evidence denied the

Appellant due process and his right to effectively confront the witnesses against him and further denied the Appellant an effective defense by preventing him from invoking the mandatory right to inspect and test the evidence."

Initially, we note that the trial court *did* allow defendant's motion to suppress in part and prohibited testimony regarding the condition of the victim's sweatshirt. The sweatshirt, which the witness would testify had grass on it, had been destroyed along with the rape kit and other clothing. Moreover, defendant did not attempt to view or perform tests on the evidence at any point before the trial although as early as 23 October 1992 the State informed defendant that he could have access to or copies of any tests performed, as well as access to any physical evidence. The police did not destroy the evidence until 3 March 1993, only two months before trial. We agree with the State's argument that defendant cannot now contend he was deprived of his right to test that evidence where he made no attempt to do so during the many months preceding trial. The trial court did not abuse its discretion in failing to award sanctions under G.S. § 15A-910.

[3] Defendant next contends the trial court erred in permitting the State to impeach Edward Sloan by eliciting that he was in jail awaiting trial at the time of his testimony on defendant's behalf. The court allowed the evidence in order to show possible bias against the State, but would not allow the State to inquire into the nature of the charges. Sloan testified that the victim told him she was pregnant and that defendant was the father. He also testified that he had watched defendant and the victim hugging and touching, and had seen defendant come out of the victim's house.

In *State v. Williams*, our Supreme Court held that "*for purposes of impeachment*, a witness . . . may not be cross-examined as to whether he has been *indicted* or is *under indictment* for a criminal offense." *State v. Williams*, 279 N.C. 663, 672, 185 S.E.2d 174, 180 (1971). Several years later, in *State v. Howie*, defendant asked the Supreme Court to recognize an exception to this rule where the purpose for the cross-examination is to impeach by showing bias or prejudice. *State v. Howie*, 310 N.C. 613, 313 S.E.2d 554 (1984). The bias defendant wanted to show in *Howie* was the possibility that the witness was testifying for the State in return for preferential treatment on the pending charges. *Id.* The Supreme Court did not address the issue. However, our Courts had already determined that it is prejudicial error not to allow a *State's* witness to answer questions regarding

pending criminal charges in order to show the witness may be testifying to receive a lighter sentence. *See State v. Evans*, 40 N.C. App. 623, 253 S.E.2d 333 (1979).

We now hold that evidence of a pending charge or indictment may not be offered to show bias of a defense witness. As the court in *Williams* stated, "an indictment cannot rightly be considered as more than an unproved accusation." *Williams*, 279 N.C. at 672, 185 S.E.2d at 180. Moreover, the rationale for allowing such evidence where the witness testifies for the State is inapplicable. Therefore, the trial court erred in allowing the State to elicit that Sloan was in jail awaiting trial at the time of his testimony. However, under the facts of this case a new trial is not warranted, particularly since several witnesses gave similar testimony, and since the jury was not told the nature of the pending charge.

[4] Defendant further contends the trial court erred in denying his request to cross-examine the victim about her pregnancy and whether she told defendant he was the father of the child. We disagree.

In *State v. Black*, defendant argued that the trial court erred in failing to allow him to cross-examine the victim as to whether she had previously engaged in sexual intercourse with two other men. *State v. Black*, 111 N.C. App. 284, 432 S.E.2d 710 (1993). This Court affirmed the trial court's ruling and stated:

> [t]he use of an alleged rape victim's prior sexual behavior is governed by North Carolina's Rape Shield Statute, N.C.R. Evid. 412. . . . Under procedures mandated by this statute, the proponent of such evidence . . . must first apply to the trial court for a determination of the relevance of the complainant's sexual behavior. The trial court is then required to "conduct an *in camera* hearing . . . to consider the proponent's *offer of proof* and the argument of counsel . . . ."

Id. at 289, 432 S.E.2d at 714 (citations omitted). The Court noted that the victim, the sole witness at the *in camera* hearing, denied having sexual intercourse with the other two men and no one testified to the contrary. We then held that, since defendant failed to offer proof that it actually occurred, and failed to demonstrate the relevancy of the evidence, the trial court properly applied the Rape Shield Statute.

Here, defense counsel questioned the victim about the pregnancy during *voir dire* and she denied both having sexual relations with defendant and telling him he was the father of her child. No other evi-

dence was presented. The trial court, consistent with Rule 412 and our holding in *Black*, allowed defendant during cross-examination to question the victim concerning any prior sexual relations with defendant. It determined, however, that evidence about the pregnancy was not relevant until defendant brought out that fact during his case-in-chief. In accord with that ruling, once defendant testified about the pregnancy and his sexual relationship with the victim, the trial court allowed testimony from the emergency room physician that the victim was four to eight weeks pregnant at the time of the rape. In addition, the court emphasized to defendant that he could recall the victim and question her about the pregnancy. Defendant chose not to do so. We believe the trial court ruled correctly. Furthermore, even if the trial court erred, we fail to see how defendant was prejudiced since the pregnancy was brought out during his case, and he was given an additional opportunity to examine the victim.

[5] Finally, defendant contends the trial court erred in refusing to instruct the jury on attempted second degree rape. We disagree. "Whether instruction on a lesser included offense is proper depends solely on whether there is evidence that would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater offense." *State v. Hoffman*, 95 N.C. App. 647, 649, 383 S.E.2d 458 (1989), *disc. review denied*, 326 N.C. 52, 389 S.E.2d 101 (1990) (finding no error in refusal to instruct on attempted first degree rape where evidence showed only that defendant raped his niece); *see also State v. Green*, 95 N.C. App. 558, 383 S.E.2d 419 (1989) (affirming trial court's refusal to instruct on attempted first degree rape where no evidence of attempt was present).

In this case, the evidence unequivocally showed an act of penetration by defendant. The only conflict presented by the evidence was whether intercourse was consensual or by force. The trial court did not err in denying his request because an instruction on attempted second degree rape was not warranted.

We have reviewed defendant's remaining assignment of error and find it to be without merit. Defendant received a fair trial free from prejudicial error.

No error.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. JOSEPH FRANCIS JERNIGAN

No. 945SC286

(Filed 21 March 1995)

1. Automobiles and Other Vehicles § 818.1 (NCI4th)— habitual impaired driving—no arraignment on charge alleging previous conviction—stipulation to previous convictions—no error

In a prosecution for habitual impaired driving, the trial court's failure to formally arraign defendant upon the charge alleging the previous convictions and failure to inform defendant that he could admit the previous convictions, deny them, or remain silent as required by N.C.G.S. § 15A-928(c) was not reversible error, since defendant's attorney informed the court that he had discussed the case with defendant and that defendant would stipulate to the previous convictions; defendant did not contend that his attorney was acting contrary to his wishes; defendant was fully aware of the charges against him; and defendant was in no way prejudiced by the omission of the arraignment.

Am Jur 2d, Automobiles and Highway Traffic § 310.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations. 48 ALR4th 367.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 ALR5th 263, sec. 1.

2. Jury § 69 (NCI4th)— alternate juror sent to jury room—no deliberations—no prejudicial error

The trial court did not err in allowing an alternate juror to retire to the jury room with the jury and in not declaring a mistrial based on this error where the jurors, along with the alternate, were sent to the jury room and instructed to select a foreman but not to discuss the case while counsel argued for corrections to the charge; the jurors returned to the courtroom after having selected a foreman and were reinstructed on a portion of the charge; and the court then excused the alternate.

Am Jur 2d, Jury § 126.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction. 15 ALR4th 1127.

3. Criminal Law § 275 (NCI4th)— denial of continuance to secure witness

The trial court did not err in the denial of defendant's motion for a continuance to secure the presence of a defense witness where the whereabouts of the witness were unknown; no subpoena for the witness was issued prior to the original trial date; defense counsel stated that the witness had "just sort of disappeared" and that if subpoenaed for another trial date "he might not show up"; and the testimony of the witness would not have added anything more than corroboration to the defense.

Am Jur 2d, Continuance §§ 29-32.

Right of accused to continuance because of absence of witness who is fugitive from justice. 42 ALR2d 1229, supp sec. 1.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case. 9 ALR3d 1180.

Appeal by defendant from judgments and commitments entered 1 July 1993 by Judge Paul M. Wright in New Hanover County Superior Court. Heard in the Court of Appeals 11 January 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III and Associate Attorney General Allyson K. Kurzmann, for the State.

Nora Henry Hargrove for defendant-appellant.

LEWIS, Judge.

Defendant was convicted of habitual impaired driving, no operator's license, and resisting arrest and was sentenced to consecutive terms of three years, six months, and six months, respectively. From the judgments and commitments, defendant appeals.

The State's evidence tended to show that on 2 January 1993 at about 1:45 a.m., Detective Douglas Vredenburgh, of the New Hanover County Sheriff's Department, observed defendant get into the driver's side of a black pickup truck at a convenience store. Vredenburgh

knew defendant and was aware that he did not have a valid driver's license. Vredenburgh followed defendant for approximately a mile and a half with his blue lights on, and he noticed that defendant was driving erratically. The truck then pulled into a driveway near defendant's home. Defendant got out by the driver's side door and began running away from the truck. Defendant's passenger, Charles Curtis Atkinson, whom Vredenburgh also knew, got out of the passenger's side door but stood by the truck. Vredenburgh called for backup and then began to chase defendant, who had run out of sight. About three or four minutes later, Vredenburgh found defendant hiding in a bush in back of a nearby house. Defendant was then placed under arrest.

Defendant's evidence consisted of the testimony of Jasper Hollowuay and that of defendant. Hollowuay testified that at about 1:45 on the morning in question, he was driving to his parents' house, when he saw defendant, walking along the side of the road. Though he did not know him, he decided to offer defendant a ride because defendant was stumbling and weaving back and forth. As they approached defendant's home, Hollowuay saw the blue lights of the police car and decided to stop and let defendant out. Hollowuay testified that he had drunk a few beers and did not want to be stopped by the police.

Defendant testified that, after leaving a lounge, he began to walk home. As he was walking, Hollowuay offered him a ride and he accepted. After defendant got out of Hollowuay's car, he noticed the blue lights and saw a person running toward him. Defendant ducked behind a bush and the person ran by him. Shortly thereafter, an officer came up, ordered defendant out of the bushes, and arrested him.

Defendant also testified that because of his poor vision he receives disability benefits and is unable to drive. He further stated that he had not driven since 1990. On cross-examination, defendant testified that he had been receiving disability benefits for about seven years because of his vision. He also testified that in those seven years, he had been convicted of driving while impaired three times.

I.

[1] Defendant's first contention relates to his conviction for habitual impaired driving. A person commits the offense of habitual impaired driving if he drives while impaired and has been convicted of three or more offenses involving impaired driving within seven years of the date of the current offense. N.C.G.S. § 20-138.5(a) (Cum. Supp. 1994).

N.C.G.S. § 15A-928 (1988) provides the procedures to be followed in cases in which "the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter." § 15A-928(a). Defendant's contention is that the trial court erred in failing to follow the procedures set out in section 15A-928.

Section 15A-928(c) provides that after the commencement of the trial and before the close of the State's case, the judge must arraign the defendant in the absence of the jury upon the charge that the defendant was previously convicted of the specified offense. The judge must advise the defendant that he may admit the previous conviction, deny it, or remain silent. *Id.* If the defendant admits the previous conviction, that element of the higher grade offense is established, and no evidence in support thereof may be adduced by the State. § 15A-928(c)(1). If the defendant denies the previous conviction or remains silent, the State may prove that element of the higher grade offense before the jury as a part of its case. § 15A-928(c)(2).

In this case, the trial court did not formally arraign defendant upon the charge alleging the previous convictions and did not advise defendant that he could admit the previous convictions, deny them, or remain silent, as required by section 15A-928(c). Defendant argues that this failure to follow the statute was reversible error. We disagree.

Before trial, the prosecutor and defense counsel informed the trial court that defendant was willing to stipulate to his previous convictions. The prosecutor asked defense counsel if, in fact, defendant was stipulating to the previous convictions set out in the indictment. Thereafter, the following exchange took place:

> [Defense Counsel]: Your Honor, for purposes of simplifying the case I have had discussions with my client and he understands that basically our defense is that he was not there. He is not only willing to stipulate as to his criminal record and it would be a felony, he is also willing to stipulate that he was legally impaired . . . .
>
> [Prosecutor]: [A]s far as the criminal record I just want to make sure that the basis as set out in the indictment is correct.
>
> [Defense Counsel]: That's correct.

[Prosecutor]: And would be guilty of felony DWI?

[Defense Counsel]: That's correct.

Because defendant stipulated to his previous convictions, the State, in accordance with section 15A-928(c)(1), presented no evidence to the jury of defendant's previous impaired driving convictions, and the case was submitted to the jury with no reference to those convictions and as if the fact of the previous convictions were not an element of the offense.

The purpose of section 15A-928 is to insure that the defendant is informed of the previous convictions the State intends to use and is given a fair opportunity to either admit or deny them or remain silent. *State v. Ford*, 71 N.C. App. 452, 454, 322 S.E.2d 431, 432 (1984). This purpose is analogous to that of N.C.G.S. § 15A-941 (Cum. Supp. 1994), the general arraignment statute. Under that statute, the defendant must be brought before a judge and must have the charges read or summarized to him and must be directed to plead. § 15A-941(a). If the defendant does not plead, he must be tried as if he pled not guilty. *Id.* The failure to arraign the defendant under section 15A-941 is not always reversible error. "Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding." *State v. Smith*, 300 N.C. 71, 73, 265 S.E.2d 164, 166 (1980).

We believe that the reasoning and holding in *Smith* apply here. If there is no doubt that defendant was fully aware of the charges against him and was in no way prejudiced by the omission of the arraignment required by section 15A-928(c), the trial court's failure to arraign defendant is not reversible error. In this case, defendant's attorney informed the court that he had discussed the case with defendant and that defendant would stipulate to the previous convictions. In addition, just before the close of the State's case-in-chief, defense counsel reaffirmed the stipulation to the trial court. Because of defendant's stipulation to the previous convictions, the State could not introduce evidence of the previous convictions before the jury. § 15A-928(c)(1); *Ford*, 71 N.C. App. at 454, 322 S.E.2d at 432. Defendant makes no contention on appeal that he was not aware of the charges against him, that he did not understand his rights, or that he did not understand the effect of the stipulation.

Defendant does contend, however, that the stipulation was ineffective because it was made by his attorney without defendant's having been advised by the court of his rights regarding the stipulation. Defendant equates the requirements of section 15A-928(c) to the requirement that a guilty plea be made knowingly and voluntarily. However, it is clear that a defendant's attorney may stipulate to an element of the charged crime on behalf of the defendant, and that the stipulation may be entered and read to the jury. *State v. Morrison*, 85 N.C. App. 511, 514-15, 355 S.E.2d 182, 185, *disc. review denied and appeal dismissed*, 320 N.C. 796, 361 S.E.2d 84 (1987). Moreover, there is no requirement that the record show that the defendant personally stipulated to the element or that the defendant knowingly, voluntarily, and understandingly consented to the stipulation. *Id.* In *State v. Watson*, 303 N.C. 533, 538, 279 S.E.2d 580, 583 (1981), the Supreme Court held:

> It is well-established that stipulations are acceptable and desirable substitutes for proving a particular act. Statements of an attorney are admissible against his client provided that they have been within the scope of his authority and that the relationship of attorney and client existed at the time. In conducting an individual's defense an attorney is presumed to have the authority to act on behalf of his client. The burden is upon the client to prove lack of authority to the satisfaction of the court.

(Citations omitted). In the present case, defendant has not shown, nor does he contend, that his attorney was acting contrary to his wishes.

From the record it is clear that defendant was fully aware of the charges against him, that he understood his rights and the effect of the stipulation, and that he was in no way prejudiced by the failure of the court to formally arraign him and advise him of his rights. We must not put form over substance; we must not return to strict legalism and require magic words chanted in precise sequence to make an act right. We conclude that there was no reversible error.

II.

[2] Defendant's next contention is that the trial court erred in allowing an alternate juror to retire to the jury room with the jury and in not declaring a mistrial based on this error.

At the conclusion of the court's charge to the jury, the court instructed:

> I would recommend the first thing you do when you retire to your jury room is to select a foreman or foreperson. . . . Now, at this time the law requires me to let you go back to the jury room for just a minute or two while I confer with the lawyers. During this time I recommend you select a foreman but do not talk about the case itself. Now, I will call you back in and then I will give you your final order to go talk about the case. Sheriff, take the jury out for just a minute.

The jurors, including the alternate, were excused from the courtroom. The court then heard the arguments of counsel regarding portions of the jury charge. The jurors returned to the courtroom, after having selected a foreman, and were reinstructed on a portion of the charge. The court then excused the alternate, directing him to have a seat in the audience.

It is well settled that the presence of an alternate juror in the jury room *during deliberations* constitutes reversible error *per se. State v. Bindyke*, 288 N.C. 608, 627, 220 S.E.2d 521, 533 (1975); *see also* N.C.G.S. § 15A-1215(a) (1988) (alternate jurors must be discharged upon final submission of case to jury). In *Bindyke*, the Court held:

> The presence of an alternate juror in the jury room at any time during the jury's deliberations will void the trial. The alternate has participated by his presence; and the court will conduct no inquiry into the nature or extent of his participation. However, if through inadvertence, the alternate retires with the jury at the time the case is submitted to it, and his presence in the jury room is discovered so promptly that the trial judge believes it probable no deliberations have begun, he may recall the jury and the alternate and make the limited inquiry whether there has been any discussion of the case or comment with reference to what the verdict should be. If the answer is YES, the judge must declare a mistrial; if the answer is NO, the jury will retire to begin its deliberations.

Id. at 629-30, 220 S.E.2d at 534-35.

"At the heart of the Court's holding in *Bindyke* was the appearance of impropriety during the *deliberations* of the jury." *State v. Kennedy*, 320 N.C. 20, 30, 357 S.E.2d 359, 365 (1987). In the present case, however, the case had not been submitted to the jury for deliberation. The jury was sent out so that counsel could argue for corrections to the charge, and the jurors merely selected a foreman. We do

not believe that the selection of a foreman constitutes "deliberations," "discussion of the case" or "comment with reference to what the verdict should be," as proscribed by *Bindyke*. *See State v. Godwin*, 95 N.C. App. 565, 571, 383 S.E.2d 234, 237 (1989) (implying that the selection of a foreperson does not amount to deliberation). The trial judge here instructed the jurors not to talk about the case itself, but that he would call them back into the courtroom and give them their final order to retire to discuss the case. He then instructed the Sheriff to take the jury out "for just a minute." In the absence of any indication to the contrary, we must presume that the jurors followed the instructions of the court and did not discuss the case. *See State v. Shrader*, 290 N.C. 253, 265, 225 S.E.2d 522, 530 (1976) (jury presumed to have followed court's instruction during trial not to discuss case or to be exposed to media accounts of it). Because the jury in this case had not retired to discuss the case, we find the analysis and holding in *Bindyke* inapplicable. We believe the better practice is to instruct the jurors to select a foreperson only upon final submission of the case to the jury; however, we find no prejudicial error here.

III.

[3] Defendant's final argument is that the trial court erred in not granting defendant's motion for a continuance in order to secure the presence of a defense witness, Charles Curtis Atkinson. Defense counsel had been unable to locate Atkinson, and at the time of trial his whereabouts were unknown. Atkinson was alleged by the State to have been defendant's passenger in the truck. Defense counsel informed the court that Atkinson would testify that defendant was not the driver of the truck and, in fact, was not in the truck.

A motion for a continuance is ordinarily addressed to the sound discretion of the trial court and is not subject to review absent a gross abuse of discretion. *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). However, when such a motion raises a constitutional issue, the trial court's ruling involves a question of law and is fully reviewable by an examination of the particular circumstances of the case. *Id.* Defendant correctly states that the right to present witnesses to confront the evidence against him and the right to present a defense are rights protected by our Constitutions. *See State v. Davis*, 61 N.C. App. 522, 525, 300 S.E.2d 861, 863 (1983); *State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993). Denial of a motion for a continuance, regardless of its nature, is, however,

grounds for a new trial only upon a showing by defendant that the denial was erroneous and that he was prejudiced thereby. *Searles*, 304 N.C. at 153, 282 S.E.2d at 433.

In the case at hand, trial was originally set for Monday, 28 June 1993, but was delayed until 30 June because defendant failed to appear. As of 28 June, Atkinson's whereabouts were unknown, and no subpoena for Atkinson had been issued prior to that day. Defense counsel stated to the court that Atkinson had "just sort of disappeared" and that if subpoenaed for another trial date, "he might not show up." Under these circumstances, we conclude that it was not error for the trial court to deny defendant's motion for a continuance. *See State v. Horne*, 21 N.C. App. 197, 200-01, 203 S.E.2d 636, 638 (1974) (no error where defense waited until day of trial to subpoena absent witness).

Furthermore, defendant suffered no prejudice from the denial of his motion. Defendant testified that he was not driving the truck, but was instead a passenger in another car, driven by Jasper Hollowuay. This testimony was supported by the testimony of Hollowuay, who testified that he picked defendant up on the side of the road and drove him home. The testimony of Charles Atkinson would not have added anything more than corroboration to the defense. Defendant has therefore failed to demonstrate that the lack of Atkinson's testimony was prejudicial to him. *See State v. Highsmith*, 74 N.C. App. 96, 99, 327 S.E.2d 628, 630 (no prejudice where absent witness's testimony would only have added corroboration), *disc. review denied*, 314 N.C. 119, 332 S.E.2d 486 (1985). Defendant is not entitled to a new trial based on the trial court's failure to grant his motion for a continuance.

We find that defendant received a fair trial free from prejudicial error.

No error.

Judges WYNN and McGEE concur.

TONI LAGRANGE MELTON, WIDOW; TONI LAGRANGE MELTON, GUARDIAN AD LITEM FOR RYAN D. MELTON, MINOR SON OF ROBERT D. MELTON (DECEASED), EMPLOYEE-PLAINTIFFS-APPELLEES v. CITY OF ROCKY MOUNT, EMPLOYER, SELF-INSURED, DEFENDANT-APPELLANT

No. 9410IC473

(Filed 21 March 1995)

Workers' Compensation § 115 (NCI4th)— death on the job—cause of death unknown—application of Pickrell presumption of compensability—insufficiency of evidence to rebut presumption

Where death occurred within the decedent's course of employment as a traffic light technician and circumstances bearing on the work-relatedness of his death were unknown, the Industrial Commission correctly invoked the *Pickrell* presumption of compensability; furthermore, the Commission did not err in rejecting defendant's contention that the introduction of any evidence, no matter how speculative or unpersuasive, wholly deflates the *Pickrell* presumption and in determining that the evidence proffered by defendant was insufficient to rebut the presumption.

Am Jur 2d, Workers' Compensation §§ 263 et seq.

Appeal by defendant from order entered 24 February 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 1995.

Taft, Taft & Haigler, P.A., by Thomas F. Taft and James S. Walker, for plaintiff-appellee.

Poyner & Spruill, L.L.P., by Ernie K. Murray, for defendant-appellant.

MARTIN, MARK D., Judge.

The issue presented is whether the Industrial Commission erred in applying the *Pickrell* "presumption of compensability" and awarding compensation to plaintiffs. We affirm.

Robert D. Melton, decedent, was employed by defendant, City of Rocky Mount, as a traffic signal technician. His job duties included repair and maintenance of traffic lights operated within the city lim-

its. On 7 May 1990 Melton and co-worker Ronald Lewis were sent to an intersection where a traffic light was in need of repair. Melton was transported to the height of the traffic light by use of a "bucket," which is a mechanical device used for lifting workers to moderate heights. Prior to Melton entering the bucket, Mr. Lewis testified he checked the electrical current to ensure it was turned off. While Melton was elevated in the bucket, Mr. Lewis heard a noise of "beating and banging" and, when he looked up, observed Melton "waving his hands and flopping" around. Melton was lowered to the ground and paramedics were immediately summoned to the scene. He was rushed to the hospital, where all efforts to revive him failed and he was pronounced dead.

On 8 May 1990, Dr. Louis Levy, local medical examiner, performed an autopsy and issued his autopsy report. Dr. Levy indicated the probable cause of death was anoxic encephalopathy (lack of oxygen to the brain) due to the aspiration of gastric contents. On 9 May 1990 Dr. Levy issued the medical examiner's certificate of death listing the immediate cause of death as "pending." On 7 June 1990 Dr. Levy issued a supplemental report listing "anoxic encephalopathy due to aspiration of gastric contents" as the immediate cause of death and also listing the manner of death as "accident."

The Rocky Mount Police Department conducted an investigation but could not determine the cause of death. However, they did conclude decedent did not sustain any type of electrical shock.

At the widow's request, on 7 September 1990 decedent's body was exhumed and a second autopsy was performed by Dr. Lawrence S. Harris, a forensic pathologist at ECU School of Medicine in Greenville, North Carolina. Dr. Harris filed an autopsy report indicating no new pathologic diagnoses and no evidence of electrical injury. On 12 December 1990 Dr. Harris issued an opinion letter indicating an aerosol spray lubricant decedent was using immediately prior to his death could potentially be a causal factor in the death. By letter dated 1 April 1991, Dr. Harris indicated he could not tie the aerosol to decedent's death.

The Chief Medical Examiner's office reviewed the matter and ordered its own testing to determine the cause and manner of death. On 12 September 1990 Dr. Thomas Clark, Associate Chief Medical Examiner for the State of North Carolina, issued a supplemental report of cause of death changing the cause of death to "aspiration of

gastric contents due to undetermined" causes. The manner of death was listed as "not determined."

In response to correspondence from Dr. Levy, on 27 December 1990, Dr. John Butts, Chief Medical Examiner for the State of North Carolina, issued a supplemental report of cause of death to Dr. Levy again stating the immediate cause of death was "aspiration of gastric contents due to undetermined causes." However, the manner of death was changed from "not determined" to "accident." Both Drs. Clark and Butts acted pursuant to Section 130A-385(c) of the General Statutes of North Carolina, which states: "[t]he Chief Medical Examiner shall have the authority to amend a medical examiner death certificate."

Dr. Levy never signed the supplemental report of cause of death containing the amendments issued by the Office of the Chief Medical Examiner, and did not notify the Chief Medical Examiner's Office of his failure to do so.

On 3 October 1991, Associate Chief Medical Examiner Clark filed the supplemental report of cause of death listing the immediate cause of death as "aspiration of gastric contents due to undetermined" causes, and listing the manner of death as "accident."

Dr. Arthur E. Davis, Jr., defendant's expert witness, testified decedent died from aspiration of gastric contents caused by "gastroesophageal reflux syndrome," a noncompensable idiopathic condition. As support for his conclusion, Dr. Davis cited decedent's asthma as a child and his alleged chronic bronchitis at the time of the accident. Dr. Davis also commented on the supplemental report of cause of death certificate prepared by Dr. Clark. Dr. Davis testified Dr. Clark's supplemental report of cause of death filed 6 September 1990 had been "reversed" by Dr. Levy:

> Walker (attorney for plaintiff): And you didn't talk with the pathologist in completing this document?
>
> Davis: No, this has been reversed.
>
> Walker: It's been reversed?
>
> Davis: Yes, it has.
>
> Walker: How so?
>
> Davis: Dr. Levy was outraged at his report being changed.

> Walker: Do you have a document or material —
>
> Davis: I asked Dr. Levy for that document, but they could not find it.

Dr. Davis further testified:

> Davis: This was Dr. Clark's opinion without the courtesy of consulting with Dr. Levy. And that's why Dr. Levy, through many negotiations, had it reversed so that it correspond[ed] to the death certificate.
>
> Walker: Where is the reversal, Sir?
>
> Davis: I do not know. I asked them for that.

Dr. Davis did not produce a written report.

Subsequent to the hearing, Dr. Davis generated an undated opinion letter. Dr. Davis wrote, "[a]s I further testified at the hearing, it is my opinion that the gastroesophogeal [sic] reflux and/or the aspiration of gastric contents did not result from an injury by accident sustained by Mr. Melton during the course and scope of his employment with the City of Rocky Mount."

Although the evidence indicated decedent suffered a single asthma attack as a small child, it does not appear he presented any further asthma symptoms again. Decedent's widow never observed him have an asthma attack. Decedent's pediatrician stated he had never treated decedent for any serious condition and that he had enjoyed excellent health other than ordinary childhood illnesses.

Decedent's widow testified she had seen her husband immediately prior to the accident. She testified that decedent ate a normal meal at lunch and she did not notice anything unusual about him.

When decedent returned to work after lunch, co-worker Ronald Lewis testified he looked "fine" and did not appear to be sick when they went to repair the traffic light. Mr. Lewis also testified decedent's appearance was the same after lunch as it was before lunch, and he did not appear to be sick at either time. Mr. Lewis had worked with decedent on several occasions and had never seen him have a seizure or convulsion.

On 8 October 1991 Dr. Clark issued an opinion letter addressing the likelihood of gastroesophageal reflux syndrome causing decedent's death. In this letter Dr. Clark explained the procedural process

for amending the death certificate and indicated the 1990 amendment had never been filed due to a clerical oversight. Dr. Clark also stated that Dr. Levy did not have the authority to reverse the determination of the Chief Medical Examiner's Office. According to Dr. Clark, "Now that I have personally signed the supplemental death certificate it can no longer be modified by anyone outside of the chief medical examiner's office." Dr. Clark also stated, "[i]t is my opinion that [decedent's] aspiration probably occurred as a result of death, or may have been the mechanism of death but not the proximate cause of it." (emphasis in original). Dr. Clark further stated:

> [T]he only significant finding of this case is aspiration. I consider it most likely that this aspiration is a result of stresses surrounding death, and not the proximate cause of death. The proximate cause of death remains undetermined. . . . I consider it more likely than not that something in his environment caused his death. The manner of death, therefore, is considered to be accidental.

Lastly, Dr. Clark stated, "[i]t is difficult for me to follow the logic of Dr. Davis' testimony in which an attempt is made to link chronic bronchitis to esophageal reflux in this death. Based on my knowledge of this case I can see no reason that either would be related to his death."

Classifying Dr. Davis' gastroesophageal reflux theory as "speculation," Dr. Harris stated: "It is a tribute to Dr. Davis' chutzpa that he was able, apparently successfully, to throw this obfuscatory handful of sand into the machinery of legal proceedings." Dr. Harris further stated: "I am equally certain that I do not understand why that vomiting and aspiration took place. I would concur with Dr. Clark of Chapel Hill who reached a similar conclusion that the 'bottom line' cause of death remains '[u]ndetermined.' "

The decedent's surviving next of kin properly and timely filed a workers' compensation claim for death benefits with the North Carolina Industrial Commission. The City of Rocky Mount denied the claim on 24 July 1990.

On 9 September 1991 the matter came on for hearing before Deputy Commissioner Roger L. Dillard. On 18 June 1992 Deputy Commissioner Dillard applied the *Pickrell* presumption of compensability and awarded compensation to plaintiffs. On 14 March 1994 the Full Commission affirmed the award of the Deputy Commissioner in a two-to-one decision, Deputy Commissioner Haigh dissenting.

On appeal defendant contends the Industrial Commission improperly applied the *Pickrell* presumption of compensability in awarding compensation to plaintiffs. We disagree.

To recover workers' compensation benefits for death, a claimant must prove that death resulted from an injury "(1) by accident; (2) arising out of his employment; and (3) in the course of the employment." *Harris v. Henry's Auto Parts, Inc.*, 57 N.C. App. 90, 91, 290 S.E.2d 716, 717 *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982) (citation omitted).

In the present case decedent was a traffic light technician. Decedent was repairing a traffic light when the accident occurred, and therefore there is no dispute he was acting within the course of his employment. However, two elements remain, (1) whether the cause of death was "accidental"; and (2) whether the accident arose out of decedent's employment.

The Supreme Court has stated as a general rule: " 'When an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, most courts will indulge a presumption or inference that the death arose out of employment.' " *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 367, 368 S.E.2d 582, 584 (1988) (*quoting* 1 Larson, *The Law of Workmen's Compensation* § 10.32 (1985)).

Explaining the nature of this presumption, the *Pickrell* Court indicated: "[T]he presumption is really one of compensability. It may be used to help a claimant carry his burden of proving that death was caused by accident, or that it arose out of the decedent's employment, or both." *Pickrell* at 368, 368 S.E.2d at 585.

At the outset we must determine whether the Industrial Commission correctly invoked the *Pickrell* presumption of compensability.

Defendant contends the introduction of <u>any</u> evidence regarding the two remaining elements, whether the cause of death was accidental, and whether the accident arose out of employment, prevents application of the *Pickrell* presumption of compensability.

According to the *Pickrell* Court, "[W]here the circumstances bearing on work-relatedness are unknown and the death occurs within the course of employment, [plaintiffs] should be able to rely on

a presumption that death was work-related, and therefore compensable, whether the medical reason for death is known or unknown." 322 N.C. at 370, 368 S.E.2d 586.

The present case clearly falls within the category of death benefit cases contemplated by the Supreme Court when it articulated the *Pickrell* presumption of compensability. Decedent was repairing a traffic light when the accident occurred. As indicated in the death certificate, the medical reason for death is known, lack of oxygen to the brain. The aspiration of vomit was most probably the result of the stresses surrounding the death but not the proximate cause of death. The Chief Medical Examiner's office has ruled the manner of death an "accident." Like *Pickrell*, the death occurred within the decedent's course of employment and circumstances bearing on the work-relatedness of his death are unknown. We hold the Industrial Commission correctly invoked the *Pickrell* presumption of compensability.

Having determined the Industrial Commission correctly invoked the *Pickrell* presumption of compensability, the only remaining inquiry is whether defendant proffered sufficient evidence to rebut the presumption.

Consistent with its initial argument, defendant contends the existence of <u>any</u> evidence regarding the two remaining elements, whether the cause of death was accidental, and whether the accident arose out of the decedent's employment, wholly rebuts the *Pickrell* presumption of compensability. We disagree.

Application of the *Pickrell* presumption cannot be properly understood without reference to well settled principles of law concerning the duty and role of the Industrial Commission in workers compensation cases. According to the Supreme Court, "[t]he Workmen's Compensation Act, G.S. § 97-86, vests the Industrial Commission with full authority to find essential facts." *Anderson v. Construction Co.*, 265 N.C. 431, 433, 144 S.E.2d 272, 274 (1965). "The Commission's findings of fact are conclusive on appeal, . . . even if there is evidence which would support a finding to the contrary." *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985) (citations omitted). Finally, "the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-684 (1982).

The Supreme Court has concluded that the *Pickrell* presumption of compensability is a true presumption. *Pickrell*, 322 N.C. at 371, 368 S.E.2d at 586. As such, "where the claimant is entitled to rely on the presumption, the defendant must come forward with some evidence that death occurred as a result of a non-compensable cause . . . . In the presence of evidence that death was not compensable, the presumption disappears." *Id.* (emphasis added). "If no such evidence is produced, or if the evidence proffered is insufficient for that purpose, the party against whom the presumption operates will be subject to an adverse ruling . . . if the basic fact is found to have been established." *Id.* (emphasis added) (citations omitted); *see* 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence*, § 44 (4th ed. 1993) (with true presumptions, "[w]hen the basic fact has been established, the presumed or elemental fact *must* be found unless sufficient evidence of its nonexistence is forthcoming" (footnotes omitted)).

To rebut the *Pickrell* presumption, therefore, the party against whom the presumption operates must produce sufficient, credible evidence that the death is non-compensable.

The Industrial Commission heard testimony presented by defendant's expert that decedent died from the aspiration of gastric contents caused by "gastroesophageal reflux syndrome," a noncompensable idiopathic condition. It also heard testimony presented by plaintiffs' expert witnesses that the cause of death was undetermined. Significantly, the defendant's theory of cause of death was classified as "speculative" by plaintiffs' expert witness, Dr. Harris, and as "difficult . . . to follow" by Associate Chief Medical Examiner Clark. Finally, the conclusion of plaintiffs' expert witnesses was adopted in the final certificate of death issued by the Office of the Chief Medical Examiner for the State of North Carolina. In *Pickrell* the Supreme Court afforded great weight to the conclusions contained in the final certificate of death. *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586.

As the sole judge of the credibility of the witnesses and the weight to be given their testimony, *Hilliard v. Apex Cabinet Co.*, *supra*, the Industrial Commission found that "the greater weight of the evidence indicates that the decedent died accidentally due to undetermined causes." We conclude the evidence supports the findings of fact of the Industrial Commission and the findings of fact support the conclusions of law based thereon.

To hold, as suggested by defendant, that the introduction of any evidence, no matter how speculative or unpersuasive, wholly deflates the *Pickrell* presumption of compensability is tantamount to repealing the presumption altogether. We therefore conclude the Industrial Commission did not err in determining the evidence proffered by the defendant was insufficient to rebut the *Pickrell* presumption of compensability.

Affirmed.

Chief Judge ARNOLD and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. DOUGLAS HAMMOND

No. 945SC377

(Filed 21 March 1995)

1. **Criminal Law § 1177 (NCI4th)— violation of position of trust—acquaintance through work—insufficiency of evidence of aggravating factor**

In a prosecution of defendant for first-degree rape, first-degree sexual offense, and first-degree kidnapping, the trial court erred in finding as an aggravating factor that defendant took advantage of a position of trust where the evidence tended to show that the only relationship between the victim and defendant was a relationship of having worked at the same place of employment.

Am Jur 2d, Criminal Law §§ 598, 599.

2. **Criminal Law § 1123 (NCI4th)— kidnapping—aggravating factor of premeditation and deliberation—sufficiency of evidence**

The trial court in a kidnapping case did not err in finding as an aggravating factor that the kidnapping was premeditated and deliberated where the evidence tended to show that defendant waited by the victim's office during the early morning hours and that he had scissors and an electrical cord.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 23 July 1993 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 31 January 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Nora Henry Hargrove for defendant-appellant.

JOHNSON, Judge.

Defendant Douglas Hammond was indicted for first degree rape, first degree sexual offense, first degree kidnapping, and armed robbery. Defendant was tried on his pleas of not guilty during the 20 July 1993 session of New Hanover Superior Court.

Evidence presented at trial showed the following: Kimberly Winn, a social worker at Southeastern Mental Health, testified that her office was located in Wilmington, North Carolina, at the intersection of Market and 16th Streets. She knew defendant at the time because he had been working as a driver for the Center. There were nine employees in all at the Center.

Ms. Winn testified that on Monday, 30 November 1992, she arrived at work at approximately 7:30 a.m. in her 1993 Mazda; that when she pulled into the parking lot, she noticed defendant coming toward her; that defendant approached her and told her his car had broken down and that he had been waiting for a tow truck; and that defendant asked her if she would take him back over to his car and she agreed to do so. She testified further that the two drove to the area where the car was supposed to be; that when they arrived at the location, defendant hesitated and said that the tow truck must have already gotten his car; that she told him that she would help him get his car, and he told her the car would be at the Greenfield Body Shop and it would help if she could take him there; and that defendant gave her directions and they ended up driving near the State Port. She continued, that as the two drove onto an isolated stretch of road, defendant grabbed her by her shoulder, held a pair of scissors up to her throat, and told her to pull over; that the scissors looked similar to scissors used at her workplace; that she pulled over to a soft shoulder of the road and her car would not go further; that she screamed and tried to get out of the car; that defendant pulled her back into the car and told her, "[D]on't do that"; and that defendant seemed very angry and

aggressive and tried to bind her hands with a piece of yellow electrical cord with the plug still attached.

Ms. Winn testified further that defendant forced her into the passenger side of the car; that defendant drove the car to a nearby dirt road and ordered her to take off some clothes; that defendant lifted up her blouse and her bra, inserted his finger into her vagina, and attempted to penetrate her vagina with his penis but he was not erect and was unable to do so; that defendant then stretched the cord tight across her throat; that she then got the cord off but defendant put his forearm against her throat; and that she struggled out of that grasp and defendant put his thumb against her throat but then defendant abruptly stopped. Ms. Winn stated that defendant then told her a long story about his personal problems; that she got back in the driver's seat and from this position, when defendant moved, she could see the scissors and the cord in the passenger seat, behind defendant; that she offered defendant money in an attempt to appease him; that defendant threw the cord out of the window and continued to converse with her; that defendant decided to drive and took her to a different isolated dirt road; that the scissors were now under the driver's seat; and that when the two were at an isolated spot, defendant told her to lift up her skirt and that she resisted but defendant inserted his penis into her vagina. Finally, she testified that afterwards, defendant wanted her to walk with him but she refused to get out of the car; that as a truck pulled onto the road, defendant started driving again; that defendant told her he was taking her to the hospital; that he drove to the hospital and went to the visitor's area but did not stop; and that when she got the opportunity, she jumped out of the car, ran to a nearby business and the police were called.

On cross-examination, Ms. Winn testified that as far as she could remember, defendant was neat in his appearance; that after initially seeing the scissors when defendant held them to her throat, she did not see them again until she saw them on the seat behind defendant; that when defendant tried to turn off the car's flashers, she reached and got the scissors and hid them under the front seat; that even though the scissors were hidden at the time she was penetrated vaginally by defendant's penis, she was still scared and she thought defendant might find the scissors; and that she knew defendant's strength was superior to hers and that he might try to strangle her.

Other witnesses for the State testified as to Ms. Winn's appearance after the incident, her recollection of the incident, and physical evidence found at the scene of the incident.

Officer Rodney Simmons of the Wilmington Police Department, one of the initial investigators, testified that the evening of the incident he was informed that defendant was at the police station, that he went to the station and found Ms. Winn's car there, and that he spoke with defendant for a few minutes and did not see any scratches or bruises or smell any alcohol on defendant. Officer Wayne Norris testified that defendant came into the police station about 8:00 p.m. and asked if there were any outstanding warrants for him; that he asked defendant what the subject of the warrants would be and defendant said for kidnapping and sex offense; that he took defendant to a back room and called for a warrant; that while he and defendant waited for the warrant, he read defendant his rights; that defendant orally waived his rights and never asked for an attorney; and that he asked defendant if he did it and defendant said, "Well, I'm not denying it. I knew I shouldn't have not [sic] done it." Officer Norris testified further that defendant told him that the car that was involved was a Mazda, that defendant told him he did not know where the scissors were and that he had thrown them away, and that defendant did not appear to be intoxicated or confused. Officer Norris also testified that when he asked defendant if he "did it" defendant did not know what was in [Officer Norris'] head, and that there had been no previous discussions of specific behavior. Defendant was arrested and processed.

Defendant testified that on Saturday, 29 November 1992, defendant and a friend ingested large quantities of crack cocaine, beer, and hard alcohol; that he went to work on Monday morning and before doing so, he took another hit of crack cocaine; that his intention was to go to the office, leave a note for his supervisor, and go home; that he did not have his office keys with him and so he waited outside until someone came up; that Ms. Winn drove up and he asked her to take him to a friend at 5th and Market Streets to get his car; and that his friend was not there so he asked Ms. Winn to take him to his friend's place of business. Defendant testified further that he and Ms. Winn tried to turn the car around but it got stuck in the sand; that he moved the car out of the sand and they drove on their way; that when they got to the dirt road near the pump station described earlier by Ms. Winn he told her he wanted to have sexual intercourse and told her to take off her stockings and pull up her skirt; that she did so and he tried to penetrate her but he could not get an erection; and that he

never threatened Ms. Winn with scissors and she never tried to stop him or fight him.

Defendant continued that when he could not become erect, he became angry and began choking Ms. Winn and that he tried to use the yellow electrical cord; that she did not try to get out of the car; that they talked; that he panicked when he saw another car and drove her to another spot; that he threw the cord out of the window to let Ms. Winn know he would not cause any more violence; that he again attempted to have sex with Ms. Winn but was unable to maintain an erection and never penetrated her; and that she never resisted him. Finally, defendant testified that after seeing another car, they left the area; that he noticed her neck and told her he would take her to a hospital; that when they got near the hospital, he stopped at a stop sign and Ms. Winn jumped out of the car; that he panicked and abandoned Ms. Winn's car at a nearby shopping area; that he learned his picture was on the police channel on television; and that he took another hit of crack cocaine, got Ms. Winn's car and drove to the police station where he turned himself in. Defendant testified that at the station, he told Officer Norris that he thought he was in trouble and he was afraid, and that he did not give any statements to Officer Norris or Officer Simmons.

Defendant was found guilty of first degree rape, first degree sexual offense, and first degree kidnapping. Defendant has appealed to our Court with arguments based on two assignments of error relating to the sentencing hearing.

[1] Defendant first argues that the trial court erred in finding as an aggravating factor that defendant took advantage of a position of trust because the evidence did not support the finding. Defendant notes that "the victim and the perpetrator are acquaintances but nothing more."

This aggravating factor is found pursuant to North Carolina General Statutes § 15A-1340.16(d)(15) (Cum. Supp. 1994). "The existence of this aggravating factor is premised on a relationship of trust between defendant and the victim which causes the victim to rely upon defendant." *State v. Farlow*, 336 N.C. 534, 542, 444 S.E.2d 913, 918 (1994). This aggravating factor has been previously found as to familial relationships (i.e., brother-brother, *see State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984), and husband-wife, *see State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991)). This aggravating factor has also been applied when the relationship between the defendant

and the victim was one of best friends. *See State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), *disc. review denied*, 311 N.C. 406, 319 S.E.2d 278 (1984). However, our Supreme Court did not apply this factor when the relationship between the defendant and the victim was that of a drug dealer and a customer. *See State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991). The Court stated, "[t]o apply [this] aggravating factor to an ongoing criminal conspiracy between a drug dealer and his customer would give the aggravating factor an application so broad that it would retain little meaning." *Id.* at 638, 403 S.E.2d at 286. Likewise, our Court did not apply this factor in *State v. Carroll*, 85 N.C. App. 696, 355 S.E.2d 844, *disc. review denied*, 320 N.C. 514, 358 S.E.2d 523 (1987), where the defendant and the victim had met only one and a half days before the murder and decided to take a trip in the defendant's car.

Although we believe this statutory aggravating factor can arise within the context of the work environment, the evidence here indicates that the only relationship between the victim, Ms. Winn, and defendant, was a relationship of having worked at the same place of employment. Ms. Winn was a social worker at Southeastern Mental Health, and defendant had been a driver for the Center for three months. Ms. Winn testified that defendant had driven a van that Ms. Winn, children from the Center, and other staff had been in at least five times. This evidence shows only that the victim was acquainted with defendant. We do not believe the relationship between the victim and defendant in this case rose to a relationship of trust "that cause[d] the victim to rely upon defendant." *See State v. Midyette*, 87 N.C. App. 199, 360 S.E.2d 507 (1987), *aff'd*, 322 N.C. 108, 366 S.E.2d 440 (1988) (evidence that the victim and the defendant met a month before the sexual offenses, at which time the defendant came to the victim's home for a New Year's Eve breakfast and slept on the living room sofa, showed only that the victim was acquainted with the defendant and did not show the existence of a relationship through which the defendant would occupy a position of trust and confidence). Therefore, we find that the trial court erred in finding as an aggravating factor that defendant took advantage of a position of trust.

[2] Defendant next argues that the trial court erred in finding as an aggravating factor that the kidnapping was premeditated and deliberated because the factor was not supported by the evidence and therefore violated North Carolina General Statutes § 15A-1340.16 (Cum. Supp. 1994) to the prejudice of defendant. We disagree. "As long as

they are not elements essential to the establishment of the offense . . . all circumstances which are transactionally related to the . . . offense and which are reasonably related to the purposes of sentencing must be considered during sentencing." *State v. Melton*, 307 N.C. 370, 378, 298 S.E.2d 673, 679 (1983). "The presence of premeditation and deliberation is important in elevating culpability for violent crimes." *State v. Smith*, 92 N.C. App. 500, 503, 374 S.E.2d 617, 619 (1988), *disc. review denied*, 324 N.C. 340, 378 S.E.2d 805 (1989). Previous decisions have allowed as a nonstatutory factor that a violent offense was premeditated and deliberated. *Id.* In the case *sub judice*, evidence that defendant waited by Ms. Winn's office during the early morning hours of 30 November 1992 and that defendant had scissors and an electrical cord is evidence of premeditation and deliberation. We reject this assignment of error.

Because we have found that the trial court erred in finding and considering as an aggravating factor that defendant took advantage of a position of trust, we remand this case for a new sentencing hearing. *See State v. Whitley*, 111 N.C. App. 916, 433 S.E.2d 826 (1993) and cases cited therein.

Remanded.

Judges JOHN and MARTIN, MARK. D. concur.

DAVID OUTEN, PERSONALLY, AND AS PRESIDENT OF SOUTHEASTERN CANOPY CORP., AND DEBORAH OUTEN, PLAINTIFFS v. RONALD MICAL AND WANDA MICAL, DEFENDANTS

No. 9421SC199

(Filed 21 March 1995)

1. Corporations § 146 (NCI4th)— misappropriation of corporate funds—award to plaintiff individually error

In an action for misappropriation of funds of a Subchapter S corporation, the trial court erred in entering a judgment awarding damages to plaintiff president individually instead of to the corporation, since plaintiff did not show that he suffered a loss different from the loss to the corporation; plaintiff was not a minority shareholder and therefore entitled to bring an individual suit because the corporation was dominated by defendant; and

awarding damages directly to plaintiff shareholder could impair the rights of creditors whose claims might be superior to that of plaintiff.

Am Jur 2d, Corporations § 2400.

2. **Corporations § 108 (NCI4th)— misappropriation of corporate funds—amount of damages—sufficiency of evidence**

In an action for misappropriation of corporate funds, the trial court did not abuse its discretion in determining that there was sufficient evidence presented at trial to support the jury's award of $60,000 in damages.

Am Jur 2d, Corporations §§ 1842-1845.

3. **Corporations § 108 (NCI4th)— misappropriation of corporate funds—insufficiency of evidence**

The evidence was insufficient to support a claim for misappropriation of corporate funds against plaintiff president where the evidence tended to show that the funds in question were used for corporate purposes.

Am Jur 2d, Corporations §§ 1842-1845.

Judge GREENE concurring in part and dissenting in part.

Appeal by defendants from judgment entered 28 October 1993 by Judge Julius A. Rousseau, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 10 January 1995.

Plaintiff David Outen (hereinafter plaintiff) and defendant Ronald Mical (hereinafter defendant) are first cousins. In March 1988 they formed a Subchapter S corporation, Southeastern Canopy Corporation, to install canopies of the kind typically found at self-service gas stations. Plaintiff and defendant were each fifty percent shareholders in the corporation. Plaintiff was president of the corporation and defendant was secretary-treasurer. Defendant's wife acted as bookkeeper for the corporation.

Plaintiff and defendant ceased doing business together in April 1992. On 15 May 1992, plaintiff filed a complaint "in his own behalf and on behalf of all other stockholders of The Corporation similarly situated, in the right of The Corporation and for its benefit." The complaint alleged fourteen causes of action including breach of fiduciary duty, fraud, and misappropriation of funds. Plaintiff alleged *inter alia*

that defendants had used corporate funds for their personal use throughout the existence of the corporation. In their answer, defendants generally denied the claims and counterclaimed, alleging that plaintiffs had misappropriated funds, had not fulfilled fiduciary duties, had made material misrepresentations, and had committed fraud.

At trial at the close of plaintiffs' evidence, the trial court directed a verdict in favor of defendants as to all of plaintiffs' claims except the claim for misappropriation of corporate funds. At the close of defendants' evidence, the trial court granted a directed verdict in favor of plaintiffs as to defendants' counterclaim. During the charge conference, plaintiff's counsel renewed his request that an issue on punitive damages be submitted to the jury. The trial court denied the motion. The issues submitted to the jury read:

1. Did Ronald Mical misappropriate funds or assets of Southeastern Canopy Corporation?

   Answer: ___

2. What amount of damages, if any, is the plaintiff entitled to recover of Ronald Mical?

   Answer: ___

3. Did Wanda Mical misappropriate funds or assets of Southeastern Canopy Corporation?

   Answer: ___

4. What amount of damages, if any, is the plaintiff entitled to recover of Wanda Mical?

   Answer: ___

The jury found that defendants had misappropriated funds and that plaintiff was entitled to recover $20,000 in damages from defendant and $40,000 in damages from defendant's wife. Defendants' counsel moved to set aside the verdict pursuant to Rule 59 of the North Carolina Rules of Civil Procedure, arguing that the verdict was "against the weight of the evidence and the weight of the trial." The trial court denied the motion and entered judgment on 28 October 1993.

Defendants appeal.

Bennett & Blancato, LLP, by William A. Blancato, for defendant-appellants.

Dummit & Associates, by E. Clarke Dummit, for plaintiff-appellees.

EAGLES, Judge.

I.

[1] Defendants argue that the trial court erred by entering a judgment that runs in favor of plaintiff personally. "Ordinarily stockholders have no right in their name to enforce causes of action accruing to the corporation." *Fulton v. Talbert,* 255 N.C. 183, 185, 120 S.E.2d 410, 412 (1961). Thus, in a derivative action, the recovery goes to the corporation. Russell M. Robinson, II, *Robinson On North Carolina Corporation Law* § 17.2(a) (1990). However, a shareholder may attempt to bring a direct cause of action in addition to a derivative action and might be able to recover individual damages if the shareholder can " 'allege a loss peculiar to himself' by reason of some special circumstances or special relationship to the wrongdoers." Russell M. Robinson, II, *Robinson On North Carolina Corporation Law* § 17.2(a) (1990), *citing Howell v. Fisher*, 49 N.C. App. 488, 272 S.E.2d 19 (1980), *review denied*, 302 N.C. 218, 277 S.E.2d 69 (1981).

Here, plaintiffs argue that plaintiff and defendant had a special relationship because each was a fifty percent shareholder in this closely-held corporation. While plaintiff and defendant may have had a special relationship because each was a fifty percent shareholder, plaintiff did not show that he suffered a loss different from the loss to the corporation. The loss alleged resulted from the misappropriation of corporate funds. *See Howell* at 498, 272 S.E.2d at 26 (stating that a plaintiff may maintain an individual action only where the plaintiff suffered damages "distinct from any damages suffered by the corporation").

Plaintiffs also rely on *Fulton v. Talbert*, 255 N.C. 183, 120 S.E.2d 410 (1961) to argue that when the corporation is powerless to act, a shareholder may bring the suit individually. In *Fulton*, our Supreme Court stated that a **minority** shareholder may bring an individual suit "where the corporation is so dominated and controlled by a wrongdoer as to be powerless to act." *Fulton* at 185, 120 S.E.2d at 412. Here, plaintiff was not a minority shareholder and the record does not show

that the corporation was dominated by defendant. Plaintiffs' reliance on *Fulton* is misplaced.

Finally, plaintiffs argue that because Southeastern Canopy Corporation was a closely-held corporation, different rules should apply. Indeed, "[i]n an appropriate [closely-held corporation] case, a court might exercise its discretion to treat an action raising derivative claims as a direct action." Russell M. Robinson, II, *Robinson On North Carolina Corporation Law* 17.2(c) (1990). However, the cases cited by Robinson mainly deal with situations where a minority shareholder has alleged corruption by majority shareholders, and as we concluded above, this is not a minority-majority shareholder situation. Our concern here is to protect the rights of possible creditors of Southeastern Canopy Corporation. In *Schachter v. Kulik*, 547 N.E.2d 71 (N.Y. 1989), two shareholders each owned fifty percent of the closely-held corporation's stock and one shareholder sued the other for diversion of corporate assets. The innocent shareholder sued derivatively and individually. In holding that the damages should be recovered in the name of the corporation, the court stated that "[a]warding [damages] directly to a shareholder could impair the rights of creditors whose claims may be superior to that of the innocent shareholder." *Schachter*, 547 N.E.2d at 74. Accordingly, plaintiff's argument that special rules should apply here is without merit.

Plaintiffs have failed to show that they maintained a direct action in addition to or in lieu of a derivative action. Accordingly, the trial court erred in entering a judgment awarding damages to plaintiff individually. The damages should have been awarded in favor of the corporation.

II.

[2] Defendants also argue that the trial court erred in refusing to grant a new trial because the evidence was insufficient to support the verdict. In their brief, defendants focus on the amount of damages awarded by the jury, asserting that the amount of damages was not supported by the evidence. A trial court's decision on a motion for a new trial is not reviewable on appeal absent an abuse of discretion. *Hord v. Atkinson*, 68 N.C. App. 346, 353, 315 S.E.2d 339, 343 (1984), *citing Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982). Here, the jury awarded plaintiff $60,000 in damages. By their own summary of the evidence, which does not include all of the evidence concerning alleged misappropriations, defendants show that after July of 1989 defendant's wife allegedly misappropriated

$24,467.41 and that defendant misappropriated $14,375.00. In their brief, plaintiffs point out that the jury had before it evidence that plaintiffs were subject to an $80,000 Internal Revenue Service (hereinafter IRS) lien. We hold that the trial court did not abuse its discretion in determining that there was sufficient evidence presented at trial to support the jury's award of $60,000 in damages.

III.

[3] Finally, the defendants argue that the trial court erred by granting plaintiffs' motion for a directed verdict as to defendants' counterclaim. In deciding whether to grant a motion for directed verdict, the trial court must determine whether the evidence, viewed in the light most favorable to the non-moving party, is sufficient to take the case to a jury. *Freese v. Smith*, 110 N.C. App. 28, 33, 428 S.E.2d 841, 845 (1993). "In making this determination, a directed verdict should be denied if there is more than a scintilla of evidence supporting each element of the nonmovant's case." *Freese* at 33-34, 428 S.E.2d at 845, *citing Snead v. Holloman*, 101 N.C. App. 462, 400 S.E.2d 91 (1991). Defendants' counterclaim included allegations that plaintiff misappropriated corporate funds, breached his fiduciary duty, made material misrepresentations and committed fraud. In their brief, defendants argue only that the trial court erred in granting plaintiffs' directed verdict as to defendants' misappropriation of funds claim. Accordingly, we limit our review to the misappropriation of funds counterclaim. Defendants' other theories of recovery are deemed abandoned. N.C. R. App. P. 28(b)(5).

In its jury instructions, the trial court explained that to find misappropriation, a party must prove that the accused (1) misappropriated funds, i.e. used funds for a purpose that does not benefit the corporation; (2) converted the funds for a use not beneficial to the corporation; and (3) converted the funds without authority. In their brief, defendants argue that they presented sufficient evidence at trial of plaintiff's misappropriation of money in a First Citizens bank account and of $1500 in another corporate account. We have carefully reviewed the record and transcripts and have found references to the First Citizens bank account and to $1500 that plaintiff used to pay an attorney for allegedly corporate-related purposes. We conclude that the evidence is insufficient to support a claim for misappropriation of corporate funds. Accordingly, we hold that the trial court did not err in granting plaintiffs' directed verdict motion as to defendants' counterclaim.

Affirmed in part and remanded in part for entry of damages in favor of the corporation.

Judge WALKER concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

Although I agree the trial court erred in entering its judgment for the plaintiff individually, I disagree with the holding of the majority that the judgment must be entered for the corporation. Otherwise, I concur in the opinion of the majority.

This action was filed in the name of David Outen, individually and as president of the corporation. The issues submitted to the jury required it to determine the amount of damages the "plaintiff" was entitled to recover of the defendants. The judge instructed the jury that the word "plaintiff" had reference to "David Outen personally and as president of the corporation." The defendants did not object at trial to either the issues or the jury instructions. Accordingly, they cannot on appeal now argue that the corporation is the only proper plaintiff. N.C. R. App. P. 10(b) (objections not made before trial court are waived).

Because, however, the judgment entered by the trial court does not conform to the jury verdict, I would reverse the judgment in favor of the individual plaintiff and remand for entry of a judgment in favor of "David Outen personally and as president of the corporation." Neither the trial court nor this Court is permitted to enter a judgment inconsistent with the verdict of the jury. *Southeastern Fire Ins. Co. v. Walton*, 256 N.C. 345, 348, 123 S.E.2d 780, 783 (1962).

STATE OF NORTH CAROLINA v. GARY LEONARD SHOPE

No. 9430SC64

(Filed 21 March 1995)

Jury §§ 192, 202 (NCI4th)— juror with preconceived opinion of defendant's guilt—denial of challenge for cause—prejudicial error

The trial court erred in denying defendant's challenge for cause of prospective juror who clearly stated that she believed defendant was guilty and that the burden would be on defendant to prove his innocence; furthermore, the error was prejudicial to defendant because it stripped him of a peremptory challenge and prevented him from excusing another unacceptable juror who worked with the victim's brother for several years and who would be testifying for the State.

Am Jur 2d, Jury §§ 266 et seq., 291 et seq., 335.

Appeal by defendant from judgment entered 9 April 1993 by Judge James U. Downs in Graham County Superior Court. Heard in the Court of Appeals 24 October 1994.

Defendant was tried capitally for the murder of Lillian Porter. Evidence at trial tended to show that following an argument defendant struck Porter repeatedly with a stick at her Lake Santeela campsite. Ms. Porter suffered massive head trauma and died as a result of the injuries. After the murder, defendant, who had dated Porter for approximately two years, was found with blood on his clothing and acknowledged striking Porter. The jury returned a verdict of guilty on the lesser included offense of second degree murder. The trial court sentenced defendant to thirty-five years imprisonment. Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Jacob L. Safron, for the State.

Appellate Defender Malcolm R. Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

ARNOLD, Chief Judge.

Defendant brings forth several arguments on appeal. In his first argument, defendant contends the trial court erred during jury selec-

tion in denying a challenge for cause, and that this denial violated his rights to a fair trial and due process of law. We agree.

During jury selection, defendant moved to excuse juror Waldroup for cause. Waldroup was an employee of the Graham Star, the local newspaper, and well aware of the case before becoming a member of the jury pool. During voir dire, the following exchange occurred between the district attorney and Waldroup:

> Q. Anything that you remember about those that would cause you to have already formed an opinion about the guilt or innocence of Mr. Shope?
>
> A. Well, *as of right now the burden of proof would have to be on the defense as far as I'm concerned.*
>
> Q. So are you saying that you would not hold the state in that case to a burden of beyond a reasonable doubt as far as proof is concerned?
>
> A. No.

A short time later, further questioning by defense counsel revealed the following:

> Q. Ms. Waldroup, a minute ago you answered one of the district attorney's questions and you said that you believed that, and I may have taken this wrong, or you may have made a misstatement, but the way I understood it *you said that you would require the defendant to prove his innocence?*
>
> A. Right.
>
> Q. You would?
>
> A. That's what I meant, yes.
>
> Q. And that's what you meant?
>
> A. Yes.
>
> Q. So for that reason, Ms. Waldroup, would you be unable to render a verdict in accordance with the law given the fact that our law is that it's up to the state to prove the defendant's guilt beyond a reasonable doubt?
>
> A. I can hear the evidence and I would be fair. I mean I would listen to both sides, but I'm just human, *what I have heard thus far, I have come to the conclusion that I think he's guilty.*

Following this exchange, defense counsel moved to excuse Waldroup for cause. Prior to ruling, the trial court asked a series of presumably rehabilitative questions, the substance of which is shown below:

THE COURT: Ms. Waldroup, do you understand that what you've heard so far, whatever that may be, is not evidence?

A. Absolutely.

THE COURT: That's just talk on the street or things that you've read or third or fourth hand information?

A. Yes.

THE COURT: And that whatever conclusion that a juror would come to in this case is to be based upon what comes to you from the witness stand in this case and no other place, and so much of that as you see fit to believe, you understand that?

A. Yes.

THE COURT: And regardless of what the source of your prior information is, can you put that aside, not consider it in any way whatsoever, and come to whatever conclusion that you come to in this case based upon the evidence that you hear here and nowhere else?

A. Well, I can put it aside, but just like I said, I would listen carefully, I would try to be as fair as possible; but just like I said, right now with what I have heard and what I have read and, you know, what has been discussed, you know, I would have to—*he would have to be proven innocent instead of guilty.*

THE COURT: Well, I'll go one step further. Do you understand that he has no burden to prove anything?

A. Yes, I understand everyone is innocent until proven guilty.

THE COURT: Ma'am?

A. I said I know that everyone *should* be considered innocent until proven guilty.

THE COURT: Well, they are presumed innocent until proven guilty.

A. Yes, yes.

THE COURT: Can you not accept that premise?

A. Yes, I can, I'm just talking about a very personal opinion which I think everyone has.

THE COURT: The question, the ultimate question is can you put those personal opinions aside, those dialogues and communications aside, and not consider them and base whatever decision that you make in this case, if you serve as a juror, upon the evidence that you hear in this courtroom; that is, so much of as you see fit to believe? Yea or nea?

A. Yes, I can.

THE COURT: Thank you, ma'am. Denied.

Before using a peremptory challenge to dismiss Waldroup, defendant questioned her further about her opinions. This exchange is set out below:

Q: Ms. Waldroup, given what you have told me earlier about your beliefs about the burden of proof, do you believe that you could be totally fair to Mr. Shope in this case?

A. Well, I certainly hope I could. It's like I said, the reason I have come to that conclusion now is because I haven't heard any other evidence so, I mean that's all I have to go on. Now I think that maybe, I mean everybody says that they haven't formed an opinion but I think most people do and I have.

Q. You have formed an opinion about his guilt or innocence?

A. Yes.

Q. Okay, given that fact, isn't it true that you could not be totally fair to Mr. Shope, given what Judge Downs has told you about the law?

A. Possibly not, I don't know.

Defendant ultimately dismissed Waldroup peremptorily. When he encountered another juror he found unacceptable, but who he could not challenge for cause, defendant had already exhausted his peremptory challenges and could not excuse the juror.

A challenge for cause may be made on the ground that the juror "[h]as formed or expressed an opinion as to the guilt or innocence of the defendant." N.C. Gen. Stat. § 15A-1212(6) (1988). It may also be

made where the juror "would be unable to render a verdict with respect to the charge" or "is unable to render a fair and impartial verdict." N.C. Gen. Stat. § 15A-1212(8), (9) (1988). "Challenges for cause are granted to ensure that defendants are tried by fair, impartial, and unbiased juries." *State v. Leonard*, 296 N.C. 58, 62, 248 S.E.2d 853, 855 (1978). The trial court's ruling on a challenge for cause rests in its sound discretion. *State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993).

Typically, "a juror who has formed an opinion as to defendant's guilt or innocence is not impartial and ought not serve." *State v. Corbett*, 309 N.C. 382, 386, 307 S.E.2d 139, 143 (1983). Our Supreme Court held in *Cunningham* that the trial court abused its discretion when it failed to excuse for cause a juror who was confused about, misunderstood, or reluctant to follow the law concerning defendant's presumption of innocence. *Cunningham*, 333 N.C. 744, 429 S.E.2d 718. It is clear, however, that where a juror credibly maintains that he can put his opinion aside and render a verdict on the evidence presented, the court will not have erred in denying defendant's motion to remove the juror for cause. *See State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990) (holding that trial court did not err in failing to excuse juror for cause where juror stated that he could put aside his preconceived notions as to defendant's guilt or innocence); *but see State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992) (holding that trial court erred in denying challenge for cause where juror stated that defendant's failure to testify might stick in the back of his mind, but who agreed to make every effort to follow the law whether he agreed with it or not).

We believe the trial court erred in denying defendant's challenge for cause. Waldroup clearly stated that she believed defendant was guilty, and that he would have to be proven innocent. The rehabilitative exchange with the trial court did not demonstrate any change in her position and we are not persuaded by her ultimate agreement to follow the law. In fact, during the trial court's rehabilitation she reiterated her belief that the burden would be on defendant to prove his innocence. Later, when questioned about the presumption of innocence, she prefaced her acknowledgement of that principle with the word "should". It is evident that although she ultimately agreed to be fair and put away her preconceptions, she still adhered to her prior statements. This adherence is reflected in her statements to counsel during subsequent questioning and we cannot point to any exchange between Waldroup and the trial court which satisfies us that

Waldroup abandoned or set aside her rather strong preconceptions of defendant's guilt and her placement of the burden of proof. Her agreement to follow the law is really no better than that expressed by the juror in *Hightower*. The trial court erred in failing to excuse her for cause.

This error was prejudicial because it stripped defendant of a peremptory challenge and prevented him from excusing another unacceptable juror. This juror worked with the victim's brother, who would be testifying for the State, for several years and defendant believed he would be sympathetic to the prosecution. Because the trial court's error deprived defendant of his right to excuse this juror peremptorily, there must be a new trial. *See Hightower*, 331 N.C. 636, 417 S.E.2d 237 (awarding defendant new trial for erroneous denial of challenge for cause where error deprived defendant of his prerogative to excuse another juror peremptorily).

New Trial.

Judges COZORT and LEWIS concur.

HOUSECALLS NURSING SERVICES, INC., PETITIONER/APPELLEE v. WILHEMINA R. LYNCH, RESPONDENT, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT/APPELLANT

No. 9419SC459

(Filed 21 March 1995)

1. Labor and Employment § 164 (NCI4th)— available work—distance from employee's home — sufficiency of evidence

The evidence was sufficient to support the Employment Security Commission's finding that the job offered by petitioner to respondent would have required her to travel a minimum of 270 miles per day.

Am Jur 2d, Unemployment Compensation §§ 119, 120.

2. Labor and Employment § 164 (NCI4th)— available work not suitable—respondent not disqualified from receiving unemployment benefits

The distance from respondent employee's residence to the available work (270 miles), the disconnected work schedule (a

ten-hour span of time during which she would be "on duty" and paid for only six hours), and the transportation available to the employee (a ten-year-old vehicle with over 100,000 miles on it) supported the ESC's conclusion that the available work was not suitable, and the ESC correctly ordered that respondent was not disqualified from receiving unemployment benefits.

Am Jur 2d, Unemployment Compensation §§ 119, 120.

Judge LEWIS dissenting.

Appeal by respondent from judgment entered 18 February 1994 in Randolph County Superior Court by Judge Peter M. McHugh. Heard in the Court of Appeals 2 February 1995.

J. Sam Johnson, Jr. for petitioner-appellee.

Chief Counsel T. S. Whitaker and Staff Attorney C. Coleman Billingsley, Jr., for respondent-appellant.

GREENE, Judge.

Pursuant to N.C. Gen. Stat. § 96-15(i), the Employment Security Commission of North Carolina (ESC) appeals from a judgment of the Randolph County Superior Court holding that Wilhemina R. Lynch (Lynch) was disqualified for unemployment insurance benefits.

The evidence shows that Lynch worked for Housecalls Nursing Services, Inc. (Housecalls), a provider of in-home patient care, as a certified nursing assistant from April 1991 until April 1993.

Lynch was discharged from her job at Housecalls because the patient with whom she worked was admitted to a nursing home on 8 April 1993, and Housecalls did not have other work available for Lynch at this time. On 11 April 1993, Lynch filed a claim for unemployment insurance benefits, pursuant to N.C. Gen. Stat. § 96-15(a), against Housecalls.

Pursuant to N.C. Gen. Stat. § 96-15(b)(1), an Adjudicator reviewed Lynch's claim and found her to be "not disqualified for benefits," because she was not discharged "for misconduct or substantial fault on [her] part." Housecalls contests Lynch's qualification to receive unemployment insurance benefits, because Housecalls offered Lynch a job with a new patient on 13 April 1993 and she refused the job. Thus, pursuant to N.C. Gen. Stat. § 96-15(b)(2),

Housecalls appealed the Adjudicator's determination, arguing that Lynch "refused opportunities for other additional work." During a hearing on 23 June 1993, a representative from Housecalls testified that they offered Lynch a job working three two-hour shifts, the times of which were 8 a.m. until 10 a.m., then again from 12 noon until 2 p.m., and again from 4 p.m. until 6 p.m. Lynch testified that on the day she drove to that location to work, her odometer measured fifty miles, one way. She also testified that the odometer on her car displayed over 100,000 miles. After the hearing, the appeals referee made the following findings of fact:

1. On April 13, 1993, [Lynch] was offered a job by Housecalls in Goldsboro, which is 45 miles from [Lynch's] residence.

2. A brief description of the job is as follows: working three two hour visits per day, caring for a patient in his home at $20.00 per visit. This was identical to [Lynch's] previous work except that she had earned $16.00 per visit previously. This job would have been five days per week.

3. [Lynch] failed to accept the job because she felt her car was not reliable enough to drive that far on a regular basis. She did work two visits on April 14, 1993 to train other workers.

4. [Lynch] is qualified by experience and training to perform the following types of work: certified nursing assistant.

The appeals referee then concluded that the job offered Lynch was "suitable" for her and that she "did not have good cause for failing to accept the suitable work." Thus, the appeals referee determined that Lynch was "disqualified for unemployment benefits."

Lynch then appealed to the ESC, pursuant to N.C. Gen. Stat. § 96-15(e), which reversed the decision of the appeals referee based on his improper application of the law in this case, because it did not "consider the distance of the available work from [Lynch's] residence." The ESC accordingly held Lynch "not disqualified" from receiving unemployment benefits because the job offered by Housecalls was "unsuitable" for Lynch. In so deciding, the ESC adopted the appeals referee's findings of facts with the following modifications:

2. Unless [Lynch] was assigned other visits within the same work area between the visits associated with this particular assign-

ment, the job would have required her to travel a minimum of two hundred-seventy (270) miles per day; i.e., three (3) trips originating at and returning to her place of residence. The Appeals Referee obtained no labor market information from an agency witness on the travel distances normally associated with these types of jobs, although information appearing on Commission Exhibit #5 indicated that the customary one-way travel distance for such jobs would be twenty (20) miles.

3. [Lynch's] car was a 1983 Buick with over one hundred thousand (100,000) miles.

Thereafter, Housecalls, pursuant to N.C. Gen. Stat. § 96-15(h), petitioned the Randolph County Superior Court for review. On 16 February 1994, that court reversed the ESC's decision and reinstated the decision of the appeals referee, thus concluding that the job offered Lynch was "suitable."

The appeal from the superior court to this Court requires that we review the order of the ESC in the same manner as the superior court must review that order. N.C.G.S. § 96-15(i) (1993); *Reco Transp., Inc. v. Employment Sec. Comm'n*, 81 N.C. App. 415, 418, 344 S.E.2d 294, 296, *disc. rev. denied*, 318 N.C. 509, 349 S.E.2d 865 (1986). Thus, we accept as conclusive the findings of fact made by the ESC "if there is any competent evidence to support them." N.C.G.S. § 96-15(i). The ESC's conclusions of law receive *de novo* review. *Id.* Appeals to the courts from orders of the ESC are not governed by the Administrative Procedures Act. N.C.G.S. § 150B-1(c)(5) (1991).

The issues on appeal are whether (I) the ESC's findings of fact are supported by competent evidence; and (II) those findings support the ESC's conclusion that the job offered Lynch was "suitable."

I

[1] Housecalls argues that the ESC's finding that "the job would have required [Lynch] to travel a minimum of two hundred-seventy (270) miles per day" is not supported by competent evidence. We disagree.

The evidence before the ESC was that Housecalls offered Lynch a job, which consisted of three, two-hour sessions with a patient who lived forty-five miles from Lynch's residence. The sessions began at 8 a.m. and ended at 6 p.m. with a two-hour break from 10 a.m. until 12 noon and another two-hour break from 2 p.m. until 4 p.m. There is no

evidence in the record that Housecalls provided Lynch any place to stay during the four hours she was required to wait between working periods, or that she had some place to stay near the work site. Furthermore, as the ESC argues, "[t]o expect claimant to find something to do four hours per day, twenty hours per week, when she is 45 miles from her house is not reasonable," because this effectively requires Lynch to be at or near the work site for ten hours a day while compensating her for only six hours. Thus, the finding that the job required Lynch to drive back and forth between her home and the patient's home between the sessions for a total of 270 miles each day is supported by this record. *See In re Durham Annexation Ordinance*, 69 N.C. App. 77, 85, 316 S.E.2d 649, 654 (ultimate findings, which fact finders are required to make, are reached by process of logical reasoning from the evidence), *disc. rev. denied and appeal dismissed*, 312 N.C. 493, 322 S.E.2d 553 (1984).

II

[2] To qualify for unemployment benefits, a claimant must accept "suitable work when offered him." N.C.G.S. § 96-14(3) (1993). The determination of whether the work is suitable requires a consideration of several factors, including "the distance of the available work from [the employee's] residence." *Id.* In this case the distance from the employee's residence to the available work, the disconnected work schedule and the transportation available to the employee support the conclusion that the available work was not suitable, as that term is used in N.C. Gen. Stat. § 96-14(3). *See Watson v. Employment Sec. Comm'n*, 111 N.C. App. 410, 415, 432 S.E.2d 399, 402 (1993) (employee, who did not have reliable transportation, not disqualified from unemployment benefits when she refused employment after employer moved plant location farther from residence of employee). Thus, the ESC correctly ordered that Lynch was not disqualified from receiving unemployment benefits and the trial court erred in reversing that order. The order of the superior court is accordingly reversed.

Reversed.

Judge COZORT concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent. The superior court correctly ruled that the ESC's findings of fact were not supported by sufficient competent evidence. There was no evidence to support the ESC's finding that the job would have required Lynch to travel a minimum of 270 miles per day. The majority implies that logical reasoning permits the inference that the three-visit per day schedule would require Lynch to drive home after each visit. I find no logical reason why anyone would drive the forty-five miles to work for the first visit at 8:00 a.m., then home, then back for the second visit, then home, then back for the third visit, then home at 6:00 p.m.

As to the forty-five mile commute, I note that on Lynch's 1991 application for employment, she answered "yes" to the following three questions: "Can you travel 30 miles (one-way) daily to work?"; "Can you travel over 30 miles occasionally to work?"; "Can you travel over 30 miles routinely to work?" Additionally, one of the "special requirements" of the terms of her employment was that she have transportation.

Because the superior court correctly concluded that there was insufficient evidence to support the ESC's findings of fact, I would affirm the judgment of the superior court.

GAYLORD DYE, EMPLOYEE-PLAINTIFF v. SHIPPERS FREIGHT LINES, EMPLOYER-DEFENDANT AND OLD REPUBLIC INSURANCE CO., SERVICING-AGENT, CARRIER-DEFENDANT

No. 9410IC431

(Filed 21 March 1995)

Workers' Compensation § 114 (NCI4th)— heart attack on the job—accident arising out of and in course of employment—insufficiency of evidence

The evidence was sufficient to support the Industrial Commission's finding that plaintiff who suffered a heart attack while driving a truck for defendant did not sustain an injury by accident or occupational disease where the deputy commissioner did not consider plaintiff's demeanor at the hearing to be credible; the deputy commissioner found that the alleged working con-

ditions would absolutely preclude anyone from working under them; and defendant employer had accommodated plaintiff's complaints about his working conditions on at least two occasions. Furthermore, the evidence was insufficient to establish that plaintiff was unaccustomed to his work hours and thus his work hours constituted a new condition of employment which never became routine, and that his heart attack was caused by the excessive work hours.

Am Jur 2d, Workers' Compensation §§ 267 et seq.

Appeal by plaintiff from Opinion and Award entered 29 December 1993 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 February 1995.

Frederick R. Stann for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Daniel Carter Pope, Jr. and F. Stephen Glass, for defendants-appellees.

WALKER, Judge.

Plaintiff was employed as a truck driver for defendant. On 30 April 1985, while driving his route, plaintiff suffered a heart attack. Plaintiff filed a workers' compensation claim, alleging that the disabling condition caused by the heart attack was the result of an accident or occupational disease caused by "stress, equipment, and long hours."

Plaintiff's claim was heard before a deputy commissioner on 25 October 1988. At the hearing, plaintiff contended that his heart attack was brought on by long work hours, a rough ride caused by his nearly empty truck, equipment failure which caused the inside temperature of his truck on 30 April 1985 to be some 40 degrees hotter than the outside temperature of 70 degrees, and prior stress related to his job conditions.

The deputy commissioner found that plaintiff's testimony, if believed, "would tend to establish either an interruption of plaintiff's normal work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences contributing to his [heart attack] . . . or the contribution of other prior stress from his employment to the same condition." However, the deputy commissioner did not accept plaintiff's testimony as credible and concluded, based on its findings of fact, that plaintiff's disabling condition was

the result of a pre-existing significant coronary artery disease he suffered independent of his employment rather than the result of an injury by accident arising out of and in the course of his employment or the result of an occupational disease.

Plaintiff appealed to the Full Commission, which affirmed the deputy commissioner's denial of plaintiff's claims by Opinion and Award entered 29 December 1993. The Industrial Commission adopted the deputy commissioner's findings and conclusions with some revisions.

Review on appeal from an Opinion and Award of the Industrial Commission is limited to a determination of whether the Commission's findings are supported by the evidence and whether the findings support the Commission's conclusions. *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 105-106 (1991).

To be compensable under the Workers' Compensation Act, an injury must result from an "accident arising out of and in the course of employment." N.C. Gen. Stat. 97-2 (6) (1994). " 'In deciding whether there was an accident, the only question on appeal is whether there was "an unlooked for and untoward event [which is not expected or designed by the injured employee]" or "the interruption of the routine work and the introduction thereby of unusual conditions.' " *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985) (citation omitted). Thus, a heart attack does not arise by accident out of and in the course of employment if it occurs when one is carrying on his usual work in the usual way. *Jackson v. Highway Comm'n*, 272 N.C. 697, 701, 158 S.E.2d 865 (1968). *See also Lewter v. Enterprises*, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954) (heart attack ordinarily does not result from an injury by accident arising out of or in the course of employment unless it results from an unusual or extraordinary exertion incident to the employment).

" 'New conditions of employment to which an employee is introduced and expected to perform regularly do not become a part of an employee's work routine until . . . the employee has gained proficiency performing in the new employment and becomes accustomed to the conditions it entails.' " *Church v. Baxter Travenol Laboratories*, 104 N.C. App. 411, 414, 409 S.E.2d 715, 716 (1991) (citation omitted). However, "once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an inter-

ruption of the work routine or otherwise an 'injury by accident.' " *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985).

An accidental injury "arises out of" the employment where a contributing proximate cause of the injury was a risk inherent or incidental to the employment and one to which the employee would not have been equally exposed apart from the employment. *Fortner v. J.K. Holding Co.*, 83 N.C. App. 101, 103-104, 349 S.E.2d 296, 298 (1986), *affirmed*, 319 N.C. 640, 357 S.E.2d 167 (1987).

The Commission found as fact that plaintiff, who had been a truck driver for 26 years, was accustomed to driving both empty and full vehicles over all types of roads and road conditions and to driving long hours in violation of the appropriate DOT regulations. The Commission further found that: (1) plaintiff did not experience an interruption of his normal work on 30 April 1985 by driving his nearly empty vehicle on his assigned route, (2) plaintiff's heart attack was "neither due to an interruption of his normal work routine . . . nor to any abnormal stress at work, but was instead due to the pre-existing significant coronary artery disease he suffered, which was the result of his smoking habit, his diet, and other factors," and (3) "the normal stress that plaintiff had in his work as a truck driver did not place him at any more risk of stress-related coronary artery disease and resulting myocardial infarction therefrom than members of the general public and there is no credible evidence that plaintiff experienced any unusual or abnormal stresses in his work that contributed to his disabling myocardial infarction."

The Commission further found and concluded that although plaintiff's testimony, if believed, would tend to establish either that his disabling heart condition was a result of a compensable injury by accident or occupational disease, it was not credible because: (1) the deputy commissioner did not consider plaintiff's demeanor at the hearing to be credible, (2) the deputy commissioner found that the alleged working conditions would absolutely preclude anyone from working under them, (3) defendant-employer had accommodated plaintiff's complaints about his working conditions on at least two occasions, and (4) when previously asked by the insurance adjuster handling his claim, plaintiff denied that he had over exerted himself and denied any exceptional problems with his equipment.

The above findings support the Commission's conclusion that plaintiff did not sustain an injury by accident. The Commission's find-

ings of fact are conclusive and binding on appeal if supported by competent evidence in the record even though the record contains evidence which would support a contrary finding. *Blalock v. Roberts Co.*, 12 N.C. App. 499, 504, 183 S.E.2d 827, 830 (1971). The Commission "is the sole judge of the credibility of the witness and the weight to be given its testimony; it may accept or reject all of the testimony of a witness; it may accept a part . . . and reject a part . . . ." *Robbins v. Nicholson*, 10 N.C. App. 421, 426, 179 S.E.2d 183, 186 (1971), *reversed on other grounds*, 281 N.C. 234, 188 S.E.2d 350 (1972). Plaintiff must introduce competent evidence to support the inference that an accident caused the injury in question. *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 106 (1991).

Plaintiff argues that he introduced evidence sufficient to show that his heart attack was caused by an accident. In particular, plaintiff argues that the evidence showed that he never became accustomed to his long work hours and thus his work hours constituted a new condition of employment which never became routine, and that his heart attack was caused by the excessive work hours.

The evidence shows that since plaintiff was employed by defendant-employer in November 1984, he repeatedly complained about his long hours. In response to those complaints, defendant-employer assigned a second driver to plaintiff's initial 20 to 35-hour route and later assigned him a new route which he could complete in 12 to 13 hours. Plaintiff introduced a table of his work hours for the six months preceding his injury. The table showed that plaintiff worked an average of 53.8 hours a week over a period of approximately six months. Although it showed that plaintiff worked as many as 92 hours one week, between 80 to 90 hours for four weeks, and between 70 to 80 hours for five weeks, plaintiff worked only 54 hours the week preceding his heart attack and worked 33 hours during the week he suffered a heart attack.

Dr. W. Kenneth Austin, an expert in cardiology, and Dr. B. V. Chendraj, an Internal Medical Specialist testified for plaintiff. Dr. Austin testified that plaintiff had a pre-existing coronary disease which was probably aggravated, accelerated, or made worse by stress, heat and the conditions under which plaintiff worked. Dr. Chendraj testified that the stress associated with plaintiff's work was a contributing factor in plaintiff's coronary artery disease.

We find the evidence insufficient to establish that plaintiff was unaccustomed to his work hours and thus to show that plaintiff's heart attack was caused by an accident arising out of and in the course of employment. The evidence shows that plaintiff worked the long hours which he complained of for over a period of six months, that plaintiff's hours were twice reduced in response to his complaints, and that plaintiff was driving a shorter route at the time of his heart attack and during the preceding week. This was sufficient to support the Commission's finding that plaintiff was accustomed to his work hours and work conditions. *See Trudell v. Heating & Air Conditioning Co.*, 55 N.C. App. 89, 91, 284 S.E.2d 538, 540 (1981) (no injury by accident where plaintiff had worked in low crawl space for at least one week and possibly two weeks before experiencing lower back pain; by that time, working in low crawl space had become part of plaintiff's normal work routine). Moreover, we also find the medical evidence insufficient to establish plaintiff's employment as a contributing proximate cause of his heart attack. *See Lewter v. Enterprises*, Inc., 240 N.C. 399, 405-406, 82 S.E.2d 410, 415-416 (1954) (medical evidence to the effect that plaintiff suffered high blood pressure for many years and that fire and plaintiff's excitement could have aggravated her high blood pressure condition to such an extent as to cause the cerebral hemorrage from which she died clearly showed that death resulting from cerebral hemorrage was not fairly traceable to employment).

The decision of the Industrial Commission is hereby

Affirmed.

Judges EAGLES and McGEE concur.

JOHN RAUSEO AND WIFE, DEBRA M. RAUSEO; JAMES A. GREENE; ALEXANDER SLOAN, III, AND WIFE, SANDRA SLOAN; IVEY JOHNSON, ROBERT SPUHLER AND WIFE, CLAUDIA SPUHLER; FRED MACRAE AND WIFE, LINDA MACRAE; GEORGE MURRAY AND WIFE, MARY ANN MURRAY, PETITIONERS v. NEW HANOVER COUNTY AND THE NEW HANOVER COUNTY BOARD OF COMMISSIONERS, RESPONDENTS

No. 945SC540

(Filed 21 March 1995)

1. Zoning § 66 (NCI4th)— construction of fire station in residential area—authority of board to grant special use permit

There was no merit to petitioners' contention that since a zoning ordinance did not expressly permit a volunteer fire station in a district zoned for low-density residential use, respondent board of commissioners did not have authority to grant a volunteer fire department a special use permit for a fire station, since the board found that a fire station qualifies for a special use permit under the "government offices and buildings" category, and the board's interpretation was reasonable and thus entitled to deference by the court.

Am Jur 2d, Zoning and Planning §§ 974-978.

Applicability of zoning regulations to governmental projects or activities. 61 ALR2d 970.

2. Zoning § 73 (NCI4th)— construction of fire station—special use permit—sufficiency of evidence to support issuance

Respondent board's decision to issue a special use permit for construction of a fire station was supported by competent, material, and substantial evidence where the board found that the use of the property as a fire station would preserve the public health and safety; the application met all required conditions and specifications; the presence of a fire station would decrease the response time to fire calls in the area; and the use would be in harmony with the surrounding area.

Am Jur 2d, Zoning and Planning §§ 803-806.

Appeal by petitioners from order entered 16 December 1993 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 27 January 1995.

Shipman & Lea, by Gary K. Shipman, for petitioners-appellants.

New Hanover County Attorney's Office, by Kemp Burpeau, and Rountree and Seagle, by George Rountree, III, for respondents-appellees.

WYNN, Judge.

On 6 October 1992, the Ogden Volunteer Fire Department (Ogden) filed an application for a special use permit with the New Hanover County Planning Department to construct a fire station at the intersection of Porter's Neck Road and Edgewater Club Road in New Hanover County. On 7 December 1992, a public hearing was held before respondent New Hanover Board of County Commissioners (Board). Eleven individuals spoke at the hearing, five of whom supported granting the permit and six of whom opposed it. The Board directed Ogden to work with the county's planning staff to consider alternative sites for the fire station and then make another presentation.

On 4 January 1993, the Board reconsidered Ogden's permit application. Larry Sneeden, Ogden's representative, informed the Board that the original site was the only viable option for a fire station. The Board instructed the planning staff to coordinate a meeting between Ogden and area residents to address the residents' concerns. On 3 May 1993, the Board held a public hearing to decide whether to approve Ogden's permit application. Seven individuals spoke at the hearing, one in favor of the permit and six in opposition. Several speakers questioned whether Commissioner E. L. Matthews had a conflict of interest since he lived near the proposed site. The county attorney, however, advised the Board that there was no conflict of interest since any benefit Mr. Matthews might receive from the fire station would be one common to everyone in the surrounding area. The Board then voted four to one to grant the special use permit and entered an order finding that the requirements of the zoning ordinance were satisfied and the permit should be issued. Petitioners filed a petition for writ of certiorari to review the Board's decision with the superior court pursuant to N.C. Gen. Stat. § 153A-340. After a hearing, the superior court entered an order dismissing petitioners' appeal and affirming the Board's decision to issue the permit. From that order, petitioners appeal.

The issues presented for our consideration are I) whether the Board had the authority to issue the special use permit; II) whether the decision to issue the permit was supported by the evidence; III) whether the Board properly followed its procedures in issuing the permit; and, IV) whether the Board's decision to issue the permit was arbitrary. We find no error and affirm.

I.

Petitioners first assign error to the Board's determination that it had the authority to issue the special permit. Petitioners contend that the site is zoned residential and that there is no provision in the ordinance granting the Board the authority to issue a special use permit for the construction and operation of a fire station in a residential zone. We disagree.

N.C. Gen. Stat. § 153A-340 provides that every decision of a board of commissioners issuing a special use permit is "subject to review by the superior court by proceedings in the nature of certiorari." N.C. Gen. Stat. § 153A-340 (1991). The scope of review of the superior court 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, *disc. review denied*, 336 N.C. 604, 447 S.E.2d 390 (1994); *In re Application of Goforth Properties, Inc.*, 76 N.C. App. 231, 332 S.E.2d 503, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 857 (1985). 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. *Simpson v. City of Charlotte*, 115 N.C.

App. 51, 443 S.E.2d 772 (1994). 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 determining the sufficiency of evidence to support a board's decision to issue a special permit, the court applies the whole record test which requires examination of all competent evidence to determine if the board's decision was based upon substantial evidence. *In re Application of City of Raleigh*, 107 N.C. App. 505, 421 S.E.2d 179 (1992).

In the instant case, the proposed site for the fire station was zoned R-20 which is described in the zoning regulations as to be used for "low density residential and recreational purposes." In its amended order the Board made the following finding of fact:

> The Zoning Ordinance establishes no special conditions for the construction of a fire station. It only states that government offices, buildings and related structures and uses obtain a special use permit.

[1] Petitioners argue that since the zoning ordinance did not expressly permit a volunteer fire station in a R-20 district, the Board did not have the authority to grant Ogden a special use permit. While "fire station" is not a specifically denominated category in the table of permitted uses in the zoning regulations, the Board found that a fire station qualifies for a special use permit under the "government offices and buildings" category. The Board is vested with reasonable discretion in interpreting the meaning of a zoning ordinance, and a court may not substitute its judgment for the board in the absence of error of law or arbitrary, oppressive, or manifest abuse of authority. *P.A.W. v. Town of Boone Bd. of Adjustment*, 95 N.C. App. 110, 382 S.E.2d 443 (1989). The Board's interpretation is reasonable and thus entitled to deference. This assignment of error is overruled.

II.

[2] Petitioners next argue that the Board's decision to issue the special permit is not supported by competent, material, and substantial evidence. Petitioners contend that Ogden presented no evidence at the 3 May hearing upon which the Board could base its decision to issue the permit. We disagree.

When the standards governing the issuance of a special use permit are specified in a zoning ordinance and an applicant fully com-

plies with the standards, a board of commissioners may not deny the permit to that applicant. *Charlotte Yacht Club Inc. v. County of Mecklenburg*, 64 N.C. App. 477, 307 S.E.2d 595 (1983); *see Woodhouse v. Board of Comm'rs*, 299 N.C. 211, 261 S.E.2d 882 (1980). In the instant case, the record indicates that New Hanover County's zoning ordinances provide that an applicant for a special use permit must show the following:

A. That the use will not materially endanger the public health or safety if located where proposed and approved;

B. That the use meets all required conditions and specifications;

C. That the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and

D. That the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the plan of development for New Hanover County.

The Board found that the use of the property as a fire station would preserve the public health and safety; that the application met all required conditions and specifications; that the presence of a fire station would decrease the response time to fire calls in the area; and, that the use would be in harmony with the surrounding area. We have reviewed the record and conclude that there was substantial evidence before the Board to support its findings and decision to issue the permit. This assignment of error is overruled.

III.

Petitioners next argue that the Board erred by failing to follow its own procedures before issuing the special use permit. Petitioners contend that the Board failed to make its findings of fact and enter its order granting the permit at the close of the public hearing as required by *Cardwell v. Forsyth County Zoning Bd. of Adjustment*, 88 N.C. App. 244, 362 S.E.2d 843 (1987), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 858 (1988). In *Cardwell*, however, the Forsyth County Zoning Board of Adjustment Rules of Procedure specifically required the Board to make its findings of fact on the record at the close of the hearing. *Cardwell*, 88 N.C. App. at 249, 362 S.E.2d at 846. New Hanover County does not have such a requirement, therefore, this

Court's holding in *Cardwell* is not applicable. The record indicates that the Board fully complied with its procedures before issuing the special use permit. This assignment of error is overruled.

IV.

Petitioners finally argue that the Board utilized a flawed procedure in granting the special use permit and its decision was arbitrary. We disagree. The record indicates that the Board issued the special use permit to Ogden for the construction of a volunteer fire station after reviewing the recommendation of its planning staff and holding three public hearings. There is sufficient evidence in the record to support the Board's decision. This assignment of error is overruled.

For the foregoing reasons, the order of the trial court is

Affirmed.

Judges LEWIS and McGEE concur.

CHARLES E. BABB, PLAINTIFF v. HARNETT COUNTY BOARD OF EDUCATION AND IVO A. WORTMAN, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. 9411SC476

(Filed 21 March 1995)

1. Schools § 165 (NCI4th)— high school coach—failure to assign coaching duties—no breach of contract

A former high school basketball and football coach could not recover for breach of his contract to teach and coach because he was assigned no coaching duties based upon a sentence in an addendum to his contract stating that "changes in coaching duties shall be with mutual consent of both parties," since this sentence applies only to a change in the type of coaching duties assigned and does not apply when no coaching duties are assigned.

Am Jur 2d, Schools §§ 111 et seq.

2. Schools § 165 (NCI4th)— no property interest in coaching—denial of due process claim proper

Plaintiff, who had been coaching basketball and football, had no property interest in coaching pursuant to the plain and unambiguous language of his contract with defendant board of educa-

tion; therefore, the trial court did not err in granting defendants' summary judgment motion as to plaintiff's constitutional due process claim based upon defendant principal's failure to assign coaching duties to plaintiff.

Am Jur 2d, Schools §§ 111 et seq.

3. Schools § 165 (NCI4th)— coach's reassignment to teaching duties—failure to show retaliation

Where plaintiff complained about not being assigned coaching duties and was then reassigned from his job as a health and P.E. teacher to duties as a competency lab teacher, plaintiff failed to offer evidence to substantiate his claim of retaliation; therefore, the trial court did not err in granting defendants' summary judgment motion as to plaintiff's constitutional claim.

Am Jur 2d, Schools §§ 111 et seq.

Appeal by plaintiff from order entered 28 January 1994 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 26 January 1995.

Plaintiff first began working in Harnett County in 1983 as a Physical Education (hereinafter P.E.) teacher and as a football and basketball coach at Western Harnett High School. At that time, he signed a contract with the Harnett County Board of Education (hereinafter defendant Board). He left after "approximately two weeks" to coach basketball and track and teach P.E. and life science at a high school in Lee County. After his third year in Lee County, plaintiff resigned his basketball coaching position and was asked to discontinue coaching track. During his fourth and final year in Lee County, he taught but did not coach at the high school and completed his masters degree in P.E.

The principal at Western Harnett High School then approached plaintiff about returning to Western Harnett and coaching basketball. After signing a probationary contract, plaintiff returned to work in Harnett County in 1987. During the 1987-88 year, plaintiff taught in the competency lab and coached basketball. On 23 May 1988, plaintiff entered into a career contract with defendant Board to teach and coach in the school system. The contract included an addendum (written by plaintiff and his wife and originally included in plaintiff's 1983 contract with defendant Board) which provided:

It is mutually understood and agreed upon that this contract tendered is for employment both as teacher and coach. The contract is accepted and executed by both parties with full understanding and agreement that separation or resignation from either duty is tantamount to complete separation and resignation from employment as both teacher and coach notwithstanding that fact that the employee may have gained career status as provided by NC G.S. 115-142. Specific coaching duties shall be assigned by the principal on an annual basis, and, where different from the original agreement, changes in coaching duties shall be with mutual consent of both parties.

During the 1988-89 school year, plaintiff's coaching duty was as head basketball coach at Western Harnett High School. In the 1989-90 school year, then-principal Steve McNeill told plaintiff he was going to be assigned to coach soccer, but plaintiff refused and was not given that assignment. During the 1990-91 school year, plaintiff and defendants agreed that plaintiff would also be assigned as assistant football coach. At the end of that school year in a letter dated 13 May 1991, then-principal Henry Holt advised plaintiff that he had "no plans to include [plaintiff] as a member of Western Harnett High School's coaching staff for the school year 1991-92." Plaintiff then met with Superintendent Ivo Wortman (hereinafter defendant Wortman) twice about not being assigned any coaching duties for the 1991-92 school year. Plaintiff was subsequently assigned to teach in the competency lab. Since the 1990-91 school year, plaintiff has requested to teach P.E. again, but has not been reassigned to this teaching position. In his 5 November 1993 deposition, defendant Wortman explained that the high school had fewer P.E. teaching positions at that time than when plaintiff had previously taught in that department.

Plaintiff filed a complaint against defendant Board and defendant Wortman on 4 August 1992 alleging breach of contract and violations of plaintiff's state constitutional rights pursuant to Art. I, sections 12, 14, 18, and 19 of the North Carolina Constitution. Plaintiff and defendants each made motions for summary judgment. The trial court granted defendants' summary judgment motion and denied plaintiff's motion on 28 January 1994. Plaintiff appeals.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for plaintiff-appellant.

Thompson & Godwin, L.L.P., by Benjamin N. Thompson and Elaine Rose O'Hara, for defendant-appellees.

EAGLES, Judge.

Plaintiff assigns as error the trial court's denial of plaintiff's motion for summary judgment and the trial court's granting of defendants' motion for summary judgment. Summary judgment is appropriate when the moving party can "establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Pulley v. Rex. Hosp.*, 326 N.C. 701, 704, 392 S.E.2d 380, 382 (1990), *quoting Watts v. Cumberland County Hosp. Systems*, 317 N.C. 321, 322-23, 345 S.E.2d 201, 202 (1986). " '[A]ll inferences of fact from the proofs offered at the hearing must be' " viewed in favor of the non-movant. *Pulley* at 704, 392 S.E.2d at 382, *citing Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981).

Breach of Contract Claim

[1] Plaintiff first asserts that based on this legal standard, the trial court erred in denying plaintiff's summary judgment motion and granting defendants' motion as to plaintiff's breach of contract claim. Plaintiff fails to argue how the trial court misapplied the legal standard. Plaintiff then argues that "he has a contractual right to coach pursuant to the terms of his specific agreement with the Defendants." Plaintiff bases this argument on the last sentence in the addendum and argues that it is unambiguous and clearly allows the principal to assign plaintiff no coaching duties only with the "mutual consent of both parties." Plaintiff's interpretation of this sentence is erroneous.

"When the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court." *Whirlpool Corp. v. Dailey Const., Inc.*, 110 N.C. App. 468, 471, 429 S.E.2d 748, 751 (1993).We agree with plaintiff that the last sentence of the addendum is unambiguous. However, we hold that the last sentence provides that the principal and plaintiff need only mutually consent to a **change** in plaintiff's assigned coaching duties. Here, the principal did not assign plaintiff any coaching duties, which is different from a change in the type of coaching duties assigned. Because no coaching duties were assigned, the last sentence of the addendum did not apply. Where an agreement is clear and unambiguous, no genuine issue of material fact exists and summary judgment is appropriate. *Corbin v. Langdon*, 23 N.C. App. 21, 27, 208 S.E.2d 251, 255 (1974). Accordingly, the trial court did not err in denying plaintiff's summary judgment motion and granting defendants' summary judgment motion as to plaintiff's breach of contract claim because the disputed

sentence in the addendum is clear and unambiguous and did not apply to plaintiff's situation.

Constitutional Claim

A. Due Process

[2] Plaintiff argues that the trial court erred in granting defendants' summary judgment motion as to plaintiff's constitutional claim. Pursuant to Art. I, section 19 of the North Carolina Constitution, no person can be deprived of a property interest without due process of law. Plaintiff argues that he has a property interest in coaching and that defendants terminated his coaching duties without a due process hearing. We disagree that plaintiff has a property interest in coaching.

G.S. 115C-325(a)(4) distinguishes between teaching and coaching because the statute classifies coaching as a "special duty" in addition to regular teaching duties. Coaching is not protected by the tenure provisions of G.S. 115C-325(d), which apply to career teachers and protect them from dismissal, demotion, or employment on a part-time basis. Instead of arguing that Chapter 115 provides him with a property interest in coaching, plaintiff argues that his contract with defendants gave him a property interest in coaching. We have already held that under plaintiff's contract, the principal may unilaterally choose to assign no coaching duties to plaintiff. Thus, we hold that plaintiff has no property interest in coaching pursuant to the plain and unambiguous language of his contract with defendants.

B. Retaliation

[3] Plaintiff argues that he had the right pursuant to Art. I, sections 12, 14, and 18 of the North Carolina Constitution to petition the Board and if he did not obtain relief, to seek access to the courts to redress his injuries. In his complaint, plaintiff alleged that after he complained about not being assigned coaching duties for the 1991-92 season, defendant Wortman retaliated by reassigning plaintiff from his job as a health and P.E. teacher to duties as a competency laboratory instructor. Thus, plaintiff argues that the trial court erred in granting defendants' summary judgment motion as to plaintiff's constitutional claim pursuant to Art. I, sections 12, 14, and 18 of the state constitution because of defendant Wortman's alleged retaliation.

Plaintiff petitioned the Board and was heard but was denied the relief he sought i.e., reinstatement to his coaching position. Subsequently, plaintiff sued in superior court. Plaintiff has not been

denied access to the courts. However, he has not been successful in persuading the courts that his claim has merit.

In response to defendants' motion for summary judgment, plaintiff offered no forecast of evidence to support his allegations that defendant Wortman's assignment of teaching duties was done to retaliate against plaintiff. In opposing a summary judgment motion, a plaintiff " 'may not rest upon the mere allegations or denials of his pleading[s], but his response, by affidavits or as otherwise provided in [G.S. 1A-1, Rule 56] must set forth specific facts showing that there is a genuine issue for trial.' " *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992), *quoting* G.S. 1A-1, Rule 56(e). Furthermore, after carefully reviewing the entire record, we find no evidence to substantiate plaintiff's claim of retaliation. Accordingly, we hold that the trial court did not err in granting defendants' summary judgment motion as to plaintiff's constitutional claim.

Affirmed.

Judges GREENE and WALKER concur.

IN RE: ESTATE OF J.V. PEEBLES

No. 9422SC374

(Filed 21 March 1995)

1. Judgments § 123 (NCI4th)— will caveat—consent judgment signed by all parties and judge—judgment entered at that point—attempt to withdraw consent not effective

There was no merit to caveator's contention that the trial court erred in denying her motion to set aside a consent judgment because she withdrew her consent before the judgment was entered and it was therefore void, since the parties, their attorneys, and the judge all signed the handwritten consent judgment which was filed in the clerk's office; all the parties had fair notice of the handwritten agreement's terms because they created and signed it; by signing the consent judgment, the parties agreed to settle the will caveat which was the only matter for adjudication; and entry of the consent judgment occurred when the judge

signed it because it was at this point that the intent and purpose of N.C.G.S. § 1A-1, Rule 58 were satisfied.

Am Jur 2d, Judgments § 212.

Right to appellate review of consent judgment. 69 ALR2d 755.

2. Judgments § 119 (NCI4th)— no findings of fact and conclusions of law—consent judgment not void

The consent judgment in this action was not void for failing to contain findings of fact and conclusions of law.

Am Jur 2d, Judgments § 207.

Appeal by caveator from order entered 9 February 1994 by Judge Fetzer Mills in Davie County Superior Court. Heard in the Court of Appeals 12 January 1995.

J.V. Peebles died testate on 15 July 1991 and in his will, dated 25 March 1991, he left all of his property to Clifton Lee Peoples, III and appointed him as the executor of his estate. On 19 July 1991, Clifton Lee Peoples, III offered J.V. Peebles' will for probate. Ruth Peebles Dulin, J.V. Peebles' "next of kin," filed a caveat proceeding on 25 September 1991. Although not clear from the record, it appears that Ezell P. Carson later joined Ruth Peebles Dulin in the proceeding as a caveator.

After the trial began in February 1993 but before the conclusion of propounder's evidence, Clifton Lee Peoples, III, as propounder of the will, and Ruth Peebles Dulin and Ezell P. Carson, as caveators of the will, entered into a handwritten "Memorandum Of Family Settlement Agreement And Consent Judgment" to settle the will caveat. The consent judgment provided that Clifton Lee Peoples, III would execute a deed with life estates to himself and Ruth Peebles Dulin "for the life of whoever lives longest." The remainder interests were to go to Ruth Peebles Dulin's children (Tawana, Barron, Sharma, and Warren Dulin) and to Regina Carson, Joan Peebles and Renay Peebles. The consent judgment also provided that Ruth Peebles Dulin would be allowed to live in and have possession of the "home" until her death and that upon her death, her children would be allowed to remain on the property along with the other remaindermen. The consent judgment also stated that the parties agreed that J.V. Peebles' will dated 25 March 1991 was "valid and sustained in accord with terms [sic] of this agreement." Ruth Peebles Dulin, Ezell P. Carson,

and Clifton Lee Peoples, III, their attorneys, and Judge Thomas W. Ross all signed the consent judgment on 9 February 1993.

On 6 July 1993, Ezell P. Carson (hereinafter caveator) filed a motion with Davie County Superior Court asking the court to set aside the consent judgment, alleging that the consent judgment was void. Caveator subsequently filed an affidavit objecting to the consent judgment because "[t]he intent of the agreement, to keep a place for Ruth Peebles Dulin to live, has been thwarted by the death of Ruth Peebles Dulin and consequently there is no purpose in upholding the agreement." Judge Fetzer Mills heard caveator's motion and denied it on 9 February 1994.

Caveator appeals.

Grady L. McClamrock, Jr. for caveator-appellant.

Hall, Vogler & Fleming, by Tamara A. Fleming, for propounder-appellee.

EAGLES, Judge.

I.

[1] Caveator argues that the trial court erred in denying her motion to set aside the consent judgment because it was void. G.S. 1A-1, Rule 60(b)(4) allows a trial court "[o]n motion and upon such terms as are just, . . . [to] relieve a party or his legal representative from a final judgment, order, or proceeding . . . [if] the [j]udgment is void." The trial court's decision on a Rule 60 motion is discretionary, and will be reversed only upon a showing of an abuse of discretion. *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983).

Caveator argues that the consent judgment was void because she withdrew her consent before the agreement was entered. We have previously held that a consent judgment is void if a party withdraws consent before the judgment is entered. *Briar Metal Products, Inc. v. Smith*, 64 N.C. App. 173, 176, 306 S.E.2d 553, 555 (1983). In her motion, caveator argued that the consent judgment was void because it was not entered in compliance with the requirements of G.S. 1A-1, Rule 58. Rule 58 provides that "where judgment is not rendered in open court, entry of judgment . . . shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to

all parties." Caveator's argument is without merit here; her reliance on Rule 58 is misplaced.

Our Supreme Court has recognized that there are situations that "do[] not fit squarely within the rubric of Rule 58." *Stachlowski v. Stach*, 328 N.C. 276, 279, 401 S.E.2d 638, 641 (1991). Rule 58 envisions the situation where a judge makes findings of fact and conclusions of law and renders a decision. The consent judgment here is one of those situations that does not fit squarely within Rule 58 because a consent judgment is merely an agreement between the parties that has been sanctioned by the court. *Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144, 144-45 (1994), *citing Armstrong v. Aetna Insurance Co.*, 249 N.C. 352, 106 S.E.2d 515 (1959), (stating that except in the area of domestic law, "[t]he . . . rule is that a consent judgment is the contract of the parties entered upon the record with the sanction of the court").

Although here "the express provisions of Rule 58 are ineffective to establish the point of entry of judgment, the intent and purpose of the rule should nevertheless guide our resolution of when entry of judgment occurred." *Stachlowski* at 281, 401 S.E.2d at 642. The purposes of Rule 58 "are to make the moment of entry of judgment easily identifiable and to give fair notice to all parties [of the entry of judgment]." *Rivers v. Rivers*, 29 N.C. App. 172, 173, 223 S.E.2d 568, 569, review denied, 290 N.C. 309, 225 S.E.2d 829 (1976). The court in *Stachlowski* added that in determining when entry of judgment occurs, we should consider whether "the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review." *Stachlowski* at 287, 401 S.E.2d at 645. Here, the parties, their attorneys, and the judge all signed the handwritten consent judgment and it was filed in the clerk's office. All of the parties had fair notice of the handwritten agreement's terms because they created and signed it. By signing the consent judgment, the parties agreed to settle the will caveat, which was the only matter for adjudication. Accordingly, we hold that entry of the consent judgment occurred when the judge signed it because it was at this point that the "intent and purpose" of Rule 58 were satisfied.

Caveator also argues that the consent judgment here was not entered as provided in G.S. 31-37. We have already concluded that the consent judgment was effectively entered before caveator withdrew her consent. Furthermore, caveator did not assign error to the consent judgment's alleged failure to comply with G.S. 31-37.

Accordingly, caveator has failed to preserve this issue for appellate review.

Because entry of the consent judgment had already occurred when caveator attempted to withdraw her consent to the agreement, the trial court did not err in denying caveator's motion to set aside the consent judgment based on Rule 58.

II.

[2] Caveator argues that if the consent judgment was entered as a judgment, it was still void because it failed to contain findings of fact and conclusions of law as is required by Rule 52(a) of the North Carolina Rules of Civil Procedure. Rule 52(a) provides:

> (1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.
>
> . . . .
>
> (3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

Caveator cites *Stachlowski* for the proposition that a judge is required to make findings of fact and conclusions of law and that failure to do so can result in the granting of a new trial. *Stachlowski* at 285, 401 S.E.2d at 644. Caveator's reliance on Rule 52 and on *Stachlowski* is misplaced because of the special nature of consent judgments. As we indicated in I., *supra*, a consent judgment is "merely a recital of the parties' agreement and not an adjudication of rights." *Crane* at 107, 441 S.E.2d at 145. This type of judgment does not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties. As our Supreme Court stated with regard to Rule 58, the consent judgment here "does not fit squarely within the rubric of" Rule 52. *Stachlowski* at 279, 401 S.E.2d at 641. Accordingly, we hold that the consent judgment here is not void for failing to contain findings of fact and conclusions of law.

III.

[3] Caveator further argues that "if the judgment was entered as [a] judgment," the trial court erred in denying caveator's motion to set it

aside because it is void for "ambiguities, indefiniteness, and uncertainties." Caveator cites *Hodges v. Stewart*, 218 N.C. 290, 291, 10 S.E.2d 723, 724 (1940), *overruled by Stephenson v. Rowe*, 315 N.C. 330, 339, 338 S.E.2d 301, 306 (1986), which states that "a conveyance of land by deed or will must set forth [the description of the] subject matter" so that the land can be located and distinguished from other land. In *Stephenson*, our Supreme Court concluded that *Hodges* was wrongly decided because it did not specify that devises in wills are interpreted more liberally than conveyances in deeds. *Stephenson* at 335, 338 S.E.2d at 304. Nevertheless, caveator argues that the consent judgment here contains ambiguities and fails to satisfy the standard set out in *Hodges*. However, our Supreme Court stated in *Hodges* that it is the **deed**, not a consent judgment directing the execution of a deed, that must be sufficiently specific. Because the consent judgment here serves its purpose in settling the will caveat, caveator's argument that the consent judgment is vague and void is without merit.

IV.

Finally, caveator argues for the first time on appeal that whether or not the judgment was entered, the trial court erred in denying her motion because "not all persons in interest were served with notice of the caveat proceeding." While caveator included this argument as an assignment of error in the record on appeal, she did not include this argument in her motion before the trial court as a reason why the consent judgment was void. Because the lack of notice was not asserted as a basis for the motion, the trial court could not have ruled on this issue. Because the trial court never had the opportunity to consider the issue, it is not properly before us on appeal. N.C. R. App. P. 10(b)(1); *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991).

Affirmed.

Judges GREENE and WALKER concur.

WILLA M. TOWNSEND, PLAINTIFF v. BOARD OF EDUCATION OF ROBESON COUNTY, ET AL DEFENDANTS

No. COA94-758

(Filed 21 March 1995)

Negligence § 6 (NCI4th)— determination of class rank—plaintiff not named valedictorian—no negligent infliction of emotional distress

The trial court properly granted summary judgment for defendant board of education in plaintiff's action for negligent infliction of emotional distress based on the fact that she was not named class valedictorian because of defendant's ranking system, since the undisputed facts did not allow a reasonable conclusion that defendant's conduct in determining class rank at plaintiff's high school was in any manner negligent.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 1-3.

Modern status of intentional infliction of mental distress as independent tort. 38 ALR4th 998.

Appeal by plaintiff from order entered 21 March 1994 by Judge Joe Freeman Britt in Robeson County Superior Court. Heard in the Court of Appeals 13 March 1995.

The Lee Law Firm, P.A., by C. Leon Lee, II, for plaintiff-appellant.

Locklear, Jacobs, Sutton & Hunt, by Brian K. Brooks, for defendant-appellee.

MARTIN, John C., Judge.

The pleadings and affidavits filed in this case provide the following undisputed facts: Plaintiff was a student at Fairmont High School in Robeson County during the school years of 1989-90 (plaintiff's junior year) and 1990-91 (plaintiff's senior year). Colon Lane, Jr., was appointed principal of the high school during the school year of 1990-1991. Due in part to difficulties with the school's computer system in 1989, Donald Bullock, the principal that year, decided that the school's honor students would be chosen by following a weighted yearly grade average formula. Under this formula, a student's grades

for the second semester of the year were projected forward, and the yearly average was determined as though those grades were actually achieved. Based on this formula, plaintiff was determined to be first in her junior class standing, and accordingly was chosen to be Chief Marshall for the 1989-90 class graduation ceremony.

Upon Mr. Lane's arrival at the school, he noted that the formula used to rank students during the 1989-90 academic year was in conflict with school board policy. The school board required that class ranking be determined by using a weighted semester grade average formula. Using this formula, plaintiff's ranking was changed, and at the start of the 1990-91 school year she was no longer first in her class.

On 10 September 1990 a meeting was held for all parents interested in the ranking process, and the top five students and their parents were notified by mail. At the meeting it was explained that for the purpose of choosing honor students for the 1990-91 school year, the grades achieved during the first semester of the year would be averaged with the grades achieved in each of the prior semesters of the student's high school career. An involved process was instituted, permitting two representatives from the Program Services Division of the Public Schools of Robeson County, as well as the students themselves, to compute their averages. The process was then repeated five times to ensure accuracy. As a result of this method, plaintiff finished fourth in her class and was not selected as valedictorian of her graduating class.

In September 1990 Sam Tedder, a guidance counselor at Fairmont, filled out a scholarship application on behalf of plaintiff wherein he designated her as first in her class. In his affidavit, Mr. Tedder explained that the ranking he assigned to plaintiff in the application was the result of his use of the yearly grade average formula. He further stated that the 1989-90 school year was the only time the yearly method had been used; that he was later informed by Mr. Lane that the semester average formula would be used from then on according to school board policy; that the administration of the ranking system for the school year of 1990-91 was fair to all students; and that he did not at any time advise plaintiff that she would serve as valedictorian of the 1990-91 class.

Plaintiff's parents appealed Mr. Lane's decision to use the semester average formula to the school board. Superintendent of the Public

Schools of Robeson County, William R. Johnson, informed them by letter that the process used to determine class ranking was fair, equitable, and in accordance with school board policy. Plaintiff's parents appealed Superintendent Johnson's administrative decision to the Board of Education which concluded that Mr. Lane used proper procedures in establishing class ranking.

Plaintiff filed a complaint against the Board of Education of Robeson County, alleging negligent infliction of emotional distress as well as violation of N.C. Gen. Stat. § 99D-1 (1992) and plaintiff's state and federal constitutional rights. By order dated 21 March 1994 the trial court granted defendants' motion for summary judgment finding that "there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law." Plaintiff appeals.

Plaintiff's sole argument on appeal is that the trial court erred in granting summary judgment in favor of defendants. In addressing a motion for summary judgment, the trial court is required to view the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party, to determine whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1990); *Dunleavy v. Yates Construction Co.*, 114 N.C. App. 196, 442 S.E.2d 53 (1994). An issue of fact is deemed material "if it would constitute or would irrevocably establish any material element of a claim or a defense." *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981). Summary judgment is proper where the moving party can establish that an essential element of the opposing party's claim does not exist, or that the opposing party cannot produce evidence to support an essential element. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992). In the case before us, an examination of the whole record fails to reveal any issue of material fact, and makes clear that plaintiff cannot provide support for an essential element of her claim. Accordingly, defendants are entitled to judgment as a matter of law.

To state a claim for negligent infliction of emotional distress, plaintiff is required to allege (1) negligent conduct on the part of defendants, (2) which defendants should have reasonably foreseen would cause plaintiff severe emotional distress, and (3) that the conduct did actually cause plaintiff to suffer severe emotional distress. *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994). Plaintiff's allegation in the instant case must fail because the undisputed facts

in this case, even when viewed in a light most favorable to plaintiff, do not allow a reasonable conclusion that defendants' conduct was in any manner negligent.

The pleadings and affidavits presented to the trial court state that the method of computing class ranking as instituted in the 1990-91 school year was pursuant to the mandate of the school board, and had been used exclusively with the exception of the 1989-90 term. Plaintiff and her family were apprised of the change back to the semester method, and the procedure to be utilized was explained. There was no "recalculation" of plaintiff's grades alone, rather every student was subject to the same procedure for determining ranking. Plaintiff does not allege that the calculations were incorrect, or that the calculation procedure used for her was any different than that used to compute every other student's rankings. Nor does plaintiff allege that at any time she was specifically told that she would be chosen valedictorian of her class. The mere fact that plaintiff believed that she was going to be first in her class does not demonstrate negligence on the part of defendants simply because plaintiff failed to reach that goal.

Further, plaintiff has failed to demonstrate any genuine issue of material fact. Plaintiff presented three affidavits in support of her opposition of defendants' motion for summary judgment. Each affidavit contained exactly the same statement: "That the affidavit [of Colon Lane] does not truly and accurately represent the facts as there are numerous discrepancies with respect to the action taken by the Board and the matters informed to the persons in attendance at that meeting referenced in the Affidavit of Mr. Lane." Mere allegations of discrepancies without specific supporting facts do not demonstrate the existence of a genuine issue for trial. N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990); *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 338 S.E.2d 601, *disc. review denied*, 316 N.C. 374, 342 S.E.2d 889 (1986). Plaintiff offered nothing beyond the above statements, therefore we can find no error by the trial court in granting summary judgment in favor of defendants on this issue.

Plaintiff's allegation of violations of her civil rights stem from her contention that defendants "attempted to interfere with her right to be valedictorian of her senior class." As discussed above, the record indicates that plaintiff did not obtain the right to be valedictorian, and plaintiff offers nothing beyond bare assertions that defendants engaged in some conspiracy to keep her from attaining the position.

There is no merit to this argument and no error by the trial court in granting summary judgment on this issue.

For these reasons, we affirm the order of the trial court granting defendants' motion for summary judgment.

Affirmed.

Judges COZORT and WALKER concur.

STATE OF NORTH CAROLINA v. CLARENCE ELVIS HARRINGTON

No. 939SC1117

(Filed 21 March 1995)

Criminal Law § 1115 (NCI4th)— providing false alibi to investigating officer—finding of nonstatutory aggravating factor proper

Though the Court of Appeals recommends caution against the unwarranted use of the nonstatutory aggravating factor of providing a false alibi to law enforcement officers with investigative jurisdiction, the factor was properly considered in sentencing defendant for second-degree murder where it was supported by a preponderance of the evidence and fell within the stated purpose of sentencing to punish the offender with the degree of severity his culpability merited.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 30 June 1993 by Judge Anthony M. Brannon in Warren County Superior Court. Heard in the Court of Appeals 30 August 1994.

Attorney General Michael F. Easley, by Assistant Attorney General Patsy Smith Morgan, for the State.

J. Henry Banks for defendant-appellant.

JOHN, Judge.

Defendant was indicted on a charge of first degree murder. On 8 March 1993, he pled guilty to second degree murder in exchange for his testimony in cases against any co-defendants and dismissal of

charges of conspiracy to commit murder and armed robbery. No specific sentence was agreed upon in connection with the plea arrangement.

On 30 June 1993, the trial court found a statutory and a non-statutory factor in aggravation of sentence and a statutory factor in mitigation. After determining the aggravating factors outweighed those in mitigation, the court subsequently enhanced the presumptive term of 15 years and imposed a sentence of 28 years.

Defendant maintains the trial court erred by finding the following non-statutory aggravating factor: "defendant freely and voluntarily and willfully and knowingly made a false fictitious and fraudulent statement (a false alibi) to an investigating officer with [j]urisdiction, in the course of the criminal investigation. [*See U.S. v. Rogers*, 466 U.S. 475, 80 L. Ed. 2d 492 (1984)]." We hold the court did not err.

A sentencing court is required to consider the statutory list of aggravating and mitigating factors, *see* N.C. Gen. Stat. § 15A-1340.4 (1988), before imposing a sentence other than the presumptive term for a particular offense, to make written findings of fact concerning the factors, and to determine whether one set outweighs the other or whether they are counterbalanced. *State v. Green*, 101 N.C. App. 317, 322, 399 S.E.2d 376, 379, *supersedeas denied and temporary stay denied*, 328 N.C. 335, 400 S.E.2d 449 (1991). Moreover, the court may consider, in its discretion, those non-statutory aggravating and mitigating factors which are "reasonably related to the purposes of sentencing and supported by a preponderance of the evidence . . . ." *State v. Flowe*, 107 N.C. App. 468, 471-72, 420 S.E.2d 475, 477, *disc. review denied*, 332 N.C. 669, 424 S.E.2d 412 (1992).

In the case *sub judice*, defendant does not contend the non-statutory factor of providing a false alibi to law enforcement officers with investigative jurisdiction is not supported by a preponderance of the evidence. Indeed, he refers several times in his appellate brief to the "false alibi given by the [d]efendant."

Moreover, the record also reflects uncontroverted evidence in support of the court's finding. Richard Sims, assistant supervisor of the North Carolina State Bureau of Investigation, testified about his initial pre-arrest interview with defendant. Sims stated *inter alia:*

> COURT: On what occasion did you first talk to [the defendant], I believe is counsel's question.

WITNESS: When we first talked to him, he stated on the date of the killing he was at Loretha Durham's trailer all day, he did not go anywhere, and stayed there all day and all night.

COURT: He gave you an alibi the first time?

WITNESS: Yes, sir.

COURT: You didn't have him up with charges then?

WITNESS: No, sir.

COURT: He just walked out?

WITNESS: Plus, we were unsure of his identification. It was just like I stated before; he said his name was Troy Durham, and we weren't sure his name was Clarence Elvis Harrington until after—after he left.

Once defendant was extradited from New York on 9 February 1993 pursuant to an arrest warrant issued by the State of North Carolina, he gave a second statement to law enforcement officers. Sims testified about that interview as follows:

Q: Prior to the time you talked with [the defendant], did you advise him of his rights?

A: Yes, sir.

Q: And I believe he indicated to you, did he not, Mr. Sims, that he also went into the dwelling of [the victim]?

A: That is what he stated; yes, sir.

Q: And what was his version as to how [the victim] was shot?

A: His version was similar to [his co-defendant's], except Mr. Harrington stated that he went through the back door, and that [his co-defendant] shot [the victim].

Because the factor is supported by the evidence, therefore, our inquiry is focused upon whether it falls within a stated purpose of sentencing.

The goal of sentencing is to punish the offender with the degree of severity his or her culpability merits. *State v. Flowers*, 100 N.C. App. 58, 63, 394 S.E.2d 296, 300 (1990). Our General Assembly codified this principle in N.C. Gen. Stat. § 15A-1340.3 (1988) which states:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

In *Roberts v. United States*, 445 U.S. 552, 63 L. Ed. 2d 622 (1980), the United States Supreme Court held the trial court properly considered as a factor in sentencing the defendant's refusal to cooperate with law enforcement officials investigating a criminal conspiracy in which he was a confessed participant. In *Roberts*, the defendant refused to divulge the names of drug suppliers. *Id.* at 554-55, 63 L. Ed. 2d at 627. The Court emphasized that

> [c]oncealment of crime has been condemned throughout our history. The citizen's duty to "raise the 'hue and cry' and report felonies to the authorities" was an established tenet of Anglo-Saxon law at least as early as the 13th century. . . . This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination, the criminal defendant no less than any other citizen is obliged to assist the authorities. . . . By declining to cooperate, [defendants reject] an "obligatio[n] of community life" that should be recognized before rehabilitation can begin.

Id. at 557-58, 63 L. Ed. 2d at 629 (citations omitted). The Court further noted that even *Roberts* did "not seriously contend that disregard for the obligation to assist in a criminal investigation is irrelevant to the determination of an appropriate sentence." *Id.* at 559, 63 L. Ed. 2d at 629.

More significantly, the federal court in *United States v. Ruminer*, 786 F.2d 381, 385 (10th Cir. 1986), found relevant to sentencing not only the general failure to "cooperate with officials," but the "affirmative misconduct" of suggesting "false leads in a purposeful attempt to hinder the investigation," and commented that such conduct "was more egregious than the defendant's conduct in *Roberts*." Providing a false alibi is indisputably analogous to the furnishing of false leads. *See also State v. Whitaker*, 110 N.M. 486, 490, 797 P.2d 275, 279, *cert. denied*, 109 N.M. 631, 788 P.2d 931 (1990) (defendant's attempt to escape punishment by blaming another person for crime is evidence

of bad character and "probative of defendant's prospects for rehabilitation").

We are cognizant that in *State v. Blackwood*, 60 N.C. App. 150, 154, 298 S.E.2d 196, 199-200 (1982), this Court held consideration of the non-statutory factor that defendant "did not at any time [offer] assistance to the arresting officers or the District Attorney . . . potentially infring[ed] impermissibly upon defendant's right to plead not guilty," and was therefore improper. However, *Blackwood* is distinguishable in that the defendant herein actively proffered a false alibi (and indeed a false name) to law enforcement officers and was not simply exercising his rights to remain silent or to plead not guilty. The *Blackwood* Court itself pointed out that the record therein contained "no evidence of any affirmative action by defendant to hinder efforts by the arresting officers or the district attorney." *Id.*

In support of his argument, defendant relies heavily upon the decision of our Supreme Court in *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). In that case, the Court held perjury may not constitute a non-statutory aggravating factor in North Carolina because "a trial judge's determination of the factor is basically dependent upon his subjective evaluation of the defendant's demeanor . . . ." *Id.* at 574, 364 S.E.2d at 375. Particularly in view of the uncontroverted evidence before the trial court, we perceive no risk in the case *sub judice* that the trial court exercised any "subjective evaluation" in determining that the defendant had given a false alibi to law enforcement officers. Nonetheless, we recommend caution against the unwarranted use of this non-statutory factor. *See Vandiver*, 321 N.C. at 573, 364 S.E.2d at 375 (noting that a prior decision approving use of perjury as a sentencing factor had warned trial courts to "exercise extreme caution" and refrain from use of the factor "except in the most extreme case") (quoting *State v. Thompson*, 310 N.C. 209, 227, 311 S.E.2d 866, 876 (1984)); *see also State v. Baucom*, 66 N.C. App. 298, 301-02, 311 S.E.2d 73, 75 (1984) (trial judges reminded that "only one factor in aggravation is necessary to support a sentence greater than the presumptive term," and that they "may wish to exercise restraint when considering non-statutory aggravating factors after having found statutory factors").

Defendant also asserts two additional assignments of error, but fails to provide any argument or authority in support thereof. Under our appellate rules, "[a]ssignments of error . . . in support of which no

reason or argument is stated or authority cited, will be taken as abandoned," N.C.R. App. P. 28(b)(5) (1994), and "[w]e have consistently interpreted this rule as requiring a question to be both presented *and argued* in the appellant's brief." *Liggett Group v. Sunas*, 113 N.C. App. 19, 29, 437 S.E.2d 674, 681 (1993) (emphasis in original). Accordingly, defendant's final two arguments are deemed abandoned.

Affirmed.

Judges EAGLES and ORR concur.

Judge ORR concurred prior to 5 January 1995.

FUSHA MAE STANLEY, PLAINTIFF v. BILL STANLEY, DEFENDANT

No. 9424DC522

(Filed 21 March 1995)

1. Parent and Child § 37 (NCI4th)— retroactive child support—guidelines as basis—error

In an action for retroactive child support, the trial court must calculate defendant's share of the monies actually expended by plaintiff for the care of the child during the relevant period rather than rely on the child support guidelines.

Am Jur 2d, Parent and Child §§ 72-74.

Retrospective increase in allowance for alimony, separate maintenance, or support. 52 ALR3d 156.

2. Divorce and Separation § 117 (NCI4th)— equitable distribution—failure to classify property—error

The trial court in an equitable distribution action erred in failing to classify the property as marital or separate and failing to value the property.

Am Jur 2d, Divorce and Separation §§ 878 et seq.

Necessity that divorce court value property before distributing it. 51 ALR4th 11.

3. Divorce and Separation § 112 (NCI4th)— equitable distribution—quitclaim deed executed after separation—no effect on distribution

Where plaintiff executed a quitclaim deed after the parties' separation and the property was titled in both names on the date of separation, the quitclaim deed did not serve to withdraw the property from the marital estate, nor should it affect the distribution.

Am Jur 2d, Divorce and Separation §§ 878 et seq.

Appeal by defendant from judgment entered 23 November 1993 by Judge R. Alexander Lyerly in Mitchell County District Court. Heard in the Court of Appeals 11 January 1995.

Plaintiff and defendant married in December of 1972 and in June of 1973 plaintiff gave birth to their only child. The parties separated and attempted to divorce in 1981. At that time, plaintiff did not seek alimony or child support and quitclaimed her interest in Mine Creek Road property titled in both names. In 1991, the trial court declared the 1981 divorce null and void.

In December of 1990, plaintiff again filed for divorce. This time she sought custody of their seventeen-year-old daughter, retroactive child support, and an equitable distribution of all marital property. In her equitable distribution affidavit, she listed two pieces of real property, a checking account, and a savings account. The two pieces of real property included the Mine Creek Road property, which she reported had a fair market value of $22,000.00 on the date of separation, and the Bandana Road property, which she reported had a fair market value of $50,000.00 on the date of separation. The checking account contained joint funds of $1,000.00 and the savings account contained joint funds of $35,000.00 on the date of separation.

Defendant reported much of the same property in his equitable distribution affidavit. He indicated, however, that all property was his separate property acquired *after* the parties separated. Defendant claimed the property was acquired with separate funds and that, even though one piece of property was deeded in both names, plaintiff later quitclaimed it back to him. Defendant maintained the parties separated in 1973 just after the birth of their daughter, whereas plaintiff maintained, and the trial court found, that the parties separated in 1979.

On 23 November 1993, the trial court entered judgment. The court found defendant had not paid child support since 1981 and concluded that plaintiff was entitled to child support, as determined by the child support guidelines, for the three years preceding the action in the amount of $11,048.40. The court also concluded that plaintiff was entitled to one-half of the value of the bank accounts, or $5,000.00, one-half the value of the Mine Creek Road property, or $12,500.00, and one-half of the value of improvements to the Bandana Road property, or $6,000.00. Defendant appeals.

Norris & Peterson, P.A., by Allen J. Peterson, for defendant appellant.

No brief for plaintiff appellee.

ARNOLD, Chief Judge.

[1] Defendant presents three arguments on appeal. He first argues the trial court erred in awarding three years child support without evidence or findings of fact reflecting actual past expenditures in that amount. This Court addressed a similar argument in *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992). In *Lawrence*, appellant contended the trial court erred in applying the child support guidelines to determine the non-custodial parent's retroactive child support obligation. We agreed, stating that "[r]etroactive child support is based on the non-custodial parent's share of the reasonable actual expenditures made by the custodial parent on behalf of the child." *Id.* at 151, 419 S.E.2d at 183. Rather than focusing on what the non-custodial parent should have paid under the guidelines, the trial court must focus on the "amount of monies actually expended by the custodial parent on the child." *Id.*

In this case, the judgment clearly shows the trial court based its award on the child support guidelines, rather than on reasonable actual expenditures. This was incorrect. On remand, the trial court must calculate defendant's share of the monies actually expended by plaintiff for the care of the child during the relevant period. In doing so, the "trial court must make specific factual findings to support" its award. *See Savani v. Savani*, 102 N.C. App. 496, 501, 403 S.E.2d 900, 903 (1991).

[2] Defendant next argues the trial court erred when it awarded $23,000.00 to plaintiff without determining (1) whether the property was marital, (2) whether an even distribution was equitable, (3) what

the fair market value of the property was, and (4) the effect of the factors in N.C. Gen. Stat. § 50-20(c) (1987). He contends the trial court's failure to make these determinations constitutes reversible error.

Any equitable distribution action involves the following analysis:

> The trial judge is required to conduct a three-stage analysis in order to equitably distribute the marital assets. He must first ascertain upon appropriate findings of fact, what is marital property; then determine the net market value of the marital property as of the date of separation; and finally, make an equitable distribution between the parties. The marital property is to be distributed equally, unless the court determines equal is not equitable.

Willis v. Willis, 86 N.C. App. 546, 550, 358 S.E.2d 571, 573 (1987) (citations omitted); *see also Nix v. Nix*, 80 N.C. App. 110, 341 S.E.2d 116 (1986). In this case, the judgment does not reflect that the trial court classified the property as marital or separate and the parties made no stipulations regarding classification. Classification was hotly contested by each party and complicated by the sale of defendant's separate property and subsequent use of those funds. Referring to the statutory definitions of separate and marital property, our case law, and evidence presented by the parties, the trial court must classify the property on remand. In doing so, the "[c]lassification of property must be supported by . . . appropriate findings of fact." *McIver v. McIver*, 92 N.C. App. 116, 127, 374 S.E.2d 144, 151 (1988).

After classifying the property, the court must determine the net value of all marital property as of the date of separation. *See Willis*, 85 N.C. App. 708, 355 S.E.2d 828. The judgment does not reflect that the trial court performed this vital step. In fact, the findings are silent on valuation. When arriving at a value, "[t]he trial court must make findings of fact, based upon competent evidence, to support its conclusions." *Nix*, 80 N.C. App. at 115, 341 S.E.2d at 119.

Because this matter must be remanded, we do not find it necessary to address defendant's remaining contentions under this argument. However, we strongly urge the trial court to consider all pertinent factors presented by the parties.

[3] Finally, defendant argues the trial court erred in failing to consider the effect of the 1980 quitclaim deed. Although he does not suggest what effect the deed should have, he argues that the court should have considered it in making its distribution.

In *Beroth v. Beroth*, 87 N.C. App. 93, 359 S.E.2d 512, *disc. review denied*, 321 N.C. 296, 362 S.E.2d 778 (1987), the trial court held a hearing to determine the effect of six quitclaim deeds on the equitable distribution action. The deeds, which applied to land formerly owned by the parties as tenants by the entireties, had been executed by the plaintiff one year before the parties separated. *Id.* Defendant argued the properties were not marital because the tenancy by entirety was dissolved by the quitclaim deeds. *Id.* The Court disagreed, stating that because the deeds were given to him before separation or during the marriage they were *ipso facto* marital property. *Id.* Furthermore, the Court made clear that quitclaim deeds did not have the effect of a release or separation agreement. *Id.* It stated that the circumstances of the case were not "controlled by G.S. 52-10, which concerns contracts and releases between husband and wife" as "there is a profound distinction between a conveyance and a contract or release." *Id.* at 94, 359 S.E.2d at 513.

The quitclaim deed, executed after the parties separated, did not serve to withdraw the property from the marital estate, nor should it affect the distribution. In any equitable distribution action the trial court works with property existing at the date of separation. Here, the quitclaim deed had not yet been executed and the property was titled in both names on the date of separation.

Because of errors in both the child support and equitable distribution portions of the judgment, this case must be reversed and remanded. On remand, the trial court should make more detailed findings and, if necessary, gather additional evidence.

Reversed and remanded.

Judges JOHNSON and MARTIN, MARK D., concur.

STATE OF NORTH CAROLINA v. CHARLIE ANDERSON McBRIDE, JR., DEFENDANT

No. 9419SC456

(Filed 21 March 1995)

Criminal Law § 1149 (NCI4th)— knowingly creating risk to more than one person with device normally hazardous to more than one person—drunk driver—fatal accident—finding of aggravating factor proper

The trial court did not err in finding as an aggravating factor for second-degree murder and impaired driving that defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person, since an automobile driven by an intoxicated driver is a device which in its normal use is hazardous to the lives of more than one person, and defendant's prior convictions for driving while impaired and his reckless operation of his automobile on the night in question, together with his factual misrepresentations, supported the conclusion that defendant knowingly created this risk. N.C.G.S. § 15A-1340.16(d)(8).

Am Jur 2d, Criminal Law §§ 598, 599.

Homicide by automobile as murder. 21 ALR3d 116.

What constitutes "imminently dangerous" act within homicide statute. 67 ALR3d 900, sec. 1.

Alcohol-related vehicular homicide: nature and elements of offense. 64 ALR4th 166.

Appeal by defendant from judgment entered 27 September 1993 by Judge James M. Webb in Rowan County Superior Court. Heard in the Court of Appeals 31 January 1995.

Attorney General Michael F. Easley, by Associate Attorney General John A. Greenlee, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charles L. Alston, Jr., for defendant-appellant.

MARTIN, MARK D., Judge.

The question presented by this appeal is whether the trial court erred by finding as a factor in aggravation of punishment under the Fair Sentencing Act that defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person. We find no error.

On the night of 28 December 1989 defendant was involved in a motor vehicle collision. After weaving in and out of his lane of travel and into the oncoming lane of traffic, defendant crossed over into the oncoming lane of traffic and struck an automobile containing three passengers. One of the passengers died as a result of the collision and the other two passengers were seriously injured.

Defendant was legally intoxicated at the time of the collision. A blood alcohol test revealed defendant had an alcohol concentration of .183 grams of alcohol per 100 milliliters of blood.

Immediately after the collision, witnesses noticed defendant exit the driver's side of his vehicle. He had a strong odor of alcohol about him and slurred speech. When questioned by police, defendant denied having operated the automobile and stated the driver had run away after the collision.

The evidence at trial indicated that on the night of the collision defendant was driving while his license was permanently revoked. The evidence also revealed defendant had lied about the ownership of his automobile to obtain an inspection sticker and had placed illegal license tags on the car. Defendant's prior record included convictions for driving while impaired in 1981 and 1982, and driving while license revoked in 1982, 1984, and 1986.

On 26 February 1990 defendant was indicted for second degree murder and driving while impaired. On 3 May 1991 the jury convicted defendant of second degree murder and driving while impaired. Defendant appealed to the North Carolina Court of Appeals, and this case was subsequently remanded to the Superior Court of Rowan County for resentencing. *State v. McBride*, 109 N.C. App 64, 425 S.E.2d 731 (1993). On 27 September 1993 Judge James M. Webb conducted the resentencing hearing in Rowan County Superior Court and sentenced defendant to twenty-five years imprisonment.

On appeal defendant contends the trial court erred by finding, as a factor in aggravation of punishment, the automobile constituted a weapon or device knowingly used by defendant which created a great risk of death to more than one person.

The challenged aggravating factor is codified at North Carolina General Statutes § 15A-1340.4(a)(1)g (repealed effective 1 October 1994; re-enacted as N.C. Gen. Stat. § 15A-1340.16(d)(8) effective 1 October 1994). The North Carolina Supreme Court has indicated that to impose this aggravating factor, the trial court must focus on two considerations: (1) whether the weapon or device in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was knowingly created. *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990); *State v. Carver*, 319 N.C. 665, 667, 356 S.E.2d 349, 351 (1987); *State v. Antoine*, 117 N.C. App. 549, —, 451 S.E.2d 368, 370 (1995).

Defendant contends the automobile he was driving does not qualify as a weapon or device which in its normal use is hazardous to the lives of more than one person. We disagree.

To qualify as a weapon or device which in its normal use is hazardous to the lives of more than one person, the instrumentality must be one which is "indiscriminate in [its] hazardous power." *State v. Bethea*, 71 N.C. App. 125, 129, 321 S.E.2d 520, 523 (1984). The focus of the inquiry is therefore upon "the destructive capabilities of the weapon or device," *State v. Moose*, 310 N.C. 482, 497, 313 S.E.2d 507, 517 (1984), and the circumstances of its use. *See State v. Carver*, 319 N.C. 665, 668, 356 S.E.2d 349, 351 (1987) (use of weapon or device determines degree of danger to lives).

In *State v. Garcia-Lorenzo*, 110 N.C. App. 319, 430 S.E.2d 290 (1993), this Court addressed whether the trial court erred by applying N.C. Gen. Stat. § 15A-1340.4(a)(1)g within the context of the operation of an automobile by a legally intoxicated driver. In *Garcia-Lorenzo* a police officer noticed defendant was having a difficult time maintaining proper control over his vehicle. The police officer followed the vehicle and observed defendant drive on the wrong side of the road. Defendant was travelling 60-70 m.p.h in a 25 m.p.h. zone. Defendant struck two pedestrians. One of the pedestrians later died as a result of the injuries sustained in the collision. Defendant was legally intoxicated at the time of the collision. A blood alcohol test

revealed an alcohol concentration of .1456 grams of alcohol per 100 milliliters of blood. *Garcia-Lorenzo*, 110 N.C. App. at 322-324, 430 S.E.2d at 291-293.

On appeal defendant in *Garcia-Lorenzo* contended the trial court erred in applying N.C. Gen. Stat. § 15A-1340.4(a)(1)g because it constituted an element of the offense for which defendant was convicted, and contrary to N.C. Gen. Stat. § 15A-1340.4, allowed evidence necessary to prove an element of the offense to be used to prove a factor in aggravation. *Id.* at 335, 430 S.E.2d at 299. This Court concluded the trial court did not err in finding as a factor in aggravation of punishment that the automobile constituted a device knowingly used by defendant which created a great risk of death to more than one person. *Id.*

Although defendant in *Garcia-Lorenzo* did not challenge the application of N.C. Gen. Stat. § 15A-1340.4(a)(1)g on the same ground asserted by defendant in the present case, the *Garcia-Lorenzo* Court nevertheless approved the use of the challenged aggravating factor within the context of motor vehicle collisions caused by legally intoxicated drivers. Like *Garcia-Lorenzo*, defendant here operated his automobile while legally intoxicated. His blood alcohol concentration was .183 grams of alcohol per 100 milliliters of blood. Defendant drove his automobile recklessly, crossing over into the oncoming lane of traffic and striking an automobile containing three passengers. One of the passengers died as a result of the collision and the other two passengers were seriously injured.

We conclude the trial court did not err in finding that defendant's automobile, under the circumstances surrounding its use in the present case, constituted a device which in its normal use is hazardous to the lives of more than one person. *Cf. State v. Carver, supra.*

The remaining question is whether defendant knowingly created this great risk of death.

Defendant's prior convictions for driving while impaired and his reckless operation of his automobile on the night in question, together with his factual misrepresentations, all support the conclusion defendant knowingly created this risk. However, apart from this overwhelming evidence, we hold any reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find

themselves in the automobile's path. Therefore, we conclude the defendant created this risk knowingly.

No Error.

Judges JOHNSON and JOHN concur.

PAULA MICHELE McCASKILL, PLAINTIFF v. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, DEFENDANT

No. 9415SC447

(Filed 21 March 1995)

Insurance § 528 (NCI4th)— nonfleet vehicle—policy covering private passenger vehicles—accident in 1990—intrapolicy stacking of UIM coverages allowed

Because the policy at issue was a nonfleet policy covering only private passenger motor vehicles, even though it covered five vehicles owned by insured, and because the accident in question occurred in 1990, thus causing the disposition of this case to be governed by the pre-1991 version of N.C.G.S. § 20-279.21(b)(4), the trial court erred in finding that intrapolicy stacking of underinsured motorist coverages was not allowed and in granting summary judgment for defendant.

Am Jur 2d, Automobile Insurance § 322.

Combining or "stacking" uninsured motorist coverages provided in separate policies issued by same insurer to same insured. 25 ALR4th 6, sec. 1.

Combining or "stacking" uninsured motorist coverages provided in fleet policy. 25 ALR4th 896.

Appeal by plaintiff from order entered 4 March 1994 by Judge A. Leon Stanback, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 25 January 1995.

On 16 August 1990, Paula McCaskill was driving a 1974 Volkswagen owned by her father, William McCaskill, and insured by defendant, Pennsylvania National. Christopher Todd Carter turned left directly in front of plaintiff, causing an accident in which plaintiff

suffered injuries. At the time of the accident, Paula was living with her parents and was listed as a named driver on the insurance policy.

Plaintiff filed an underlying tort suit against Carter and obtained a judgment against him in the amount of $85,000 on 8 May 1993. Prior to the underlying suit, Carter's insurance company tendered their policy limits of $50,000. Because plaintiff's damages exceeded Carter's limits, she attempted to pursue underinsured coverage through her father's personal automobile insurance policy. Mr. McCaskill's policy had stated underinsured motorist coverage of $50,000 per claimant and $100,000 per accident. At the time of the accident there were five motor vehicles covered on the McCaskill policy, including the 1974 Volkswagen.

On 19 February 1993, Paula McCaskill filed a declaratory judgment action against defendant, asking the court to find that stacking was allowed under the policy and, therefore, the limits under her father's policy were $250,000 per person and $500,000 per accident. Both parties thereafter filed motions for summary judgment. The trial court granted defendant's motion and denied plaintiff's motion. Plaintiff appeals.

Duffus & Associates, P.A., by J. David Duffus, Jr. and R. Bailey Melvin, for plaintiff appellant.

Nichols, Caffrey, Hill & Evans, L.L.P., by Joseph R. Beatty, for defendant appellee.

ARNOLD, Chief Judge.

Plaintiff contends that the trial court erred by entering summary judgment in favor of defendant and denying plaintiff's motion for summary judgment. Because the accident occurred in 1990, the disposition of this case is governed by the pre-1991 version of N.C. Gen. Stat. § 20-279.21(b)(4), which stated:

> 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)* [sic].

G.S. § 20-279.21(b)(4) (1989) (emphasis added). This provision has been interpreted to require both interpolicy and intrapolicy stacking of underinsured motorist coverages. *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). An exception exists under the emphasized portion above, however, for fleet policies vis-a-vis intrapolicy stacking. *Id.* "The language of this statute makes it clear that intra-policy stacking is only available when the coverage is nonfleet and the vehicle covered is of the private passenger type." *Aetna Casualty and Surety Co. v. Fields*, 105 N.C. App. 563, 567, 414 S.E.2d 69, 71, *disc. review denied*, 331 N.C. 383, 417 S.E.2d 788 (1992). The issue for this Court, therefore, is twofold: (1) whether the coverage at issue is nonfleet, and (2) whether the vehicles covered are private passenger motor vehicles.

Each of these questions is answered by reference to definitions provided by G.S. § 58-131.35A, now codified as G.S. § 58-40-10, as well as our courts' interpretations of those definitions. "Nonfleet" coverage is defined as "a motor vehicle not eligible for classification as a fleet vehicle for the reason that the motor vehicle is one of four or less motor vehicles owned or hired under a long-term contract by the policy named insured." *See* G.S. § 58-40-10(2) (1989). Defendant argues that on the face of the statute, the McCaskill policy qualifies as a fleet policy because it covers five vehicles, and thus automatically falls within the stacking exception for nonfleet coverage under G.S. § 20-279.21(b)(4). Our Supreme Court, however, defined a fleet policy as "a single policy designed to provide coverage for a multiple and changing number of motor vehicles used in an insured's business." *Sutton*, 325 N.C. at 266, 382 S.E.2d at 763; *see also Watson v. American National Fire Insurance Co.*, 106 N.C. App. 681, 417 S.E.2d 814 (1992), *aff'd*, 333 N.C. 338, 425 S.E.2d 696 (1993).

Although the McCaskill policy covers five vehicles, we think, as evidenced by the Supreme Court's definition of "fleet", that the purpose of excepting a fleet policy from intrapolicy stacking would not be furthered by strictly applying the statutory definition of "nonfleet." Intrapolicy stacking within a fleet policy, where many vehicles are usually involved, gives the insured an amount of underinsured coverage conceivably far in excess of what the parties bargained for. *Sutton*, 325 N.C. 259, 382 S.E.2d 759. In the instant case, it makes far

more sense to include the Court's definition of "fleet" in conjunction with the statutory definition of "nonfleet" where it is undisputed that the McCaskill vehicles were not used for the insured's business, and the unexpected dangers of intrapolicy stacking are not present. Therefore, plaintiff's policy is nonfleet.

The second prong of this issue is controlled by the applicable statute at the time of the accident which defined "private passenger motor vehicle" 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 that is a pickup truck or van that is owned by an individual or by husband and wife or individuals who are residents of the same household if it:
>
> 1. Has a gross vehicle weight as specified by the manufacturer of less than 10,000 pounds; and
>
> 2. Is not used for the delivery or transportation of goods or materials unless such use is (i) incidental to the insured's business of installing, maintaining, or repairing furnishings or equipment, or (ii) for farming or ranching.
>
> Such vehicles owned by a family farm copartnership or a family farm corporation shall be considered owned by an individual for the purposes of this section; or
>
> c. A motorcycle, motorized scooter or other similar motorized vehicle not used for commercial purposes.

G.S. § 58-40-10(1) (1989). From these definitions, and the undisputed deposed statements of the named insured and his wife, the five vehicles listed in the policy were private passenger motor vehicles.

Defendant contends that the policy expressly prohibits intrapolicy stacking and that the policy provisions should be enforced as written. The limit of liability clause in the McCaskill policy states in pertinent part, "This is the most we will pay for bodily injury and property damage regardless of the number of . . . vehicles or premiums shown in the Declarations." Similar policy language has appeared in previous opinions in which the Supreme Court and this Court have consistently held that the relevant statute prevails over the limit of liability clause. *Wiggins v. Nationwide Mutual Ins. Co.*,

112 N.C. App. 26, 434 S.E.2d 642 (1993). Furthermore, the insured's payment of separate premiums for each vehicle within underinsured coverage should be, and is, relevant to our consideration. *See Sutton*, 325 N.C. 259, 382 S.E.2d 759.

Because the policy at issue is a nonfleet policy covering only private passenger motor vehicles, the trial court erred by entering summary judgment for defendant and denying plaintiff's motion for summary judgment. Summary judgment should have been entered for plaintiff. The decision of the trial court is therefore reversed.

Reversed and remanded.

Judges JOHNSON and MARTIN, MARK D., concur.

VANBUREN COUNTY DEPARTMENT OF SOCIAL SERVICES, BY DONNA J. CURTIS, O/B/O SHIRLEY ANN SWEARENGIN, PLAINTIFF v. STEVE EDWARD SWEARENGIN, DEFENDANT

No. 9420DC423

(Filed 21 March 1995)

Parent and Child § 80 (NCI4th)— child support conditioned upon compliance with visitation order—no jurisdiction of trial court to order

The provision of the trial court's order which conditioned child support payments under a Florida order on plaintiff's compliance with visitation rights was null and void for lack of subject matter jurisdiction, since the duty of support is the only subject matter covered by URESA.

Am Jur 2d, Desertion and Nonsupport § 128.

Withholding visitation rights for failure to make alimony or support payments. 65 ALR4th 1155.

Appeal by plaintiff from order entered 24 September 1993 by Judge Donald R. Huffman in Anson County District Court. Heard in the Court of Appeals 2 February 1995.

Shirley Ann Swearengin and defendant were divorced in Florida on 24 May 1979. The Florida divorce decree incorporated the parties' settlement agreement, which awarded custody of the parties' minor child to plaintiff, set forth defendant's visitation rights, and ordered

defendant to pay plaintiff child support of $25.00 per week. Subsequently, defendant moved to North Carolina.

From 1984 to present, plaintiff has sought, in three separate actions, to enforce the Florida child support order in North Carolina pursuant to the provisions of the Uniform Reciprocal Enforcement of Support Act (URESA). In the first action, Chief District Court Judge Donald R. Huffman, by order entered 28 June 1984, concluded that defendant has the duty to provide for the support of his minor child, that defendant has the right to have reasonable visitation with his minor child, and that plaintiff has an obligation to comply with a reasonable visitation schedule. Judge Huffman ordered respondent to pay $30.00 per week child support and $10.00 a week in arrears to the Office of the Clerk of Superior Court of Anson County beginning 29 June 1984. He further ordered that defendant be given visitation with his minor child for certain periods set forth in the 28 June 1984 order, directed the Clerk of Superior Court of Anson County to hold defendant's child support payments until the court advises the Clerk that plaintiff has complied with the court's order regarding visitation, and directed the Clerk to withhold all future child support payments from disbursement so long as the visitation schedule is not honored by plaintiff.

In the second action, instituted in March 1986, plaintiff again sought support for the parties' minor child and to recover arrears. Defendant answered, alleging that the petition should be dismissed for plaintiff's failure to allow visitation as previously ordered on 28 June 1984. By order entered 22 September 1986, Judge Huffman allowed defendant's motion to dismiss on the ground that plaintiff, by not allowing visitation as previously ordered by the court, had unclean hands. Judge Huffman also terminated defendant's obligation to pay child support until such time as plaintiff complies with previous orders of the court regarding visitation.

The third action, which is the subject of this appeal, was instituted on 30 September 1992 by the filing of a Notice of Registration of Foreign Support Order. The Anson County Child Support Enforcement Office sought to enforce the Florida decree by implementing wage witholding pursuant to N.C. Gen. Stat. § 110-136.3 *et. seq.* (1991). On 1 December 1992, defendant answered, alleging the previous actions as *res judicata*. Plaintiff then filed motions pursuant to Rule 56(a) for summary judgment and pursuant to Rule 60(b) to amend the order entered 28 June 1984 by setting aside the require-

ment that child support funds be held in escrow and paid on the basis of compliance with visitation. N.C. Gen. Stat. § 1A-1, Rules 56(a) and 60(b) (1990). Plaintiff alleged that the latter requirement is void as a matter of law and should thus be stricken. Defendant responded by moving to dismiss plaintiff's motions and moving for summary judgment. On 24 September 1993, Judge Huffman denied plaintiff's motions and granted defendant's motion to dismiss on grounds of *res judicata*. From this order, plaintiff appeals.

Attorney General Michael F. Easley, by Assistant Attorney General T. Byron Smith and Associate Attorney General Elizabeth J. Weese, for plaintiff-appellant.

Henry T. Drake for defendant-appellee.

WALKER, Judge.

Plaintiff argues that a trial court only has jurisdiction to enforce defendant's obligation of child support and thus the provision of the 28 June 1984 order which conditions child support payments on compliance with visitation rights is null and void. For this reason, plaintiff argues the trial court abused its discretion in denying her motion to set aside that provision and erred in dismissing plaintiff's URESA action. We agree and thus reverse.

Our review of a trial court's decision on a motion for relief under Rule 60(b) is limited to determining whether the court abused its discretion. *City Finance Co. v. Boykin*, 86 N.C. App. 446, 448, 358 S.E.2d 83, 84 (1987). Rule 60(b)(4) provides that a court may relieve a party from a judgment if it is void. N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (1990). A void judgment is a nullity which may be attacked at any time. *Allred v. Tucci*, 85 N.C. App. 138, 141, 354 S.E.2d 291, 294, *cert. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987). If a court has no jurisdiction over the subject matter, the judgment is void. *Pifer v. Pifer*, 31 N.C. App. 486, 229 S.E.2d 700, 702 (1976).

The issue before us was squarely addressed in *Pifer v. Pifer*, 31 N.C. App. 486, 229 S.E.2d 700 (1976), a case with nearly identical facts. Pursuant to URESA, the plaintiff in *Pifer* enforced a Florida divorce decree which set forth defendant's obligation of child support. The Florida decree granted plaintiff custody and set forth defendant's visitation rights. The North Carolina court ordered defendant to pay child support, but also ordered that defendant shall be permitted to see his children at any reasonable time and on rea-

sonable notice and that "[u]pon the first report by defendant to this Court that he has been denied such visits, all support payments herein ordered shall immediately cease." *Pifer*, 31 N.C. App. at 486-487, 229 S.E.2d at 701-702. Subsequently, upon defendant's report that plaintiff had refused visitation, the court entered *ex parte* orders terminating defendant's obligation of support. Plaintiff appealed from the dismissal of her motion to set aside the *ex parte* orders. *Id.* at 487-88, 229 S.E.2d at 702.

This Court concluded that the duty of support is the only subject matter covered by URESA and that "[n]othing in the act allows the adjudication of child custody or visitation privileges or other matters commonly determined in domestic relation cases." *Id.* at 489, 229 S.E.2d at 703. The court's conclusion was based on N.C. Gen. Stat. § 52A-2 (1992), which provides that the purpose of URESA is "to improve and extend by reciprocal legislation the enforcement of *duties of support* and to make uniform the law with respect thereto," and N.C. Gen. Stat. § 52A-13 (1992), which provides that "[i]f the court of the responding state finds a *duty of support*, it may order the defendant to furnish support or reimbursement therefor . . . ." *Id.* (emphasis added). The court stated that "the [trial court] in the responding State of North Carolina had jurisdiction only to determine whether the defendant owed a duty of support to his children in the initiating state . . . and to enter an order requiring defendant to furnish such support." *Id.* Since the trial court which entered the prior support order had "no jurisdiction whatsoever to condition the support payments upon certain visitation privileges for the defendant," the *Pifer* court held that the subsequent *ex parte* orders were manifestly null and void and that the trial court erred in refusing to hear plaintiff's motion to set those orders aside. *Id.*

This case illustrates how a child can become the "victim" within our system which is supposed to enforce child support from a parent. The District Court of Anson County should be aware that a parent has remedies to secure visitation privileges with a child even if the child resides in another state. As the Court stated in *Pifer*, "innocent children should not be deprived of support under these circumstances." *Id.* at 490, 229 S.E.2d at 703.

Since we find this case indistinguishable from *Pifer*, we hold that the provision of the 28 June 1984 order which conditioned child support payments on plaintiff's compliance with visitation rights is null and void for lack of subject matter jurisdiction. For this reason, we

also hold that the trial court abused its discretion in denying plaintiff's Rule 60(b) motion and erred in dismissing plaintiff's action.

The case is remanded to the District Court of Anson County for enforcement of the Order of Child Support dated 27 June 1984 (84CVD31).

Reversed and remanded.

Judges EAGLES and McGEE concur.

MARK REGAN, PLAINTIFF v. AMERIMARK BUILDING PRODUCTS, INC. AND CLEM FOX AND MICHAEL WLOCK, DEFENDANTS

No. 9410SC401

(Filed 21 March 1995)

Workers' Compensation §§ 62, 69 (NCI4th)— employer's intentional misconduct—failure to inform employee of lack of safety features—sufficiency of conflict

Plaintiff's complaint was sufficient to state a claim against defendant employer based on *Woodson v. Rowland*, 329 N.C. 330, against his fellow employees who were his supervisors for willful and wanton negligence, and for punitive damages where plaintiff alleged that the design of defendant's paint machine made it dangerous to clean; plaintiff suffered serious injuries when his arm and body were caught in the paint machine as he attempted to clean the drum; defendants failed to inform plaintiff that the emergency switches on his machine were not functioning; and this particular machine had caused previous injury and deaths.

Am Jur 2d, Workers' Compensation § 101.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064, supp sec. 1.

Workmen's Compensation Act as furnishing exclusive remedy for employee injured by product manufactured, sold, or distributed by employer. 9 ALR4th 873, supp sec. 1.

Modern status: "dual capacity doctrine" as basis for employee's recovery from employer in tort. 23 ALR4th 1151.

Appeal by plaintiff from order entered 25 February 1994 by Judge Henry V. Barnette in Wake County Superior Court. Heard in the Court of Appeals 13 January 1995.

Glenn, Mills and Fisher, P.A., by Robert B. Glenn, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten, for defendant-appellee Amerimark Building Products., Inc., and Womble, Carlyle, Sandridge & Rice, by David A. Irvin, for defendants-appellees Clem Fox and Michael Wlock.

LEWIS, Judge.

Plaintiff appeals from the trial court's dismissal of his case for failure to state a claim upon which relief could be granted. N.C.G.S. § 1A-1, Rule 12(b)(6) (1990). The issues on appeal are whether plaintiff has stated a claim against the defendant employer based on *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) or against the defendant co-employees based on *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), and whether plaintiff's complaint is sufficient to state a claim for punitive damages.

For the purposes of reviewing a Rule 12(b)(6) motion to dismiss, the allegations in the complaint must be taken as true. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981). According to the allegations in the complaint, plaintiff was employed by defendant Amerimark Building Products, Inc. (hereinafter "Amerimark") in Person County, North Carolina. The individual defendants were plaintiff's supervisors. Plaintiff oversaw a paint machine along a paint line at Amerimark. Plaintiff's job required that he periodically clean a steel drum by reaching into the paint machine and scraping the drum while the paint line continued to operate. Plaintiff suffered serious injuries on 7 April 1993 when his arm and body were caught in the paint machine as he attempted to clean the drum.

Plaintiff alleges that, prior to 7 April 1993, other employees of Amerimark had clothing, gloves, arms and legs caught in the paint machine and suffered serious injury and death. Plaintiff contends that Amerimark, in an effort to diminish the risk of injury or death, installed emergency cutoff switches for employees who got caught in the machine. The employees were instructed on the hazards of the paint machine and on the operation of the emergency switches.

Plaintiff alleges that at the time of his injury he was operating the paint machine and performing the cleaning operation. He believed the emergency switches were functioning properly. When plaintiff's hand was caught and pulled into the machine, he tried to stop the machine with the emergency switches only to find them inoperable. Plaintiff was injured as described above.

Plaintiff alleges that defendants' actions were grossly negligent, willful, wanton, and constituted intentional misconduct, and were done with manifest indifference to the consequences, in that: (a) defendants failed to provide a fixed metal scraper or proper guarding, (b) defendants failed to maintain the emergency switches at plaintiff's station and chose to operate plaintiff's line without functional emergency switches, (c) defendants assigned plaintiff to perform his customary duties, including scraping the drum, knowing that the emergency switches were not functioning and without telling plaintiff that the switches were not functioning, and (d) defendants knew it was substantially certain that plaintiff would assume the switches were functional, would clean the drum, and, as a result, would be seriously injured or killed. Plaintiff further alleges that the defendants' actions were the proximate cause of plaintiff's injuries, and that plaintiff is entitled to punitive damages as a result of defendants' gross, reckless, willful, wanton, and intentional conduct.

According to N.C.G.S. § 97-10.1 and subsequent case law, the Workers' Compensation Act provides the exclusive remedy for an employee injured in a workplace accident unless the injury resulted from an intentional tort. N.C.G.S. § 97-10.1 (1991); *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 488, 340 S.E.2d 116, 120, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140, *and disc. review denied*, 346 S.E.2d 141 (N.C. 1986). However, in *Pleasant* and *Woodson* our Supreme Court carved out two exceptions to this rule and created causes of action against co-employees and employers respectively. In *Pleasant*, the Court held that an injured employee may pursue a civil action against a co-employee on the basis of willful, wanton and reckless negligence. *Pleasant*, 312 N.C. at 711, 325 S.E.2d at 246. In *Woodson*, the Court held that an injured employee may sue an employer for damages when the employer "intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees." *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228.

A. *Woodson* Claim

We first address whether plaintiff has stated a cause of action under *Woodson* against defendant Amerimark. "Substantial certainty" under *Woodson* is more than the "mere possibility" or "substantial probability" of serious injury or death. *See id.* at 345, 407 S.E.2d at 231. No one factor is determinative in evaluating whether a plaintiff has stated a valid *Woodson* claim; rather, all of the facts taken together must be considered. *Mickles v. Duke Power Co.*, 115 N.C. App. 624, 628, 446 S.E.2d 369, 372, *disc. review allowed*, 338 N.C. 311, 450 S.E.2d 488 (1994).

Appellees argue that this case is indistinguishable from *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993). The plaintiff employee in *Pendergrass* was seriously injured when his arm got caught in a machine he operated. *Id.* at 236, 424 S.E.2d at 393.

Our Supreme Court upheld the trial court's dismissal of the claims against the co-employees finding that those allegations did not rise to the level of willful, wanton and reckless negligence under *Pleasant*. *Id.* at 238, 424 S.E.2d at 394. Since the plaintiffs failed to make out a *Pleasant* claim against the co-employees, the Court further held that the allegations were necessarily insufficient to state a claim against the employer under the higher standard of negligence required under *Woodson*. *Id.* at 240, 424 S.E.2d at 395.

Plaintiff's allegations, when taken as true, make out a sharper case than *Pendergrass* for application of the *Woodson* exception to the exclusivity rule. The allegations in *Pendergrass* focused on the design of a machine that had latent defects and violated OSHA requirements and industry standards. *Id.* at 236, 424 S.E.2d at 393. Here, although the design of plaintiff's machine made it dangerous to clean, the risk of injury was increased by the alleged failure of the corrective emergency switches. In addition, there were no allegations in *Pendergrass*, as there are here, that the particular machine had caused previous injury and deaths. *Id.*

Amerimark's alleged failure to inform plaintiff that the emergency switches on his machine were not functioning demonstrates a much higher level of indifference to employee safety than that alleged in *Pendergrass*. When plaintiff's allegations are taken as true, we find a *Woodson* claim is made against Amerimark.

B. *Pleasant* Claim

Plaintiff alleges the same acts of negligence to support his claim against his co-employee supervisors Fox and Wlock as support his claim against Amerimark. We hold that plaintiff has alleged conduct sufficient to show the requisite and lower degree of willful, wanton, and reckless negligence of his fellow employees to survive a 12(b)(6) motion.

C. Punitive Damages Claim

Plaintiff's complaint also alleges that plaintiff is entitled to recover punitive damages against defendants for willful, wanton and intentional acts. Plaintiff has alleged willful and wanton misconduct and has specifically requested punitive damages. This gives defendants adequate notice of plaintiff's claim for punitive damages. *See Shugar v. Guill,* 304 N.C. 332, 338, 283 S.E.2d 507, 510 (1981) (holding that the principles of notice pleading apply to punitive damages claims).

Plaintiff has alleged aggravated conduct under *Pleasant* and *Woodson* sufficient to state a claim for punitive damages.

For the reasons stated above, the order of the trial court dismissing plaintiff's claims against defendants is reversed.

Reversed and remanded.

Judges WYNN and MARTIN, JOHN C. concur.

EUNICE MARROW v. JAMES E. MARROW

No. 949DC382

(Filed 21 March 1995)

Mortgages and Deeds of Trust § 44 (NCI4th)— defendant required to pay mortgages—deed with assumption clause—no agreement by plaintiff to relieve defendant of obligations

The mere fact that a deed which contains an assumption clause purporting to impose personal liability upon the grantee has been executed and recorded is insufficient to raise the presumption that the grantee agreed to the provision; therefore, the

trial court properly required defendant to make the mortgage payments on the parties' marital home pursuant to a divorce order, even though defendant, subsequent to the divorce, presented plaintiff with a deed to the home which contained an assumption clause; plaintiff accepted and recorded the deed; but there was no evidence that she agreed to assume the mortgages and relieve defendant of his obligations.

Am Jur 2d, Mortgages § 1050.

Appeal by defendant from judgment entered 9 November 1993 by Judge J. Larry Senter in Granville County District Court. Heard in the Court of Appeals 1 February 1995.

Bobby W. Rogers, for plaintiff-appellee.

D. Lynn Whitted, for defendant-appellant.

WYNN, Judge.

Plaintiff, Eunice Marrow, was granted a divorce from bed and board of defendant, James E. Marrow, on 7 April 1992. The divorce order, entered by Judge Pattie Harrison, contained the following provision concerning two mortgages on the marital home:

> 4. That the defendant shall pay the mortgage payment on said home in the sum of $435.00 per month and shall pay a second mortgage payment for aluminum siding on said home in the sum of $106.00 per month;

On 8 April 1993, defendant filed a verified complaint for an absolute divorce which was granted on 30 June 1993. Defendant's complaint contained the following allegation:

> 6. That during the marriage the [husband] and [wife] purchased personal property and as tenants-by-the-entirety, a house and lot known as 610 Roxboro Road, Oxford, Granville, North Carolina; whereupon [husband] verily believes the same would be considered marital property and therefore subject to equitable distribution; therefore [husband] does hereby judicially waive any further right, title and interest in the same and is willing to execute any and all documents whereupon the [wife] will have sole and free simple ownership in the real and personal property.

On 12 June 1993, defendant delivered a quitclaim deed to the marital home to plaintiff which she accepted and recorded. The deed contained the following clause:

> For in consideration of such transfer, GRANTEE [plaintiff] hereby agrees to assume any and all outstanding and existing Deeds of Trust or indebtedness on the subject property and to indemnify and hold the GRANTOR harmless on account of same.

In reliance upon this clause, defendant ceased making the mortgage payments. Plaintiff filed a motion for defendant to show cause why he should not be held in contempt on 21 October 1993. Defendant filed a motion in the cause requesting to be relieved of the obligation to pay the two mortgages. After a hearing, the trial court found that there was an arrearage of $4,410.28 on the mortgage on the house and an arrearage of $706.96 on the mortgage for the aluminum siding. The trial court found that while defendant could have believed he no longer had to make the mortgage payments by virtue of the deed he delivered to plaintiff, such a belief did not relieve him of his obligation. The trial court then ordered that defendant immediately pay both arrearages within thirty days or else be subject to incarceration for wilful contempt. From that order, defendant appeals.

Defendant argues that the trial court erred by ordering him to make the mortgage payments and by denying his motion to modify Judge Harrison's order requiring him to make the mortgage payments. We disagree.

Defendant was required by Judge Harrison's order to make the monthly payments for the mortgages on the parties' house and aluminum siding. Defendant agreed in his complaint for absolute divorce to transfer title to the property to plaintiff. In accordance with his promise, defendant delivered the deed to the property to plaintiff. This deed contained an assumption clause purporting to indemnify defendant from any liability for the mortgages. In his motion to modify Judge Harrison's order, defendant contends that plaintiff agreed to assume the mortgages as consideration for the transfer. The mere fact that a deed which contains an assumption clause purporting to impose personal liability upon the grantee has been executed and recorded is insufficient to raise the presumption that the grantee agreed to the provision. *Beaver v. Ledbetter*, 269 N.C. 142, 152 S.E.2d 165 (1967); *see Messer v. Laurel Hill Associates*, 93 N.C. App. 439, 378 S.E.2d 220 (1989). Defendant has not presented sufficient evidence that plaintiff agreed to assume the mortgages and relieve defendant of his obligations. Therefore, the trial court did not err by denying defendant's motion to modify Judge Harrison's order and by conclud-

ing that defendant was still subject to that order. Accordingly, the judgment of the trial court is

Affirmed.

Chief Judge ARNOLD and Judge MARTIN, John C. concur.

IN RE ANDREA GREEN

[118 N.C. App. 336 (1995)]

IN THE MATTER OF:	)	
	)	
ANDRE GREEN	)	ORDER
	)	
JUVENILE ANDRE GREEN BY AND THROUGH HIS ATTORNEY APPEALED	))	

No. COA94-1405

(Filed 6 January 1995)

The following order was entered:

The petition filed in this cause on 20 December 1994 and designated "Petition for Writ of Mandamus or, in the Alternative, a Writ of Prohibition to: The Honorable Donald W. Stephens Superior Court Judge Tenth Judicial District" and the motion filed in this cause on 6 January 1995 and designated "State's Motion to Dismiss Appeal" are decided as follows:

The Order of transfer appealed from by the juvenile is not a "final order of the court in a juvenile matter" as defined in N.C. Gen. Stat. 7A-666 (1989). Therefore, the juvenile has no right to appeal the discretionary order pursuant to that statute. The State's motion to dismiss the appeal in this case is hereby ALLOWED.

Because no appeal in this case remains pending before this Court, the relief requested by the juvenile, a writ of prohibition directing a stay of further proceedings in superior court, Wake County, is not warranted. The petition is hereby DENIED. It is further ordered that this order be published in its entirety in the NC COURT OF APPEALS REPORTS.

And it is considered and adjudged further, that the Defendant-Appellant, do pay the costs of the appeal in this Court incurred, to wit, the sum of NINE NO/100 dollars ($9.00), and execution issued therefor.

By order of the Court this 6th day of January 1995.

The above order is therefore certified to the Clerk of District Court Wake County.

s/John H. Connell
Clerk of the Court of Appeals

CASES REPORTED WITHOUT PUBLISHED OPINIONS
FILED MARCH 21 1995

Case	County	Disposition
BAILEY v. BAILEY No. 94-525	Durham (92CVS00390)	Reversed & Remanded
BLAKELY v. LOCKWOOD No. 94-358	Buncombe (89SP267)	Affirmed
BRADFORD v. LANDING No. 94-759	Guilford (94CVS5209)	Dismissed
BUCHANAN v. CROWDER & BUCHANAN LOGGING No. 94-1071	Ind. Comm. (838628)	Affirmed
BULLARD v. WALTERS No. 94-954	Robeson (93CVS2492)	Appeal Dismissed
DIXON v. O'NEAL AND MAE'S GRILL No. 94-910	Ind. Comm. (247447)	Affirmed
GEORGE v. CRAVEN No. 94-753	Ind. Comm. (804179)	Dismissed
IN RE ADOLF No. 94-416	Person (92CVD438)	Reversed
IN RE FORECLOSURE OF MEEHAN No. 94-398	Macon (93SP55)	Affirmed
IN RE POWELL No. 94-397	Columbus (92SP148)	Affirmed in part, No error in part
IN RE WHITE No. 94-517	Mecklenburg (93J646)	No Prejudicial Error
JOHNSON v. BAHLSEN, INC. No. 94-857	Wake (92CVS10054)	Affirmed
MORNINGSIDE v. CITY OF BURLINGTON No. 94-604	Alamance (93CVS1061)	Affirmed
PARHAM v. PORTIS No. 93-636	Edgecombe (92CVS1020)	Affirmed
POWELL v. POWELL No. 94-1125	Davie (91CVD26)	Dismissed
SHELL v. HOLLY FARMS No. 94-548	Ind. Comm. (600148)	Affirmed

STATE v. ADAMS No. 94-848	Pitt (93CRS19001)	No Error
STATE v. BLAKENEY No. 94-772	Cabarrus (93CRS138) (93CRS139) (93CRS140) (93CRS141)	No Error
STATE v. BLUE No. 94-820	Moore (94CRS118) (94CRS119)	No Error in trial; Remanded for resentencing
STATE v. BOWDEN No. 94-415	Mecklenburg (92CRS71672)	No Error
STATE v. BROOKS No. 94-1070	Gaston (93CRS15778) (93CRS15781)	No Error
STATE v. CAREY No. 94-964	Mecklenburg (93CRS75137)	No Error
STATE v. CARMON No. 94-850	Pitt (93CRS23684)	No Error
STATE v. CHOI No. 94-756	New Hanover (93CRS15191)	Affirmed
STATE v. CRAWFORD No. 94-272	Mecklenburg (93CRS3073) (93CRS3074)	No Error
STATE v. ERWIN No. 94-1078	Guilford (92CRS44916)	Affirmed
STATE v. FOSTER No. 94-1072	Pitt (93CRS18929)	No Error
STATE v. GOODWIN No. 94-262	Chowan (94CRS361) (94CRS362) (94CRS681)	No Error
STATE v. HARDEN No. 94-155	Alamance (92CRS25664)	No Error
STATE v. HARPER No. 94-986	Randolph (92CRS10405)	No Error

STATE v. JHONSON No. 94-677	Johnston (93CRS12485) (93CRS12486) (93CRS12489) (93CRS12492) (93CRS12493) (93CRS12495) (93CRS12496)	No Error
STATE v. LUCAS No. 94-803	Guilford (93CRS77899) (93CRS77901)	No Error
STATE v. MANN No. 94-701	Wake (92CRS89115)	No Error
STATE v. McKINNON No. 94-529	Cumberland (93CRS5722) (93CRS5723) (93CRS5724) (93CRS5725) (93CRS5726) (93CRS5727)	No Error
STATE v. MILLER No. 94-965	Cabarrus (93CRS12114)	No Error
STATE v. MILLER No. 94-1258	Forsyth (94CRS7779) (94CRS8627)	No Error
STATE v. MITCHELL No. 94-1062	Mecklenburg (93CRS60197)	No Error
STATE v. NELSON No. 94-1015	Guilford (92CRS63557) (92CRS63558) (92CRS63559)	Affirmed
STATE v. RULAND No. 94-1161	Mecklenburg (93CRS56804)	No Error
STATE v. STEWART No. 94-658	Robeson (92CRS2258)	No Error
STATE v. WADE No. 94-1026	Guilford (94CRS20275) (94CRS20276)	Affirmed
STATE v. WALKER No. 94-570	Wake (93CRS1915) (92CRS88650)	No Error
STATE v. WHITE No. 94-976	Cumberland (91CRS29179)	No Error

STATE v. WILDER No. 94-765	Pasquotank (93CRS3569)	No Error
STATE v. WRIGHT No. 94-544	Wayne (93CRS3321) (93CRS3322)	No Error
TART v. NEW No. 94-370	Ind. Comm. (141506)	Affirmed in part, Reversed in part
VANCE v. BASS No. 94-420	Edgecombe (93CVS967)	Affirmed

GODWIN v. WALLS

[118 N.C. App. 341 (1995)]

JAMES F. GODWIN, SR., ADMINISTRATOR OF THE ESTATE OF JAMES F. GODWIN, JR., DECEASED; JAMES F. GODWIN, SR., INDIVIDUALLY; AND JEAN P. GODWIN, PLAINTIFFS v. ROGER BRENT WALLS; M & B TRUCKING INCORPORATED; AND MEDIQUIK EXPRESS, INC., DEFENDANTS

No. 9315SC1200

(Filed 4 April 1995)

1. Courts § 14 (NCI4th)— nonresident truck driver working for North Carolina company—accident occurring in another state—long-arm statute inapplicable

No basis for personal jurisdiction existed under N.C.G.S. § 1-75.4(3), the long-arm statute pertaining to acts or omissions within this state, though defendant may have been a truck driver for a North Carolina corporation and may have failed to properly inspect the vehicle he was driving at the time of the accident, since the agency relationship was alleged in the complaint but no sworn verification appeared of record; defendant made no response to plaintiffs' allegations, including no admission; even if the court did have jurisdiction over defendant's employer, that would not give the court personal jurisdiction over defendant, as an agent may not be held liable under the jurisdiction of North Carolina courts for acts or omissions allegedly committed by the corporation; and there was no allegation or evidence that defendant's alleged failure to inspect the vehicle and his operation of the vehicle occurred within North Carolina.

Am Jur 2d, Courts §§ 118, 119.

2. Courts §§ 14, 18 (NCI4th)— injuries occurring outside North Carolina—wrongful death and property damage claims

The claims of plaintiffs for negligent infliction of emotional distress and loss of consortium are classified as "injuries to person or property" within the purview of N.C.G.S. § 1-75.4(4) conferring *in personam* jurisdiction for acts occurring outside North Carolina, provided service activities were carried on within North Carolina, and defendant's own affidavit showed that he picked up or delivered pharmaceuticals in North Carolina on two occasions each week; however, claims of wrongful death and property damage could not be joined in the action alleging negligent infliction of emotional distress and loss of consortium.

Am Jur 2d, Courts §§ 99-100, 118, 119.

3. Courts § 15 (NCI4th)— nonresident defendant—wrongful death and property damage—failure to show defendant engaged in substantial activity in North Carolina when served

N.C.G.S. § 1-75.4(1) was ineffective to confer upon North Carolina courts personal jurisdiction over defendant with respect to plaintiffs' claims for wrongful death and property damage, since plaintiffs did not make a *prima facie* showing that defendant was engaged in substantial activity within this state when service of process was made upon him.

Am Jur 2d, Courts §§ 118, 119.

4. Courts § 15 (NCI4th)— nonresident defendant—minimum contacts—due process requirements met—in personam jurisdiction

The nonresident defendant had sufficient contacts with North Carolina to meet the requirements of due process and to permit the exercise of personal jurisdiction over him where defendant entered into an employment arrangement with a North Carolina based company, purposefully availed himself of the privilege of conducting business here for the purpose of obtaining a financial benefit, and traveled to this state approximately twice weekly over an eight-month period hauling pharmaceuticals for another company with offices in North Carolina.

Am Jur 2d, Courts §§ 118, 119.

Development of the doctrine of *Pennoyer v. Neff* as regards jurisdiction over nonresident individuals and foreign corporations—Supreme Court cases. 2 L. Ed. 2d 1664.

Appeal by defendant Roger Brent Walls from order filed 3 September 1993 by Judge George R. Greene in Orange County Superior Court. Heard in the Court of Appeals 1 September 1994.

Mast, Morris, Schulz & Mast, P.A., by George B. Mast, Bradley N. Schulz, and David F. Mills, for plaintiff-appellees.

Poe, Hoof & Reinhardt, by G. Jona Poe, Jr., Martha New Milam, and James C. Worthington, for defendant-appellant.

JOHN, Judge.

Defendant Roger Brent Walls (Walls) appeals the trial court's order denying his motion to dismiss for lack of personal jurisdiction.

He contends the trial court erred by failing to consider oral arguments or written briefs from counsel in support of his motion and by concluding North Carolina may properly assert jurisdiction over his person. For the reasons set forth herein, we find certain of defendant's arguments persuasive.

Relevant factual and procedural information is as follows: On 23 July 1992, James F. Godwin, Jr. and William Roma Godwin were standing beside a 1986 Chevrolet pickup truck occupied by James F. Godwin, Sr. The vehicle was temporarily stopped on a grass shoulder along southbound Interstate 95 in Caroline County, Virginia. Walls was operating a Kenworth tractor-trailer southbound on Interstate 95 when his vehicle left the surfaced portion of the highway and collided with the truck, killing both James Godwin, Jr. and William Godwin.

Walls is a citizen and resident of Maryland. At the time of the accident, he had been an employee of defendant M & B Trucking, Inc. (M & B) since 5 December 1991. M & B is a North Carolina corporation whose principal place of business is Durham, North Carolina. Walls continued to reside in Maryland during his employment and made approximately two trips per week to North Carolina hauling pharmaceuticals for defendant Mediquik Express, Inc. (Mediquik), an Ohio corporation which maintained a North Carolina office in Chapel Hill. The owners of both the tractor (M & B) and the trailer (Mediquik) involved in the accident are defendants herein, but are not subjects of this appeal.

Plaintiffs instituted this action seeking damages from all defendants for wrongful death, property damage, loss of consortium, and emotional distress, as well as punitive damages.

On 18 June 1993, Walls filed a motion to dismiss for lack of personal jurisdiction and submitted an affidavit in support of the motion. The affidavit stated *inter alia*:

> 4. I am presently 26 years old and I have resided in the State of Maryland continuously since my birth.
>
> 5. On or about December 5, 1991, I became employed as a truck driver for M & B Trucking, Incorporated, a North Carolina corporation.
>
> 6. I was employed by M & B Trucking, Incorporated as an over-the-road truck driver.

7. Between December 1991 and July 23, 1992, I made approximately 2 trips per week to the State of North Carolina in connection with my employment as a driver for M & B Trucking, Incorporated. Each of my trips to North Carolina involved pick up or delivery of a trailer load of pharmaceuticals and I spent only a few hours within the State of North Carolina on each of these trips.

8. Other than as stated in paragraph seven (7) of this Affidavit, I have had no further contacts with the State of North Carolina.

9. On or about the 24th day of April, 1993, I was served with a copy of the Summons and Complaint in the above-captioned lawsuit by the Sheriff of Queen Anne's County, Maryland.

10. The accident which is the subject of the above-captioned lawsuit took place in the Commonwealth of Virginia on July 23, 1992.

11. I have not returned to nor had any further contact with the State of North Carolina since July 22, 1992, that date being one day before the accident that is the subject of the above-captioned lawsuit.

The trial court denied defendant Walls' motion and he thereafter filed timely notice of appeal to this Court 21 September 1993.

Although the denial of a motion to dismiss is not ordinarily immediately appealable, Walls properly proceeds pursuant to N.C. Gen. Stat. § 1-277(b) (1983), which prescribes a right of immediate appeal where there has been "an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." *See also Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982). We therefore consider Walls' contentions.

I.

Walls first assigns as error the trial court's alleged denial *sua sponte* of his motion to dismiss for lack of personal jurisdiction without considering written briefs or oral arguments of counsel. We find this contention unpersuasive.

It is well settled that due process of law requires both notice and an opportunity to be heard before a competent tribunal. *Forman & Zuckerman v. Schupak*, 38 N.C. App. 17, 19, 247 S.E.2d 266, 268

(1978). "It is elementary and fundamental that every person is entitled to his day in court to assert his own rights or to defend against their infringement." *Coach Co. v. Burrell*, 241 N.C. 432, 436, 85 S.E.2d 688, 692 (1955).

Walls maintains the trial court determined personal jurisdiction existed on "the mere fact the Plaintiffs were from North Carolina . . . . Thus, no consideration was given to the question presented by [Walls regarding his] Motion to Dismiss for lack of personal jurisdiction . . . . In essence, [Walls] never had an opportunity to be heard."

However, "[i]f a judgment is regular on its face the record is presumed to be valid until the contrary is shown by the proper proceeding." *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 368, 276 S.E.2d 521, 524, *disc. review denied*, 303 N.C. 314, 281 S.E.2d 651 (1981) (citing *Shaver v. Shaver*, 248 N.C. 113, 102 S.E.2d 791 (1958)). Thus, without a showing to the contrary, the trial court must receive the benefit of *omnia rite acta praesumuntur*, all things are presumed to have been rightly done. *See Sherwood v. Sherwood*, 29 N.C. App. 112, 114, 223 S.E.2d 509, 511 (1976).

The order herein indicates a hearing on Walls' motion was held whereby the plaintiffs and all defendants were represented by counsel. Further, counsel stipulate on appeal that "[t]he August 23, 1993 Civil Session of Orange County Superior Court was duly organized and held, and the proceedings in this case held before the Honorable George R. Greene, Superior Court Judge Presiding, were not recorded." Accordingly, as there is no record evidence to the contrary, we must assume a hearing was held in regards to Walls' motion to dismiss. *Fungaroli*, 51 N.C. App. at 368, 276 S.E.2d at 524. Walls consequently lacks a basis upon which to assert a violation of his procedural due process rights, and this assignment of error must therefore fail.

II.

Walls next argues the trial court committed reversible error when it denied his motion to dismiss for lack of personal jurisdiction. We conclude this contention has merit in certain respects.

The resolution of whether the trial court acquired *in personam* jurisdiction over defendant involves a two-fold determination. First, the statutes of North Carolina must permit the exercise of jurisdiction, and second, such exercise must comport with due process of law under the Fourteenth Amendment to the U.S. Constitution.

Century Data Systems v. McDonald, 109 N.C. App. 425, 426-27, 428 S.E.2d 190, 190 (1993).

Long-Arm Statute

We first consider whether a basis for asserting personal jurisdiction exists under N.C. Gen. Stat. § 1-75.4 (1983), commonly referred to as the "long-arm statute."

In the case *sub judice* the trial court did not indicate under which subsection of the long-arm statute it determined jurisdiction was acquired over Walls. However, absent request by a party, the trial court is not required to make findings as to which statutory grounds it utilized in finding personal jurisdiction. *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986). Rather it is presumed the court, upon proper evidence, found facts sufficient to support its decision. *J. M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. 419, 424, 324 S.E.2d 909, 912, *disc. review denied*, 313 N.C. 602, 330 S.E.2d 611 (1985) (citations omitted).

Since the trial court herein made no findings of fact, the dispositive issue before this Court is sufficiency of the evidence to support a determination of personal jurisdiction. *Id.* Plaintiffs contend three sections of our long-arm statute have applicability to the case *sub judice.* We examine each in turn. In the event we find one or more to confer personal jurisdiction over Walls, we must then decide if exercise of the statutory grant of jurisdiction violates the due process clause of the federal constitution. *Century Data Systems*, 109 N.C. App. at 426-27, 428 S.E.2d at 190.

A.

[1] N.C. Gen. Stat. § 1-75.4(3) (1983) provides for personal jurisdiction

> [i]n any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

Thus, personal jurisdiction is authorized for any injury arising from a local act or omission.

Plaintiffs in their appellate brief assert the following acts or omissions by Walls occurred in North Carolina:

> 1. That defendant Walls was an agent and employee of M & B Trucking[, a North Carolina corporation,] and Mediquik and was

> operating a tractor trailer registered in the State of North Carolina at the time of the collision;
>
> 2. That Walls was a "motor carrier" as defined by the Federal Motor Carrier Safety Regulations . . . (which imposes upon him a duty to properly inspect and maintain his vehicle);
>
> 3. That Walls, M & B Trucking and Mediquik's agent, failed to properly inspect the vehicle he was driving at the time of the accident;
>
> 4. That Walls, among other things, operated his vehicle without a properly working windshield wiper, with defective or unsafe equipment, with defective brakes, with a defective fifth-wheel coupling device and bracket, with a front steering tire with less than adequate tread groove depth, and with an improper speedometer and tachometer; . . . and
>
> 5. That even if Walls did properly inspect his vehicle, he made negligent decisions to operate the motor vehicle when it was in an unsafe condition so as to likely cause an accident.

Plaintiffs further argue that "to be authorized to operate and inspect this North Carolina licensed tractor, [Walls] had to pass written and driving tests for this particular commercial vehicle administered by M & B Trucking," and accordingly, "the majority of his negligent decisions to drive and negligent inspections occurred within the State of North Carolina while an employee and agent of a North Carolina corporation."

The primary focus of plaintiffs' argument regarding personal jurisdiction for a "local act or omission" is thus upon the alleged employer-employee and agency relationship between Walls and M & B Trucking, a North Carolina corporation. Because Walls was acting within the scope and course of that relationship with a North Carolina company at the time of the collision, plaintiffs suggest, then North Carolina courts may exercise personal jurisdiction over him. This argument fails for several reasons.

First, we note that upon a challenge to jurisdiction, " 'plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists.' " *Century Data Systems*, 109 N.C. App. at 427, 428 S.E.2d at 190-91 (quoting *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 629-30, 394 S.E.2d 651, 654 (1990)). We find no such showing by plaintiffs.

The agency relationship is alleged in plaintiffs' complaint and incorporated into their amended complaint, but no sworn verification appears of record. Moreover, Walls filed his motion to dismiss prior to pleading in accordance with the provisions of N.C. Gen. Stat. § 1A-1, Rule 12(b) (1990), and hence has made no response to, much less admitted, plaintiffs' allegations.

Next, the emphasis upon the agency relationship ignores the issue for resolution in this appeal, namely, the exercise of personal jurisdiction by North Carolina courts over *Walls*, not M & B. While a corporate entity is liable for any wrongful act or omission of an agent acting with proper authority, *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 596, 394 S.E.2d 643, 648 (1990), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991) (citation omitted), it does not follow an agent may be held liable under the jurisdiction of our courts for acts or omissions allegedly committed by the corporation. A corporation can only act through its agents, *Blanton v. Moses H. Cone Hosp.*, 319 N.C. 372, 375, 354 S.E.2d 455, 457 (1987) (citation omitted); therefore, plaintiffs may not assert jurisdiction over a corporate agent without some affirmative act committed in his individual official capacity. *See Moore v. American Barmag Corp.*, 710 F.Supp 1050, 1057 (W.D.N.C. 1989), *aff'd*, 902 F.2d 44 (4th Cir. 1990) (senior official of corporation not liable for alleged patent infringement by corporation without showing defendant acted as alter ego of corporation or acted outside his official capacity).

Finally, there is neither mention in plaintiffs' complaint nor evidence of record to indicate that Walls' alleged failure to inspect the vehicle, his alleged decision to operate and his subsequent operation of the vehicle occurred within North Carolina. While these items might indeed constitute local acts or omissions and arguably would suffice as the trial court's presumed findings if supported by the evidence, *J. M. Thompson Co.*, 72 N.C. App. at 424, 324 S.E.2d at 912, the only indication they may have taken place within this State is plaintiffs' bald assertion in their appellate brief. *See Hankins v. Somers*, 39 N.C. App. 617, 620, 251 S.E.2d 640, 643, *disc. review denied*, 297 N.C. 300, 254 S.E.2d 920 (1979) (the single allegation of local act or omission being plaintiff's information and belief that defendant, as partner and agent of a corporation, had committed some act of conspiracy in North Carolina, insufficient to confer personal jurisdiction).

As G.S. § 1-75.4(3) applies to "act[s] or omission[s] *within this State* by [a] defendant, the section does not grant personal jurisdiction of our courts over Walls.

B.

[2] N.C. Gen. Stat. § 1-75.4(4) confers *in personam* jurisdiction

> [i]n any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
>
> a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or
>
> b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.

Walls argues "[a] careful review of [this section] reveals that it does not provide for personal jurisdiction over nonresident defendants . . . in cases where both the act complained of and the injury alleged are 'foreign.' " We believe he misstates the applicable purview of the statute.

Plaintiffs herein allege Walls' actions in Virginia caused, *inter alia*, negligent infliction of emotional distress and loss of consortium, "injuries which arose and continue to exist in the State of North Carolina," and that they "continue to suffer from these injuries, and continue to incur loss of earnings and medical expenses arising therefrom."

We first note the statute requires only that the action "claim" injury to person or property within this state in order to establish personal jurisdiction. It does not mandate evidence or proof of such injury. *Vishay Intertechnology, Inc. v. Delta Intern. Corp.*, 696 F.2d 1062, 1067 (4th Cir. 1982). The question remains whether negligent infliction of emotional distress and loss of consortium are the type of "injury" contemplated by the section.

In *Sherwood*, this Court examined whether marital abandonment constitutes " 'injury to the person or property' as used in G.S. 1-75.4(3) . . . ." 29 N.C. App. at 115, 223 S.E.2d at 512. We first stated the phrase "should be given a broad meaning consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit the actions thereunder to traditional claims for bodily injury and property damages." *Id.* In keeping with this concept, we acknowl-

edged actions for alienation of affections and criminal conversation which "involve wrongs willfully inflicted and the deprivation of martial companionship and cohabitation" had previously been held to constitute injury to person or property under the statute. *Id.* at 116, 223 S.E.2d at 512; *see Golding v. Taylor*, 19 N.C. App. 245, 247, 198 S.E.2d 478, 479, *cert. denied*, 284 N.C. 121, 199 S.E.2d 659 (1973). Accordingly, we concluded "injury to person or property" includes a claim based upon marital abandonment. *Sherwood*, 29 N.C. App. at 116, 223 S.E.2d at 512.

The claims of plaintiffs for negligent infliction of emotional distress and loss of consortium are sufficiently similar to those approved in *Sherwood* and *Golding* to permit classification as "injur[ies] to person or property" within the purview of G.S. § 1-75.4(4).

Finally, the statute requires "services activities" to have been carried on within this state by or on behalf of the defendants "at or about the time of the injury." Walls' own affidavit reveals that at the time of the accident he was engaged as a truck driver for M & B. In this capacity, he picked up or delivered pharmaceuticals in North Carolina on approximately two occasions per week. We believe this to be a sufficient *prima facie* showing that Walls was engaged in service activity at or about the time of the claimed injury.

Based on the foregoing, we hold plaintiffs have met their burden concerning the personal jurisdiction requirements of G.S. § 1-75.4(4) with respect to their claims against Walls for negligent infliction of emotional distress and loss of consortium and for any damages flowing therefrom. However, plaintiffs also assert claims of wrongful death and property damage, injuries which indisputably occurred outside the State of North Carolina.

N.C. Gen. Stat. § 1-75.5 (1983) provides as follows:

> In any action brought in reliance upon jurisdictional grounds stated in subdivisions (2) to (10) of G.S. 1-75.4 there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under G.S. 1-75.4 for personal jurisdiction over the defendant as to the claim or cause to be joined.

Accordingly, unless another basis for assertion of personal jurisdiction over Walls may be found for plaintiffs' claims of wrongful death and property damage, these may not be joined in the action alleging negligent infliction of emotional distress and loss of consortium. We

therefore proceed to examine, under the remaining provision of our long-arm statute which may be applicable, whether grounds exist for assertion of personal jurisdiction over Walls as to these claims.

C.

[3] N.C. Gen. Stat. § 1-75.4(1) provides in pertinent part:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:
>
> (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> . . . .
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

Walls argues that at the time service of process was effected upon him in the State of Maryland, he was no longer engaged in any activity relating to the State of North Carolina. He points to the statutory language "when service of process is made," as well as his affidavit to the effect he neither returned to nor had any further contact with the State of North Carolina following 22 July 1992, that date being one day prior to the accident which is the subject of the lawsuit in question. Therefore, Walls concludes, G.S. § 1-75.4(1) does not apply to confer jurisdiction over his person.

Plaintiffs respond by stating the record reflects no attempt by Walls to "deny or dispute that he remained employed by [the corporate defendants] at the time when service of process" was obtained. We reiterate that upon a challenge to jurisdiction, plaintiff assumes the burden of proof of a *prima facie* case. *Century Data Systems*, 109 N.C. App. at 427, 428 S.E.2d at 190-91. The only evidence of record as to Walls' activities at the time of service of process is contained in his affidavit. Moreover, neither the complaint nor the amended complaint contain any allegation regarding the nature of Walls' contacts with North Carolina or his continued employment with the corporate defendants following the accident. Hence, because the record is devoid of evidence which would support the trial court's presumed finding of "substantial activity within this State" by Walls "when serv-

ice of process [was] made upon [him]," Walls' argument that the section is inapplicable must be sustained.

We are cognizant that our long-arm statute " 'should be liberally construed in favor of finding personal jurisdiction,' " *Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 719, 245 S.E.2d 229, 233 (1978) (citation omitted), and that "[b]y the enactment of G.S. 1-75.4(1)(d), . . . the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977) (citation omitted). We also observe that at least one court has impliedly questioned "whether absolute contemporaneity of 'activities' and service of process is constitutionally required by the 'when service . . . is made' phrase . . . ." *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989).

Nonetheless, the statute specifically speaks of substantial activity within this state "*when service of process is made.*" "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) (citation omitted). As no argument was raised below concerning the constitutional validity of this provision of the statute, we do not address any constitutional concerns that may be pertinent. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). Rather, we give full effect to the statute as enacted. Accordingly, plaintiff not having made a *prima facie* showing that Walls was engaged in substantial activity within this State "when service of process [was] made" upon him, this section is not effective to confer upon our courts personal jurisdiction over Walls with respect to plaintiffs' claims for wrongful death and property damage.

<u>Due Process</u>

[4] Having determined the requirements of our long-arm statute were satisfied as to plaintiffs' claims for negligent infliction of emotional distress and loss of consortium, we next consider regarding those claims Walls' contention that "the North Carolina courts could not exercise personal jurisdiction over [him] because the constitutional requirements [of due process] were not met."

The crucial inquiry in determining whether the exercise of personal jurisdiction over a nonresident defendant comports with due process is whether the defendant has established certain minimum contacts with the forum state. In *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945), the United States Supreme Court noted:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316, 90 L. Ed. at 102 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). There must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Farmer v. Ferris*, 260 N.C. 619, 625, 133 S.E.2d 492, 497 (1963) (citations omitted). This relationship between the defendant and the forum must be "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980) (citations omitted). Whether the activity of the defendant adequately satisfies due process depends upon the facts of each case. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445, 96 L. Ed. 485, 492 (1952).

Factors helpful in determining the existence of minimum contacts include the quantity of the contacts, the nature and quality thereof, the source and connection of the cause of action with those contacts, interest of the forum state and convenience to the parties. *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 531, 265 S.E.2d 476, 479 (1980) (quoting *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965)). "No single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case." *B. F. Goodrich Co. v. Tire King and Smith v. Hill*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986) (citations omitted). Thus, determining what contacts with the forum state constitute minimum contacts for due process purposes is ultimately a fairness determination. *J. M. Thompson Co.*, 72 N.C. App. at 425, 324 S.E.2d at 913.

Concerning the "quality and quantity of contacts," the United States Supreme Court noted in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L. Ed. 2d 528 (1985), that

> "[t]he application of [the minimum contacts] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person, . . ." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State.

Id. at 474-75, 85 L. Ed. 2d at 542 (citations omitted).

In the case *sub judice* Walls voluntarily entered into an employment arrangement with a North Carolina based company and purposefully availed himself of the privilege of conducting business here for the purpose of obtaining a financial benefit. By his own admission, he traveled to this State approximately twice weekly over a eight (8) month period hauling pharmaceuticals for another company with offices in North Carolina. While Walls argues "the combined effect of the minimal amount of hours spent in North Carolina each trip and the relatively short period of time—merely two thirds of a year—does not rise to the level of minimum contacts required by the Constitution," we find his territorial presence sufficient to withstand a due process challenge. His regular presence in North Carolina was both "continuous and systematic," *Cherry Bekaert & Holland*, 99 N.C. App. at 632, 394 S.E.2d at 655 (1990), and "reinforce[d] the reasonable foreseeability of suit" here. *Burger King Corp.*, 471 U.S. at 475, 85 L. Ed. 2d at 543. Fewer and less consistent contacts with our state than those of Walls have been held sufficient to confer personal jurisdiction over nonresident defendants. *See Century Data Systems*, 109 N.C. App. at 430-32, 428 S.E.2d at 192-93 (minimum contacts sufficient for each individual defendant where contract existed and each defendant attended brief meetings and training sessions in North Carolina); *ETR Corporation v. Wilson Welding Service*, 96 N.C. App. 666, 669, 386 S.E.2d 766, 768 (1990) (minimum contacts exist where defendant entered this state three times to conduct business).

Moreover, plaintiffs' claims arise directly out of Walls' employment with North Carolina based companies. At the time of the accident, he was operating within the scope of his employment with

M & B Trucking and in furtherance of his duties for Mediquik Express.

Finally, this State has an interest in providing to its citizens a convenient forum in which to seek redress for injuries, *see Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 787 (1986) ("It is generally conceded that a state has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors"), and it does not appear Walls would be unfairly prejudiced by litigation of plaintiffs' claims in North Carolina. Both corporate defendants are located in North Carolina, and Walls resides in a state in relatively close proximity to ours. Additionally, certain witnesses, including treating physicians, and evidence are located in North Carolina. Indeed, North Carolina appears to be the most convenient forum and Walls has failed to show otherwise. *See ETR Corporation*, 96 N.C. App. at 669, 386 S.E.2d at 768 (where defendant located in Georgia failed to demonstrate any reason why the exercise of personal jurisdiction would be unfair, North Carolina is as convenient a forum as any to resolve suit).

Defendant relies upon *O'Neal v. Hicks Brokerage Co.*, 537 F.2d 1266 (4th Cir. 1976). Suffice it to observe that case is not binding precedent upon this Court, *see McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990), and our examination reveals it to be distinguishable.

In sum, both our long-arm statute and federal due process requirements permit exercise of personal jurisdiction by our courts over Walls as to plaintiffs' claims for negligent infliction of emotional distress and loss of consortium. Accordingly, as to those claims, we affirm the ruling of the trial court. However, having found no basis under our long-arm statute for the exercise of personal jurisdiction over Walls as to plaintiffs' claims of wrongful death and property damage, we reverse the trial court's denial of Walls' motion to dismiss as to those causes of action. As our ruling in effect "splits" plaintiffs' claims against Walls, the parties may now wish to reach some accommodation in that regard.

Affirmed in part; reversed in part.

Judges EAGLES and ORR concur.

Judge ORR concurred prior to 5 January 1995.

JOHN ANDERSON TAYLOR, JR., PLAINTIFF v. DULCIA G. TAYLOR, DEFENDANT

No. 9421DC599

(Filed 4 April 1995)

1. Divorce and Separation § 392 (NCI4th)— child support from filing of complaint to hearing—no retroactive child support—incorrect test applied

Child support awarded from the time a party files a complaint for child support to the date of trial is in the nature of prospective child support and is not retroactive child support; therefore, the trial court erred in classifying the child support ordered from the date defendant filed her claim for child support to the date the hearing on the issue was held as retroactive child support and used the incorrect test in determining what child support should be awarded.

Am Jur 2d, Divorce and Separation §§ 1035 et seq.

2. Divorce and Separation § 392.1 (NCI4th)— child support guidelines—inapplicability because of parties' income

The child support guidelines did not apply to a determination of child support where the parties' combined income was approximately $400,000 per year.

Am Jur 2d, Divorce and Separation §§ 1035 et seq.

3. Divorce and Separation § 403 (NCI4th)— child support—father's expenses—exclusion of certain debts

Loan payments to plaintiff's father were properly excluded by the trial court in determining plaintiff's income for child support purposes where the payments have been deferred and plaintiff has no concrete plans for making such payments. However, the trial court erred in excluding plaintiff's monthly payments to a trust for debt incurred to purchase defendant's stock in a Subchapter S corporation under an equitable distribution settlement.

Am Jur 2d, Divorce and Separation §§ 1041, 1042.

4. Divorce and Separation § 400 (NCI4th)— child support—income improperly calculated—failure to find value of parties' estates

The trial court erred in using the amount of income allocated to plaintiff by Taylor Oil, a Subchapter S corporation in which

plaintiff was a shareholder, in calculating his income because the allocated amount was higher than the cash actually distributed to him by Taylor Oil, and the court erred in failing to make findings of fact as to the value of the parties' estates.

Am Jur 2d, Divorce and Separation §§ 1041, 1042.

5. Divorce and Separation § 551 (NCI4th)— action for child support—inability of party to defray expenses—insufficiency of findings—award of attorney fees improper

The trial court erred in finding that defendant had sufficient means to defray litigation expenses and that plaintiff did not refuse to pay child support, and in therefore denying defendant's motion for attorney's fees, where the court was required to find that plaintiff did not refuse to pay adequate child support under the circumstances, but this issue was not addressed by the trial court; furthermore, whether a party has insufficient means to defray the expenses of the action requires a consideration of the estates of both parties, but the trial court made findings only as to the value of defendant's estate.

Am Jur 2d, Divorce and Separation §§ 798 et seq.

Judge LEWIS dissenting in part, concurring in part.

Appeal by plaintiff and defendant from order entered 24 January 1994 in Forsyth County District Court by Judge Chester C. Davis. Heard in the Court of Appeals 24 February 1995.

Edward P. Hausle, P.A., by Edward P. Hausle, for plaintiff-appellee/appellant.

Robinson Maready Lawing & Comerford, L.L.P., by Norwood Robinson and C. Ray Grantham, Jr., for defendant-appellee/appellant.

GREENE, Judge.

John Anderson Taylor, Jr. (plaintiff) appeals from an order entered 24 January 1994 in Forsyth County District Court, ordering him to pay Dulcia G. Taylor (defendant) prospective and retroactive child support, and defendant appeals from the same order, denying her claim for attorney's fees.

Plaintiff and defendant were married on 30 December 1981 and separated on 7 May 1990 and have two children from the marriage. On 10 May 1991, plaintiff filed a verified complaint for absolute divorce, and on 10 June 1991, defendant filed an answer and counterclaim, seeking primary physical custody of their two children, child support, and the costs of the action. Judge Margaret L. Sharpe granted the parties an absolute divorce on 18 July 1991, and on 6 December 1991, Judge R. Kason Keiger signed an "interim child support order" consented to by the parties and decreeing "in lieu of a child support order in a sum certain," plaintiff "will insure that funds are made available from applicable trusts or otherwise to continue to pay the children's educational expenses . . . until such time as a final determination is made as to the issues of custody and child support."

A hearing on the issues of child support, child custody, and attorney's fees took place in August and October of 1993. Roger Edwards (Edwards), a certified public accountant who handles plaintiff and Taylor Oil Company's (Taylor Oil) accounts, testified that plaintiff is a shareholder in Taylor Oil, a subchapter S corporation. "[E]ach year the corporation allocates the income [from Taylor Oil] among all the shareholders. . . . The income that is actually allocated is included in that shareholders individual income tax return, and he pays the income tax on it." Edwards stated that allocations on which shareholders pay income tax are often different from the cash distributions actually received by the shareholders so that plaintiff paid income taxes on allocations of $262,689 in 1991 and $334,911 in 1992 while receiving actual cash distributions of $220,000 in 1991 and $295,000 in 1992.

In an order filed 23 January 1994 and entered 24 January 1994, Judge Chester C. Davis made the findings of fact that defendant, as a result of the separation agreement, received the marital home with a value of $200,000, all the furniture in the home, and $1,036,307, and that "[d]efendant's answer and counterclaim did not specifically request retroactive child support for the period between May 10, 1990, and June 10, 1991, . . . [but] did request attorney's fees on August 20, 1993." Judge Davis also found plaintiff paid defendant child support of $2,500 to $5,000 per month from 7 May 1990 until 1 February 1991, but "did not consider the school expenses at Forsyth Country Day School [of $600 to $650 per month per child paid out of a trust] because neither party is paying that expense." Judge Davis then made findings for: (1) "**RETROACTIVE CHILD SUPPORT June 10, 1991 through December 31, 1991**" concerning defendant's expenses for

the reasonable needs of the children for that period, defendant's 1991 income, and plaintiff's 1991 income; (2) "**Retroactive Child Support-1992**" concerning defendant's expenses for the children's reasonable needs for 1992, defendant's 1992 income, and plaintiff's 1992 income; and (3) "**Retroactive Child Support January 1, 1993 through September 30, 1993**" concerning defendant's expenses for the reasonable needs of the children during that time, defendant's projected 1993 income, and plaintiff's 1993 income.

Then, in a section labeled "**Future Child Support**," Judge Davis made the following relevant findings:

> 89. At the time of the equitable distribution, plaintiff chose not to give defendant one half of the stock they owned in Taylor Oil but instead decided to retain the stock and create debt to purchase defendant's interest in the stock.
>
> 90. The court finds that plaintiff created a financial situation in which he generated debt in the approximate amount of $1,036,000 while retaining assets which otherwise could have been transferred to defendant in this matter.
>
> 91. Therefore, the Court finds that the Salem Trust debt with monthly payments of $9,967 is not allowed as a valid debt of the plaintiff for determining his gross income for child support purposes.
>
> 92. Plaintiff also claimed as an itemized monthly deduction from his gross income, a debt that he owes to his father, John A. Taylor, Sr., in the amount of $195,126 for a loan he received to pay defendant her equitable distribution of the parties' marital property. The court finds that plaintiff is making monthly payments of interest in the amount of $657 on that loan.
>
> 93. Further, the court finds that the plaintiff owes his father, John A. Taylor, Sr., $292,178 for a loan he received to purchase shares of Taylor Oil Company stock, on which plaintiff is making monthly payments of $984.
>
> 94. The Court finds that both of these debts like the Salem Trust debt, were created by plaintiff so he could retain assets which otherwise could have been transferred to defendant during the equitable distribution. The Court will not allow deductions for these monthly payments because plaintiff has created this debt.

> 95. The Court notes that plaintiff's father has deferred any payment on the principal of these notes and has forgiven the interest payments.
>
> . . . .
>
> 105. Therefore, the Court finds that the total combined annual income for the parties is approximately $419,690.00.

In the three sections of the order labeled "retroactive child support" and the one section labeled "future child support," the court used the allocated income figures which plaintiff received from Taylor Oil rather than the cash actually distributed to plaintiff in determining his income. For attorney's fees, the trial court found defendant "has a reasonably liquid estate of $666,581, a home now having an approximate value of $350,000, two cars, and furniture all of which have an approximate total value of 1.1 million dollars," that she is "an interested party" and "was acting in good faith."

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

> 3. That plaintiff has sufficient funds to pay child support as is hereinafter ordered by the Court.
>
> 4. That plaintiff has sufficient assets to pay retroactive child support as is hereinafter ordered by the Court.
>
> 5. That plaintiff's gross projected income for 1993 is $372,182.
>
> . . . .
>
> 8. That the plaintiff did not refuse to pay child support.
>
> . . . .
>
> 10. That defendant is entitled to recover retroactive child support from plaintiff for the period June 7, 1991 through September 30, 1993.

Based on these findings and conclusions, the trial court ordered the following:

> 1. Plaintiff shall pay directly to the defendant the sum of $4,685 per month for John and Ashton as child support, beginning November 15, 1993, by the 15th day of each month thereafter for the support of each of the minor children until as prescribed by N.C. Gen. Stat. §50-13.4(c) as recently amended.

2. Plaintiff shall pay directly to the defendant the sum of $110,727 as retroactive child support by January 31, 1994. . . .

3. Defendant shall have and recover no attorneys' fees from plaintiff.

The issues presented are whether (I) the trial court properly used the test for retroactive child support in awarding child support from the date defendant filed her claim for child support to the date of trial; (II) the trial court, in calculating prospective child support, properly considered (A) debt incurred by plaintiff by virtue of the equitable distribution settlement with defendant; and (B) plaintiff's income allocated to him by Taylor Oil where cash distributions he received from Taylor Oil were lower than the allocated income and the value of the parties' estates; and (III) there is sufficient evidence to support the conclusion defendant is not entitled to attorney's fees.

I

[1] Child support awarded **prior** to the time a party files a complaint is properly classified as retroactive child support and is determined by considering reasonably necessary expenditures made on behalf of the child by the party seeking retroactive child support and "the defendant's ability to pay during the period in the past for which reimbursement is sought." *Savani v. Savani*, 102 N.C. App. 496, 501-02, 403 S.E.2d 900, 903 (1991). Child support awarded, however, from the time a party files a complaint for child support to the date of trial is not "retroactive child support," but is in the nature of prospective child support representing that period from the time a complaint seeking child support is filed to the date of trial. *Tidwell v. Booker*, 290 N.C. 98, 116, 225 S.E.2d 816, 827 (1976) (awarding future child support from date of filing of complaint forward and awarding retroactive child support for period before filing of complaint); *cf. Hill v. Hill*, 335 N.C. 140, 143-44, 435 S.E.2d 766, 768 (1993) (trial court's order modifying alimony from date matter was first noticed for hearing is not a retroactive modification); *Mackins v. Mackins*, 114 N.C. App. 538, 543-44, 442 S.E.2d 352, 355-56 (trial court's order increasing child support from April 1991 through February 1993 was not a retroactive modification of child support because April 1991 was subsequent to 27 March 1991, the date plaintiff filed motion for increased child support), *disc. rev. denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). This is so because an order for child support can "properly take effect as of [the] date" a complaint for child support is filed.

Hill, 335 N.C. at 144, 435 S.E.2d at 768 (*quoting Harris v. Harris*, 259 N.Y. 334, 336-37, 182 N.E. 7, 8 (1932)).

In this case, the trial court classified the child support ordered from 10 June 1991, the date defendant filed her claim for child support to 30 September 1993, a date when the hearing on the issues were being held, as "retroactive child support" and used the test for determining retroactive child support for that period. The trial court, therefore, used the incorrect test in determining what child support should be awarded defendant from the time she filed her claim to the date of trial. The court should have used the same test for determining the child support from 10 June 1991, the date defendant filed her claim for child support, and the date of trial as it used for determining prospective child support.

II

[2] Prospective child support is normally determined under the North Carolina Child Support Guidelines (the Guidelines). The Guidelines in effect at the time of this trial specifically state the Guidelines do not apply in determining child support where the parents' combined adjusted gross income is higher than $10,000 per month ($120,000 per year). 1991 *North Carolina Child Support Guidelines; see* 1994 *North Carolina Child Support Guidelines* (Guidelines do not apply if parents' combined adjusted gross income is higher than $12,500 per month ($150,000 per year)). "For cases with higher combined monthly adjusted gross income, child support should be determined on a case-by-case basis. But in no event should the award in such case be lower than that established by applying the Guidelines' maximum amount in the Schedule of Basic Child Support Obligations." 1991 *Guidelines*. Because in this case, the parties' combined income is approximately $400,000, the Guidelines do not apply. In determining child support on a case-by-case basis, the order "must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount." *Newman v. Newman*, 64 N.C. App. 125, 127, 306 S.E.2d 540, 542, *disc. rev. denied*, 309 N.C. 822, 310 S.E.2d 351 (1983) (*quoting Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). The court should determine the child's reasonable needs that exist at the time of trial and the parties' relative abilities to pay at the time of trial. Furthermore, to determine the relative abilities of the parties to provide support, the court "must hear evidence and make findings of

fact on the parents' income[s], estates (e.g., savings; real estate holdings, including fair market value and equity; stocks; and bonds) and present reasonable expenses." *Little v. Little*, 74 N.C. App. 12, 20, 327 S.E.2d 283, 290 (1985) (*citing Newman*, 64 N.C. App. at 128, 306 S.E.2d at 542). The trial court, in determining the appropriate amount of child support, has considerable discretion in considering the factors contained in N.C. Gen. Stat. § 50-13.4(c); *Boyd v. Boyd*, 81 N.C. App. 71, 78, 343 S.E.2d 581, 586 (1986). If the court's findings are supported by competent evidence in the record and are specific enough to enable this Court to determine the trial court "took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and the parents," *Coble*, 300 N.C. at 712, 268 S.E.2d at 189, its determination as to the proper amount of support will not be disturbed on appeal absent a clear abuse of discretion, i.e., "manifestly unsupported by reason." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985).

A. Debt Incurred by Plaintiff

[3] Plaintiff first contends that the trial court did not consider his ability to pay in calculating the award for child support because it failed to deduct from his monthly income and excluded from his monthly expenses payments to creditors required to maintain income producing assets associated with the equitable distribution of marital property. The payments to creditors include $9,967 per month to Salem Trust, $657 per month to plaintiff's father for a loan, and $984 per month to plaintiff's father for another loan. Because the evidence shows, and the trial court found, that the payments to plaintiff's father have been deferred, the trial court did not abuse its discretion in failing to deduct these amounts which are expenses "not yet made by [plaintiff] with no concrete plans to make such" expenditures. *Witherow v. Witherow*, 99 N.C. App. 61, 65, 392 S.E.2d 627, 630 (1990), *aff'd*, 328 N.C. 324, 401 S.E.2d 362 (1991).

The trial court, however, in considering plaintiff's income generated by the stock he has as a result of incurring the Salem Trust debt, abused its discretion in not considering plaintiff's payments to Salem Trust as part of his expenses. Had plaintiff not incurred the Salem Trust debt, he would have had to deplete the amount of assets he possessed in order to comply with the equitable distribution settlement and would therefore have less income to consider for determining child support. Therefore, by failing to include the Salem Trust debt, the trial court did not give "due regard" to plaintiff's reasonable

expenses and did not accurately reflect his relative ability to pay child support.

B. Plaintiff's Income From Taylor Oil

[4] Plaintiff contends the trial court erred in using the amount of income allocated to him by Taylor Oil in calculating his income because the allocated amount is higher than the cash actually distributed to him by Taylor Oil and in failing to make findings of fact as to the value of the parties' estates. We agree.

The allocated income amount used by the trial court does not represent plaintiff's actual income received as cash distributions from Taylor Oil; therefore, the court did not give due regard to plaintiff's earnings and relative ability to pay child support. Furthermore, there is no finding in the trial court's order regarding the value of plaintiff's estate. "At the very least, a trial court must determine what major assets comprise the parties' estates and their approximate value." *Sloan v. Sloan*, 87 N.C. App. 392, 395, 360 S.E.2d 816, 819 (1987). Therefore, the trial court abused its discretion in calculating plaintiff's income and in failing to value plaintiff's estate.

For the reasons previously discussed, the trial court abused its discretion in calculating the amount of prospective child support, and the case must be remanded for further findings on the parties' incomes, estates, expenses, and relative abilities to pay in determining prospective child support. Furthermore, because we have already determined that the trial court erred in using the "retroactive child support" test for calculating prospective child support representing that time from 10 June 1991 through 30 September 1993, the case must be remanded so that the court can, pursuant to N.C. Gen. Stat. § 50-13.4(c), make appropriate findings of fact on the reasonable needs of the children, the "estates, earnings, conditions, accustomed standard of living of the child and the parties" for that period of time from 10 June 1991 through September 1993.

We have reviewed plaintiff's other assignments of error concerning the order for prospective child support and find no abuse of discretion by the trial court on those issues.

III

[5] Defendant, in her appeal, contends the trial court erred in finding she had sufficient means to defray litigation expenses and in finding

plaintiff did not refuse to pay child support, and, therefore, in denying defendant's motion for attorney's fees.

Although the trial court has considerable discretion in allowing or disallowing attorney's fees in child support cases, *Warner v. Latimer*, 68 N.C. App. 170, 176, 314 S.E.2d 789, 793 (1984), an award of attorney's fees in a child support action is proper only if the trial court finds as fact that "(1) the interested party (a) acted in good faith and (b) has insufficient means to defray the expenses of the action and further, that (2) the supporting party refused to provide adequate support 'under the circumstances existing at the time of the institution of the action or proceeding.' " *Brower v. Brower*, 75 N.C. App. 425, 429, 331 S.E.2d 170, 174 (1985); N.C.G.S. § 50-13.6.

In this case, the trial court found "plaintiff did not refuse to pay child support." This finding, however, cannot be a basis for denying attorney's fees because the question is not whether plaintiff refused to pay any child support but whether he refused to pay **adequate** child support "*under the circumstances existing at the time of the* institution of the action." This issue has not been addressed by the trial court. Plaintiff nonetheless argues that because he complied with the 6 December 1991 consent decree with regard to the trust fund payments, the trial court must find, as a matter of law, that he has provided adequate child support within the meaning of N.C. Gen. Stat. § 50-13.6. We disagree. *See Sikes v. Sikes*, 330 N.C. 595, 600, 411 S.E.2d 588, 591-92 (1992).

On the question of whether defendant has insufficient means to defray the expenses of the action, the record reveals that the court made its determination on this issue without considering the relative estates of the parties. The trial court only made findings on the value of the defendant's estate. Whether a party has insufficient means to defray the expenses of the action requires a consideration of the estates of both parties. "[T]o require one seeking an award of attorney's fees to meet the expenses of litigation through the unreasonable depletion of her separate estate where her separate estate is smaller than that of the other party" would be contrary to the intent of the legislature. *Cobb v. Cobb*, 79 N.C. App. 592, 596-97, 339 S.E.2d 825, 828 (1986); *Lawrence v. Tise*, 107 N.C. App. 140, 153-54, 419 S.E.2d 176, 185 (1992) (court's finding mother has means to pay attorney is not supported by evidence where her income is not sufficient to pay legal expenses and she would have to deplete her small estate to pay legal expenses); *cf. Clark v. Clark*, 301 N.C. 123, 136-37, 271 S.E.2d 58,

67-8 (1980) (in alimony case, court should inquire into separate estates of parties which are available to defray costs of litigation and disparity of financial resources). Because, therefore, of these inadequacies with respect to the issues of whether the plaintiff refused to pay adequate child support and whether the defendant had sufficient means to defray the legal expenses of the child support action, the question of defendant's entitlement to attorney's fees is remanded to the trial court for reconsideration.

On remand, with regard to both the child support issue and the attorney's fees issue, "the trial court should enter a new judgment consistent with this opinion, relying upon the existing record . . . and receiving additional evidence and entertaining argument only as necessary to correct the errors identified herein." *Fox v. Fox*, 114 N.C. App. 125, 138, 441 S.E.2d 613, 621 (1994).

Reversed and remanded.

Judge COZORT concurs.

Judge LEWIS dissents in part and concurs in part.

Judge LEWIS dissenting in part, concurring in part.

I dissent as to the majority's decision to remand on the issue of attorney's fees under N.C.G.S. § 50-13.6. I do not agree that the trial court is required in this case to consider the relative estates of the parties in determining whether the party seeking attorney's fees has insufficient means to defray the expense of the suit. I also do not agree that requiring this defendant to pay her own attorney's fees constitutes an unreasonable depletion of her estate.

None of the cases cited by the majority require a consideration of the relative estates of the parties in determining the threshold question of whether attorney's fees should be awarded in child support cases. *Clark* was an alimony case dealing with the issue of whether the proper amount of fees had been awarded, and not with the initial determination of whether attorney's fees should have been awarded at all. *See Clark*, 301 N.C. at 136, 271 S.E.2d at 67. As such, it is inapposite.

In *Cobb*, this court did consider the relative estates of the parties in making a determination of whether an award of attorney's fees was proper. *Cobb*, 79 N.C. App. at 596, 339 S.E.2d at 828. However, *Cobb*

does not require such a consideration in all cases. Consideration of both parties' estates is appropriate under Cobb when the party seeking attorney's fees would be required to deplete her estate unreasonably in order to pay her litigation expenses. *See id.* at 596-7, 339 S.E.2d at 828.

The plaintiff seeking attorney's fees in *Cobb* had no liquid assets and her actual income did not meet her living expenses. Thus, requiring her to deplete this small estate was not reasonable. Here, the court found that defendant has a liquid estate of $666,581, a home worth $350,000, two cars, and furniture, all of which have an approximate value of $ 1.1 million. Defendant's situation is very different from the plaintiff in *Cobb* who would have had to sell her only remaining asset, her home, to pay attorney's fees. Defendant's situation is also very different from the plaintiff in *Lawrence*, also cited by the majority, whose monthly expenses exceeded her income and who had a small estate compared to that of defendant here. *See Lawrence*, 107 N.C. App. at 153-54, 419 S.E.2d at 184.

Requiring defendant to sell some of her substantial assets to pay her attorney's fees is not an unreasonable depletion of her estate. Plaintiff may well be required to liquidate some of his assets to pay his litigation expenses. Since defendant has substantial assets, it is not unreasonable to require her to liquidate some of hers as well. Thus, there was no need for the court to inquire into the relative estates of the parties.

The majority's requirement that a court always consider the relative estates of both parties may result in the award of attorney's fees whenever one spouse has a larger estate than the other even when the moving party has a substantial estate. Such a requirement goes far beyond the scope of section 50-13.6 which permits attorney's fees only when the party seeking fees has "*insufficient means to defray the expense of the* suit" I cannot believe that the legislature intended such a result nor should we build an additional hurdle for trial judges to clear.

The trial court did not err in finding that the defendant had sufficient means to defray her litigation expenses. Since a finding of insufficient means is required for an award of attorney's fees under section 50-13.6, the trial court properly denied defendant's motion for attorney's fees.

I concur with the majority's disposition of the other issues raised in this case.

NATIONWIDE MUTUAL INSURANCE CO. v. STEVE E. LANKFORD, LINDA LANKFORD, WALTER SCOTT LANKFORD AND NANCY B. OLDHAM

No. 9310SC1143

(Filed 4 April 1995)

Insurance § 439 (NCI4th)— parental obligation to pay child's medical expenses—claim covered by parents' insurance policy—"family member" exclusion invalid

The contract of insurance between plaintiff and defendant parents could properly be construed so as to provide UM coverage for their claim for medical expenses incurred by their unemancipated minor son grounded upon the parental support obligation, and the language of defendant son's policy had no bearing on the right of the parents to pursue that coverage under their separate policy; furthermore, the parents' claim was not barred by the "family member" exclusion for UM coverage in their policy, since it was repugnant to the purpose of UM and UIM coverage and therefore invalid.

Am Jur 2d, Automobile Insurance §§ 287 et seq.

Validity, construction, and application of provision of automobile liability policy excluding from coverage injury or death of member of family or household of insured. 46 ALR3d 1024.

Validity, under insurance statutes, of coverage exclusion for injury to or death of insured's family or household members. 52 ALR4th 18.

Appeal by defendants from summary judgment entered 11 August 1993 by Judge Jack A. Thompson in Wake County Superior Court. Heard in the Court of Appeals 9 June 1994.

Bailey & Dixon, by Dorothy V. Kibler and Kenyann G. Brown, for plaintiff-appellee.

Staton, Perkinson, Doster, Post, Silverman & Adcock, by Jonathan Silverman and Elizabeth Myrick, for defendants-appellants Steve E. Lankford, Linda Lankford, and Walter Scott Lankford.

JOHN, Judge.

In this declaratory judgment action, defendants-appellants (defendants) argue the trial court improperly granted summary judgment in favor of plaintiff Nationwide Mutual Insurance Company (Nationwide), thereby effectively barring defendants Steve and Linda Lankford (Mr. and Mrs. Lankford, the parents) and their son, defendant Walter Scott Lankford (Scott), from raising any claims for uninsured motorists (UM) coverage under the parents' insurance policy with Nationwide. We agree the parents were erroneously denied coverage by the court's ruling.

Pertinent factual and procedural information may be summarized as follows: On 19 March 1992, Scott (a minor child on that date) was operating a 1984 Chevrolet Camaro on Rural Paved Road 1001 in Sanford, North Carolina. Scott was seriously injured when a 1983 Dodge, operated by defendant Nancy B. Oldham (Oldham), crossed the center line and collided with his Camaro. It is undisputed that Oldham's vehicle was not covered by automobile liability insurance at the time of the collision, and that Scott's resultant medical expenses for his injuries totalled $19,229.41.

Nationwide had previously issued two personal automobile insurance policies to members of the Lankford family which were in effect on 19 March 1992—Policy Number 61-32-J-586-038 (Scott's policy) and Policy Number 61-32-B-499-546 (the parents' policy). Scott's policy, providing coverage for his separately-owned Camaro, contained UM coverage of $50,000.00 per person and $100,000.00 per accident. The parents' policy, listing a 1990 Nissan and a 1985 Ford as covered vehicles, also afforded UM coverage in the amount of $50,000.00 per person and $100,000.00 per accident.

Scott and his parents subsequently filed claims with Nationwide under both policies to recover their damages. On 8 June 1992, Nationwide tendered a check for $50,000.00 to the attorney representing the three, contending that sum represented the total amount of UM coverage applicable to the claims of both Scott and his parents. Nationwide's tender was rejected, however, and on 23 June 1992, two separate civil actions against Oldham were filed in Lee County Superior Court. In their action, Mr. and Mrs. Lankford sought to recover expenses incurred for Scott's medical care. Scott's separate lawsuit, brought on his behalf by guardian *ad litem* Linda Lankford, included claims to recover damages for "permanent physical injuries, scarring and great pain and suffering [and] . . . severe emotional distress."

On 30 November 1992, Nationwide filed the instant action in Wake County Superior Court seeking declaratory relief under N.C. Gen. Stat. § 1-253 (1983) as well as a directive that the parents and Scott interplead their respective claims within the policy limits of UM coverage provided in *Scott's* insurance policy. Nationwide alleged "[t]he parents' policy provides no coverage for claims arising out of [the 19 March 1992] [ac]cident," and that "[a]ny and all claims asserted by [the parents] that arise out of the [ac]cident are derivative of Scott['s] . . . claim for bodily injury." Nationwide sought a declaration that the parents' policy provided "no coverage . . . for any damages which Ms. Oldham is or may become legally responsible [for] because of injuries to Mr. Lankford, Ms. Lankford, or . . . Scott Lankford[.]" Nationwide further requested a determination that its "maximum limit of liability is $50,000.00, the liability limit for Uninsured Motorist Coverage under the minor child's policy." As all parties had stipulated that the combined damages of Scott and his parents exceeded $50,000.00, Nationwide further suggested that the court "adjudge which Defendant or Defendants is entitled to the sum of money or to any portion."

The parties subsequently filed cross-motions for summary judgment which were heard at the 28 June 1993 civil session of Wake County Superior Court. The court's order, entered 11 August 1993, denied defendants' motion and granted that of plaintiff, stating in pertinent part:

> 3. The total amount of coverage under any policy issued by Nationwide available to the Lankfords as a result of the March 19, 1992 accident between . . . Scott . . . and Nancy B. Oldham is hereby declared to be $50,000.00;
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> 4. Nationwide, having previously deposited the sum of $50,000.00 with the Wake County Clerk of Superior Court, is hereby discharged from all liability under its Policy Number 61-32-B-499-546, issued to Steve E. Lankford and Linda Lankford, and Policy Number 61-32-J-586-038, issued to Walter Scott Lankford, including any obligation of any type arising out of the lawsuits pending in Lee County Superior Court . . . ;
>
> 5. Each of the Defendants Steve E. Lankford, Linda Lankford, [and] Walter Scott Lankford . . . shall proceed to determine the amount of their claims and their interest in the $50,000.00 currently held by the Wake County Clerk of Superior Court;

> 6. Defendants are restrained and enjoined from any and all further attempts to recover amounts in excess of $50,000.00 from Nationwide . . . .

Nationwide informs us that the monies held by the Clerk were disbursed to Scott following the court's ruling pursuant to the terms of a consent order signed by Scott, Mr. and Mrs. Lankford, the attorney representing both parents and Scott, and counsel for Nationwide.

Defendants appeal summary judgment in favor of Nationwide on grounds that "both policies of automobile insurance issued by [Nationwide] afforded coverage for the injuries and damages sustained by the Lankford Defendants."

In their appellate brief, Scott and his parents expound upon the above contention by presenting two basic propositions: (A) that the parents are entitled to recover for Scott's medical expenses under the UM section of the insurance policy issued them individually by Nationwide; and (B) that Scott may also recover under the UM coverage portion of their policy as a "person insured," despite certain exclusions from coverage contained within Scott's own policy. We find merit in defendants' discussion relative to Part A and hold the parents' personal contract of insurance provides coverage for their separate claims in this instance. However, we decline to discuss in detail the contentions raised in Part B, which contain internal inconsistencies and which at times are irreconcilable with other assertions made in defendants' brief.

A.

With respect to their first argument, defendants begin with the assurance that the parents "are simply seeking *coverage they contracted for in their own policy* for the injuries they sustained due to necessary medical treatment for their minor child caused by a negligent uninsured motorist." (Emphasis added). In other words, "[Scott] is not claiming on his parents' policy and the parents' [sic] are not claiming on [Scott's] policy." That being so, defendants correctly observe that "this is neither an intrapolicy [n]or [an] interpolicy stacking case." *See, e.g.*, *Mitchell v. Nationwide Ins. Co.*, 110 N.C. App. 16, 23-25, 429 S.E.2d 351, 354-56 (1993) (*intrapolicy* stacking involves aggregating the limits of liability for different vehicles insured under a single policy; *interpolicy* stacking means aggregating the limits of coverage contained under two or more contracts of insurance), *aff'd*, 335 N.C. 433, 439 S.E.2d 110 (1994); *see also Proctor*

v. N.C. Farm Bureau Mutual Ins. Co., 335 N.C. 533, 534-35, 439 S.E.2d 112, 113 (1994).

The fundamental question herein, therefore, is whether the policy of insurance issued to the parents provides by its own terms UM coverage of their claim for reimbursement of Scott's medical expenses. Our consideration of this issue is guided by this Court's recent statement that, "[i]n determining whether coverage is provided by a particular automobile liability insurance policy, 'careful attention must be given to [1] the type of coverage, [2] the relevant statutory provisions, and [3] the terms of the policy.' " *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 115 N.C. App. 438, 441, 445 S.E.2d 79, 81 (quoting *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)), *disc. review allowed*, 337 N.C. 800, 449 S.E.2d 565 (1994).

In the case *sub judice*, because of Oldham's failure to have in effect bodily injury liability insurance at the time of the collision, we are concerned with UM coverage. The relevant statute on 19 March 1992 (and now) is N.C. Gen. Stat. § 20-279.21(b) (1993), which comprises a portion of the Financial Responsibility Act and provides in part as follows:

> (3) No policy of bodily injury liability insurance . . . shall be delivered or issued for delivery in this State with respect to any motor vehicle registered . . . in this State unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . because of bodily injury, sickness or disease, including death, resulting therefrom . . . .
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> . . . .
>
> 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 the 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 the motor vehicle.

In accordance with G.S. § 20-279.21(b)(3), beyond obtaining the standard liability and medical payments coverage, the parents also contracted in their Nationwide policy for the following UM coverage:

> INSURING AGREEMENT. We will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:
>
> 1. **Bodily injury** sustained by an **insured** and caused by an accident;
>
> . . . .
>
> **"Insured"** as used in this Part means:
>
> 1. You or any family member.
>
> . . . .
>
> LIMIT OF LIABILITY. The limit of bodily injury liability shown in the Declarations for "each person" for Uninsured Motorists Coverage [$50,000.00] 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 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 [$100,000.00] 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.

The parents individually filed suit against Oldham (the uninsured tortfeasor) seeking recovery of present and future expenses resulting from Scott's medical care. The declaratory judgment action herein arose to deal with the eventuality that a tort recovery against Oldham proved to be uncollectible and Mr. and Mrs. Lankford thereafter sought indemnity from Nationwide.

Because Scott was an unemancipated minor at the time of the events giving rise to the lawsuit filed by his parents, they allege an obligation to provide him support and necessary medical treatment. *See, e.g., Flippin v. Jarrell*, 301 N.C. 108, 120, 270 S.E.2d 482, 490 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981). The right to bring an independent cause of action for recovery of medical expenses is, they continue, concomitant with these parental duties. As our Supreme Court has stated:

> When an unemancipated minor is injured by the negligence of another, two claims may arise. The minor has a claim for his or her losses, and the parent has a claim for the loss of the child's services during minority and the medical expenses reasonably necessary for treatment of the minor's injuries.

Bolkhir v. N.C. State Univ., 321 N.C. 706, 713, 365 S.E.2d 898, 902 (1988) (citations omitted); *see also Vaughan v. Moore*, 89 N.C. App. 566, 568, 366 S.E.2d 518, 520 (1988) (citation omitted).

Nationwide argues, however, that because any and all damages sustained by the parents arose out of the single accident for which Scott received compensation under his own policy, the parents' claim is entirely derivative in nature and barred by the terms of *Scott's* insurance policy. In making this assertion, Nationwide points to language in the Declarations section of Scott's policy designating $50,000.00 as "[Nationwide's] 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 auto accident," coupled with its tender of $50,000.00 to the Clerk of Court when instituting the declaratory judgment action *sub judice*.

However, we do not perceive the parents' claim as being "derivative" with respect to the provisions and terms of *their individual* policy. As noted above, our cases have established that the parents of an unemancipated minor injured by the negligence of another obtain an independent cause of action for the medical expenses reasonably necessary for treatment of the minor's injuries. *See, e.g., Bolkhir*, 321 N.C. at 713, 365 S.E.2d at 902 (citations omitted). Admittedly, the parents would have no claim absent bodily injury to Scott. *See South Carolina Ins. Co. v. White*, 82 N.C. App. 122, 126, 345 S.E.2d 414, 416 (1986). However, if the contract of insurance between Nationwide and Scott's *parents* may properly be construed so as to provide coverage for the claim grounded upon the parental support obligation, the language of Scott's policy (by happenstance also issued by

Nationwide) has no bearing on the right of the parents to pursue that coverage under their separate policy.

Thus, bared to its essence, the sole issue before us is whether the provisions of the policy issued to Mr. and Mrs. Lankford provide coverage for the claim pursued in their independent action against Oldham. We note in this context that when construing insurance policies:

> The various terms of [an insurance] 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).

Bearing the foregoing principles in mind, we focus on the language of the parents' policy, which expressly provides that Nationwide "will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of: . . . **Bodily injury** sustained by an **insured** and caused by an accident . . . ." In the section of the policy detailing the limits of Nationwide's liability, Nationwide defines "bodily injury" as including "damages for care, loss of services or death, sustained by any one person in any one auto accident." In addition, the policy defines "insured" as "You [the named insured, i.e., Mr. and Mrs. Lankford] or any family member."

We hold the above language operates to provide coverage for the claim of Mr. and Mrs. Lankford for Scott's medical expenses. Both parents are "insureds" (named insureds) seeking "compensatory damages" (for medical expenses) from an uninsured motorist (Oldham) for "bodily injury" ("damages for care") sustained by "an insured" (*either* Scott *or* his parents). In arriving at this conclusion, it is neither necessary nor pertinent to consider Scott's distinct claims and coverage, raised under his separate contract of insurance.

Nationwide responds by referring to certain exclusionary language also contained within the policy issued to the parents, to wit:

> **EXCLUSIONS**
>
> A. We do not provide Uninsured Motorists Coverage for **property damage** or **bodily injury** 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.

Nationwide maintains that because Scott was "occupying" a motor vehicle "owned by . . . a[] family member [i.e., Scott]" but "not insured for this coverage under this policy" (which specifically listed only a 1990 Nissan and a 1985 Ford), these circumstances fall squarely within contemplation of Exclusion 7, and UM coverage is barred. We disagree.

First, it is well-established that the primary purpose of the Financial Responsibility Act (including G.S. § 20-279.21(b)(3)) "is to compensate the innocent victims of financially irresponsible motorists." *Insurance Co. v. Guaranty Co.*, 283 N.C. 87, 90, 194 S.E.2d 834, 837 (1973); *see also Nationwide Mutual Ins. Co. v. Baer*, 113 N.C. App. 517, 522, 439 S.E.2d 202, 205 (1994) (purpose of the Financial Responsibility Act "has always been to protect innocent motorists from financially irresponsible motorists") (citation omitted). Thus, since G.S. § 20-279.21(b)(3) is "remedial legislation," it is to be liberally construed so as to effectuate its purposes. *Hendricks v. Guaranty Co.*, 5 N.C. App. 181, 184, 167 S.E.2d 876, 878 (1969); *Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, 206, 444 S.E.2d 664, 672, *disc. review allowed*, 337 N.C. 802, 449 S.E.2d 748, 450 S.E.2d 485 (1994).

As a consequence, this Court in a series of decisions has determined that although a "family-owned vehicle" (or "household-owned vehicle") exclusion may be "clear and unambiguous," it will not be upheld by our courts in the context of UM/UIM coverage. *See Hussey v. State Farm Mut. Auto. Ins. Co.*, 115 N.C. App. 464, 468, 445 S.E.2d 63, 65-66, *disc. review allowed*, 338 N.C. 310, 450 S.E.2d 487 (1994); *Bray*, 115 N.C. App. at 444, 445 S.E.2d at 82; *Mabe*, 115 N.C. App. at 203-06, 444 S.E.2d at 670-72. Our rulings in these cases have turned on the premise that such exclusions "work[] to deny UM protection to Class I insureds [e.g., Mr. and Mrs. Lankford and Scott], thereby subverting the legislative policies articulated in the Financial Responsibility Act." *Hussey*, 115 N.C. App. at 468, 445 S.E.2d at 66; *see Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 554, 340 S.E.2d 127, 129-30 (For purposes of UM/UIM coverage, there are 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 . . . ."), *disc. review denied*, 316 N.C. 731, 345 S.E.2d 387 (1986); *see also* G.S. § 20-279.21(b)(3).

In the words of our Supreme Court: "[w]hen one member of a household purchases first-party [UM/]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 [UM/]UIM coverage . . . ." *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 193, 420 S.E.2d 124, 130 (1992). Further, UM/UIM coverage has been described as being "essentially person oriented." *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 148, 400 S.E.2d 44, 50 (1991). Therefore, "[m]embers of the first class [here, both Scott and his parents] are 'persons insured' for the purposes of UM coverage regardless of whether the insured vehicle is involved in their injuries[;]" *Bray*, 115 N.C. App. at 443, 445 S.E.2d at 82 (citation omitted), indeed even if "just walking down the street." *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 112, 418 S.E.2d 221, 223 (1992) (discussing UIM coverage).

As we concluded in *Bray*, the parents' policy's " 'family member' exclusion for UM coverage is repugnant to the purpose of UM and UIM coverage and is therefore invalid." *Bray*, 115 N.C. App. at 444, 445 S.E.d at 82; *Hussey*, 115 N.C. App. at 468, 445 S.E.2d at 65 (although "the 'owned vehicle' exclusion is clear and unambiguous, . . . the exclusion's effect renders it void against public policy"). Because the effect of Exclusion 7 in the case *sub judice* is "to deny UM protection to Class I insureds, thereby subverting the legislative policies articulated in the Financial Responsibility Act," it is "void against public policy." *Hussey*, 115 N.C. App. at 468, 445 S.E.2d at 65.

Accordingly, we will not give effect to the "family owned" exclusion written into the policy issued to Mr. and Mrs. Lankford. As no other language contained within their insurance contract serves to preclude from coverage the claim for Scott's medical expenses, we hold coverage for such claim is provided by their independent insurance policy issued by Nationwide. The trial court therefore erred in entering summary judgment in favor of Nationwide.

B.

Defendants also argue that as a Class I insured Scott is entitled as well to UM coverage under the policy issued to the parents. We find

this contention irreconcilable with defendants' earlier assertion that "in this case, [Scott] is not claiming on his parents' policy and [Mr. and Mrs. Lankford] are not claiming on [Scott's] policy." Having ruled in defendants' favor at least partly on the basis of that assurance, we therefore decline to discuss this alternative argument in detail.

However, we do note defendants' assertion of Scott's entitlement to recovery under his parents' policy relies in the main upon the notion that Scott's status as a minor when *he* contracted for insurance somehow renders unenforceable as to him certain contractual provisions included in the *parents'* policy. In particular, defendants allege that Exclusion 7 in the *parents'* insurance contract (determined to be contrary to public policy, *see* related discussion *supra*) should not be held to bar Scott's recovery under their policy. This argument surely misses the mark. As Scott was not a party to the insurance contract entered into between the parents and Nationwide, his minority would not appear to have any bearing upon the terms and enforceability thereof.

For the reasons discussed in Part A., *supra*, we reverse the trial court's entry of summary judgment in favor of Nationwide and remand with instructions that summary judgment be entered in favor of Mr. and Mrs. Lankford on the issue of entitlement to coverage under their individual policy of insurance. As the consent judgment apparently entered into by the parties subsequent to the trial court's ruling is not part of the record herein, we express no opinion as to the effect thereof, if any, upon the determination of the parents' claim following remand. Our opinion speaks only to the parents' entitlement to pursue a claim for Scott's medical expenses under the provisions of their independent policy of insurance.

Reversed and remanded.

Judges GREENE and McCRODDEN concur.

Judge McCRODDEN concurred prior to 15 December 1994.

BRITTHAVEN, INC., D/B/A BRITTHAVEN OF MORGANTON, PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, RESPONDENT-APPELLEE, AND VALDESE NURSING HOME, INC., RESPONDENT-INTERVENOR-APPELLEE

No. 9410DHR502

(Filed 4 April 1995)

1. Hospitals and Medical Facilities or Institutions § 15 (NCI4th)— certificate of need—review of decision—de novo hearing not required

A nursing facility owner was not entitled to a *de novo* proceeding by an administrative law judge when it petitioned for a contested case hearing challenging an agency's denial of its application for a certificate of need for additional nursing and home-for-the-aged beds in its facility, and the agency's initial decision was properly reviewed by the administrative law judge. The subject matter of a contested case hearing before an administrative law judge is the agency decision, and the administrative law judge is to determine whether the petitioner has met its burden of showing that the agency substantially prejudiced its rights and that the agency acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law. N.C.G.S. §§ 131E-188, 150B-23(a).

Am Jur 2d, Hospitals and Asylums §§ 3 et seq.

2. Hospitals and Medical Facilities or Institutions § 12 (NCI4th)— competing certificate of need applications—applications judged individually, then compared—least costly or most effective alternative

It is not the intent of N.C.G.S. § 131E-183(a) to compare competing applications for a certificate of need under Criterion 4, that applicant shall demonstrate that the least costly or most effective alternative has been proposed, but rather to judge each application individually under Criterion 4, as well as the remaining criteria set forth in the statute, and only thereafter analyze the competing proposals to determine which is better overall. Even though respondent improperly applied Criterion 4, the agency's initial decision was supported by substantial evidence, and the same result would have been reached if the agency had analyzed the applications by the required two-step process.

Am Jur 2d, Hospitals and Asylums §§ 3 et seq.

3. Hospitals and Medical Facilities or Institutions § 12 (NCI4th)— certificate of need applications—method of allocating bed need proper

The method of allocating bed need used by the project analyst of the Certificate of Need Section in determining where nursing beds should be located, including a subcounty analysis, was included in the findings of the recommended decision and eventually adopted in the Final Decision, was supported by substantial evidence and was not without reasonable basis, and was not arbitrary, capricious, or inconsistent with agency practice.

Am Jur 2d, Hospitals and Asylums §§ 3 et seq.

Appeal by petitioner from final decision entered 21 November 1993 by John M. Syria, Director of the North Carolina Department of Human Resources Division of Facility Services, Burke County. Heard in the Court of Appeals 11 January 1995.

In 1992, the State Medical Facilities Plan (hereinafter "SMFP") identified a need for sixty nursing beds in Burke County. On 16 July 1992, North Carolina Department of Human Resources, Division of Facility Services, Certificate of Need Section (hereinafter "the Agency") received proposals from three different applicants, each seeking to develop or expand their respective Burke County facilities.

Prior to the 1992 review, Valdese Nursing Home, Inc. (hereinafter "Valdese") had received a certificate of need to construct an eighty bed nursing facility, consisting of forty nursing beds and forty home-for-the-aged beds. During the 1992 review, Valdese submitted an application seeking to convert twenty home-for-the-aged beds to twenty nursing facility beds, and to construct forty new nursing facility beds in Valdese, North Carolina. Burke Health Care Center, Inc. (hereinafter "Burke") filed an application seeking to construct a new eighty bed combination nursing facility in Morganton, North Carolina. Britthaven, Inc., d/b/a Britthaven of Morganton (hereinafter "Britthaven") submitted a CON application, seeking to add sixty additional nursing facility beds and five home-for-the-aged beds at its existing one hundred twenty-one nursing bed facility located in Morganton.

On 25 November 1992, following a public hearing the Agency notified Britthaven and Burke of its decision to deny their applications and to approve the Valdese application. Only Britthaven filed a petition for contested case in the Office of Administrative Hearings (here-

inafter "OAH"), challenging the denial of its application and approval of Valdese's application. Valdese intervened. On 17 September 1993, an administrative law judge (hereinafter "ALJ") affirmed the Agency's decision to approve the Valdese application, but concluded that the Agency failed to use proper procedure in conducting the review of the applications under the applicable statutory criteria. The ALJ held, however, that "such procedural imperfection amounts to harmless error not affecting the outcome of the Agency decision."

On 21 November 1993, the Director of the Division of Facility Services issued the Final Decision. He adopted and affirmed the ALJ's findings of fact, but disagreed "to the extent that [the Recommended Decision] implies that the Agency improperly conducted the review of the applications . . . ." Britthaven appeals the Final Decision.

Additionally, Respondent Valdese presents a cross-assignment of error pursuant to North Carolina Rule of Appellate Procedure, Rule 10(d) (1994) pertaining to the exclusion of evidence that Britthaven misrepresented certain information in its CON application.

Bode, Call & Green, by Robert V. Bode, Nancy O. Mason, and Diana E. Ricketts, for petitioner appellant.

Attorney General Michael F. Easley, by Associate Attorney General Sherry L. Cornett, for respondent North Carolina Department of Human Resources.

Smith, Helms, Mullis & Moore, L.L.P., by Maureen Demarest Murray and Terrill Johnson Harris, for respondent Valdese Nursing Home, Inc.

ARNOLD, Chief Judge.

[1] Petitioner Britthaven's first assignment of error is that the Agency's initial decision was improperly reviewed, thereby restricting the applicant's statutory hearing rights. Specifically, petitioner argues that the ALJ's Recommended Decision and the Director's Final Decision afforded a "presumption of correctness" as to the Agency's initial decision, rather than providing a *de novo* hearing as to all disputed issues. Petitioner's argument is without merit.

The review procedure set forth in certificate of need (hereinafter "CON") law allows for the agency to make an initial decision as to whether an applicant is entitled to a certificate of need. N.C. Gen. Stat. § 131E-186(a) (1994). If there are competing applications, the

agency must hold a public hearing. G.S. § 131E-185(a)(2). The agency's decision to approve, approve with conditions, or deny an application for a certificate of need is based upon its determination of whether the applicant has complied with statutory review criteria under N.C. Gen. Stat. § 131E-183(a) and rules adopted by the agency, in this case, 10 North Carolina Administrative Code § 3R.1100, *et seq.* (1991). G.S. § 131E-186(a) and (b).

Thereafter, administrative and judicial review of the agency's decision is governed by N.C. Gen. Stat. § 131E-188. Any "affected person," such as Britthaven, is entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes. G.S. § 131E-188(a). Under Chapter 150B, a petitioner is afforded a full adjudicatory hearing before the ALJ, including an opportunity to present evidence and to cross examine witnesses. G.S. §§ 150B-23(a) and 150B-25(c) and (d) (1991). The ALJ then makes a recommended decision or order, containing findings of fact and conclusions of law. G.S. § 150B-34(a). Based solely upon its review of an official record prepared by the OAH, which includes evidence presented at the contested case hearing, the agency issues a final decision, either adopting the ALJ's recommended decision, or if not, stating specific reasons why it did not adopt the recommended decision. G.S. § 150B-36(b). Finally, any affected person who was a party in the contested case hearing may appeal to this Court for judicial review of all or any portion of the final decision. G.S. § 131E-188(b).

Petitioner contends that the exercise of its right to an evidentiary hearing under the contested case provision of N.C. Gen. Stat. § 131E-188(a) commenced a *de novo* proceeding by the ALJ intended to lead to a formulation of the final decision. Petitioner misconstrues the nature of contested case hearings under the CON law and the Administrative Procedure Act. The subject matter of a contested case hearing by the ALJ is an agency decision. Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that *the agency* substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. G.S. § 150B-23(a). The judge determines these issues based on a hearing limited to the evidence that is presented or available to the agency during the review period. *See In re Application of Wake Kidney Clinic*, 85 N.C. App. 639, 355 S.E.2d 788, *disc. review denied*, 320 N.C. 793, 361 S.E.2d 89 (1987); *see also* 2 Am. Jur. 2d, *Administrative*

Law § 299 (1994) ("[U]pon resumption of formal proceedings all evidence presented in the informal proceeding becomes part of the record of the formal proceeding."). Therefore, based on the evidence presented here, the Agency's decision was properly reviewed for error under N.C. Gen. Stat. § 150B-23(a).

Furthermore, petitioner's reliance on *Ashbacker Radio Corp. v. Federal Com. Com.*, 326 U.S. 327, 90 L. Ed. 108 (1945) for its contention that petitioner is entitled to a *de novo* hearing in the OAH is misplaced. The Supreme Court merely held in *Ashbacker* that "where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Id.* at 333, 90 L. Ed. at 113. In this case, unlike in *Ashbacker*, each applicant was afforded an opportunity to be heard on their competing applications.

[2] Petitioner's second assignment of error is that the Agency erred in its improper application of the review criterion found in N.C. Gen. Stat. § 131E-183(a)(4), referred to as Criterion 4. The ALJ agreed with petitioner that the Agency's review process "did not comport with the statutory requirements," but nevertheless found that the procedural defect amounted to "harmless error not affecting the outcome of the Agency decision." The Director in his Final Decision affirmed the ALJ's Recommended Decision, however, he disagreed with the judge "to the extent that it implies that the Agency improperly conducted the review of the applications . . . ." Therefore, there are conflicting views as to how competing applications for a certificate of need are to be compared under the statute.

Before addressing the merits of petitioner's assignment of error, the proper scope of review for this Court to review a CON case should be considered. *See Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981) (holding that in presenting appeals from an administrative decision to the judicial branch, it is essential for the parties to present their contentions as to the applicable scope of review, and further, the reviewing court should make clear the review standard under which it proceeds). "The nature of the contended error dictates the applicable scope of review." *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981). Because the nature of this assignment of error concerns the Agency's interpretation and application of an administrative statute, the following rule applies:

> When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. "The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Company*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124, 129 (1944).

Brooks, 303 N.C. at 580-81, 281 S.E.2d at 29 (citations omitted) (quoting *In re Appeal of North Carolina Savings & Loan League*, 302 N.C. 458, 465-66, 276 S.E.2d 404, 410 (1981)).

In deciding whether to issue a certificate of need, the Agency must determine whether an application is "either consistent with or not in conflict with [the criteria set forth in N.C. Gen. Stat. § 131E-183(a)]." G.S. § 131E-183(a). One of the fifteen criteria in effect, Criterion 4 states, "Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed." G.S. § 131E-183(a)(4). Petitioner contends that the Agency, in making its initial decision, improperly used Criterion 4 as a "catch-all comparative standard" to decide which of the applicants was the "least costly or most effective." In other words, once the Agency found petitioner conforming to several criteria, it in effect used the same criteria to decide Criterion 4, finding petitioner nonconforming solely because it chose Valdese as the "least costly or most effective" of the mutually exclusive applications. Petitioner argues that it is not the intent of N.C. Gen. Stat. § 131E-183(a) to compare competing applications under Criterion 4, but rather to judge each application individually under Criterion 4, as well as the remaining criteria set forth in the statute, and only thereafter analyze the competing proposals to determine which was better overall. Petitioner's argument has merit.

The CON statute calls for competing applications to be reviewed together, or "batched," in compliance with *Ashbacker*, yet the statute does not set forth a procedure as to how to compare the applications. "[A] statute must be construed, if possible, to give meaning and effect to all of its provisions." *HCA Crossroads Residential Ctrs. v. N.C.*

Dept. of Human Res., 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990). A two stage process similar to that suggested by petitioner, and the ALJ in his Recommended Decision, is consistent with the language, purpose and overall scheme of the statute.

First, after the Agency "batches" all applications for competing proposals, the Agency must review each application independently against the criteria (without considering the competing applications) and determine whether it "is either consistent with or not in conflict with these criteria." G.S. § 131E-183(a). The use of singular nouns in the phrases beginning each listed criterion, such as "*the applicant* shall show" or "*the proposed project* shall show," support an initial independent evaluation of each application. Moreover, the plain language of Criterion 4 establishes that an applicant's burden is to show the least costly or most effective of the alternative methods, if any, within its *own* proposed project, not that its project is the least costly or most effective of *all* competing proposals. G.S. § 131E-183(a)(4).

Second, after each application is reviewed on its own merits, the Agency must decide which of the competing applications should be approved. This decision may include not only whether and to what extent the applications meet the statutory and regulatory criteria, but it may also include other "findings and conclusions upon which it based its decision." G.S. § 131E-186(b). Those additional findings and conclusions give the Agency the opportunity to explain why it finds one applicant preferable to another on a comparative basis. The CON law, therefore, does not contemplate that the Agency will review any criteria competitively, and subsequently find one applicant nonconforming to a criterion simply because another applicant is found conforming.

This procedure is consistent with the CON statute and its stated purpose. The language of the statute demonstrates the intent of the Legislature to have the Agency first ensure that each application comports with the statutory and regulatory criteria. Moreover, the stated purpose of the CON law to "control the cost, utilization, and distribution of health services and to assure that the less costly and more effective alternatives are made available," *In re Denial of Request by Humana Hospital Corp.*, 78 N.C. App. 637, 646, 338 S.E.2d 139, 145 (1986) (decided under former N.C. Gen. Stat. §§ 131-175 and 131-181 (1985 Supp.)), is fulfilled by the Agency's second step of making an overall comparison of the applications and supporting its decision to

grant the certificate to one applicant, and not the other, with written findings and conclusions explaining its decision.

Our next question is whether the Agency's improper application of Criterion 4 was nevertheless harmless given the ultimate decision to issue the certificate of need to Valdese. Both the ALJ and the Director agreed that the Agency's initial decision was supported by substantial evidence, and that the same result would have been reached if the Agency had analyzed the applications in the manner prescribed above. Petitioner argues that the Agency's findings under Criterion 4 were not supported by the evidence.

The scope of review here is the whole record test, "under which the findings of fact made by the agency are conclusive on appeal if they are supported by substantial evidence in the record reviewed as a whole." *Wake Kidney Clinic*, 85 N.C. App. at 644, 355 S.E.2d at 791. We are required to consider evidence which detracts from the decision, as well as evidence which supports it, but we cannot substitute our judgment for that of the Agency. *Id.* Proper application of the whole record test takes into account the administrative agency's expertise. *In re Charter Pines Hospital, Inc. v. N.C. Dept. of Human Resources*, 83 N.C. App. 161, 349 S.E.2d 639 (1986), *disc. review denied*, 319 N.C. 105, 353 S.E.2d 106 (1987).

Petitioner contends that there was insufficient evidence to support the Agency's findings and conclusions concerning Criterion 4, specifically the following: (1) Valdese was a more effective alternative with regard to geographic accessibility, (2) Valdese was the least costly or most effective alternative with regard to operating costs and charges, and (3) Valdese's application would promote competition. Although we agree with petitioner that Criterion 4 was improperly used as a catch-all standard for competing applications, after a thorough review of the record and transcripts of the OAH hearing, we find the evidence supported these findings and further serves as a rational basis for the Agency's decision that Valdese was entitled to the certificate of need. Although there was evidence presented by petitioner at the hearing which detracts from the decision, the instant case is not one in which this Court will substitute its judgment for that of a well-reasoned and supported Agency decision. *Id.*

[3] Finally, petitioner assigns as error a method of allocating bed need used by the Project Analyst of the CON Section in determining where the beds should be located. Petitioner contends that the Project Analyst improperly departed from the SMFP's method used to

compute the need for nursing beds on a county basis. Although, according to the SMFP mathematical formula, the overall need for nursing beds in Burke County was sixty, the Project Analyst used an independent sub-county analysis to determine *where* those sixty beds should be located within the county. In conducting his analysis, the Project Analyst analyzed Burke County's nursing home bed need using the same methodology used by the 1992 SMFP. He then divided Burke County into three areas, western, central and eastern, based upon the population clusters, existence of one or more nursing homes located in each area, and the highway systems. The analyst determined that eastern Burke County, in which the Valdese facility was located, had the greatest need for beds, and that the approval of Valdese's application would best address the need for additional nursing beds in Burke County. The ALJ made the following findings relevant to this issue, which were adopted by the Director in his Final Decision:

> 81. The Project Analyst performed an independent analysis of geographic access and used the 1992 SMFP methodology to project future bed need by township in Burke County.
>
> 82. The Project Analyst normally uses a sub-county analysis in his nursing home reviews. (Vol. II, p. 163). A sub-county analysis is consistent with Agency practice. The Project Analyst correctly determined that using townships was a valid means of analyzing where to locate nursing beds in Burke County, because the information from the 1990 census was the most current and readily available in the age categories used in the SMFP. (Vol. II, pp. 164-65). Britthaven did not provide any statistical sub-county analysis of need in its application and, in particular, did not offer a zip code analysis in its application, written comments or at the public hearing. Moreover, a zip code analysis was not practical, because maps are not always available showing the zip code areas, and zip codes can change from time to time. (Vol. I, p. 158).
>
> . . . .
>
> 83. The Project Analyst's decision to divide Burke County into three (3) areas, western, central, and eastern, based on the existence of a population cluster and one or more nursing homes in each area, was reasonable. (Vol. II, p. 167).

Under CON regulations, the "correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a con-

tested case hearing." 10 N.C.A.C. 3R .0420 (1989); *Charter Pines Hospital*, 83 N.C. App. 161, 349 S.E.2d 639. However, while the use of the required SMFP methodology was not reviewable at the contested case hearing, the Project Analyst's application of the SMFP methodology was "open to scrutiny at the contested case hearing for analytical, procedural and mathematical correctness." *Charter Pines Hospital*, 83 N.C. App. at 175, 369 S.E.2d at 648. The rules adopted by the Department of Human Resources for the review of nursing facility applications require the applicant only to show that "at least 85 percent of the anticipated patient population lives within 45 minutes automobile driving time . . . from the facility," 10 N.C.A.C. 3R .1118(b) (1991), but nothing in the statute prohibits the analysis conducted by the Project Analyst in the instant case. Although the Agency must review the applications in accordance with statutory criteria and administrative rules adopted by the Department of Human Resources, N.C. Gen. Stat. § 131E-186(b) requires the Agency to provide notice of its findings and conclusions upon which it based its decision, but does not limit those findings to statutory criteria or rules. In fact, the Project Analyst testified that it was his usual practice to conduct a sub-county analysis when receiving competing applications from applicants who propose to locate facilities in different areas within the county. As this Court stated in *Charter Pines Hospital:*

> The hearing officer was empowered to use his own best judgment in evaluating the weight and credibility of the evidence in the light of his administrative expertise. He was not bound by the testimony of [the petitioner's] expert, nor was he required to accept it as true. His determination that [the agency's project analyst] properly applied the 1983 SMFP methodology to [the petitioner's] proposal for psychiatric beds required the use of his administrative expertise in judging the credibility of the expert testimony presented. We cannot second-guess the exercise of that expertise and, finding substantial evidence in the record to support DHR's findings and conclusions, overrule these assignments of error.

Id., 83 N.C. at 177-78, 349 S.E.2d at 649-50. The findings made in the Recommended Decision and eventually adopted in the Final Decision include the sub-county analysis performed by the Project Analyst, which was supported by substantial evidence and was not without reasonable basis, was not arbitrary and capricious or inconsistent with Agency practice.

In a related issue we are not persuaded by petitioner's argument that the ALJ abused his discretion by not allowing Britthaven's rebuttal expert testimony. The judge properly excluded the testimony of an expert witness identified by petitioner to rebut the Project Analyst's sub-county need analysis because petitioner failed to disclose its witness in a timely manner. *See Mt. Olive Home Health Care Agency, Inc. v. Dept. of Human Resources*, 78 N.C. App. 224, 336 S.E.2d 625 (1985).

For the foregoing reasons we conclude that the Agency erred in comparing the competing applications by misapplying the statutory review criteria, but, based on our review of the record, and the arguments presented by the parties, the error was harmless. In light of our disposition of petitioner's appeal there is no need to address respondent Valdese's cross-assignments of error.

Affirmed.

Judges JOHNSON and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA v. ROBERT EUGENE WARD, DEFENDANT

No. 9421SC460

(Filed 4 April 1995)

1. Evidence and Witnesses § 2542 (NCI4th)— two-year-old sexual victim—competency to testify

In a prosecution of defendant for the alleged sexual abuse of a two-year-old, the trial court did not err in finding that the victim, who was four years old at the time of trial, was competent to testify and in allowing her to testify even though there were some contradictions in her testimony as to her knowledge of the difference in telling the truth and telling a "story." N.C.G.S. § 8C-1, Rule 601(b).

Am Jur 2d, Witnesses §§ 218, 219.

Competency of young child as witness in civil case. 81 ALR2d 386.

Witnesses: child competency statutes. 60 ALR4th 369.

2. Evidence and Witnesses § 981 (NCI4th)— young sexual abuse victim—refusal to cooperate—witness unavailable—hearsay testimony admissible

The trial court in a sexual abuse case did not err in admitting hearsay testimony of witnesses concerning statements that the victim made to them which identified defendant as the person who sexually abused her, since the victim's limited testimony showed that she was neither cooperative nor responsive and was therefore "unavailable" for purposes of testifying at trial; given her unavailability and the evidentiary importance of her statements, the hearsay testimony of the witnesses was "necessary"; and defendant did not dispute that the State established the inherent trustworthiness of the original declaration.

Am Jur 2d, Evidence §§ 691 et seq.

3. Rape and Allied Offenses § 195 (NCI4th)— first-degree sexual offense and rape—submission of attempted offenses not required

The trial court in a prosecution for first-degree sexual offense and first-degree statutory rape did not err in refusing to instruct the jury on attempted first-degree sexual offense and attempted first-degree rape where the State presented evidence that defendant anally and vaginally penetrated the two-year-old victim; defendant presented evidence that he was not with the victim on the weekend when she was allegedly abused and that the victim's mother actually abused her; and testimony elicited by defendant merely showed that he touched the victim in addition to committing acts sufficient to convict for first-degree sexual offense and first-degree rape.

Am Jur 2d, Rape §§ 97, 98.

Appeal by defendant from judgment entered 12 January 1994 by Judge James C. Davis in Forsyth County Superior Court. Heard in the Court of Appeals 31 January 1995.

This case involves the alleged sexual abuse of two year old Crystal Marie Wilson, the daughter of Samantha Wilson and James Lee Wilson, Jr. Samantha and James Wilson, Jr. separated in July 1992 and James Wilson, Jr. moved to the home of his mother, Sandra Wilson. The defendant, Robert Eugene Ward (hereinafter defendant), had also separated from his wife and had lived at Sandra Wilson's

home since January 1990. According to the visitation agreement that Samantha and James Wilson, Jr. had reached, James Wilson, Jr. was to have the couple's children every other weekend, every Monday from 1:30 p.m. to 8:00 p.m., and every other Thursday from 6:00 p.m. to 8:00 p.m. During the weekend of November 6-8, 1992, the infant victim stayed with her father at Sandra Wilson's home. After the victim returned from the weekend with her father, she told her mother that it hurt when she urinated. Samantha Wilson then noticed that her daughter's vaginal area was red and that her panties contained more discharge than normal. Though the victim had previously had urinary tract infections, her mother was concerned and asked her what had happened. The victim responded that defendant "put his bone in her cootie-coo." Samantha Wilson then took the victim to the North Carolina Baptist Hospital Emergency Room where an investigation into possible child sexual abuse began. Defendant was indicted on charges of first degree statutory rape, first degree statutory sexual offense, and taking indecent liberties with a child.

At the trial beginning 10 January 1994, a Dr. Santos testified that she had been a resident in pediatrics at North Carolina Baptist Hospital when the victim was first brought to the hospital on 8 November 1992. Dr. Santos testified that she examined the victim and that her vulva and labia were very red and that "[t]here was a tear or a laceration at the posterior part of the vulva area." Dr. Santos also found that the anal area was very red and that there was a "rectal tag which is an extra piece of skin" outside of the anal area. Dr. Santos testified that the rectal tag could have been congenital or could have resulted from an "irritation" such as penetration. Dr. Santos also testified that she gave the victim anatomical dolls and that with those dolls, the victim had demonstrated how defendant kissed her on the mouth, removed both his and her clothes, and touched her rectum with his finger. The victim told Dr. Santos that defendant put his penis (which the victim orally referred to as his "bone") in her vagina and rectum.

Cindy Stewart, a social worker with the Baptist Hospital Child/Medical Evaluation Team, testified that she interviewed the victim on 12 November 1992 in the pediatric clinic at Baptist Hospital. When the victim entered the room to talk with Ms. Stewart, the victim went directly to the anatomical dolls and began exploring them. The victim identified the vaginal area as the "cootie-coo" and told Ms. Stewart that defendant had hurt her "cootie-coo" and had put his "bone" in her "tail."

Dr. Sarah Hendrix Sinal, associate professor of pediatrics and family medicine at Bowman Gray School of Medicine and a member of the clinical staff at Baptist Hospital, testified as an expert in the field of pediatrics and child sexual abuse. Dr. Sinal testified she had examined the victim on 12 November 1992 and discovered a tear in the victim's anal area which she estimated was less than six weeks old. She testified that in her opinion the victim had been sexually abused.

Joetta Shephard, a social worker and supervisor with Family Services, a non-profit human service agency, testified that she first talked with the victim on 5 January 1993 for purposes of therapy. Ms. Shephard testified that the victim told her that defendant "hurt her cootie" and demonstrated by the use of anatomical dolls how defendant had been on top of her. Ms. Shephard stated that in her opinion, the victim had been sexually abused. Detective Ailene Sims with the Winston-Salem Police Department's Juvenile Unit testified that she interviewed the victim on 9 November 1992. Detective Sims testified that the victim told her that defendant put his "bone" in her.

Defendant then offered evidence. Nancy Ward, defendant's daughter, testified that she had previously accused her father of molesting her, but that she had fabricated the charges, hoping that it would bring her estranged parents closer together. Defendant testified that he had pled "no contest" to the charges brought by his daughter to spare her the trauma of a trial but that he had never molested her. He then testified that he had been living at Sandra Wilson's home but that he had never been alone with the victim and had never sexually abused her in any way.

James Lee Wilson, Sr., Sandra Wilson's husband, testified that defendant was not in his and Sandra Wilson's home during the weekend of November 6-8, 1992 and that defendant moved out in September 1992. After moving out, defendant was never there when the victim was visiting. Ronnie Cranfield, defendant's stepson, testified that defendant was not at Sandra Wilson's home during that weekend because defendant had been with him during much of that time. William Hill, Sr. also testified that defendant was not at Sandra Wilson's home during the November 6-8 weekend because he was with him at a repair shop working on an automobile carburetor. Spurgeon Wood, Jr. and Gene Ward, defendant's adopted son, also testified that defendant was at the repair shop during that weekend.

James Wilson, Jr., the victim's father, testified that defendant stopped living in Sandra Wilson's home in September 1992 and thereafter was never there when the victim was visiting at the home. James Wilson, Jr. also testified that while the victim was visiting him after the November 6-8, 1992 weekend, the victim awoke from a nightmare and told him that her mother had stuck her finger in her "cootie-coo" and that defendant did not hurt her. Janet Motsinger, a relative by marriage of Sandra Wilson, and Sandra Wilson also testified that the victim told them that her mother hurt her in her "cootie-coo." Sandra Wilson further testified that she talked to Samantha Wilson in September 1992 and that Samantha Wilson told her that James Wilson, Jr. would never get custody of his children because "there was a convicted child molester living in [Sandra Wilson's] household." Sandra Wilson testified that she then asked defendant to move out of her home because she did not want to hurt her son's chances of gaining custody of his children and because she did not want defendant to be accused of something he had not done.

On 12 January 1994, the jury found defendant guilty of the charges of first degree statutory rape, first degree statutory sexual offense, and taking indecent liberties with a child. The trial court consolidated the three offenses and sentenced defendant to life in prison.

Defendant appeals.

Nelson Boyles Niblock & Green, by Laurel O. Boyles, for defendant-appellant.

Attorney General Michael F. Easley, by Associate Attorney General Carol K. Barnhill, for the State.

EAGLES, Judge.

I.

[1] Defendant first argues that the trial court erred in finding that the victim was competent to testify and in allowing her to testify. The victim was four years old when she testified and the alleged offenses occurred when she was two years of age. Defendant argues that because of the victim's age and because of her inconsistent answers as to whether she knew what it meant to tell the truth, she was not competent to testify. G.S. 8C-1, Rule 601(b) provides:

(b) *Disqualification of witness in general.*—A person is disqualified to testify as a witness when the court determines that he is

> (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

"There is no age below which one is incompetent, as a matter of law, to testify." *State v. Jenkins*, 83 N.C. App. 616, 621, 351 S.E.2d 299, 302 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987). Determining whether a child is competent to testify is a matter within the sound discretion of the trial court. *Id.* The trial court's decision will not be reversed on appeal unless it is shown that it could not have been the result of a reasoned decision. *State v. Spaugh*, 321 N.C. 550, 554, 364 S.E.2d 368, 371 (1988), *citing State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987). In exercising his discretion, the trial court "must rely on his personal observation of the child's demeanor and responses to inquiry on *voir dire* examination." *State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 555 (1985).

In *Jenkins*, we held that the trial court did not err in finding that a four year old witness was competent to testify even though the witness gave contradictory answers on *voir dire* as to whether she knew the difference between the truth and a lie. *Jenkins* at 621-22, 351 S.E.2d at 302-303. There we stated that "the vast majority of cases in which a child witness' competency has been addressed have resulted in the finding, pursuant to an informal *voir dire* examination of the child before the trial judge, that the child was competent to testify." *Jenkins* at 621, 351 S.E.2d at 302-03. We pointed to *State v. McNeely*, 314 N.C. 451, 454-57, 333 S.E.2d 738, 741-42 (1985), where our Supreme Court upheld the trial court's finding of competency even though the child witness responded that she did not know what it meant to tell the truth. *Jenkins* at 621-22, 351 S.E.2d at 303. We also referred to *State v. Jones*, 310 N.C. 716, 722, 314 S.E.2d 529, 533 (1984), where our Supreme Court "cited as evidence of competency that the child knew that if she did not tell the truth she would get a spanking." *Jenkins* at 622, 351 S.E.2d at 303.

Here, relevant portions of the conversation between counsel for the State and the victim were:

> Q. Crystal, do you know what it means to tell the truth?
>
> A. (Witness nods head affirmatively.)
>
> Q. You do? What happens to you at home if you don't tell the truth?

A. A whipping.

Q. And does that hurt when you get a whipping?

A. Yes.

Q. Once you get a whipping, what do you know you're supposed to do after that? Do you know?

A. (Witness shakes head negatively.)

Q. But you know you get a whipping when you tell a story. Is that right?

A. Yes.

Q. Do you know what it means to tell a story?

A. No.

Q. You don't? Do you know what it means to tell the truth?

A. No.

Q. You don't know what it means to tell the truth? If I said that I had on a blue shirt, would I be telling the truth?

A. (Witness shakes head negatively.)

Q. I would not? What color is my shirt?

A. Blue.

Q. So if I had a blue shirt, then I would be telling the truth, wouldn't I?

A. (No response.)

. . . .

Q. Do you go to church or Sunday School?

A. I go to church.

. . . .

Q. You learned about Jesus in the manger at church. Is that right?

A. Yes.

Q. Would Jesus want you to tell the truth?

A. Yes.

Q. Would Jesus tell you to tell a story?

A. (Witness shakes head negatively.)

. . . .

Q. And if the judge asks you to tell the truth today, will you tell the truth?

A. Yes.

Q. Can you answer yes or no? If the judge wants you to tell the truth today, can you tell the truth?

A. No.

Q. You won't? Do you mean that you would tell the judge a story today?

A. No.

. . . .

Q. Will you tell the truth today about what happened to you?

A. (Witness nods head affirmatively.)

Relevant portions of the court's conversation with the victim were:

THE COURT: Now do you go to church?

THE WITNESS: Yes.

THE COURT: You indicated or you said that you knew you were supposed to tell the truth and what happens if you don't tell the truth?

THE WITNESS: I get a whipping.

. . . .

THE COURT: If I said your name was Mary, would I be telling the truth?

THE WITNESS: No. My name is Crystal.

. . . .

THE COURT: If I said your name was Crystal, would I be telling the truth?

THE WITNESS: Yes.

. . . .

THE COURT: If I said the lady over on the end over here was Mrs. Wilson, would I be telling the truth?

THE WITNESS: No.

THE COURT: If I said her name was Mrs. Sims, would I be telling the truth?

THE WITNESS: Yes.

Based on this testimony and our prior cases, we hold that the trial court did not abuse its discretion in finding the victim competent to testify and allowing her to testify. Any contradictions in her testimony went to her credibility, rather than her competency to testify. *State v. Cooke*, 278 N.C. 288, 291, 179 S.E.2d 365, 368 (1971).

II.

[2] Defendant next argues that the trial court erred in admitting hearsay testimony of Dr. Santos, Ms. Stewart, Ms. Shephard, and Detective Sims. These four witnesses testified about statements that the victim made to them which identified defendant as the person who sexually abused the victim. "To introduce hearsay evidence in a criminal trial, the prosecution must meet two requirements: (1) it must show the necessity for using hearsay testimony, and (2) it must establish the inherent trustworthiness of the original declaration." *State v. Jones,* 89 N.C. App. 584, 589, 367 S.E.2d 139, 143 (1988). In *Jones*, we found that the necessity requirement was satisfied because the victim was found incompetent to testify and thus was unavailable. *Jones* at 589-90, 367 S.E.2d at 143. In reaching that conclusion, we stated that " '[t]he unavailability of the victim due to incompetency and the evidentiary importance of the victim's statements adequately demonstrate[d] the necessity' requirement of the two-part hearsay test." *Jones* at 590, 367 S.E.2d at 143, *quoting State v. Gregory,* 78 N.C. App. 565, 568, 338 S.E.2d 110, 112-13 (1985), *review denied,* 316 N.C. 382, 342 S.E.2d 901 (1986). Because the victim here was available and did testify, defendant argues that the necessity requirement was not met. We disagree.

Once the infant victim here was declared competent to testify, she briefly answered a few questions asked by the State's counsel and then was cross examined by defendant's counsel. She never testified

about anything dealing with the charges in the case. A review of the transcript of her limited testimony shows clearly that the victim was neither cooperative nor responsive. Because the victim's testimony was so limited and because of her uncooperativeness, we hold that the victim was in fact "unavailable" for purposes of testifying at trial. Combining her *de facto* unavailability with the evidentiary importance of her statements, we hold that the hearsay testimony of the witnesses was "necessary" under the two-part hearsay test.

The second requirement of the two-part hearsay test requires the prosecution to establish the inherent trustworthiness of the original declaration. Defendant's brief does not dispute that the State established the inherent trustworthiness of the original declaration. Accordingly, we need not address the second requirement and hold that the trial court did not err in admitting the hearsay testimony of Dr. Santos, Ms. Stewart, Ms. Shephard, and Detective Sims.

III.

[3] Defendant next argues that the trial court erred in refusing to instruct the jury on attempted first degree sexual offense and attempted first degree rape. Dr. Santos testified that the victim had shown her on anatomical dolls how defendant touched her rectum with his finger. Ms. Stewart testified that the victim told her that defendant "hurted [sic] [her] tail, too." Based on this testimony, defendant, at the charge conference, moved that an instruction on attempted first degree sexual offense be given. Defendant also requested an instruction on attempted first degree rape based on Dr. Sinal's testimony that she found a tear in the victim's anal area that "was consistent with attempted penetration or penetration."

"A trial court must submit a lesser included offense instruction if the evidence would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater." *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986), *citing State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983). However, when the State seeks a conviction only on the greater offense and tries the case on an "all or nothing basis," the trial court needs to present an instruction on the lesser offense only when the "defendant presents evidence thereof or when the State's evidence is conflicting." *State v. Bullard*, 97 N.C. App. 496, 498, 389 S.E.2d 123, 124, *review denied*, 327 N.C. 142, 394 S.E.2d 181 (1990).

Here, the State proceeded on an "all or nothing basis." The defendant presented no evidence tending to show attempted first degree sexual offense or attempted rape. Instead, defendant only presented evidence to establish the defense that he was not with the victim on the weekend when she was allegedly abused and that the victim's mother actually abused her. Accordingly, defendant was entitled to an instruction on the lesser included offenses only if the State's evidence was contradicted. Defendant argues that the testimony by the State's witnesses, Dr. Santos, Ms. Stewart, and Dr. Sinal, created conflicts in the State's evidence. We disagree.

In *State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986), our Supreme Court held that evidence was conflicting because on direct examination, the victim testified that "she complied with the assailant's instructions to put his penis into her vagina," but on cross examination, the victim testified that she had told the police that the assailant tried to penetrate her but could not. *Johnson* at 436, 347 S.E.2d at 18. Our Supreme Court concluded that this testimony created a conflict in the evidence as to whether penetration occurred. *Id.*

The testimony elicited by defendant created no conflict in the evidence. The State presented evidence that defendant vaginally and anally penetrated the victim. The victim told her mother, Dr. Santos, Ms. Stewart, Ms. Shephard and Detective Sims that defendant "put his bone in her cootie-coo" and hurt her. The victim also demonstrated to Dr. Santos, Ms. Stewart, and Ms. Shephard on anatomical dolls where defendant had touched and penetrated her and showed Ms. Stewart that defendant had also "put his bone" in her anal opening. While defendant contends the testimony by Ms. Stewart, Dr. Santos, and Dr. Sinal created a conflict, their testimony merely showed that defendant touched the victim in addition to committing acts sufficient to convict for first degree sexual offense and first degree rape. Accordingly, we conclude that the trial court did not err in refusing to instruct the jury on attempted first degree rape and attempted first degree sexual offense.

IV.

Defendant finally argues that the trial court erred by signing and entering the judgment finding him guilty. From our review of the record and based on our conclusions above, we hold that the trial court did not err in signing and entering the judgment.

No error.

Judges WALKER and McGEE concur.

GEORGE A. GRIFFIN AND BRENDA GRIFFIN, PLAINTIFFS v. SAMUEL GRIFFIN, JO BULLOCK, CHARLIE LANKFORD, DOROTHY LANKFORD, AND KENNETH DAVID BULLOCK, DEFENDANTS v. MICHAEL GRIFFIN AND DONNA GRIFFIN, THIRD PARTY DEFENDANTS

No. 9411DC490

(Filed 4 April 1995)

Adoption or Placement for Adoption § 4 (NCI4th)— adoption proceeding in superior court—custody proceeding in district court—superior court's jurisdiction supersedes district court's

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody between nonparents with regard to the child who is the subject of the adoption petition. The superior court's jurisdiction supersedes that of the district court with regard to the custody of a child who is the subject of a simultaneous adoption and custody proceeding between nonparents since the adoption is more likely to result in a permanent plan of care for the child and because the superior court has jurisdiction over adoption. Furthermore, a judge of the superior court may consolidate the adoption and custody proceedings for disposition in the superior court.

Am Jur 2d, Adoption §§ 49, 69, 70.

Judge LEWIS concurring.

Appeal by third-party defendants from order entered 23 December 1993 in Johnston County District Court by Judge William A. Christian. Heard in the Court of Appeals 2 February 1995.

No brief filed for plaintiffs George A. Griffin and Brenda Griffin.

Kafer & Hunter, by Stephanie T. Jenkins and J. Randal Hunter, and Stephen C. Woodard, Jr., for defendant-appellees.

Charles C. Henderson for third-party defendant-appellants.

GREENE, Judge.

Michael and Donna Griffin (Michael Griffins) appeal from an order entered in the Johnston County District Court denying their motion to dismiss and abate the Johnston County District Court's jurisdiction.

Samuel Griffin, II, born 4 November 1984, and Catherine Marie Griffin, born 22 July 1987, (children) were born of a marriage between Samuel Griffin (father) and Marie Lankford Griffin (mother). The father shot and killed the mother and in September 1990 he began serving a life sentence for the murder. On 7 September 1990, after the father executed a "Custodial Designation and Appointment of Guardian" placing "full and complete Custody, care, and control" of the children with his nephew and niece-in-law, George and Brenda Griffin (George Griffins), the George Griffins filed a "Complaint for Custody" in the Jones County District Court. This complaint sought sole custody of the children and named the father, Jo Bullock (the mother's sister), and Charlie and Dorothy Lankford (the mother's parents), as defendants. Kenneth David Bullock, Jo Bullock's husband (Bullocks), later joined these proceedings. The Jones County District Court entered an order on 29 August 1991 granting joint custody to the George Griffins and the Bullocks. The Bullocks filed a motion in the Jones County District Court on 10 December 1991, seeking temporary and permanent custody of the children because of a substantial change in circumstances. On 4 March 1992, the Jones County District Court entered a consent order placing primary custody with the Bullocks and secondary custody with the George Griffins.

Between 10 December 1991 and 4 March 1992, the Michael Griffins, who are the father's brother and sister-in-law, filed an adoption petition in the Jones County Superior Court, seeking to adopt the children. On 23 April 1992, the Jones County Clerk of Superior Court entered an Interlocutory Decree, regarding the adoption petition filed by the Michael Griffins, finding that the children "had been placed with [the] Michael Griffin[s] . . . 'by the persons having legal custody.' " We note that this Interlocutory Decree itself is not included in the record, but the fact that an Interlocutory Decree was entered is made a part of the record because it was included in findings of fact in an 18 May 1992 order of the Jones County District Court. Sometime on 23 April 1992, though it is not clear whether it was before or after the superior court's Interlocutory Decree, the Jones County District Court issued a Temporary Restraining Order,

which was dissolved on 24 August 1992, restraining and prohibiting the Michael Griffins, their counsel, Chris Henderson, the Clerk of Superior Court for Jones County, Ron Metts, and the Jones County Department of Social Services from "entering any orders, filing any pleadings or otherwise taking any action of any kind whatsoever regarding the adoption proceeding for" these children. The court also found that the "adoption proceeding [was] instituted solely for the purpose of interfering with and circumventing the orders of the District Court entered in regard to the custody of these children."

On 28 April 1992, the Bullocks filed motions, in both the Jones County Superior Court and the Jones County District Court, to obtain, among other things, immediate physical custody of the children and a change of venue to Johnston County. The Jones County District Court then ordered that physical custody of the children immediately go to the Bullocks and that the Michael Griffins, as well as legal counsel, take steps to comply with the order. In August, the court transferred the custody action to Onslow County, and ultimately venue in the custody action was transferred to Johnston County. It is our reading of the record that the adoption action is still pending before the Jones County Superior Court, although the interlocutory decree entered in the action was, at some point, vacated.

On 24 August 1992, the Michael Griffins were allowed to intervene in the custody action as third party defendants. On 15 October 1993, the Michael Griffins filed a "Motion to Stay" the jurisdiction of the Johnston County District Court, on the grounds that the former adoption petition filed by them in the Jones County Superior Court abated any district court jurisdiction. The Michael Griffins next moved, on 28 October 1993, for the Johnston County District Court to "vacate all orders entered subsequent to February 25, 1992, and to terminate jurisdiction from the district court," on the same grounds as the motion to stay. On 23 December 1993, the Johnston County District Court denied the Michael Griffins' motions and ordered that the Johnston County District Court would "hereby assume jurisdiction for the determination of all issues with regard to custody and visitation of the minor children."

The sole issue is whether the filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to the child who is the subject of the adoption petition.

Adoption and custody proceedings are in some important respects alike, yet they remain very different. They are alike in that both proceedings require a determination based on the best interest of the child. N.C.G.S. §§ 48-17(b)(9), -22(b)(10) (1991) (adoption); N.C.G.S. § 50-13.2(a) (1987) (custody). The proceedings are different in that a final adoption order permanently establishes "the relationship of parent and child," N.C.G.S. § 48-23(1) (1991), and an order of custody is always subject to modification upon a showing of changed circumstances. N.C.G.S. § 50-13.7(a) (1987). Furthermore, the proceedings are different in that they are generally adjudicated in different courts. Adoptions are in the nature of special proceedings and are necessarily before the superior court, N.C.G.S. § 48-12(a) (1991), and the district court is the proper division for the trial of custody actions. N.C.G.S. § 7A-244 (1989). Because, however, the superior court has concurrent jurisdiction to adjudicate custody disputes, N.C.G.S. § 7A-240 (1989), and because custody and adoption proceedings relating to the same child have "common questions of law or fact," the judge of the superior court may consolidate the proceedings for disposition in the superior court. N.C.G.S. § 1A-1, Rule 42(a) (1990); *see Oxendine v. Department of Social Servs.*, 303 N.C. 699, 703, 281 S.E.2d 370, 373 (1981).

In the absence of such an order of consolidation and when the same child is the subject of a simultaneous custody and adoption proceeding, do both courts have continuing jurisdiction to fully adjudicate the respective issues before them? The answer has to be no, because this would create an unresolvable conflict. The conflict arises because in an adoption proceeding the superior court is authorized to issue an interlocutory decree of adoption "giving the care and custody of the child to the petitioners." N.C.G.S. § 48-17(a). In a custody proceeding the district court is authorized to award custody of the child to a "person, agency, organization or institution." N.C.G.S. § 50-13.2(a). If both courts are granted simultaneous jurisdiction to adjudicate the issues of custody and adoption, who is to be given custody of the child, the petitioners who have been granted custody pursuant to an interlocutory adoption decree or the person granted custody by the district court? There is no language in either Chapter 50 (custody) or Chapter 48 (adoptions) which addresses the issue before this Court. There is language in Chapter 7A (Juvenile Code) which indicates that upon the filing of an adoption petition, the jurisdiction of the district court to review the post termination of parental rights' placement is suspended, N.C.G.S. § 7A-659(b) (1989);

In re Adoption of Duncan, 112 N.C. App. 196, 201, 435 S.E.2d 121, 124 (1993); *In re James S.*, 86 N.C. App. 364, 366, 357 S.E.2d 430, 431 (1987), but that language and the holdings of *Duncan* and *James* have no applicability to a Chapter 50 custody proceeding.

Although there are no statutes or cases directly on point, the legislature has enunciated a public policy that every child should have "a permanent plan of care." N.C.G.S. § 7A-289.22(2) (1989). Because adoption is more likely than a custody proceeding between non-parents (as in this case) to result in a permanent plan of care for the child and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child the subject of a simultaneous adoption and custody proceeding. Therefore, upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the interlocutory decree is vacated, the adoption petition is dismissed or a final decree of adoption is entered. If a final adoption decree is entered, the district court would again be the proper division to adjudicate any custody disputes that may arise between the adoptive parents and any other parties, upon the filing of a new action for custody. In the event of a final adoption decree, any orders previous entered by the district court, regarding custody of the child, are void.

In this case, the record reveals that an adoption petition was filed in the superior court with regard to children who were the subject of a district court custody dispute between non-parents. The record also reveals that an interlocutory decree of adoption was entered by the superior court, and subsequently vacated. It is not clear from the record whether the superior court actually ordered that "the care and custody" of the children be granted to the Michael Griffins, the petitioners in the adoption case. The record simply shows that a finding was made by the superior court that the children "had been placed with [the] Michael Griffins . . . by the persons having legal custody." The incompleteness of this record requires us to remand this case to the Johnston County District Court. On remand, if it is determined that the superior court has entered an interlocutory decree of adoption granting the care and custody of the children to anyone, the jurisdiction of the district court is stayed upon entry of the decree. In the event it is determined that the interlocutory decree was vacated or the adoption petition dismissed, the jurisdiction of the district court resumes as of the date of the vacation or dismissal. If it is determined

that an interlocutory decree of adoption has not been entered directing the custody of the children, the jurisdiction of the district court continues until the entry of such an order.

We are not unaware that the result reached in this case can lead to abuse by non-parent parties who lose custody disputes with other non-parent parties, in that they may file an adoption petition to circumvent the orders of the district court. The solution to that possibility is not, however, to deny parties the right to file good faith petitions for adoptions, which may very well serve the best interest of the child. Parties who abuse the process are subject to a claim for abuse of process, a tort long recognized by our courts. *E.g.*, *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1945).

We are aware that our district court judges are better able by experience and training to determine issues of child custody. We also recognize that good policy arguments exist for having custody and adoption determinations made by the same court. Nonetheless, we are bound by the statutes enacted by our General Assembly and must defer to the policies adopted by that branch of our government.

Remanded.

Judge COZORT concurs.

Judge LEWIS concurs with separate opinion.

Judge LEWIS concurring.

I concur in the majority opinion but wish to separately note that it is the clerk of superior court, and not a judge of the superior court, who typically presides over adoption proceedings. *See* N.C.G.S. § 48-12(a) (1991) ("Adoption shall be by a special proceeding before the clerk of the superior court.") A superior court judge would rarely take part in adoption proceedings. I believe that many of the majority's references to the superior court would more appropriately be to the clerk of superior court. In addition, to the extent that the majority opinion may imply to the contrary, I wish to emphasize that, in my view, the clerks of court of this state have the experience needed to properly deal with the adoption proceedings brought before them. In this regard, I also note that the clerk of superior court is, in fact, the clerk of district court as well.

I also wish to emphasize the importance of compliance with the requirements of N.C.G.S. § 48-16 (1991). That statute provides in pertinent part that, upon the filing of a petition for adoption, the court shall order the department of social services, or a licensed child-placing agency, to investigate any circumstances or conditions which may have a bearing on the adoption and of which the court should have knowledge. § 48-16(a). The findings of the investigation must be reported to the court within sixty days. § 48-16(c). In a case such as this, it would certainly be important for the clerk of court to know of the existence of contemporaneous custody proceedings. The record is silent as to whether the investigative report was made as required and, if so, whether the clerk examined the report before making his interlocutory decree. I agree with the majority that remand is necessary, but for the additional purpose of obtaining a complete record of the proceedings necessary before an interlocutory decree of adoption can be entered. I concur separately.

JANE DOE v. DUKE UNIVERSITY, A NORTH CAROLINA CORPORATION

No. 9414SC463

(Filed 4 April 1995)

Appeal and Error § 175 (NCI4th)— action dismissed by plaintiff—contention concerning trial court's protective order moot

Because plaintiff entered a dismissal in her action for claim and delivery of breast implants which had been surgically removed from her body at defendant hospital, her argument in the Court of Appeals that the trial court erred in entering a protective order concerning possession of the implants was moot.

Am Jur 2d, Appellate Review §§ 640 et seq.

Judge LEWIS dissenting.

Appeal by plaintiff from order entered 22 November 1993 and from order signed 1 December 1993 and filed 3 December 1993 by Judge Anthony M. Brannon in Durham County Superior Court. Heard in the Court of Appeals 2 February 1995.

Roberti, Wittenberg, Holtkamp & Lauffer, by R. David Wicker, Jr., for plaintiff-appellant and party-in-interest.

Moore & Van Allen, by Charles Holton, Loni S. Caudill, and Gloria Cabada-Leman, for defendant-appellee.

GREENE, Judge.

Jane Doe (plaintiff) appeals from a protective order entered 22 November 1993 and an order entered 1 December 1993 in Durham County Superior Court, denying her motion for relief from the protective order, in her action for conversion of personal property, unfair and deceptive trade practices, and creation of a constructive trust in favor of plaintiff.

The pertinent facts are as follows: In 1976, plaintiff underwent surgery at Duke University Medical Center (Duke) for implantation of breast prostheses. In 1992, plaintiff underwent surgery again at Duke for removal of the breast prostheses (implants). Plaintiff requested Duke to return the implants prior to this litigation; however, the parties could not reach an agreement on the conditions of custody. In July 1993, plaintiff filed a complaint against Duke, alleging conversion and unfair and deceptive trade practices, and seeking, among other remedies, an order instructing Duke "to immediately release to the Plaintiff all implant devices and material removed from the Plaintiff."

In September 1993, Duke made a motion for protective order pursuant to N.C. Gen. Stat. § 1A-1, Rule 26 (1990). On 22 November 1993, the trial court entered a protective order which provided that the implants "shall be turned over to the exclusive care, custody and control of Lynne M. Holtkamp, attorney for" plaintiff for at least five years during which time Ms. Holtkamp was required to preserve the implants, to make them available to Duke as needed, to give Duke notice of their location, and to abide by federal regulations concerning handling of the implants. On 23 November 1993, plaintiff made a motion to amend the protective order to relieve Ms. Holtkamp of the responsibility of having care, custody and control of the implants and to deliver the implants to a New York pathologist. This motion, however, was denied by order filed 3 December 1993.

Plaintiff filed notice of appeal as to both the protective order and the order denying her motion to amend the protective order on 21

December 1993. On 9 February 1994, plaintiff filed a notice of voluntary dismissal without prejudice of her July 1993 complaint.

The issue presented is whether the correctness of the trial court's orders concerning possession of the implants is properly before this Court where plaintiff has entered a dismissal in her action for custody of the implants.

Once a party voluntarily dismisses her action pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990), "it [is] as if the suit had never been filed," *Tompkins v. Log Sys., Inc.*, 96 N.C. App. 333, 335, 385 S.E.2d 545, 547 (1989), *disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 819 (1990), and the dismissal "carries down with it previous rulings and orders in the case." *Gibbs v. Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965) (*quoting* 11 A.L.R.2d 1407, 1411). Therefore, because plaintiff has entered a dismissal in her action for claim and delivery of the implants, her present argument in this Court that the trial court erred in entering the protective order concerning possession of the implants is moot, and we need not consider it. *See Walker v. Walker*, 59 N.C. App. 485, 489, 297 S.E.2d 125, 128 (1982). Because the protective order was nullified by plaintiff's dismissal, it is vacated and remanded. On remand, the trial judge shall enter an order directing that possession of the implants be returned to defendant.

Vacated and remanded.

Judge COZORT concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent as to the majority's decision to vacate the order and remand for return of the implants to defendant.

The majority holds that the order does not survive the plaintiff's voluntary dismissal without prejudice. In so holding, they rely on the general rule that a voluntary dismissal "carries down with it previous rulings and orders in the case." *Gibbs*, 265 N.C. at 464, 144 S.E.2d at 398 (quoting R.P. Davis, Annotation, *Effect of Nonsuit, Dismissal, or Discontinuance of Action on Previous Orders*, 11 A.L.R.2d 1407, 1411 (1950)). The majority's analysis is based on treatment of the order as a protective order pursuant to section 1A-1, Rule 26. I sug-

gest that a different analysis is needed given these unique circumstances.

There are exceptions to the general rule concerning the survival of orders after dismissal of the suit. *See* Davis, *supra*, at 1423-28. Courts in other states have held that an order appointing a receiver can survive a voluntary dismissal. *Id.* at 1426-28; *e.g. Fountain v. Mills*, 36 S.E. 428, 430 (Ga. 1900) (receiver not discharged by dismissal and can only be discharged by court order).

Although denominated a protective order in defendant's motion, the order issued by the court here is in substance a provisional equitable order appointing Ms. Holtkamp as a receiver for the implants. Judges in North Carolina have the power to appoint a receiver to preserve specific property that is the subject of litigation pendente lite. *See* N.C.G.S. §§ 1-501 to -507 (1983); *United States v. McPherson*, 631 F. Supp. 269, 272 (M.D.N.C. 1986) (*citing* F. Wyatt, *State Court Receiverships in North Carolina*, 17 Wake Forest L. Rev. 745 (1981)). The trial court's power to appoint a receiver is not limited to that given by statute; a court of equity has inherent power to appoint a receiver. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 576, 273 S.E.2d 247, 256 (1981). A receiver is an officer of the court, and his or her possession is possession of the court. *McPherson*, 631 F. Supp. at 272; *State v. Norfolk & Southern R.R.*, 152 N.C. 785, 789, 67 S.E. 42, 44 (1910).

I conclude that, in this case, this Court should follow the approach taken by the Georgia Supreme Court in *Fountain*. I would hold that, since possession by Ms. Holtkamp as receiver is possession by the court, the court's jurisdiction and her custody continue even though the case has been voluntarily dismissed by plaintiff. *See Fountain*, 36 S.E. at 430. I would hold that the order survives the dismissal and that this appeal is not moot.

The fact that these orders are interlocutory also should not prevent their review here. Ordinarily, interlocutory orders are not immediately appealable unless they affect a substantial right which would be lost if the ruling is not reviewed prior to final judgment. N.C.G.S. § 7A-27(d) (1989); N.C.G.S. § 1-277 (1983); *N.C. Farm Bureau Mutual Ins. Co. v. Wingler*, 110 N.C. App. 397, 401, 429 S.E.2d 759, 762, *disc. review denied*, 334 N.C. 434, 433 S.E.2d 177 (1993). The issue of whether these orders create irreconcilable ethical duties for Ms. Holtkamp as an attorney justifies our review of these orders as affecting the substantial rights of both plaintiff and her attorney, Ms.

Holtkamp. If such conflict were found to exist, a correction on appeal after final judgment would be too late to prevent the harm.

The issues on appeal are whether the trial court properly exercised its discretion (1) in entering the order directing Ms. Holtkamp to take custody of the implants and (2) in denying plaintiff's motion to amend the order. I would hold that the trial court properly exercised its discretion in both instances.

I first address the validity of the orders. A receiver may be appointed pendente lite in the discretion of the court where specific property is in danger of being lost or materially injured or impaired and where a party establishes an apparent right to specific property which is in the possession of the adverse party and is the subject of the action. § 1-502; *See Murphy v. Murphy*, 261 N.C. 95, 101, 134 S.E.2d 148, 153 (1964). A court's appointment of a receiver is presumed to be correct, and the appellant has the burden to show error. *Whitehead v. Hale*, 118 N.C. 601, 603, 24 S.E. 360 (1896).

I cannot say that the trial court's issuance of this receivership order was an abuse of discretion. The transcript reveals that the trial court recognized the need to protect the implants as evidence in this and in other litigation. The transcript also reveals that the trial court had to consider the impact of various federal regulations on the storage and handling of the implants. The trial court's concern with protecting the implants is made evident in its directions to Ms. Holtkamp to store and transport the implants in accord with these federal regulations. These implants are unique for their evidentiary rather than monetary value. If damaged or destroyed, they are irreplaceable as evidence. Pre-judgment attachment or another provisional remedy would not protect both parties and would not serve to preserve the implants as evidence. Given the concerns that both parties had that the implants be preserved for use as evidence in pending and future litigation, I would find the order reasonable.

The court's designation of Ms. Holtkamp as the person to take custody of the implants is also supported by reason. The selection of a receiver is made in the discretion of the trial judge, and this exercise of discretion will not generally be reviewed by an appellate court "unless it has been greatly abused." *Mitchell v. Realty Co.*, 169 N.C. 516, 520-21, 86 S.E. 358, 360 (1915). Although the appointment of a party's attorney as receiver is a practice not to be commended unless done by the parties' consent, it is not necessarily wrong for a court to do so. *Id.* at 520, 86 S.E. at 360. As our Supreme Court has stated:

> It is not regarded as an abuse of judicial discretion to appoint as receiver the attorneys of the respective parties to the cause, and the court, in making such appointment, will not be interfered with upon appeal.

Id. At the initial hearing, plaintiff did not object to this designation and did not suggest an alternative. Only later, in her motion to amend the order did plaintiff suggest a different custodian who was a pathologist in New Jersey, not a party, and therefore outside the trial court's jurisdiction. The trial court acted with reason in designating Ms. Holtkamp, an officer of the General Court of Justice, over whom it has enforcement power.

I also fail to see how the court's order creates a conflict of interest for Ms. Holtkamp. She is not required by the order to disclose confidential information, litigation strategy, or the names of expert witnesses. She is only required to notify defendant of the location of the implants. Ms. Holtkamp is free to choose a neutral location and then to permit access by defendant, experts and others as necessary.

A receiver can always be removed upon application to the proper judge. *Id.* at 521, 86 S.E. at 360. If the trial court's jurisdiction over the order is not vitiated by the dismissal, if a problem of conflict, confidentiality, hardship, or ethics develops in the future, Ms. Holtkamp would remain free to seek modification of the order by the trial court. She would also remain free to seek modification if she ceases to represent plaintiff. Since there is nothing in the record to show that Ms. Holtkamp no longer represents plaintiff, there is no need to address the impact of a future decision of Ms. Holtkamp to withdraw as plaintiff's counsel. Plaintiff claims that the key issue in this case is ownership of the implants. However, ownership of the implants was the subject of plaintiff's underlying suit. Neither the order nor the court's denial of plaintiff's motion to amend resolved the merits of plaintiff's underlying claims but simply operated to protect the implants and the parties. Since the ownership issue is not properly before this court, I would not address it further.

The majority's decision to vacate and remand for return of the implants to defendant is an intrusion upon the province of the trial court which here properly exercised its equitable discretion to preserve crucial evidence. The majority finds the "protective order" nullified but remands to the trial judge with directions to order the implants returned to defendant. Since the order originally obligated the plaintiff to pay the costs of various aspects of the custody, I

believe it necessary that the order survive until modified or terminated by the trial judge. There are "loose ends" such as payment of costs, timing of the return of the implants and the methods to be employed. Any questions or conflicts which arise would be resolved by the trial court so long as the implants are a matter of concern. If not the trial court, the appellate courts will be thrown into the business of micro-managing evidence, work for which we are neither fitted nor inclined. I believe the trial court is best equipped to deal with this situation.

Based on the record that plaintiff has prepared and on the circumstances that existed when the trial court made these orders, I would hold that the court's initial order and the order denying plaintiff's motion to amend the order be affirmed.

LEAH MILLER, INDIVIDUALLY AND D/B/A PARAGON PLUS, AND PATRICIA KELLAR, PLAINTIFFS v. TWO STATE CONSTRUCTION COMPANY, INC., RICK BANKS, LA QUINTA, INC., HARRISON ROWLAND, AND BRIAN WOODLING, DEFENDANTS

No. 9417SC666

(Filed 4 April 1995)

Arbitration and Award § 4 (NCI4th)— arbitration not invalidated by N.C.G.S. § 22B-10—arbitration not waived

N.C.G.S. § 22B-10 did not invalidate arbitration in this case, since an agreement to arbitrate is not an unenforceable contract requiring waiver of a jury; furthermore, defendants did not waive arbitration, since there was no showing of prejudice to plaintiffs by defendants' delay in demanding arbitration. N.C.G.S. § 1-567.2.

Am Jur 2d, Arbitration and Award §§ 20 et seq.

Appeal by defendants from order entered in open court 14 April 1994 and dated 15 April 1994 by Judge William Z. Wood, Jr. in Surry County Superior Court granting plaintiffs' motion for a preliminary injunction and staying arbitration. Heard in the Court of Appeals 23 February 1995.

Gordon & Nesbit, P.L.L.C., by Thomas L. Nesbit, for plaintiffs-appellees.

Bennett & Blancato, L.L.P., by Richard V. Bennett and Sherry R. Dawson, for defendants-appellants.

JOHNSON, Judge.

The pleadings reveal the following: plaintiffs, Ms. Miller (d/b/a Paragon Plus) and Ms. Kellar, are two young women who run a small painting subcontracting firm. In September 1993, Ms. Miller, the proprietor of the firm, executed a contract with defendant Two State to paint three separate La Quinta Inns as part of La Quinta's "Reimaging" project. Two State was the general contractor for the three inns identified in the painting contract. Plaintiffs were the only female subcontractors on the project. Throughout their work, plaintiffs were subject to rude, disparate treatment, i.e., Two State's employees made lewd remarks regarding them, to the effect that they had traded sexual favors to obtain the contracts; and Two State's employees "grabbed" the women's buttocks, and "spanked" them with project notebooks. In general, plaintiffs were treated as inferior to the male contractors.

Additionally, a dispute as to the scope of the work had arisen. The contract documents called for the paint in most areas of the inns to be applied "full coverage, single coat" [or "one coat"]. In compliance with this language, Ms. Miller had her painters apply a full, but single, coat of paint to the appropriate areas. The result did not suit the owner, and the painters were instructed to apply a second coat. This additional work almost doubled the amount of work that the painters had to perform, but Two State refused to concede that it owed plaintiffs for the additional work. Two State did not execute a change order for the extra work, as the contract Two State drafted required.

Furthermore, as the work progressed, Two State ceased making progress payments and began trying to run Ms. Miller and Ms. Kellar off the project. Two State wanted to keep the "men" painters. This conduct further led to Two State's employees seizing the business property of Ms. Miller, and seizing the personal property of both plaintiffs. Additionally, Two State reported Ms. Miller to the Charlotte police for stealing a sprayer. Two State took the police to the women's hotel room, and publicly accused them of larceny. After talking with plaintiffs, the police told the Two State employees to leave the premises without the sprayer.

Plaintiffs filed suit in the General Court of Justice on 2 March 1994. In their complaint they sought damages for breach of contract, quantum meruit, bad faith, unfair trade practices, slander, conversion, battery and punitive damages. Two State reacted by filing its own demand for arbitration on 22 March 1994 with the American

Arbitration Association in accordance with Article 8 of the contract. Two State did not seek to stay plaintiffs' action. Plaintiffs moved to stay Two State's demand for arbitration.

Judge William Z. Wood, Jr. entered an order granting plaintiffs' motion for a preliminary injunction prohibiting arbitration and staying all further arbitration proceedings in the case. Judge Wood concluded that the building construction contract between the parties was an enforceable contract providing for binding arbitration of all claims, disputes or other matters in question arising out of or relating to the contract. Judge Wood concluded that the arbitration provision "is unconscionable and unenforceable under N.C.G.S. § 22B-10." Judge Wood further concluded that the arbitration provision in the contract violated Article I § 18 of the North Carolina Constitution as well as Article I § 25 of the North Carolina Constitution. From this order, defendants appeal.

This appeal by defendants is from an order staying arbitration; as such, it is an interlocutory appeal. An "order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Bennish v. N.C. Dance Theater*, 108 N.C. App. 42, 44, 422 S.E.2d 335, 336 (1992) (*quoting Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). North Carolina General Statutes §§ 1-277(a) (1983) and 7A-27(d)(1) (1989). Defendants argue that North Carolina General Statutes § 22B-10 (1994) does not invalidate Article 8 of the contract between the parties which requires that all claims, disputes or other matters in question arising out of or relating to the contract be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. Defendants further argue that the arbitration provision of the contract between the parties does not violate Article I, § 18 nor § 25 of the North Carolina Constitution.

North Carolina General Statutes § 22B-10, which became effective 1 October 1993, provides:

> Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. *This section does not prohibit parties from entering into agreements to arbitrate* or engage in other forms of alternative dispute resolution. (Emphasis added.)

In the instant case, the parties entered into an agreement which provided:

> All claims, disputes and other matters in questions arising out of, or relating to, this Subcontract or the breach thereof shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon in accordance with applicable law in any court having jurisdiction thereof.

This agreement was enforceable under North Carolina General Statutes § 1-567.2 (1983) which states:

> (a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

The parties to the contract in the instant case agreed to submit any disputes for arbitration. Accordingly, an agreement to arbitrate exists. Plaintiffs argue that enforcing an agreement to arbitrate limits access to the courts. This argument is without merit. Once an agreement to arbitrate is found, courts should compel arbitration on a party's motion and then "step back and take a 'hands-off' attitude during the arbitration proceeding. The trial court then reenters the dispute arena to confirm, modify, deny or vacate the arbiter's award." *Henderson v. Herman*, 104 N.C. App. 482, 486, 409 S.E.2d 739, 741 (1991), *disc. review denied*, 330 N.C. 851, 413 S.E.2d 551 (1992). This Court in *Henderson* further stated:

> An agreement to arbitrate does not cut off a party's access to the courts. On the contrary, an action compelled to arbitration must have the arbiter's decision confirmed by the court. . . . The ACT [Uniform Arbitration Act, Article 45, North Carolina General Statutes §§ 1-567.1 through 1-567.20] provides parties with a means to bypass the morass of judicial litigation, while still main-

> taining the judicial doors ajar for recalcitrant disputes. Hence, it would appear that the legislature intended the courts to send certain predetermined issues to arbitration and then to step back until the arbitration proceeding is complete.

Id. at 485, 409 S.E.2d at 741.

North Carolina has a strong public policy favoring arbitration of disputes between parties. *Servomation Corp. v. Hickory Construction. Co.*, 316 N.C. 543, 342 S.E.2d 853 (1986); *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984). "Our strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). Additionally, there is no legislative bar to arbitrating claims which are based on tortious conduct or unfair and deceptive trade practices and claims for punitive damages as long as they arise out of or relate to a contract that provides for arbitration or its breach. *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). Thus, the claims are subject to arbitration regardless of whether they are characterized as a tort or contract action. *Id.*

An agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury; thus, the trial court erred in concluding that because the arbitration provision did not provide for trial of facts by a jury that it was unconscionable and unenforceable under North Carolina General Statutes § 22B-10, and in violation of Article I §§ 18 and 25 of the North Carolina Constitution.

Although our Courts have not explicitly said that arbitration violates the North Carolina Constitution in that it deprives parties of their right to a trial by jury, this Court in *Bentley v. N.C. Insurance Guaranty Assn.*, 107 N.C. 1, 418 S.E.2d 705 (1992) discussed and found persuasive the reasoning in a Delaware Supreme Court case concerning the constitutionality of a mandatory binding arbitration clause in an automobile insurance policy. In *Bentley*, an insurance policy had an appraisal clause upon which disputes were to be subject. *Bentley*, quoting the Supreme Court of Delaware, stated:

> In arguing against enforcement of the arbitration clause, [plaintiffs] attempt to appeal to "the old judicial hostility to arbitration." . . . Over time . . . the judicial view of arbitration has evolved from hostility to eager acceptance. In part, the change has been

> fostered by a recognition of the efficiency and specialized expertise available in an arbitral forum. . . .
>
> . . . In short, the public policy of this state favors the resolution of disputes through arbitration.

Bentley, 107 N.C. at 10-11, 418 S.E.2d at 710 (*quoting Graham v. State Farm Mut. Automobile Ins. Co.*, 565 A.2d 908, 910-11 (1989) and *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)). This Court in *Bentley* went on to say that plaintiff's right to a trial by jury was not abridged by the appraisal clause under the North Carolina Constitution. Thus, there is no constitutional impediment to arbitration agreements.

Plaintiffs next argue that defendants waived arbitration. Plaintiffs base their waiver claims on the fact that defendants withheld payments, seized plaintiffs' property, barred plaintiffs from the project, and sought to have them arrested. In addition, plaintiffs say that defendants' delay in seeking arbitration should act as a waiver, and that defendants should be estopped from enforcing the provision.

Our Supreme Court in *Cyclone Roofing Co. v. Lafave Co.* stated:

> Waiver of a contractual right to arbitration is a question of fact. Because of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right. ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.") Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. (Citations and footnote omitted.)

312 N.C. at 229, 321 S.E.2d at 876. The Court went on to say that prejudice may result if a party has to bear the expenses of a lengthy trial; evidence which may be helpful to the party is lost because of delay in seeking of arbitration; a party's opponent seeks an advantage of judicial discovery procedures which are not available in arbitration; or because of delay, the party takes steps in litigation to its detriment or expended significant amounts of money. *Id.* In the instant case, prejudice has not been shown. Defendants did not file an answer to plain-

tiffs' complaint, until after they made a demand for arbitration and opposed plaintiffs' motion to stay arbitration. Thus, plaintiffs have failed to establish that defendants waived arbitration in accordance with the contract.

Because we hold that North Carolina General Statutes § 22B-10 does not invalidate arbitration in the instant case, we need not address the other issues raised by defendants. The agreement in the instant case is a valid written agreement to arbitrate disputes according to North Carolina General Statutes § 1-567.2. Thus, the trial court erred in staying arbitration. The decision is reversed and remanded.

Reversed and remanded.

Judges JOHN and MARTIN, MARK D. concur.

CORINTHIA BYRD v. MARY ELIZABETH ARROWOOD (MOORE), INDIVIDUALLY AND AS A PARTNER OF: BALL, KELLEY & ARROWOOD P.A.; BALL, KELLEY, BARDEN & ARROWOOD; BALL, KELLEY, BARDEN, MATNEY & ARROWOOD "P.A."; ERVIN L. BALL, INDIVIDUALLY AND AS A PARTNER OF: BALL, KELLEY & ARROWOOD P.A.; BALL, KELLEY, BARDEN & ARROWOOD P.A.; BALL, KELLEY, BARDEN, MATNEY & ARROWOOD "P.A."; PHILLIP G. KELLEY, INDIVIDUALLY AND AS A PARTNER OF: BALL, KELLEY & ARROWOOD P.A.; BALL, KELLEY, BARDEN & ARROWOOD P.A.; BALL, KELLEY, BARDEN, MATNEY & ARROWOOD "P.A."; STEVEN L. BARDEN III. INDIVIDUALLY AND AS A PARTNER OF: BALL, KELLEY, BARDEN & ARROWOOD P.A., BALL, KELLEY, BARDEN, MATNEY & ARROWOOD "P.A."

No. 9428SC316

(Filed 4 April 1995)

Attorneys at Law § 47 (NCI4th)— legal malpractice claim—inability to win underlying case—summary judgment proper—effect of failure to answer amended complaint

The trial court properly entered summary judgment for defendants on plaintiff's legal malpractice claim where plaintiff failed to show that she would have won her underlying slip and fall case against a church; furthermore, there was no merit to plaintiff's claim that the trial court erred by granting summary judgment to one defendant who failed to answer the amended complaint, since she did answer the original complaint, the amended complaint served primarily to add other defendants, and summary judgment may be entered at any time, including prior to the filing of responsive pleadings.

Am Jur 2d, Attorneys at Law §§ 202, 203.

Measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation—Twentieth Century cases. 90 ALR4th 1033.

Appeal by plaintiff from order signed and filed 10 September 1993 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 11 January 1995.

Wade Hall for plaintiff-appellant.

Long, Parker & Payne, P.A., by Ronald K. Payne, for defendant-appellee Mary Elizabeth Arrowood.

Ball Barden Contrivo & Bell, P.A., by Frank J. Contrivo, for all defendants-appellees except defendant-appellee Mary Elizabeth Arrowood.

LEWIS, Judge.

Plaintiff filed this legal malpractice action against defendants on 28 April 1992. On 10 September 1993 the trial court granted summary judgment for all defendants. Plaintiff now appeals.

Plaintiff suffered injuries when she fell at St. Joan of Arc Catholic Church [hereinafter "church"] in Asheville on 15 May 1987. Later in 1987, plaintiff hired the firm of Ball, Kelley & Arrowood, P.A. to represent her in an action against the church. Defendant Ball began representing plaintiff and later assigned the case to defendant Arrowood. Since no action was filed until 21 May 1990, plaintiff's action against the church was barred by the three year statute of limitations. On 9 July 1991 defendant Arrowood filed a voluntary dismissal without prejudice in the action against the church. Plaintiff alleges that defendants were negligent in failing either to settle the case or file an action within the statute of limitations and that this failure was the proximate cause of the loss of her personal injury action. Plaintiff also alleges that defendants' actions amounted to gross, willful and wanton negligence justifying an award of punitive damages.

Plaintiff initially sued only defendant Arrowood, but then added the other defendants. The other defendants moved for summary judgment on 29 June 1993. Defendant Arrowood did not move for summary judgment. Plaintiff moved for partial summary judgment as to defendant Arrowood on 25 August 1993. On 10 September 1993 the

court granted summary judgment for all defendants, including defendant Arrowood.

The evidence presented at summary judgment shows that plaintiff went to the church to play bingo on the evening of 15 May 1987. According to plaintiff, it was raining that night, and the floors of the building became wet from people tracking in. During a break in the game, the patrons moved about in the building. Plaintiff walked up a sloped hall to the bathroom. She alleged that, while on her way back, she slipped and fell. Plaintiff contends that items along the wall prevented her from walking close to the wall, that no one warned her that the floor was wet, that unsupervised children were playing in the area, that the church had just polished or waxed the floor, and that the surface of the floor was slick. Plaintiff's evidence shows that her clothes were wet after the fall. Defendant's evidence reveals that plaintiff was not looking at the floor, did not see water on the floor, and does not know what caused her to fall.

The issue on appeal is whether the court erred in granting summary judgment to defendants. As to the propriety of summary judgment, the following issues are raised by the parties: (1) whether plaintiff's case could not have been won against the church so as to justify summary judgment for defendants on proximate cause, (2) whether the statute of limitations ran against any independent negligence of the defendants other than Arrowood, and (3) whether granting summary judgment to defendant Arrowood was error since she failed to answer the amended complaint.

I. Proximate Cause

We first address whether summary judgment for defendants was proper on the issue of whether plaintiff could have prevailed on her underlying claim. One of the essential elements of negligence in a legal malpractice case is proximate cause. *See Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985). In order to establish proximate cause in a legal malpractice action, a plaintiff must prove the following elements:

> (1) The original claim was valid;
>
> (2) It would have resulted in a judgment in plaintiff's favor; and
>
> (3) The judgment would have been collectible.

Id.

In reviewing the summary judgment order entered by the superior court, we must determine whether there are any genuine issues of material fact regarding the above elements. Viewing the evidence in the light most favorable to plaintiff, we find that plaintiff has failed to show that she would have won the underlying case. Because there are no genuine issues of material fact on proximate cause, plaintiff's legal malpractice case must fail.

The proof required of plaintiff in the underlying "slip and fall case" depends on whether plaintiff was an invitee or a licensee. We do not know her status as a member of the church, or a bingo club, or a paying participant, or observer. As such, we cannot determine whether plaintiff is an invitee or licensee on the record before us. However, even if plaintiff attains the higher status of invitee, she still could not have won her underlying negligence suit since she has not offered sufficient evidence that the church breached a duty to her and that this breach proximately caused her fall and injuries.

An owner of premises owes to an invitee the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to warn the invitee of hidden perils or unsafe conditions that can be ascertained by reasonable inspection and supervision. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992). Plaintiff argues that she could have succeeded on her underlying claim by proving that the church was negligent in creating or failing to warn plaintiff that (1) the floor was wet with water or that (2) the floor was slick from wax.

We first address the issue of whether plaintiff has produced sufficient evidence that the church had a duty to warn her that the floor was wet. An owner of premises has no duty to warn an invitee of an obvious danger or condition of which the invitee has equal or superior knowledge. *Id.* at 66, 414 S.E.2d at 344. Plaintiff admits in her deposition and in her affidavit that she knew it was raining that night. Yet, plaintiff could not say that the floor was wet when she walked to the bathroom and did not notice water on the floor after she fell. She can only say that her clothes were wet after her fall. None of these assertions shows that the church created or had actual or constructive notice that the floor was wet.

Even if the floor was wet due to the rain that evening, this condition would have been an obvious danger of which plaintiff should have been aware since she knew it was raining outside and it was likely that people would track water in on their shoes. Plaintiff's

assertions that the crowded conditions and the presence of young children prevented her from seeing the floor do not overcome the obvious fact that the floor might have been wet due to people tracking in. These factors would only put plaintiff on notice to be extra careful. Since plaintiff and the church had equal knowledge of this obvious danger and since plaintiff has not shown that the church had actual or constructive notice that this spot was wet, the church had no duty to warn plaintiff of this potential peril.

Plaintiff has also failed to present sufficient evidence that the church was negligent in waxing the floor and that the wax caused her fall. The only evidence plaintiff has offered on this issue are statements in her affidavit and an accompanying photo that the floor is polished with a highly reflective finish that makes it appear wet. Yet plaintiff admits that she was not looking at the floor at the time of her fall and does not know what caused her to fall.

Even if the floor was waxed and slick, that mere fact does not make the owner liable. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 739, 157 S.E.2d 537, 538 (1967). Here, neither plaintiff's affidavit nor the accompanying photo constitute substantial evidence that the floor actually was waxed and slick at the time of plaintiff's fall because of the actions or omissions of the church. Plaintiff has not shown how long the floor was either slick or wet, if at all. Plaintiff has failed to prove that the church had actual or constructive notice that the floor was slick, if it was. Since plaintiff has offered no other evidence to prove this theory of negligence, she has not shown that there is a genuine issue of fact as to whether she would have prevailed on this theory.

We also find no merit in plaintiff's argument that defendants' certification of the complaint against the church under N.C.G.S. § 1A-1, Rule 11 (1990) is sufficient by itself to prove that there is a genuine issue of fact on the issue of whether plaintiff could have won her underlying claim. The signature of an attorney under Rule 11 simply certifies upon reasonable inquiry that the complaint is well grounded in fact and warranted by existing law. § 1A-1, Rule 11. This signature does not demonstrate that there is a genuine issue of material fact, in light of evidence gathered after the complaint is filed, as to whether a plaintiff would actually have prevailed on the underlying claim.

Since plaintiff has failed to show that she could have proven that the church breached a duty to her, this failure alone is sufficient to defeat her underlying claim and consequently her claim for malprac-

tice against defendants. However, we note that plaintiff's failure to show what actions, if any, of defendant caused her fall also defeats the proximate cause element of her underlying claim.

II. Statute of Limitations

Since summary judgment was properly entered against plaintiff on the proximate cause element of her legal malpractice claim, we need not address defendants' statute of limitations defenses.

III. Arrowood's Failure to Answer Amended Complaint

Plaintiff also contends that the court erred by granting summary judgment to defendant Arrowood, who failed to answer the amended complaint. Defendant Arrowood did answer the original complaint. The amended complaint served primarily to add the other defendants. The substance of the additional allegations against defendant Arrowood were that she failed to advise plaintiff to seek independent counsel, continued to exercise a position of trust as to plaintiff and failed to exercise due care in supervising the other defendants. Even if these allegations are deemed admitted under N.C.G.S. § 1A-1, Rule 8(d) (1990) for defendant Arrowood's failure to answer, they do not establish negligence since plaintiff has failed, as discussed above, to prove the proximate cause element of her legal malpractice claim.

Plaintiff contends that the court erred by granting summary judgment before defendant Arrowood answered the amended complaint. However, summary judgment may be entered "at any time" including prior to the filing of responsive pleadings. *Kavanau Real Estate Trust v. Debnam,* 299 N.C. 510, 513, 263 S.E.2d 595, 598 (1980). Plaintiff's reliance on *Brown v. Greene,* 98 N.C. App. 377, 390 S.E.2d 695 (1990), is misplaced. This is not a case, as was *Brown,* in which the parties had not had time to conduct discovery. Here, the record shows that depositions of plaintiff and defendant Ball were taken prior to summary judgment, and there is no evidence in the record that either party requested a continuance of the summary judgment motion in order to complete discovery. In fact, plaintiff herself moved for summary judgment in spite of the fact that defendant Arrowood had not answered the amended complaint. Furthermore, we fail to see how discovery on the allegations added against defendant Arrowood in the amended complaint would have altered plaintiff's inability to prove her underlying claim. Thus, we hold that plaintiff's assignment of error on this issue is without merit.

For the reasons stated above, the order granting summary judgment to all defendants is affirmed.

Affirmed.

Judges WYNN and McGEE concur.

MARY ELLEN JOHNS AND JAMES M. BALEY, III, ANCILLARY ADMINISTRATOR OF THE ESTATE OF JESSE THOMAS JOHNS, PLAINTIFFS/APPELLEES v. AUTOMOBILE CLUB INSURANCE COMPANY AND ALLSTATE INSURANCE COMPANY, DEFENDANTS/APPELLANTS

No. 9428SC475

(Filed 4 April 1995)

1. **Insurance § 101 (NCI4th)— contract made in Tennessee—parties residing in Tennessee—accident in North Carolina—Tennessee law applicable**

Tennessee law governed coverage of the automobile insurance policy in question where there were no significant contacts with North Carolina in this action other than the fact that the injuries occurred in North Carolina; the contract was made in Tennessee; the parties intended to be obligated by the Tennessee policy; and the parties involved resided in Tennessee.

Am Jur 2d, Insurance § 332.

2. **Insurance § 606 (NCI4th)— family member exclusion—no coverage pursuant to Tennessee law**

Pursuant to Tennessee law, the family member exclusion in plaintiff's automobile policy excluded her recovery of uninsured/underinsured motorist benefits under her own policy for an accident that occurred while she was a passenger in her son's vehicle.

Am Jur 2d, Automobile Insurance §§ 291, 292.

Appeal by defendant Allstate Insurance Company from order entered 14 February 1994 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 25 January 1995.

Gudger and Gudger, by Lamar Gudger and James H. Toms & Associates, P.A., by James H. Toms and Christopher A. Bomba, for plaintiffs/appellees.

Ball Barden Contrivo & Bell, P.A., by Frank J. Contrivo and Cynthia C. Harbin, for defendant/appellant Allstate.

JOHNSON, Judge.

On 6 March 1992, plaintiff Mary Ellen Johns was a passenger in the left rear seat of a 1989 Ford Tempo passenger vehicle owned and driven by her son, Jerry C. Johns. Plaintiff Mary Ellen Johns' other son, Jesse T. Johns, rode in the right rear seat. At 5:50 p.m. on that rainy day, while traveling east on Interstate 26 in Buncombe County, North Carolina, Jerry C. Johns lost control of his vehicle on the wet pavement, crossed the median, and collided with three other vehicles. Jerry C. Johns and Jesse Johns were both killed in the collision, and plaintiff Mary Ellen Johns was injured. The three family members resided together in a mobile home in Maryville, Tennessee.

Plaintiff Mary Ellen Johns and plaintiff James M. Bailey as administrator of the estate of Jesse Johns filed a complaint alleging negligence on the part of Jerry C. Johns and seeking a declaratory judgment that Allstate Insurance Company as the uninsured motorist carrier for plaintiff Mary Ellen Johns, had coverage for injuries sustained by plaintiffs.

Jerry C. Johns was the sole named insured on an Automobile Club Insurance Company automobile insurance policy covering his 1989 Ford. Plaintiff Mary Ellen Johns was the sole named insured on an Allstate automobile insurance policy on a 1988 Isuzu.

Section II, Exclusions, Paragraph 2 of plaintiff Mary Ellen Johns' policy contains the policy terms concerning uninsured (UM)/underinsured (UIM) coverage, states that the UM/UIM coverage does not apply "to bodily injury to an insured . . . sustained by him while occupying an automobile . . . owned by . . . any relative resident in the same household."

Jerry C. Johns' Automobile Club policy contains a similar exclusion under its liability coverage. A "Tennessee Amendatory Endorsement" declines "Liability Coverage for any person for 'bodily injury' to you or any 'family member.' " "Family member" is defined, in part, as a person related by blood or marriage to the named insured, or to the named insured's co-resident spouse, "who is a resi-

dent of your (i.e., the named insured's or the named insured's spouse's) household."

Both policies were issued to plaintiff Mary Ellen Johns and Jerry C. Johns while they were residents of Tennessee, and residents of the same household. Jesse Johns was a member of the same household.

Both defendants admit plaintiffs' allegation that their companies have permission to do business in the State of North Carolina and that defendant Allstate "does business in Buncombe County, North Carolina." Defendant Allstate admitted that it provided liability and uninsured motorist coverage to plaintiff Mary Ellen Johns; this Allstate policy provides coverage throughout "the United States of America, its territories or possessions or Canada or between parts thereof. . . ."

Defendant Allstate contemporaneously with defendant Automobile Club Insurance Company moved for summary judgment. The motion was denied on 14 February 1994. Plaintiffs also moved for summary judgment on the coverage issue; the trial court allowed plaintiffs' motion. Defendant Allstate appeals. Defendant Automobile Club Insurance Company withdrew its appeal prior to filing of the record of appeal.

Defendant Allstate contends that the trial court committed reversible error in denying its motion for summary judgment and granting plaintiffs' motion for summary judgment on the issue of coverage.

[1] Defendant Allstate argues that Tennessee law should be applied to the construction of plaintiff Mary Ellen Johns' policy of insurance with defendant Allstate. The first issue to be resolved is which state's choice of law is to be applied, i.e., whether Tennessee contract law controls the insurance coverage and exclusions in the policy under review in the instant case or North Carolina's contract law.

Our Supreme Court has said that a contract of insurance is to be interpreted in accordance with the laws of the state where the contract was made and delivered, notwithstanding the fact that liability of the insured resulted from a collision occurring in North Carolina. *Roomy v. Insurance Co.*, 256 N.C. 318, 123 S.E.2d 817 (1962). *See also Connor v. Insurance Co.*, 265 N.C. 188, 143 S.E.2d 98 (1965). "Under North Carolina law, the substantive law of the state where the last act to make a contract occurs governs all aspects of the contract." *Tolaram Fibers, Inc. v. Tandy Corp.*, 92 N.C. App. 713, 717, 375

S.E.2d 673, 675, *disc. review denied*, 324 N.C. 436, 379 S.E.2d 249 (1989); *See also Land Co. v. Wood*, 40 N.C. App. 133, 252 S.E.2d 546 (1979). This contract action was entered into in Tennessee where the parties resided; however, our analysis does not stop here simply because the contract was entered into in the state of Tennessee.

In *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 335 N.C. 91, 436 S.E.2d 243 (1993), our Supreme Court applied North Carolina law even though the application for and delivery of the insurance contract occurred in California. The Court concluded North Carolina had close connections with the interests insured by the policy because most of the insured's vehicles were titled in North Carolina and the insured's transportation division was located in North Carolina. *Id.* Our Supreme Court in *Collins & Aikman Corp.* noting that the connection of the state with the interests insured is the preeminent issue, held that the law of North Carolina governs in interpreting the policy where North Carolina has *close connections* with the interests insured by the policy. *Id.*

In the case *sub judice*, close ties with North Carolina do not exist. There are no significant contacts with North Carolina in this insurance contract action other than the fact that the injuries occurred in North Carolina. All of the significant connections occurred in Tennessee. The contract was made in Tennessee, the parties intended to be obligated by the Tennessee policy, and the parties involved resided in Tennessee; thus, the accident is the only contact the parties had with North Carolina. Thus, Tennessee law governs coverage of the insurance policy herein.

Plaintiffs argue that we should not apply Tennessee law to determine the enforceability of the family member exclusion, because it conflicts with the statutory provisions in the North Carolina Financial Responsibility Act, North Carolina's public policy, and with the trends of North Carolina conflicts of law jurisprudence. We find plaintiffs' argument inapplicable in this instance.

Plaintiffs cite *Cannady v. R. R.*, 143 N.C. 439, 443, 55 S.E. 836, 838 (1906) to buttress their position that this Court should refrain from enforcing the Tennessee contract "when the contract violates the positive legislation of the State of the forum, that is, is contrary to its Constitution or statutes," or "when the contract violates the public policy of the State of the forum." *See also* 16 Am Jur 2d *Conflict of Laws* § 19.

North Carolina's legislature, in North Carolina's Financial Responsibility Act at North Carolina General Statutes § 20-279.21(b) (1993), has determined that family members are not to be excluded from primary or UM/UIM coverage. Our Supreme Court in *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991), indicated in dicta that family member exclusions are contrary to North Carolina law and are thus, unenforceable.

Plaintiffs' arguments, though persuasive, are not applicable in the case *sub judice*. Our Supreme Court, quoting the United States Supreme Court, noted that "a state 'may not, on grounds of public policy, ignore a right which has lawfully vested elsewhere, if as here, the interest of the forum has but slight connection with the substance of the contract obligations.' " *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 335 N.C. at 95, 436 S.E.2d at 245 (*quoting Hartford A. and I. Co. v. Delta and Pine Land Co.*, 292 U.S. 143, 78 L.Ed. 1178 (1934)). In this case, as in *Collins & Aikman*, the forum state has more than a casual connection. Thus, Tennessee law governs because significant connection exists with Tennessee and the connection with North Carolina is casual.

[2] We now consider whether defendant Allstate's policy provides coverage to plaintiffs under Tennessee law. The liability section of the policy provides coverage to the named insured with respect to the owned or a non-owned automobile, any resident of the named insured's household, and any relative with respect to a non-owned private passenger automobile. However, among the exclusions is a section which precludes coverage for:

> [B]odily injury to any person who is related by blood, marriage or adoption to an insured against whom claim is made if such person resides in the same household as such insured; provided, however, that this exclusion shall apply only if a premium is indicated for a Coverage CC in the declarations of this policy[.]

In addition, the Uninsured Motorists Insurance section, Coverage SS, excludes "bodily injury to an insured . . . while occupying an automobile (other than an insured automobile) owned by a named insured or any relative resident in the same household, or through being struck by such an automobile[.]" Thus, plaintiffs are not covered or are otherwise excluded from coverage by defendant Allstate's policy.

Family member exclusions have resulted in splits of authority among states. *See Hill v. Nationwide Mut. Ins. Co.*, 535 S.W.2d 327 (1976). However, family member exclusions have been upheld under Tennessee law. *See Kirk v. State Farm Mutual Ins. Co.*, 200 Tenn. 37, 289 S.E.2d 538 (1956). *See also McManus v. State Farm Mutual Insurance Company*, 463 S.W.2d 702 (Tenn. 1971); *Holt v. State Farm Mutual Automobile Ins. Co.*, 486 S.W.2d 734 (Tenn. 1972); *Dockins v. Balboa Ins. Co.*, 764 S.W.2d 529 (Tenn. 1989). Accordingly, because Tennessee law is the applicable law, and plaintiff is not covered or is otherwise excluded under the liability section of the policy, defendant Allstate is not liable. The trial court erred in granting summary judgment for plaintiff; thus, the decision should be reversed and remanded.

Reversed and remanded for entry of declaratory judgment for defendant Allstate.

Chief Judge ARNOLD and Judge WYNN concur.

TOP LINE CONSTRUCTION CO., PLAINTIFF v. J.W. COOK & SONS, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. JOHN WHITE CONSTRUCTION COMPANY, LTD., THIRD PARTY DEFENDANT

No. 9413SC498

(Filed 4 April 1995)

1. Contracts § 69 (NCI4th)— masonry subcontract—unacceptable work—architect as judge—summary judgment for contractor proper

Where a subcontract between plaintiff and defendant general contractor designated the owner's architect as the judge of acceptable work, the parties were bound by his decision that masonry work performed by plaintiff was unacceptable; therefore, whether the masonry work was completed to project specifications and inspected and approved by defendant on a weekly basis was irrelevant, defendant was entitled to recover from plaintiff the amount it was backcharged by the owner, and the trial court properly entered summary judgment for defendant.

Am Jur 2d, Building and Construction Contracts §§ 32 et seq.

2. Contracts § 111 (NCI4th)— rescission of subcontract—issue of fact as to mutuality—summary judgment improper

The trial court erred in granting summary judgment for defendant against third-party defendant for the amount defendant was backcharged by a building owner for masonry work, since there was a genuine issue of fact as to whether there was a mutual termination or rescission of the subcontract between defendant and third-party defendant.

Am Jur 2d, Contracts § 539 et seq.

Appeal by plaintiff and third party defendant from judgment entered 12 November 1993 by Judge Orlando F. Hudson in Columbus County Superior Court. Heard in the Court of Appeals 26 January 1995.

On 1 March 1990, plaintiff and defendant executed a purchase order subcontract in which plaintiff agreed to furnish certain labor, materials and equipment necessary to complete all masonry work in the construction of Western Harnett Middle School. Plaintiff's invoices were paid on a weekly basis minus a ten percent retainage fee held pursuant to the contract. Plaintiff alleged that defendant inspected all masonry work on a weekly basis before making payment. On 20 November 1990, upon completion of the project, plaintiff submitted a bill of $47,666.21 to defendant for the amount of the retainage defendant held pursuant to the subcontract. Defendant refused to pay. Plaintiff further alleged that pursuant to defendant's request, plaintiff returned to the jobsite and spent another $25,000 upgrading the masonry work to defendant's specifications. Defendant contended that the masonry work was still unsatisfactory and refused to pay. Plaintiff then filed suit against defendant to recover the amount due on its retainage bill.

Defendant's answer included a counterclaim against plaintiff and a third party complaint against John White Construction Co. (hereinafter third party defendant). Defendant alleged in its counterclaim against plaintiff that plaintiff did not perform the masonry work consistent with the requirements of the subcontract. As part of its complaint, defendant included a letter from the owner's representative, architect Dan MacMillan, in which he stated that the masonry work was the "worst he had ever seen" in his 40 years as an architect. Defendant alleged that it backcharged the expenses necessary to complete the project against plaintiff's retainage. After those

expenses had been deducted, only $6,808.71 remained due to plaintiff on the retainage. Defendant further alleged that the School Board (hereinafter owner) backcharged defendant an additional $48,750 for the defective masonry work on the project. Defendant contended that after offsetting the $6,808.71 remaining on plaintiff's retainage, plaintiff still owed defendant $41,941.29.

Defendant's third party complaint alleged that prior to defendant's subcontract with plaintiff, third party defendant had entered into a similar subcontract with defendant on 17 May 1989. On 1 March 1990, third party defendant asked defendant to cancel the subcontract and retain another subcontractor to complete the work. Defendant responded that the subcontract was in default and that defendant would retain another subcontractor to complete the work. Defendant alleged that third party defendant was liable to defendant for $41,941.29.

On 15 September 1993, defendant filed a motion for summary judgment. On 12 October 1993, third party defendant also filed a motion for summary judgment. The trial court granted defendant's motion for summary judgment on all of its claims and entered judgment for defendant in the amount of $41,941.29 plus $7,648.76 in attorney's fees against plaintiff and third party defendant jointly and severally. Plaintiff and third party defendant appeal.

Soles, Phipps, Ray and Prince, by Sherry Dew Prince, for plaintiff-appellant.

Thomas Wayne White for third-party defendant-appellant.

Mark C. Kirby for defendant-appellee.

EAGLES, Judge.

Plaintiff and third party defendant contend that the trial court erred in granting defendant's motion for summary judgment. After careful review of the record and briefs, we affirm as to plaintiff and reverse as to third party defendant.

[1] We first address plaintiff's appeal. Summary judgment should only be granted when the pleadings, affidavits and other evidentiary materials presented to the trial court show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56. Article 8 of the subcontract here states:

> Should the Subcontractor [plaintiff], at any time . . . refuse to follow plans and specifications, or fail in any respect to prosecute the covenant on its part to be performed, the Contractor [defendant] shall have the right . . . to terminate this contract in whole or in part. The Architect/Engineer and/or Owner's Representative shall be the judge of the acceptable work and settlement shall be made to this point on this basis. In that event, Contractor [defendant] shall provide the necessary material, labor, etc. to complete the contract in whole or in part and charge the cost thereof to the Subcontractor [plaintiff] crediting or debiting his account as the case may be when the work under this contract is fully completed and accepted. The Subcontractor [plaintiff] expressly agrees to accept and to abide by the above clause in this connection and further agrees that . . . nothing herein shall affect the right of the Contractor [defendant] to recover damages from the Subcontractor [plaintiff] for delay or malperformance or nonperformance of this contract.

In support of its motion for summary judgment, defendant filed the affidavit of the owner's representative/architect, Dan MacMillan, who stated that the masonry work performed by plaintiff and third party defendant was the worst "I have ever observed in my more than forty-two (42) years as a licensed architect." In response to defendant's motion, plaintiff submitted the affidavit of John C. White, III. White stated that he was the president of John White Construction Company prior to its dissolution and that he was currently the manager of plaintiff. White stated that all the masonry work on the project was completed to project specifications and that defendant inspected and approved the work on a weekly basis prior to payment. Plaintiff contends that MacMillan's credibility is at issue and cannot be resolved on summary judgment. We disagree.

The subcontract designates MacMillan as the judge of acceptable work. "[W]here the contract provides that the work shall be done to the satisfaction, approval, or acceptance of an architect or engineer, such architect or engineer is thereby constituted sole arbitrator between the parties, and the parties are bound by his decision, in the absence of fraud or gross mistake." *Welborn Plumbing and Heating Co. v. Randolph County Board of Education*, 268 N.C. 85, 90, 150 S.E.2d 65, 68 (1966) (quoting 13 Am. Jur. 2d *Building, Etc. Contracts*, § 34 (1964)). There is no evidence here of fraud or gross mistake. Plaintiff expressly agreed to be bound by this clause and defendant retained its right to recover damages for malperformance of the con-

tract. Accordingly, there are no genuine issues of material fact. MacMillan's judgment as to the quality of the masonry work is final as between the parties and defendant is entitled to recover from plaintiff the amount it was backcharged by the school board. Summary judgment was properly entered against plaintiff.

[2] We conclude, however, that the trial court erred in granting summary judgment against third party defendant. In response to defendant's motion for summary judgment, third party defendant moved for summary judgment against defendant. In support of its motion, third party defendant relied on its answer and the affidavit of its former president, John C. White, III. Third party defendant admitted in its answer that on 17 May 1989, it entered into a subcontract with defendant (hereinafter third party subcontract) to perform masonry work on the project. White stated in his affidavit that on 1 March 1990, he informed defendant that third party defendant had ceased its business operations and that White would make arrangements with plaintiff to perform the masonry work on the subcontract. White would be employed with plaintiff. White stated that on 1 March 1990 he and defendant mutually agreed to terminate the subcontract with neither party having to perform any further obligations nor receive any further benefits. Defendant and White further agreed that plaintiff would perform the masonry work and that defendant would enter into a new subcontract with plaintiff. All retainages and benefits of third party defendant were to be transferred to plaintiff.

Third party defendant contends that its subcontract with defendant was mutually terminated. We conclude that an issue of material fact exists as to whether there was a mutual rescission of the third party subcontract. Rescission may be made by mutual agreement. *Brannock v. Fletcher*, 271 N.C. 65, 75, 155 S.E.2d 532, 542 (1967). Rescission depends not only upon the acts of the parties, but it also depends upon the intent with which they are done.

> *For rescission there must be mutuality, express or implied.* The mutuality essential to rescission may be found to exist if, after breach of contract or abandonment by one party, the other by word or act declares the contract rescinded.

Id. at 74-75, 155 S.E.2d at 542 (quoting *Dooley v. Stillson*, 46 R.I. 332, 335, 128 Atl. 217, 218 (1928)). To constitute rescission by mutual consent, there must be an abandonment or repudiation of the contract by one of the parties that is assented to or acquiesced in by the other. *Id.* at 75, 155 S.E.2d at 542 (quoting 91 C.J.S. *Vendor & Purchaser*

§ 124 (1955)). Both elements must be present. Parol evidence is generally admissible to show grounds for granting a rescission even if the written agreement includes a merger clause. *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 66, 344 S.E.2d 68, 75 (1986). Third party defendant's affidavit creates an issue of fact as to whether there was a mutual rescission of the third party subcontract. Accordingly, we reverse the trial court's order granting summary judgment against third party defendant.

Affirmed in part, reversed in part and remanded.

Judges GREENE and WALKER concur.

GOLDIE V. LEACH, PLAINTIFF v. MONUMENTAL LIFE INSURANCE COMPANY, DEFENDANT

No. 9427SC555

(Filed 4 April 1995)

Insurance § 353 (NCI4th)— accidental death policy—definition of children—grandchild included

The term "children" as used in defendant's accidental death insurance policy issued to plaintiff includes her grandchild who was in her custody pursuant to a court order, was primarily dependent on plaintiff for his support and maintenance, and lived in a parent-child relationship with plaintiff.

Am Jur 2d, Insurance §§ 559 et seq.

Judge LEWIS dissenting.

Appeal by plaintiff from judgment entered 5 April 1994 in Cleveland County Superior Court by Judge Robert P. Johnston. Heard in the Court of Appeals 22 February 1995.

Corry, Cerwin & Luptak, by Todd R. Cerwin, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by F. Lane Williamson, for defendant-appellee.

GREENE, Judge.

Goldie V. Leach (plaintiff) appeals from a judgment entered 5 April 1994 in Cleveland County Superior Court, granting Monumental Life Insurance Company's (defendant) motion for judgment on the pleadings in plaintiff's declaratory judgment action.

Plaintiff is the maternal grandmother of Corey Demetrius Leach (Corey), born 28 March 1978 to plaintiff's natural daughter, Donna Leach Gingles, and Christopher Johnson. Corey's natural mother died on 10 September 1991. Prior to that date, Corey resided exclusively with plaintiff. On 3 October 1991, plaintiff filed a civil action seeking legal custody of Corey. On 8 November 1991, a consent judgment as to child custody was entered, awarding plaintiff the primary care, custody, control and supervision of Corey.

Defendant issued plaintiff a life insurance policy effective 10 April 1992, insuring plaintiff and her family against accidental death in the principal sum of $25,000.00. Plaintiff listed Corey on the enrollment form, submitted in March of 1992 to defendant, as an additional child to be insured under the family plan. The Dependent Coverage Rider provision of plaintiff's policy with defendant provides in pertinent part:

> Persons . . . covered under this policy are you and your Dependents [named in the application for this policy or added at a later date on forms provided by us]. Dependent means your spouse . . . your unmarried children under age 19; or under age 23, if enrolled as a full-time student . . . and children whose support is required by a court decree.
>
> Children **include** natural children, stepchildren and legally adopted children. **They must be primarily dependent on you for support and maintenance and must live in a parent-child relationship with you**. [Emphasis added.]

On 9 September 1992, Corey was accidentally killed by a gunshot wound. Plaintiff submitted a claim for benefits for Corey's death under her accidental death insurance policy issued to her by defendant. By letter dated 21 October 1992, defendant denied plaintiff's claim and refused to provide benefits because "grandchildren are not considered as eligible dependents under the terms of this policy." On 15 December 1993, plaintiff filed an action for declaratory judgment in Cleveland County Superior Court, requesting the court to enter an order "that determines Corey D. Leach to be a dependent of [plaintiff]

within the meaning of the described insurance policy." On 26 January 1994, defendant served its answer stating that Corey is not a dependent within the meaning of the policy and further making a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure.

On 9 February 1994, plaintiff made a motion to amend her complaint. The parties entered a stipulation allowing plaintiff to amend her complaint to state that Corey was "at all relevant times primarily dependent" upon plaintiff "for his support and maintenance, including the date of the Application and his date of death" and that Corey "lived in a parent-child relationship with [plaintiff] at all relevant times, including both the date of Application through and including his date of death." After a hearing on defendant's motion for judgment on the pleadings, the trial court entered an order on 5 April 1994, granting defendant's motion because "as a matter of law, there is no insurance coverage under the insurance policy issued by the defendant for the death of Corey D. Leach, as alleged by the plaintiff in this action for declaratory judgment."

The issue presented is whether the term "children" as used in defendant's accidental death insurance policy issued to plaintiff includes her grandchild who was in her custody pursuant to a court order, was primarily dependent on plaintiff for his support and maintenance, and lived in a parent-child relationship with plaintiff.

A motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure is proper when all the material allegations of fact are resolved in the pleadings and only questions of law remain. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). In this case, the material facts are undisputed and the only question remaining, which is the meaning of the language in the insurance policy, is a question of law, *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970); therefore, a Rule 12(c) motion is proper.

Defendant argues that because the policy defines children by stating "[c]hildren include natural children, stepchildren and legally adopted children," "[a]s a grandchild, Corey D. Leach was by definition not within the class of persons" who could be covered under the terms of the policy. We disagree.

The definition used by defendant in the insurance policy in this case to define "children" is not ambiguous, and we must therefore

"enforce the contract as the parties have made it." *Id.* The word "include" implies an incomplete listing and "is used most appropriately before an incomplete list of components," *The American Heritage Dictionary* 651 (2d ed. 1982), and is "ordinarily a word of enlargement and not of limitation." *Turnpike Auth. v. Pine Island*, 265 N.C. 109, 120, 143 S.E.2d 319, 327 (1965) (use of word "including" in statutory delegation of authority does not necessarily restrict it to matters enumerated in the inclusion). Therefore, by using the word include, defendant has unambiguously stated that "children" is not limited to "natural children, stepchildren and legally adopted children" so long as the "child" is "primarily dependent on [the policyholder] for support and maintenance" and lives "in a parent-child relationship" with the policyholder. In this case, Corey was "at all relevant times primarily dependent" upon plaintiff for his "support and maintenance" and "lived in a parent-child relationship with [plaintiff] at all relevant times," facts to which the parties stipulated, and plaintiff listed Corey on the enrollment form to the policy. Therefore, the term "children" in defendant's insurance policy issued to plaintiff provides coverage for the accidental death of Corey, plaintiff's grandchild. For these reasons, the decision of the trial court is

Reversed and remanded.

Judge COZORT concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent. The majority's reliance on language in *Turnpike* is misplaced. *Turnpike* dealt with construction of a statute, not an insurance policy. *See Turnpike*, 265 N.C. at 120, 143 S.E.2d at 327. It has no application in this context.

The majority also cites *Wachovia Bank*, a case dealing with the construction of terms in an insurance policy. However, the majority fails to follow language in *Wachovia Bank* in which our Supreme Court set forth the proper method of construing a <u>definition</u> in an insurance policy. The Court stated:

> When the policy contains a definition of a term used in it, this is the meaning which must be given to that term wherever it

appears in the policy, unless the context clearly requires otherwise.

Wachovia Bank, 276 N.C. at 354, 172 S.E.2d at 522.

Plaintiff's policy unambiguously defines "children" to include natural children, stepchildren and legally adopted children. Thus, we must uphold this definition as that intended by the parties. Since the definition of "children" is unambiguous, it is not our role to "remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay." *See Id.*

The majority's construction elevates the policy language on dependency over the actual definition of "children." Yet, this dependency language, requiring that the children "be primarily dependent" on the policyholder "for support and maintenance" and that the child and policyholder "live in a parent-child relationship" operates as a limitation on which children are covered. As such, it should not be used to expand coverage to include any dependent minor.

The majority's approach would remake the contract and bestow coverage on any dependent minor including foster children, grandchildren, great-grandchildren, and minors who are no kin at all, so long as they are the children of someone. This result goes far beyond the contract made between the parties.

The order granting judgment on the pleadings to defendant should be affirmed.

W.C. CALTON, JR. AND MARY H. CALTON, EXECUTORS OF THE ESTATE OF WILBURN CLYDE CALTON, PLAINTIFFS, AND PHILLIP BYRON CALTON, INDIVIDUALLY AND AS A SHAREHOLDER OF NORTH CAROLINA EQUIPMENT COMPANY, INTERVENOR-PLAINTIFF v. RENNETH JAVAN ("VAN") CALTON, W.C. CALTON, JR., RAYMOND H. KEES, AND HOWARD E. MANNING, TRUSTEES OF THE "STOCK TRUST" CREATED UNDER THE WILL OF W.C. CALTON, MARY C. FERNANDEZ DECASTRO, RENNETH JAVAN CALTON, PHILLIP BYRON CALTON, W.C. CALTON, JR. AND MARY H. CALTON, TRUSTEES OF THE "MARITAL TRUST" CREATED UNDER THE WILL OF W.C. CALTON, AND NORTH CAROLINA EQUIPMENT COMPANY, DEFENDANTS

No. 9410SC595

(Filed 4 April 1995)

Declaratory Judgment Actions § 7 (NCI4th); Corporations § 187 (NCI4th)— transfer of stock by testator—restrictions—no justiciable controversy

In a declaratory judgment action to determine the validity of stock transfers to trustees necessitated by testator's will in light of the transfer restrictions set out in the company's charter and on the stock certificates requiring that shares first be offered to the company and the other shareholders, there was no justiciable controversy and the trial court had no jurisdiction to hear the action where plaintiffs neither alleged nor presented any evidence to show that any shareholder exercised his right to purchase the stock, intended to exercise his right, or was even financially able to do so at the time this action was filed. Furthermore, even if there were an actual controversy, plaintiffs waived any right they may have had to object to the stock transfers where they had knowledge of testator's death and the restrictions contained on the stock certificates, no shareholder asked to purchase any of testator's stock upon his death, and plaintiffs waited eighteen months to file this action.

Am Jur 2d, Declaratory Judgments §§ 25-41; Corporations §§ 683-708.

Appeal by defendants Renneth Javan Calton, Raymond H. Kees, and Howard E. Manning, trustees of the stock trust, and by defendant North Carolina Equipment Company from judgment signed 11 February 1994 and filed 17 February 1994 by Judge Coy E. Brewer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 February 1995.

Gulley, Kuhn & Taylor, L.L.P., by Jack P. Gulley and David J. Kuhn, for plaintiffs-appellees. William E. West, Jr. for intervenor-plaintiff-appellee.

Hunter, Wharton & Stroupe, by John V. Hunter III, for defendants-appellants Renneth Javan Calton, Raymond H. Kees, and Howard E. Manning, Trustees of the Stock Trust.

Moore & Van Allen, PLLC, by Joseph W. Eason and A. Bailey Nager, and Law Offices of Raymond Mason Taylor, by Raymond M. Taylor, for defendant-appellant North Carolina Equipment Company.

LEWIS, Judge.

W.C. Calton, Sr. (hereinafter "Mr. Calton") died testate on 29 July 1990. At his death, he owned 610 shares of Class A voting common stock and 2,779 shares of Class B non-voting common stock in North Carolina Equipment Company (hereinafter "NCEC" or "the company"). His will left the Class A stock to a testamentary "stock trust" and the Class B stock to a testamentary "marital trust." The stock trust was to be administered by Renneth Javan ("Van") Calton, Raymond Kees, Howard Manning, and W.C. Calton, Jr., as trustees, and the marital trust was to be administered by Mr. Calton's wife, Mary H. Calton, and his four children, Van Calton, W.C. Calton, Jr., Phillip Calton, and Mary C. Fernandez DeCastro, as trustees. Additionally, W.C. Calton, Jr. and Mary H. Calton were named as executors of the estate of Mr. Calton.

The executors delivered the stock to the company for transfer to the trustees of the two trusts within two weeks of Mr. Calton's death, as required by the will, and the company prepared new stock certificates in the names of the trustees. Eighteen months later, in February 1992, the executors filed this declaratory judgment action. In June 1993, Phillip Calton was allowed to intervene as intervenor-plaintiff. At issue was the validity of the stock transfers to the trustees, in light of the transfer restrictions set out in the company's charter and on the stock certificates. The restrictions state in pertinent part:

> The stock of this corporation can be sold by the owners thereof only by first making an offer in writing to the Company to sell such stock to the Company or to the remaining stockholders thereof, at the value as shown by the books of the corporation at

> the last preceding annual audit. No stockholder may pledge or assign any stock owned by him except with the understanding that the pledge or assignment so made is subject to this provision of the Certificate of Incorporation of North Carolina Equipment Company, limiting the right of any holder of the stock of said corporation to sell or pledge said stock as set out herein.
>
> If any stockholder shall desire to dispose of his stock or any part of it, he shall first offer to sell the stock or part thereof to the Company and then to the remaining stockholders, for a period of thirty days by written notice, at the book value as shown by the books of the Company at the last preceding annual audit. No stock shall be transferred on the books of the Company unless and until the conditions herein are complied with; and a transfer when and if made shall be prima facie compliance. In the event of the death of any stockholder, this stock shall forthwith be subject to this thirty days option to purchase by the Company and remaining stockholders, and if exercised, the legal representatives of the deceased are and shall be bound to deliver the stock upon tender of the book value as shown by the books of the Company at the last preceding annual audit within the thirty days period after the death or within thirty days after the qualification of the executors or administrators as the case may require. If the stockholder is also an employee or officer of the Company, and he shall sever his connections with the Company for any reason whatsoever, then and in that event, his stock shall be subject to a thirty day option of purchase by the Company, or the remaining shareholders. . . . If neither the Company nor the remaining stockholders purchase the stock within the time limited, the Seller shall have the right to dispose of it as he sees fit; but the Buyer shall take subject to these same restrictions, options, rules and regulations.

Plaintiffs allege that the company did not exercise its option to purchase the stock held by the estate and that the company did not offer the other shareholders the right to purchase the stock or any part of it as required by the transfer restrictions. As a result, plaintiffs allege, there is an actual controversy between plaintiffs and defendants

> relating to their respective rights and obligations in relating to the construction and validity of the provisions of the Charter of North Carolina Equipment [Company] as to the rights of the remaining

shareholders of North Carolina Equipment Company to purchase all or part of the stock owned by W. C. Calton at the date of his death.

After a hearing, the trial court concluded that the shares owned by Mr. Calton at his death were transferred to the stock trust and the marital trust in violation of the above restrictions, as the shares were not first offered to the company and the other shareholders, and that the transfers were therefore void *ab initio*. From the judgment, the trustees of the stock trust (less W.C. Calton, Jr.) and NCEC appeal. For purposes of this opinion, the executors and the intervenor-plaintiff will be referred to collectively as "plaintiffs," and the trustees of the stock trust and NCEC will be referred to collectively as "defendants."

Although not raised by the parties, we first address the jurisdiction of the trial court to hear this declaratory judgment action. *See Ramsey v. Interstate Insurors, Inc.*, 89 N.C. App. 98, 102, 365 S.E.2d 172, 175 (holding that this Court may address subject matter jurisdiction of trial court in declaratory judgment action even though not argued by parties), *disc. review denied*, 322 N.C. 607, 370 S.E.2d 248 (1988). N.C.G.S. § 1-254 (1983) provides as follows:

> Any person interested under a deed, will, written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

Although the Declaratory Judgment Act does not specifically state that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law has imposed such a requirement. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986). Further, the controversy must exist between the parties at the time the pleading requesting declaratory relief is filed. *Id.* at 584, 347 S.E.2d at 29. Our Supreme Court has stated that an actual controversy is more than a mere disagreement between the parties; rather, litigation must appear unavoidable. *Id.* at 589, 347 S.E.2d at 32. A mere difference of opinion between the parties, without any practical bearing on any contemplated action, does not constitute a genuine controversy. *Barbour v. Little*, 37 N.C. App. 686, 691, 247 S.E.2d 252, 255, *disc. review denied*, 295 N.C. 733, 248

S.E.2d 862 (1978). That is, the Declaratory Judgment Act does not authorize the adjudication of abstract or theoretical questions. *Angell v. City of Raleigh*, 267 N.C. 387, 391, 148 S.E.2d 233, 236 (1966).

For example, in *Sharpe*, the plaintiffs were minority shareholders in a corporation that sold its assets to the defendant. In partial payment of the purchase price for the assets, the defendant gave promissory notes to the corporation, which were distributed to the shareholders. The notes conditioned the amount of their payoff on whether the shareholders competed against the defendant over the next several years. The plaintiffs sought a declaratory judgment to determine the validity of the competition provisions in their note. The plaintiffs presented no evidence of specific plans to directly or indirectly compete with the defendant. The Court held that because there was no evidence of a practical certainty that the plaintiffs would compete with the defendant or that they had the intention of doing so if the provisions in the note were declared invalid, no justiciable controversy existed between the parties at the time the action was filed. 317 N.C. at 590, 347 S.E.2d at 32.

Similarly, in the case at hand, we find that there was no justiciable controversy and that the trial court therefore had no jurisdiction to hear the action. Plaintiffs neither alleged nor presented any evidence to show that any shareholder exercised his right to purchase the stock, intended to exercise his right, or was even financially able to do so at the time this action was filed. Without such allegations or evidence, the issue before the trial court was merely an abstract or theoretical question. There was simply a difference of opinion between the parties, with no practical bearing on any contemplated action. The trial court had no authority to address such an issue where plaintiffs could not establish that there was an actual controversy.

Furthermore, even if there were an actual controversy, all parties to this action had notice of Mr. Calton's death, all were aware of the restrictions contained on the stock certificates, no shareholder asked to purchase any of the stock upon Mr. Calton's death, and some eighteen months elapsed before this action was filed. On these facts we would hold that plaintiffs waived any right they may have had to object to the stock transfers.

For the reasons stated, the judgment of the trial court is vacated, and the case is remanded to the trial court for dismissal.

Vacated and remanded.

Judges COZORT and GREENE concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, PLAINTIFF v. BOB DUNN FORD, INC., DEFENDANT

No. 9418DC546

(Filed 4 April 1995)

Secured Transactions § 123 (NCI4th)— repurchase agreement—definition

The trial court's findings supported its conclusion that a "repurchase agreement" between an automobile dealer and the bank to which the dealer sold a security agreement was a trade term in the industry that required the dealer to repurchase the secured vehicle from the bank only if the bank tendered the vehicle to the dealer within 90 days of the buyers' default.

Am Jur 2d, Secured Transactions § 631.

Appeal by plaintiff from judgment entered 17 December 1993 by Judge William Daisy in Guilford County District Court. Heard in the Court of Appeals 20 February 1995.

In May 1987 defendant and a married couple (the buyers) entered into a purchase and sale agreement (the security agreement) for the sale of a 1987 Ford Bronco. Defendant then attempted to sell the security agreement to plaintiff. Plaintiff and defendant had previously entered into a contract which governed the purchase and sale of all such security agreements on a without recourse basis, meaning that once plaintiff purchased a security agreement from defendant, defendant was relieved of liability to plaintiff for the balance remaining due on the security agreement in case of default by a buyer.

On this occasion defendant mailed the security agreement to plaintiff with the understanding that plaintiff would purchase it without recourse. Plaintiff refused to purchase the security agreement because the buyers did not meet plaintiff's minimum credit requirements. Plaintiff mailed a letter to defendant stating that plaintiff would purchase the security agreement only if defendant agreed to enter into a repurchase agreement. Plaintiff provided a form, but it

contained only a space for guarantors to sign. Defendant's general manager called plaintiff to ask how he should sign the agreement. Plaintiff told defendant to sign in the space reserved for guarantors, and the agreement would be treated as a repurchase agreement.

The buyers defaulted in November 1988. In April 1990 plaintiff, pursuant to the repurchase agreement, demanded payment from defendant of the outstanding balance on the security agreement.

At trial plaintiff abandoned its claim that defendant was liable as a guarantor. The parties agreed that, although defendant signed in a space reserved for guarantors, the agreement was actually a repurchase agreement and that the real issue was over the meaning of the term repurchase agreement.

Defendant's evidence showed that, in the industry, a repurchase agreement was an agreement under which the financial institution must repossess the automobile and return it to the dealer. The dealer must then repurchase the automobile. The dealer's liability is contingent, however, on the financial institution returning the automobile within 90 days of default, subject to a few exceptions such as acts of war or bankruptcy of the defaulting buyer. The evidence also showed that plaintiff did not tender the automobile to defendant until at least one and a half years after the buyers defaulted.

Plaintiff's evidence showed that a repurchase agreement is a full recourse agreement and that under a full recourse agreement defendant would have to repurchase the security agreement upon demand by plaintiff. Next, in anticipation that the judge might accept defendant's definition of repurchase agreement, plaintiff showed that there are many industry exceptions to the 90 day rule and that plaintiff fell within at least one of those exceptions.

The trial judge accepted defendant's definition of repurchase agreement and ruled that because plaintiff did not return the automobile to defendant within 90 days of the buyers' default defendant was not required to repurchase the automobile. From this judgment plaintiff appeals.

Clontz, Clontz & Hunter, P.L.L.C., by Michael S. Hunter, for plaintiff appellant.

Alspaugh & Carruthers, by Thomas D. Carruthers, for defendant appellee.

ARNOLD, Chief Judge.

Plaintiff brings forward one assignment of error: "The Court's Conclusion of Law Number 3, on the ground that the facts as found by the court and the applicable law do not support the Conclusion." Much of plaintiff's argument, however, is dedicated to another question—whether or not the evidence supports the findings. This question is not properly before us. Plaintiff did not assign error to any of the trial judge's findings. When no assignment of error is made to particular findings, they are "presumed to be supported by competent evidence and are binding on appeal." *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). Even if the assignment of error could be read as challenging the sufficiency of the evidence, it would be ineffective to support plaintiff's argument. An assignment of error generally challenging the sufficiency of evidence to support numerous findings of fact is broadside and ineffective. *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E.2d 755, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Our review is therefore limited to whether or not the findings support the judge's conclusion of law number 3.

The primary issue at trial was the meaning of "repurchase agreement." The court found that the term repurchase is subject to multiple interpretations. The court also found facts related to each interpretation. Specifically, the court found the following:

> That at trial Bob Dunn asserted the repurchase agreement is a trade term in the industry that requires the dealer to repurchase the vehicle from the bank if the bank tenders the vehicle to the dealer within 90 days of default by the purchaser. That Bob Dunn admitted there are some instances in which this 90 day period can be extended such as acts of war or bankruptcy of the defaulting purchaser. That First Union at trial asserted that a repurchase agreement acts as a full guaranty. That First Union also asserted that if a repurchase does not act as a full guaranty then the repurchase forms utilized by First Union control the terms of the agreement. That First Union asserted these forms provide for the 90 day period as described by Bob Dunn. that (sic) this 90 day period can be extended by acts of war or bankruptcy as described by Bob Dunn and that this 90 day period can also be extended if the defaulting purchaser "refuses to surrender possession" as stated

> in the First Union Form. Bob Dunn admitted that the First Union form, the Northwestern Bank form, and the agreement as he described it were typical of the industry even though each format differed as to specific exceptions to the 90 day period. Both parties agreed that Bob Dunn had not signed the First Union form nor was this form presented to Bob Dunn at any point prior signing (sic) of the agreement which is the basis of this lawsuit.

From these and other findings of fact the trial judge drew conclusion number 3:

> That the agreement which is the basis of this lawsuit is ambiguous. That this agreement was a repurchase agreement. That a repurchase agreement is a trade term in the industry that requires the dealer to repurchase the vehicle from the bank if the bank tenders the vehicle to the dealer within 90 days of default by the purchaser. That there are some instances in which this 90 day period can be extended. That Bob Dunn's asserted exceptions to this 90 day period are reasonable and form the basis of the agreement. This 90 day period can be extended due to acts of war or bankruptcy of the defaulting purchaser. That First Union failed to tender the car to Bob Dunn within 90 days of default by the purchasers and failed to demonstrate it fell within any exceptions to the 90 day period. Thus Bob Dunn is not required to repurchase the vehicle from First Union.

The questions before the judge were (1) whether or not the agreement between plaintiff and defendant is ambiguous, and (2) if the agreement is ambiguous, what is the meaning of repurchase agreement. The trial judge's findings are relevant to these questions, and the findings fully support his conclusion of law. The order reflects a reasoned decision. We therefore affirm the judgment.

Affirmed.

Judges WYNN and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v ANTHONY F. HANNON, DEFENDANT-APPELLANT

No. 9421SC541

(Filed 4 April 1995)

Evidence and Witnesses § 2338 (NCI4th)— expert witness—opinion that witness was telling the truth—plain error

In a prosecution of defendant for second-degree rape and taking indecent liberties with a child where there was no evidence of sexual intercourse other than the testimony of the mentally handicapped prosecuting witness, the trial court committed plain error in allowing a witness whom the court accepted as an expert to express an opinion that the prosecuting witness was telling the truth about having sex with defendant.

Am Jur 2d, Expert and Opinion Evidence § 244.

Appeal by defendant from judgment entered 7 October 1993 by Judge W. Steven Allen, Sr. in Forsyth County Superior Court. Heard in the Court of Appeals 20 February 1995.

The alleged victim in this case was a fifteen-year-old trainable mentally handicapped student at South Park High School. Defendant was a teacher's assistant at South Park. The State presented evidence that the victim asked defendant for a ride home from school on 8 November 1990, that defendant took her to McDonald's and then to his apartment, and that defendant then performed vaginal intercourse five times with the victim.

The victim told her mother about the incident when she returned home that evening. The following day the victim received a medical examination at an area hospital. There was no trace of semen in the victim's vagina, and, in all, the medical and physical evidence neither supported nor refuted the prosecuting witness's allegations.

Defendant was tried on charges of second degree rape and taking indecent liberties with a child. The jury found defendant guilty of taking indecent liberties with a child. The trial judge entered judgment, sentencing defendant to seven years imprisonment. From this judgment defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Diane G. Miller, for the State.

S. Mark Rabil for defendant appellant.

ARNOLD, Chief Judge.

Dr. Jane Matteson was assistant principal at South Park High School at the time the victim made her allegations. She was called to testify as an expert for the State. The following statements constitute the objectionable portion of her testimony according to defendant.

> [Prosecutor]: Based upon your personal dealings with [the victim] and your observations of her for over three years now; is that correct? Do you have an opinion satisfactory to yourself as to her truthfulness or untruthfulness?
>
> [Dr. Matteson]: Yes, I do.
>
> Q: Could you please tell us that opinion?
>
> A: [The victim] shows us a very different set of behaviors when she's lying and when she's telling —
>
> [Defense Attorney]: Objection.
>
> THE COURT: Hold on a second. You have to answer the question first.
>
> Q: Question is what is your opinion as to her truthfulness or untruthfulness?
>
> A: I think that she shows me very clearly when she is telling the truth and when she is not.
>
> [Defense Attorney]: Objection.
>
> THE COURT: You have to answer his question first. Then you can explain the answer. His question is do you think she's truthful or not?
>
> THE WITNESS: Yes, I think she's truthful.
>
> THE COURT: Now, you can explain.
>
> [Defense Attorney]: Objection to specific instances.
>
> THE COURT: Overruled. You can explain why you have that opinion.

> A: The victim] shows us different behaviors when she is lying or when she is telling the truth. She's a very poor liar. She—when she does lie it's evident in how she handles herself. She is usually very defensive and volatile in her personality pattern. She reacts badly. The adults that work with her, and myself in particular because I had as much experience with her in that regard, see that she will get very, very defensive. When you talk through a situation with her, she is ultimately truthful and is regretful of having lied to you, created a scene, created difficulty, and is very, very interested in being back in integrity with you.
>
> If she is telling the truth initially she usually has a lot what I would call a flatter profile. She's not—she's much more calm about it and more matter of fact about whatever it is that she's talking about.
>
> If she's lying it's immediately apparent to us that she's been caught in a lie. And then we work through that process, get to the point where we get to the truth and get the situation resolved. And that's a very predictable pattern with her.

Dr. Matteson had not been tendered as an expert at the time she stated her opinion on truthfulness. She was, however, subsequently tendered and accepted as an expert in mental retardation and the behavior of mentally retarded children.

Defendant argues that Dr. Matteson's testimony was an improper expert opinion on the victim's credibility. After scrutinizing Dr. Matteson's testimony, we believe that instead of giving an opinion on the prosecuting witness's credibility, she was trying to convey to the jury that the victim was telling the truth on this particular occasion. Dr. Matteson's explanation of how she knows when the victim is telling the truth makes sense if we view her testimony in this manner. In effect, Dr. Matteson testified that the victim is telling the truth about having sex with defendant, and this is how I know she is telling the truth. No matter whether we view her testimony this way, or as an opinion on the prosecuting witness's credibility in general, it was error to admit it at trial. *See State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986); *State v. Teeter*, 85 N.C. App. 624, 355 S.E.2d 804, *disc. review denied, appeal dismissed*, 320 N.C.175, 358 S.E.2d 67 (1987) (holding that expert's opinion that she believed the witness and explanation of why she believed witness was inadmissible).

Defendant did not object to this testimony at trial. He asks that we view the admission of this evidence as plain error. Plain error is

error that results in a miscarriage of justice or denies a defendant a fair trial. *State v. Holloway*, 82 N.C. App. 586, 347 S.E.2d 72 (1986) (citing *United States v. McCaskill*, 676 F.2d 995 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982). It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury. *Holloway*, 82 N.C. App. at 587, 347 S.E.2d at 73-74. Our Courts have held numerous times that an expert's opinion to the effect that a witness is credible, believable, or truthful is inadmissible. *See State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986); *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986); *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986). This Court in *Holloway* determined that the admission of such an opinion is plain error when the State's case depends largely on the prosecuting witness's credibility.

In this case there was no evidence of sexual intercourse other than the prosecuting witness's testimony. Therefore, her credibility was of critical importance. Under these circumstances, Dr. Matteson's testimony was unduly prejudicial to defendant because of the influence it had over the jury's determination of credibility. As in *Holloway*, we believe that this opinion on the prosecuting witness's credibility was plain error warranting a new trial.

Although Dr. Matteson had not been tendered as an expert at the time she stated her opinion, it is apparent to us that the court implicitly accepted her as an expert before she stated her opinion. Prior to stating her opinion, Dr. Matteson testified extensively on matters within her field of expertise. The trial judge had also questioned Dr. Matteson on her education and experience before allowing her to answer a line of questioning during direct examination. The foregoing facts indicate that the judge unquestionably accepted Dr. Matteson as an expert. Furthermore, and more importantly, the judge's treatment of Dr. Matteson conveyed to the jury that Dr. Matteson was testifying as an expert.

After reviewing the transcript we cannot say that there is a reasonable possibility that a different result would not have been reached if Dr. Matteson had not stated her opinion on the victim's truthfulness. Defendant is entitled to a new trial.

New trial.

Judges WYNN and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. GURNEY GRAY MYERS, JR.

No. COA94-743

(Filed 4 April 1995)

Automobiles and Other Vehicles § 813 (NCI4th)— request to have wife witness breathalyzer test—refusal—results inadmissible at trial

The trial court erred in admitting the results of a breathalyzer test in a prosecution of defendant for impaired driving where defendant asked that his wife be permitted to observe the taking of the breathalyzer test; the administering officer's statement that "that might not be a good idea" because she had been drinking was tantamount to a refusal of that request; and the fact that defendant later took the test could not be construed as a waiver of his right to have a witness. N.C.G.S. § 20-16.2(a)(6).

Am Jur 2d, Automobiles and Highway Traffic §§ 302, 305-308.

Appeal by defendant from judgment entered 6 April 1994 in Rowan County Superior Court by Judge William H. Helms. Heard in the Court of Appeals 1 March 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Morrow, Alexander, Tash & Long, by Charles J. Alexander, II and Daniel A. Landis, for defendant-appellant.

GREENE, Judge.

Gurney Gray Myers, Jr. (defendant) appeals from a judgment entered pursuant to a jury verdict, finding him guilty of Driving While Impaired.

On 10 October 1993, North Carolina Highway Patrolman Glenn Hester (Hester) stopped defendant, who was driving his wife and a friend, because defendant's automobile had an expired license plate. Although he observed the defendant walking to the Patrol vehicle, Hester was not suspicious that defendant was drinking until defendant was in the Patrol vehicle and Hester smelled the "obvious odor of alcohol" and noticed that defendant's eyes were bloodshot and his face was flushed. Defendant told Hester that he had consumed five

beers during defendant's day at the Charlotte Motor Speedway. Hester did not conduct any physical tests on defendant, but arrested defendant for driving while impaired, after giving defendant an "Alchosenser test," and transported defendant to the Salisbury Police Department for a breathalyzer test. The breathalyzer test results were .10 and .09.

The defendant was later convicted of "Impaired Driving" in the Rowan County District Court. He appealed the conviction to the Rowan County Superior Court and received a jury trial. Before trial, the defendant made a motion to suppress the results of the breathalyzer test upon which the impaired driving arrest was based, on the grounds that the defendant was denied his right to have a witness of his choice present when the test was administered. The trial court denied the defendant's motion to suppress and allowed the results to be admitted at trial. The trial court also denied the defendant's motion to dismiss, made at the close of the State's evidence and renewed at the end of all the evidence.

In denying the defendant's motion to suppress, the trial court found the following facts which are not disputed:

> That the defendant told Officer Hester that he wanted his wife to come into the Breathalyzer room with him, and that Officer Hester said that might not be a good idea because she had been drinking also.
>
> That at that time the defendant's wife and Belinda Cecil left to check on their children who were with a babysitter.
>
> That during the processing of the defendant and the administration of the Intoxalyzer test the defendant was read his rights by Officer Hester regarding the Intoxalyzer and his right to have a witness present.
>
> That the defendant said the only person I want is my wife, but she is gone.
>
> That he did not at any time ask for Belinda Cecil to come in the room, even though she had not had anything to drink.
>
> That Officer Hester, after advising the defendant of his rights and waiting some 22 minutes, asked the defendant if he was ready to perform the test.

> That the defendant responded, don't you have to wait 30 minutes? Officer Hester then said, only for a witness. Do you want to contact a witness? And the defendant said no, that he was ready to take the test.

The trial court then concluded as a matter of law that "the defendant's right to have a witness view the testing procedures was not violated by the conduct of Officer Hester."

The defendant's sole assignment of error raises the issue of whether the trial court's order was supported by its findings. *See In re Morrison*, 6 N.C. App. 47, 49, 169 S.E.2d 228, 230 (1969) (appeal from order presents issue of whether it is supported by findings of fact).

The issue presented is whether the findings can support the conclusion that the "defendant's right to have a witness view the testing procedures was not violated by the conduct of Officer Hester."

During the administration of a breathalyzer test, the person being tested has the right to "call an attorney and select a witness to view for him the testing procedures." N.C.G.S. § 20-16.2(a)(6) (1993). This statutory right may be waived by the defendant, *see McDaniel v. Division of Motor Vehicles*, 96 N.C. App. 495, 497, 386 S.E.2d 73, 75 (1989) (defendant's failure to indicate desire to have a witness present is waiver), *cert. denied*, 326 N.C. 364, 389 S.E.2d 815 (1990); *State v. Sykes*, 285 N.C. 202, 208, 203 S.E.2d 849, 853 (1974) (express statement by defendant that he does not want a witness is waiver), but absent waiver, denial of this right requires suppression of the results of the breathalyzer test. *See State v. Shadding*, 17 N.C. App. 279, 283, 194 S.E.2d 55, 57 (failure to advise defendant of statutory rights requires suppression of test results), *cert. denied*, 283 N.C. 108, 194 S.E.2d 636 (1973).

In this case the defendant unequivocally asked that his wife be permitted to observe the taking of the breathalyzer test. Hester's statement that "that might not be a good idea" was tantamount to a refusal of that request and Hester had no right to refuse the request. The right to choose a witness is a choice within the sole province of the defendant and unless there is some evidence that the witness would disrupt the taking of the test, the defendant has the right to have the witness of his choice present. In this case, there is no evidence that the defendant's wife would have disrupted the testing procedures. Furthermore, the fact that he later did take the breathalyzer,

after he was first refused permission to have his wife witness the test, cannot be construed to be a waiver of his right to have a witness. Thus, the findings and evidence support a conclusion contrary to that entered by the trial court, as the defendant was denied his right to have his wife witness the breathalyzer.

Accordingly, the trial court erred in admitting the results of the breathalyzer test at trial. Without the breathalyzer test results, the State's case rests solely upon the odor of alcohol Hester detected on defendant and defendant's bloodshot eyes and flushed face. In light of the scarcity of evidence remaining without the breathalyzer test, there is a reasonable possibility that a different result would have been reached without the results. *See* N.C.G.S. § 15A-1443(a) (1988). Thus, the admission of the results was prejudicial error requiring a new trial.

New trial.

Judges COZORT and LEWIS concur.

DONALD W. ALLEN, JR., PLAINTIFF v. SARAH A. ALLEN, DEFENDANT

No. 9426DC618

(Filed 4 April 1995)

Divorce and Separation § 168 (NCI4th)— 401(k) plan—award of post-separation gains and losses proper

The trial court's judgment and orders awarding defendant post-separation gains and losses on her portion of plaintiff's 401(k) plan were consistent with both the parties' agreement and the law of this State.

Am Jur 2d, Divorce and Separation §§ 870 et seq.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses. 94 ALR3d 176.

Appeal by plaintiff from qualified domestic relations order entered 4 January 1994 and equitable distribution judgment and order entered 8 February 1994 by Judge Resa L. Harris in Mecklenburg

County District Court. Heard in the Court of Appeals 28 February 1995.

Dennis J. Slattery for plaintiff-appellant.

Hicks, Brown and Mann, P.A., by Fred A. Hicks and Terri L. Young, for defendant-appellee.

WALKER, Judge.

Plaintiff initiated this action on 25 October 1991 by filing a complaint for equitable distribution pursuant to N.C. Gen. Stat. § 50-20. This case and a companion case were calendared for the week of 31 August 1992 for trial on the issues of equitable distribution and alimony. When the case was called for trial the parties were discussing a settlement of all issues, and on 2 September 1992, the parties read into the record the terms of their agreement and waived their rights to sign the written judgment.

The terms of the agreement provided for a 60/40 division of all assets of the marital estate valued as of the date of separation, with defendant receiving the larger share. Among the assets to be distributed was a fully vested defined benefit 401(k) retirement plan which plaintiff maintained through his employer. The agreement provided that the marital portion of the 401(k) plan would be distributed pursuant to a qualified domestic relations order (QDRO).

During the process of drafting the equitable distribution order and judgment memorializing the parties' agreement, plaintiff objected to the inclusion of post-separation gains and losses in defendant's share of the 401(k) plan. On 12 April 1993 the trial judge ruled that "as a matter of law . . . the distribution of sixty percent (60%) of the retirement account to Defendant, as of date of separation, included an allocation of gains and losses from date of separation to date of entry of the [QDRO]."

Thereafter the court entered the equitable distribution judgment and order and the related QDRO. The equitable distribution order provided that "the value to be divided from the 401(k) is determined to be $206,535 as of the date of separation, December 21, 1990" and that "Wife shall receive a distributive award in the form of a [QDRO] distributing to her 60% of the account balance of $206,535 or $123,921 as of December 31, 1990." The order stated that

> [t]he $123,921 distributed to Wife shall thereafter include gains and losses on the portion of the plan divided to Wife from 12/31/90 but shall not include further contributions to the account from Husband or his employer. The portion of the gains or losses which shall be attributed to the account of Wife from December 31, 1990 shall be 52.85% of the total gains or losses. This figure is determined as the fractional share of the total account divided to Wife as follows: ($123,921 / $234,489 = 52.85%).

Plaintiff appeals only on the issue of the propriety of including post-separation gains and losses on the portion of the 401(k) plan allocated to defendant.

Plaintiff argues that the trial court erred by "impos[ing] additional terms in the entry of an order or judgment beyond those terms contained in the agreement read into the record by the parties." He claims that the parties' agreement read into the record "was virtually silent as to the 401(k) and the [QDRO] in general" and that "[t]he terms added by the court concerning the gains and losses on the Plaintiff's 401(k) had not been and have never been consented to by the Plaintiff." Plaintiff's position is that the trial court was "without jurisdiction to enter the order on that issue" and that the order "should be reversed and the award of gains and losses on the plaintiff's 401(k) account since the date of separation to the Defendant should be stricken from both the Equitable Distribution Judgment and the QDRO. . . ."

Defendant contends that distribution of defendant's 60% share of the 401(k) plan using the date of separation value necessarily resulted in allocation of any gains or losses since separation and that no additional terms were needed as a result of the actual physical division of the 401(k) plan between the parties. She argues that her earnings or losses would follow her portion of the 401(k) plan from date of separation until date of actual distribution. We agree.

At the outset, we note that the parties' agreement was not, as plaintiff claims, "virtually silent" as to the distribution of the 401(k) plan. The parties agreed that the marital estate, which included the marital portion of the 401(k) plan, was to be divided 60/40 in favor of defendant using date of separation values. Thus, their agreement contemplated that defendant would receive 60% of the marital portion of the 401(k) plan valued as of the date of separation.

Contrary to plaintiff's assertions, the trial court's judgment and orders as to the 401(k) plan did not modify or add to the parties' agreement. Rather, the court simply effectuated the agreement in accordance with N.C. Gen. Stat. § 50-20(b)(3), which provides that an award of a retirement account "shall be based on the vested accrued benefit, . . . calculated as of the date of separation" and "shall include gains and losses on the prorated portion of the benefit vested at the date of separation." *See also Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595 (1994) (in evaluating defined benefit plans, calculation will "include 'gains and losses on the prorated portion of the benefit vested at the date of separation' ") (*quoting* N.C. Gen. Stat. § 50-20(b)(3)).

We hold that the trial court's judgment and orders awarding defendant post-separation gains and losses on her portion of the 401(k) plan are consistent with both the parties' agreement and the law of this state.

Affirmed.

Judges EAGLES and McGEE concur.

IN THE MATTER OF: THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY FERRELL BROTHERS FARMS, INC.

No. 941SC674

(Filed 4 April 1995)

Mortgages and Deeds of Trust § 120 (NCI4th)— foreclosure sale—trustee's commission and attorney's fees—court approval of amount not required

A trustee conducting a sale of real property pursuant to an express power of sale contained in a mortgage or deed of trust is not required to receive court approval of the amount of the disbursements made pursuant to N.C.G.S. § 45-21.31(a), including the trustee's commission and attorney's fees.

Am Jur 2d, Mortgages §§ 978 et seq.

Appeal by Essex Mortgage Corporation from order entered 17 March 1994 in Currituck County Superior Court by Judge Thomas S. Watts. Heard in the Court of Appeals 1 March 1995.

Trimpi & Nash, by John G. Trimpi, for appellant Essex Mortgage Corporation.

Pritchett, Cooke & Burch, by Lars P. Simonsen and Stephen R. Burch, for appellee substitute trustee.

Everett, Everett, Warren & Harper, by Edward J. Harper, II, for appellee East Carolina Farm Credit, ACA, and in its own behalf as Attorneys for ACA.

GREENE, Judge.

Essex Mortgage Corporation (Essex) appeals from the trial court's order granting the trustee in a foreclosure proceeding a trustee's commission and permitting the payment of attorneys' fees.

This case arises out of a foreclosure proceeding instituted by East Carolina Farm Credit, ACA, who held the first mortgage (the instrument) on property owned by Ferrell Brothers Farms, Inc. Essex had the rights of a second mortgagee on the same property. After the sale, Essex filed notice with the Currituck County Superior Court claiming ownership of any surplus funds available from the sale. After learning that Essex would challenge the amount of their commission and fees, the trustee and attorneys filed motions with the superior court for the allowance of their respective commission and fees. Essex then filed motions "to limit" the attorneys' fees and the trustee's commissions, on the grounds that those payments reduced the amount of surplus that Essex would eventually recover.

At a hearing before a superior court judge on 3 March 1994 to determine whether the trustee's commission and attorneys' fees should be paid, Essex was not allowed to present evidence challenging the reasonableness of the commission or fees. Because a motion was pending, the trial judge determined that the requested commission and fees were reasonable and held the trustee was entitled to five percent of the gross sale proceeds as his commission and the attorneys were entitled to fifteen percent of the outstanding balance at the time the foreclosure action was instituted as their fees.

The dispositive issue is whether a trustee conducting a sale of real property pursuant to an express power of sale contained in a mortgage or deed of trust is required to receive court approval of the amount of the disbursements made pursuant to N.C. Gen. Stat. § 45-21.31(a).

There is no dispute in this case that Essex is entitled to any surplus remaining after the trustee makes the disbursements as required by N.C. Gen. Stat. § 45-21.31(a). The only question is whether the legislature has provided or whether the instrument provides any means for Essex to contest the amount of disbursements made by the trustee. The answer is no.

Upon default and after notice and hearing as required by Chapter 45, Article 2A, a person so designated in a mortgage or deed of trust is authorized to conduct a sale of the property described in the instrument. The sale must be conducted consistent with Chapter 45, Article 2A. The proceeds from the sale

> shall be applied by the person making the sale, in the following order, to the payment of—
>
> (1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;
>
> (2) Taxes due and unpaid on the property sold, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;
>
> (3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to special assessment thereon and the property was so sold;
>
> (4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

N.C.G.S. § 45-21.31(a) (1991). "Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the person or persons entitled thereto . . . ." N.C.G.S. § 45-21.31(b). After the sale is completed and the disbursements made, the trustee is required to file a final report "with the clerk of the superior court of the county where the sale is held." N.C.G.S. § 45-21.33(a) (Supp. 1994). The clerk is required to "audit the account and record it." N.C.G.S. § 45-21.33(b).

The trustee is entitled to compensation "as is stipulated in the instrument," N.C.G.S. § 45-21.15(a) (Supp. 1994), and the trustee's commission is specifically listed as an expense which is properly deducted from the proceeds of the sale. N.C.G.S. § 45-21.31(a)(1).

Although N.C. Gen. Stat. § 45-21.31(a) does not have specific reference to attorneys' fees, to the extent the instrument provides for the payment of such fees, they become an "obligation secured by" the instrument. N.C.G.S. § 45-21.31(a)(4). Thus, any entitlement to and the amount of attorneys' fees required for the conduct of the sale is also controlled by the instrument and subject to deduction from the sale proceeds.

Chapter 45, Article 2A contains no language that suggests the trustee must seek or obtain approval from either the clerk of the superior court or the court prior to making the disbursements permitted in N.C. Gen. Stat. § 45-21.31(a). Additionally, neither party to this appeal suggests that the instrument giving rise to this foreclosure grants anyone the right to contest the disbursements permitted in N.C. Gen. Stat. § 45-21.31(a). Thus, in this case, the disbursements made pursuant to N.C. Gen. Stat. § 45-21.31(a) are within the sole province of the trustee. The trustee is required to file a final report and that report must be audited by the clerk of the superior court. In conducting the "audit," however, the clerk is merely authorized to determine whether the entries in the report reflect the actual receipts and disbursements made by the trustee.

Accordingly, the trial court did not err in refusing to allow Essex to present evidence on the reasonableness of the trustee's commission and attorneys' fees. Indeed, the reasonableness of these expenses was not an issue properly before the trial court.

Affirmed.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER MORGAN

No. COA94-1196

(Filed 4 April 1995)

Narcotics, Controlled Substances, and Paraphernalia § 34 (NCI4th)— trafficking in cocaine by possession—failure to pay excise tax on a controlled substance—no double jeopardy

Defendant was not put twice in jeopardy by being sentenced both for trafficking in cocaine by possession and for failure to pay

excise tax on a controlled substance, since successive criminal prosecutions were not an issue; defendant was charged with two distinct criminal statutes which required proof of different elements; and neither of the crimes in question was a lesser included offense of the other.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 27.13 et seq.

Appeal by defendant from order entered 29 July 1994 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 20 March 1995.

On 3 April 1992, a jury found defendant guilty both of trafficking in cocaine by possession and of failure to pay excise tax on controlled substances. The trial court imposed sentences of seven years and two years for the respective convictions and defendant appealed. This Court found no error in *State v. Morgan*, 111 N.C. App. 662, 432 S.E.2d 877 (1993).

On 9 June 1994, defendant filed a motion for appropriate relief with the trial court contending that his convictions for trafficking and for failure to pay excise tax placed him in jeopardy twice for the same offense and were unconstitutional. From the trial court's denial of his motion, defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Christopher E. Allen, for the State.

David L. Best for defendant-appellant.

WALKER, Judge.

Defendant contends that the trial court erred in denying his motion for appropriate relief because his convictions for trafficking in cocaine by possession and for failure to pay excise tax on the controlled substance constitute double jeopardy. He argues that the punishments imposed upon those convictions violate the prohibition against multiple punishments for the same offense, citing *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994). We disagree and find no error.

We first address the State's contention that defendant's appeal should be dismissed. The State correctly contends that defendant has no right to appeal from the trial court's denial of his motion for appro-

priate relief but must raise this issue by writ of certiorari. A trial "court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." N.C. Gen. Stat. § 15A-1422(c)(3) (1988). This Court disposed of defendant's appeal from his convictions approximately ten months before defendant filed his motion for appropriate relief with the trial court. Accordingly, the trial court's ruling on defendant's motion for appropriate relief is reviewable only by writ of certiorari. *Id.* In our discretion and pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we treat defendant's attempted appeal as a petition for a writ of certiorari, issue the writ, and address the merits.

"The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). In *Kurth Ranch*, the United States Supreme Court found an attempt by the State of Montana to collect a civil drug tax in a proceeding subsequent to the criminal prosecution to be "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence [sic].' " *Kurth Ranch*, 114 S.Ct. at 1948. The Court further stated that such a second punishment "must be imposed during the first prosecution or not at all." *Id.*

In the case *sub judice*, the State sought to collect the drug excise tax from defendant in the same prosecution. Therefore, successive criminal prosecutions are not an issue. As for defendant's contention that the trial court imposed multiple punishments for the same offense, it is without merit. The State charged defendant with violating two distinct criminal statutes which required proof of different elements. Trafficking in cocaine by possession requires that an individual possess twenty-eight grams or more, but less than 200 grams, of cocaine. N.C. Gen. Stat. § 90-95(h)(3)(a) (1993). The offense of failure to pay excise tax on controlled substances involves possession of seven or more grams of a controlled substance "upon which the tax due under this Article has not been paid, as evidenced by a stamp. . . ." N.C. Gen. Stat. § 105-113.110(a) (1992); N.C. Gen. Stat. § 105-113.106(3) (1992). Since neither of the crimes in question is a lesser included offense of the other, the convictions fail to support a plea of double jeopardy. *See State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987). We hold that defendant was not put twice in jeop-

ardy by being sentenced both for trafficking in cocaine by possession and for failure to pay excise tax on a controlled substance.

No error.

Judges COZORT and MARTIN, JOHN C. concur.

PHILLIP KENNETH EDWARDS, PLAINTIFF v. LORETTA S. EDWARDS, DEFENDANT

No. 9322DC1139

(Filed 18 April 1995)

1. Judgments § 208 (NCI4th)— res judicata—collateral estoppel—distinguished

While *res judicata* precludes a subsequent action based on the same claim, collateral estoppel bars subsequent determination of the same issue, even though the action may be premised upon a different claim.

Am Jur 2d, Judgments §§ 514-639.

2. Judgments § 274 (NCI4th)— collateral estoppel—identity of issues—claim not barred

Plaintiff's indemnification claim was not barred by the principle of collateral estoppel where plaintiff and defendant executed a separation agreement which provided that the defaulting party would indemnify the other for expenses, including attorney fees, involved in collecting financial obligations or enforcing rights; plaintiff filed suit seeking specific enforcement of the provision requiring that the homeplace be listed for sale; defendant was ordered to list the homeplace in a judgment signed on 20 April; and plaintiff filed a motion on 7 July seeking reimbursement under the indemnity clause for the attorney fees incurred in prosecuting the suit for specific performance. Plaintiff's indemnification claim is totally dissimilar to any issue previously presented; the earlier trial determined only the validity of the separation agreement and plaintiff's entitlement to specific performance.

Am Jur 2d, Judgments §§ 415 et seq.

3. Judgments § 298 (NCI4th)— enforcement of separation agreement—separate action for attorney fees—res judicata

Plaintiff's claim was not barred by *res judicata* where plaintiff and defendant executed a separation agreement which provided that the defaulting party would indemnify the other for expenses, including attorney fees, involved in collecting financial obligations or enforcing rights; plaintiff filed suit seeking specific enforcement of the provision requiring that the homeplace be listed for sale; defendant was ordered to list the homeplace in a judgment signed on 20 April; and plaintiff filed a motion on 7 July seeking reimbursement under the indemnity clause for the attorney fees incurred in prosecuting the suit for specific performance. Although plaintiff contends that there was no indemnity claim to pursue until the court ruled that defendant had breached the agreement, under our Rules of Civil Procedure presentation of an indemnity claim prior to accrual is no longer precluded and joinder rules would have allowed plaintiff to pursue attorneys fees under the indemnity clause in the earlier action notwithstanding absence of accrual. However, *res judicata* should be applied as fairness and justice require, permissive joinder here is simply a relaxation of the traditional indemnity rule, and joinder of a non-accrued indemnification claim was not mandatory. Moreover, there is a substantive distinction between plaintiff's specific performance action and his later motion for a monetary award of counsel fees; our courts have consistently rejected efforts to disallow awards of counsel fees under statutory entitlements not pursued in the earlier principal action; and plaintiff in his complaint prayed the trial court to grant such other relief as is just and proper, with a copy of the separation agreement containing the indemnity clause being attached to the complaint. Given that broad language, plaintiff asserted a claim for indemnification in the earlier action and later merely particularized that claim. Finally, defendant had full notice that recoupment was available to plaintiff and neither fairness nor justice are offended by failing to rule that plaintiff's claim ought to have been pled with particularity in the specific performance complaint.

Am Jur 2d, Divorce and Separation §§ 749-818.

Appeal by defendant from order filed 17 August 1993 by Judge George T. Fuller in Davidson County District Court. Heard in the Court of Appeals 9 June 1994.

Wyatt, Early, Harris, Wheeler & Hauser, L.L.P., by A. Doyle Early, Jr., for plaintiff-appellee.

C. Richard Tate, Jr. for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's order granting plaintiff's motion for attorneys' fees. She contends the award is barred by entry of the court's earlier judgment dated 20 April 1993. We disagree.

Relevant background information is as follows: Plaintiff and defendant were married 4 September 1965 and separated 26 September 1991. On or about the latter date, they executed a separation agreement (the Agreement) which provided defendant would list the parties' homeplace for sale and that the proceeds would be divided equally between the two. The Agreement further provided:

> 17. INDEMNITY
>
> If either party for any reason fails to perform his or her financial or other obligations to the other party hereunder, and as a result thereof, the party incurs any expense, including reasonable attorney's fees, to collect the same or otherwise enforce his or her rights with respect thereof, the defaulting party shall indemnify and hold him or her harmless from any such expense.

On 21 May 1992, plaintiff filed suit seeking specific performance of the Agreement, alleging defendant had refused to list the property for sale. Defendant answered and counterclaimed. She admitted failing to list the property, but denied this constituted a breach of the Agreement. Additionally, she prayed the Agreement be declared null and void.

At trial, Judge James M. Honeycutt ruled the Agreement was valid and that it had been breached by defendant. In a judgment signed 20 April 1993, he ordered defendant "to list the homeplace for sale as soon as practical and to divide the net proceeds equally."

On 7 July 1993, plaintiff filed a motion seeking reimbursement from defendant under the indemnity clause of the Agreement for attorneys' fees incurred in prosecuting his suit for specific performance. Defendant moved to dismiss plaintiff's motion. Upon hearing, the Honorable George T. Fuller denied defendant's motion and granted plaintiff's request for attorneys' fees. Defendant appeals.

The sole issue raised herein is whether the 20 April 1993 judgment operates as a bar to the subsequent award of counsel fees to plaintiff. Defendant argues that under the principles of *res judicata* and collateral estoppel plaintiff was required to bring his claim for attorneys' fees in the action for specific performance. His failure to do so, she continues, precludes his later motion and the trial court erred in allowing it. We conclude the trial court did not commit error.

Plaintiff's 7 July 1993 motion was brought under Paragraph 17 of the Agreement entitled "Indemnity." "Ordinarily, the engagement in an indemnity contract is to make good and save the indemnitee harmless from loss or some obligation which he has incurred to a *third* party . . . ." 17 Strong's N.C. Index 4th *Indemnity* § 4, at 405-06 (1992) (emphasis added). Thus, indemnity generally "connotes liability for derivative fault." *Dixie Container Corp. v. Dale*, 273 N.C. 624, 628, 160 S.E.2d 708, 711 (1968) (citing *Edwards v. Hamill*, 262 N.C. 528, 531, 138 S.E.2d 151, 153 (1964)). Nonetheless, this Court has specifically approved a provision establishing indemnification for attorneys' fees between the parties to a separation agreement. *Edwards v. Edwards*, 102 N.C. App. 706, 713, 403 S.E.2d 530, 533-34, *disc. review denied*, 329 N.C. 787, 408 S.E.2d 518 (1991). In this context, we note defendant's focus herein is upon the timing of plaintiff's resort to the indemnity clause, and that she makes no argument contesting the validity thereof. *See Bromhal v. Stott*, 116 N.C. App. 250, 254-56, 447 S.E.2d 481, 484-85 (1994), *disc. review denied*, 339 N.C. 609, 454 S.E.2d 246 (1995) (Greene, J. dissenting in part) (dissent asserts attorneys' fees provision in separation agreement is invalid).

[1] In challenging the award of counsel fees to plaintiff, defendant relies upon the companion doctrines of *res judicata*, also referred to as "claim preclusion," and collateral estoppel, or "issue preclusion." *Hales v. N.C. Insurance Guaranty Assn.*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). Both doctrines involve a form of estoppel by final judgment. The distinction between the two has been stated as follows:

> [A] judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . .

> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352-53, 24 L. Ed. 195, 197-98 (1877)). Thus, while in the first circumstance *res judicata* precludes a subsequent action based on the same claim, collateral estoppel in the latter instance bars subsequent determination of the same issue, even though the action may be premised upon a different claim. *Hales*, 337 N.C. at 333, 445 S.E.2d at 594.

[2] We first discuss the issue of collateral estoppel. In *U.S. Fire Ins. Co. v. Southeast Airmotive Corp.*, 102 N.C. App. 470, 402 S.E.2d 466, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991), this Court noted that

> [c]ollateral estoppel is applicable only (1) where the issues to be precluded are the same as those involved in the prior action, (2) where those actions were actually raised and litigated, (3) where the issues must have been relevant to the disposition of the prior action, and (4) where the determination of those issues must have been necessary to the resulting judgment.

Id. at 472, 402 S.E.2d at 468 (citation omitted). We therefore held that "[i]nsofar as the issue of reimbursement [to an insurer of costs for defense] is distinct from the issue of coverage, the issue of reimbursement was neither raised nor disposed of in the prior action," *Id.* at 473, 402 S.E.2d at 468, and thus plaintiff's later claim seeking repayment of defense costs was not barred by application of collateral estoppel.

Further, in *Beckwith v. Llewellyn*, 326 N.C. 569, 391 S.E.2d 189, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990), settlement of a wrongful death claim including payment of attorneys' fees was approved by court order. Plaintiff thereafter instituted suit against her original attorneys seeking damages based upon allegations including breach of fiduciary duty and malpractice. The trial court granted summary judgment in favor of defendants on the basis of collateral estoppel. Our Supreme Court reversed, reasoning as follows:

> A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical. If they are not identical, then the doctrine of collateral estoppel does not apply.
>
> . . .
>
> In the present case, plaintiff attempts to show that her former attorneys took advantage of the attorney-client relationship to her detriment; her former attorneys are now her adversaries. In the prior case, she and her attorneys, as client and fiduciaries, attempted to show that they had reached a reasonable settlement with the original defendants . . . The issues are not identical.
>
> . . .
>
> Thus, the "issues to be concluded," are not the same as those involved in the prior action and the "issues in question" are not identical to the "issues . . . actually litigated," in the prior action.

Id. at 574-75, 391 S.E.2d at 191-92 (citation omitted).

In the case *sub judice*, as in the cases cited hereinabove, plaintiff's indemnification claim is totally dissimilar to any issue previously presented. In the earlier trial, the court determined only the validity of the Agreement and plaintiff's entitlement to specific performance. Plaintiff has not endeavored to relitigate these matters, but rather the separate and distinct issue of recoupment of attorneys' fees under the indemnity clause of the Agreement. As that issue was not litigated in the prior action, we conclude plaintiff's indemnification claim is not barred by the principle of collateral estoppel.

[3] Defendant's assertion of the application of *res judicata* requires a more extensive analysis. Under this doctrine, a final judgment on the merits in a prior action by a court of competent jurisdiction operates as "an absolute bar to a subsequent action involving the same claim, demand, and cause of action" between "the parties and their privies." *Gaither Corp. v. Skinner*, 241 N.C. 532, 535, 85 S.E.2d 909, 911 (1955).

More specifically, defendant relies on the principle of merger, "a collateral aspect of *res judicata* which determines the scope of claims precluded from relitigation by an existing judgment." *Behr v. Behr*, 46 N.C. App. 694, 698, 266 S.E.2d 393, 395-96 (1980) (citations omitted). When a plaintiff recovers a valid and final judgment, his or her original claim is extinguished and the rights granted pursuant to

the judgment are substituted for it, and plaintiff's original claim is thus said to have "merged" with the judgment. Restatement (Second) of Judgments § 18, Comment a (1982).

Merger requires all damages resulting from a single wrong or cause of action to be recovered in one suit. *Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993) (citing *Smith v. Pate*, 246 N.C. 63, 67, 97 S.E.2d 457, 460 (1957)). Stated otherwise, "a party suing for the breach of an indivisible contract must sue for all of the benefits which have accrued at the time of suit or be precluded from maintaining a subsequent action for installments omitted." *Behr*, 46 N.C. App. at 698, 266 S.E.2d at 396 (citing Restatement of Judgments § 62, Comment h (1942)).

As a consequence of merger, defendant maintains, *res judicata* applies " 'not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties *exercising reasonable diligence*, might have brought forward at the time and determined respecting it.' " *Painter v. Board of Education*, 288 N.C. 165, 173, 217 S.E.2d 650, 655 (1975) (quoting *Gibbs v. Higgins*, 215 N.C. 201, 204-05, 1 S.E.2d 554, 557 (1939)).

Defendant is correct that as a result of the doctrine of merger, "all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded." *Thomas M. McInnis & Assoc., Inc.*, 318 N.C. at 428, 349 S.E.2d at 556 (citations omitted). It is uncontroverted that plaintiff's claim for indemnification was not adjudicated in his specific performance lawsuit. The question remains whether the claim was one which "should have been adjudicated" therein.

Plaintiff justifies seeking indemnity by separate motion subsequent to the 20 April 1993 judgment on the basis that an indemnity action traditionally may not be "instituted at law" until damages actually have been suffered. 17 Strong's Index 4th *Indemnity* § 23, at 420 (1992). Consequently, he argues, there existed "no claim or right to pursue any claim against the defendant pursuant to the contract of indemnity provision" until the court ruled defendant had breached the Agreement and until plaintiff had incurred counsel fees and expenses. "[T]hen the plaintiff/indemnitee's claim vest[ed]," he concludes, "and could be properly brought, but not before."

While plaintiff accurately states traditional practice, since the enactment of our North Carolina Rules of Civil Procedure, 1967 N.C. Sess. Laws ch. 954, " 'a defendant, as a third-party plaintiff, may cause a summons and complaint to be served [upon a non-party] who is *or may be liable* to him for all or part of the plaintiff's claim against him,' " and the traditional rule no longer precludes presentation of an indemnity claim prior to accrual. *Heath v. Board of Commissioners*, 292 N.C. 369, 375-76, 233 S.E.2d 889, 893 (1977) (citing N.C.R. Civ. P. Rule 14 (a)).

Additionally, we note under our joinder rules, "[a] party asserting a claim for relief . . . may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party," N.C.R. Civ. P. Rule 18(a), and "[w]henever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action . . . ." N.C.R. Civ. P. Rule 18(b).

It thus appears plaintiff's claim for indemnification had not accrued at the time of filing his complaint for specific performance in that neither had breach of the Agreement been determined nor had he incurred counsel fees. Notwithstanding absence of accrual, our joinder rules would nonetheless have allowed plaintiff in the earlier action to pursue attorneys' fees under the indemnity clause. However, he did not do so. We therefore return to a consideration of whether plaintiff's failure to seek indemnification in the specific performance proceeding operates to bar his later petition for reimbursement of attorneys' fees.

The doctrine of *res judicata* has been the subject of much litigation, and its applicability is not without limitation. *Shelton v. Fairley*, 72 N.C. App. 1, 5, 323 S.E.2d 410, 414 (1984), *disc. review denied*, 313 N.C. 509, 329 S.E.2d 394 (1985). This Court has previously acknowledged commentators' "support for the rule that judgments relied upon as creating a bar or preclusion are to be construed with strictness." *Id.* (citation omitted). Therefore, *res judicata* should "be applied in particular situations as fairness and justice require," and not "so rigidly as to defeat the ends of justice or so as to work an injustice." 46 Am. Jur. 2d *Judgments* § 522, at 786-87 (1994). As our Supreme Court has observed:

> The court requires parties to bring forward the whole case, and will not, *except under special circumstances*, permit the same parties to open the same subject of litigation in respect to matters

> which might have been brought forward as part of the subject in controversy . . . The plea of *res adjudicata* applies, *except in special cases*, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.

In re Trucking Co., 285 N.C. 552, 560, 206 S.E.2d 172, 178 (1974) (citations omitted) (emphasis added).

Accordingly, we examine the case *sub judice* from the standpoint of "fairness" and "justice." Viewed in that light, we must determine whether plaintiff's pursuit of his indemnification motion subsequent to conclusion of his suit on the Agreement constitutes a "special circumstance" in which rigid application of the *res judicata* doctrine would be contrary to the principles of "justice." We hold the present instance is one in which *res judicata* is inapplicable.

First, while it is unquestioned our joinder rules would have allowed plaintiff to request counsel fee repayment in the specific performance suit, we view the policy of permissive joinder in this instance simply as a relaxation of the traditional rule that an indemnitee's right of action accrues only at the time loss has been incurred. Accordingly, we do not subscribe to the proposition that joinder of an non-accrued indemnification claim was mandatory. For example, in *U.S. Fire Ins. Co.*, 102 N.C. App. at 472, 402 S.E.2d at 468, we determined a proceeding for recoupment of defense costs was not required to have been brought as a compulsory counterclaim in a previous action to determine insurance coverage. We observed:

> A counterclaim is compulsory when *it is in existence at the time of the serving of the pleading* [and] when it arises out of the same transaction or occurrence . . . .

Id. (emphasis added).

Moreover, our Supreme Court impliedly held in *Heath* that an indemnity claim may *either* be joined with a principal action *or* brought separately. The Court therein stated: "[w]hen [an indemnitee] brings a separate suit against the person whose action caused the loss," the rule that the loss must have accrued continues to prevail. *Heath*, 292 N.C. at 377, 233 S.E.2d at 893.

Next, we perceive a substantial distinction between plaintiff's specific performance action seeking to require defendant to list the parties' real property for sale and plaintiff's later motion for a monetary award in repayment of his counsel fees. " '[T]he res judicata doctrine precluding relitigation of the same cause of action has been held inapplicable where the performance of an act was sought in one action and a money judgment in the other.' " *Shelton*, 72 N.C. App. at 8, 323 S.E.2d at 416 (citations omitted).

Further, in dealing with claims for attorneys' fees brought pursuant to various statutory entitlements, our courts have consistently rejected efforts to disallow awards not pursued in the earlier principal action. *See, e.g., Black v. Insurance Co.*, 42 N.C. App. 50, 53, 255 S.E.2d 782, 784, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 910 (1979) (N.C. Gen. Stat. § 6-21.1, providing for counsel fees upon "unwarranted refusal" to settle by insurance carrier, does not require an affirmative pleading for such an award as a separate claim in the complaint; rather, "plaintiff may properly move for an award of attorney's fees after a verdict has been returned in its favor"); *Upchurch v. Upchurch*, 34 N.C. App. 658, 664-65, 239 S.E.2d 701, 705 (1977), *disc. review denied*, 294 N.C. 363, 242 S.E.2d 634 (1978) and *Evans v. Evans*, 111 N.C. App. 792, 799, 434 S.E.2d 856, 861, *disc. review denied*, 335 N.C. 554, 439 S.E.2d 144 (1993) (N.C. Gen. Stat. § 50-16.4, allowing the award of counsel fees in alimony cases "*at any time*" dependent spouse is entitled to alimony *pendente lite*, "includes times subsequent to the determination of the issues in [the dependent spouse's] favor at the trial of [his or] her cause on its merits"); *In re Baby Boy Scearce*, 81 N.C. App. 662, 663, 345 S.E.2d 411, 413, *disc. review denied*, 318 N.C. 415, 349 S.E.2d 590 (1986) (under N.C. Gen. Stat. § 50-13.6, entitled "Counsel Fees in Actions for Custody and Support of Minor Children," a "request for attorney's fees may be properly raised by a motion in the cause subsequent to the determination of the main custody action"); *Surles v. Surles*, 113 N.C. App. 32, 43, 437 S.E.2d 661, 667-68 (1993); *see also In re Estate of Tucci*, 104 N.C. App. 142, 145, 408 S.E.2d 859, 861-62 (1991), *review dismissed as improvidently granted*, 331 N.C. 749, 417 S.E.2d 236 (1992) (fee petition pursuant to N.C. Gen. Stat. § 6-21(2) filed following unsuccessful will caveat proceeding) and *Tay v. Flaherty*, 100 N.C. App. 51, 53, 394 S.E.2d 217, 218, *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990) (attorneys' fees sought under N.C. Gen. Stat. § 6-19.1 subsequent to proceeding contesting agency decision denying food stamps).

Finally, defendant argues in her brief that plaintiff "had not plead anything regarding attorneys['] fees and had not argued nor raised any issue regarding any indemnification prior to Judge Honeycutt signing the judgment on 20 April 1993." However, plaintiff in his complaint prayed the trial court to "[g]rant the plaintiff such other relief as is just and proper." A copy of the Agreement containing the indemnity clause was attached as Exhibit 1. Therefore, given the broad language of the complaint and reference to the attached Agreement, plaintiff thereby asserted a claim for indemnification in the earlier action, and his later motion merely particularized the specifics of that claim. *See Clark v. Clark*, 301 N.C. 123, 134, n.4, 271 S.E.2d 58, 67, n.4 (1980) (although defendant did not expressly demand possession of certain property in her counterclaim, she was nonetheless entitled to same given the broad nature of "relief . . . which the court deems just and proper"); *Highway Commission v. Thornton*, 271 N.C. 227, 237, 156 S.E.2d 248, 256 (1967) (a party's prayer for relief does not determine the relief to which he or she is entitled). In that event, defendant's *res judicata* argument is unavailing.

In addition, the Agreement was executed by the parties 26 September 1991 and plaintiff's complaint which referenced the Agreement attached thereto was personally served upon defendant 2 June 1992. Defendant had full notice that recoupment was available to plaintiff should legal fees and expenses be incurred in consequence of failure to perform under the Agreement. Neither "fairness" nor "justice," 46 Am. Jur. 2d *Judgments* § 522, at 786-87 (1994), are offended by failing to rule plaintiff's claim for indemnification ought to have been pled with particularity in his specific performance complaint.

For the reasons stated hereinabove, the trial court did not err by entry of its 17 August 1993 order awarding counsel fees to plaintiff.

Affirmed.

Judges GREENE and McCRODDEN concur.

Judge McCRODDEN concurred prior to 15 December 1994.

FRED A. WILKIE, Petitioner-Appellee v. N.C. WILDLIFE RESOURCES COMMISSION, Respondent-Appellant

No. 9424SC339

(Filed 18 April 1995)

1. Public Officers and Employees § 67 (NCI4th)— wildlife enforcement officer—dismissal—whole record test—evidence insufficient

The State Personnel Commission's decision that the North Carolina Wildlife Resources Commission had met its burden of showing just cause for the dismissal of petitioner on the basis of unacceptable personal conduct was not supported by the whole record where the dismissal was based upon falsifying the hours documented on petitioner's weekly activity reports and giving false information as to his location to his supervisor, but the demands of the job required a form of falsification because officers were told by supervisors that they would work as required and answer all calls, but that they could not show or report more than 171 hours per twenty-eight day work period; officers often wrote and signed reports that were not absolutely correct in every detail; these practices were known by supervisors and sometimes directed by them due to the hour limitation; although the custom was for officers to work out of their home while staying in radio contact with Raleigh, the practice was for officers to refrain from indicating their residence as their location due to the use of scanners by hunters and lack of effectiveness if the exact location of the officer was known; and officers deviated from the policy of using signals whenever using their radios. This evidence indicates that petitioner was following what had become an accepted standard of reporting and performing work, although not strictly "by the book."

Am Jur 2d, Civil Service § 63.

2. Public Officers and Employees § 67 (NCI4th)— wildlife officer—dismissal—unacceptable personal conduct—falsified records

The State Personnel Commission erroneously concluded that the North Carolina Wildlife Resources Commission had met its burden of showing that there was just cause to dismiss petitioner based on falsified work records and giving false information on his location to his supervisor where petitioner's performance of

his duties were what had become accepted standards of reporting and performing his work and disciplinary action by his supervisors would have therefore propelled this behavior into the category of unsatisfactory job performance, for which petitioner would have been afforded certain warnings before being terminated. N.C.G.S. § 126-35.

Am Jur 2d, Civil Service § 63.

Appeal by respondent from order entered 7 December 1993 by Judge Forrest A. Ferrell in Watauga County Superior Court. Heard in the Court of Appeals 21 March 1995.

Robert T. Speed for petitioner-appellee.

Attorney General Michael F. Easley, by Associate Attorney General Virginia A. Gibbons, for respondent-appellant.

JOHNSON, Judge.

Petitioner Fred A. Wilkie was a sergeant in the Enforcement Division of the North Carolina Wildlife Resources Commission (respondent NCWRC) from 1 February 1974 until his dismissal on 30 April 1990. At the time of his dismissal, he held the rank of sergeant for Area 5 of District 7 which included eleven counties of Western North Carolina.

The facts underlying this dismissal are as follows: petitioner had enforcement duties as well as supervisory responsibility for three enforcement officers in his patrol area. Petitioner worked out of his home as is the custom with wildlife officers. Contact with other officers and with the Raleigh office is by radio and radio scanner. Calls for assistance and to transmit information from one officer to another are relayed via radio using “ten” signals.

Petitioner’s immediate supervisor was Lieutenant Rocky Hendrix, who reported to Captain Mike Lambert. Captain Lambert had been assigned to District 7 since 1 October 1989. Captain Lambert reviewed the weekly reports and work records for officers in District 7. An officer’s weekly activity report is a detailed summary of that officer’s work hours, the specific breakdown of the way in which an officer spent his work time, the locations an officer worked, and the miles an officer drove. The weekly report contains several categories of hours worked, including categories for patrol activity, court hours, equipment maintenance, and hunting and boating safety programs.

Categories are also provided for, among others, training given and received, wildlife service pickups, nongame wildlife, special investigations, game management, accident investigation, and administrative and office work. The office work category is used when an officer is doing paperwork which pertains to his own work detail, i.e., completion of his own weekly activity reports. The administrative work category is used when an officer is reviewing the paperwork submitted by other officers. An officer signs below a statement on the weekly report which reads as follows: "This is a true and accurate report of work performed during this time period."

Despite the signing of this statement, other officers in the District indicated that the demands of the job required a form of falsification. Officers were told by supervisors that they would work as required and answer all calls, but they could not show or report more than 171 hours per twenty-eight day work period. Officers often wrote and signed reports that were not absolutely correct in every detail; these practices were known by supervisors and sometimes directed by them, because only a certain number of hours could be reported within a twenty-eight day work period.

The practice was for officers to commonly refrain from indicating their residence as their location and give a town instead. This was due to the use of scanners by hunters and lack of effectiveness if the exact location of the officer was known. Additionally, although respondent NCWRC had established a policy requiring officers to use signals whenever using their radios, it appeared that officers in District 7 and other districts deviated from this policy.

Petitioner was described as being hardworking, always available to assist officers needing help, and working as hard or harder than most workers in the District. The number of arrests made by petitioner was in the upper 25% of the District, his total number of cases was higher than anyone in the District, and officers that he supervised were performing their duties satisfactorily.

Petitioner stated he had never worked less than the required 160 hours in a pay period without taking vacation time in that period. Petitioner acknowledged that his weekly reports may not reflect the exact hours worked, but this is due to the fact that his interest was in enforcing the law and he never regarded paperwork as a matter of high priority. Petitioner normally did his reports on Sunday night or Monday and did not keep daily notes of his activities. Petitioner frequently guessed at his hours when making out a weekly report, and

the inaccuracies frequently included omissions of hours worked at night as well as the exact or particular hours that he did work.

It was Captain Lambert's practice to monitor the entire District by monitoring his radio to determine if his officers were working. If a day or two passed and an officer had not been heard on the radio, yet his weekly reports showed him working during those days, Captain Lambert had reason to wonder where the officer was when he did not respond to radio calls. Captain Lambert suspected that petitioner was being untruthful in his weekly reports and location reports, so he decided to put petitioner under surveillance.

The officers assigned to the surveillance detail were Lieutenant Tony Lewis and Sergeant Doran Robbins, from District 8. Captain Lambert randomly selected dates from petitioner's work schedule. Captain Lambert gave the dates to Lieutenant Lewis and told him to set up the surveillance detail near petitioner's residence and to note his comings and goings.

Two or three days prior to 14 March 1990, Lieutenant Lewis and Sergeant Robbins went to Watauga County to set up the surveillance. At petitioner's residence, they saw a clothesline in the backyard with wildlife shirts hanging on it. They also saw a Blazer with state license tag PV3921 parked in the yard. The road into petitioner's residence deadended and did not come out anywhere by vehicle except on Highway 421.

On 14 March 1990, Lieutenant Lewis and Sergeant Robbins began their surveillance detail at 8:00 a.m. At 10:25 a.m., they saw petitioner come out of his driveway in his Blazer and turn left onto Highway 421 toward Deep Gap. Lieutenant Lewis and Sergeant Robbins followed petitioner toward Boone. At 10:40 a.m., petitioner received a radio call stating that someone was on Beech Creek with fishing gear and a truck was stocking fish on Beech Creek. Petitioner continued through Boone and turned left onto Highway 105 toward Avery County. He appeared to be checking fishing on the Watauga River. Lieutenant Lewis and Sergeant Robbins continued to follow petitioner until he passed Valle Crucis Road. At 11:16 a.m., they stopped following petitioner and returned to their original position near State Road 1612 adjacent to Highway 421. At 2:33 p.m., petitioner returned to his home until 3:35 p.m. Petitioner left home at that time and went to the Post Office on State Road 1612. Lieutenant Lewis and Sergeant Robbins followed him to Fleetwood and Jefferson. When petitioner headed

toward Lansing, they returned to his residence. Lieutenant Lewis and Sergeant Robbins ended the surveillance at that time.

On 18 March 1990, at 7:30 a.m., Lieutenant Lewis and Sergeant Robbins walked from the Parkway through the woods to petitioner's residence where Lieutenant Lewis saw the Blazer parked at the residence. At 11:03 a.m., they heard Raleigh call petitioner's call number two or three times without response. They then heard Lieutenant Hendrix answer the Raleigh call. Petitioner responded at the same time. In the course of the radio conversation, Lieutenant Hendrix asked petitioner for his location; petitioner told Lieutenant Hendrix that he was just north of Deep Gap. Lieutenant Lewis and Sergeant Robbins had not seen petitioner drive out of his driveway. At 11:45 a.m., they saw him leave his residence. Petitioner went to the Parkway and drove north. Lieutenant Lewis and Sergeant Robbins did not follow petitioner at this time; they heard petitioner give a radio call of ten-eight at 1:12 p.m. which meant he was "in-service." At 2:48 p.m., petitioner again gave a radio call of ten-eight, and again at 3:59 p.m. At 4:15 p.m., petitioner returned home. Lieutenant Lewis and Sergeant Robbins stayed at their location until 7:10 p.m. and did not see petitioner again that date. They also monitored radio traffic and heard Raleigh call for petitioner at 6:00 p.m.; petitioner did not respond.

The next surveillance date was 26 March 1990. Sergeant Robbins began the surveillance alone at approximately 7:15 a.m. When Sergeant Robbins arrived, he went through the woods to the house where he had previously seen petitioner and saw petitioner's Blazer parked there. Lieutenant Lewis arrived at the observation point near petitioner's residence at 2:00 p.m. At 3:18 p.m., petitioner came out of his residence in his Blazer. This was the only time either officer saw petitioner on 26 March 1990. Petitioner returned at 6:25 p.m.

On 30 March 1990, Lieutenant Lewis and Sergeant Robbins arrived at their observation point at 7:30 a.m. Lieutenant Lewis walked back into the woods to petitioner's residence. At 9:17 a.m., petitioner left his residence in his Blazer and drove to Deep Gap and then on toward Boone. Lieutenant Lewis and Sergeant Robbins followed petitioner back to the Parkway and then at 9:40 a.m. left him to return to their original location. At 11:30 a.m., they heard petitioner give a ten-eight radio call. At 4:45 p.m., petitioner and Officer Dennis Thomas drove into petitioner's driveway. Officer Thomas left at 5:57

p.m. Lieutenant Lewis and Sergeant Robbins ended their surveillance at 7:30 p.m. and did not see petitioner any other time that day.

On 31 March 1990, Sergeant Robbins and Lieutenant R. W. Lequire worked the surveillance detail together. They arrived at 7:30 a.m. They saw petitioner leave at 9:30 a.m. and return at approximately 10:30 or 11:00 a.m. At this time petitioner did not turn into the road that leads to his house, but drove past. Petitioner returned to his residence at 2:00 p.m. Sergeant Robbins did not see petitioner again that day. Lieutenant Lequire saw petitioner at 6:50 p.m. when Lieutenant Lequire walked from the Parkway and saw petitioner working around his house. The detail concluded at approximately 7:30 p.m.

Lieutenant Lequire compiled a written report of the findings the surveillance team had gathered. Captain Lambert compared petitioner's weekly reports to the same dates of the surveillance detail.

On 14 March 1990, petitioner's report showed that he left home at 9:00 a.m. and returned to his residence at 7:00 p.m., categorized as 9 hours fishing patrol. However, the surveillance report showed petitioner left his home at 10:25 a.m., gave no radio call, returned to his home at 2:33 p.m., left again at 3:35 p.m., and returned at 7:40 p.m. Petitioner had given an in-service radio call in 1:26 p.m., but no location was given. The surveillance report showed petitioner working 7.21 hours.

On 18 March 1990, petitioner reported working 6 hours of fishing patrol. Lieutenant Lequire's information showed petitioner working 3.5 hours. On 26 March 1990, petitioner reported working 8.5 hours on fishing patrol and 2 hours on office work. Lieutenant Lequire's information showed that petitioner left his residence at 3:18 p.m. and returned at 6:25 p.m., for a total of only 3.12 hours.

On 30 March 1990, petitioner reported 2 hours of hunting patrol and 7 hours of fishing patrol. According to the surveillance report, petitioner worked 6.47 hours. On 31 March 1990, petitioner reported 9 hours of patrol work ("patrol work" means away from the residence). The surveillance report showed petitioner working 4.11 hours.

On one of the dates of surveillance, petitioner was called on the radio by Lieutenant Hendrix who asked him, using radio code, where he was located. Petitioner radioed back to Lieutenant Hendrix that he was "just north of Deep Gap." According to the surveillance report,

petitioner was not just north of Deep Gap, but was south of Deep Gap at his residence.

Lieutenant Hendrix was called to the Raleigh office in early April 1990 for his own predismissal conference. At that time, Captain Lambert presented the surveillance information to Lieutenant Hendrix. Lieutenant Hendrix had no knowledge of the surveillance or disciplinary action concerning petitioner, even though he was petitioner's immediate supervisor. Captain Lambert recommended petitioner's dismissal based on his review of the weekly reports and Lieutenant Lequire's compilation. Captain Lambert concluded that petitioner had falsified the hours shown as work time and the locations patrolled.

After receiving Major C. J. Smith and Colonel W. H. Ragland's recommendations to dismiss petitioner, Captain Lambert instructed Lieutenant Hendrix to have petitioner present for a predismissal conference on 16 April 1990. Captain Lambert, Lieutenant Lequire, Lieutenant Hendrix, and petitioner were present; the conference was conducted by Captain Lambert. Captain Lambert gave the predismissal conference document to petitioner and read it to him, and gave petitioner an opportunity to respond.

Petitioner gave a lengthy response to the allegations. Petitioner was informed that he could submit additional responses in writing and that any final action on his dismissal would be delayed until his response could be considered. Petitioner was told that he would be given a written decision on 30 April 1990.

Charles R. Fullwood, respondent NCWRC's executive director, approved the staff recommendation to terminate petitioner on 30 April 1990. The specific instances of alleged misconduct for which he had been dismissed included falsifying the hours documented on his weekly activity reports and giving false information to his supervisor, and giving false information on his location to his supervisor.

Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings (OAH) on 6 May 1991. An evidentiary hearing was held before Administrative Law Judge Sammie Chess, Jr. on 2 December 1991. Judge Chess filed a recommended decision on 20 April 1991 that petitioner's dismissal be reversed, and that petitioner be reinstated and awarded back pay as well as attorney's fees.

The full State Personnel Commission (SPC) rejected the findings and conclusions of Judge Chess, concluding that respondent NCWRC had met its burden of showing just cause for the dismissal of petitioner on the basis of unacceptable personal conduct. The decision and order of the SPC, entered on 21 October 1992, affirmed the dismissal of petitioner by respondent NCWRC.

Petitioner filed a petition for judicial review on 25 November 1992 in Watauga County Superior Court. On 7 December 1993, Superior Court Judge Forrest A. Ferrell ordered that the decision of the SPC be reversed and that the matter be remanded to the SPC for further action in compliance with the order. Further, Judge Ferrell ordered that petitioner be awarded attorney's fees, and respondent NCWRC be ordered to pay costs. Respondent NCWRC has appealed to our Court.

[1] Respondent NCWRC presents two arguments on appeal. First, respondent NCWRC argues that there is substantial evidence in the record supporting the findings of fact and conclusions of law contained in the decision and order of the SPC.

North Carolina General Statutes § 150B-51 states the standard of review for this Court when reviewing a decision of the SPC:

> [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:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

North Carolina General Statutes § 150B-51 (1991). If the issue on appeal is whether the agency decision was supported by the evidence, or was arbitrary or capricious, our Court employs the "whole

record" test. *See Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), *disc. review and supersedeas denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). This requires our Court to examine all of the competent evidence in determining whether there is substantial evidence to support the SPC's findings and conclusions; if substantial evidence in the record does not support an agency decision, it may be reversed. *Id.*

We have conducted a review of the record in this case and find that the SPC's decision *was* unsupported by substantial evidence in view of the entire record as submitted. We note that "the 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*[.]" *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). However, we cannot ignore Judge Chess' findings regarding the manner in which the officers in the District had come to report and perform their work; i.e., that the demands of the job required a form of falsification because officers were told by supervisors that they would work as required and answer all calls, but they could not show or report more than 171 hours per twenty-eight day work period; that officers often wrote and signed reports that were not absolutely correct in every detail, and these practices were known by supervisors and sometimes directed by them, because only a certain number of hours could be reported within a twenty-eight day work period; that the practice was for officers to commonly refrain from indicating their residence as their location and give a town instead, due to the use of scanners by hunters and lack of effectiveness if the exact location of the officer was known; and that although respondent NCWRC had established a policy requiring officers to use signals whenever using their radios, it appeared that officers in District 7 and other districts deviated from this policy. This evidence indicates that petitioner was following what had become, during his years as a wildlife officer, an accepted standard of reporting and performing work, although not strictly "by the book." This observation is buttressed by evidence that petitioner's own supervisor had a predismissal conference conducted by Captain Lambert. Therefore, a review of the "whole record" compels us to reach the result that the SPC's decision was not supported by the entire record.

[2] Respondent NCWRC next argues that they followed correct procedure in the dismissal of petitioner for unacceptable personal con-

duct and did not violate his right to procedural due process. Specifically, respondent NCWRC argues that the SPC properly concluded that respondent NCWRC had met its burden of showing that there was just cause to dismiss petitioner.

North Carolina General Statutes § 126-35 (1993) states that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." Two classifications which will warrant disciplinary action are (1) unsatisfactory job performance and (2) unacceptable personal conduct. *Id.* Referencing both the State Personnel Manual and the N.C. Admin. Code, our Court has stated that "[c]ertain warnings are . . . required before a permanent State employee may be terminated on the grounds of unsatisfactory job performance . . . while none are required for dismissals based on an employee's personal (mis)conduct." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 679, 443 S.E.2d 114, 121 (1994).

As we concluded earlier, our review of the whole record indicates that *in this case*, petitioner's performance of his duties as a wildlife officer were what had become accepted standards of reporting and performing his work. As such, disciplinary action by his supervisors to halt these accepted standards would have propelled this behavior into the "unsatisfactory job performance" category rather than the "unacceptable personal conduct" category. In that event, petitioner would have been afforded certain warnings before being terminated on the grounds of unsatisfactory job performance. Therefore, we find the SPC improperly concluded that respondent NCWRC had met its burden of showing that there was just cause to dismiss petitioner.

Because we have found that the SPC's decision was not supported by the whole record, and that the SPC improperly concluded that respondent NCWRC had met its burden of showing that there was just cause to dismiss petitioner, we affirm the decision of the trial court.

Affirmed.

Judges COZORT and MARTIN, JOHN C. concur.

CAROLINA MEDICORP, INC., FORSYTH MEMORIAL HOSPITAL, INC., MEDICAL PARK HOSPITAL, INC., REBA J. SMITH, CLEVELAND MEMORIAL HOSPITAL, DINA L. BRADDY, MOORE REGIONAL HOSPITAL AND ELIZABETH MATHESON-SMITH, PETITIONERS v. BOARD OF TRUSTEES OF THE STATE OF NORTH CAROLINA TEACHERS' AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, AND DAVID G. DEVRIES, AS EXECUTIVE ADMINISTRATOR OF THE NORTH CAROLINA TEACHERS' AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, RESPONDENTS

No. 9410SC427

(Filed 18 April 1995)

1. Public Works and Contracts § 29 (NCI4th)—hospitals—preferred provider contracts—competitive bidding—not required

The trial court did not err by failing to conclude that respondents violated the public contracting statutes concerning competitive bids when they executed preferred provider contracts with petitioners for the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan. The method of obtaining the preferred provider contracts was not governed by the public contracting statutes because the language of N.C.G.S. § 143-49(3) provides that those statutes apply when the Secretary of Administration purchases or contracts for contractual services; here, the plan members themselves purchased or contracted for hospital services and respondents merely entered into preferred provider contracts concerning the rates charged for services provided by hospitals to plan members. The preferred provider contracts were not for the needs of the State but were for the benefit of individual Plan members.

Am Jur 2d, Public Works and Contracts §§ 34 et seq.

2. Public Works and Contracts § 29 (NCI4th)— health insurance—preferred provider contracts with hospitals—public contracting statutes—exemption

Assuming that the public contracting laws apply to the preferred provider contracts entered into with hospitals by the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan, the State Purchasing Officer would still have the authority to exempt the preferred provider contracts from the competitive bidding process because the North Carolina

Administrative Code provides that the State Purchasing Officer may designate any service as exempt from "these procedures."

Am Jur 2d, Public Works and Contracts §§ 34 et seq.

3. Public Works and Contracts § 29 (NCI4th)— health insurance—preferred provider contracts—statutory amendment

Senate Bill 1148, which amended N.C.G.S. § 135-40.4, provided that preferred provider contracts for the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan would not be subject to the requirements of Chapter 143 of the General Statutes, which involve competitive bidding. Savings language at the end of the bill which provides that the Act shall not apply to any litigation or administrative proceeding prior to that date does not show that the public contracting laws applied to preferred provider contracts before then, but plainly means that the Act does not affect pending litigation. A change in the title of the bill did not show that the public contracting laws applied before the bill.

Am Jur 2d, Public Works and Contracts §§ 34 et seq.

4. Public Works and Contracts § 29 (NCI4th)— health insurance—preferred provider contracts—recoupment of money

The trial court did not err in ruling that petitioners were not entitled to recoup from respondents money they allegedly lost by providing discounts to hospital patients under preferred provider contracts which were lawfully entered into.

Am Jur 2d, Public Works and Contracts §§ 34 et seq.

5. Estoppel § 15 (NCI4th)— health insurance—preferred provider contracts—standing to challenge

The trial court did not err in failing to rule that the hospital petitioners are entitled to challenge respondents' actions in executing preferred provider contracts for the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan even though petitioners executed the contracts under protest. The preferred provider contracts were not void and the doctrine of estoppel by benefit applies to estop petitioners. Although petitioners argue that they did not benefit in that they lost money by executing the contracts, the record is clear that petitioners benefited from the contracts by retaining Plan members as customers. Voluntariness is not an element of quasi estop-

pel and, even if it were, petitioners chose to avoid the risk of losing patients to other preferred provider hospitals and were not compelled to sign the contracts. Finally, detrimental reliance is irrelevant under quasi-estoppel.

Am Jur 2d, Estoppel and Waiver §§ 26-113.

6. Public Works and Contracts § 29 (NCI4th)— health insurance—preferred provider contracts—challenges by individuals—not named as taxpayers

The trial court did not err by dismissing the individual petitioners' claims challenging preferred provider contracts executed by the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan where the individual petitioners were not named in the petitions in their capacity as taxpayers.

Am Jur 2d, Public Works and Contracts §§ 34 et seq.

Appeal by petitioners from order entered 29 November 1993 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 2 February 1995.

The Teachers' and State Employees' Comprehensive Major Medical Plan (hereinafter Plan) provides health insurance coverage for state employees, state retirees, and their dependents. From 1985 until 1993, G.S. 135-40.4(a) authorized the Board of Trustees of the Plan (hereinafter Board) to "begin the process of negotiating prospective rates of charges that are to be allowed under the Plan with preferred providers of institutional and professional medical care and services." In 1993, G.S. 135-40.4(a) was amended to provide that the Board "may contract with providers of institutional and professional medical care and services to established preferred provider networks."

Pursuant to the Plan, "preferred providers" are health care providers which contract to provide health care services to Plan members at prices lower than other providers offer. Under the proposal submitted by the Plan's Executive Administrator, David G. DeVries, each hospital could become a preferred provider pursuant to a straight discount method if it agreed to discount its inpatient room and board charges and its outpatient charges by 5% and agreed to discount its inpatient ancillary charges by 8%. As an alternative to the straight discount method, a hospital could become a preferred

provider under a "per case arrangement" whereby "the Plan [would] pay[] the hospital a fixed amount for broad categories of service or treatment, regardless of the patient's length of stay at the hospital." Plan members who used North Carolina hospitals which were not preferred providers would be subject to an additional "twenty percent (20%) coinsurance rate up to five thousand dollars ($5,000) per fiscal year per covered individual." G.S. 135-40.8(d). The Plan sought a formal determination by the State Purchasing Officer that the preferred provider contracts were exempt from competitive bidding requirements of Chapter 143. The State Purchasing Officer, William J. Stuckey, stated that the contracts did not constitute "contractual services" and declared them exempt from Chapter 143 pursuant to N.C. Admin. Code tit. 1, r. 05D.0302(9) (July 1988). All 117 North Carolina hospitals contracted with respondents.

The hospital petitioners challenged respondents' decision to require the discounts of all participating hospitals without differentiation because the hospital petitioners here claimed that they already charged less than other hospitals in the state. Plan members Reba J. Smith, Dina L. Braddy, and Elizabeth Matheson-Smith joined the hospital petitioners in challenging the validity of the preferred provider contracts. Petitioners filed their cases in the Office of Administrative Hearings and the cases were consolidated for hearing. On 29 January 1993, Administrative Law Judge (hereinafter ALJ) Robert R. Reilly, Jr. issued a recommended decision declaring that "[r]espondents contracted for services contrary to Article 3 of GS Chapter 143." Nevertheless the ALJ concluded that summary judgment should be granted in favor of respondents because the hospital petitioners were estopped to pursue their claims and the individual petitioners lacked standing to sue. The final agency decision rejected the ALJ's conclusion that respondents violated Article 3 of Chapter 143, agreed that summary judgment should be granted in favor of respondents, and dismissed petitioners' consolidated petitions. On 2 June 1993, petitioners filed a petition for judicial review in superior court. Judge Donald W. Stephens affirmed the final agency decision on 29 November 1993.

Petitioners appeal.

Petree Stockton, L.L.P., by Noah H. Huffstetler, III., L. Elizabeth Henry, and Gary S. Qualls, for petitioner-appellants Carolina Medicorp, Inc., Forsyth Memorial Hospital, Inc., Medical Park Hospital, Inc., Reba J. Smith, Moore Regional Hospital, and

Elizabeth Metheson-Smith; and Church Paksoy & Wray, by John Church, for petitioner-appellants Cleveland Memorial Hospital, Inc., and Dina L. Braddy.

Attorney General Michael F. Easley, by Special Deputy Attorney General Jo Anne Sanford and Assistant Attorney General W. Wallace Finlator, Jr., for respondent-appellees.

EAGLES, Judge.

I.

[1] Petitioners argue that the trial court erred in failing to conclude that respondents violated the public contracting statutes (Chapter 143 of the North Carolina General Statutes) when they executed the 1992-93 preferred provider contracts with petitioners. G.S. 143-49 provides:

> The Secretary of Administration shall have power and authority, and it shall be his duty, subject to the provisions of this Article:
>
> . . . .
>
> (3) To purchase or to contract for, by sealed, competitive bidding or other suitable means, all **contractual services** and needs of the State government, or any of its departments, institutions, or agencies; or to authorize any department, institution or agency to purchase or contract for such services. (Emphasis added.)

G.S. 143-49(3) provides that "contractual services" means "work performed by an independent contractor requiring specialized knowledge, experience, expertise or similar capabilities." Petitioners argue that the preferred provider contracts fit within the definition of contracts for contractual services because the preferred provider contracts expressly provide that the hospitals are independent contractors and the services that hospitals provide require specialized knowledge and skills. Petitioners argue that the State should have followed the competitive bidding process whereby the State issues a written formal request for proposals and solicits proposals from as many sources as possible. Because the State did not follow this procedure, petitioners argue that the State violated the public contracting statutes. We disagree.

The method of obtaining the preferred provider contracts here was not governed by the public contracting statutes during the 1992-93 year. The plain language of G.S. 143-49(3), now and as it existed in

1992-93, provides that the public contracting statutes apply when the Secretary of Administration "purchase[s] or . . . contract[s] for . . . contractual services." Here, the Plan members themselves purchased or contracted for hospital services. Respondents merely entered into preferred provider contracts concerning the rates charged for services provided by hospitals to Plan members. Respondents did not enter into contracts **for** contractual services.

Furthermore, the preferred provider contracts were not for the "needs" of the State, but were for the benefit of the individual Plan members. G.S. 143-51 provides that it is the duty of agencies to notify the Secretary of Administration of "all supplies, materials, contractual services and equipment needed" by them so that the Secretary can purchase or contract for those needs. The language of G.S. 243-51 clarifies that the "contractual services" the statute refers to must be for the State's benefit—not for the benefit of individual Plan members. Accordingly, we hold that the public contracting requirements do not apply to the preferred provider contracts here and that respondents did not violate the statutory negotiating and competitive bidding procedures in obtaining the discount contracts.

[2] Petitioners also argue that the State Purchasing Officer had no authority to exempt the preferred provider contracts from the requirements of the public contracting statutes. To the contrary, assuming arguendo that the public contracting laws apply here, the State Purchasing Officer would still have the authority to exempt the preferred provider contracts from the competitive bidding process. The North Carolina Administrative Code, title 1, r. 05D.0302 provides that the State Purchasing Officer may designate any service as exempt from adherence to "these procedures." Petitioners argue that "these procedures" refers to the Department of Administrations' own regulations, not to the public contracting laws. Petitioners offer no authority for this assertion and we are not persuaded. Further, petitioners argue that North Carolina Administrative Code, title 1, r. 05D.0302 is void because the power it purports to confer on the State Purchasing Officer in effect sets aside the statutory public contracting requirements enacted by the legislature. Petitioners rely on *States' Rights Democratic Party v. Board of Elec.*, 229 N.C. 179, 187, 49 S.E.2d 379, 384 (1948) (stating that any administrative rule which sets aside a provision of a statute the Legislature has enacted to govern the operations of state agencies is a nullity). Here, however, the power granted by North Carolina Administrative Code, title 1, r. 05D.0302 does not set aside any provisions in Chapter 143. G.S. 143-

49(3) provides that the purchase or contracting for services should be by competitive bidding "or other suitable means." Here, the State Purchasing Officer, as a representative of the Secretary of Administration, determined that "other suitable means" were available to acquire these contracts. Accordingly, we hold that even if we assumed that the preferred provider contracts fell within the purview of the public contracting laws, and we do not, the State Purchasing Officer had full authority pursuant to G.S. 143-49(3) and North Carolina Administrative Code, title 1, r. 05D.0302 to exempt the contracts from the competitive bidding process.

[3] Petitioners also argue that the enactment of Senate Bill 1148, which amended G.S. 135-40.4 in 1993, shows that the public contracting requirements in Chapter 143 applied to the 1992-93 preferred provider contracts. We disagree. After reviewing the legislative history of the bill, it appears that petitioners read more into the language of the bill than is justified. The bill, ratified on 24 July 1993, provided that the preferred provider contracts would **not** be subject to the requirements of Chapter 143. Petitioners point to the savings clause at the end of the ratified bill which provides that the act becomes effective 1 July 1993 "and shall not apply to any litigation or administrative proceedings pending prior to that date." Petitioners contend that this language shows that before then, the public contracting laws did apply to the preferred provider contracts. However, this boilerplate language plainly means that the act does not affect pending litigation in any way.

Petitioners also argue that the title of the bill shows that the public contracting laws applied until 1993. As introduced, the title of Senate Bill 1148 was: "AN ACT TO MAKE CLARIFYING CHANGES IN THE TEACHERS' AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN AND TO RESOLVE LEGAL ISSUES BY MAKING CLEAR THAT THE LEGISLATIVE INTENT SINCE ENACTMENT IS THAT CONTRACTING WITH PREFERRED PROVIDERS IS NOT SUBJECT TO CHAPTER 143 OF THE GENERAL STATUTES." By contrast, the title of the bill **as ratified** read: "AN ACT TO AFFECT THE TEACHERS' AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN." Petitioners argue that the title change from "clarifying changes" to "affect" shows that the bill did more than merely clarify the applicability of the contracting laws to the preferred provider contracts. We disagree because the ratified bill contained additional provisions which were not in the proposed bill. The original title was not sufficiently broad to encompass all the provisions of the ratified act.

Petitioners' arguments concerning the import of Senate Bill 1148 are without merit. Accordingly, the trial court did not err in holding that the preferred provider contracts are valid.

II.

[4] Petitioners also argue that because the preferred provider contracts were unlawful, the trial court erred in failing to rule that the hospital petitioners are entitled to recoup the amount of money they allegedly lost by providing discounts to hospital patients. Because we have determined, *supra*, that the preferred provider contracts were lawfully entered into between petitioners and respondents, it is not necessary to address each of petitioners' arguments related to recoupment of money. We hold that the trial court did not err in ruling that the hospital petitioners were not entitled to recoup money from respondents.

III.

[5] Petitioners argue that the trial court erred in failing to rule that the hospital petitioners are entitled to challenge as unlawful respondents' actions in executing the preferred provider contracts even though hospital petitioners stated that they were executing the contracts under protest. Petitioners argue that respondents' failure to comply with the mandatory state contracting requirements rendered the preferred provider contracts void pursuant to G.S. 143-58 and therefore hospital petitioners are not estopped from challenging the contracts' validity. G.S. 143-58 provides that contracts for the purchase or lease of services made contrary to the provisions of Article 3 of Chapter 143 shall be void. However, as we have concluded above, the preferred provider contracts were not void. Furthermore, the doctrine of estoppel by benefit applies here to estop the hospital petitioners from challenging respondents' allegedly unlawful actions.

We first note that the trial court based its decision on the doctrine of "estoppel by the acceptance of benefits" which is also referred to as "quasi-estoppel." *Brooks v. Hackney*, 329 N.C. 166, 172 n.3, 404 S.E.2d 854, 858 n.3 (1991). Quasi-estoppel differs from the doctrine of equitable estoppel. Quasi-estoppel "has its basis in acceptance of benefits" and provides that "[w]here one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." *Redevelopment Com'n of Greenville v.*

Hannaford, 29 N.C. App. 1, 4, 222 S.E.2d 752, 754 (1976). *See Brooks v. Hackney*, 329 N.C. 166, 172, 404 S.E.2d 854, 859 (1991) (stating that a party cannot dispute the validity of a contract after it has accepted benefits which arise from the contract).

Petitioners argue that they did not benefit from the contracts. They assert that they actually lost money by executing the contracts because they could no longer charge as much money for their services to Plan members. However, the record is clear that hospital petitioners did benefit from the contracts. In each of their petitions, the hospital petitioners stated that other hospitals in their areas had already become preferred providers. The hospital petitioners acknowledged that if they did not discount their costs, they could lose patients to nearby preferred providers because Plan members using non-preferred providers were subject to an additional co-payment of twenty percent of the hospital's charge up to $5,000 per year. Accordingly, the hospital petitioners clearly benefitted by becoming preferred providers because thereby they were able to retain Plan members as customers.

Petitioners also argue that estoppel applies because they did not enter into the contracts voluntarily. However, voluntariness is not an element under the doctrine of quasi estoppel. Furthermore, even if it were an element of quasi estoppel, petitioners were not compelled to sign the contracts. They chose to avoid the risk of losing patients to other preferred provider hospitals by signing the contracts. Accordingly, petitioners' argument that estoppel should not apply because they did not voluntarily sign the preferred provider contracts is not persuasive.

Petitioners also argue that respondents did not detrimentally rely on the hospital petitioners' execution of the preferred provider contracts and that detrimental reliance is an essential element of equitable estoppel. However, as we indicated above, we are dealing with quasi estoppel rather than equitable estoppel here. Detrimental reliance is irrelevant under the doctrine of "quasi estoppel." *Taylor v. Taylor*, 321 N.C. 244, 249, 362 S.E.2d 542, 546 (1987), *citing Mayer v. Mayer*, 66 N.C. App. 522, 532, 311 S.E.2d 659, 666, *review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984). Accordingly, petitioners' argument concerning a lack of detrimental reliance is without merit.

Petitioners also argue that the hospital petitioners' execution of their own contracts cannot estop them from challenging the void con-

tracts of others. We have already concluded that the preferred provider contracts are valid. Accordingly, petitioners' argument is without merit.

IV.

[6] Finally, petitioners argue that the trial court erred in ruling that there was no valid basis to support a claim of individual taxpayer harm. In its recommended decision, the ALJ concluded that summary judgment was appropriate for respondents and noted that "[t]he Petitions did not name the individual Petitioners in their capacity as "taxpayers" and therefore that issue is not properly presented in these cases." The Full Commission agreed that summary judgment should be granted in favor of respondents and the trial court affirmed, stating that "the Agency has properly dismissed [the individual petitioners'] claims." We have reviewed the record and conclude that the trial court did not err in dismissing the individual petitioners' claims. Accordingly, the issue of individual taxpayer harm is not before us.

Affirmed.

Judges WALKER and McGEE concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, PLAINTIFFS v. ARTIE DAVIS, STEVE DAVIS, DONALD BUMGARDNER, GUARDIAN AD LITEM FOR TIFFANY DIANE MATTHEWS, AN INFANT, AND KENNETH MATTHEWS, DEFENDANTS

No. 9410SC632

(Filed 18 April 1995)

1. Insurance § 1155 (NCI4th)— automobile policy—child struck after leaving vehicle—vehicle in use

An insured's van was in use at the time her granddaughter was struck by a truck after leaving the van and an auto policy providing coverage for ownership, maintenance, or use provided coverage here where the insured was purposefully using the van as a means of transportation to her destination, a Superette; the van was instrumental in the trip to the Superette where the accident happened; and there was a causal connection between the

van and the accident in that the child had to cross a roadway to reach the Superette from where the van was parked.

Am Jur 2d, Insurance § 631.

2. Insurance § 822 (NCI4th)— homeowner's policy—child struck after leaving vehicle—automobile exclusion not applicable

A homeowner's policy provided coverage for the insured's granddaughter's injuries suffered after she had left the insured's van, where the use of the van was not the sole proximate cause of the accident. A concurrent cause was the grandmother's negligent supervision.

Am Jur 2d, Insurance § 727.

Appeal by plaintiffs from order and judgment entered 5 May 1994 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 March 1995.

Bailey & Dixon, L.L.P., by David S. Coats, for plaintiffs-appellants.

Tim L. Harris & Associates, by Jerry N. Ragan, for defendants-appellees.

WALKER, Judge.

In this action plaintiffs seek a declaration of the rights of plaintiffs and defendants under two insurance policies. Specifically, plaintiffs seek a declaration that one but not both of the policies provides coverage for an accident that occurred on 15 August 1990.

On 26 August 1993, plaintiffs filed a motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c). On 18 October 1993, defendants filed a corresponding motion. Thereafter, the court entered an order denying plaintiffs' motion for judgment on the pleadings and granting defendants' corresponding motion.

The parties stipulated to the following pertinent facts: On 15 August 1990, six-year-old Tiffany Diane Matthews, a pedestrian, was struck by a truck operated by Michael Sain. Immediately before the accident, Tiffany had been a passenger in a van driven by defendant Artie Davis, her grandmother. Ms. Davis had parked the van near the Cat Square Superette and turned off the motor. Ms. Davis exited the

van and started walking toward the Superette. Tiffany then called to Ms. Davis and asked her if she could come in and get some ice cream. When Ms. Davis told her that she could, Tiffany got out of the passenger side of the van, walked around the van, and walked into the one-lane roadway separating the van and the store. Tiffany was then struck by the truck operated by Mr. Sain.

Tiffany and her father, defendant Kenneth Matthews, filed an action alleging negligence and seeking damages from Ms. Davis, Mr. Sain, and Sain & Sain Trucking Company (the tort action). At the time of the accident, Mr. Davis maintained a motor vehicle liability policy issued by Nationwide (the auto policy) which provided liability coverage in the amount of $100,000 per person/$300,000 per accident. Mr. Davis also maintained a homeowner's insurance policy issued by Nationwide Fire (the homeowner's policy) which provided personal liability coverage in the amount of $100,000 for each occurrence.

The tort action was settled on 3 December 1992 when Tiffany's guardian ad litem Donald Bumgardner, Mr. Matthews, Ms. Davis, Mr. Sain, Nationwide, and Nationwide Fire entered into a consent judgment approving settlement. Pursuant to the parties' agreement, the claim against Mr. Sain was settled for $25,000; the claim against Ms. Davis was settled for $150,000 and Ms. Davis was released; $100,000 was paid to the plaintiffs by Nationwide; and it was stipulated that the instant action would determine whether there was coverage under both policies.

The issue to be determined is whether the auto policy, the homeowner's policy, both policies, or neither policy provide(s) coverage for the injuries and damages sustained by Tiffany in the accident. If both policies provide coverage, Nationwide and Nationwide Fire would be obligated to pay an additional $50,000 to the plaintiffs in the tort action. If only one or neither of the policies provides coverage, the plaintiffs in the tort action would be limited to the $100,000 already received from Nationwide for the claim against Ms. Davis.

We note at the outset that each insurance policy is a separate contract for which Mr. Davis has paid a separate premium. As such, each contract "must be interpreted in accordance with its own terms and using the applicable rules of construction. . . ." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 74 (1986). We therefore must look at each policy separately to determine whether it provides coverage for the accident.

[1] We first examine the auto policy, keeping in mind the rule of construction that "provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction." *State Capital, supra*, at 538, 350 S.E.2d at 68.

The Davis' auto policy provides liability coverage to Ms. Davis "for the ownership, maintenance or use" of the vehicle. Under the facts of this case, the issue is whether at the time of the accident the van was in "use." Plaintiffs contend that since Ms. Davis was not driving the van or otherwise operating it at the time of the accident, the van was not in "use" and there is no coverage under the policy. However, North Carolina courts have recognized that liberally construed, the term "use" may refer to more than the actual driving or operation of a vehicle. For example, in *Whisnant v. Insurance Co.*, 264 N.C. 303, 141 S.E.2d 502 (1965), plaintiff was struck by a passing car as he attempted to push the disabled vehicle he had been driving onto the shoulder of the road. *Id.* at 308, 141 S.E.2d at 506. Our Supreme Court held that for purposes of a medical payments provision in an automobile insurance policy maintained by the owner of the disabled vehicle, the plaintiff was "using" the vehicle at the time he was injured. *Id.* The Court recognized that a person "uses" a vehicle when he uses it for the purpose of transportation to a destination. *Id.* at 308, 141 S.E.2d at 505 (citing with approval *Madden v. Farm Bureau Mut. Auto. Ins. Co.*, 79 N.E.2d 586 (Ohio App. 1948)).

In *Leonard v. N.C. Farm Bureau Mut. Ins. Co.*, 104 N.C. App. 665, 411 S.E.2d 178 (1991), *rev'd on other grounds*, 332 N.C. 656, 423 S.E.2d 71 (1992), involving the term "use" as it related to an underinsured motorist provision, this Court adopted the ordinary meaning of the word "use"—" 'to put into action or service[,] . . . to carry out a purpose or action by means of[, or] . . . [to] make instrumental to an end or process. . . .' " *Id.* at 671, 411 S.E.2d at 181-82 (*quoting Webster's Third New International Dictionary* 2523-24 (1968)). The Court held that the plaintiff, who was injured while changing a flat tire, was "using" the vehicle as he "was purposefully using the van as his means of transportation to his job. . . ." *Id.* at 672, 411 S.E.2d at 182.

Our Courts have also held that a person "uses" a motor vehicle when loading and unloading it, even if that person is not the named insured, *Casualty Co. v. Insurance Co.*, 16 N.C. App. 194, 199, 192 S.E.2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972), and

that a hunter "uses" a motor vehicle while hunting when he reaches into it to get a rifle, *State Capital, supra*, at 540, 350 S.E.2d at 70.

In *State Capital*, our Supreme Court noted that the provisions of N.C. Gen. Stat. § 20-279.21 *et. seq.*, commonly known as the Financial Responsibility Act, "are written into every automobile liability policy." *State Capital, supra*, at 538-39, 350 S.E.2d at 69. The Act provides that any motor vehicle policy certified as proof of financial responsibility shall insure the named insured against loss from the liability imposed by law "for damages arising out of the ownership, maintenance or use of such motor vehicle. . . ." N.C. Gen. Stat. § 20-279.21 (b)(2) (1994). The *State Capital* court, mindful that the "arising out of" language in the Act should be liberally construed, stated:

> [T]he test for determining whether an automobile liability policy provides coverage for an accident is not whether the automobile was a proximate cause of the accident. Instead, the test is whether there is a causal connection between the use of the automobile and the accident.

Id. at 539-40, 350 S.E.2d at 69.

Ms. Davis was purposefully using the van as a means of transportation to get to her destination, the Cat Square Superette. The van was instrumental in the trip to the Superette where the accident happened. Furthermore, there was a causal connection between the use of the van and the accident. Because Ms. Davis parked the van where she did, Tiffany had to cross a roadway to reach the Superette. In light of the foregoing authority, we conclude that the Davis' van was in "use" at the time of the accident and therefore hold that the auto policy provides coverage.

[2] We next examine the homeowner's policy to determine whether it also provides coverage for the accident. The homeowner's policy provides personal liability insurance coverage to any "**insured** for damages because of **bodily injury** or **property damage** caused by **an occurrence** to which this coverage applies . . . (emphasis in original)." However, the homeowner's policy contains the following exclusion:

> 1. **Coverage E—Personal Liability** and **Coverage F—Medical Payments to Others** do not apply to **bodily injury** or **property damage**: . . .

e. arising out of:

(1) the ownership, maintenance, use, loading, or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an **insured** . . .

(emphasis in original). Plaintiffs argue that if, as we have already determined, the van was in "use" at the time of the accident so that the auto policy supplies coverage, we must necessarily find that the accident arose out of the "use" of the van so that the exclusion in the homeowner's policy bars coverage.

Plaintiffs base their argument in part on this Court's decision in *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 99 N.C. App. 753, 394 S.E.2d 242, *disc. rev. allowed*, 327 N.C. 481, 397 S.E.2d 214 (1990), *disc. rev. dismissed*, 329 N.C. 691, 406 S.E.2d 579 (1991). In *Beatty* the Board had waived its governmental immunity to the extent that it had purchased a commercial insurance liability policy. The policy contained an exclusion similar to the one at issue in the homeowner's policy here. The plaintiff, who had been struck by a car as he attempted to reach his assigned bus stop, urged that the exclusion did not apply because his injuries occurred as a result of the negligent design of the bus route and not as a result of the "use, loading, or unloading" of the school bus. *Id.* at 755-56, 394 S.E.2d at 244. The Court held that the Board had not waived its immunity under the facts of the case but did not address the specific language of the exclusionary provision. *Id.* at 756, 394 S.E.2d at 245.

In contrast, the *State Capital* case contains an extensive discussion by our Supreme Court of the language of an exclusionary provision in a homeowner's policy similar to the one here. In that case, the owner of a pickup truck and a companion went on a hunting trip. The owner stored a rifle behind the seat of his truck because the truck's gun rack was full. The owner saw a deer and reached for the rifle from outside the truck. The rifle discharged, injuring the owner's companion as he was exiting the truck. *State Capital*, 318 N.C. at 536, 350 S.E.2d at 67-68. At the time of the accident, the owner maintained both an automobile insurance policy issued by Nationwide Mutual Insurance Company and a homeowner's liability insurance policy issued by State Capital Insurance Company. *Id.* A declaratory action was brought to determine the rights and liabilities of both insurance companies. *Id.* at 537, 350 S.E.2d at 68.

The Court first held that coverage was provided under the auto policy, finding that a causal connection existed between the use of the pickup truck and the passenger's injuries. *Id.* at 540-41, 350 S.E.2d at 69-70. The Court then went on to consider the applicability of the homeowner's policy. The Court reviewed case law from other jurisdictions which established two principles regarding a determination of coverage under homeowners' policies:

> (1) ambiguous terms and standards of causation in exclusion provisions of homeowners policies must be strictly construed against the insurer, and (2) homeowners policies provide coverage for injuries *so long as a non-excluded cause is either the sole or concurrent cause of the injury giving rise to liability.* Stating the second principle in reverse, *the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy.*

Id. at 546, 350 S.E.2d at 73 (emphasis added).

The Court noted that both of these principles are supported by North Carolina case law.

> First, it is well settled in North Carolina that insurance policies are construed strictly against insurance companies and in favor of the insured. . . . Provisions which exclude liability of insurance companies are not favored. . . . We agree with the Court of Appeals' decision that when strictly construed the standard of causation applicable to the ambiguous "arising out of" language in a homeowners policy exclusion is one of proximate cause.
>
> . . .
>
> Secondly, this Court has held that when an accident has more than one cause, one of which is covered by an "all risks" insurance policy and the other which is not, the insurer must provide coverage. In *Avis v. Hartford Fire Insurance Co.*, 283 N.C. 142, 150, 195 S.E.2d 545, 549 (1973), this Court stated: "As a general rule, coverage will extend when damage results from more than one cause even though one of the causes is specifically excluded."

Id. at 546-47, 350 S.E.2d at 73-74 (citations omitted). The Court then applied the two principles to the case and concluded that

> the exclusionary language in the State Capital homeowners policy should be interpreted as excluding accidents for which the

sole proximate cause involves the use of an automobile. *If there is any non-automobile proximate cause, then the automobile use exclusion does not apply.*

Id. at 547, 350 S.E.2d at 74 (emphasis added).

We find the holding in *State Capital* controlling. In this case, the "use" of the van was not the *sole proximate cause* of the accident; a concurrent cause was Ms. Davis' negligent supervision of Tiffany when Tiffany exited the van to enter the Superette. Therefore, under *State Capital*, because there was a "non-automobile proximate cause" of the accident, the automobile exclusion does not apply to bar coverage under the homeowner's policy.

We therefore hold that both the auto policy and the homeowner's policy provide coverage for Tiffany's injuries. We agree with the *State Capital* court that

> when the properly construed terms of more than one policy provide coverage for a single accident, this result is not burdensome to the insurance companies nor against public policy—the companies have been paid premiums to cover certain risks, and when the event insured against occurs, those companies should be required to provide coverage.

State Capital, *supra*, at 548, 350 S.E.2d at 74.

Affirmed.

Judges EAGLES and McGEE concur.

BETTINA COLEY LOVING v. LARRY DALE LOVING

No. COA94-731

(Filed 18 April 1995)

1. Divorce and Separation § 147 (NCI4th)— distribution of marital debt

The trial court distributed a $9,000 marital debt (an amount owed on marital property) to plaintiff wife where the property had a value of $28,250 but the court placed a value of only $19,250 on the property, and this property was distributed to plaintiff.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

2. Divorce and Separation § 148 (NCI4th)— equitable distribution—payment of marital debt—distributional factor

The trial court had the discretion to treat the post-separation payment of a marital debt by the spouse not receiving distribution of the debt as a distributional factor.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

3. Divorce and Separation § 148 (NCI4th)— equitable distribution—payment of marital debt—decrease in debt value—distributional factor

Where a marital debt distributed to plaintiff wife was valued at $9,000 on the date of separation but was paid in full by defendant husband after the date of separation and thus had a value of zero on the date of distribution, the trial court was required to consider this decrease in value as a distributional factor in making its distribution of marital property.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

4. Divorce and Separation § 122 (NCI4th)— conveyance from husband's parents—tenancy by entirety—presumption of gift to marital estate

Assuming that any or all of the property acquired by deed from defendant husband's parents was a gift only to defendant from his parents and was therefore defendant's separate property, a gift by defendant to the marital estate is presumed from defendant's direction that the title be placed in the names of both parties as tenants by the entirety, and where defendant did not produce any evidence to rebut the presumption of a gift to the marital estate, the trial court did not err in concluding that the entire property is marital property.

Am Jur 2d, Divorce and Separation §§ 884-886.

Appeal by defendant from order entered 10 January 1994 in Cabarrus County District Court by Judge Clarence E. Horton, Jr. Heard in the Court of Appeals 23 March 1995.

Johnson, Roberts & Hastings, by Randell F. Hastings, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr. and Katherine Line Thompson Kelly, for defendant-appellant.

GREENE, Judge.

Larry Dale Loving (defendant) appeals from a judgment of equitable distribution entered in Cabarrus County District Court on 10 January 1994.

Defendant and Bettina Coley Loving (plaintiff) were married 9 December 1966, separated on 23 June 1989, and divorced on 4 September 1990. On 30 June 1989, plaintiff filed an action against defendant for equitable distribution of marital property in Cabarrus County District Court. An equitable distribution trial was held on 10 October 1993 and 11 November 1993.

The parties stipulated to the classification, valuation and distribution of much of the property. There did exist disagreement with regard to a tract of land known as the Alleghany property and a tract of land containing the marital residence known as the Midland property. With regard to the Alleghany property, the parties stipulated that it was marital property.

The evidence is that the Alleghany property had a value as of the date of separation of $28,250 and that there existed, on the date of separation, a debt on the property of $9,000. There is no dispute among the parties that that debt is a marital debt and was fully paid by the defendant after the date of separation and before the trial.

The Midland property was acquired by the parties as tenants by the entireties, during the marriage, by deed from the defendant's parents. There is no dispute as to the value of the Midland property, as the disagreement relates to whether the property is marital or separate.

Defendant testified that his parents transferred title to the Midland property to plaintiff and defendant by deed dated 6 May 1968. The parties paid $40,000 for the property with no money down and financed by a deed of trust signed by both plaintiff and defendant back to defendant's parents. Defendant testified that he "was to pay [his] parents $150 a month interest free until the forty thousand was paid off." The parties paid the full $40,000 out of their incomes over a twenty-two year period.

Defendant testified to the following concerning the Midland property:

> My parents told me they would like for me to have the [Midland property]. This is probably prior to the marriage that we dis-

> cussed it and I said, "I don't—I don't have a family. . . . But then after I got married and had a child . . . I started looking for a place to live. And daddy said, "I want you to have the [Midland property]." . . . "I want to give you the house and forty acres." And I said, "No." I said, "I don't want to do that." And he said, "Well, I'll give it all to you, then." And I said . . . "I want to pay you something so you can retire and enjoy the rest of your life." So then we talked about, you know, this, that and the other and I said, "$40,000." And he said—well, I don't remember what else he said, but then he did check with my brothers and sister because it was to be part of my inheritance.

Defendant also testified his mother told him the Midland property was part of his inheritance and he did not remember any discussions about his parents making a gift of any of the Midland property to plaintiff. He stated that the plaintiff's name is on the deed because "I was a trusting husband and I thought it would be best if her name would be put on there too." During his testimony, defendant identified a letter written in his mother's handwriting and signed by her on 9 September 1989 to William Rogers, the lawyer who then represented defendant. In the letter, defendant's mother wrote that her husband "wanted [defendant] to have a house so we agreed to let him have not only the house and two acres, but <u>all</u> of it for $40,000. This was agreed <u>interest free</u> for his inheritance. He and [plaintiff] paid $150.00 per mo. then $200.00 per month until paid in full."

Lucy Jarvis, defendant's sister, testified that "Daddy wanted to give [the Midland property] to [defendant]. Mother said that it wouldn't be quite right just to give it to him." Paul Finnen, a residential real estate appraisal expert, testified that the present value in 1968 of a $40,000 interest-free loan payable over twenty-two years was $21,000, and this price was $45,000 less than the actual worth of the Midland property.

The trial court determined that both the Alleghany and Midland properties were marital. As to the Midland property, the court found as a fact that "[i]f any portion of this transaction be held to be a gift only to the defendant, he clearly intended to share that gift with his wife, the plaintiff. The defendant has failed to rebut the presumption, by clear and convincing evidence . . . that the conveyance . . . constituted a gift of the property to the marital estate." The trial court valued the Alleghany property at $19,250 and the Midland property at $238,021. The trial court distributed the marital properties, with the

Alleghany property going to the plaintiff and the Midland property going to the defendant. The court finally determined, after making extensive findings on evidence offered with regard to the distributional factors set out in N.C. Gen. Stat. § 50-20(c), that "an unequal division of the marital assets in favor of the defendant would be equitable," with the "plaintiff receiving 43% of the marital property and the defendant receiving 57% of the marital property." One of the distributional factor findings was that the defendant had paid, after the date of separation, the $9,000 debt secured by the Alleghany property.

The issues presented are whether the trial court erred in (I)(A) failing to distribute the $9,000 marital debt, (B) treating the defendant's post-separation payment of the $9,000 debt as a distributional factor, and (C) failing to treat the post-separation decrease in value of the $9,000 debt as a distributional factor; and (II) determining that the Midland property constituted marital property.

I

This Court has consistently held that there can be "no complete and equitable distribution . . . without also . . . distributing [the marital] debt." *Byrd v. Owens*, 86 N.C. App. 418, 423, 358 S.E.2d 102, 106 (1987); *Smith v. Smith*, 111 N.C. App. 460, 509-10, 433 S.E.2d 196, 226 (1993) (marital debt must be valued and distributed), *rev'd in part*, 336 N.C. 575, 444 S.E.2d 420 (1994). "Debt, as well as assets, must be classified as marital or separate property . . . [and if marital], the court must value the debt and distribute it." *Byrd*, 86 N.C. App. at 424, 358 S.E.2d at 106. The valuation must occur "as of the date of the separation of the parties." N.C.G.S. § 50-21(b) (1994). The classification, valuation and distribution of the marital debt is required without regard to whether the debt may be liquidated after the date of separation and before the trial. Just as with assets, the question is whether the debt was acquired during the marriage and before the date of separation and in existence on the date of the separation. *See Talent v. Talent*, 76 N.C. App. 545, 553, 334 S.E.2d 256, 261-62 (1985) (savings account must be valued as of the date of separation without regard to amount in account at time of the trial); *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (debt is marital if "incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties"), *disc. rev. denied*, 336 N.C. 605, 447 S.E.2d 392 (1994). The spouse not receiving the distribution of the marital debt who makes some payment on the marital debt after the date of separation and before the equitable dis-

tribution trial is entitled to either (1) a reimbursement from the other spouse for the amount of the payment, (2) a credit to his share of the equitable distribution award in an amount equal to the payment, or (3) an upward adjustment in his percentage of the distribution of the marital properties. *Smith*, 111 N.C. App. at 510, 433 S.E.2d at 226. The trial court retains the discretion to choose the appropriate method of compensating the spouse for his post-separation payment of marital debt. *Id.*

A

[1] In this case, the defendant argues that the trial court "did not distribute the [$9,000] marital debt to anyone." It is true that the judgment does not specifically indicate that the trial court distributed the $9,000 debt to anyone. It can be implied, however, that in placing a value on the Alleghany property of $19,250, when it in fact had a value of $28,250, and distributing that property to the plaintiff, the trial court also distributed the $9,000 debt to her.

B

[2] The defendant further argues that the trial court erred in treating the defendant's post-separation payment of the $9,000 as a distributional factor. We disagree. As we have stated, the trial court is given the discretion to treat the post-separation payment of a martial debt, by a spouse not receiving distribution of the debt, as a distributional factor. In so doing, the trial court did not abuse its discretion.

C

[3] The defendant finally argues on this issue that because the debt was paid in full after the date of separation and before the date of the trial, the debt distributed to the plaintiff decreased in value and that decrease must be considered by the trial court as a distributional factor. We agree. It is fundamental that the trial court must consider the "value of the marital property [and debts] at the date of distribution because the post-separation appreciation [and depreciation] . . . is a distributional factor." *Haywood v. Haywood*, 106 N.C. App. 91, 96, 415 S.E.2d 565, 568 (1992), *rev'd in part*, 333 N.C. 342, 425 S.E.2d 696 (1993); *Smith*, 111 N.C. App. at 511-12, 433 S.E.2d at 227 (spouse's post-separation discharge of a second mortgage increased value of home and must be considered as a distributional factor). In this case, the marital debt which was distributed to plaintiff and valued at $9,000 on the date of separation had a value of zero on the date of distribution. The trial court was required to consider this fact as a dis-

tributional factor in making its distribution, and there are no findings suggesting that it did. This error requires that the award be reversed and remanded for entry of a new judgment giving proper consideration to this evidence.

II

[4] Defendant also contends that the Midland property is, at least in part, defendant's own separate property. We disagree.

Under N.C. Gen. Stat. § 50-20(b)(1), (2),

> [T]he party claiming the property to be marital must meet the burden of showing by a preponderance of the evidence that the property was acquired by either spouse or both spouses during the marriage, before the date of separation, and is presently owned. . . . Once that burden is met, the burden shifts to the party claiming the property to be separate property. The party must prove by a preponderance of the evidence that the property was acquired by bequest, descent or gift during the course of the marriage.

Godley v. Godley, 110 N.C. App. 99, 108, 429 S.E.2d 382, 388 (1993) (*citing* N.C.G.S. § 50-20(b)(1), (2) and *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991)). As to whether property is marital or separate, the findings of the trial court will not be disturbed on appeal if there is competent evidence to support the findings. *Nix v. Nix*, 80 N.C. App. 110, 112-13, 341 S.E.2d 116, 118 (1986).

While conceding that plaintiff met her burden of showing the Midland property is marital property pursuant to Section 50-20(b)(1), defendant argues that at a minimum, the Midland property "was Defendant's separate property to the extent of the difference between the value of the property ($65,000) at the time of the gift and the value of the interest free loan ($21,000) or a $44,000 separate component in this land." Even assuming that any or all of the Midland property was acquired as a gift only to defendant from his parents and was therefore defendant's separate property, when the defendant directed that the title be placed in the entireties, a gift by the defendant to the marital estate is presumed. *McLean v. McLean*, 323 N.C. 543, 555, 374 S.E.2d 376, 383 (1988). "This presumption is rebuttable only by clear, cogent and convincing evidence that a gift was not intended." *Id.* " '[W]hether defendant succeeded in rebutting the presumption of gift to the marital estate by clear, cogent, and convincing evidence is a matter left to the trial court's discretion.' " *Id.* (*quoting McLean v.*

McLean, 88 N.C. App. 285, 290, 363 S.E.2d 95, 98-99 (1987)). In so holding, we reject the defendant's argument that the *McLean* presumption applies only when a spouse uses separate property to acquire other property which is titled in the entireties. The *McLean* presumption also applies when a spouse directs that title of his separate property be placed in the entireties, as was done in this case. As this Court has stated, "[w]hen one party titles property jointly it is reasonable that the other party expects it to be an addition to marital property." *McLeod v. McLeod*, 74 N.C. App. 144, 157, 327 S.E.2d 910, 919, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985).

In this case, the defendant did not produce any evidence to rebut the presumption of a gift to the marital estate. Thus, the trial court did not err in finding defendant made a gift of his separate Midland property to the marital estate and in concluding the entire Midland property is marital property. For these reasons, the decision of the trial court is

Affirmed in part, reversed in part and remanded.

Judges LEWIS and MARTIN, MARK D., concur.

STATE OF NORTH CAROLINA v. ALBERT NORRIS BEASLEY AND BOBBY DEE PAIGE, DEFENDANTS

No. COA94-814

(Filed 18 April 1995)

1. Criminal Law § 626 (NCI4th)— credibility of identification testimony

The victim's identification of defendant as the driver of the vehicle from which the codefendant shot at the victim was not inherently incredible so as to require the dismissal of charges against defendant for assault with a deadly weapon with intent to kill and discharging a firearm into occupied property where the victim testified that she met defendant in the summer of 1992, she had seen him twenty to twenty-five times before the incident in May 1993, and when she pulled alongside the codefendant's vehicle, she noticed defendant looking at her from the driver's side.

Am Jur 2d, Evidence §§ 1478 et seq.

2. Criminal Law § 865 (NCI4th)— refusal to instruct jury on reasoning together—no abuse of discretion

The trial court did not abuse its discretion by refusing to give the jury the instructions on reasoning together set forth in N.C.G.S. § 15A-1235(b) before the jury retired to deliberate.

Am Jur 2d, Trial §§ 1104 et seq.

3. Criminal Law § 816 (NCI4th)— identification testimony—refusal to give requested instruction

The trial court did not err by refusing defendant's request to give the former pattern jury instruction on identification which enumerated relevant factors to be considered in evaluating a witness's identification of defendant where the trial court gave the current pattern instruction on the State's burden of proving defendant's identity, and this instruction conveyed in substance defendant's requested instruction.

Am Jur 2d, Trial §§ 1104 et seq.

4. Criminal Law § 1156 (NCI4th)— assault with deadly weapon—discharging firearm into occupied property—use of gun improper aggravating factor

The trial court erred in finding as an aggravating factor that the crimes of assault with a deadly weapon with intent to kill and discharging a firearm into occupied property were committed with a gun when the use of a deadly weapon was an essential element of both offenses.

Am Jur 2d, Criminal Law §§ 525 et seq.

5. Constitutional Law § 345 (NCI4th); Criminal Law § 1067 (NCI4th)— aggravating factor—addition after hearing—absence of defendant

The trial court erred by adding the aggravating factor that defendant's conduct created a great risk to public safety after the sentencing hearing was completed and outside of defendant's presence.

Am Jur 2d, Criminal Law §§ 598, 921-923.

6. Criminal Law § 1142 (NCI4th)— aggravated assault—motivation of codefendant—improper aggravating factor

The trial court erred in finding as an aggravating factor against defendant that his codefendant was motivated to retaliate

against an assault victim for seeking child support from the codefendant.

Am Jur 2d, Criminal Law §§ 598, 599.

7. Criminal Law § 1145 (NCI4th)— aggravated assault and discharging firearm into occupied property—aggravating factor—heinous conduct—insufficient evidence

The trial court erred by finding as an aggravating factor for assault with a deadly weapon with intent to kill and discharging a firearm into occupied property that defendant's conduct was heinous because the victim was the mother of defendant's nephew where the victim was not wounded, and there was no evidence that she suffered any adverse effects not normally present in the charged offenses.

Am Jur 2d, Criminal Law §§ 598, 599.

8. Criminal Law § 1203 (NCI4th)— failure to find mitigating factors—absence of supporting evidence

The trial court did not abuse its discretion in failing to find any mitigating factors where defendant offered no uncontradicted or substantial evidence to support the mitigating factors he offered to the trial court.

Am Jur 2d, Evidence §§ 934-1022.

Appeal by defendants from judgments entered 25 February 1994 by Judge Marcus Johnson in Catawba County Superior Court. Heard in the Court of Appeals 21 March 1995.

Defendants are brothers and were both convicted of assault with a deadly weapon with intent to kill, G.S. 14-32, and discharging a firearm into occupied property, G.S. 14-34.1. Defendants were each sentenced to two consecutive ten year terms of imprisonment.

The State's evidence tended to show the following: Rachel Icard, the victim, testified that she dated defendant Bobby Paige during the winter of 1989 for one year and had a child by him. She met defendant Beasley at a nightclub in the summer of 1992 and saw him a number of times afterwards. On 10 May 1993, victim received a call from defendant Paige about a warrant charging him with nonpayment of child support. During the conversation, he told victim that if he shot her below the waist that would be considered a misdemeanor and not a felony.

On 12 May 1993, victim went to the magistrate's office at about 8:30 or 9:00 p.m. to obtain an arrest warrant for defendant Paige. On her way home from the magistrate's office, she noticed defendant Paige's car near hers but moving slowly. She attempted to pass on the right hand side and as she passed Paige's car, she observed defendant Paige sitting on the passenger side of the car with defendant Beasley driving the car. When she looked over at defendant Beasley, she then saw that defendant Paige had a silver handgun pointed at her. She ducked and accelerated and then heard two or three gunshots. She went back to the police station and reported to Officer Farmer that defendant Paige had shot at her. Officer Farmer testified that victim was hysterical and crying and that her whole body was shaking. There were three bullet holes in victim's car.

Defendant Paige testified that he had to stop dating victim because of several incidents with victim, including slashing his tires. He testified that on 12 May 1993, he was at a recreation center from 5:30 p.m. until closing at 9:50 p.m. At least two witnesses verified that defendant Paige was at the recreation center until closing time. Defendant Beasley testified to essentially the same facts, adding that he could not have driven his brother's car, because he did not know how to drive a stick shift very well.

Defendants appeal.

Attorney General Michael F. Easley, by Assistant Attorney General Floyd M. Lewis, for the State.

E.X. de Torres for defendant-appellant Beasley.

Robert W. Adams for defendant-appellant Paige.

EAGLES, Judge.

Defendants each bring forward several assignments of error. After careful review of the record and briefs, we find no errors in the trial but remand for a new sentencing hearing for each defendant.

DEFENDANT BEASLEY'S APPEAL

I.

[1] Defendant first contends that the trial court erred in denying defendant's motion to dismiss. In ruling upon a motion to dismiss, the trial court must determine whether, "upon consideration of all of the evidence in the light most favorable to the State, there is substantial evidence that the crime charged . . . was committed and that defend-

ant was the perpetrator." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). Defendant contends that victim's identification of him as the driver of the vehicle was inherently incredible. We disagree.

The credibility of witnesses and the proper weight to be given their identification testimony is a matter for the jury to decide. *State v. Turner*, 305 N.C. 356, 362, 289 S.E.2d 368, 372 (1982). In determining whether a witness' identification testimony is inherently incredible requiring dismissal, the test is whether "there is a reasonable possibility of observation sufficient to permit subsequent identification." *Id.* at 363, 289 S.E.2d at 372 (quoting *State v. Miller*, 270 N.C. 726, 732, 154 S.E.2d 902, 906 (1967)). Here, victim testified that she met defendant Beasley in the summer of 1992 and had seen him approximately "twenty to twenty five times" before the incident on 12 May 1993. Victim also testified that when she pulled alongside defendant Paige's car, she noticed defendant Beasley looking at her from the driver's side. Victim's testimony establishes that there was a reasonable possibility of observing defendant. This assignment of error is overruled.

II.

[2] Defendant's next three assignments of error concern the trial court's denial of defendant's request to give certain instructions to the jury before they retired to deliberate. Defendant first contends that the trial court erred in refusing to give the following instructions listed in G.S. 15A-1235(b):

> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

The trial court is not required to give these instructions upon request, but may give them in its discretion. G.S. 15A-1235(b). We find no abuse of discretion here.

[3] Second, defendant contends that the trial court erred in refusing to instruct the jury on the relevant factors of identification. The trial court is not required to charge the jury in the exact language requested by defendant. "A charge which conveys the substance of the requested instructions is sufficient." *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984). The trial court gave the current criminal pattern jury instruction regarding the State's burden in proving defendant's identity. The court charged the jury as follows:

> Now the State has the burden of proving the identity of the defendant as the perpetrator of the crime charged beyond a reasonable doubt. This means that you the jury must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

Defendant requested the former pattern jury instruction regarding identification that enumerated relevant factors to be considered in evaluating a witness' identification. We conclude that the trial court's instruction conveyed defendant's requested instructions in substance. We also note that defendant did not submit this proposed instruction in writing as required by G.S. 15A-1231. This assignment of error fails.

Third, defendant contends that the trial court erred in refusing to instruct the jury that they must first consider the guilt or innocence of defendant Paige before they could consider defendant's guilt. The trial court gave this instruction in substance in its initial charge to the jury. This assignment of error is without merit.

III.

Defendant's next four assignments of error concern sentencing errors. Defendant contends that the trial court erred in finding as aggravating factors that 1) the crimes were committed with a gun when a gun is an essential element of both offenses; 2) defendant Paige was motivated to retaliate against victim for seeking to require him to pay child support; 3) defendant's conduct was heinous in that victim was the mother of defendant's nephew; and 4) defendant's conduct created a great risk to public safety. We agree that the trial court erred in finding these factors in aggravation.

[4] Defendant first contends that the trial court erred in finding as an aggravating factor that the crimes were committed with a gun. "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." G.S. 15A-1340.4(a)(1).

Defendant was convicted of assault with a deadly weapon with intent to kill and discharging a firearm into occupied property. Use of a deadly weapon is an essential element of both of these offenses. The trial court erred in relying upon the aggravating factor of defendant's use of a deadly weapon when an essential element of both offenses involves the use of a deadly weapon.

[5] The trial court also erred by finding as an aggravating factor that defendant's conduct created a great risk to public safety and by doing so other than in open court. Defendant's sentencing hearing was conducted in open court on 25 February 1994. On 28 February 1994, the trial court added this nonstatutory aggravating factor after the sentencing hearing and outside of defendant's presence.

> The accused has the undeniable right to be personally present when sentence is imposed. Oral testimony, as such, relating to punishment is not to be heard in his absence. He shall be given full opportunity to rebut defamatory and condemnatory matters urged against him, and to give his version of the offense charged, and to introduce any relevant facts in mitigation.

State v. Midyette, 87 N.C. App. 199, 204, 360 S.E.2d 507, 510 (1987) (quoting *State v. Pope*, 257 N.C. 326, 334, 126 S.E.2d 132-33 (1962)). In *Midyette*, the trial court conducted an *in camera* examination of the rape victim to permit the victim to express her views concerning the defendant's appropriate punishment. Defense counsel, the prosecutor, the judge, and the victim were present in the trial court's chambers. Defendant was not present. This court held that defendant was denied his opportunity to be present at the sentencing hearing and to refute or explain the information used to aggravate his punishment. *Id.* at 204, 360 S.E.2d at 510. It appears from the record here, that the trial court added this aggravating factor after the sentencing hearing was completed. The trial court erred in adding this aggravating factor outside of defendant's presence.

[6] Defendant next contends that the trial court erred in finding as an aggravating factor against defendant that his codefendant, defendant Paige, was motivated to retaliate against victim for seeking child support. We agree. The existence of an aggravating factor must be proved by a preponderance of the evidence. *State v. Thompson*, 314 N.C. 618, 622, 336 S.E.2d 78, 80 (1985). There is no evidence here as to defendant Beasley's motivation. Defendant Beasley did not have a child by victim and there is no evidence that victim sought child support from him. The trial court apparently imputed defendant Paige's motivation

for committing these crimes to defendant Beasley. During sentencing, "reliance on evidence from the trials of others connected with the same offense is improper absent a stipulation." *State v. Thompson*, 314 N.C. 618, 623, 336 S.E.2d 78, 81 (1985). The trial court erred in finding this aggravating factor.

[7] Finally, defendant contends that the trial court erred in finding that defendant's conduct was heinous in that victim was the mother of defendant's nephew. In determining whether an offense is especially heinous, atrocious or cruel, "the focus should be on whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense." *State v. Brown*, 314 N.C. 588, 592, 336 S.E.2d 388, 391 (1985) (quoting *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983)). Here, victim was not wounded. There is no evidence that she suffered any adverse effects not normally present in the charged offenses. The trial court erred in finding this factor in aggravation.

When the trial court erroneously finds aggravating factors and imposes a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing. *State v. Ahern*, 307 N.C. 584, 300 S.E.2d 689 (1983). Accordingly, defendant is entitled to a new sentencing hearing.

IV.

[8] Finally, defendant contends that the trial court erred in failing to find any mitigating factors. The trial court is not required to find a mitigating factor unless the evidence supporting the factor is uncontradicted, substantial and there is no reason to doubt its credibility. *State v. Daniel*, 319 N.C. 308, 312, 354 S.E.2d 216, 218 (1987). Defendant offered no uncontradicted or substantial evidence to support the mitigating factors he offered to the trial court. The trial court did not abuse its discretion in failing to find any mitigating factors.

DEFENDANT PAIGE'S APPEAL

Defendant Paige contends that the trial court erred in denying his motion to dismiss and in adding as an aggravating factor that defendant Paige's conduct created a great risk to public safety. For the reasons discussed *supra* in dealing with defendant Beasley's appeal, we hold that the trial court did not err in denying defendant Paige's motion to dismiss. I. *supra*. However, for the reasons discussed *supra* in defendant Beasley's appeal, we hold that the trial court erred

in adding as an aggravating factor outside of defendants' presence that defendant Paige's conduct created a great risk to public safety.

In sum, defendants received a fair trial free from prejudicial error, but these cases are remanded for a new sentencing hearing based on errors in the sentencing stage of trial.

As to defendant Beasley, no error in trial, remanded for resentencing.

As to defendant Paige, no error in trial, remanded for resentencing.

Judges MARTIN, JOHN C., and WALKER concur.

DOUGLAS E. TART, PLAINTIFF v. PRESCOTT'S PHARMACIES, INC., D/B/A THE MEDICINE SHOPPE; CKI INDUSTRIES, INC.; NATROL, INC.; ELBERT CARL ANDERSON, JR., INDIVIDUALLY; BARBARA W. LARKINS, INDIVIDUALLY; AND RONALD E. ANDERSON, INDIVIDUALLY, DEFENDANTS

No. 9410SC421

(Filed 18 April 1995)

1. Courts § 5 (NCI4th)— action against alter ego of bankrupt corporation—subject matter jurisdiction

The trial court had subject matter jurisdiction of plaintiff's claims against defendants as the alter ego of a bankrupt corporation for negligent misrepresentation and breach of warranties of a weight loss drug since plaintiff's claims did not belong to the bankruptcy estate and did not have to be prosecuted by the bankruptcy trustee.

Am Jur 2d, Courts §§ 87-97.

2. Courts § 15 (NCI4th)— nonresident defendants—personal jurisdiction—minimum contacts—due process

The trial court had authority under N.C.G.S. § 1-75.4(4) to exercise personal jurisdiction over the nonresident defendants where plaintiff alleged that the individual defendants, as officers, directors and the alter ego of a Florida corporation, supplied a weight loss drug to defendant pharmacy in this state; the Florida corporation manufactured, marketed and distributed the drug;

and plaintiff's injuries were caused by his consumption of the drug. Furthermore, the nonresident defendants had sufficient minimum contacts with this state so that the exercise of personal jurisdiction over them did not violate due process where defendants, as the alter ego of the Florida corporation, advertised the weight loss drug in the print and electronic media; the corporation sold the drug to defendant distributor, who advertised and sold the drug to defendant pharmacy in this state; and the individual defendants, through the corporation and their distributor, thus injected the drug into the stream of commerce in this state with the expectation that the drug would be purchased by consumers here.

Am Jur 2d, Courts §§ 118-119.

3. Appeal and Error § 118 (NCI4th)— denial of summary judgment—no immediate appeal

An order denying motions for summary judgment by plaintiff and by one defendant is interlocutory and not immediately appealable.

Am Jur 2d, Appellate Review § 162.

Appeal by plaintiff and defendants from order entered 13 December 1993 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 2 February 1995.

This action arises out of the alleged marketing and sale by defendants of a weight loss drug named Cal-Ban 3000. In his complaint, plaintiff alleges he suffered a ruptured colon as a result of taking Cal-Ban 3000. Plaintiff's wife purchased the drug from defendant Prescott's Pharmacies after reading newspaper advertisements which stated that the drug was 100% natural and had been clinically tested for safety. The newspaper advertisements also stated that persons taking Cal-Ban 3000 would lose weight without changing their eating habits. Plaintiff's wife purchased the drug on 28 June 1990, and plaintiff began taking the drug according to the instructions on the label. On 5 July 1990, plaintiff suffered a ruptured colon.

The individual defendants (hereinafter defendants) began marketing the drug through a shell corporation advertised as Anderson Pharmacals doing business as Health Care Products, Inc. (hereinafter Health Care). Health Care was a Florida corporation. In September

1987, the United States Postal Service charged defendants and Health Care with obtaining money through the mail by means of false representations. On 3 March 1989, the United States Postal Service entered a cease and desist order against Health Care to stop representing that Cal-Ban 3000 would significantly reduce weight without exercise and without changes in eating habits. Sometime in 1989, defendant CKI Industries, also a Florida based company, started soliciting pharmacies and health-food stores to purchase the drug and sell it in their stores. Defendant Prescott's Pharmacies obtained the drug from defendant CKI Industries.

Plaintiff asserts claims against all defendants for fraud, negligence, negligent misrepresentation, breach of express and implied warranties, strict liability, unfair and deceptive trade practices and punitive damages. Defendants moved to dismiss for lack of personal jurisdiction. Defendant Prescott's Pharmacies and defendant CKI Industries moved to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Defendant Prescott's Pharmacies also moved for summary judgment. During the hearings on defendants' motions, plaintiff made an oral motion for summary judgment.

On 13 December 1993, the trial court held that it had personal jurisdiction over all defendants. The trial court dismissed certain claims against defendant Prescott's Pharmacies, and awarded summary judgment for Prescott's Pharmacies on several other claims. Defendant Prescott's Pharmacies motion for summary judgment was denied as to plaintiff's claims based on negligence, breach of warranties and negligent misrepresentation. Defendant CKI Industries' motion to dismiss was denied. Plaintiff's oral motion for summary judgment was denied.

Defendants and Defendant Prescott's Pharmacies appeal. Plaintiff cross-appeals.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams and Robert O. Jenkins; Pope, Tilghman, Tart & Taylor, by Patrick H. Pope, for plaintiff-appellee and cross-appellant.

Shumaker, Loop & Kendrick, by Kevin H. Graham and Robert A. Donat, for individual defendant-appellants.

Yates, McLamb & Weyher, by Kirk G. Warner and Barry S. Cobb, for defendant-appellant Prescott's Pharmacies.

EAGLES, Judge.

Defendants appeal the trial court's denial of their motion to dismiss for lack of personal jurisdiction. Defendant Prescott's Pharmacies appeals the denial of its motion for summary judgment on plaintiff's claims of negligence, breach of warranties and negligent misrepresentation. Plaintiff cross-appeals the denial of its motion for summary judgment. After careful review of the record and briefs, we dismiss defendant Prescott's Pharmacies appeal and plaintiff's cross-appeal and affirm the trial court's order denying defendants' motion to dismiss for lack of personal jurisdiction.

I.

[1] Defendants contend that the trial court erred in denying their motion to dismiss for lack of personal jurisdiction. Defendants contend that the trial court lacked personal jurisdiction over them because the trial court did not have subject matter jurisdiction over the claims brought forward in plaintiff's complaint. We disagree.

Subject matter jurisdiction is a prerequisite to the exercise of personal jurisdiction. G.S. 1-74.4; *Church v. Carter*, 94 N.C. App. 286, 288, 380 S.E.2d 167, 168 (1989). G.S. 7A-240 confers subject matter jurisdiction on the trial courts of this state "[in] all justiciable matters of a civil nature," except where jurisdiction specifically lies elsewhere. G.S. 7A-240; *Church v. Carter*, 94 N.C. App. 286, 288, 380 S.E.2d 167, 168 (1989). Plaintiff's complaint alleges that Health Care was merely the instrumentality or alter ego of defendants and that defendants were personally liable for the acts of Health Care. Defendants contend that on 23 August 1991, Health Care filed a petition for bankruptcy in the United States Bankruptcy Court for the Middle District of Florida under Chapter 7 of the Bankruptcy Code. Defendants contend that plaintiff's claims against them as the alter ego of Health Care belong to the bankruptcy trustee. Defendants further contend that the trustee may not abandon a claim of the bankrupt debtor without a court order. 11 U.S.C. § 554(a), (b). Defendants cite *Steyer-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132 (4th Cir. 1988) and *Holcomb v. Pilot Freight Carriers*, 120 B.R. 35 (Bankr. M.D.N.C. 1990) for the proposition that alter ego claims belong to the bankruptcy estate and must be prosecuted by the bankruptcy trustee. We find these cases inapposite.

Health Care filed for bankruptcy in the U.S. Bankruptcy Court, Middle District of Florida, Tampa Division. The question of whether

plaintiff's alter ego claims here belong to the bankrupt estate and must be prosecuted by the bankruptcy trustee is controlled by the decisions of the Eleventh Circuit Court of Appeals. *See Litman v. Massachussetts Mutual Life Insurance Co.*, 825 F.2d 1506, 1508 (11th Cir. 1987) ("Absent a Supreme Court decision to the contrary, district courts are compelled to follow mandates of appellate courts"). In *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979 (11th Cir. 1990), the Eleventh Circuit Court of Appeals held that a bankruptcy trustee does not have standing to assert specific claims of the creditors of the bankrupt. In *Hadley*, GIC Government Securities (hereinafter GIC), a dealer in government-backed mortgage securities had a margin account with E.F. Hutton & Co. (hereinafter Hutton). Under the margin account, GIC was permitted to purchase securities by paying Hutton a portion of the purchase price and Hutton loaning GIC the balance of the purchase price. In July and September of 1985, Hutton sold $1,700,000 and $3,000,000 respectively of GIC-purchased securities pursuant to the terms of the margin account. These securities belonged to GIC customers who had paid GIC in full for those securities. Although these securities had been paid in full by GIC customers, full payment had not been received by Hutton from GIC. In October 1985, GIC filed for bankruptcy and Hadley was appointed bankruptcy trustee. Hadley filed suit against Hutton on behalf of GIC customers who had fully paid GIC for their securities which had been sold by Hutton pursuant to its margin account with GIC.

The *Hadley* court noted that although Hadley was asserting the claims of GIC customer creditors, the GIC customers had never delegated their authority to pursue their claims to Hadley. In discussing the duties of the bankruptcy trustee, the court stated that the trustee is to "collect and reduce to money the property of the estate." 11 U.S.C. § 704(1). Property of the bankrupt estate is defined as "all legal and equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The court went on to hold that bankruptcy trustee Hadley had failed to show that GIC, the bankrupt, had any possessory interest in those securities. The court recognized that several other jurisdictions had held that the bankruptcy trustee had standing to bring actions against third parties on behalf of creditors of the bankrupt. The *Hadley* court expressly disapproved of *Pappas* and held that "the bankruptcy trustee does not have standing to assert claims of creditors of the bankrupt." *Hadley*, 901 F.2d at 985; *see also*, *Felton v. Prudential Bache Securities*, 122 B.R. 466 (S.D.Fl. 1990); *but see*, *Steyer-Daimler-Puch of America Corp. v. Pappas*, 852

F.2d 132 (4th Cir. 1988); *Holcomb v. Pilot Freight Carriers*, 120 B.R. 35 (Bankr. M.D.N.C. 1990). Accordingly, we hold that because plaintiff's claim here is not a property of the bankrupt estate, the trial court has subject matter jurisdiction over plaintiff's claims.

[2] Having determined that the trial court has subject matter jurisdiction over plaintiff's claims, we now consider whether the trial court has personal jurisdiction over defendants. Personal jurisdiction involves a two-step analysis. First, we determine whether the trial court has statutory authority to exercise jurisdiction and second, whether the exercise of jurisdiction violates constitutional due process. *Church v. Carter*, 94 N.C. App. 286, 289, 380 S.E.2d 167, 169 (1989).

The North Carolina "long-arm" statute, G.S.1-75.4, lists twelve "circumstances" under which a court having subject matter jurisdiction may exercise personal jurisdiction. G.S. 1-75.4(4) confers jurisdiction when there has been an "injury to person or property within this State arising out of an act or omission outside this State by the defendant" provided that at the time of the injury, "Solicitation or services activities were carried on within this State by or on behalf of the defendant; or Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade." G.S. 1-75.4(4). Here, plaintiff alleged that defendants, as the principal officers and directors and alter ego of Health Care, supplied Cal-Ban 3000 to defendant Prescott's Pharmacies in this State and that plaintiff's injuries were caused by his consumption of the product. The complaint also alleged that Health Care manufactured, marketed and distributed the drug. We hold that the trial court had statutory authority under G.S. 1-75.4(4) to exercise jurisdiction over defendants.

We now address the issue of whether the exercise of personal jurisdiction in this instance is consistent with constitutional due process. We note initially that our long-arm statute is designed to confer jurisdiction over nonresident defendants to the fullest extent possible under the due process clause of the Fourteenth Amendment. *Church v. Carter*, 94 N.C. App. at 290, 380 S.E.2d at 169. Under the Due Process clause, a defendant must have sufficient "minimum contacts" with the forum state so that the state's exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945) (citations omitted). A forum state does not

exceed its authority under the Due Process Clause, "if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 62 L.Ed.2d 490, 502 (1980). When a corporation purposefully avails itself of the privilege of conducting activities in this State, it is not unreasonable to subject it to suit here. *Id.* at 297, 62 L.Ed.2d at 501; *Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 411 S.E.2d 640 (1992).

Defendants, as the alter ego of Health Care, advertised Cal-Ban 3000 in various print and electronic media. Health Care sold the Cal-Ban 3000 capsules to its distributor, defendant CKI Industries, who in turn advertised and sold the drug to defendant Prescott's Pharmacies. Plaintiff's wife purchased the drug from defendant Prescott's Pharmacies. "A foreign [corporation] cannot shield itself from liability for injuries caused by its defective product in the forum state with which it has no direct contacts simply by funnelling its products through a . . . completely separate and uncontrolled subsidiary or through an exclusive agent or distributor." *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 50, 306 S.E.2d 562, 568 (1983). Here, defendants, through Health Care, sold the Cal-Ban 3000 tablets and capsules to defendant CKI Industries, who in turn sold the drug to defendant Prescott's Pharmacies. Plaintiff's wife allegedly purchased the Cal-Ban 3000 capsules that allegedly injured her husband from defendant Prescott's Pharmacies. Accordingly, defendants, through Health Care and their distributor CKI Industries, injected Cal-Ban 3000 into the stream of commerce of this State with the expectation that the drug would be purchased by consumers here. The trial court properly exercised personal jurisdiction over defendants.

II.

[3] We dismiss plaintiff's cross-appeal and defendant Prescott's Pharmacies appeal as interlocutory. Both parties appeal the denial of their motions for summary judgment. Generally, the denial of a motion for summary judgment is an interlocutory order and not immediately appealable. *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 230 (1985).

In sum, the trial court's decision denying defendants' motion to dismiss for lack of personal jurisdiction is affirmed. Plaintiff's cross-appeal and defendant Prescott's Pharmacies appeal are dismissed.

Affirmed in part, dismissed in part.

Judges WALKER and McGEE concur.

J. NORWOOD WHITLEY, JR. AND SHIRLEY H. WHITLEY, PLAINTIFFS-APPELLANTS v. CAROLINA CLINIC, INC., A NORTH CAROLINA CORPORATION, ALBERT JENNETTE, M.D., JAMES GLOVER, M.D., JERRY C. WOODARD, M.D., ROBERT A. APPERT, M.D., HUITT E. MATTOX, M.D., AND JOHN A. KIRKLAND, M.D., DEFENDANTS-APPELLEES

No. 947SC616

(Filed 18 April 1995)

1. **Landlord and Tenant § 25 (NCI4th)— medical clinic—action for breach of lease—summary judgment**

The trial court erred by denying the plaintiff's motion for partial summary judgment in an action for breach of a lease at a medical clinic where it is undisputed that the Clinic ceased making payments on the lease.

Am Jur 2d, Landlord and Tenant §§ 79 et seq.

2. **Corporations § 96 (NCI4th)— medical clinic—nonpayment of lease—deferred compensation claims paid—balance sheet insolvency—no breach of fiduciary duty**

The individual defendants, shareholders and directors of a medical clinic, did not breach any fiduciary duty to plaintiffs, the landlord of the clinic, where payments were made to the individual defendants from the clinic's deferred compensation plan and the rent was not paid. The Clinic was solvent on a cash flow basis and was continuing to conduct its business in good faith at the time of the payments to the individual defendants. For a corporate director to breach a fiduciary duty to a creditor, the transaction at issue must occur under circumstances amounting to a "winding-up" or dissolution of the corporation; balance sheet insolvency, absent such circumstances, is insufficient to give rise to breach of a fiduciary duty to creditors of a corporation.

Am Jur 2d, Corporations §§ 1689 et seq.

Appeal by plaintiffs from summary judgment entered 8 April 1994 by Judge Frank R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 28 February 1995.

Wallace, Creech, Sarda & Zaytoun, by Peter J. Sarda and Richard P. Nordan, for plaintiffs-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr. and Kerry A. Shad, for defendants-appellees James Glover, M.D., Robert A. Appert, M.D., and John A. Kirkland, M.D.

Narron, Holdford, Babb, Harrison & Rhodes, by Henry C. Babb, Jr., for defendants-appellees Carolina Clinic, Inc., Albert Jennette, M.D., Jerry C. Woodard, M.D., and Huitt E. Mattox, M.D.

WALKER, Judge.

Defendant Carolina Clinic, Inc. (the Clinic) was a large multi-specialty medical clinic located in Wilson, North Carolina. In October 1979, the plaintiffs leased to the Clinic certain real property located in Stantonsburg, North Carolina. The parties to the lease restated the lease in 1987, extending the term of the lease through 30 June 2007. From 1979 through July 1992, the property housed the Stantonsburg Clinic, a medical facility staffed and operated by the Clinic. During that time, the Clinic satisfied all terms and conditions of the lease and made each rental payment when it was due. In December 1991, the Clinic merged with its primary competitor, the Wilson Clinic. The two entities continued to provide medical services to the community under the name Wilson-Carolina Medical Center through July 1992.

The Clinic maintained a non-qualified deferred compensation plan whereby physicians could elect to defer a portion of their annual earned income for tax-saving purposes. These deferrals were made pursuant to a plan whereby the deferred income remained in the general funds of the Clinic and could be withdrawn later at a physician's election. A physician wishing to obtain his deferred compensation would request the Clinic's chief financial officer to issue a check. The individual defendants in this action are physicians who were employed by the Clinic and who were shareholders and directors of the Clinic. During 1989 and 1990, the Clinic paid a total of $1,433,943.77 in deferred compensation to the individual defendants.

Although the Clinic's audited balance sheets for the years 1989 and 1990 reflected that total liabilities exceeded total assets, the Clinic was always able to pay its financial obligations when they were due. In addition, the Clinic's chief financial officer attested that in

1990 and 1991 the Clinic reduced its indebtedness to its principal creditor, Branch Banking & Trust (BB&T), by two to three million dollars.

In July 1992, the Clinic ceased doing business and notified the plaintiffs that it would make no further payments on the lease. In August 1992, all assets of the Clinic were transferred to BB&T, the Clinic's only secured creditor.

On 8 September 1992, the plaintiffs filed suit against the Clinic seeking to recover damages for breach of lease. On 9 June 1993, the plaintiffs amended their complaint to include the individual defendants, alleging that while the Clinic was insolvent, the individual defendants, in their capacities as shareholders and directors of the Clinic, caused the Clinic to pay $1,433,943.77 in deferred compensation to the individual defendants. The complaint alleged that these payments constituted a breach of fiduciary duty owed to creditors of the Clinic, were in defraud of creditors, and violated statutory prohibitions against unlawful shareholder distributions. The Clinic answered the complaint, admitting the existence of the lease and the Clinic's failure to make payments after July 1992 because it was no longer in business. The individual defendants answered and admitted they received payments of deferred compensation but denied they took any action as directors or shareholders to cause these payments to be made. They also denied the Clinic was insolvent at the time of the payments. All defendants further alleged that the plaintiffs' complaint failed to state a claim for which relief could be granted.

On 27 January 1994, the Clinic and the individual defendants moved for summary judgment on all claims. Thereafter the plaintiffs moved for partial summary judgment on the issue of liability. The trial court granted summary judgment in favor of all defendants and denied the plaintiffs' motion for partial summary judgment.

[1] A party moving for summary judgment is entitled to such judgment if the party can show, through pleadings and affidavits, that there is no genuine issue of material fact requiring a trial and that the party is entitled to judgment as a matter of law. *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 231 (1987).

As to the plaintiffs' claim against the Clinic, the only issue before the trial court upon the plaintiffs' motion for partial summary judgment was whether the Clinic breached the lease. It is undisputed that the Clinic ceased making payments on the lease in July 1992, and the

Clinic has acknowledged that "it is liable to the Plaintiffs for some amount of damages arising out of the breach of lease." We therefore hold that the trial court erred by denying the plaintiffs' motion for partial summary judgment against the Clinic on the issue of liability, and we remand to the trial court for further proceedings.

[2] We next address the plaintiffs' claim against the individual defendants for breach of fiduciary duty (the plaintiffs have not raised the claims of fraud or statutory violations on appeal). The plaintiffs argue that the law of this state and other jurisdictions supports the proposition that even if directors have valid claims against the corporation, when the corporation is insolvent, it may not prefer the claims of its directors over its obligations to third party creditors. The plaintiffs claim that in this case, the record shows that while the Clinic was insolvent, the individual defendants caused the corporation to pay the obligations owed to them. The plaintiffs therefore contend that the individual defendants breached their fiduciary duty to creditors of the Clinic, including the plaintiffs, by using their positions as directors and shareholders of the Clinic to improperly prefer their own claims for deferred compensation over the plaintiffs' claim for rent.

As a general rule, directors of a corporation do not owe a fiduciary duty to creditors of the corporation. *See* N.C. Gen. Stat. § 55-8-30, North Carolina Commentary (expressing the opinion that "in general no such duty exists"). However, " 'directors of an insolvent corporation cannot as creditors of such corporation secure to themselves a preference. They must share ratably in the distribution of the company's assets.' " *Hill v. Lumber Co.*, 113 N.C. 173, 177, 18 S.E. 107, 108 (1893) (citation omitted). *See also Bassett v. Cooperage Co.*, 188 N.C. 511, 512-13, 125 S.E. 14-15 (1924); *Steel Co. v. Hardware Co.*, 175 N.C. 450, 451, 95 S.E. 896, 897 (1918); *Edwards v. Supply Co.*, 150 N.C. 171, 172, 63 S.E. 742, 742 (1909); Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 15.3, at 255 (4th ed. 1990) ("an insolvent corporation cannot in any way prefer the claims of its directors, officers or shareholders because they are not allowed to take advantage of their intimate knowledge of the corporate affairs or their position of trust to the detriment of other creditors"). The plaintiffs claim that the Clinic was insolvent at the time the individual defendants took the deferred compensation payments. They base their claim on the fact that the Clinic's audited balance sheets for 1989 and 1990 reflect liabilities in excess of assets and negative stockholders' equity of $5,014,967 and $3,890,841 respectively.

However, *Bassett* and other decisions of our Supreme Court cited by the plaintiffs establish that more than "balance sheet insolvency" is required in order to impose on directors a fiduciary duty to creditors. In *Bassett*, the plaintiff filed a lawsuit against the defendant corporation. One year later, and before the plaintiff recovered a judgment, the individual defendants (directors and officers) effected the sale of all corporate assets. *Bassett*, 188 N.C. at 512, 125 S.E. at 14. At the time of the sale, the corporation

> was practically insolvent, *the sale being made with a view of paying off its indebtedness and going out of business*, and the defendants, its officers and directors, in the management and control of its affairs, having received [the] purchase money, and with full knowledge or notice of plaintiff's claim, applied and distributed the entire purchase price to the payment and satisfaction of [the] company's existent indebtedness other than plaintiff's claim, and for the greater part of which said officers and directors were liable as endorsers on the company's notes.

Id. (emphasis added). Finding that the defendants could be liable for a proportionate part of the plaintiff's claim, the Court stated the following rule:

> [T]he corporation being insolvent or nearly so, this conveyance of its entire property *with a view of going out of business amounted practically to a dissolution*, and in such case the rule of distribution encumbent [sic] upon its directors and managers is that of equality among all of its creditors. . . .

Id. (emphasis added). *See also Steel Co., supra* (involving distribution of proceeds from *sale of all corporate assets*); *Graham v. Carr*, 130 N.C. 271, 41 S.E. 379 (1902) (sale of corporate assets and application of proceeds occurred when corporation was insolvent *and its operations "shut down"*); *Hill, supra* (defendant caused corporation to confess judgment in his favor *after the corporation had "fail[ed] of success and become[] insolvent"*).

In view of the foregoing case law, "insider preference liability might be limited to corporate liquidations and not be applicable to debt payments made in the ordinary course of business. . . ." Robinson, *supra*, § 14.8, at 247-48. Another authority has noted that in the context of insider preferences,

> a corporation is *not insolvent*, as a general rule, merely because it is embarrassed and cannot pay its debts as they become due, or

> because its assets, if sold, would not bring enough to pay all its liabilities, *if it is still prosecuting its business in good faith, with a reasonable prospect and expectation of continuing to do so.*

15A William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 7472, at 273-74 (perm. ed. rev. vol. 1990) (emphasis added).

Other jurisdictions also recognize that liability for improper preferences cannot rest on balance sheet insolvency alone. For example, Texas courts have stated that in determining when a corporation is insolvent such that its directors owe a fiduciary duty to creditors,

> "[i]t is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business, with the prospect and expectation of doing so,—in other words, if it be, in good faith, what is sometimes called a 'going' business or establishment. Many successful corporate enterprises, it is believed, have passed through crises where their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent."

Fagan v. La Gloria Oil & Gas Co., 494 S.W.2d 624, 629 (Tex. Civ. App. 1973) (*quoting Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 24 S.W. 16, 25 (Tex. 1893)). *See also McGivern v. Amasa Lumber Co.*, 252 N.W.2d 371, 378 (Wis. 1977) (recognizing that Wisconsin courts have "moved away from the concept of a director's fiduciary duty to creditors except perhaps where the corporation was insolvent *and no longer a going concern*") (emphasis added).

Thus, contrary to the plaintiffs' assertions, the law of this state, consistent with other authorities, establishes that for a corporate director to breach a fiduciary duty to a creditor, the transaction at issue must occur under circumstances amounting to a "winding-up" or dissolution of the corporation. Balance sheet insolvency, absent such circumstances, is insufficient to give rise to breach of a fiduciary duty to creditors of a corporation. This rule recognizes that many

modern-day corporations, while "balance sheet insolvent," are solvent on a cash flow basis and continuing to do business in good faith.

In this case, the facts show that at the time of the payments of deferred compensation to the individual defendants (the last of which occurred some eight months before the corporation ceased doing business) the Clinic was solvent on a cash flow basis in that it was meeting its obligations, including payment of the plaintiffs' lease, and had reduced its indebtedness to BB&T by two to three million dollars. In addition, there was no evidence that the Clinic was making plans to cease doing business in July 1992. Each individual defendant (except defendant Appert, who was dismissed) signed an affidavit stating that at the time of the payments, he had "no knowledge or thought" that the Clinic would cease doing business as a provider of medical services in July 1992.

Because the Clinic was solvent on a cash flow basis and was continuing to conduct its business in good faith at the time of the payments to the individual defendants, the individual defendants did not breach any fiduciary duty to the plaintiffs. Thus, an essential element of the plaintiffs' claim against them is missing, and the trial court did not err in granting summary judgment in favor of the individual defendants. *See Little v. Natl. Services Indus., Inc.*, 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986) (defending party entitled to summary judgment if he can show that claimant cannot prove existence of essential element of claim).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Judges EAGLES and McGEE concur.

STATE OF NORTH CAROLINA v. KEVIN M. DELLINGER

No. 9426SC246

(Filed 18 April 1995)

Infants or Minors § 72 (NCI4th)— juvenile—twelve or thirteen at the time of the act—sixteen at indictment—eighteen at time of appeal—appeal moot

The issue of whether the superior court erred by denying defendant's motion to dismiss for lack of subject matter jurisdic-

tion was moot where defendant was twelve or thirteen at the time of the alleged act, a crime against nature, sixteen when he was indicted, and eighteen at the time of this appeal. Under the express language of N.C.G.S. § 7A-523, the district court possessed exclusive, original jurisdiction at the time of the offense; however, defendant turned eighteen pending appeal and thus aged out of the district court's jurisdiction over the person and the subject matter. Under both the statutory and case law of North Carolina, defendant is now an adult subject to the jurisdiction of superior court.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 16-21.

Age of child at time of alleged offense or delinquency, or at time of legal proceedings, as criterion of jurisdiction of juvenile court. 89 ALR2d 506.

Judge JOHNSON concurring.

On writ of certiorari to review order entered 6 October 1993 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 January 1995.

Defendant was born on 26 October 1976. On 23 August 1993, defendant was indicted under N.C. Gen. Stat. § 14-177 (1993) for a crime against nature. According to the indictment, the alleged act occurred between January and December 1989. Defendant was either twelve or thirteen at the time of the alleged act. He was sixteen at the time of the indictment, and eighteen at the time of this appeal.

Defendant filed a motion to dismiss for lack of jurisdiction on 27 August 1993. During his arraignment hearing on 6 October 1993, defendant argued his motion, which was subsequently denied. Defendant petitioned this Court for writ of certiorari to review the trial court's order. We allowed the petition.

Attorney General Michael F. Easley, by Assistant Attorney General Robin W. Smith, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant appellant.

ARNOLD, Chief Judge.

The sole issue presented on appeal is whether the trial court erred by denying defendant's motion to dismiss for lack of jurisdiction where a delinquent juvenile commits a felony at age thirteen but turns sixteen before proceedings are instituted.

Jurisdiction in juvenile cases is governed by N.C. Gen. Stat. § 7A-523:

> The [district] court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent . . . . For purposes of determining jurisdiction, the age of the juvenile . . . at the time of the alleged offense . . . governs.

G.S. § 7A-523(a) (1989). Furthermore, once the court obtains jurisdiction over a juvenile, jurisdiction continues "until terminated by order of the court or until he reaches his eighteenth birthday." G.S. § 7A-524 (1989).

These statutes have been applied most recently in *State v. Lundberg*, 104 N.C. App. 543, 410 S.E.2d 216 (1991) and *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982). In *Lundberg*, the defendant was indicted at age twenty-three. Prosecution of the defendant was attempted in superior court for unlawful acts (arson) committed by defendant when he was thirteen and fifteen. Although this Court recognized that jurisdiction is determined under G.S. § 7A-523(a) by the defendant's age at the time of the offense, the Court concluded that the case at bar turned "not upon defendant's age at the time of the crime, but upon whether or not the defendant is entitled to the continued protection of the juvenile code at the present time." *Lundberg*, 104 N.C. App. at 545, 410 S.E.2d at 217. The Court further reasoned that because the district court's retention of jurisdiction terminates upon the juvenile's turning eighteen, the twenty-three-year-old defendant is no longer entitled to the protection evidenced by the Juvenile Code's enumerated purposes, such as balancing the needs and interests of the child, parents and society, and ensuring that juvenile offenders may remain in their homes. *Id.*; G.S. § 7A-516 (1989).

Similarly in *Stedman*, the defendant aged out of the district court's original jurisdiction upon turning eighteen at the time of his indictment for felonies occurring when he was age fifteen. *Stedman*, 305 N.C. 92, 286 S.E.2d 527. G.S. § 7A-524 terminated the jurisdiction of the district court over the juvenile and the subject matter of the juvenile petitions. *Id.*

In the instant case, defendant was only sixteen at the time of indictment for an offense he allegedly committed at age thirteen. We agree with defendant that, under the express language of G.S. § 7A-523, the district court possessed exclusive, original jurisdiction at the time of the offense, between January and December 1989. Pending this appeal, however, defendant turned eighteen on 26 October 1994, thus aging him out of the district court's jurisdiction over the person and the subject matter. Therefore, the issue of whether the trial court erred by denying defendant's motion to dismiss for lack of jurisdiction is moot because under both statutory and case law of this State, defendant is now an adult subject to the jurisdiction of superior court. *In re Cowles*, 108 N.C. App. 74, 422 S.E.2d 443 (1992).

Appeal dismissed.

Judges JOHNSON consurs with a separate opinion.

Judge MARTIN, Mark D., concurs.

Judge JOHNSON concurring.

I concur only because we are bound by this Court's holding in *State v. Lundberg*, 104 N.C. App. 543, 410 S.E.2d 216 (1991), which relied upon *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982). In *Stedman*, the Court held that an eighteen year old defendant could be indicted and tried as an adult for felony offenses allegedly committed when he was fifteen years old. In *Lundberg*, the Court held that a twenty-three year old defendant could be indicted and tried as an adult for a felony offense allegedly committed when he was thirteen years old. In the instant case, we hold that defendant, who was sixteen at the time of the indictment but who turned eighteen pending this appeal, could be indicted and tried as an adult for a felony offense allegedly committed when he was thirteen years of age.

Simply stated, the reasoning in *Stedman*, *Lundberg* and the case *sub judice* is that, having aged out of the district court's jurisdiction over their person and the subject matter, the defendants who are now adults must be subjected to the jurisdiction of superior court for crimes they allegedly committed when the defendant in *Stedman* was fifteen, and the defendants in *Lundberg* and the instant case were thirteen years of age respectively. However, I find the facts of *Stedman* to be quite distinguishable from *Lundberg* and the instant matter in that the defendant in *Stedman* was fifteen years old at the time he allegedly committed the felony offenses.

North Carolina General Statutes § 7A-523(a) provides in pertinent part:

> The [district] court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent[.] . . . For purposes of determining jurisdiction, the age of the juvenile . . . at the time of the alleged offense . . . governs.

North Carolina General Statutes § 7A-523(a) (1989).

North Carolina General Statutes § 7A-608 states in pertinent part:

> The court . . . may transfer jurisdiction over a juvenile 14 years of age or older to superior court if the juvenile was 14 years of age or older at the time he allegedly committed an offense which would be a felony if committed by an adult. If the alleged felony constitutes a capital offense and the judge finds probable cause, the judge shall transfer the case to the superior court for trial as in the case of adults.

North Carolina General Statutes § 7A-608 (1989). This statute has been recently amended to apply to juveniles thirteen years of age or older for acts committed on or after 1 May 1994. *See* North Carolina General Statutes § 7A-608 (Cum. Supp. 1994). Further, once the court obtains jurisdiction over a juvenile, jurisdiction continues "until terminated by order of the court or until he reaches his eighteenth birthday." North Carolina General Statutes § 7A-524 (1989).

By providing that only juveniles of the age of fourteen or older (now thirteen or older) could be transferred to superior court, I believe the intent of the legislature was to preclude, under any circumstances, the trial of a juvenile below the age of fourteen (now thirteen) in superior court, or *at any time* in superior court for any offense committed by the juvenile (defendant) at the age of thirteen or younger. Since the age of the juvenile at the time of the alleged offense governs jurisdiction, it seems logical that the legislature's intent with the enactment of North Carolina General Statutes §§ 7A-523 and 7A-608 was to mandate that any juvenile below the age of fourteen (now thirteen) charged with an offense be dealt with solely at the juvenile court level, the expectation being that hopefully the services available at that level would help the juvenile to become a law abiding and productive citizen before age fourteen (now thirteen) and older. Otherwise, the age limitation governing the transfer of a juvenile to superior court has no meaning.

This distinction becomes apparent in *Stedman* because at the time the defendant therein allegedly committed the offenses, he was fifteen and was therefore in that age category the legislature intended to be subject to the jurisdiction of the superior court under the transfer provisions of North Carolina General Statutes § 7A-608. This is not so with offenders below the age of fourteen (now thirteen) who the legislature, in my opinion, did not intend under any circumstances to be tried in superior court *at any age* or under any circumstances for offenses committed below the age of fourteen (now thirteen). This is buttressed by the earlier cited recent amendment to North Carolina General Statutes § 7A-608.

To read the statutes otherwise would lend them to possible abuse and illogical results. For example, suppose a district court judge was faced with a fourteen year old juvenile who stood charged with having committed a felony offense at age eleven which was not lodged against the juvenile until the juvenile was age fourteen. Could the district court judge, considering the fact that the juvenile has aged out of the protective group of age twelve or younger, transfer the juvenile to superior court for trial? I think not. But this is the effect of what happened in *Lundberg*, and in the instant case, i.e., the defendants were allowed to be indicted and tried in superior court for offenses allegedly committed by them at age thirteen, an age at that time within a protected class that precluded this result.

I realize that if the *Lundberg* Court had held that the defendant could not have been indicted and tried in superior court, and the defendant had aged out of the jurisdiction of the district court, the crime, under the current law, would go unpunished. However, this is a matter that should be addressed within the province of the legislature and not our courts.

JEFFREY C. WATSON, SR., PLAINTIFF v. SUSAN Z. WATSON, DEFENDANT

No. 9418DC426

(Filed 18 April 1995)

1. Divorce and Separation § 164 (NCI4th)— equitable distribution—oral agreement on distribution—court's inquiry

The trial court correctly entered a judgment in an equitable distribution action where the parties informed the court that they had agreed to entry of judgment in accordance with one of two

alternative draft judgments which dealt with the marital home prepared and filed with a motion in the cause by defendant's attorney; defendant's attorney explained several changes; the court asked defendant whether she understood what her attorney had said, whether she understood what the order and judgment accomplished and what was contained in the twelve-page order, and whether she agreed to the entry of that order; defendant responded affirmatively to each inquiry; the court asked plaintiff whether he understood what defendant's attorney was saying, whether he had read through or understood the judgment and order, and whether he agreed to entering that order as modified; and the plaintiff also replied affirmatively. It may reasonably be inferred that the parties understood the terms of the proposed distribution of marital property from the fact that both parties were represented by counsel; the parties had participated in a prior equitable distribution hearing; the alternative draft judgment was filed with a motion in the cause and served on plaintiff's counsel; the major asset in the case was the marital home encumbered by a deed of trust and unpaid tax lien; and the parties indicated that they either read or understood the terms of the proposed distribution. *McIntosh v. McIntosh*, 74 N.C. App. 554, does not require the trial court to read to the parties in open court the terms of the proposed distribution of marital property under these circumstances. Moreover, plaintiff does not allege that he neither read nor understood the agreement and does not argue that he was prejudiced.

Am Jur 2d, Divorce and Separation §§ 817 et seq.

2. Judgments § 95 (NCI4th)— equitable distribution—correction of judgment—entered into upon consent—no error

There was no error where the trial court corrected a judgment in an equitable distribution action to reflect that it was entered into with the parties' consent. N.C.G.S. § 1A-1, Rule 60(a).

Am Jur 2d, Judgments §§ 203 et seq.

3. Appeal and Error § 180 (NCI4th)— correction of judgment—docketing of appeal

The trial court had the authority to correct a judgment where defendant's motion to correct the judgment was filed on 30 March, the order correcting the judgment was entered on 11 April, and the judgment was docketed on 24 April. Although plain-

tiff argued that the trial court had no authority to correct the judgment because plaintiff had filed in the Court of Appeals an order extending the time to contract with the court reporter for preparation of the trial transcript, an appeal is docketed upon the filing of the record on appeal.

Am Jur 2d, Appellate Review §§ 345, 433.

Appeal by plaintiff from order entered 8 September 1993 by Judge Joseph E. Turner in Guilford County District Court. Heard in the Court of Appeals 2 February 1995.

Edward P. Hausle for plaintiff-appellant.

Alexander-Ralston, Speckhard & Speckhard, by Stanley E. Speckhard, for defendant-appellee.

WALKER, Judge.

Plaintiff and defendant were married on 31 July 1976 and were separated on 12 June 1991. Subsequently, on 13 September 1991, defendant filed an action for alimony, child custody and support, interim and injunctive relief, and attorney's fees. On 20 July 1992, plaintiff filed an action for absolute divorce and equitable distribution. Plaintiff was granted an absolute divorce on 12 October 1992. The parties' equitable distribution hearing was held on 8 June 1993. At the conclusion of the hearing, the trial court announced a tentative judgment and postponed entry of a final written judgment.

Subsequently, defendant's attorney prepared drafts of alternative judgments and filed a motion in the cause in the equitable distribution action. The motion, which contained copies of the alternative draft judgments designated as Exhibits A and B, prayed that judgment be entered in the manner described in Exhibit B. Exhibit A was a narrative of the court's tentative judgment of 8 June 1993. It provided for sale of the parties' residence and an equal division of the net proceeds after certain reimbursements were made. Either party was permitted to buy out the other's interest in the residence, but defendant was given first priority in a buy-out. Exhibit B provided that plaintiff transfer his equity in the residence valued at $9,230.64 to defendant in satisfaction of $10,804.00 in child support and alimony arearrages and attorney's fees which plaintiff owed defendant.

On 30 August 1993, the parties appeared for a hearing on plaintiff's motion for equitable distribution, defendant's motion to "show

cause," and defendant's motion for permanent alimony and child support. At that time, the parties informed the court that they had agreed to the entry of judgment in accordance with Exhibit B, with several changes. Defendant's attorney explained these changes and also noted that plaintiff's attorney held a deed by which plaintiff was conveying his interest in the residence to defendant.

Thereafter, the court asked defendant whether she understood what her attorney had said, whether she understood what the order and judgment accomplishes and what was contained in the twelve-page order, and whether she agreed "to the entry of that order by me settling these matters . . . between you and [plaintiff]." Defendant replied, "Yes," to each inquiry. The court then asked plaintiff whether he understood what defendant's attorney was saying, whether he "read through or do you understand the terms of this twelve-page judgment and order," and whether he agreed to entering that order as modified by the deletion of two sentences. To each of these inquiries, plaintiff also replied, "Yes."

On 8 September 1993, the court entered an order and judgment in the parties' equitable distribution action in accord with Exhibit B. Plaintiff filed notice of appeal from this order. Subsequently, defendant filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(a) (1990) to correct the judgment on grounds that "by oversight reference to the fact that the parties in open court on August 30, 1993, voluntarily consented to the entry of the findings of fact and conclusions of law and the court's decree was omitted." By order entered 11 April 1994, the trial court granted defendant's motion.

[1] Plaintiff argues that the order of 8 September 1994 should be vacated because the trial court's inquiry regarding the proposed distribution of marital property failed to meet the requirements of *McIntosh v. McIntosh*, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985), where the court held that:

> [where] oral stipulations [concerning marital property] are not reduced to writing it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will.

"This procedure is to insure that each party's rights are protected and to prevent fraud and overreaching on the part of either spouse." *Id.*

Plaintiff argues that the court's inquiry was insufficient to satisfy the requirements of *McIntosh* because it did not read the terms of the proposed order and there is nothing to show that the parties read and understood the proposed order. In *McIntosh,* this Court considered whether an order dividing the parties' marital property according to their oral stipulations was valid where the trial court made "[n]o inquiry . . . into the parties' understanding of the legal effect of their agreement or the terms of their agreement" and "[t]he stipulations were not reduced to writing nor were they acknowledged by the parties as accurately reflecting their agreement." *McIntosh,* 74 N.C. App. at 555-56, 328 S.E.2d at 601. The Court stated, "[w]e believe that failure of the trial court to make such inquiries and/or the parties' failure to reduce the stipulations to writing is inadequate to protect . . . the rights of the parties." The court found support for this belief in N.C. Gen. Stat. § 50-20(d) (1994), which provides that the parties may "by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property . . . and the agreement shall be binding on [them]." *Id.*

The Court stated that it believed that N.C. Gen. Stat. § 50-20(d) was enacted to insure against fraud and overreaching on the part of one of the spouses and noted that to be valid, " 'a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties.' " *Id.* at 556, 328 S.E.2d at 602 (*quoting Johnson v. Johnson,* 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984)).

Here the record establishes the following facts from which it reasonably appears that the parties understood the terms of the proposed distribution of marital property: (1) both parties were represented by counsel, (2) the parties had participated in an equitable distribution hearing on 8 June 1993, (3) Exhibit B was filed with a motion in the cause in this action on 24 August 1993 and served on plaintiff's counsel, (4) the major asset in the case was the marital home encumbered by a deed of trust and unpaid tax lien, and (5) the parties indicated that they either read or understood the terms of the

proposed distribution. We do not construe *McIntosh* as requiring the trial court to read to the parties in open court the terms of the proposed distribution of marital property under these circumstances. Moreover, we note that plaintiff does not allege that he neither read nor understood the terms of the order. *Assuming arguendo* that plaintiff neither read nor understood the order, plaintiff does not argue that he was prejudiced and we find no prejudice. We thus affirm.

[2] Plaintiff further argues that the trial court erred in correcting the judgment to reflect that it was entered into upon the parties' consent. N.C. Gen. Stat. § 1A-1, Rule 60(a) (1990) addresses the correction of clerical mistakes in judgments. Section (a) permits the courts to correct clerical errors or omissions; however, courts do not have the power under this section to affect the substantive rights of the parties or to correct substantive errors in their decisions. *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), *disc. rev. denied*, 316 N.C. 377, 342 S.E.2d 895 (1986). Plaintiff argues that the addition of language which reflects the parties' consent to the order and judgment may have affected his substantive rights by eliminating the necessity of following *McIntosh* procedures and was thus prohibited under Rule 60(a). Based on our determination in this case we find this argument without merit.

[3] Plaintiff also argues that the trial court had no authority to correct the judgment because plaintiff had docketed the appeal by filing in the Court of Appeals an order extending the time in which plaintiff was required to contract with the court reporter for preparation of the trial transcript and the court did not obtain leave of this Court. This argument is without merit. Pursuant to Rule 12(b) of our appellate rules, an appeal is docketed upon the time of filing the record on appeal. N.C. R. App. P. 12(b) (1994). The record shows that plaintiff's appeal was filed and docketed on 24 April 1994, defendant's motion to correct judgment was filed 30 March 1994, and the order correcting judgment was entered 11 April 1994. The judgment below is

Affirmed.

Judges EAGLES and McGEE concur.

STATE v. SNYDER

[118 N.C. App. 540 (1995)]

STATE OF NORTH CAROLINA v. LANCE ALBERT SNYDER

No. 9418SC482

(Filed 18 April 1995)

1. Indictment, Information, and Criminal Pleadings § 38 (NCI4th)— impaired driving—amendment to allege public vehicular area

The trial court erred by permitting the State to amend an indictment for driving while impaired which alleged that defendant drove on a "street or highway" to allege that defendant drove on a "highway or public vehicular area" because the amendment altered an essential element of the offense and thus substantially altered the charge against defendant.

Am Jur 2d, Indictments and Informations § 183.

2. Automobiles and Other Vehicles § 849 (NCI4th)— impaired driving—nightclub parking lot—not public vehicular area as matter of law

The trial court erred by instructing the jury in a driving while impaired case that a nightclub's parking lot was a public vehicular area as a matter of law where the evidence on this issue was contradictory in that evidence that the parking lot connects with an adjacent motel parking lot and that all persons are welcome to drop in and check out the club tended to show that the lot was open to the public, but evidence that the lot is the exclusive property of the club, that club policy prohibits use of the lot by persons other than members and their guests, and that such persons may park in the lot only while in the club and not overnight tended to show that the lot is private.

Am Jur 2d, Automobiles and Highway Traffic §§ 1105 et seq.

Appeal by defendant from judgment and commitment entered 19 November 1993 by Judge Orlando F. Hudson in Guilford County Superior Court. Heard in the Court of Appeals 25 January 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender J. Michael Smith, for defendant-appellant.

LEWIS, Judge.

Defendant was convicted 19 November 1993 of driving while impaired (DWI), habitual impaired driving, and being an habitual felon.

The evidence presented at trial shows that on 11 May 1993 Officer Long of the Greensboro Police Department responded to a call that there was a disturbance caused by a man with a knife at Lost Dimensions Nightclub (hereinafter "club"). When he arrived at the club, the officer was told by the manager that the man causing the disturbance was driving a beige stationwagon in the club parking lot. The officer stopped the vehicle being driven by defendant in the parking lot. After defendant failed several sobriety tests, Officer Long arrested and charged him with driving while impaired.

The club parking lot connects with an adjacent motel parking lot. Members of the public are welcome to drop in and check out the club and to enter the lobby. The lot is the exclusive property of the club whose policy prohibits use of the lot by persons other than members or their guests who are only allowed to park in the lot while in the club and may not park there overnight.

Defendant was indicted by a grand jury on 7 June 1993 for DWI, habitual impaired driving, and being an habitual felon. A single indictment was issued for the DWI and habitual impaired driving charges (hereinafter "felony DWI indictment"). Count I of this indictment charged that defendant "unlawfully, willfully did operate a motor vehicle on a street or highway while subject to an impairing substance" on 12 May 1993. Count II of this indictment, incorporating Count I by reference, charged defendant with the habitual impaired driving felony. The habitual felon charge was issued in a separate indictment that was based on the habitual impaired driving charge.

At the close of the State's evidence, defendant, who offered no evidence, moved to dismiss all charges on the grounds that the State had not offered sufficient evidence that defendant drove on a street or highway as charged in the felony DWI indictment. The State then moved to amend this indictment to read "on a highway or public vehicular area." The court granted the State's motion to amend the felony DWI indictment over defendant's objection, and denied defendant's motion to dismiss. Judgment was entered against defendant on all charges, and he was sentenced to forty years in prison.

On appeal, defendant contends that the court erred by (1) granting the State's motion to amend the felony DWI indictment to include the allegation that defendant drove on a public vehicular area, (2) denying defendant's motion to dismiss, and (3) instructing the jury that the parking lot of the club is a public vehicular area as a matter of law.

[1] As to numbers (1) and (2): defendant contends that the amendment of the indictment to add "public vehicular area" substantially altered the charge depriving him of the right to be tried for a felony upon a valid bill of indictment returned by a grand jury. We agree and hold that the judgment and commitment of defendant for driving while impaired, for habitual impaired driving, and with being an habitual felon is arrested.

A valid bill of indictment is essential to jurisdiction of the superior court to try an accused for a felony. *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143-44 (1994). This right to an indictment is guaranteed by our North Carolina Constitution. N.C. Const. art. I, § 22. An indictment that charges a statutory offense must allege all essential elements of the offense. *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975). Amendments of indictments are prohibited by N.C.G.S. § 15A-923(e) (1973). Our courts have held that an amendment is any change which substantially alters the charge set forth in the indictment. *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984).

In upholding a minor change to an indictment as not being a prohibited amendment, our Supreme Court stressed that minor changes are those that do not alter an essential element of a charge. *See id.* at 599-600, 313 S.E.2d at 559. Situs, "any highway, any street, or any public vehicular area," is an essential element of the offense of driving while impaired. *See* N.C.G.S. § 20-138.1 (1993); *see also State v. Bowen*, 67 N.C. App. 512, 515, 313 S.E.2d 196, 197 (treating "public vehicular area" as an essential element of DWI), *appeal dismissed*, 312 N.C. 79, 320 S.E.2d 405 (1984). Since changing the felony DWI indictment from "street or highway" to "on a highway or public vehicular area" altered an essential element of the offense, we hold that it substantially altered the charge and thus improperly amended the indictment.

Our Supreme Court has held that "where the indictment and the proof are at variance, . . . the trial court should dismiss the charge stemming from the flawed indictment and grant the State leave to

secure a proper bill of indictment." *Abraham*, 338 N.C. at 341, 451 S.E.2d at 144 (citing *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967) and *State v. Overman*, 257 N.C. 464, 125 S.E.2d 920 (1962)). After holding that an indictment had been improperly amended by the trial court, the Court in *Abraham* arrested judgment and remanded for proceedings consistent with *Bell* and *Overman*. *Abraham*, 338 N.C. at 341, 451 S.E.2d at 144.

Here, the trial court erred in amending the felony DWI indictment and in failing to dismiss the charges stemming from the flawed indictment. In accord with *Abraham*, we arrest judgment and commitment as to defendant's conviction for DWI and habitual impaired driving. We also arrest judgment and commitment on the habitual felon conviction since that conviction was dependent on defendant's conviction of the underlying felony of habitual impaired driving. We remand to the trial court to dismiss these charges and to consider granting the State leave to secure a proper indictment should it be sought.

[2] As to issue number (3): since we have arrested judgment, we are not required to address defendant's contention that the court erred by instructing the jury that the parking lot of the club is a public vehicular area as a matter of law. However, since this issue is likely to reappear if the case is retried, we hold it was reversible error to instruct, in this case, that the club's parking lot was a public vehicular area as a matter of law as this removed an essential element of the offense charged from the jury's consideration.

A trial court must instruct jurors on every element of the charged offense. *State v. Hairr*, 244 N.C. 506, 509, 94 S.E.2d 472, 474 (1956). One of the essential elements of driving while impaired is that the driving must occur upon a highway, street, or public vehicular area. *See* N.C.G.S. § 20-138.1; *see also Bowen*, 67 N.C. App. at 515, 313 S.E.2d at 197. A peremptory instruction, establishing an element as a matter of law, is rarely proper in a criminal prosecution and only when the element is established beyond a reasonable doubt by uncontradicted evidence. *Bowen*, 67 N.C. App. at 515, 313 S.E.2d at 197.

N.C.G.S. § 20-4.01(32) (1993) defines public vehicular area, in relevant portions, as follows:

> Any area within the State . . . that is generally open to and used by the public for vehicular traffic, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of: . . . b. any

service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public; . . . c. . . . The term "public vehicular area" shall not be construed to mean any private property not generally open to and used by the public.

In *Bowen*, this Court held that a condominium complex parking lot was not a public vehicular area as a matter of law because of sharply conflicting evidence on the issue. *Bowen*, 67 N.C. App. at 514-15, 313 S.E.2d at 197.

As in *Bowen*, the evidence in this case is contradictory. The fact that the club parking lot connects with an adjacent motel parking lot tends to indicate it is open to the public as does the club manager's testimony that all persons are welcome to drop in and check out the club. However, other evidence tends to show that the lot is private. For instance, the lot is the exclusive property of the club whose policy prohibits use of the lot by persons other than members or their guests. Members are only allowed to park in the lot while in the club and cannot park there overnight. This contradictory evidence does not establish beyond a reasonable doubt that this parking lot is a public vehicular area. This is for the jury to decide.

For the reasons stated, judgment and commitment is arrested, and the case is remanded.

Judges WYNN and McGEE concur.

THOMAS E. COLLINS, ADMINISTRATOR OF THE ESTATE OF JUDY DIANNE COLLINS, PLAINTIFF (TA-10219); THOMAS E. COLLINS, INDIVIDUALLY, PLAINTIFF (TA-11510) v. NORTH CAROLINA PAROLE COMMISSION, DEFENDANT

No. 9410IC675

(Filed 18 April 1995)

State § 39 (NCI4th)— negligence action—parole of prisoner—allegations of gross negligence—outside Industrial Commission's jurisdiction

The Industrial Commission did not err by dismissing plaintiff's claims against the North Carolina Parole Commission where plaintiff was wounded and his wife killed by a prisoner on parole.

The Tort Claims Act is in derogation of sovereign immunity and must be strictly construed and followed as written and may not be enlarged beyond the meaning of its plain and unambiguous terms. Assuming that plaintiff sued defendant's members in their official capacities as required by the Act, the Act allows a suit against the State only for ordinary negligence in the forum of the Industrial Commission and plaintiff alleged gross negligence and wanton, reckless and malicious conduct, something more than ordinary negligence. N.C.G.S. § 143-291(a).

Am Jur 2d, Municipal, County, School and State Tort Liability §§ 649-651.

Appeal by plaintiff from Opinion and Order for the Full Commission filed 23 March 1994. Heard in the Court of Appeals 22 March 1995.

Griffin & Wilson, P.A., by Michael H. Griffin, for plaintiff-appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General E. H. Bunting, Jr., for the State.

GREENE, Judge.

Thomas E. Collins (plaintiff), individually and as administrator of the estate of Judy Dianne Collins (Mrs. Collins), appeals from an order filed 23 March 1994 for the North Carolina Industrial Commission (Industrial Commission) by James J. Booker (Commissioner Booker), adopting the decision and order of Deputy Commissioner Charles Markham (the Deputy Commissioner) to deny and dismiss plaintiff's claims against the North Carolina Parole Commission (defendant).

The facts are as follows: In July 1973, Karl DeGregory (DeGregory) received two life sentences after being charged and convicted in Mecklenburg County Superior Court of two counts of first degree murder. DeGregory became eligible for parole in December 1979 which was denied. After subsequent petitions and denials for parole, defendant approved the Mutual Agreement Parole Program (MAPP) for DeGregory in March 1983, and after reviewing a psychological evaluation, letters of recommendation, and prison reports, defendant released DeGregory under MAPP on 13 August 1984.

On 22 May 1985, DeGregory came to the home of plaintiff and his wife, Mrs. Collins, in Conway, South Carolina. DeGregory and Mrs. Collins were related. After entering plaintiff's residence, DeGregory shot and wounded plaintiff and left the residence with Mrs. Collins. On 23 May 1985, the bodies of DeGregory and Mrs. Collins were found in a motel room in Myrtle Beach, South Carolina. The police report indicated DeGregory shot Mrs. Collins in the head and then killed himself.

On 15 April 1987, plaintiff filed affidavits pursuant to N.C. Gen. Stat. §§ 143-291, -297 (1993), individually and as the administrator of Mrs. Collins' estate, with the Industrial Commission supporting claims for damages under the Tort Claims Act against defendant for its alleged negligence in releasing DeGregory for parole and in its subsequent supervision of DeGregory after he was released. Plaintiff filed a motion to amend his affidavits, and on 9 August 1991, Deputy Commissioner Richard B. Ford filed an order allowing plaintiff to amend his affidavits.

On 28 July 1992, plaintiff filed two amended affidavits, one in his individual capacity and one as the administrator of Mrs. Collins' estate. Both affidavits provided in pertinent part:

> Plaintiff files this claim . . . against [defendant], its former members, including former Chairman Walter T. Johnson, Joe H. Palmer, and Joy J. Johnson and their agents, employees and servants for damages resulting from:
>
> A. Said commission's wanton, reckless, malicious and grossly negligent decision to grant Parole to Karl DeGregory, a convicted murderer with a history of mental problems.
>
> B. Said commission, its agents, employees, servant's wanton, reckless, malicious, grossly negligent and negligent breach of duty to control Karl DeGregory while DeGregory, a convicted murderer with a history of mental problems, was on parole. . . .
>
> In light of DeGregory's multiple convictions of first degree murder, involvement in other Florida murders and history of mental problems, said decision by the said committee of [defendant] was wanton, reckless, grossly negligent and malicious in that it was contrary to what persons of reasonable intelligence would know, by virtue of reading the reports on DeGregory, to be their duty and was in disregard of the public's safety.

Plaintiff also alleged defendant "remained in ultimate control over" DeGregory, "had a duty to control and supervise DeGregory," and "breached said duty to control DeGregory by wantonly, recklessly, maliciously, grossly negligently, and negligently failing to revoke DeGregory's parole or otherwise re-incarcerate DeGregory when the face of the supervision reports compiled on DeGregory" and made available to defendant showed DeGregory had violated the terms of his parole on several occasions.

By order filed 17 December 1992, the Deputy Commissioner denied and dismissed plaintiff's claims individually and as administrator of Mrs. Collins' estate, and plaintiff appealed to the full Industrial Commission. By order filed 23 March 1994, the full Industrial Commission by Commissioner Booker, adopted the Deputy Commissioner's decision and order "as that of the Full Commission." The Industrial Commission, among other reasons, dismissed and denied plaintiff's claims because his allegations that the Commission panel's actions were wanton, willful, malicious, or reckless conduct or gross negligence constituted allegations beyond the scope of the Tort Claims Act, and "to award damages for same is beyond the power of the Industrial Commission."

The issue presented is whether the Industrial Commission has jurisdiction to hear plaintiff's claims under the Tort Claims Act which allows actions for negligence against State officers where plaintiff's only allegations are that members of the Parole Commission engaged in actions that were wanton, reckless and malicious and that amounted to gross negligence.

Under the doctrine of sovereign immunity, the State is immune from suit "unless it consents to be sued," and because a suit against public officials "in their official capacities is considered a suit against the State, sovereign immunity also protects these individuals from suit." *Hawkins v. State*, 117 N.C. App. 615, 628-29, 453 S.E.2d 233, 241 (1995). Under the Tort Claims Act, the State has consented to direct suits arising "as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority" and provided that the forum for such direct suits is the Industrial Commission rather than the State courts. N.C.G.S. § 143-291(a); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 329, 293 S.E.2d 182, 185 (1982). If the Industrial Commission finds "such negligence" on the part of a state officer, employee, involuntary servant or agent, and no

contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Industrial Commission determines the amount of damages to be awarded. N.C.G.S. § 143-291(a).

Assuming plaintiff has sued defendant's members in their official capacities as required by the Tort Claims Act, the Industrial Commission does not have jurisdiction to adjudicate plaintiff's claims. N.C.G.S. § 143-291(a) (Industrial Commission not given jurisdiction to adjudicate claims against public officers in their individual capacities). The Tort Claims Act is in derogation of sovereign immunity and must be strictly construed and followed as written. *Watson v. North Carolina Dep't of Correction*, 47 N.C. App. 718, 722, 268 S.E.2d 546, 549, *disc. rev. denied*, 301 N.C. 239, 283 S.E.2d 135 (1980); *Bailey v. North Carolina Dep't of Mental Health*, 2 N.C. App. 645, 649, 163 S.E.2d 652, 655 (1968). The scope of the Tort Claims Act may not be enlarged beyond the meaning of its plain and unambiguous terms. *Alliance Co. v. State Hosp.*, 241 N.C. 329, 332, 85 S.E.2d 386, 389 (1955). Based on these principles which we apply in construing the language of the statute, the Tort Claims Act allows a suit against the State only for ordinary negligence in the forum of the Industrial Commission.

Plaintiff alleges in his affidavits and brief, however, that the actions of defendant's members did not constitute ordinary negligence; rather, he asserts "(1) that the initial decision to grant parole to Karl DeGregory was of such gross negligence as to be malicious, wanton, reckless and grossly negligent," and "(2) that the supervision and control of DeGregory after he had been released on parole including the omission to revoke DeGregory's parole or otherwise incarcerate DeGregory was grossly negligent, wanton, reckless and malicious." Without deciding whether gross negligence is something less than wanton conduct or whether it is wanton conduct, *see Cowan v. Brian Ctr. Mgmt. Corp.*, 109 N.C. App. 443, 448-49, 428 S.E.2d 263, 266 (1993) (defining gross negligence as something less than wanton conduct and including absence of even sight care, indifference to rights and welfare of others in context of wrongful death statute); *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988) (defining gross negligence as wanton conduct demonstrating conscious and reckless disregard for rights of safety of others in context of statute governing police officers' standard of care when engaged in pursuits by vehicle), plaintiff's allegations of gross negligence and wanton, reckless and malicious conduct assert a claim for something more than ordinary negligence. Therefore, the Industrial

Commission does not have jurisdiction to hear and award damages on plaintiff's claims. For these reasons, the decision of the Industrial Commission dismissing and denying plaintiff's claims is

Affirmed.

Judges LEWIS and MARTIN, MARK D., concur.

STATE OF NORTH CAROLINA v. THOMAS MILTON LINDSEY

No. 9421SC550

(Filed 18 April 1995)

1. Evidence and Witnesses § 437 (NCI4th)— pretrial photographic identification—no impermissible suggestiveness

The trial court did not err by finding that no single photograph of defendant was ever shown to a robbery victim prior to a pretrial photographic lineup and that the photographic identification procedure was not impermissibly suggestive, although the victim testified that he was shown a single photograph of defendant prior to the photographic lineup, where a detective testified that the victim was shown bank surveillance pictures of the robbery at an automatic teller machine and asked to describe the events depicted in the pictures in order to verify that a robbery had occurred, and that the victim was shown a single photograph of another alleged perpetrator but was not shown a single photograph of defendant.

Am Jur 2d, Evidence § 630.

2. Evidence and Witnesses § 468 (NCI4th)— pretrial photographic identification—independent origin of in-court identification

The trial court did not err by finding that a robbery victim's in-court identification of defendant was based upon what he observed the night of the robbery at a bank teller machine and was of independent origin from a pretrial photographic identification where the victim testified that he was face to face with defendant for ten minutes in a well-lighted area with nothing concealing defendant's facial features and that his corrected vision is 20/20, and a detective testified that the victim's initial description

of defendant after the robbery was "pretty close" to his actual appearance and that defendant immediately picked defendant's picture at the photographic lineup and seemed positive about his identification.

Am Jur 2d, Evidence § 629.

3. Criminal Law § 1286 (NCI4th)— habitual felon—failure to prove conviction for felony

A habitual felon charge should have been dismissed for insufficient evidence because the State failed to show that a New Jersey conviction upon which the State relied was for a felony where the State presented evidence that defendant pled guilty to an indictment charging him with receiving stolen property valued between $200 and $400 and was given a sentence of two to three years; the indictment does not appear to charge defendant with felonious possession of stolen property; the judgment does not recite that defendant pled guilty to a felony or was sentenced as a felon; and there was no certification from any official that the offense was a felony in New Jersey at the time defendant was convicted.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 26, 27.

Appeal by defendant from judgment entered 4 January 1994 by Judge James A. Beaty, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 21 February 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Carol L. Teeter for defendant-appellant.

WALKER, Judge.

On 28 August 1993 at about 10:30 p.m., Jeffrey Dean Norris stopped to use the automatic teller machine at the Wachovia Bank branch at 916 West Fourth Street in Winston-Salem, North Carolina. After making a withdrawal, Mr. Norris was approached by two men with knives who asked for his money and forced him to withdraw more money from the automatic teller machine. The two men took approximately $125 from Mr. Norris and fled the scene. Defendant was arrested on 13 September 1993 and charged in a bill of indictment with robbery with a dangerous weapon (Count I) and with being an

habitual felon (Count II). At trial, Mr. Norris identified defendant as one of the perpetrators. Defendant was found guilty on both counts and was sentenced on Count I to thirty years in prison as an habitual felon.

Defendant first argues that the trial court erred in allowing Mr. Norris to identify him as one of the perpetrators because the in-court identification was tainted by a suggestive pretrial identification procedure in violation of defendant's Sixth and Fourteenth Amendment rights. To address this argument, we must inquire whether in the totality of the circumstances the procedure was "so unnecessarily suggestive and conducive to irreparable misidentification that it offend[ed] fundamental standards of decency and justice." *State v. Freeman*, 313 N.C. 539, 544, 330 S.E.2d 465, 471 (1985). Factors to consider in making this inquiry include (1) the witness' opportunity to observe the accused at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the accused; (4) the witness' level of certainty at the confrontation; and (5) the length of time between the crime and the confrontation. *Id.*; *State v. Capps*, 114 N.C. App. 156, 162, 441 S.E.2d 621, 624-25 (1994). "If an identification procedure is not impermissibly suggestive, the inquiry is ended." *Freeman*, 313 N.C. at 544, 330 S.E.2d at 471. The trial court's findings on this issue are conclusive on appeal if they are supported by competent evidence. *State v. White*, 311 N.C. 238, 243, 316 S.E.2d 42, 45 (1984).

[1] The trial court conducted a voir dire upon defendant's objection to Mr. Norris' in-court identification. The witnesses were Mr. Norris and Detective Chapple, the officer who conducted the pretrial identification procedure. Mr. Norris initially testified that at some point in the investigation he was shown a single photograph of defendant prior to viewing a photographic lineup and was asked, "Is this him?" However, Detective Chapple testified that three days after the robbery, Mr. Norris was shown bank surveillance pictures of the robbery. This was not done for identification purposes; rather, Detective Chapple asked Mr. Norris to describe the events depicted in the pictures in order to verify that a robbery had occurred. Detective Chapple further testified that in September 1993 Mr. Norris was shown a single picture of Gerald Hodge, the other alleged perpetrator, but that no single picture of defendant was ever shown to Mr. Norris. On 28 October 1993 Mr. Norris was shown a photographic lineup containing defendant's picture. He immediately made a positive identification of defendant. The trial court relied on the testimony of

Detective Chapple and found that no single picture of defendant was ever shown to Mr. Norris prior to the lineup. The court then found that the pretrial identification procedure was not impermissibly suggestive. The trial court was in the best position to make this factual determination and it will not be disturbed on appeal. Because there was competent evidence to support this finding, we find no error in the trial court's ruling.

[2] The trial court also found that Mr. Norris' in-court identification was based upon what he witnessed the night of the robbery and was of independent origin from the pretrial lineup. In determining whether an in-court identification is of independent origin, the trial judge should consider the same factors set forth in *Freeman, supra. State v. Wilson*, 313 N.C. 516, 530, 330 S.E.2d 450, 460 (1985). Mr. Norris testified on voir dire that he was face to face with defendant for ten minutes in a well-lighted area with nothing concealing defendant's facial features and that his corrected vision is 20/20. Detective Chapple testified that Mr. Norris' initial physical description of defendant after the robbery was "pretty close" to his actual appearance and that at the lineup Mr. Norris picked defendant out "within two seconds" and seemed "positive" about his identification. We find this evidence sufficient to support the trial court's findings.

[3] Defendant also claims the trial court erred by denying his motion to dismiss the habitual felon indictment because there was insufficient evidence to submit this charge to the jury. In resolving a motion to dismiss, the trial court must view the evidence presented in the light most favorable to the State, giving the State every reasonable inference to be drawn therefrom, and determine whether the State has presented substantial evidence of each element of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-67, 296 S.E.2d 649, 651-53 (1982). Substantial evidence is " 'evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt.' " *State v. Carson*, 337 N.C. 407, 412, 445 S.E.2d 585, 588 (1994) (citations omitted). Substantial evidence "must be existing and real, not just seeming and imaginary." *State v. Irwin*, 304 N.C. 93, 97-98, 282 S.E.2d 439, 443 (1981). "Evidence is not substantial if it arouses only a suspicion about the facts to be proved, even if the suspicion is strong." *Carson, supra*, at 412, 445 S.E.2d at 588-89.

N.C. Gen. Stat. § 14-7.1 (1994) defines an habitual felon as a person who has been convicted of or pled guilty to three felony offenses. Thus, in order to withstand defendant's motion to dismiss the habit-

ual felon charge, the State had to present substantial evidence that defendant had three prior felony convictions. The habitual felon indictment here alleged three prior felony convictions, one in North Carolina and two in the state of New Jersey. Defendant concedes that the State presented substantial evidence that he was convicted of one felony in North Carolina and one felony in New Jersey, but he contends that the State did not present substantial evidence that a third offense of which he had been convicted in New Jersey was a felony.

The State presented its evidence regarding the questioned offense through a court clerk who read the contents of the indictment and judgment for the offense. The questioned offense was under a three count indictment from the Superior Court, Camden County, New Jersey, that charged defendant with (1) breaking and entering a dwelling house with intent to commit larceny, (2) felonious larceny, and (3) "unlawfully receiv[ing] or hav[ing] possession of an Admiral color television and a Sony tape recorder of a value in excess of $200 and under $500 or more, of the property, goods and chattels of Sonny Willis before then feloniously stolen, taken and carried away, the said [defendant] well knowing the same to have been feloniously stolen, taken and carried away. . . ." Defendant pled guilty to Count III and received a sentence of two to three years. Counts I and II were dismissed.

The indictment does not charge defendant with felonious possession of stolen property. The judgment does not recite that defendant pled guilty to a felony or was sentenced as a felon. There was no certification from any official that the offense charged in Count III was a felony in New Jersey in 1975. We cannot conclude from the length of defendant's sentence (two to three years) that the offense was a felony in New Jersey.

In sum, we agree with defendant that the State did not present substantial evidence that this third conviction relied upon was a felony as required by our law; therefore, defendant's motion to dismiss the habitual felon charge should have been allowed. Because defendant's conviction on this charge allowed the trial court to enhance defendant's sentence on the underlying offense of robbery with a dangerous weapon, we reverse and remand for resentencing on that offense.

No error as to defendant's conviction of robbery with a dangerous weapon.

Reversed as to defendant's conviction of being an habitual felon.

Remanded for resentencing on the conviction of robbery with a dangerous weapon.

Judges EAGLES and McGEE concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. ROBERT F. WELCH, JR., DAVID WOODARD, DAVID WOODARD D/B/A WOODARD TILE COMPANY AND THURMAN POWELL, DEFENDANTS

No. 9410SC585

(Filed 18 April 1995)

1. Insurance § 554 (NCI4th)— pickup truck used in business—not listed in personal policy—not covered

A pickup truck involved in an accident was not covered under a personal auto policy where the truck was registered to a tile company, was being driven within the course and scope of the driver's employment with the tile company, was insured under a business auto policy, and the owner of the company had a personal auto policy which did not list the truck, but which defendant Welch contended covered the truck under the definition of covered auto. The truck was not listed in the Declarations of the personal policy, it was not a replacement vehicle for the auto listed in the policy, and the owner had never asked Farm Bureau to insure the truck under the personal auto policy.

Am Jur 2d, Automobile Insurance § 152.

2. Insurance § 572 (NCI4th)— pickup truck used in business—not covered under personal policy exception to exclusion

An exception to an exclusion in a personal auto policy did not provide coverage for a pickup truck used in a business where defendant Welch contended that the exception was ambiguous and should be resolved to provide coverage, but there was no evidence that the pickup truck was a household vehicle, it was listed under a business policy, and the evidence showed that it was used in the owner's business. Therefore, the exception to an exclusion

for vehicles owned by a family member or furnished for the regular use of a family member did not provide coverage for the truck.

Am Jur 2d, Automobile Insurance §§ 330 et seq.

Appeal by defendant Robert F. Welch, Jr. from judgment entered 24 March 1994 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 23 February 1995.

On 13 January 1993, Thurman Powell (hereinafter Powell) was driving a 1980 Chevrolet pickup truck when it collided with a motorcycle driven by Robert F. Welch, Jr. (hereinafter Welch). Welch was injured as a result of the accident.

At the time of the accident, the pickup truck was registered to Woodard Tile Company, a tile business operated by David Woodard (hereinafter Woodard). Powell was driving the pickup truck within the course and scope of his employment with Woodard Tile Company. Woodard, doing business as Woodard Tile Company, was insured under a North Carolina Farm Bureau Mutual Insurance Company (hereinafter Farm Bureau) business auto policy which provided liability coverage for bodily injury damages of $100,000 per person. The pickup truck involved in the accident was covered under the business auto policy. Woodard and his wife, Lou W. Woodard, were named insureds under a Farm Bureau personal auto policy which provided liability coverage for bodily injury damages of $100,000 per person. The only vehicle listed under the personal auto policy was a 1987 Pontiac 6000.

On 10 June 1993, Welch filed a personal injury action in Pitt County against Woodard, Woodard Tile Company, and Powell. Farm Bureau then filed a declaratory judgment action to determine whether there was coverage under the personal auto policy for any recovery that Welch might obtain in the underlying personal injury action in Pitt County. After discovery, both parties made motions for summary judgment. On 23 March 1994, Farm Bureau and Welch stipulated that Woodard was legally responsible for the $190,000 in bodily injury damages suffered by Welch as a result of the accident. Farm Bureau agreed to pay $100,000 to Welch under the business auto policy. On 24 March 1994, the trial court granted Farm Bureau's motion for summary judgment and declared that the personal auto policy provided no coverage for the injuries of Welch arising out of the 13 January 1993 accident.

Welch appeals.

Thompson, Barefoot & Smyth, L.L.P., by Theodore B. Smyth, for plaintiff-appellee.

Hardee & Hardee, by Charles R. Hardee and G. Wayne Hardee, for defendant-appellant Robert F. Welch, Jr.

EAGLES, Judge.

[1] Welch argues that the trial court erred in granting Farm Bureau's summary judgment motion and in declaring that the personal auto policy provided no coverage for Welch's injuries.

Welch contends that a liberal construction of the definition of "[y]our covered auto" shows that the pickup truck driven by Powell at the time of the accident was a covered auto under the Woodards' personal auto policy. The pertinent portion of the personal auto policy provides:

"Your covered auto" means:

1. Any vehicle shown in the Declarations.
2. Any of the following types of vehicles on the date you become the owner:

    a. a private passenger auto or station wagon type; or

    b. a pickup truck or van that:

    (1) has a Gross Vehicle Weight as specified by the manufacturer of less than 10,000 pounds; and

    (2) is not used for the delivery or transportation of goods and materials unless such use is:

    (a) incidental to your business of installing, maintaining or repairing furnishings or equipment; or

    (b) for farming or ranching.

If the vehicle you acquire replaces one shown in the Declarations, it will have the same coverage as the vehicle it replaced.

If the vehicle you acquire is in addition to any shown in the Declarations, it will have the broadest coverage we now provide for any vehicle shown in the Declarations, if you:

a. acquire the vehicle during the policy period; and

b. ask us to insure it:

(1) during the policy period; or

(2) within 30 days after you become the owner.

Welch interprets this language to mean that the definition of "[y]our covered auto" includes two categories of autos: (1) autos which are listed in the declarations page and (2) autos which fall within the specifications of paragraph two of the covered auto definition. Welch interprets the language following paragraph two to mean that if either of the two categories of covered autos are replaced or if autos are subsequently acquired, these replacement autos or additional autos will not be covered under the policy unless there is compliance with the replacement auto or additional auto provisions in the policy. Therefore, Welch argues that the pickup truck was a "covered auto" under paragraph two because it was owned by Woodard, had a gross vehicle weight of less than 10,000 pounds, and was used in Woodard's tile business to transport Woodard's employees and materials used in the installation of tile.

We disagree with Welch's contention that the pickup truck is a covered auto. In *N.C. Farm Bureau Mut. Ins. v. Walton*, 107 N.C. App. 207, 418 S.E.2d 837 (1992), the definition of "[y]our covered auto" appeared in the same format as it appears here. There, we interpreted the language to provide that if the vehicle involved in the accident was not listed in the Declarations of the policy, the owner of the acquired vehicle either had to ask Farm Bureau to insure it as an additional auto or the vehicle had to qualify as a replacement auto for it to gain coverage as a covered auto under the personal auto policy. *Walton* at 210, 418 S.E.2d at 840. The pickup truck here was not listed in the Declarations of the personal auto policy; the pickup truck was not a replacement vehicle for the 1987 Pontiac 6000 listed in the Declarations of the personal auto policy; and Woodard never asked Farm Bureau to insure the pickup truck under the personal auto policy. Accordingly, we hold that the pickup truck is not a covered auto under the personal auto policy.

[2] Welch also contends that summary judgment in favor of Farm Bureau was error because the language of two exclusions in the personal auto policy did not exclude coverage for Welch's injuries. Exclusion B. provides:

B. We do not provide Liability coverage for the ownership, maintenance or use of:

1. Any vehicle, other than your covered auto, which is:

   a. owned by you; or

   b. furnished for your regular use.

2. Any vehicle, other than your covered auto, which is:

   a. owned by any family member; or

   b. furnished for the regular use of any family member.

However, this exclusion (B.2.) does not apply to your maintenance or use of any vehicle which is:

   a. owned by a family member; or

   b. furnished for the regular use of a family member.

Welch argues that this language is ambiguous and should be resolved in his favor to provide coverage for his injuries. However, in *Walton*, we discussed the purpose of Exclusion B. and stated:

> The exclusions contained in these policies are common and serve the important purpose of providing coverage for the infrequent or casual use of automobiles not listed in the Declarations, while excluding coverage for automobiles available for the regular use of family members. If automobile insurance policies did not contain these limitations, an insured simply could list one vehicle in the Declarations and receive insurance coverage for any number of household vehicles.

Walton at 212-13, 418 S.E.2d at 841 (citations omitted). Here, there is no evidence to show that the pickup truck was a household vehicle. Rather, the pickup truck was listed as a covered auto under the business auto policy and the evidence shows that the pickup truck was used in Woodard's tile business. Accordingly, we conclude that the exception to Exclusion B. of Farm Bureau's personal auto policy did not provide coverage for the pickup truck.

Welch also argues that Exclusion A.7. of the personal auto policy did not prevent coverage. Exclusion A.7. of the personal auto policy provides:

A. We do not provide Liability coverage for any person:

. . . .

7. Maintaining or using any vehicle while that person is employed or otherwise engaged in any business (other than farming or ranching) not described in Exclusion 6. This exclusion does not apply to the maintenance or use of a:

a. private passenger auto;

b. pickup or van that you own; or

c. trailer used with a vehicle described in a. or b. above.

Because we have concluded that the pickup truck was not a covered vehicle under the policy, we do not need to determine whether Exclusion A.7. prevented Woodard from being a covered person under the personal auto policy. *See Walton* at 211, 418 S.E.2d at 840 (stating that even where the person involved in the accident was a covered person within the meaning of the personal auto policy, the insurance company still was not liable because the vehicle involved in the accident was not a covered vehicle). Accordingly, we hold that the trial court did not err in granting summary judgment for Farm Bureau because the personal auto policy provided no coverage for Welch's injuries.

Affirmed.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. JESSE DWIGHT MIXION, DEFENDANT

No. 9421SC587

(Filed 18 April 1995)

1. Criminal Law § 1236 (NCI4th)—second-degree murder and assault—sentencing—mitigating factors—victims more than 16 years old and voluntary participants

There was no error in resentencing defendant for second-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury where the court failed to find *ex mero motu* as a mitigating factor that the victims were more than sixteen years old and voluntary participants in defendant's conduct. Defendant did not ask the trial judge to find this mitigating factor

at the sentencing rehearing and the evidence did not so clearly establish the fact in issue that no reasonable inference to the contrary can be drawn.

Am Jur 2d, Criminal Law §§ 598, 599.

2. **Criminal Law § 1185 (NCI4th)— second-degree murder and assault—aggravating factors—prior conviction—additional conviction between first sentencing and resentencing following appeal**

The trial court did not err in resentencing defendant for second-degree murder and assault with a deadly weapon inflicting serious injury by finding the aggravating factor of prior convictions based upon drug convictions which occurred subsequently to the murder and assault convictions but before the resentencing for the murder and assault convictions. The record is devoid of any evidence that shows or suggests that defendant's drug convictions were not final at the resentencing date and, based on a plain reading of N.C.G.S. § 15A-1340.2(4), defendant had a prior conviction at the time of resentencing.

Am Jur 2d, Criminal Law §§ 551-556.

3. **Criminal Law § 1081 (NCI4th)— second-degree murder and assault—resentencing—aggravating factor outnumbered but not outweighed by mitigating factors**

There was no abuse of discretion in a resentencing hearing for second-degree murder and assault with a deadly weapon inflicting serious injury where the court found that the aggravating factor outweighed the mitigating factors and imposed a fifty-two year sentence.

Am Jur 2d, Criminal Law §§ 580-587.

Appeal by defendant from judgment entered 9 December 1993 by Judge W. Steven Allen, Sr. in Forsyth County Superior Court. Heard in the Court of Appeals 28 February 1995.

Attorney General Michael F. Easley, by Assistant Attorney General John G. Barnwell, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

JOHNSON, Judge.

Defendant Jesse Dwight Mixion was found guilty of second degree murder and assault with a deadly weapon with intent to kill inflicting serious injury on 5 April 1991. Judge W. Steven Allen, Sr. found aggravating and mitigating factors in both cases, entered judgments and commitments, and sentenced defendant to forty years imprisonment for the murder conviction and twelve more consecutive years imprisonment for the assault conviction, for a total of fifty-two years imprisonment. Defendant appealed to our Court. Our Court affirmed defendant's conviction but remanded the case for new sentencing hearings. *State v. Mixion*, 110 N.C. App. 138, 429 S.E.2d 363, *disc. review denied*, 334 N.C. 437, 433 S.E.2d 183 (1993).

The cases came on together for resentencing, again before Judge Allen. On 9 December 1993, Judge Allen found aggravating and mitigating sentencing factors in both cases, entered judgments and commitments, and sentenced defendant to forty years imprisonment for the murder conviction and twelve more consecutive years imprisonment for the assault conviction, for a total of fifty-two years imprisonment. Defendant has again appealed to our Court.

[1] Defendant presents several arguments to support his contention that he should receive a new sentencing hearing. Defendant first argues that the trial court erroneously failed to find as a mitigating factor that the victims were more than sixteen years old and voluntary participants in defendant's conduct. We initially note that defendant did not ask the trial judge to find this mitigating factor at the sentencing rehearing; defendant now argues that the trial court should have found this mitigating factor *ex mero motu*.

In *State v. Gardner*, 312 N.C. 70, 73, 320 S.E.2d 688, 690 (1984), our Supreme Court stated, "[w]e wish to make it abundantly clear that the duty of the trial judge to find a mitigating factor that has not been submitted by defendant arises only when the evidence offered at the sentencing hearing supports the existence of a mitigating factor *specifically listed in N.C. Gen. Stat. § 15A-1340.4(a)(2)* and when the defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983)." The defendant's position

> is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that "the evidence so clearly establishes the fact in issue that no reason-

able inferences to the contrary can be drawn," and that the credibility of the evidence "is manifest as a matter of law."

Gardner, 312 N.C. at 72, 320 S.E.2d at 690 (*quoting State. v. Jones*, 309 N.C. at 220, 306 S.E.2d at 455) (citations omitted).

After a review of the record, we find that the evidence did not so clearly establish "the fact in issue" so "that no reasonable [inference] to the contrary can be drawn." The trial court did not err in failing to find as a mitigating factor that the victims were more than sixteen years old and voluntary participants in defendant's conduct.

[2] Defendant next argues that the trial court erroneously found the aggravating factor of prior convictions. Defendant states that the question presented here is "whether, at a resentencing [hearing] under the Fair Sentencing Act, a judge may aggravate a sentence under G.S. 15A-1340.4(a)(1)o with a conviction that was entered after [his conviction and] first sentencing [on 5 April 1991,] but before [his] resentencing [on 9 December 1993]." The chronology of events in the instant matter is as follows:

5 July 1990:	date of murder and assault offenses
15 March 1991:	date of drug offenses
5 April 1991:	date of conviction and sentencing of murder and assault offenses
23 September 1991:	date of conviction and sentencing of drug offenses
9 December 1993:	date of resentencing of murder and assault offenses

Defendant cites *State v. Coffey*, 336 N.C. 412, 444 S.E.2d 431 (1994) for his contention that his drug convictions which occurred subsequent to the murder and assault convictions cannot serve as a prior conviction to enhance his sentence on the murder and assault convictions. Defendant's reliance upon *Coffey* is misplaced. In *Coffey*, the Court was faced with the meaning of the phrase "history of prior criminal activity" which was not clearly defined by statute or case law. The *Coffey* Court held that " 'history of prior criminal activity' as used in N.C.G.S. § 15A-2000(f)(1) refers to criminal activity occurring before the murder." *Coffey*, 336 N.C. at 418, 444 S.E.2d at 435. Otherwise, the Court noted, "[i]f this language were to refer to defendant's criminal activity up to the time of sentencing, the word

'prior' would have no meaning since at the time of sentencing the defendant's criminal activity prior to sentencing is identical to his 'history of criminal activity.' " *Id.* at 418, 444 S.E.2d at 434.

Here, we are not faced with a lack of clarity requiring interpretation of the phrase "prior conviction" as it is defined in North Carolina General Statutes § 15A-1340.2(4) (1988) and referenced in North Carolina General Statutes § 15A-1340.4(a)(1)(o) (1988). North Carolina General Statutes § 15A-1340.2(4) defines prior conviction as follows:

> [The following definitions apply in this Article.]
>
> . . .
>
> (4) Prior Conviction.—A person has received a prior conviction when he has been adjudged guilty of or has entered a plea of guilty or no contest to a criminal charge, and judgment has been entered thereon, and the time for appeal has expired, or the conviction has been finally upheld on direct appeal.

The definition clearly states that the point in time a conviction is to be considered a *prior* conviction is (1) after the time for appeal has expired, or (2) the conviction has been finally upheld on direct appeal. The record is devoid of any evidence that shows or suggests that at the 9 December 1993 resentencing date, defendant's drug convictions were not final.

Based on a plain reading of the statute, we find that at the time of resentencing, defendant had a prior conviction. (Our holding is buttressed by the newly enacted North Carolina General Statutes § 15A-1340.11(7) (Cum. Supp. 1994), applicable to offenses occurring on or after 1 October 1994, which states "[a] person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime. . . ." The statute goes on to explain how an appeal of the conviction affects whether it is a prior conviction.)

The State quotes *State v. McCullers*, 77 N.C. App. 433, 436, 335 S.E.2d 348, 350 (1985), where our Court said, "[w]e believe that a fair reading of [North Carolina General Statutes § 15A-1340.4(a)(1)(o)] defines 'prior conviction' as one that is obtained before the defendant is sentenced for another offense." We point out, however, that pursuant to North Carolina General Statutes § 15A-1340.2(4), the time for

appeal for that prior conviction must have expired, or the prior conviction must have been finally upheld on direct appeal.

Therefore, based on North Carolina General Statutes § 15A-1340.2(4), we find in the instant case that the trial court properly found defendant's prior conviction as an aggravating factor at the resentencing.

[3] Defendant's final argument is that the trial court erroneously concluded that the aggravating factor outweighed the mitigating factors and erroneously imposed a fifty-two year sentence. We reject this argument. *See State v. Parker*, 319 N.C. 444, 448, 355 S.E.2d 489, 491 (1987) where the Court stated, "[i]t is well established that one aggravating factor may outweigh several mitigating factors." The trial court did not abuse its discretion in the instant case by finding that the aggravating factor outweighed the mitigating factors.

No error.

Judges JOHN and MARTIN, MARK D. concur.

THOMAS A. RITTER, PETITIONER v. DEPARTMENT OF HUMAN RESOURCES, RESPONDENT

No. 9410SC615

(Filed 18 April 1995)

1. Administrative Law and Procedure § 77 (NCI4th)— dismissed State employee—personal misconduct—denial of remand for evidence of alcoholism treatment

The trial court did not err by denying the application of a State employee who was dismissed for personal misconduct to remand his case to the Office of Administrative Hearings to take additional evidence about his successful completion of an alcohol recovery program since alcoholism was not a defense to the employee's dismissal for just cause, and evidence about his treatment was not material to the issues in the case. N.C.G.S. § 150B-49.

Am Jur 2d, Public Officers and Employees § 267.

2. Administrative Law and Procedure § 44 (NCI4th)— decision by administrative law judge—reasons for not adopting—sufficient statement

The State Personnel Commission's order dismissing a State employee for just cause stated with sufficient specificity the reasons it did not adopt the administrative law judge's recommendation that the employee be disciplined and reinstated. The Commission's decision to adopt its own findings of fact and to reject many of the administrative law judge's findings of fact was supported by the whole record. N.C.G.S. §§ 150B-36(b), 150B-51(a).

Am Jur 2d, Public Officers and Employees § 267.

3. Public Officers and Employees § 67 (NCI4th)— dismissal of State employee—personal misconduct—supporting evidence

A decision by the State Personnel Commission to dismiss a State employee for unacceptable personal conduct based upon his request that a sheriff write a letter discrediting one of the employee's subordinates and his abusive behavior toward the sheriff when he refused to write such a letter was supported by the whole record and was not arbitrary and capricious.

Am Jur 2d, Public Officers and Employees § 239.

Appeal by petitioner from order entered 14 January 1994 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 28 February 1995.

On 22 April 1991, petitioner was dismissed by respondent for unacceptable personal conduct. Petitioner was employed with the Division of Facility Services as Head of the Jail and Detention Branch. As Head of the Jail and Detention Branch, petitioner was responsible for inspecting all county and municipal jails to insure that they complied with state laws and regulations. Petitioner was required to work closely with county sheriffs from across the State in the performance of his duties.

On 7 March 1991, petitioner attended a meeting of the North Carolina Sheriffs Association in Rocky Mount, North Carolina. Petitioner attended this meeting as part of his official duties. Sometime that evening, petitioner joined the Sheriff of New Hanover County, Joseph McQueen, Jr., and several others for dinner. During

dinner, petitioner asked Sheriff McQueen to write a letter to David Flaherty, the Secretary of Human Resources, to discredit one of petitioner's subordinate employees. When Sheriff McQueen refused to write the letter, petitioner became verbally abusive toward Sheriff McQueen using extensive profanity. Petitioner also told Sheriff McQueen never to call petitioner again about any problems concerning the New Hanover County jail. Petitioner made these statements in the presence of several other sheriffs.

The following Monday, 11 March, Sheriff McQueen called Secretary Flaherty and told him about petitioner's abusive behavior. Sheriff Jack Henderson also called Secretary Flaherty about petitioner's behavior. These complaints were forwarded to petitioner's immediate supervisor, Lynda McDaniel, for investigation. McDaniel concluded that petitioner should be terminated based on his "unacceptable personal conduct." On 23 August 1991, petitioner received respondent's decision confirming his dismissal.

On 26 September 1991, petitioner filed a petition for hearing. On 19 May 1992, after a hearing, the Chief Administrative Law Judge issued a recommended decision recommending that the State Personnel Commission uphold the determination of just cause, but recommended that petitioner be reinstated and appropriately disciplined. On 21 October 1992, the full State Personnel Commission upheld respondent's decision to dismiss petitioner for just cause. Petitioner sought judicial review and on 14 January 1994, the trial court affirmed petitioner's dismissal. Petitioner appeals.

Allen & Pinnix, by M. Jackson Nichols, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Robert M. Curran, for respondent-appellee.

EAGLES, Judge.

Petitioner contends that the trial court erred in affirming the State Personnel Commission's (hereinafter Commission) decision upholding his dismissal. After careful review of the record and briefs, we affirm.

We note initially that respondent has cross-assigned as error the administrative law judge's (hereinafter ALJ) denial of its motion to dismiss for lack of subject matter jurisdiction. Respondent contends that petitioner did not file a petition for a contested case hearing within thirty days of receiving respondent's letter confirming peti-

tioner's dismissal. G.S. 126-38. Although the petition was not filed with the Office of Administrative Hearings within thirty days after petitioner received notice of respondent's decision, we exercise our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to address the merits of petitioner's appeal.

I.

[1] Petitioner first contends that the trial court erred in denying his request to remand the case to the Office of Administrative Hearings to take additional evidence regarding petitioner's alcohol assessment, treatment and recovery. We disagree.

G.S. 150B-49 provides:

> An aggrieved person who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken.

Petitioner argues that he successfully completed an alcohol recovery program after the hearing before the Commission. Petitioner contends that his earlier misbehavior was due to alcohol and that the evidence of his alcoholism and treatment were material issues to the case and could not have been presented at the hearing.

Petitioner was discharged for unacceptable personal conduct. His dismissal stemmed from his requesting Sheriff McQueen to write a letter discrediting one of petitioner's subordinate employees and his abusive behavior toward Sheriff McQueen when he refused to write such a letter. Petitioner's alcohol assessment and subsequent treatment is not material to the issues involved. Petitioner's alcoholism does not afford petitioner a defense for his termination for just cause. Even if petitioner's alcohol assessment and treatment were issues material to petitioner's dismissal, the trial court's decision here to deny petitioner's motion to remand for additional evidence can be reversed only for abuse of discretion. G.S. 150B-49. This assignment of error is overruled.

II.

[2] Petitioner further contends that the trial court erred in affirming his dismissal because the Commission did not state specific reasons for rejecting the recommended decision of the ALJ. We disagree.

If an agency does not adopt the ALJ's recommended decision as its final decision, the agency must state the specific reasons why it did not adopt the ALJ's recommended decision. G.S. 150B-36(b). Upon judicial review, a reviewing court must determine whether the agency's decision adequately states specific reasons why it did not adopt the ALJ's decision. G.S. 150B-51(a). In *Ford v. N.C. Dep't. of Environment, Health, and Natural Resources*, 107 N.C. App. 192, 419 S.E.2d 204 (1992), this court affirmed a final agency decision where the respondent agency selectively adopted and rejected the ALJ's recommended findings of fact. The respondent agency also rejected the ALJ's conclusions of law based upon its own findings of fact. This court held that the respondent agency's order sufficiently satisfied the spirit of G.S. 150B-36 and G.S. 150B-51. Examining this record in light of *Ford*, we conclude that the Commission's order states with sufficient specificity the reasons why it did not adopt the ALJ's recommended decision.

Petitioner also contends here that the Commission erroneously rejected several of the ALJ's findings of fact as "irrelevant" or "not supported by substantial, credible evidence." In reviewing a final agency decision, the trial court must apply the "whole record" test, which requires an examination of all the evidence to determine whether the agency's decision is supported by substantial evidence. *Rector v. N.C. Sheriffs' Educ. and Training Standards Com'n.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991); G.S. 150B-51(b)(5). The trial court is not permitted to substitute its judgment for the agency's judgment when there are two reasonably conflicting views. *Id.* Respondent's decision to adopt its own findings of fact and to reject many of the ALJ's recommended findings of fact is supported by the whole record. This assignment of error fails.

III.

[3] Finally, petitioner contends that the Commission's decision was arbitrary and capricious. Our review of the record shows that the Commission's decision dismissing petitioner is supported by the whole record and was not arbitrary and capricious. This assignment of error also fails.

In sum, the trial court did not err in affirming petitioner's dismissal for just cause.

Affirmed.

Judges WALKER and McGEE concur.

[118 N.C. App. 569 (1995)]

NANCY JOAN CATO, PLAINTIFF-APPELLEE v. TONY LEE CATO, DEFENDANT-APPELLANT

No. 9420DC467

(Filed 18 April 1995)

Divorce and Separation § 37 (NCI4th); Bankruptcy and Insolvency § 12 (NCI4th)— separation agreement—defendant's obligation to pay joint debt—bankruptcy petition—knowledge by plaintiff

An action seeking specific performance by defendant of his obligation under a separation and property settlement agreement to pay two joint debts is remanded for findings as to when plaintiff learned of defendant's bankruptcy petition and a determination as to whether defendant's debt to plaintiff had been discharged where defendant filed for bankruptcy in October 1992 and the bankruptcy court granted his discharge in February 1993; defendant scheduled the debts in the bankruptcy action but did not list plaintiff as a creditor; the trial court found that plaintiff learned of the bankruptcy action when defendant called plaintiff to tell her the debts had been discharged and there was nothing she could do about it "either on December 7, 1992 or February 25, 1993"; if plaintiff learned of the bankruptcy action on 7 December 1992, she had a duty to inquire further and had ample time to file a claim and protect her interests; but if plaintiff learned of the bankruptcy action on 25 February 1993, she did not have ample time to file a proof of claim and defendant's obligation to her under their separation agreement was not discharged.

Am Jur 2d, Divorce and Separation §§ 856 et seq.

Appeal by defendant from order entered 7 February 1994 by Judge Michael E. Beale in Union County District Court. Heard in the Court of Appeals 25 January 1995.

Plaintiff and defendant married in October of 1988 and separated in March of 1992. Upon separation they entered into a Separation Agreement and Property Settlement (Agreement) that distributed all property and debts between them. Pursuant to the Agreement, defendant assumed responsibility for payment of a $6,500.00 joint debt to First Citizens and a $4,700.00 joint debt to Citicorp. In October of 1992, however, he filed for bankruptcy under Chapter 7. Defendant scheduled the First Citizens and Citicorp debts and listed plaintiff as a non-filing co-debtor. In February of 1993, the bankruptcy

court granted his discharge. Afterwards, defendant refused to pay the First Citizens and Citicorp debts pursuant to the Agreement.

Plaintiff filed this action seeking, among other things, an order directing defendant to perform his debt obligations under the Agreement. The trial court found defendant had not listed plaintiff as a creditor in his bankruptcy schedules, that she did not receive notice from the bankruptcy court concerning his petition, and that she did not file a claim before the 3 March 1993 deadline. The court also found that plaintiff had neither timely notice nor actual knowledge of the bankruptcy and that defendant's debt to her had not been discharged. The trial court granted plaintiff specific performance of the debt obligations created in the Agreement. From this order, defendant appeals.

Weaver, Bennett & Bland, P.A., by Bill G. Whittaker, for defendant appellant.

W. David McSheehan for plaintiff appellee.

ARNOLD, Chief Judge.

At the outset, we note that in filing the record on appeal defendant made an unauthorized change in the caption of this case in violation of our appellate rules. *State v. Sneed*, 112 N.C. App. 361, 435 S.E.2d 579 (1993). "Rule 26(g) . . . provides that '[t]he format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules,' and Appendix B provides that '[t]he caption should reflect the title to the action (all parties named) as it appeared in the trial division.' " *Id.* at 363, 435 S.E.2d at 580 (quoting N.C.R. App. P. 26(g) and Appendix B). Our opinion reflects the caption as it appeared in the trial division.

Defendant contends the trial court committed reversible error in granting plaintiff's motion for specific performance. Specifically, he argues the court erred in finding that she did not have sufficient notice with which to protect her interest in the bankruptcy action. He admits he failed to list her as a creditor, but contends she had actual knowledge of the bankruptcy in time to file a proof of claim and protect her rights. Plaintiff contends she did not receive notice of the action as either a co-debtor or a creditor. Moreover, she contends she did not have notice of the bankruptcy action itself until appellant called to tell her the debt had been discharged and there was nothing she could do about it.

The Bankruptcy Code requires that each debtor file a list of creditors with the court. 11 U.S.C. § 521(1) (1993). Compliance with this and other requirements of the Code is necessary for a debtor to receive a discharge of all prepetition debts. *First Union Nat. Bank v. Naylor*, 102 N.C. App. 719, 404 S.E.2d 161 (1991) (holding debtor not discharged from obligation under separation agreement where he neglected to list wife as creditor and she had no notice or actual knowledge of the petition in time to protect her claim). "A discharge under section 727 . . . does not discharge an individual debtor from any debt" that was not listed with the name of the creditor in sufficient time to allow "timely filing of a proof of claim, *unless such creditor had notice or actual knowledge of the case in time for such timely filing.*" 11 U.S. C. § 523(a)(3)(A) (1993) (emphasis added). Actual knowledge means "nothing less than that the creditor must have literally read or heard of the fact that the bankruptcy had been filed." 2 Cowans, Cowans Bankruptcy Law and Practice § 6.37 (6th ed. 1994). Notice in this context means "that under the principles of agency, the actual knowledge of an agent, attorney or representative of the creditor will be imputed to the creditor." *Id.*

This notice or knowledge "must be actually existent, and not mere constructive notice or imputed knowledge." 3 Collier, Collier on Bankruptcy ¶ 523.13[c] (15th ed. 1994). Written notice is not necessary and verbal communication may be sufficient. *Id.* However, "[e]ven though the creditor may have actual knowledge of the case, such knowledge may be insufficient because of the time at which it was given." *Id.* As one commentator states:

> It seems clear under the Code when this listing, notice or knowledge must occur. It must occur in time for proof and allowance. Knowledge or notice in time to seek an extension of time to plead is not necessarily sufficient. The thirty day notice provision of Rule 4007(c) is a valuable guide, but a shorter period may be adequate under the particular circumstances of the case.

Cowans, *supra*, § 6.36.

The trial court made two significant, yet incomplete, findings on this point. First, the court found "[t]hat the plaintiff never received any notice from the bankruptcy court concerning Defendant's petition. Defendant had knowledge that a bankruptcy action had been filed by defendant." The trial court also found that "either on December 7, 1992 or February 25, 1993, the Defendant called the

Plaintiff and told her he was surprised that he did not see her in Court and told her that there was nothing she could do with him now that his debts listed were discharged."

Logic dictates that the trial court intended for the second sentence of the first finding to read "*Plaintiff* had knowledge that a bankruptcy action had been filed by the Defendant." Assuming as much, we must conclude the finding suffers from a lack of specificity because it does not indicate when plaintiff acquired this knowledge. Knowledge or notice must be acquired in time to protect your rights and the finding does not make clear whether plaintiff knew defendant had filed for bankruptcy in time to do so. If she did acquire such knowledge in sufficient time and did nothing to protect her rights, the debt would be discharged. *See Justus v. Justus*, 581 N.E.2d 1265 (Ind. App. 1991); *In re Haendiges*, 158 B.R. 871 (Bkrtcy M.D. Fla. 1993).

The second finding also suffers from a lack of specificity because it does not indicate a particular date on which plaintiff learned of the discharge. Where a creditor learned the debtor filed for bankruptcy ten months before the final date to file, the court determined that the creditor had a duty to investigate further and present his objections. *In re Rider*, 89 B.R. 137 (Bkrtcy D. Colo. 1988). Where a creditor learned of the action weeks before the deadline to file a claim, the court determined that the debt was dischargeable in light of this actual knowledge. *In re Barley*, 130 B.R. 66 (Bkrtcy N.D. Ind. 1991). Where a creditor learned of the bankruptcy action only seven days before the bar date, however, this knowledge was inadequate. *In re Dewalt*, 961 F.2d 848 (9th Cir. 1992). In *Dewalt*, the court stated that a debtor should not be rewarded for negligent filing. *Id.* In addition, the court used the thirty day notice provision of Rule 4007(c) to determine when a creditor has sufficient time to protect its interests. The court looked to Rule 4007(c) as a guide only, noting that the time required would vary with the sophistication of the creditor. *Id.*

In this case, if Nancy learned of the action on 25 February 1993, the latter of the two dates identified by the trial court, she would have had less than two weeks to file a proof of claim. Under the authority cited above, this appears to be insufficient. If, however, she learned of the action on 7 December 1992, the earlier date identified by the trial court, she had a duty to inquire further and had ample time to file a proof of claim. Since it is not clear when she acquired this knowledge, this case must be remanded for more detailed findings.

Vacated and remanded.

Judges JOHNSON and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA v. SAM C. HUGHES, DEFENDANT

No. 9429SC545

(Filed 18 April 1995)

Indictment, Information, and Criminal Pleadings § 40 (NCI4th)— embezzlement—amendment of indictment—change of owner from individual to corporation

Where the indictments alleged that defendant embezzled gasoline "belonging to Mike Frost, President of Petroleum World, Incorporated, a North Carolina corporation," the trial court erred by permitting the State to amend the indictments at the close of its evidence by deleting "Mike Frost, President" from each of the indictments and thus to change ownership from an individual to a corporation, since this was a substantial alteration of the indictment prohibited by N.C.G.S. § 15A-923(e).

Am Jur 2d, Indictments and Informations §§ 188 et seq.

Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations. 14 ALR3d 1358.

Power of court to make or permit amendment of indictment with respect to allegations as to property, objects, or instruments, other than money. 15 ALR3d 1357.

Appeal by defendant from judgment entered 2 February 1994 by Judge Paul M. Wright in Polk County Superior Court. Heard in the Court of Appeals 21 February 1995.

Defendant was convicted on three counts of embezzlement, a violation of G.S. 14-90, and sentenced to 9 years imprisonment, suspended on the condition that defendant serve 5 years supervised probation and pay $18,260.92 in restitution. At trial, the State's evidence tended to show the following: Defendant was the operator of a convenience store known as Sam's Minimart. Defendant dispensed gasoline from six pumps outside the store. The gasoline was supplied

by Petroleum World, Inc., who also owned the tanks and pumps. Each week a representative from Petroleum World would come to Sam's Minimart, read the gasoline meter to determine how many gallons of gasoline had been sold that week and based on that information would then prepare an invoice. Defendant would then give a check to the representative in the amount of the invoice as payment for the gasoline that had been sold that week. The representative would then set the unit price for the gasoline to be sold the following week. Defendant was responsible for paying only for the gas that he actually sold.

In October 1990, Petroleum World received at least two bad checks from defendant. After these checks were returned, Petroleum World padlocked defendant's pumps. Defendant, however, removed the padlocks and obtained gasoline from another supplier. When defendant paid for those checks and agreed not to pay Petroleum World in the future with bad checks, Petroleum World resumed supplying defendant with gasoline.

On 8 March 1991, defendant's check dated 1 March 1991 for $6,262.61 for gas sales based on the 1 March meter reading was returned for insufficient funds. Defendant's check for $5,780.66 dated 8 March for gasoline sold between 1 and 8 March was also returned unpaid. Defendant testified that when he gave Petroleum World's representative the 1 March check, he told the representative that the check would be good in a couple of days.

On 25 March, defendant called Petroleum World's manager, John Thornton, to refill the tanks. Thornton said that defendant would have to pay cash for the gasoline sold between 15 and 22 March and that the two previous bad checks dated 1 and 8 March had to be paid by 29 March. Defendant agreed and on 25 March sent a cashier's check to Petroleum World for the amount due for the 22 March meter reading. Petroleum World delivered the gas to defendant that day. On 26 March, defendant's check dated 15 March (for gas sold between 8 and 15 March) was returned for insufficient funds. On 27 March, Petroleum World sent a tanker to remove its gasoline and its pumps. Defendant was out of town and did not notice this until he returned on 29 March. Defendant never paid Petroleum World for the gasoline covered by the 1, 8 and 15 March meter readings.

Defendant presented evidence. Defendant testified that he did not have enough money in the bank to cover the checks that were returned in March. Defendant testified that he encountered financial

difficulty due to the fact that "some of [my] monies disappeared." Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Emmett B. Haywood, for the State.

Roberts Stevens & Cogburn, P.A., by Max O. Cogburn, for defendant-appellant.

EAGLES, Judge.

Defendant contends that the trial court erred in allowing the State to amend the bills of indictment and in denying defendant's motion to dismiss. After careful review of the record and briefs, we vacate the judgment.

I.

On 27 January 1992, defendant was indicted on three counts of embezzlement. G.S. 14-90. The bills of indictment charged that defendant embezzled gasoline "belonging to Mike Frost, President of Petroleum World, Incorporated, a North Carolina Corporation having it's [sic] principal place of business in Cliffside, North Carolina." The indictments further stated that defendant "was over 16 years of age and was the consignee of said Petroleum World, Incorporated, a North Carolina Corporation."

At the close of the State's evidence, defendant made a motion pursuant to G.S. 15A-1227 to dismiss for insufficiency of the evidence. Defendant argued that the indictments alleged that the gasoline belonged to Mike Frost. The State's evidence, however, tended to show that the gasoline was actually owned by Petroleum World, Incorporated, a corporation. After the State rested, defendant moved to dismiss based upon a fatal variance. Since the identity of the owner is an essential element of the charge of embezzlement, defendant argued that there was a fatal variance between the indictments as charged and the State's evidence as presented in court. Following an overnight recess, the State moved to amend the indictments by deleting the words "Mike Frost, President" from each of the indictments. The trial court allowed the State's motion to amend. Defendant contends that the trial court erred in allowing the State to amend the indictments. We agree.

An indictment is invalid if it does not allege all of the essential elements of the offense. *State v. Johnson*, 77 N.C. App. 583, 584, 335

S.E.2d 770, 771 (1985). An indictment for embezzlement must allege ownership of the property in a person, corporation or other legal entity able to own property. *State v. Ellis*, 33 N.C. App. 667, 669, 236 S.E.2d 299, 301 (1977). When proof of ownership at trial varies from the allegation of ownership in the indictment, the indictment is invalid. *State v. Brown*, 263 N.C. 786, 140 S.E.2d 413 (1965); *State v. Stinson*, 263 N.C. 283, 139 S.E.2d 558 (1965); *State v. Vawter*, 33 N.C. App. 131, 136, 234 S.E.2d 438, 441 (1977).

In *State v. Brown, supra*, defendant was charged in an indictment of breaking and entering a building occupied by "Stroup Sheet Metal Works, H.B. Stroup, Jr., owner," with intent to steal. The State's proof at trial, however, showed that the building was occupied by "Stroup Sheet Metal Works, Inc.," and there was no evidence that "H.B. Stroup, Jr.," was the owner of Stroup Sheet Metal Works. Our Supreme Court held that there was a fatal variance between the indictment and proof and vacated the judgment. An indictment may not be amended. G.S. 15A-923(e). An "amendment" is defined to be "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984) (quoting *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478 (1978)). Here, the trial court deleted the words, "Mike Frost, President" from the indictments to change ownership from Mike Frost, an individual to Petroleum World, Inc., a corporation. This is a substantial alteration of the indictment prohibited by G.S. 15A-923(e). Accordingly, we vacate the trial court's judgment.

Vacated.

Judges WALKER and McGEE concur.

NATIONSBANK OF NORTH CAROLINA, N.A., PLAINTIFF v. WILLIAM E. BROWN AND THOMAS F. DARDEN, II, DEFENDANTS

No. 9410SC680

(Filed 18 April 1995)

Guaranty § 17 (NCI4th)— guarantors of payment of note—default—deviation from terms of guaranty

The trial court did not err by granting summary judgment for plaintiff in an action to enforce a guaranty where defendants

claimed that they should be relieved of any liability because plaintiff deviated from the terms of the guaranty by making advances in excess of an 85% figure derived by subtracting accumulated retainage from net trade receivables. The letter setting out additional terms to the agreement authorized, but did not require plaintiff to advance monies beyond the 85% figure. Furthermore, plaintiff did not materially deviate from the terms of the letter by not obtaining Borrowing Base Certificates because the letter did not place the responsibility of supplying those certificates on plaintiff, and, in any event, the certificates were merely a form to be used by plaintiff to compute the 85% figure. Plaintiff did not deviate from the original agreement upon which the guaranty was based and summary judgment for plaintiff on its claim was proper.

Am Jur 2d, Guaranty §§ 79 et seq.

Appeal by defendants from orders entered 20 December 1993 in Wake County Superior Court by Judge Coy E. Brewer, Jr. Heard in the Court of Appeals 2 March 1995.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for plaintiff-appellee.

Durham Wyche Story Whitley & Henderson, L.L.P., by Ashley H. Story, Claire B. Casey, and Jane Flowers Finch, for defendant-appellants.

GREENE, Judge.

In this action by NationsBank of North Carolina, N.A. (plaintiff) to recover on a guaranty agreement, William E. Brown and Thomas F. Darden, II (defendants), appeal from the trial court's order granting summary judgment for the plaintiff and order denying defendants' motion to strike, defendants' motion to amend answer and counterclaims, and defendants' motion to compel discovery.

The evidence shows that, on 11 September 1989, defendants, founders of Arrowhead Masonry, Inc. (Arrowhead), signed a personal guaranty for $250,000, which guaranteed a promissory note, signed by Arrowhead, in return for plaintiff's extension of a line of credit to Arrowhead, up to $250,000. Defendants' guaranty was "an inducement to [plaintiff] to extend credit to" Arrowhead, and defendants "absolutely and unconditionally guarantee[d] to [plaintiff] the due

and punctual payment of [the note] . . . together with interest, as and when the same become due and payable." This guaranty further provided that defendants would "reimburse [plaintiff] for all costs and expenses (including attorneys' fees) incurred by [plaintiff] in connection with the enforcement of [the] guaranty." On that same day, plaintiff sent a letter to Arrowhead which outlined "the additional terms and conditions under which [plaintiff was] willing to extend a $250,000 Line of Credit to Arrowhead." That letter provides:

> [Plaintiff] is willing to advance 85% of the figure derived by subtracting Accumulated Retainage from Net Trade Receivables (Total Accounts Receivables less Reserve for Losses). The company shall send to the Bank on a month-end basis an Accounts Receivable Borrowing Base Certificate as attached. Any overadvances under this Borrowing Base approach will be reviewed on an individual occurrence basis and must be approved by the Bank.

The letter does not mention defendants' guaranty, but the letter was "Acknowledged and Accepted" by defendants on behalf of Arrowhead and individually.

On 31 March 1993, plaintiff's sued defendants on the guaranty agreement and demanded $85,266.76, interest and cost, including attorneys' fees. Defendants assert estoppel and waiver as affirmative defenses and allege that plaintiff breached the guaranty agreement by making advances to Arrowhead in excess of the 85% amount provided for in the 11 September 1989 letter. Defendants filed counterclaims making the same claims. On 20 December 1993, the trial court granted plaintiff's summary judgment motion, awarding plaintiff

> the principal amount of $79,913.40, plus accrued but unpaid interest at the annual rate of the Prime Rate of NationsBank, plus one percent (1%), from and after February 1, 1992, until paid in full, plus the costs of this action, including attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.2(2) of Fifteen Percent (15%) of the outstanding balance of principal and interest at the time of the institution of this action.

The issue presented is whether the plaintiff violated the provisions of the 11 September 1989 letter.

Defendants do not dispute that they are guarantors of payment on Arrowhead's promissory note, nor that Arrowhead is in default

because it did not make the last two payments due on the note. They argue, however, that they should be relieved of any liability because the plaintiff deviated from the terms of its 11 September 1989 letter, which stated plaintiff would advance only 85% of Arrowhead's net accounts receivable and request monthly "Borrowing Base Certificates" from Arrowhead. The plaintiff contends it did not deviate from the terms of the 11 September letter. We agree with the plaintiff.

It is a well accepted principle of law that "a guarantor will be released from his undertaking by any material alteration," made without his consent, of the original obligation or duty to which the guaranty relates. 38 C.J.S. *Guaranty* § 72 (1943); *First Citizens Bank & Trust Co. v. McLamb*, 112 N.C. App. 645, 649, 439 S.E.2d 166, 168 (1993). In this case, there is no dispute that the plaintiff agreed to "advance 85% of the figure derived by subtracting Accumulated Retainage from Net Trade Receivables." There is also no dispute that on several occasions the plaintiff advanced funds to Arrowhead in excess of the 85% figure. The question is whether these advances amount to a material deviation from the original agreement upon which the guaranty was based. They do not. The letter of 11 September 1989 authorized, but did not require plaintiff to advance monies beyond the 85% figure. In fact the letter specifically states that any "overadvances . . . must be approved by the Bank."

Furthermore, we reject the defendants' argument that plaintiff materially deviated from the terms of the 11 September letter in that it "did not obtain any Borrowing Base Certificates from Arrowhead." The letter did not place the responsibility of supplying these certificates on the plaintiff. Arrowhead was given the responsibility to "send [these certificates] to the Bank on a month-end basis." In any event, the certificates were merely a form to be used by the plaintiff to compute the 85% figure and if they were willing to make advances without regard to that figure, they were permitted to do so. In no event could the liability of the defendants exceed $250,000, the amount of the guaranty. Accordingly, the plaintiff did not deviate from the original agreement upon which the guaranty was based and summary judgment for the plaintiff on its claim was proper. For the same reasons, summary judgment for the plaintiff on the defendants' counterclaims was proper.

We have reviewed the several other assignments of error asserted by the defendants and determine that they do not require reversal or

modification of the orders entered by the trial court. It is, however, apparent from this record and the plaintiff agrees, that the order of the trial court inadvertently directs that interest accrue "from and after February 1, 1992." On remand the order must be amended to reflect the correct date of February 1, 1993, the date on which Arrowhead defaulted.

Affirmed and remanded.

Judges COZORT and LEWIS concur.

VITO STOLFO AND FLORENCE STOLFO, PLAINTIFFS v. RUBY KERNODLE AND HAROLD KERNODLE, DEFENDANTS

No. COA94-360

(Filed 18 April 1995)

Unfair Competition or Trade Practices § 12 (NCI4th)— residential rentals—in or affecting commerce—unfair trade practice

A landlord's rental of residential property is "in or affecting commerce," and the landlord thus may be liable under N.C.G.S. § 75-1.1 for an unfair trade practice even though the landlord rents only two properties (a house and a trailer space).

Am Jur 2d, Consumer and Borrower Protection § 291; Monopolies, Restraints of Trade, and Unfair Business Practices § 735.

Landlord's fraud, deceptive trade practices, and the like, in connection with mobile home owner's lease or rental of landsite. 39 ALR4th 859.

Coverage of leases under state consumer protection statutes. 89 ALR4th 854.

Appeal by plaintiffs from judgment entered 20 January 1994 by Judge Spencer B. Ennis in Alamance County District Court. Heard in the Court of Appeals 31 January 1995.

Plaintiffs filed a complaint against defendants alleging breach of an implied warranty of habitability and unfair or deceptive trade practices. The trial court granted defendants' motion for partial summary

judgment on the issue of unfair or deceptive trade practices and certified that there was no just reason to delay appeal. From this judgment plaintiffs appeal.

Civil Legal Assistance Clinic, University of North Carolina, by Walter H. Bennett, Jr.; and North State Legal Services, by Carlene McNulty, for plaintiff-appellants.

Latham, Wood, Hawkins & Whited, by James F. Latham, for defendant-appellees.

McGEE, Judge.

The plaintiffs present two issues on appeal: (1) whether a landlord renting limited residential properties operates in or affects commerce as a matter of law; and (2) if there is a genuine issue of material fact as to whether the defendants in this case were operating in or affecting commerce. This case is resolved by our decision under the first issue and we need not address the second issue. For the reasons stated below, we reverse.

Defendant Ruby Kernodle owns a house in Elon College, North Carolina that she has rented to three different families since 1987. Her tenants included the plaintiffs, who rented from February 1988 until October 1991. She also owns a trailer space she leases out by the month. Her son, defendant Harold Kernodle, collected and retained all rent payments from the plaintiffs, made repairs on the property, and dealt with plaintiffs on his mother's behalf. Aside from these duties, he has had no further involvement with rental properties, except that he once leased out his former home.

The Kernodles argue that under these facts, they do not operate in or affect commerce as a matter of law, and therefore cannot be liable under N.C. Gen. Stat. § 75-1.1 (1994) for unfair or deceptive trade practices. We disagree.

In *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977) *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978), this Court held that "for purposes of G.S. 75-1.1, a lease is a sale of an interest in real estate. . . . Thus we hold that the rental of residential housing is 'trade or commerce' under G.S. 75-1.1." *Love* at 516, 239 S.E.2d at 583. In a later case, this Court held:

> where a tenant's evidence establishes the residential rental premises were unfit for human habitation and the landlord was

> aware of needed repairs but failed to honor his promises to correct the deficiencies and continued to demand rent, then such evidence would support a factual finding by the jury that the landlord committed an unfair or deceptive trade practice.

Foy v. Spinks, 105 N.C. App. 534, 540, 414 S.E.2d 87, 89-90 (1992).

In *Stanley v. Moore*, 113 N.C. App. 523, 439 S.E.2d 250 (1994), *rev'd on other grounds*, 114PA94 (N.C. Supreme Court March 3, 1995), this Court stated: "[I]t is clear that in North Carolina a landlord may be held liable pursuant to G.S. § 75-1.1 *et. seq.*, for merely failing to maintain a rental unit in fit condition." *Stanley* at 527, 439 S.E.2d at 252. In *Stanley*, defendant's mother entered into a lease with the plaintiffs for rental of defendant's mobile home while defendant lived out of state. Upon his return, defendant constructively evicted plaintiffs from the mobile home by shutting off their electricity and water. Even though there was no indication in the opinion that the defendant maintained any other rental property, this Court held the defendant would be liable under G.S. 75-1.1 but for the fact the eviction statute, by its terms, provided plaintiffs' sole remedy. *Stanley* at 526, 439 S.E.2d at 252. Our Supreme Court later reversed on other grounds, holding that the eviction statute was not plaintiffs' sole remedy and did not prevent plaintiffs from recovering under G.S. 75-1.1. *Stanley v. Moore*, 114PA94 (N.C. Supreme Court March 3, 1995).

The only two statutory exceptions to the application of G.S. 75-1.1 are for: (1) members of learned professions providing professional services, and (2) third-party providers of advertising who have no knowledge of the falsity of an advertisement and no financial interest in the product advertised. N.C. Gen. Stat. § 75-1.1(b)-(c) (1994). This Court acknowledged an additional exception for a private homeowner selling his or her personal residence in *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979).

Our Supreme Court decided in *Bhatti v. Buckland*, 328 N.C. 240, 400 S.E.2d 440 (1991), that in order to avoid liability under G.S. 75-1.1, a defendant must fit under one of the statutory exemptions or the "homeowner's exception" recognized by this Court. While declining to decide if a "homeowner's exception" actually exists, our Supreme Court held that if it did exist, it did not apply to the defendant because there was no showing that the property he sold was his personal residence. *Bhatti* at 245-6, 400 S.E.2d at 443-4.

Under *Bhatti*, a party claiming to be exempt from the provisions of G.S. 75-1.1 has the burden of proving the party fits within a recognized exception. *Bhatti* at 244, 400 S.E.2d at 443. G.S. 75-1.1(d) states: "Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim." The Kernodles did not meet this burden. They do not fit under either statutory exception and they are not selling their personal residence. Their actions are subject to G.S. 75-1.1.

While the defendants argue it would be inequitable to apply G.S. 75-1.1 to a landlord operating on a small-scale, the language and purpose of the statute require that we rule otherwise. The statute itself states that " 'commerce' includes *all* business activities, *however denominated.*" G.S. 75-1.1(b) (emphasis added). As this Court held in *United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 339 S.E.2d 90 (1986), "[t]he 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 in this State and [it] *applies to dealings between buyers and sellers at **all** levels of commerce.*" *United Virginia Bank* at 319-20, 339 S.E.2d at 93 (emphasis added).

Given the broad consumer protection intent of the statute, combined with case law and the General Assembly's inclusive definition of the term "commerce," we hold that the Kernodles' rental of residential property is "in or affecting commerce." Therefore, they can be liable under G.S. 75-1.1 if at trial they are shown to have committed unfair or deceptive trade practices. The trial court's grant of partial summary judgment in favor of the defendants on the issue of liability under G.S. 75-1.1 is reversed; the case is remanded for trial.

Reversed and remanded.

Judges EAGLES and WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 APRIL 1995

Case	County	Disposition
ALL STAR RENTAL, INC. v. WRIGHT No. 94-387	Forsyth (92CVS1303)	Affirmed
BLINSON v. OCCIDENTAL LIFE INS. CO. No. 94-18	Wake (92CVS09883)	Affirmed
BRAMLETT v. CAROLINA GALVANIZING No. 94-1100	Ind. Comm. (755263)	Affirmed
BRITTAIN v. DIXIE CONTAINER CORP. No. 94-367	Ind. Comm. (869903)	Affirmed
CONNOR v. WALL No. 94-609	Buncombe (93CVS2076)	No Error
DURHAM TAXICAB ASSN. v. SHERRILL No. 93-1157	Durham (90CVS4779)	Affirmed
GODLEY v. GODLEY No. 94-530	Beaufort (92CVD390)	Affirmed
HANSON v. HUFFINES No. 94-1104	Durham (91CVS5145)	Affirmed
HARMON v. SOUTHERN WHOLESALE GLASS No. 93-1256	Guilford (92CVS6229)	Affirmed
HARRIS v. N.C. DEPT. OF CORRECTION No. 94-890	Ind. Comm. (TA-12203)	Dismissed
HERRING v. LYTCH No. 93-1242	Harnett (91CVS0880)	Affirmed
IN RE SKIDMORE No. 94-366	Forsyth (93SP307)	Affirmed
IN RE ZIMMERMAN No. 94-41	Forsyth (84J167) (91J022) (91J023)	Affirmed
J. W. COOK & SONS v. GRAYCO STEEL, INC. No. 94-688	Columbus (92CVS00064)	Reversed & Remanded

LEWIS v. DYER No. 94-878	Durham (91CVD02897)	Affirmed
MORTON v. MORTON No. 94-949	Montgomery (83CVD210)	Dismissed
RUTLEDGE v. MANESS No. 94-650	Randolph (92CVS0697)	Affirmed
SENJAN v. N.C. DEPT. OF TRANSPORTATION No. 94-606	Yancey (93CVS221)	Affirmed
STATE v. AVERY No. 94-1245	Bertie (93CRS1840)	No Error
STATE v. CARTER No. 94-987	Mecklenburg (93CRS65127)	No Error
STATE v. DIAL No. 94-1124	Robeson (93CRS17139)	No Error
STATE v. GADDY No. 94-1146	Mecklenburg (92CRS50558)	No Error
STATE v. JENNINGS No. 94-1267	Gaston (93CRS25741)	No Error
STATE v. LASSITER No. 94-938	New Hanover (92CRS13687)	No Error
STATE v. LAWS No. 94-577	Wilkes (93CRS3390) (93CRS3391) (93CRS3536) (93CRS5217)	No Error
STATE v. MACK No. 94-967	Mecklenburg (93CRS51688) (93CRS51690)	No Error
STATE v. MULLICAN No. 94-1141	Guilford (93CRS39170) (93CRS39171) (93CRS39172)	No Error
STATE v. PARTON No. 94-841	Swain (92CVS937) (92CVS938) (92CRS940) (92CRS941) (92CRS942) (92CVS943) (92CVS944) (92CVS945) (92CVS946) (92CVS1069) (92CRS1070)	No Error

STATE v. PEARSON No. 94-1010	Moore (92CRS10654) (94CRS4125) (94CRS4126)	No Error
STATE v. POWELL No. 94-1259	New Hanover (92CRS25664) (92CRS25665)	No Error
STATE v. RING No. 94-1288	Forsyth (94CRS10689)	No Error
STATE v. SHAW No. 94-581	Durham (89CRS31101)	Affirmed
STATE v. TETTERTON No. 94-1148	Beaufort (93CRS6100)	No Error
STATE v. WATTS No. 94-1190	Forsyth (94CRS10294)	No Error
STATE v. WILCOX No. 94-461	Mecklenburg (93CRS32957) (93CRS32959) (93CRS32960) (93CRS32961) (93CRS32962)	Affirmed
STATE v. WILKS No. 94-352	Mecklenburg (92CRS10699) (92CRS10700)	No Error
STATON v. NASH COUNTY SCHOOLS No. 94-971	Ind. Comm. (139895)	Affirmed
TINNEN v. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL No. 94-56	Wake (93CVS09678)	Reversed
WALLACE v. PERNELL No. 94-65	Johnston (92CVS1498) (92CVS1499)	Reversed in part
WHITFIELD v. CHARLOTTE MECKLENBURG POLICE DEPT. No. 94-614	Mecklenburg (93CVS15698)	Affirmed
WILLIAMS v. DALLAS & MAVIS FORWARDING CO. No. 94-562	Ind. Comm. (653516)	Affirmed

FILED 18 APRIL 1995

ANDREATOS v. BROWN No. 94-631	Carteret (92CVS996)	Affirmed
BASS AIR CONDITIONING CO. v. COUNTY OF LEE No. 94-336	Lee (93CVS38)	Dismissed
BRADLEY v. STATE OF NORTH CAROLINA No. 94-295	Mecklenburg (93CVS6679)	Affirmed
DAVIS OIL CO. v. HOKE No. 94-169	Iredell (93CVS1523)	Reversed & Remanded
FLEMING v. SELMAN No. 94-602	Buncombe (91CVD2329) (92CVD2521)	Affirmed
FLOYD v. DAVIDSON No. 94-592	Mecklenburg (83CVD12561-YME)	Affirmed
GAULDIN v. FIELDCREST CANNON, INC. No. 94-651	Ind. Comm. (218829)	Affirmed
HILLHAVEN CORP. v. FLOOD No. 94-635	Hertford (93CVS167)	Appeal is dismissed
KASEY v. KISER SUPPLY, INC. No. 94-669	Buncombe (92CVS4521)	Dismissed
MOHORN v. MOHORN No. 94-371	Guilford (90CVD2136)	Affirmed in in part, Reversed in part
REALTY ONE OF DURHAM v. BOX No. 94-406	Durham (91CVD4867)	Affirmed
SELMAN v. FLEMING No. 94-603	Buncombe (93CVS1959)	Affirmed
SOUPHANTHAVONG v. TOWN & COUNTRY FORD, INC. No. 94-453	Mecklenbug (92CVD5188-MRB)	Plaintiffs' appeal— Dismissed Defendant's appeal— Reversed & Remanded
STATE v. GRIFFIN No. 94-709	Jones (90CRS862)	No Error

STATE v. JOHNSON No. 94-52	Mecklenburg (92CRS86600)	Affirmed
STATE v. LAMSON No. 94-826	Wake (93CRS7752) (93CRS10887) (93CRS10888) (93CRS10889)	No Error
STATE v. LYNTHACUM No. 94-767	Montgomery (93CRS1443)	No Error

STATE OF NORTH CAROLINA v. ROBERT FULTON KELLY, JR.

No. 933SC676

(Filed 2 May 1995)

1. Constitutional Law § 248 (NCI4th)— sexual abuse case—file of medical and therapy notes—failure to conduct in camera review—due process

In a prosecution of defendant for sexual abuse of children in a day care center, the trial court erred in refusing defendant's request to conduct an *in camera* review of files of medical and therapy notes on the children involved in order to determine if any material evidence existed in the files where a pretrial order had been entered in accordance with *Pennsylvania v. Ritchie*, 480 U.S. 39, directing the State to file and present to the trial court for *in camera* review medical, psychotherapeutic and DSS files with respect to the children listed in the indictments and any other day care children about whom the State would offer evidence, and this order was affirmed by the North Carolina Supreme Court.

Am Jur 2d, Criminal Law § 774.

2. Evidence and Witnesses § 2068 (NCI4th)— sexual abuse case—opinion testimony of parents—admission prejudicial error

In a prosecution of defendant for sexual abuse of children in a day care center, the trial court erred in allowing into evidence improper lay opinion testimony of the testifying children's parents about child abuse and particular behaviors resulting from that abuse, the motives, intentions and opinions of the children, that the children were not fantasizing or making up abuse allegations, the opinions of others, and that the children knew more than they said, since explanations of the symptoms and characteristics of sexually abused children are admissible only through expert testimony for the limited purpose of assisting the jury in understanding the behavior patterns of abused children, and evidence of a particular child's symptoms and their consistency with established characteristics of abused children can come in only through an expert.

Am Jur 2d, Criminal Law § 774.

3. Evidence and Witnesses § 2594 (NCI4th)— sexual abuse case—former attorney testifying against defendant—reference to attorney-client relationship—error

In a prosecution of defendant for sexual abuse of children in a day care center, the trial court erred in allowing defendant's former attorney, who withdrew as counsel after his son was named as a potential victim, to refer to his former attorney-client relationship with defendant, since the minimal probative value of the testimony was clearly outweighed by its prejudicial impact. Furthermore, the attorney's statements that "I've never been so shattered" and "I had believed in his innocence" had no probative value and were improperly admitted.

Am Jur 2d, Witnesses §§ 97 et seq.

Appeal by defendant from judgments entered 23 April 1992 by Judge D. Marsh McLelland in Pitt County Superior Court. Heard in the Court of Appeals 9 January 1995.

In 1988 defendant and his wife were operating a day care center. Defendant assisted with remodelling the day care and occasionally filled in for teachers over lunch breaks. Allegations of sexual abuse at the day care arose in January 1989. Beginning 18 January 1989 and continuing over the next several months, the Department of Social Services (DSS) and Officer Brenda Toppin, a former police department dispatcher and investigator of sexual abuse cases, interviewed children named as sexual abuse victims and the day care employees. Officer Toppin's investigation consisted, in part, of additional interviews with children and parents. She instructed the parents to keep a diary of disclosures and other relevant facts for use at trial and suggested that many of the children see one of four therapists. There is disagreement over whether or not these people were actually therapists, but for convenience we refer to them as therapists throughout this opinion. Ultimately twenty-nine children were the subject of indictments returned against defendant, and at least twenty-five additional people had been accused of sexual abuse.

The State's evidence consisted primarily of the testimony of parents, teachers, and relatives who corroborated the children and described behavioral changes. Only twelve of the indictment children testified. The therapists did not testify.

Following a nine month trial, defendant was convicted of ninety-nine charges, including first degree sexual offense, first degree rape,

taking indecent liberties, and crime against nature. He was found not guilty of one charge of crime against nature. The trial judge sentenced defendant to twelve consecutive life sentences. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Ellen B. Scouten and Associate Attorney General Nancy B. Lamb, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant appellant.

ARNOLD, Chief Judge.

PRETRIAL DISCOVERY

[1] Defendant contends, in his first assignment of error, that information of material benefit to his defense was unconstitutionally withheld. Because credibility of the witnesses was crucial in this trial, as it is in most alleged child sexual abuse cases, defendant wanted direct access to, or an inspection by the trial court of any recorded information, whether written or otherwise, taken by the therapists who interviewed the children.

This assignment of error originates from a pretrial discovery motion entitled "Motion for Order to Produce Information Essential for Adequate and Competent Preparation of Defendants' Case for Trial," which was filed on behalf of all defendants named in the day care cases. Generally, the motion requested production of all information relating to medical, psychiatric, psychological, counselling, and treatment data collected and used with respect to each of the children named in the indictments, as well as any child or children whom the State intended to call either in rebuttal to defense evidence, or evidence they intended to offer pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (1988).

After a hearing on the motion, Judge L. Bradford Tillery, a pretrial judge, issued an order that directed the State to file and present to the court for *in camera* review, identifying information, medical and psychotherapeutic files, and DSS files with respect to the children listed in the indictments (hereinafter "indictment children"). The order also directed the State to prepare orders requesting all such information, including notes, reports and recordings, in the possession of third parties to be turned over to the trial court for *in camera* review. Furthermore, Judge Tillery's order instructed the State to prepare

similar orders with respect to children not named in the indictments (hereinafter "non-indictment children") upon the State's determination to offer evidence regarding those children. The North Carolina Supreme Court affirmed Judge Tillery's pretrial order insofar as it ordered the State to produce for *in camera* inspection the materials the State had in its possession; however, the Court vacated the portions of the order purporting to require the State to obtain from third parties, other than law enforcement agencies, the materials described in the order.

Before trial, in apparent compliance with Judge Tillery's order as affirmed by the Supreme Court, the State turned over a box of files to the trial court, Judge McLelland presiding. The box contained, *inter alia*, complete medical notes and therapy notes on the twenty-nine indictment children, twelve of whom testified at defendant's trial and seventeen of whom did not. The trial court refused to review the contents of the box either before trial or during trial except for one file on a non-testifying indictment child, which the court reviewed *in camera* during trial at the specific request of defense counsel and determined that no material evidence existed to warrant giving the file to the defense.

After trial, defendant's appellate counsel went to the Office of the Clerk of Court for Pitt County to view the exhibits. He opened several boxes containing trial exhibits, none of which were sealed. One of the boxes counsel opened contained twenty-nine files labeled with the names of the indictment children. Appellate counsel reviewed some of the documents contained in the files before requesting the box to be sealed and transmitted to the Court of Appeals for appellate review. Defendant argues that the files contained undisclosed information that would have been material to the defense.

Judge Tillery's pretrial order, as affirmed by our Supreme Court, was consistent with the United States Supreme Court holding in *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L. Ed. 2d 40 (1987). In *Ritchie*, the United States Supreme Court held that a defendant accused of sexual abuse of a child has a right under the Due Process Clause of the Fourteenth Amendment to have confidential records of a child abuse agency turned over to the trial court for *in camera* review and release of material information. *Ritchie*, 480 U.S. 39, 94 L. Ed. 2d 40. Before his trial, defendant Ritchie served a Pennsylvania social service agency (CYS) with a subpoena seeking access to records concerning his daughter, the alleged victim of the sexual

abuse charges brought against him. CYS acknowledged the existence of such records but refused to produce them, claiming that the records were privileged under Pennsylvania law. Ritchie argued that the records might contain the names of persons who could possibly be favorable witnesses at trial. He also specifically requested a medical report, which he believed CYS compiled during the investigation. The trial court refused to order CYS to disclose the files. At trial, Ritchie's daughter was the main witness against him. Despite a thorough cross-examination, attempting to rebut her testimony and attack her reasons for not reporting the incidents sooner, Ritchie was convicted. *Id.*

A plurality of the United States Supreme Court held that the Confrontation Clause was not violated by withholding the CYS file, and further refused to analyze the case under a Compulsory Process Clause analysis. Rather, the Court determined that Ritchie's claims were more properly considered under the Due Process Clause of the Federal Constitution. The *Ritchie* Court acknowledged the rules set forth in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) and its progeny concerning the State's obligation to turn over to the defense favorable and material information in its possession; however, it noted that neither the prosecution, the defendant nor the trial court had seen the information in the CYS file. Moreover, the information sought by defendant was privileged, with the exception that the agency may disclose the information to a " 'court of competent jurisdiction pursuant to a court order.' " *Id.* at 44, 94 L. Ed. 2d at 49 (quoting Pa. Stat. Ann., Title 11, § 2215(a)(5) (Purdon Supp. 1986)). Therefore, the Court attempted to balance the public's interest in keeping sensitive information confidential, versus the accused's right to a fair trial, by fashioning a remedy in the nature of an *in camera* review of the records by the trial court. It held

> Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records maintained by CYS contain no such information, or if the nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction.

Id. at 58, 94 L. Ed. 2d at 58.

Judge Tillery's order directed the State to turn over privileged information for the court's *in camera* review in compliance with the

holding in *Ritchie*. The order stated that the trial court should "begin the examination process as quickly as possible so as not to delay the trial of this case," and further directed the State to provide to the court information concerning the non-indictment children which the State may attempt to introduce "well before trial so that the Court may have an opportunity to review it."

Judge Tillery's order was consistent with *Ritchie*, and Judge McLelland was bound by the order as affirmed by our Supreme Court. Upon defendant's several requests for *in camera* review of these materials, Judge McLelland refused to look at the materials in the box. Failure to conduct an *in camera* inspection of the files contained therein was error. Therefore, in the event of a retrial, the presiding judge shall comply with the order and review *in camera* the materials in the box according to Judge Tillery's order.

IMPROPER LAY OPINION

[2] Defendant contends that it was error to allow into evidence opinion testimony from several lay witnesses, most of whom were parents of testifying children. Specifically, he says these witnesses gave improper lay opinion by (1) testifying about child abuse and particular behaviors resulting from that abuse, (2) testifying about the motives, intentions and opinions of the children, (3) testifying that the children were not fantasizing or making up abuse allegations, (4) testifying about others' opinions, and (5) testifying that the children knew more than they said. Much of defendant's argument focuses on the fact that many of the opinions expressed by the parents were those of non-testifying therapists. Defendant concludes that "[t]here is a reasonable likelihood that, had the parents not been allowed to give their opinions on the significance of their children's behavior, the jury would have remained unconvinced that the children had been abused by the defendant."

The State responds that the trial court did not abuse its discretion in allowing the evidence because the testimony was based on the parents' actual experience and knowledge of their own children. Moreover, the State denies that parents gave improper lay opinion, and argues that because they testified as parents, rather than non-expert professionals, there was no danger that the jury confused their testimony with that of an expert.

The "state of a person's health, the emotions he displayed on a given occasion, or other aspects of his physical appearance are

proper subjects for lay opinion." *State v. Jennings*, 333 N.C. 579, 607, 430 S.E.2d 188, 201, *cert. denied*, — U.S. —, 126 L. Ed. 2d 602 (1993). Lay opinion on the emotional state of another is permissible if rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony. *State v. Hutchens*, 110 N.C. App. 455, 429 S.E.2d 755, *disc. review denied*, 334 N.C. 437, 433 S.E.2d 181 (1993). When a lay witness testifies to the behavioral patterns and symptoms exhibited by a child (*i.e.*, the characteristics of a sexually abused child), however, she or he has gone outside the perception of the non-expert. *Id.*

Explanations of the symptoms and characteristics of sexually abused children are admissible only through expert testimony for the limited purpose of assisting the jury in understanding the behavior patterns of abused children. Furthermore, evidence of a *particular* child's symptoms, and their consistency with established characteristics of abused children, can come in only through an expert. *Id.*; *see also State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992).

This argument encompasses review of over one hundred specific objections, all of which we have reviewed. Many of the objections have merit. In the interest of brevity, we highlight some that appeared most troubling to this Court, and which best illustrate the nature of the errors we found.

On redirect examination, a mother was asked whether, at the time her child exhibited particular behaviors, she had knowledge of the behaviors seen in a sexually abused child. After acknowledging that she did not, the prosecutor asked whether she subsequently gained that knowledge, and why that knowledge made the behaviors she saw in her child make more sense. She testified that "from everything I was reading and learning, ah, it fit right into what [my child]— the pattern of what had been going with [my children]." Similar statements were made by other parents. Now the State claims that this testimony was not objectionable because it occurred on redirect examination in response to defense questions regarding why the parents did not think the behaviors were unusual at the time they first occurred. We disagree. While "[i]t is permissible on redirect examination to ask questions designed to clarify the witness' testimony on cross-examination, even if the resulting testimony would have been inadmissible otherwise," *State v. Felton*, 330 N.C. 619, 633, 412 S.E.2d 344, 353 (1992), we cannot approve testimony from a non-expert

where such testimony is reserved exclusively for experts. *See Hall*, 330 N.C. 808, 412 S.E.2d 883.

Another parent testified that after his child was examined by a physician who found physical evidence of abuse, he knew "without a shadow of a doubt Bob Kelly raped my daughter." "[W]hile opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness." *State v. Najewicz*, 112 N.C. App. 280, 293, 436 S.E.2d 132, 140 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994) (emphasis in original). " '[R]ape' is a legal term of art." *Id.* Moreover, even an expert witness is not permitted to express his opinion that it was *defendant* who raped an alleged victim. *State v. Galloway*, 304 N.C. 485, 284 S.E.2d 509 (1981).

Another parent, when asked about night terrors versus nightmares, testified that

> I mean, nightmares is one thing, but night terrors you have to—for a child to have a night terror she's had to experience something terrible, just devastating to psychologically generate that activity. And we would never have dreamt that when we first experienced it, but now, now that we have gone through it and gone through the therapy and helped her, we do realize that it is a common occurrence with children that are sexually or physically abused.

This testimony clearly oversteps the boundaries of permissible opinion for a lay witness. *See Hall*, 330 N.C. 808, 412 S.E.2d 883; *Hutchens*, 110 N.C. App. 455, 429 S.E.2d 755.

When asked about her son's memory regarding the day care, another mother surmised that he "has repressed . . . a lot of what *must* have happened." She added that "[h]e has disclosed as much as, I think, he's capable of doing in handling it. He has pushed it away and has actually forgotten things because it was so traumatic. And those have been his coping skills." Again, this is illustrative of a non-expert testifying to matters reserved for expert testimony. Moreover, this statement was not even based on the parent's personal knowledge and was nothing more than speculation. *See* N.C. Gen. Stat. § 8C-1, Rule 602 (1988).

While we call attention here to the admission into evidence of improper opinions, we in no way minimize the importance of parental observations and perceptions in this type of case. Nor do we in any

way limit or restrict admission of such testimony. For example, testimony that a child seemed embarrassed, frightened or displayed other emotions is indeed appropriate. Similarly, testimony about statements and complaints the children made, as well as the childrens' reactions to events, are all appropriate subjects for parental testimony. Many of defendant's objections in this case fell within these constraints and were properly overruled by the trial court.

CHRIS BEAN TESTIMONY

[3] Defendant, according to the State, failed to preserve the following issue for review. However, the State did not present this argument in its brief, but raised it for the first time in a Memorandum of Additional Authorities. Pursuant to Rule 28

> [a]dditional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. *The memorandum may not be used* as a reply brief or *for additional argument*, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority.

N.C.R. App. P. 28(g) (1995) (emphasis added). The State did not raise its preservation argument in a timely manner.

In January of 1989, defendant hired Chris Bean to act as his attorney in this matter. Bean remained his attorney until April of 1989 when he learned that his son had been named as a potential victim of sexual abuse. Bean formally withdrew as counsel in June of 1989. During the period of representation, Bean met with the district attorney and investigating officer and performed other services for defendant. Upon withdrawal, he became a vocal proponent for the prosecuting witnesses. Prior to trial, defendant moved to prohibit Bean and his wife from testifying for the prosecution, or, at a minimum, to prohibit reference to the attorney-client relationship. The trial court denied the motion. Defendant renewed his motion during Grace Bean's testimony and before Chris Bean's testimony.

Defendant contends that attorney Bean "participated in the prosecution of a former client" to his detriment. We disagree. Bean did not participate in the prosecution as that phrase is used in *State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993), and *United States v. Schell*, 775 F.2d 559 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098, 89 L. Ed. 2d 898 (1986), cited by defendant. Both *Reid* and *Schell* dealt with former

defense attorneys who became members of the prosecutor's staff, a situation not presented in this case.

Nonetheless, defendant's motion should have been granted, at least in part. While an order preventing the Beans from testifying *in toto* would have been overly broad, since the Beans, as parents, could corroborate their child's testimony, the trial court erred in allowing reference to the attorney-client relationship and its effect on the Beans. This error becomes apparent upon review of that part of Mr. Bean's testimony that refers to the attorney-client relationship.

Chris Bean testified at trial as follows:

> I had believed adamantly and completely in Bob Kelly's innocence. And for all of those months, ah, from January through that day had believed in his total innocence. And for me, I've never been so shattered, I don't think, in my life as I was on that Saturday, that to face the possibility that the allegations—whatever they were because we still didn't know the specific allegations—could be true. It's the first time that I had admitted to myself that it might be true. And then to think that my own child had been abused. I didn't know whether he had been. I—I selfishly prayed that he hadn't been, but thought some of the others had been. But I thought maybe he has escaped it. And I know Grace and I stood in the kitchen and—and we cried.

Bean also testified to a conversation he had with his child regarding his representation of defendant. He stated, "I just told him that I had been, ah, Bob's attorney and, um, that I had believed that—that Bob was innocent and that Bob had told me he was innocent. And then when I found out about [his child], that I was no longer Bob's attorney." He testified to a similar conversation as follows:

> [Child] said out of the clear blue sky after a whole year, um, he asked me whether I had been Mr. Bob's lawyer. And I then explained to him again that, ah, I had been Mr. Bob's lawyer; Mr. Bob had told me that he hadn't done anything to the children, and that *when I found out that he had* then I wasn't Mr. Bob's lawyer anymore. Um, then [child] said to me that—that Mr. Bob had been lying to me, and he asked me how I had found that out.

The State argues the relevancy of Bean's testimony lies in showing that (1) the Beans did not talk to others about the case, (2) they did not go out and investigate because of the attorney-client relationship, and (3) their child did not disclose earlier because of the

attorney-client relationship. Indeed, the defense theorized that the children did not disclose until after being subjected to improper therapy sessions. Chris Bean testified, however, that his child did not learn he represented defendant until *after* the child had entered therapy. Given the defense of community hysteria, the State argued that it was critical to show that parents, like the Beans, were thoughtful, educated and reasonable people.

Testimony relating to representation was, if at all, minimally relevant and of scant probative value. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (1992). Rule 403 requires balancing the proffered evidence's probative value against its prejudicial effect. *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986). The question is one of degree. *Id.* In this case, the minimal probative value of the evidence is clearly outweighed by its prejudicial impact. It should have been excluded. Moreover, highly prejudicial statements like "I've never been so shattered" and "I *had* believed in his total innocence" have no probative value whatsoever. It was error to allow such testimony.

It is untenable to assert that this error did not prejudice defendant. The prejudice inherent in having your former attorney, once your champion and defender, announce his knowledge of your guilt to the jury is blatantly obvious. In this case, Bean's testimony about his representation of defendant was unnecessary and added nothing to the State's case.

Defendant presents additional assignments of error that may or may not arise in the event this case is retried. In light of our determination that prejudicial error was committed necessitating a new trial, we do not deem it necessary to address those arguments.

New trial.

Judges JOHNSON and JOHN concur.

FIRST HEALTHCARE CORPORATION D/B/A HILLHAVEN SOUTH, INC. D/B/A WINSTON-SALEM CONVALESCENT CENTER, PLAINTIFF v. NELL H. RETTINGER, IND., AND NELL H. RETTINGER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LAWRENCE JOHN RETTINGER, DECEASED, DEFENDANT

No. 9421SC634

(Filed 2 May 1995)

1. Death § 14 (NCI4th)— costs for nursing home services rendered after request to discontinue extraordinary life prolonging treatment—compliance with living will statute—genuine issues of material fact

In an action to recover for nursing home services rendered to a patient who was kept alive by means of a nasogastric tube and who had executed a living will, the trial court erred in granting summary judgment for plaintiff nursing home where genuine issues existed as to whether the attending physician directed the removal of the nasogastric tube and whether a second physician confirmed the attending physician's conclusion that the patient's condition was terminable and incurable before the tube was removed by court order as was required by the living will statute, N.C.G.S. § 90-321. If the statutory requirements were met, then defendant would be responsible only for charges from the date they were met until her husband would have died had the tube been removed, instead of for charges from the date she requested removal of the tube until he actually died some four months later.

Am Jur 2d, Death § 686.

Living wills: validity, construction, and effect. 49 ALR4th 812.

2. Judgments § 208 (NCI4th)— collateral estoppel inapplicable

A finding of the reasonableness of plaintiff nursing home's refusal to remove a feeding tube from defendant's husband without a court order was not necessary for a judge to conclude that the requirements of the living will statute had been met and that the tube should be removed; therefore, collateral estoppel did not apply to prevent defendant from "relitigating" the issue of the reasonableness of plaintiff's conduct in plaintiff's action to recover for nursing home services rendered to defendant's husband after defendant had requested removal of the feeding tube.

Am Jur 2d, Judgments §§ 514-639.

Judge WALKER dissenting.

Appeal by defendant from order entered 19 January 1994 by Judge C. Preston Cornelius in Forsyth County Superior Court. Heard in the Court of Appeals 2 March 1995.

Lawrence Rettinger (hereinafter Mr. Rettinger) cared for his first wife during her prolonged illness and eventual death from cancer. Mr. Rettinger married his second wife, Nell Rettinger (hereinafter Mrs. Rettinger), in November 1985. Prior to marrying Mrs. Rettinger, Mr. Rettinger was diagnosed with Parkinson's Disease. On 18 August 1983, Mr. Rettinger executed a "Declaration Of A Desire For A Natural Death" pursuant to G.S. 90-321. In that document, Mr. Rettinger stated that he did not wish his life to be prolonged by "extraordinary means if [his] condition [was] determined to be terminal and incurable."

Mr. Rettinger was placed in the Winston-Salem Convalescent Center (hereinafter Hillhaven) on 11 January 1990. Mrs. Rettinger signed a document entitled "Standard Nursing Facility Services Agreement" in which she agreed to be financially responsible for services provided by Hillhaven to her husband. Hillhaven was aware that Mr. Rettinger had executed a living will and retained a copy of it in Mr. Rettinger's medical file at Hillhaven.

On 4 February 1991, Dr. Fredric J. Romm, Mr. Rettinger's attending physician, transferred Mr. Rettinger to North Carolina Baptist Hospital for treatment of pneumonia. Dr. Mark Knudson, Mr. Rettinger's primary physician at Baptist Hospital, inserted a nasogastric tube to facilitate administration of his pneumonia medications. On 4 March 1991, Mr. Rettinger was returned to Hillhaven. Mrs. Rettinger stated in her affidavit that when Mr. Rettinger was returned to Hillhaven, he was "bedridden, lying in a fetal position, unable to move and unable to communicate." She further stated that the family was informed that "he had little mental functioning, suffered from dementia, was in the late stages of irreversible Parkinson's Disease, and would die." Mrs. Rettinger alleged that Dr. Knudson had assured her that the tube would be removed within ten days of her husband's return to Hillhaven. The tube was not removed.

Mrs. Rettinger prepared a "No Code Blue" form for Mr. Rettinger in March 1991, requesting that the staff not resuscitate her husband. Because she amended the form to request that no nasogastric tube be used, Hillhaven returned the form as invalid. Mrs. Rettinger then attempted to move her husband to another facility, but could not find

another facility. She stated that she wanted to take him home but the Hillhaven staff told her she could not, "apparently because they felt [she] was not able to care for him." In March 1991, Dr. Romm informed Mrs. Rettinger that Hillhaven had a policy of not removing nasogastric tubes "if to do so would likely cause a patient to starve or dehydrate to death." In a letter dated 20 June 1991, Hillhaven informed Mr. Rettinger's attorney, Norman L. Sloan, that Hillhaven would not remove the nasogastric tube unless the requirements of G.S. 90-321 were satisfied or Mrs. Rettinger obtained a court order for the removal of the tube. Mrs. Rettinger then filed suit against Hillhaven on 27 June 1991 for a declaratory judgment requiring removal of the nasogastric tube. On 12 September 1991, Judge William B. Reingold ordered that the tube be removed. There was no appeal from Judge Reingold's order. The tube was removed on 5 October 1991 and Mr. Rettinger died on 22 October 1991.

On 4 May 1993, Hillhaven filed a complaint against Mrs. Rettinger, individually and as personal representative of Mr. Rettinger's estate, for $14,458.43 for services rendered to Mr. Rettinger from 26 June 1991 to 22 October 1991. On 21 May 1993, Kenneth P. Carlson, Jr. was appointed as Guardian Ad Litem for Mrs. Rettinger to represent her in the action filed by Hillhaven. An answer was filed on Mrs. Rettinger's behalf on 23 June 1993 denying any indebtedness to Hillhaven based in part on the assertion that the services for which Hillhaven sought payment had been expressly rejected by Mr. Rettinger through his living will and by Mrs. Rettinger. Hillhaven made a motion for summary judgment on 4 January 1994 which was granted by Judge C. Preston Cornelius on 19 January 1994. Subsequently, Mrs. Rettinger died. Ashlyn H. Chadwick, the personal representative of Mrs. Rettinger's estate and the substituted personal representative of Mr. Rettinger's estate, appeals.

Allman Spry Humphreys & Leggett, P.A., by David C. Smith and Linda L. Helms, for defendant-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Maureen Demarest Murray and Christine T. Nero, for plaintiff-appellee.

EAGLES, Judge.

I.

[1] Mrs. Rettinger argues that genuine issues of material fact exist, making summary judgment for Hillhaven improper. Summary judg-

ment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . [viewed in the light most favorable to the non-moving party,] show that there is no genuine issue as to any material fact and that a[] party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c).

Mrs. Rettinger argues that genuine issues of material fact exist as to whether the requirements of G.S. 90-321 were met before the nasogastric tube was removed by court order in September 1991. G.S. 90-321(b) provides:

> If a person has declared . . . a desire that his life not be prolonged by extraordinary means or by artificial nutrition or hydration, and the declaration has not been revoked . . . ; and
>
> (1) It is determined by the attending physician that the declarant's present condition is
>
> a. Terminal and incurable; or
>
> . . . .
>
> c. Diagnosed as a persistent vegetative state; and
>
> (2) There is confirmation of the declarant's present condition as set out above in subdivision (b)(1) by a physician other than the attending physician;
>
> then extraordinary means or artificial nutrition or hydration, as specified by the declarant, may be withheld or discontinued upon the direction and under the supervision of the attending physician.

Here, Dr. Romm stated in his affidavit that he signed a form sent by Norman Sloan, Mr. Rettinger's attorney, "which stated that Mr. Rettinger's condition was terminal and incurable and ordered removal of the nasogastric tube." The form, signed by Dr. Romm on 25 June 1991, provided:

> I have examined Lawrence John Rettinger and have determined that his medical condition is terminal and incurable. Nutrition and hydration provided to Mr. Rettinger through a nasogastric tube constitutes life-prolonging extraordinary means. Consistent with the Declaration of a Desire for a Natural Death executed by Lawrence J. Rettinger, I order the removal of the nasogastric tube. The family recognizes that implementation of Mr. Rettinger's Declaration of a Desire for a Natural Death will

result in Mr. Rettinger's death within a relatively short period of time.

The language of this form conforms to the requirement in G.S. 90-321(b) that the attending physician determine that the declarant is terminal and incurable.

Hillhaven argues that Dr. Romm never told Hillhaven to remove the tube after he signed the form. However, the statute does not specify that the attending physician has to personally direct the facility to remove the tube. The statute simply provides that "extraordinary means . . . may be withheld or discontinued upon the direction and under the supervision of the attending physician." Therefore, there is a genuine issue of material fact as to whether Dr. Romm's order to remove the nasogastric tube in the 25 June 1991 form he signed satisfies the language of G.S. 90-321(b) that the attending physician direct the removal of the nasogastric tube and whether his order was communicated to Hillhaven.

G.S. 90-321(b) requires a physician other than the attending physician to confirm the attending physician's conclusion that the declarant's condition is terminal and incurable. Dr. Romm stated in his affidavit that "[t]he findings in the [25 June 1991] form were . . . never confirmed by another physician." However, Norman Sloan stated in his affidavit that a second doctor was willing to confirm Dr. Romm's findings at the time Dr. Romm signed the form. Judge Reingold's September 1991 order, attached as Exhibit C to Hillhaven's May 1993 complaint, included a finding of fact that "Dr. Michael Adler, a colleague of Dr. Romm, saw and observed Mr. Rettinger in July, 1991, and it is Dr. Adler's opinion, which this court accepts, that Mr. Rettinger has severe Parkinson's disease and dementia and there is confirmation of Mr. Rettinger's present condition by Dr. Adler." Judge Reingold's finding of fact, combined with Mr. Sloan's assertion in his affidavit, creates a material issue of fact as to whether the statute's requirement of confirmation by a second doctor was met in July 1991. If the requirements of the statute were met in July 1991, then according to Hillhaven's own policy, set out in its 20 June 1991 letter to Mr. Sloan, Hillhaven should have removed the nasogastric tube in July 1991.

II.

[2] Hillhaven argues that Mrs. Rettinger is collaterally estopped by Judge Reingold's order from "relitigating the issue of the reasonable-

ness of [Hillhaven's] conduct concerning removal of the feeding tube." For collateral estoppel to apply:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

King v. Grindstaff, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973). Hillhaven bases its collateral estoppel argument on Judge Reingold's finding of fact that:

> It was reasonable for William L. Littlejohn, Jr., in his official capacity as Area Administrator of Winston-Salem Convalescent Center, Winston-Salem Convalescent Center, the Hillhaven Corporation and Dr. Fredric Romm to refuse to consent to the family's request that the nasogastric tube be withdrawn from Mr. Rettinger without a Court order authorizing withdrawal of the nasogastric tube.

Hillhaven's argument that Judge Reingold's finding of fact collaterally estops Mrs. Rettinger from "relitigating" the issue of Hillhaven's actions fails because determination of the "reasonableness" of Hillhaven's actions was not necessary for Judge Reingold to conclude that the statutory requirements had been met so the nasogastric tube should be removed. Accordingly, collateral estoppel does not apply here.

III.

Mrs. Rettinger also argues that summary judgment was not appropriate because she is not obligated to pay for medical services rendered by Hillhaven after 26 June 1991. Mrs. Rettinger argues that she had previously requested removal of the nasogastric tube and if her late husband's declaration and her expressed wishes for the nasogastric tube to be removed had been honored, no other medical services would have been necessary. The plain language of the "Standard Nursing Facility Services Agreement" that Mrs. Rettinger signed when Mr. Rettinger was admitted to Hillhaven provided that Mrs. Rettinger agreed to pay for all services rendered to her husband. The agreement contains no language stating that Mrs. Rettinger would only pay for services she authorized. However, we have concluded above that

there are genuine issues of material fact as to whether and when the requirements of G.S. 90-321(b), the living will statute, were met. If a jury determines that the requirements of the living will statute were complied with in July 1991, then the nasogastric tube should have been removed at that time. If the nasogastric tube had been removed in July 1991, it is likely that Mr. Rettinger would not have survived until 22 October 1991 and Mrs. Rettinger's alleged financial obligation to Hillhaven would have been substantially less.

Accordingly, we reverse the summary judgment order and remand for trial to determine whether the requirements of G.S. 90-321(b) were satisfied in July 1991. If so, the factfinder will then need to determine how long after the nasogastric tube was removed would Mr. Rettinger have likely survived. If the requirements of G.S. 90-321(b) are found by the factfinder to have been met, Mrs. Rettinger will be responsible for paying for services rendered between 26 June 1991 and the date the factfinder determines Mr. Rettinger would have died if the tube had been removed in July 1991, but not for any costs incurred thereafter.

IV.

Hillhaven argues in their brief that Mrs. Rettinger guaranteed payment of the services rendered from 26 June 1991 until 22 October 1991. We have reviewed the agreement which Mrs. Rettinger signed and conclude that Mrs. Rettinger did not sign as a guarantor. Under the terms of the agreement, Mrs. Rettinger was a joint obligor. Accordingly, Hillhaven's argument based on Mrs. Rettinger's purported status as a guarantor fails.

V.

Hillhaven also argues that Mrs. Rettinger is liable for the services rendered under the doctrine of necessaries. We do not address this argument because we have already concluded that Mrs. Rettinger will be obligated to pay for the entire amount of medical services rendered by Hillhaven pursuant to the plain language of the agreement she signed unless the factfinder determines that the requirements of G.S. 90-321(b) were met in July 1991.

In sum, we reverse the entry of summary judgment and remand for trial.

Reversed and remanded.

Judge McGEE concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I disagree that genuine issues of material fact exist as to whether the requirements of N.C. Gen. Stat. § 90-321 were met before the nasogastric tube was removed by court order in September 1991 and thus dissent.

Plaintiff submitted the affidavit of Dr. Frederic L. Romm and Lawrence Rettinger's medical chart with its motion for summary judgment. In his affidavit, Dr. Romm states that:

> 12. Between March 1991 and June 1991, I never made the necessary findings nor documented any findings in the medical record that Mr. Rettinger was terminal or incurable or that the nasogastric tube constituted extraordinary means.
>
> 13. In June 1991, Hillhaven's policy was not the reason that I did not order withdrawal of Mr. Rettinger's nasogastric tube or make the findings required under the North Carolina Right to Natural Death Act. Given my understanding of the law and the advice of my attorney, I was not comfortable withdrawing the nasogastric tube from Mr. Rettinger without a court order.
>
> 14. In July 1991, I took a one-month leave of absence. Just prior to this leave of absence, I received a form from the Rettingers' attorney, Mr. Norman Sloan, which stated that Mr. Rettinger's condition was terminal and incurable and ordered removal of the nasogastric tube.
>
> 15. On June 25, 1991, I signed the form and returned it to Mr. Sloan . . . I did not send a copy of the form to Hillhaven or ever communicate to Hillhaven that I had signed it. This form was never entered into Mr. Rettinger's medical record. The findings in the form were also never confirmed by another physician.
>
> . . .
>
> 17. As a result of the court's order, I made findings in Mr. Rettinger's medical record that his condition was terminal and incurable and that the nasogastric tube was extraordinary means. The findings were confirmed by another physician in the medical record. I then ordered removal of the tube and personally

removed the nasogastric tube from Mr. Rettinger. Per my orders, Hillhaven fed Mr. Rettinger by mouth a liquid and then a puree diet.

The medical chart confirms Dr. Romm's statement that he made no findings in the chart pursuant to N.C. Gen. Stat. § 90-321 until 4 October 1991, after the court's order, and that on 5 October 1991, another physician confirmed Dr. Romm's findings in the medical chart.

This evidence establishes that the three requirements of N.C. Gen. Stat. § 90-321 were not met until 5 October 1991, after the court ordered that the tube be removed. Assuming that the language of the form signed by Dr. Romm on 25 June 1991 conforms to the requirement of N.C. Gen. Stat. § 90-321(b)(1), defendant produced no evidence tending to show that defendant or her attorney informed plaintiff that Dr. Romm had made the requisite findings. Moreover, plaintiff's evidence was in no way contradicted by defendant's evidence that a second physician was willing to confirm Dr. Romm's findings at the time he signed the form or by Judge Reingold's September 1991 order containing a finding of fact that "Dr. Michael Adler, a colleague of Dr. Romm, saw and observed Mr. Rettinger in July, 1991, and it is Dr. Adler's opinion, which this court accepts, that Mr. Rettinger has severe Parkinson's disease and dementia and there is confirmation of Mr. Rettinger's present condition by Dr. Adler."

Since defendant failed to produce any evidence to contradict plaintiff's evidence that the requirements were not met until 5 October 1991, there were no genuine issues of material fact as to whether the requirements of N.C. Gen. Stat. § 90-321 were met before the nasogastric tube was removed on 5 October 1991 pursuant to the court's order in September 1991. Thus, summary judgment was properly granted in plaintiff's favor.

DARE COUNTY BOARD OF EDUCATION, A BODY OF POLITIC AND CORPORATE, PLAINTIFF v. ELPIS SAKARIA, DEFENDANT

DARE COUNTY BOARD OF EDUCATION, A BODY OF POLITIC AND CORPORATE, PLAINTIFF v. RAJ ALEXANDER TRUST, ELPIS J.G.B. SAKARIA, TRUSTEE, DEFENDANT

DARE COUNTY BOARD OF EDUCATION, A BODY OF POLITIC AND CORPORATE, PLAINTIFF v. JERA ASSOCIATES, A MARYLAND PARTNERSHIP, DEFENDANT

DARE COUNTY BOARD OF EDUCATION, A BODY OF POLITIC AND CORPORATE, PLAINTIFF v. JACK HILLMAN AND WIFE, LILLIAN HILLMAN

No. COA94-739

(Filed 2 May 1995)

1. Eminent Domain § 24 (NCI4th)— condemnation of land for wetlands mitigation—action permitted by statute

N.C.G.S. § 115C-517 permits a local board of education to condemn land solely for use as wetlands mitigation and a source of fill.

Am Jur 2d, Eminent Domain § 19.

Eminent domain: Right to condemn property owned for used by private educational, charitable, or religious organization. 80 ALR3d 833.

2. Schools § 90 (NCI4th); Eminent Domain § 24 (NCI4th)— condemnation of land for wetlands mitigation—no arbitrary abuse of discretion

Plaintiff board of education's decision that defendants' lots were necessary for construction of its athletic facilities was not an arbitrary abuse of discretion where plaintiff was required to have additional lands for wetlands mitigation and as a source for fill; after plaintiff's first proposal was rejected, a committee was formed which considered forty-one sites, all of which were rejected because of cost, distance, or other reasons; in its second permit application, which was denied, plaintiff proposed areas of off-site mitigation which were also rejected by Coastal Management; and the U.S. Army Corps of Engineers and Coastal Management gave off-site mitigation a lower preference than on-

site mitigation, rejected all of the off-site mitigations proffered by plaintiff, and encouraged the proposal involving defendants' lots.

Am Jur 2d, Schools § 79.

Appeal by defendants from judgment entered 27 April 1994 and corrected judgment entered 25 May 1994 in Dare County Superior Court by Judge Jerry R. Tillett. Heard in the Court of Appeals 23 March 1995.

Kellogg, White, Evans and Gray, by Ronald E. DeVeau, for plaintiff-appellee.

Vandeventer, Black, Meredith & Martin, by Norman W. Shearin, Jr., Robert L. O'Donnell, and R. Gregory McNeer, Jr., for defendant-appellants.

GREENE, Judge.

Elpis Sakaria, Raj Alexander Trust, Elpis J.G.B. Sakaria, Trustee, Jera Associates, and Jack and Lillian Hillman appeal from a 27 April 1994 final judgment and 25 May 1994 corrected judgment entered in Dare County Superior Court, decreeing that the Dare County Board of Education (plaintiff) has the authority to condemn lands for construction and use of proposed school facilities. All the defendants gave notice of appeal; however, because the assignments of error and arguments in defendants' brief only relate to property belonging to defendants Sakaria and the Hillmans, we need only address those arguments. N.C.R. App. P. 10(c)(1); N.C.R. App. P. 28(b).

Plaintiff is responsible for the operation of the Cape Hatteras School (the School) in Buxton, North Carolina, which is located on the Pamlico Sound side of Hatteras Island, part of the Outer Banks. Beginning in 1985 and again in 1988, plaintiff recognized that the School needed additional athletic facilities in order to meet state and southern accreditation requirements and began efforts to expand the School's athletic facilities in 1985. Plaintiff owns a 12.5 acre tract of land which is located west of the School's campus, which includes all land from the highway to the Pamlico Sound east of defendants' lots. Therefore, defendants' lots are surrounded by plaintiff's property on three sides, and the Pamlico Sound on the fourth side. Because portions of plaintiff's land and defendants' lands are wetlands, they are within the jurisdictional bounds of the United States Army Corps of Engineers (the Corps) under Section 404 of the Clean Water Act, 33

U.S.C. § 1344 and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 and of the North Carolina Department of Environment, Health and Natural Resources, Division of Coastal Management (Coastal Management) and subject to numerous state and federal regulations.

Plaintiff planned to use its 12.5 acre lot, which contains 3.1 acres of wetlands, to expand the School's athletic facilities. In June 1988, Coastal Management denied plaintiff's requests for a dredge and fill permit and water quality certification to make the 12.5 acre tract suitable for building athletic fields because plaintiff's proposal would result in an unacceptable loss of wetlands. A second permit application by plaintiff in 1992 was denied by both Coastal Management and the Division of Environmental Management after the coastal wetlands were realigned. On 9 February 1993, plaintiff adopted a resolution approving condemnation of defendant's six lots, lot 5 belonging to the Hillmans and lot 6 belonging to Sakaria, and submitted a proposal involving defendants' lots to the Corps on 15 February 1993. Under this proposal, defendants' lots 5 and 6 would be used only as a source of fill and for wetlands mitigation. This proposal received a conditional permit from the Corps. On 19 February 1993, plaintiff filed four separate actions in Dare County Superior Court to condemn the six lots. The four actions were consolidated, and the court conducted a bench trial on the issue of plaintiff's authority to condemn defendants' property.

At trial, Allen Burrus (Mr. Burrus), a member of plaintiff, testified that after Coastal Management denied a permit to use plaintiff's 12.5 acres for additional facilities, plaintiff "formed an ad hoc committee" which looked for available and suitable properties that were within "five miles of the facility," consisted of "eight or ten acres" and "had to be accessible by road, hard road." Mr. Burrus testified that the properties considered by the ad hoc committee were unavailable because they either did not meet the criteria necessary for school facilities, were deemed an Area of Environmental Concern, consisted of federal property belonging to the National Park Service, or were rejected by the various federal and state agencies having jurisdiction over the wetlands.

Mr. Burrus testified that in order to get a permit from the Corps, plaintiff had to mitigate damages to wetlands, and defendants' property was being offered to satisfy that mitigation "[n]ot completely but

at least partly." Plaintiff's proposal, which included using defendants' lots, received a conditional permit from the Corps. Under plaintiff's proposal, of the 1.8 acres necessary to satisfy the requirement of wetlands mitigation, "approximately a half an acre" of lots 5 and 6 would be used, with property owned by plaintiff supplying the remaining 1.3 acres necessary for mitigation. Mr. Burrus stated that plaintiff's ad hoc committee had "looked for complete sites" and, therefore, had not searched "for alternatives to find a half acre that can be offered for mitigation." Mr. Burrus agreed that there are numerous parcels within Dare County that would contain a half acre of property that could be used to satisfy the mitigation requirement, but because the agencies presented to plaintiff "in verbal exchanges more than once" that on-site mitigation would increase its chances of obtaining a permit, plaintiff looked for "on-site, on-kind mitigation." Mr. Burrus agreed, however, that the Corps permitted off-site mitigation. When asked whether plaintiff considered establishing the half acre of wetlands on property plaintiff already owned, Mr. Burrus replied, "Yes, sir, there was. . . . They just—they never gave us a yes on that. They gave us a yes on this particular scenario [involving defendants' properties] and that's it. And we offered them quite a few scenarios."

George Wood (Mr. Wood), an environmental consultant, testified that he was on the ad hoc committee that looked at forty-one possible sites for the proposed athletic fields. In the second application, plaintiff requested authorization to use a site south of Canadian Hole for off-site mitigation, but the request was denied by Coastal Management. Mr. Wood stated he did not know all the reasons for the denial, "but one of the considerations was that there was concern about off-site mitigation, that the preference of the state agencies was for mitigation which was closer to the development site." On-site means "near the site" where the impacts are. He explained that although off-site mitigation is permitted under the federal regulations, "it is not the highest preference" because the Corps prefers "to have at least the mitigation done in the same system as the unavoidable impacts are done. . . . [I]f there is the opportunity for a higher level of practicable mitigation, higher level in their priority of consideration, that you should use the highest level of mitigation practicable." Mr. Wood testified that the forty-one sites considered by the ad hoc committee were first viewed for use as the facilities, and "they were subsequently reviewed again for sites for mitigation, so we visited each site twice." None of the sites, however, were appropriate for various reasons, including distance, expense, unsuitability, or

unavailability. Mr. Wood also stated that in considering defendants' lots:

> We were trying to meet all the regulatory requirements, site-development requirements and we were trying as best we could to duplicate uses for as much of the property as possible so we could meet the minimization, so that we could meet the requirements of the mitigation not only by the Corps of Engineers but by the state agencies and so that we could meet the requirements of environmental management and other regulatory agencies that were all tugging on this application in different ways. So we felt that the proposed plan—in fact, we were encouraged by the agencies that the proposed plan had merit and that we should advance it and we did and we received approval. . . . [T]he school board advanced the application, but it was advanced at the advice and the consultation with the state and federal agencies, so it was—it was a negotiated application certainly.

He testified that plaintiff advanced its proposal involving defendants' lots to meet the Corps' requirements "to minimize wetland impacts and then to adequately mitigate under their sequence of preference" and to comply with applicable regulations. Mr. Wood also testified that he did not think Coastal Management "rejected the consideration of off-site mitigation. We certainly pursued it, continued to pursue it."

After making findings of fact, the trial court, in its order filed 27 April 1994, concluded plaintiff "has the authority to take the lands of" defendants by condemnation. The court also concluded the lands described in the complaints are necessary for the construction of the school facilities proposed by plaintiff and the uses of portions of the property for wetlands mitigation and a source of fill are necessary for the construction of the school facilities proposed and clearly implied in the condemnation authority of plaintiff. The trial court therefore ordered that plaintiff has the authority to condemn defendants' lots, vested title to defendants' properties in plaintiff, and ordered the Dare County Clerk of Superior Court to disperse the deposits made by plaintiff pursuant to N.C. Gen. Stat. § 40A-41 to each of the defendants "as a credit upon the amount of compensation to be determined and provided by law." The court then entered a corrected judgment "to include the specific descriptions of the lands affected and of the property acquired by" plaintiff.

The issues presented are (I) whether N.C. Gen. Stat. § 115C-517 permits a local board of education to condemn land solely used as wetlands mitigation and a source of fill; and (II) if so, whether plaintiff's action of condemning lots 5 and 6 as necessary to build athletic facilities was an arbitrary abuse of discretion.

I

[1] Defendants first argue that taking lots 5 and 6 only "for mitigation and as a source of fill is neither authorized by the limited grant of authority contained in N.C.G.S § 115C-517 nor clearly implied by that grant" because such uses are not "to construct any 'school facility.' " We reject this argument.

Eminent domain is the "power of the State or some agency authorized by it to take or damage private property for a public purpose upon payment of just compensation," and the manner in which eminent domain may be exercised is prescribed by our General Assembly. *Highway Comm'n v. Matthis*, 2 N.C. App. 233, 238, 163 S.E.2d 35, 38 (1968). Because the exercise of the power of eminent domain is in derogation of property rights, all laws conferring this power must be strictly construed; therefore, statutory grants of the power of eminent domain are "limited to the express terms or clear implication of the act or acts in which the grant of the power of eminent domain is contained." *Id.*

Local boards of education possess the power of eminent domain and have broad discretion to condemn under Chapter 40A of the General Statutes a "suitable site or right-of-way" for "a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities" whenever the board is unable to acquire or enlarge the suitable site or right-of-way by gift or purchase. N.C.G.S. § 115C-517 (1994). "[T]he determination of the local board of education of the land necessary for such purposes shall be conclusive" provided that no more than a total of fifty acres for one site is condemned. *Id.* Plaintiff, therefore, has the discretion under Section 115C-517 to determine what land constitutes a "suitable site" to construct its athletic facilities and what land is "necessary" to construct its athletic facilities, which may, depending on the circumstances of a particular case, encompass more than the actual land on which the athletic facility sits. Plaintiff, therefore, had the discretion under Section 115C-517 to determine that lots 5 and 6 are "necessary" to construct its proposed athletic facilities.

II

[2] Under Section 115C-517, the courts are bound by the discretionary decision of a local board of education in selecting and determining the land necessary to construct a school, school building, school bus garage, a parking area, an access road suitable for school buses or "other school facilities" unless that decision is an "arbitrary abuse of discretion or disregard of law." *Board of Educ. v. Allen*, 243 N.C. 520, 523, 91 S.E.2d 180, 183 (1956) (discussing predecessor to 115-517); *see also Department of Transp. v. Overton*, 111 N.C. App. 857, 859, 433 S.E.2d 471, 473 (1993); *Guyton v. Board of Transp.*, 30 N.C. App. 87, 90, 226 S.E.2d 175, 177 (1976). A discretionary act is an arbitrary abuse of discretion when it is "not done according to reason or judgment, but depending upon the will alone" and "done without reason." *In re Housing Auth.*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952); *Wyatt v. Hollifield*, 114 N.C. App. 352, 358, 442 S.E.2d 149, 153 (1994) (abuse of discretion means action so arbitrary it could not have been result of a reasoned decision).

Defendant argues that plaintiff's decision to use lots 5 and 6 only for wetlands mitigation and as a source of fill is arbitrary and capricious because "there were alternate sources available to meet [plaintiff]'s mitigation needs," and plaintiff did not explore available off-site mitigation alternatives. We disagree.

The evidence in this record shows that because the area on Hatteras Island on which plaintiff is proposing to build an athletic facility is an ecologically sensitive area containing a significant portion of wetlands which are under the jurisdiction of the Corps and Coastal Management and subject to other federal and state agencies, plaintiff cannot construct its proposed athletic facility without having additional land for wetlands mitigation and as a source for fill. For mitigation purposes, plaintiff has to create wetlands to replace the acre of wetlands which was to be filled under its proposal. The evidence also shows that after plaintiff's proposal in its first permit application was rejected, plaintiff formed a committee and considered forty-one sites as "complete sites" and for mitigation purposes, all of which were rejected because of cost, distance, or other reasons. In its second permit application, which was denied, plaintiff proposed areas of off-site mitigation which were also rejected by Coastal Management. Although plaintiff was aware that off-site mitigation was permitted and there were other sources of fill on Cape Hatteras, the Corps and Coastal Management gave off-site mitigation a lower

preference than on-site mitigation, rejected all of the off-site mitigations proffered by plaintiff, and encouraged the proposal involving lots 5 and 6, which would provide on-site mitigation. Although there is evidence that alternate sites were available which plaintiff did not consider, we cannot say on this record that plaintiff's decision to condemn lots 5 and 6 was "not done according to reason or judgment, but depending upon the will alone" and "done without reason." Therefore, plaintiff's decision that lots 5 and 6 are necessary for construction of its athletic facilities was not an arbitrary abuse of discretion.

Defendants also argue in their brief that the trial court "clearly erred in finding that [plaintiff] made a good faith effort to acquire all six lots by purchase as required by N.C.G.S. § 115C-517." Because, however, defendants did not assign this finding as error, we need not address this argument. N.C.R. App. P. 10(c)(1). For these reasons, the decision of the trial court is

Affirmed.

Judges LEWIS and MARTIN, MARK D., concur.

STATE OF NORTH CAROLINA v. KATHRYN DAWN WILSON

No. 931SC1277

(Filed 2 May 1995)

1. Constitutional Law § 248 (NCI4th)— sexual abuse case—State's withholding of favorable evidence—no error

There was no merit to defendant's contention that the State violated *Brady v. Maryland*, 373 U.S. 83, by withholding favorable evidence in its possession, since defendant was not entitled to such information in the State's possession until trial, and after jury selection the State complied by providing the defense with notes in its possession on all children who testified at trial; furthermore, defendant could have requested an in camera inspection of the specific documents by the trial court in order for the court to determine its relevance to the defense. The trial court did violate defendant's due process rights, however, in failing to conduct a review of the privileged materials brought forth for in cam-

era review pursuant to a judge's pretrial order applicable to all defendants in the case.

Am Jur 2d, Criminal Law § 774.

2. **Evidence and Witnesses § 3052 (NCI4th)— sexual abuse case—defendant's drug use—cross-examination error**

In a prosecution of defendant for sexual abuse of children in the day care center in which she worked, the trial court erred in allowing the prosecutor to cross-examine her regarding her drug knowledge and use, since this evidence was irrelevant and inadmissible under Rule 608(b) of the Rules of Evidence.

Am Jur 2d, Witnesses §§ 591-595.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity not having resulted in arrest or charge—modern state cases. 24 ALR4th 333.

3. **Criminal Law § 462 (NCI4th)— closing argument by prosecutor—reference to collateral matter—grossly improper argument**

The State made grossly improper arguments during its closing jury argument where, under the guise of explaining the law on collateral matters, the prosecution accomplished during its closing argument precisely what it could not during the trial, which was to contradict the defendant's answer that she had not stolen money, and the trial court erred in not intervening *ex mero motu.*

Am Jur 2d, Criminal Law § 917.

Appeal by defendant from judgment entered 26 January 1993 by Judge D. Marsh McLelland in Pasquotank County Superior Court. Heard in the Court of Appeals 9 January 1995.

Robert and Betsy Kelly hired defendant in 1988 to serve as a cook for their day care center. In addition to cooking, defendant filled in for teachers and looked after children who were dropped off after school. Defendant's arrest for sexual abuse followed the investigation into allegations made against Robert Kelly.

Defendant was originally charged with twenty-five crimes ranging from first degree sexual offense to conspiracy to commit indecent liberties with a child. Four children testified against defendant. Based

on this testimony, the trial judge submitted one charge of first degree sexual offense and four charges of taking indecent liberties with children. The jury found defendant guilty of all five charges, and the trial judge sentenced her to life imprisonment. Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General William P. Hart, for the State.

J. Kirk Osborn for defendant appellant.

ARNOLD, Chief Judge.

PRETRIAL DISCOVERY

[1] Defendant assigns as error that material information was unconstitutionally withheld that would have been of material benefit to her defense. She incorporates by reference a similar, but more fully developed argument made in the defendant's brief to this Court in *State v. Kelly*, 118 N.C. App. 589, 456 S.E.2d 861 (1995). N.C.R. App. P. 28(f) (1995). Generally, defendant contends that the United States Supreme Court's holdings in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) and *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L. Ed. 2d 40 (1987) were violated. Our decision in *Kelly* is determinative of the outcome of this issue, and we refer to that decision for a more complete analysis. Additionally, we note that defendant's pretrial motions relevant to this discussion were adopted by the trial court in the instant case.

Defendant argues that the State violated *Brady* by withholding favorable evidence in its possession. We disagree. Defendant filed a Motion for Disclosure of Impeaching Information (*Brady* motion), alleging that based upon the evidence presented at Robert Kelly's trial there existed information within the State's possession that was exculpatory to defendant and to which defendant was entitled before trial. She offered in support of her motion Robert Kelly's defense counsel, Michael Spivey's affidavit, in which he stated that there was exculpatory material pertaining to Dawn Wilson in the information he received on the twelve children who testified against Kelly.

The trial court properly denied defendant's motion. Although her counsel was in a different position than counsel in *Kelly*, since he was specifically aware of potentially exculpatory testimony by indictment children and their parents, under our discovery statutes, and *Brady*, defendant was not entitled to such information in the State's possession until trial. N.C. Gen. Stat. § 15A-903 (1988); *United States v.*

Agurs, 427 U.S. 97, 49 L. Ed. 2d 342 (1976); *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). After jury selection the State complied by providing the defense with notes in its possession on all children who testified at trial. Furthermore, if defendant was aware of specific non-privileged documents in the State's possession, she could have requested an *in camera* inspection of the specific document(s) by the trial court in order for the court to determine its relevance to the defense. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977). Defendant's knowledge of specific documents is certainly conceivable because she had access to transcripts from Robert Kelly's trial that may have disclosed the existence of specific documents relevant to her own defense.

We agree with defendant, however, that she was denied her right to due process under the Federal Constitution when the trial court failed to conduct a review of the privileged materials brought forth for *in camera Ritchie* review pursuant to Judge Tillery's pretrial order applicable to all defendants. We take judicial notice of materials referred to in *Kelly* for purposes of the present appeal. *See Barker v. Agee*, 93 N.C. App. 537, 378 S.E.2d 566 (1989), *aff'd in part, rev'd in part*, 326 N.C. 470, 389 S.E.2d 803 (1990) (holding that the appellate court may take judicial notice of its own records in related proceedings). Therefore, in the event of a retrial, the presiding judge shall review *in camera* the materials at issue pursuant to Judge Tillery's order as affirmed by our Supreme Court.

CROSS-EXAMINATION ABOUT DRUG USE

[2] Defendant contends the trial court erred in allowing the prosecutor to cross-examine her regarding her drug knowledge and use. Citing *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), and *State v. Rowland*, 89 N.C. App. 372, 366 S.E.2d 550 (1988), she argues that her previous drug use is irrelevant under Rule 608(b) of our Rules of Evidence, and that its admission entitles her to a new trial.

Rule 608(b) evidence is admissible in the narrow instance where

> (1) the *purpose* of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; and (2) the conduct in question *is in fact probative* of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question did *not result in a conviction*; and (4) the inquiry into the conduct *takes place during cross-examination*.

Morgan, 315 N.C. at 634, 340 S.E.2d at 89-90 (emphasis in original). When determining admissibility "[t]he focus . . . is upon whether the conduct sought to be inquired into is of the type which is indicative of the actor's character for truthfulness or untruthfulness." *Id.* at 634-635, 340 S.E.2d at 90. Consequently, drug use is generally considered irrelevant. *Morgan*, 315 N.C. 626, 340 S.E.2d 84; *see also Rowland*, 89 N.C. App. 372, 366 S.E.2d 550 (stating that, standing alone, evidence of drug addiction is not probative of truthfulness or untruthfulness); *State v. Clark*, 324 N.C. 146, 167, 377 S.E.2d 54, 67 (1989) (holding that question during cross-examination about defendant's use of marijuana "had no conceivable tendency to prove or disprove her truthfulness").

Here, the prosecutor questioned defendant about her prior use of cocaine and marijuana. This evidence was irrelevant and inadmissible under Rule 608(b). The State contends, however, that even if irrelevant under Rule 608(b), the evidence is admissible under Rule 611(b) because it bears on defendant's ability to observe, retain and describe details of events. The State cites *State v. Williams*, 330 N.C. 711, 412 S.E.2d 359 (1992), in support of this argument. *Williams* held that "[w]hile specific instances of drug use or mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as to 'cast doubt upon the capacity of a witness to observe, recollect, and recount.' " *Williams*, 330 N.C. at 719, 412 S.E.2d at 364 (quoting 3 David Louisell & Christopher B. Mueller, *Federal Evidence* § 305, at 326 (1979)).

Williams is distinguishable from the present case. In discussing time lapse between use of the drug and the relevant events, the *Williams* Court noted that "nearly all [jurisdictions] impose . . . some form of restraint on the use of evidence that a witness has suffered or suffers from mental illness or addiction or alcoholism. The most common restraint or limiting factor is that *the witness must be a crucial witness for the prosecution.*" *Id.* at 723, 412 S.E.2d at 366. The Court noted that all North Carolina cases addressing admissibility of this type of evidence under Rule 611(b) involved the cross-examination of a key State witness. *Id.* That situation does not exist here, and we see no compelling reason to extend *Williams'* rationale to this case.

"A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error . . . not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (1988). The State contends

defendant suffered no prejudice "in view of the defendant's admissions" to prior acts of misconduct, about which she was cross-examined extensively. We disagree. At trial, defendant admitted forging a check after stealing a co-worker's purse, but denied another theft.

When a case turns on the credibility of the witnesses it is difficult to hold such an admission harmless. *Rowland*, 89 N.C. App. 372, 366 S.E.2d 550 (finding prejudicial error where evidence of drug addiction erroneously admitted and case turned on whether jury believed defendant or alleged victim). Here, the State's case consisted primarily of the testimony of young children, accompanied by corroborating testimony from their parents. All of the children testified to events occurring approximately three years before trial when they were only three or four years old. Other than the children there were no witnesses to the alleged abuse, and scant physical evidence supported the charges against this defendant. Defendant testified on her own behalf and denied all of the allegations. Her credibility was critical to her defense and, as in *Rowland*, "[w]e cannot say that there is no 'reasonable possibility that, had this error . . . not been committed,' the jury would have reached a different verdict." *Rowland*, 89 N.C. App. at 383, 366 S.E.2d at 556 (quoting N.C. Gen. Stat. § 15A-1443(a) (1988)).

GROSS IMPROPRIETIES IN CLOSING ARGUMENT

[3] Finally, we address defendant's assertion that the State made grossly improper arguments during its closing jury argument. Defendant, however, failed to object to any of the arguments she now says were so improper. "[T]herefore, [she] may now only assert that the trial judge should have corrected the argument *ex mero motu*." *State v. Craig*, 308 N.C. 446, 454, 302 S.E.2d 740, 745, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). The standard on review is that of gross impropriety, *id.*, and "the impropriety . . . must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

Defendant first contends that the prosecutor erred when he referred to the following collateral matter during his closing argument:

> One of the things that you need to know, ladies and gentlemen, as I've told you about other evidence, we're bound by the rules of

> law and we cannot put on just any kind of evidence we want to. One of the things that we can't do is impeach a witness on a collateral matter.
>
> Now, a collateral matter is something that's not relevant, something that's not probative of the issues in this case. An example . . . . That's a collateral matter, not an issue in this case. So I couldn't have called Francis Layden as a witness and said yes, these things are true. Also could not call Captain Bonner and Kelly Jones Weber, the people that I had sitting in the courtroom that one day when I was asking Dawn about her thefts. I knew that I could not call them to rebut what she said because that was a collateral matter. I was bound by her answers but I didn't think she would know that. So I had them here so she would be confronted with them and realize that they were here and that they were ready to testify if she didn't tell the truth. But I could not put those people on the witness stand to say to the contrary because we were bound by that, I was bound by her answers.

This was a grossly improper argument. Under the guise of explaining the law on collateral matters, the prosecution accomplished during its closing argument precisely what it could not during the trial. As the State is more than well aware, " 'answers made by a witness to collateral questions on cross-examination are conclusive,' " and extrinsic evidence is not admissible to contradict the witness' answer. *State v. Robinette*, 39 N.C. App. 622, 625, 251 S.E.2d 635, 637 (1979) (quoting *State v. Long*, 280 N.C. 633, 639, 187 S.E.2d 47, 50 (1972); *see also State v. Shane*, 304 N.C. 643, 285 S.E.2d 813 (1982), *cert. denied*, 465 U.S. 1104, 80 L. Ed. 2d 134 (1984).

During a very lengthy cross-examination concerning this incident, defendant specifically denied stealing from Kelly Jones Weber. Weber had been a passenger in defendant's car, and defendant maintained that she discovered Weber's money on the floor in the back seat afterwards. The prosecutor was bound by this answer and could not call Weber or Captain Bonner, the investigating officer, to the stand to contradict her. In his closing argument, however, he did just that when he labeled the incident a theft and told the jury that Weber and Captain Bonner were present in the courtroom to assure that defendant told the truth.

"[I]t [is] improper for the State to argue [a] previously denied allegation as a proven fact." *State v. Jolly*, 332 N.C. 351, 368, 420 S.E.2d 661, 671 (1992). Moreover, we strongly disapprove of this flagrant vio-

lation of our rules of evidence and misuse of closing argument. "[C]ounsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975). We are unconvinced by the State's proposition that defendant invited the prosecutor's remarks by arguing that the State did not want the jury to see the whole picture. That argument does not relate to this specific incident. *But see State v. Stegmann*, 286 N.C. 638, 213 S.E.2d 262 (1975), *vacated in part*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976) (stating that counsel's repeated arguments that no evidence showed defendant was arrested for rape in 1971 invited prosecutor's argument that he could not introduce independent evidence of a collateral matter). We believe that the trial court erred in not intervening *ex mero motu*.

Defendant also argues that the prosecutor erred by commenting that defendant opened the door to the introduction of therapists' notes to "rub in" an alleged defense mistake. She further contends the prosecutor erred by telling the jury they could take the notes into the jury room unless defendant objected. Because we have determined above that a portion of the prosecutor's argument constituted prejudicial error, it is unnecessary to consider whether these and defendant's two remaining contentions under this issue merited *ex mero motu* intervention. Nonetheless, we take this occasion expressly to disapprove of the foregoing arguments by the prosecutor in that they mislead, misstate the law, and are calculated to demean defense counsel.

Defendant presents additional assignments of error which may or may not arise in the event of retrial, and in light of our determination that prejudicial error was committed entitling defendant to a new trial, we do not deem it necessary to address those arguments.

New trial.

Judges JOHNSON and JOHN concur.

ROBERT H. MOORE, JR., EMPLOYEE, PLAINTIFF v DAVIS AUTO SERVICE, EMPLOYER; PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 9410IC575

(Filed 2 May 1995)

Workers' Compensation § 252 (NCI4th)— plaintiff's disability—sufficiency of evidence

Testimony by a physician, a therapist, and two vocational rehabilitation specialists supported the Industrial Commission's finding that plaintiff was unable, as a result of injury sustained in the course and scope of his employment with defendant-employer, to earn wages in his former employment or in any other employment, and the Commission properly concluded that plaintiff was entitled to continued benefits for temporary total disability pursuant to N.C.G.S. § 97-29.

Am Jur 2d, Workers' Compensation §§ 381, 382.

Appeal by defendants from the Opinion and Award entered 16 March 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 February 1995.

On 7 July 1988, plaintiff, Robert Moore, who had been employed by Davis Auto Service (defendant-employer) as a mechanic for ten weeks, sustained a fracture of his right scapula, other injuries to his right shoulder, and a cervical strain when a van beneath which he was working slipped off a lift. Plaintiff was treated by Dr. David O. Lincoln who advised him not to work and prescribed anti-inflammatory medications, pain medications, and a physical therapy program. Defendants admitted liability under the Workers' Compensation Act and began paying plaintiff benefits for temporary total disability beginning 15 July 1988 and continuing for "necessary" weeks.

Dr. Lincoln advised plaintiff that he could return to work on 6 February 1989, but plaintiff was unable to perform his duties as a mechanic because of restricted motion and continued pain in his right shoulder. Dr. Lincoln subsequently formed an opinion that plaintiff was incapable of mechanical labor and recommended that he undertake less physically demanding job activities. However, there was no "light" work available for plaintiff at Davis Auto Service. The

parties executed a Form 26 supplemental agreement pursuant to which defendant-carrier resumed payment of benefits for temporary total disability beginning 11 February 1989 and continuing for "necessary" weeks. By 28 June 1989, Dr. Lincoln was of the opinion that plaintiff had reached maximum medical improvement, although he continued to have restricted motion and pain in his shoulder. Dr. Lincoln assigned plaintiff a fifteen percent partial permanent disability rating of the right shoulder.

Nancy Douglas, an occupational therapist at Asheville Rehabilitation Center, evaluated plaintiff in May 1989. Her evaluation revealed that plaintiff was severely restricted in his functional capacities secondary to right shoulder pain, left hip pain, and general deconditioning. In her opinion, plaintiff was not magnifying his symptoms and she "would not anticipate him being able to perform a job that required physical exertion, static positioning (standing or sitting), or repetitive movements."

Plaintiff also underwent a psychological evaluation in September 1989. In the opinion of Edwin Crenshaw, the psychological associate who evaluated him, plaintiff was suffering from an affective disorder and, provisionally, a somatoform pain disorder, and "his physical problems, as well as his depression, cause significant limitations in [his] ability to sustain concentration and persistence in social interactions and in adaptation, and even sedentary work would be inappropriate [for him] at this time."

Defendant-carrier, concerned that plaintiff was malingering, referred him to George Page, a vocational rehabilitation specialist, for evaluation of his work potential. Mr. Page conducted a job search in the automotive field in Buncombe County, seeking employment for plaintiff as a runner or parts delivery person. No such positions were available at that time. Mr. Page widened his search, identifying available jobs in other fields in the county which he believed plaintiff was capable of performing. Plaintiff applied for several of the positions but was not offered employment because, according to Mr. Page, the employers told him plaintiff lacked enthusiasm. Mr. Page conceded, however, that the physical requirements of these jobs could have rendered them inappropriate for plaintiff in view of the requirements for lifting and for standing for long periods of time. Stephen Carpenter, another vocational rehabilitation specialist who examined plaintiff at the request of his attorney, was of the opinion that plaintiff was "not employable in any work setting."

Defendant-carrier also hired Carter Investigations, Inc., a private investigations firm, to monitor plaintiff's physical activities. The investigators reported observing plaintiff on 2 August 1990 for approximately five hours while he was allegedly cutting up a fallen tree two feet in diameter and dragging and piling brush at his new home site with minimal rest time and without any physical impairment. The investigators also reported observing plaintiff for several hours doing yard work during the period from 4-8 September 1990. Plaintiff denied that he had engaged in such activity and contended that the investigators had mistakenly been observing his uncle, who resembles him.

On 9 April 1991, defendants filed a Request that Claim be Assigned for Hearing, alleging that plaintiff was no longer entitled to temporary total disability benefits. After a hearing, Deputy Commissioner Charles Markham filed an Opinion and Award on 18 December 1992 concluding that plaintiff was entitled to continuing compensation for temporary total disability. Defendants gave notice of appeal to the Full Commission and filed a Motion for a New Hearing to Take Additional Evidence. On 16 March 1994, the Full Commission entered its Opinion and Award declining to receive further evidence, making its own findings of fact, and concluding that plaintiff remained totally disabled, entitling him to continued benefits for temporary total disability pursuant to N.C. Gen. Stat. § 97-29 for so long as such disability continues. Defendants appealed.

Ganley, Ramer, Finger & Strom, by Thomas F. Ramer, for plaintiff-appellee.

Ball, Barden, Contrivo & Bell, P.A., by Thomas R. Bell, Jr., for defendant-appellants.

MARTIN, John C., Judge.

Defendants assign error to several of the Full Commission's findings of fact and conclusions of law, to its Opinion and Award as being unsupported by the evidence, and to its refusal to hear additional evidence. After careful review, we reject defendants' arguments and affirm the Opinion and Award.

Defendants' primary argument is that the Full Commission erred by awarding plaintiff continued benefits under G.S. § 97-29 because the overwhelming weight of the evidence showed that plaintiff was employable. We disagree.

The Industrial Commission is the finder of facts in actions brought pursuant to the Workers' Compensation Act. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E.2d 577 (1976). In performing its function as factfinder, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may accept or reject a witness' testimony based solely on its assessment of the witness' credibility. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). Appellate review of an Opinion and Award of the Commission is limited to two questions of law: (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings of fact justify its legal conclusions. *Watkins v. City of Asheville*, 99 N.C. App. 302, 392 S.E.2d 754, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). When the Commission's findings of fact are supported by sufficient evidence, they are binding on the reviewing court despite the existence of evidence supporting contrary findings. *Hilliard, supra.*

In order for a claimant to receive continuing compensation under G.S. § 97-29, he has the burden of proving the existence of a disability as well as its extent. *Id.* N.C. Gen. Stat. § 97-2(9) defines "disability" as "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." Thus, the claimant's burden is to show that because of injury his earning capacity is impaired. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). "Once the burden of disability is met, there is a presumption that disability continues until 'the employee returns to work at wages equal to those he was receiving at the time his injury occurred.' " *Simmons v. Koger Co.*, 117 N.C. App. 440, 443, 451 S.E.2d 12, 14 (1994), *quoting Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E.2d 588 (1971). The burden then shifts to the employer to produce evidence that the claimant is employable. *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 441 S.E.2d 145 (1994). The employer must "come forward with evidence to show not only that suitable jobs are available, but also that the [claimant] is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). A job is "suitable" if the claimant is capable of performing it considering his age, education, physical limitations, vocational skills, and experience. *Burwell, supra.* The claimant is "capable of getting" a job if there is a reasonable likelihood that he would be hired if he diligently sought to obtain the job. *Id.*

In this case, the evidence provided by Dr. Lincoln, plaintiff's treating physician, and by Ms. Douglas, Mr. Crenshaw, Mr. Carpenter and even Mr. Page support the Commission's finding that plaintiff was unable, as a result of injury sustained in the course and scope of his employment with defendant-employer, to earn wages in his former employment or in any other employment. As we noted in *Kennedy*, 101 N.C. App. at 31, 398 S.E.2d at 681:

> Our Supreme Court has approved the use of expert medical testimony on the issue of a claimant's ability to earn wages . . . . Similarly, this court has approved the use of testimony by vocational rehabilitation specialists on the issue of wage earning capacity . . . . (Citations omitted.)

Additionally, we held in *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 374 S.E.2d 483 (1988), that evidence of an employer's refusal to allow an employee to return to work because there was no "light" work available supports a finding that the employee was not capable of earning wages in the same employment. Thus, plaintiff has presented ample competent evidence showing that his wage earning capacity remained impaired by injury, which satisfied his burden of proof and shifted the burden to defendants to show that plaintiff is capable of earning wages in some other employment. The Full Commission, apparently rejecting defendants' evidence as not credible, found that defendants had not met the burden imposed by *Kennedy*, *supra*. Accordingly, the Full Commission did not err in concluding that plaintiff remains totally disabled and entitled to compensation under G.S. § 97-29.

Four of defendants' five remaining assignments of error challenge the findings of fact and conclusions of law made by the Commission. Specifically, defendants contend that seven of the thirteen findings of fact, which relate to plaintiff's employability, are not supported by sufficient evidence; that conclusion of law #1, which comments on defendants' failure to introduce Dr. Lincoln's medical records, is an improper conclusion; and that all but one conclusion of law, which relate to the parties' burden of proof, do not apply to the facts of this case. We have reviewed each of the questioned findings and rule that there was competent evidence to support each finding; therefore, they are binding on appeal. *Hilliard*, *supra*. We have also reviewed the Commission's conclusions of law and determine that they are correct statements of the law and are supported by the facts found in this case.

Finally, defendants contend the Commission erred when it denied their motion for a new hearing to take additional evidence. The statute controlling the receipt of additional evidence on appeal to the Full Commission provides:

> [i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, *if good ground be shown* therefor, . . . *receive further evidence* . . . .

N.C. Gen. Stat. § 97-85 (1991) (emphasis added); *Keel v. H & V Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992). The Commission's power to receive additional evidence is a plenary power "to be exercised in the sound discretion of the Commission." *Lynch v. Construction Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). "[W]hether 'good ground be shown therefore' in any particular case is a matter within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion." *Id. at* 131, 254 S.E.2d at 238.

In the present case, the additional evidence which defendants sought to introduce was edited videotape taken in 1993 by the private investigators which purportedly showed plaintiff, along with his uncle, engaged in physical activity; the written reports of the investigators' surveillance; and affidavits by one of the investigators and by plaintiff's estranged wife regarding the extent of plaintiff's physical activities. In our opinion, especially in light of the fact that other unedited videotaped evidence had already been received, the proffered evidence is simply cumulative. Defendants have not shown a manifest abuse of the Commission's discretion and we will not disturb its denial of defendants' motion.

The Opinion and Award of the Full Commission is

Affirmed.

Chief Judge ARNOLD and Judge WYNN concur.

CARL O. HOCKE, PLAINTIFF v. BENEDICT K. HANYANE, DEFENDANT

No. 9318SC726

(Filed 2 May 1995)

Process and Service § 74 (NCI4th)— summons addressed to defendant at mother's home in South Africa—sufficiency of service of process

The trial court did not err in entering default judgment against defendant under circumstances in which service of process was made to the address of defendant's mother in South Africa and not to the address of defendant, since the return receipt indicated the complaint and summons were in fact received at the stated address by the individual whose signature appeared thereon; defendant made no attempt to rebut his presumed receipt of a copy of the complaint and summons; defendant's signature appeared on the return receipt; service was not declined or rejected on grounds that the individual to be served was not available at the designated premises; defendant was a transient and apparently attempted to avoid financial obligations in the United States by returning to South Africa; plaintiff testified that the signature was that of defendant; and defendant's attorney testified that he went over the complaint, received by him from plaintiff's attorney, "piece by piece" prior to accomplishment of service.

Am Jur 2d, Process §§ 357 et seq.

Necessity and sufficiency of service of process under due process clause of Federal Constitution's Fourteenth Amendment—Supreme Court cases. 100 L. Ed. 2d 1015.

Appeal by defendant from judgment filed 22 February 1993 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 23 March 1994.

Gabriel Berry & Weston, by M. Douglas Berry, for plaintiff-appellee.

Harris & Iorio, by Douglas S. Harris, for defendant-appellant.

JOHN, Judge.

Defendant appeals entry of judgment by default. He contends the trial court erred by: (1) rendering judgment following inadequate service of process, (2) basing the judgment upon rumor and speculation, and (3) proceeding to judgment prior to the filing of executed summons. Defendant's assertions are unfounded.

Facts and procedural information pertinent to this appeal are as follows: In February 1988, Benedict Hanyane (defendant) was seriously injured in an automobile accident and thereafter remained totally disabled for a lengthy period of time. Carl Hocke (plaintiff) loaned defendant considerable sums of money to assist with his financial difficulties. These funds were provided from plaintiff's personal accounts based upon his desire to help an individual in need and were not advanced in connection with plaintiff's representative capacity as Outreach Minister of St. Pius X Catholic Church in Greensboro. Defendant agreed to repay the monies furnished by plaintiff.

Following defendant's failure to pay the debt and his subsequent avoidance of plaintiff, the instant suit was filed alleging breach of contract as well as fraud. The latter count was based upon plaintiff's having advanced defendant money to travel to South Africa following his mother's alleged stabbing death and plaintiff's subsequent receipt of information that the woman was in fact not deceased.

Plaintiff attempted to serve defendant at his last known address in Greensboro, but the summons was returned unserved 19 June 1992. An alias and pluries summons was issued 10 September 1992 for the same address, but did not appear in the court file until 24 June 1993. A third summons was issued 27 October 1992 which also never appeared in the file prior to 24 June 1993. This last summons was addressed to "Benedict K. Hanyane, c/o Frances Hanyane" at an address in South Africa. Frances Hanyane is defendant's mother. The summons was served 12 November 1992 at the address in South Africa which in actuality was the home of defendant's brother.

On 14 January 1993, plaintiff moved for entry of judgment by default. Attached to plaintiff's motion was an affidavit directing the court's attention to a "Certificate of Mailing of Service of Process" previously executed and filed by an Assistant Clerk of Superior Court which included a genuine copy of a Return Receipt indicating service being effected on 12 November 1992. Plaintiff's motion was granted in

open court 3 February 1993, and judgment was filed accordingly 22 February 1993. Defendant gave notice of appeal to this Court 1 March 1993.

I.

Defendant first contends the trial court erred in entering default judgment against him under circumstances in which service of process was made to the address of a family member and not to the address of defendant. We find his argument unpersuasive.

The trial court in the case *sub judice* determined "service of process was had on the Defendant Benedict K. Hanyane, pursuant to Rule 4(j)(3) of the North Carolina Rules of Civil Procedure." We note parenthetically that the applicable rule is in fact Rule 4(j3). However, any error in designation appears to be clerical, and it is apparent from the context that the court was indeed referring to Rule 4(j3) which states in pertinent part:

> *Service in a foreign country.*—Where service is to be effected upon a party in a foreign country, in the alternative service of the summons and complaint may be made . . . (iv) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of court to the party to be served. . . .

N.C. Gen. Stat. § 1A-1, Rule 4(j3) (1990). Thus, our focus herein is upon whether the summons and complaint were sent "to the party to be served." We believe the trial court properly resolved this issue against defendant.

First, we note the Clerk's "Certificate of Mailing of Service of Process," which incorporated the return receipt and which was contained in the court file and reviewed by the trial judge, reflected that a copy of the complaint and summons were deposited, return receipt requested, in the U.S. Post Office for mailing and that the return receipt indicated the complaint and summons were in fact received at the stated address by the individual whose signature appeared thereon. Rule 4(j2) states:

> Before judgment by default may be had on service by registered or certified mail, the serving party shall file an affidavit with the court showing proof of such service . . . This affidavit together with the return receipt signed by the person who received the

> mail if not the addressee raises a presumption that the person who received the mail and signed the receipt . . . was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode.

N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (1990). Therefore, the certificate of service itself indicates sufficient compliance with Rule 4 to "raise a rebuttable presumption of valid service." *In re Cox*, 36 N.C. App. 582, 586, 244 S.E.2d 733, 736 (1978). At the hearing below, defendant made no attempt to rebut his presumed receipt of a copy of the complaint and summons on 12 November 1992. No testimony, affidavit or other evidence of record addressed this point. *See Warzynski v. Empire Comfort Systems*, 102 N.C. App. 222, 228, 401 S.E.2d 801, 805 (1991) (noting the presumption, Court observed co-defendant "had offered no evidence to rebut" it).

Further, our holding in *In re Cox* is instructive. Petitioner therein served respondent by registered mail. The return receipt indicated the mail was addressed to "Mr. Daniel James Cox, Sr., c/o Mrs. Valeri Mixon Tellegrini, Box 3904, 403 Allewood Drive, Charlotte, North Carolina" and that it was received by Vallaree M. Pellegrinni. *Cox*, 36 N.C. App. at 583, 244 S.E.2d at 734. Respondent moved to dismiss based upon insufficiency of service. He contended that service "was not completed according to law for that the registry receipt attached to the Affidavit did not bear the signature of Daniel James Cox, Sr., the party upon whom service was sought to be served." *Id.* The trial court denied the motion.

On appeal to this Court we stated:

> [I]t is a reasonable inference from the return receipt that the summons and complaint were delivered to a person, Valeri Mixon Tellegrini, at an address where respondent apparently received correspondence, he being a transient person. Because of this relationship, we think it can further be reasonably inferred that Valeri Mixon Tellegrini received the summons and complaint on behalf of respondent. The fiction of agency, employed by the courts in accepting a receipt signed by another as proof of service by registered mail, is one "assumed from the relationship between the addressee and the person signing rather than proved."

Id. at 585, 244 S.E.2d at 735 (quoting 49 N.C.L. Rev. 235, 255, n.101 (1971)).

Similarly in the case *sub judice*, the complaint and summons were directed to "Benedict K. Hanyane, c/o Frances Hanyane," defendant's mother. While the signature on the return receipt beneath the designation "Signature of the addressee" is arguably somewhat illegible, it reads "HBKanyane." The receipt thus at a minimum raises a reasonable inference that the summons and complaint were received on behalf of defendant by a person at an address where defendant could be reached. Such inference is supported by the absence of declination or rejection of service upon grounds that the individual to be served was not available at the designated premises. Moreover, the inference is reinforced by indications of defendant's transient status, his apparent attempts to avoid financial obligations in the United States and his return to South Africa.

Even more significantly, plaintiff testified the signature on the return receipt was in fact that of defendant, another indication of valid service, *see, e.g., House v. House*, 22 N.C. App. 686, 687, 207 S.E.2d 339, 340 (1974) (where nonresident defendant signed return receipt, due process requirements of notice and opportunity to be heard fulfilled), and which testimony is corroborated by examination of the signature itself as well as its placement beneath the designation "Signature of the addressee."

Additionally, the transcript of the default proceeding reveals that defendant's attorney acknowledged he "went over the complaint [received by counsel from plaintiff's attorney] piece by piece" prior to accomplishment of service. Given that the purpose behind Rule 4 of the North Carolina Rules of Civil Procedure is notification to the party served of the litigation involved, *Copley Triangle Assoc. v. Apparel America, Inc.*, 96 N.C. App. 263, 266, 385 S.E.2d 201, 203-04 (1989) (citation omitted), defendant may not be heard to complain of lack of knowledge of the pending suit.

Based on the foregoing, therefore, defendant's argument regarding insufficiency of service fails.

II.

Defendant's second assignment of error states the trial court "erred in basing its judgment on rumor and speculation from the [p]laintiff's testimony on matters the [p]laintiff could not possibly have personal knowledge of." However, defendant cites no authority for this assertion in his brief, and we therefore deem defendant's second contention abandoned and decline to address it. N.C.R. App. P. 28(b)(5).

III.

Defendant's remaining argument relates to an alleged irregularity regarding the second and third summons. Specifically, defendant maintains these summons were not officially filed until 24 June 1993, approximately four months following the last court action, and that therefore "[i]t is plain that neither the Clerk nor the Judge could have examined the summons to see if it was properly issued prior to taking their official actions which require that the summons be examined." This argument is unpersuasive.

The trial court herein determined "service of process was had on the [d]efendant." We observe that "[t]he rulings, orders and judgments of the trial judge are presumed to be correct, and the burden is on the appealing party to rebut the presumption of verity on appeal." *Stone v. Stone*, 96 N.C. App. 633, 634, 386 S.E.2d 602, 603 (1989), *dismissal allowed and disc. review denied*, 326 N.C. 805, 393 S.E.2d 906 (1990). Therefore, while acknowledging the record is silent as to whether the trial court examined the contested summons at the hearing, we are required, absent a showing to the contrary, to presume the trial court's determination was proper. Despite defendant's contention, it is equally likely the summons were examined by the court prior to its "official action," but for some reason were not placed into the court file until later. Moreover, as noted hereinabove, the trial court had before it the Clerk's Certificate of Mailing of Service of Process and the attached return receipt indicating service at the time it reviewed this matter. In any event, defendant has made no showing to rebut the presumption of validity.

Further, a "summons should not be found invalid simply because of technical mistakes . . . ." *Humphrey v. Sinnott*, 84 N.C. App. 263, 267, 352 S.E.2d 443, 446 (1987). The summons were in all respects consistent with the North Carolina Rules of Civil Procedure and therefore contained no defect which would render process or service of process ineffective. The simple circumstance of the summons apparently being placed in the court file subsequent to entry of judgment by default is likewise insufficient to affect the validity of either the summons or the judgment itself.

Affirmed.

Judges JOHNSON and GREENE concur.

BROOKS AYSCUE, JR., ADMINISTRATOR OF THE ESTATE OF VINCENT ALLEN AYSCUE, PLAINTIFF v. MARSHALL T. WELDON, DEFENDANT

No. 949SC646

(Filed 2 May 1995)

Automobiles and Other Vehicles § 623 (NCI4th)— automobile accident involving alcohol—no contributory negligence of passenger

There was no merit to defendant's argument that plaintiff's allegation that defendant was under the influence of alcohol while he was operating a truck in which plaintiff's intestate was a passenger constituted an assertion that the passenger was contributorily negligent, since plaintiff's allegation merely constituted a binding admission that defendant was under the influence of alcohol, not that the passenger knew that defendant was under the influence of alcohol at the time he rode with defendant; moreover, the evidence did not establish the passenger's contributory negligence so clearly that no other reasonable inference or conclusion could be drawn therefrom where the evidence showed that the passenger knew that defendant had been drinking earlier in the evening, but did not establish that he knew defendant was under the influence of alcohol.

Am Jur 2d, Automobiles and Highway Traffic § 606.

Passenger's liability to vehicular accident victim for harm caused by intoxicated motor vehicle driver. 64 ALR4th 272.

Appeal by defendant from judgment entered 6 December 1993 and order entered 14 January 1994 by Judge J. Milton Read, Jr. in Vance County Superior Court. Heard in the Court of Appeals 21 March 1995.

Steven E. Hight and Steven H. McFarlane for plaintiff-appellee.

Thompson, Barefoot & Smyth, L.L.P., by Theodore B. Smyth, for defendant-appellant.

WALKER, Judge.

Plaintiff, administrator of the estate of Vincent Allen Ayscue, sued defendant for wrongful death of his intestate. The complaint alleges

that on 12 May 1989, defendant was driving a pickup truck along U.S. Highway #1 while under the influence of alcohol when he lost control of the truck, ran off the road, turned over and struck a rock. The complaint further alleges that defendant was negligent and that as a direct and proximate result of his negligence, the deceased suffered serious bodily injuries from which he died.

Defendant answered, alleging as defenses that the deceased, Vincent Allen Ayscue, was driving the truck and thus his death was caused by his own negligence and that if defendant is shown to have caused or contributed to plaintiff's injuries and damages, Vincent was contributorily negligent.

The evidence at trial showed that on 12 May 1989 defendant drove Vincent Allen Ayscue and Michael Edwin Jackson (Mickey) from Henderson to Raleigh. The three men stopped to purchase a six-pack of beer, which defendant and Mickey drank along the way. When they arrived in Raleigh, the men stopped at a club called the Foxy Lady for about thirty minutes to an hour. During this time, they sat at the same table and drank beer. Defendant testified that he drank three or four beers on the way to Raleigh and two to three beers while at the Foxy Lady.

Their next stop was a club called the Longbranch. While at the Longbranch, they went separate ways. They stayed until closing time and then left together to go to Your House restaraunt to eat. Mickey testified that when they left the Longbranch he was intoxicated and defendant was in "about the same shape I was." Defendant testified that he was drunk and "was staggering, stuttering, and stuff like that." The men walked a distance of at least a hundred yards from the Longbranch to the truck. Mickey passed out while sitting in the passenger side of the truck.

Jamie Lawrence French, an acquaintance of Vincent, was eating at Your House restaurant when he saw the pickup truck drive into the parking lot. French went over to talk to Vincent when he was eating. He noticed that Vincent and the defendant appeared to have been drinking. However, they did not "seem out of the way at all."

Vincent and defendant stayed at Your House for about thirty to forty minutes and then left the restaurant to drive back to Henderson. French watched them walk to the truck. He saw Vincent get in on the passenger side and defendant get in on the driver's side.

On cross examination, French admitted that he previously testified that in his opinion both of the men were drunk and that when he approached Vincent and defendant, he said something to the effect that "You all had had a little bit to drink, hadn't you." French also admitted that he was concerned enough about the condition of Vincent and defendant that he specifically told Vincent, "You guys need to be careful. They're [sic] a lot of highway patrol officers out there."

The men were three miles south of Henderson on U.S. 1 when the wreck occurred. Highway troopers Larry A. Parker and B.G. Brooks arrived at the scene. Trooper Brooks questioned Mickey and defendant separately. Both stated that they were sitting in the middle of the truck at the time of the accident and that Vincent was driving. Defendant was taken to the hospital and later questioned by Trooper Brooks. Parker, who was present during the questioning, testified that he noticed a strong odor of alcohol on defendant and that in his opinion defendant was impaired.

Defendant moved for a directed verdict at the close of the evidence, which was denied. The jury found that defendant was driving the truck at the time of the accident, that Vincent died as a result of defendant's negligence, and that Vincent was not contributorily negligent. Defendant then moved for judgment notwithstanding the verdict on the ground that the evidence established that Vincent was contributorily negligent as a matter or law, and in the alternative, for a new trial. Both motions were denied.

Defendant first argues that plaintiff's allegation that defendant was under the influence of alcohol while he was operating the truck constitutes an assertion that Vincent was contributorily negligent. This argument is without merit. To succeed on his claim of contributory negligence, defendant must prove that "(1) the driver was under the influence of an intoxicating beverage; (2) the passenger knew or should have known that the driver was under the influence of an intoxicating beverage; and (3) the passenger voluntarily rode with the driver even though [he or she] knew or should have known that the driver was under the influence of an intoxicating beverage." *Watkins v. Hellings*, 321 N.C. 78, 80, 361 S.E.2d 568, 569 (1987). Plaintiff's allegation merely constitutes a binding admission that defendant was under the influence of alcohol, not that Vincent knew that defendant was under the influence of alcohol at the time he rode with defendant. *See Kinney v. Baker*, 82 N.C. App. 126, 130, 345 S.E.2d 441, 444,

cert. denied, 318 N.C. 416, 349 S.E.2d 597 (1986) (allegation that defendant operated car with a blood alcohol level of greater than .10 percent does not establish that the deceased knew when he rode with defendant that defendant was intoxicated and merely establishes that at time of accident defendant's blood alcohol level exceeded legal limit). Moreover, when plaintiff alleged in the complaint that defendant was under the influence of alcohol, he had the benefit of Trooper Parker's investigation. Trooper Parker was of the opinion that defendant was impaired by reason of a strong odor of alcohol and by his manner of speech.

Defendant further argues that the uncontradicted evidence shows that Vincent was contributorily negligent as a matter of law and thus his motions for directed verdict and judgment notwithstanding the verdict should have been granted. We disagree.

A motion for directed verdict tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the nonmoving party. *Harshbarger v. Murphy*, 90 N.C. App. 393, 368 S.E.2d 450 (1988). A motion for judgment notwithstanding the verdict is merely a renewal of the motion for a directed verdict. The tests for determining the sufficiency of the evidence on these motions are the same. *DeHart v. R/S Financial Corp.*, 78 N.C. App. 93, 98-99, 337 S.E.2d 94, 98, *disc. review denied*, 316 N.C. 376, 342 S.E.2d 893 (1985). A directed verdict for defendant on the ground of contributory negligence may only be granted when the evidence, taken in the light most favorable to the plaintiff, establishes contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Horne v. Trivette*, 58 N.C. App. 77, 80, 293 S.E.2d 290, 292, *disc. review denied*, 306 N.C. 741, 295 S.E.2d 759 (1982). "Ordinarily, the question of contributory negligence of a guest in an automobile is for the jury to determine in the light of the facts and circumstances of the case." *Harrington v. Collins*, 40 N.C. App. 530, 532, 253 S.E.2d 288, 289, *affirmed*, 298 N.C. 535, 259 S.E.2d 275 (1979).

We cannot say that the evidence establishes Vincent's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom and thus decline to disturb the jury's verdict. The evidence shows that defendant drank at least five beers in Vincent's presence before going to the Longbranch. They did not stay together at the Longbranch, but instead separated until closing time. Afterwards, they stopped by Your House for at least thirty min-

utes. While there, they were seen by French, who noticed that they had been drinking a little but did not "seem out of the way at all." The evidence, which shows that Vincent last saw defendant consume alcoholic beverages earlier in the evening at the Foxy Lady, does not establish that Vincent knew defendant was under the influence. At most, it merely establishes that Vincent knew defendant was drinking.

Finally, we consider the denial of defendant's motion for a new trial. "The denial of a motion in the alternative for a new trial lies within the discretion of the trial judge and will not be disturbed absent a showing of a clear abuse of discretion." *Brown v. Brown*, 104 N.C. App. 547, 549, 410 S.E.2d 223, 225 (1991), *cert. denied*, 331 N.C. 383, 417 S.E.2d 789 (1992). We find no abuse of discretion.

No error.

Judges EAGLES and MARTIN, JOHN C. concur.

RICHARD LEON McCLERIN, PLAINTIFF v. R-M INDUSTRIES, INC., DEFENDANT

No. 9426SC589

(Filed 2 May 1995)

1. Corporations § 151 (NCI4th)— failure to provide audited financial statement—no default

There was no merit to plaintiff's argument that summary judgment should have been granted in his favor because the uncontradicted evidence showed that defendant breached the parties' settlement and stock purchase agreement by failing to provide plaintiff with an audited financial statement within 120 days after the close of defendant's fiscal year and that defendant defaulted when it failed to provide such an audited financial statement within fifteen days of notification of default, since defendant was required to provide plaintiff with a copy of its audited financial statement within 120 days after it came into defendant's hands, and the evidence showed that defendant did not have an audited financial statement in its possession 120 days prior to the date plaintiff served notice of default. N.C.G.S. § 55-16-20.

Am Jur 2d, Corporations §§ 2104 et seq.

2. Pleadings § 62 (NCI4th)— sanctions denied—no error

The trial court did not err in denying defendant's motion for Rule 11 sanctions where, considered in the light most favorable to the movant, there was no evidence that the complaint was filed for an improper purpose or that plaintiff knew that the complaint was not well grounded in fact or law. N.C.G.S. § 1A-1, Rule 11.

Am Jur 2d, Pleading § 339.

Appeals by plaintiff and defendant from orders entered 15 October 1993 by Judge C. Walter Allen in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 February 1995.

Richard L. McClerin, plaintiff-appellant, pro se.

James McElroy & Diehl, P.A., by J. Mitchell Aberman and Bruce M. Simpson, for defendant-appellee.

WALKER, Judge.

On 23 June 1993, plaintiff sued defendant for breach of a Settlement and Stock Purchase Agreement (agreement) entered into between the parties in settlement of a prior lawsuit between R-M Industries, Inc. (R-M Industries) and plaintiff. The agreement, which was attached to plaintiff's complaint, provided that plaintiff resign as Director of R-M Industries, that plaintiff transfer 9,716 shares to R-M Industries, and that defendant pay plaintiff a sum of $499,998.40 over the life of the agreement. The agreement contains a default provision which states that a breach of any term of the agreement constitutes a default and that if defendant fails to correct a default within fifteen days of receipt of notice of default, the remaining balance under the agreement shall then become due and payable.

In his complaint, plaintiff alleged that defendant breached paragraph 12, which provides that defendant shall "[w]ithin the statutory time limit applicable for the benefit of shareholders . . . provide [plaintiff] with copies of all audited financial statements of R-M Industries until the obligations of R-M Industries under this Agreement have been fulfilled." Plaintiff further states that he is "informed, believes and alleges" that defendant had breached or was going to breach certain provisions of the agreement. With respect to defendant's breach of paragraph 12, plaintiff alleged that defendant failed to cure the breach within fifteen days of notification and that plaintiff then informed defendant by letter dated 2 June 1993 that,

pursuant to the default provision, the remaining balance of $447,998 was due and payable. Plaintiff prayed for recovery of the remaining balance owed and for an order enjoining defendant from breaching certain other provisions of the agreement.

On 21 July 1993, defendant moved the court to dismiss the complaint pursuant to Rule 12(b)(6) and to impose sanctions upon plaintiff and his attorney pursuant to Rule 11. The court ordered that defendant's Rule 12(b)(6) motion should be treated as one for summary judgment. Thereafter, on 10 August 1993, plaintiff answered defendant's motion and moved for summary judgment in his favor. By orders entered 15 October 1993, the court granted defendant's motion for summary judgment and denied its motion for sanctions. Plaintiff appeals from the order granting summary judgment for defendant and defendant appeals from the order denying its motion for sanctions.

[1] Plaintiff's sole argument is that summary judgment should have been granted in his favor because the uncontradicted evidence showed that defendant breached paragraph 12 of the agreement by failing to provide plaintiff with an audited financial statement within 120 days after the close of R-M Industries' fiscal year and that defendant defaulted when it failed to provide such an audited financial statement within fifteen days of notification of default. Although summary judgment was granted on all of plaintiff's claims, we need only address whether summary judgment was properly granted on the issue of defendant's default since plaintiff's argument fails to address his allegations of various breaches and request for an order enjoining defendant from such breaches. N.C. R. App. P. 28(a) (1994).

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). Where the only issues to be decided are issues of law, summary judgment is proper. *Brawley v. Brawley*, 87 N.C. App. 545, 548, 361 S.E.2d 759, 761 (1987), *cert. denied*, 321 N.C. 471, 364 S.E.2d 981 (1988).

The evidence showed that on 2 May 1993, plaintiff informed defendant that it was in default of its obligation under paragraph 12 to furnish plaintiff with copies of all audited financial statements. Defendant had given plaintiff a copy of an audited financial statement for 1991. Defendant could not give plaintiff a copy of its audited financial statement for 1992 within 120 days of the close of its fiscal

year or within fifteen days of notification of default because such statement had not been completed and was not in its possession. However, defendant did give plaintiff a copy of its 1992 audited financial statement on approximately 3 August 1993, after plaintiff filed this action.

The parties concede that the statute referred to in paragraph 12 is N.C. Gen. Stat. § 55-16-20 (1990). That statute requires a corporation to make available to each shareholder annual financial statements within 120 days after the close of each fiscal year and does not require that such statements be audited. N.C. Gen. Stat. § 55-16-20(c). The language "copies of all" in paragraph twelve assumes that such statement is in defendant's possession within 120 days of the close of defendant's fiscal year. However, this assumption is unwarranted; section 55-16-20 does not require audited financial statements and the record does not show that plaintiff was otherwise required to have an audited financial statement within 120 days of the close of the fiscal year. Thus, we construe paragraph 12 as merely requiring defendant to provide plaintiff with a copy of its audited financial statement within 120 days after it comes into defendant's possession. Since the evidence showed that defendant did not have an audited financial statement in its possession 120 days prior to 2 May 1993, the date plaintiff served notice of default, summary judgment was properly given for defendant on the default claim.

[2] We next consider defendant's assignment of error to the court's denial of its motion for sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 (1990). In ruling on defendant's Rule 11 motion, the court considered the verified complaint, the contract incorporated therein, and the depositions and affidavits submitted by the parties. The court concluded that it "is unable to determine that the Complaint was filed for an improper purpose or that the Plaintiff knew that the Complaint was not well grounded in fact or law."

Defendant contends that the complaint was not well grounded in fact or in law and was filed for an improper purpose. The determination of whether the complaint meets the factual and legal certification requirements of Rule 11 requires a two-step analysis in each instance. The two-step analysis required under the legal sufficiency prong of the rule requires the following:

> [T]he court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially

> plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then Rule 11 sanctions are appropriate.

Mack v. Moore, 107 N.C. App. 87, 91, 418 S.E.2d 685, 688 (1992) (*citing Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992)). In analyzing whether the complaint meets the factual certification requirement, the court must make the following determinations: (1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact. *Higgins v. Patton*, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857 (1991).

Even if the complaint is well grounded in fact and in law, it may nonetheless violate the improper purpose prong of Rule 11. *Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992) ("improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements"). In determining whether a paper has been interposed for an improper purpose, an objective standard is used. The burden is on the movant to prove such improper purpose. *Id.* at 663, 412 S.E.2d at 337. "[T]he relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. . . . An improper purpose is 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.' " *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation omitted).

Although Rule 11 does not address whether findings are required by the trial court, the court in *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), held that the decision to impose or not to impose sanctions must be supported by findings of fact. A court's failure to enter findings of fact and conclusions of law on this issue is error which generally requires remand in order for the trial court to resolve any disputed factual issues. *See Taylor v. Taylor Products, Inc.*, 105 N.C. App. 620, 631, 414 S.E.2d 568, 576 (1992). However, remand is not necessary when there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper. *Id.* Having carefully reviewed the record, we find no evidence which would sup-

port an award of sanctions for any of the bases asserted by defendant. Thus, we affirm the conclusions reached by the trial court in denying defendant's motion for sanctions.

The order granting summary judgment for defendant is affirmed and the order denying defendant's motion for Rule 11 sanctions is affirmed.

Affirmed.

Judges EAGLES and McGEE concur.

BALTAZAR BENAVIDES, EMPLOYEE-PLAINTIFF v. SUMMIT STRUCTURES, INC., EMPLOYER-DEFENDANT, AND AETNA CASUALTY & SURETY CO., CARRIER-DEFENDANT

No. COA 94-729

(Filed 2 May 1995)

Workers' Compensation § 297 (NCI4th)— refusal to accept suitable employment—sufficiency of evidence

The record revealed ample support for the Industrial Commission's findings, and those findings supported the conclusion that plaintiff unjustifiably refused employment suitable to his capacity which was offered to him and procured for him by his employer.

Am Jur 2d, Workers' Compensation § 399.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 18 February 1994. Heard in the Court of Appeals 23 March 1995.

Wolfe and Collins, P.A., by George M. Cleland, IV, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, L.L.P., by Clayton M. Custer and R. Anthony Hartsoe, for defendants-appellees.

WALKER, Judge.

Plaintiff sustained a back injury on 12 January 1988 while working for defendant employer. In June 1988, plaintiff instituted this workers' compensation claim. On 25 August 1988, defendant carrier

accepted plaintiff's claim and paid plaintiff temporary total disability benefits at the weekly rate of $133.33 for approximately one year. On 22 August 1989, defendants sought approval from the Commission to stop payment of compensation to plaintiff on the ground that "the claimant has reached maximum improvement and has been rated." This request was approved on 30 August 1989.

On 26 June 1990, plaintiff filed a Form 33 with the Commission claiming that he was entitled to permanent total disability benefits pursuant to N.C. Gen. Stat. § 97-29. Defendants responded that plaintiff was only entitled to an appropriate permanent partial disability rating pursuant to N.C. Gen. Stat. § 97-31. A hearing was held before a deputy commissioner in September 1991. After further discovery, the deputy commissioner entered an opinion and award containing the following conclusions of law:

> 1. As a result of the injury by accident giving rise hereto, plaintiff was temporarily totally disabled from April 12, 1988 through January 14, 1989 and from February 3, 1989 to April 17, 1990. . . .
>
> 2. As a result of the injury by accident giving rise hereto, plaintiff was temporarily partially disabled from January 15, 1989 to February 3, 1989. . . .
>
> 3. Plaintiff unjustifiably refused employment suitable to his capacity which was offered to him and procured for him by defendant employer.
>
> 4. Plaintiff obtained the end of the healing period on July 17, 1990 and as a result of the injury by accident giving rise hereto, he sustained 25 percent permanent partial impairment of the back. . . .

Plaintiff appealed to the Full Commission, which affirmed and adopted the deputy commissioner's findings and conclusions by Opinion and Award entered 18 February 1994.

Our review of an Opinion and Award of the Industrial Commission is limited to a determination of whether the Commission's findings are supported by competent evidence and whether the findings justify the Commission's conclusions. *Gilbert v. Entenmann's, Inc.*, 113 N.C. App. 619, 623, 440 S.E.2d 115, 118 (1994).

N.C. Gen. Stat. § 97-32 (1994) states that "[i]f an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial

Commission such refusal was justified." Plaintiff argues that the Full Commission committed reversible error in affirming and adopting the deputy commissioner's conclusion that "[p]laintiff unjustifiably refused employment suitable to his capacity which was offered to him and procured for him by defendant employer."

The Commission found the following facts: On 15 March 1990, Bruce Buirkle, a vocational specialist retained by defendants to assist plaintiff with job placement, contacted plaintiff's counsel to initiate vocational services. On 20 March, Buirkle met with plaintiff and his family at their home in order to discuss vocational rehabilitation for plaintiff, including job placement. On 4 April, Randy Ayers, plaintiff's supervisor, advised Buirkle that a part-time light duty janitorial position was available for plaintiff with defendant employer. This position would involve working about four hours daily, five days weekly at job duties including mopping, sweeping, emptying paper-filled trash can liners from trash cans, picking up trash in the parking lot using a nail-studded stick, and operating a push-mower. Plaintiff's physician, Dr. Stephan Lowe, advised plaintiff's counsel that the job was "a very reasonable one for plaintiff to try" and encouraged plaintiff to do so. Buirkle left several detailed messages with plaintiff's counsel regarding the job and tried numerous times to reach plaintiff personally. Finally, Buirkle reached plaintiff on 17 April 1990 and advised him that the job was available and that Dr. Lowe had recommended that plaintiff take the job. Neither plaintiff nor his counsel ever advised Buirkle that plaintiff would accept the position. Ayers held the job for plaintiff until 23 April 1990, at which time he had to hire someone else. The Commission found that "[t]he janitorial position which was offered to plaintiff . . . was one suitable to his capacity. Evidence to the contrary is not accepted as credible. The credible evidence fails to establish any justification for plaintiff's failure to accept said position."

The Commission also found that in June 1990, as a result of Buirkle's continued efforts to locate employment consistent with plaintiff's physical limitations, YSM Janitorial Company agreed to give plaintiff a work try-out in a light duty janitorial position which was available at a Coca-Cola plant. The job consisted of cleaning for four hours daily and was within the limitations prescribed by Dr. Lowe. On 27 June, Buirkle took plaintiff to the work site, but plaintiff refused to work because of a rash on his neck, chest, and arms. The next day, plaintiff's rash had improved significantly and he and Buirkle returned to the plant. A YSM employee explained to plaintiff

that the job duties would include cleaning two restrooms, dust mopping a floor, and wiping off tables in a break room. In spite of "repeated modeling and coaxing" by Buirkle, plaintiff refused to wipe off the break room tables, ostensibly because "people were eating in the break room." After explaining and modeling the dust mopping job, Buirkle asked plaintiff to try it. Plaintiff then "took hold of the handle in a tentative manner, pushed the mop about three feet with a very awkward gait and then stopped," complaining that "he could not work anymore due to his having a lot of pain." The Commission found that "[p]laintiff was able to perform this janitorial job on June 28, 1990 and evidence to the contrary is not accepted as credible." The Commission also found that "[s]ince the injury by accident giving rise hereto, plaintiff has made no effort, independent of those efforts of Buirkle, to locate employment suitable to his capacity."

Plaintiff presented evidence that the defendant employer's offer of a light duty job "was not communicated to him until six days before it was given to someone else" and that plaintiff "agreed to begin the job before it was filled." With respect to the job with YSM at the Coca-Cola plant, plaintiff presented evidence that the job was beyond his physical capacity and that after his "try-out" the YSM supervisor decided plaintiff would "not work out." Plaintiff argues that he "could not have refused to accept this job, because it was never offered to him." The Commission did not find plaintiff's evidence credible. "The Commission is the 'sole judge of the credibility of the witnesses, and the weight to be given to their [testimony]. . . .' " *Blankley v. White Swan Uniform Rentals*, 107 N.C. App. 751, 754, 421 S.E.2d 603, 604 (1992) (citations omitted) (affirming Commission's conclusion that plaintiff unjustifiably refused employment suitable to his capacity offered by defendant employer), *disc. rev. denied*, 333 N.C. 461, 427 S.E.2d 618 (1993). The Commission's findings of fact are conclusive and binding on appeal if supported by competent evidence in the record. *Suggs v. Snow Hill Milling Co.*, 100 N.C. App. 527, 529, 397 S.E.2d 240, 241 (1990), *disc. rev. denied*, 329 N.C. 276, 407 S.E.2d 851 (1991). The record reveals ample support for the Commission's findings, and these findings support the conclusion that plaintiff unjustifiably refused employment suitable to his capacity which was offered to him and procured for him by his employer.

Plaintiff also argues that the Commission committed reversible error in concluding that he was entitled to compensation only for permanent partial impairment pursuant to the 25% disability rating on his

back. He claims the evidence showed he was entitled to permanent total disability. "The test for disability is whether and to what extent earning capacity is impaired, not the fact or extent of physical impairment." *Robinson v. J.P. Stevens*, 57 N.C. App. 619, 623, 292 S.E.2d 144, 147 (1982). Thus, in order to receive benefits for permanent total disability, plaintiff had the "burden to persuade the Commission not only that he had obtained no other employment but that he was *unable* to obtain other employment." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982) (emphasis in original).

As noted earlier, plaintiff testified that he was unable to work the light duty jobs offered to him, but the Commission did not find this testimony credible. Accordingly, the Commission's finding of partial disability amounts to a finding that plaintiff failed to carry his burden of proof as to total disability and that he was, in fact, able to earn some wages. Given the ample evidence in the record to support this finding, we affirm the Commission on this assignment of error.

Finally, plaintiff argues that the Commission's decision "is patently contrary to the philosophy of the workers' compensation act and the public policy of this state." We have carefully examined the record and find this assignment of error to be without merit. The Opinion and Award of the Industrial Commission is hereby

Affirmed.

Judges EAGLES and MARTIN, JOHN C. concur.

FRANCIS J. McGAHREN AND WIFE, JOHANNA F. McGAHREN v. GEORGE W. SAENGER

No. 9428SC537

(Filed 2 May 1995)

1. Limitations, Repose, and Laches § 26 (NCI4th)— legal malpractice claims—applicability of statute of limitations

Plaintiffs' legal malpractice claim filed in 1992 and arising out of defendant attorney's alleged negligence in failing to procure the transfer of a lot in 1985 was barred by the statute of limitations; however, their cause of action filed in 1992 and arising out of defendant's alleged negligence in procuring a deed to the lot in

1990 after plaintiffs' business partners had filed for bankruptcy was not barred by the statute of limitations. N.C.G.S. § 1-15(c).

Am Jur 2d, Attorneys at Law §§ 219-221.

What statute of limitations governs damage action against attorney for malpractice. 2 ALR4th 284.

2. Fraud, Deceit, and Misrepresentation § 38 (NCI4th)— insufficiency of evidence of deception

Summary judgment was properly entered for defendant on plaintiffs' claim for fraud based on a letter written by defendant with regard to plaintiffs' lot, which was originally omitted from a deed drawn by defendant, since plaintiffs' own affidavit showed that plaintiffs were not deceived by defendant's letter, even if it did contain false statements intended to deceive.

Am Jur 2d, Fraud and Deceit §§ 481 et seq.

Appeal by plaintiffs from judgment entered 10 February 1994 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 27 January 1995.

Law Offices of Matthew F. McGahren, by Matthew F. McGahren, for plaintiffs-appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Roy W. Davis, Jr. and Michelle Rippon, for defendant-appellee.

LEWIS, Judge.

Plaintiffs commenced this action *pro se* to recover damages for alleged legal malpractice and fraud. The trial court granted defendant's motion for summary judgment on the ground that the action was barred by the statute of limitations, N.C.G.S. § 1-15(c) (1983). From the entry of summary judgment, plaintiffs appeal.

The facts, when viewed in the light most favorable to plaintiffs, show that in May 1984 plaintiff Francis McGahren (hereinafter "McGahren") and C. Walter Weiss formed W & M Investment Company, a partnership, to develop commercial real estate. Defendant was hired to perform various legal services for the partnership. In 1985 the partnership dissolved, and the partners instructed defendant to prepare a deed transferring title to all the property in a subdivision known as Ridgedale from the partnership to

McGahren. Defendant prepared the deed but failed to include Lot 3. McGahren recorded the deed on 25 June 1985. As of that time, Lot 3 remained subject to a deed of trust, which was guaranteed by plaintiffs and Mr. and Mrs. Weiss.

On 1 July 1987, the Weisses filed a Chapter 7 bankruptcy petition. Plaintiffs did not learn about the omission of Lot 3 from the deed until 1989, after they entered into a contract to sell the lot to Barbara and Royce Sluder. The Sluder's attorney, James Baley, performed a title search in December 1989 and informed McGahren that title to the land was still in the name of W & M Investment Company. On 3 January 1990, McGahren called defendant and informed him of the problem with the deed. Defendant told McGahren that he did not know anything about Lot 3 or the partnership's intentions with respect to the lot. McGahren also called the bankruptcy trustee to inform her of the problem. The trustee told McGahren that she would have to be paid from the proceeds of the sale of the property. On 12 January, McGahren wrote defendant, demanding that defendant correct the problem with the title.

The contract with the Sluders expired on 9 January and no action was taken to extend it. In mid January, McGahren asked Baley, the Sluder's attorney, to represent him in clearing up the problem with the title. In February, Baley informed McGahren that defendant had obtained a deed to Lot 3 from Weiss, McGahren's former partner, and that defendant wanted McGahren to release defendant from liability in exchange for the deed. Baley instructed McGahren to come to his office to sign the release and to pick up the deed, and Baley informed McGahren that the bankruptcy trustee would, according to McGahren, "clear the problem with the Bankruptcy court after [McGahren] had gotten the deed." Baley also told McGahren about a mutual release with the Sluders that reflected the expiration of the sale contract.

Plaintiffs went to Baley's office on 2 March to pick up the deed and to sign the releases. Baley told plaintiffs that the deed was not yet available, but that they should sign and postdate the release of defendant and that Baley would hold the release until defendant delivered the deed. Plaintiffs also signed a release with the Sluders. On 23 March, McGahren picked up the deed from Baley's office. McGahren then delivered a copy of the deed to the bankruptcy trustee's office. On 30 March, McGahren recorded the deed with the Buncombe County Register of Deeds.

In March 1991, plaintiff became aware that the 1990 deed to Lot 3 conveyed no interest in the property because of the Weiss's bankruptcy. On 28 August 1991, McGahren wrote the bankruptcy trustee and informed her that he was turning over the property to her. On 30 August, defendant, who had received a copy of that letter, wrote McGahren, informing him that Lot 3 was McGahren's property and that the trustee agreed. From the date McGahren turned over the property to the trustee, McGahren ceased making mortgage payments on the property. The debt subsequently went into default.

On 18 March 1992, the property was abandoned by the bankruptcy trustee. Thereafter, First Citizens Bank reported the default to the Asheville Credit Bureau. McGahren contends that, as a result, he was unable to secure a credit line essential to his new business, and he suffered substantial losses. Plaintiffs filed suit against defendant in August 1992.

I.

[1] Plaintiffs contend on appeal that the statute of limitations does not bar their action against defendant and that the trial court therefore erred in granting summary judgment for defendant. N.C.G.S. § 1-15(c), which establishes a four-year statute of repose and a three-year statute of limitations, provides in pertinent part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

N.C.G.S. § 1-15(c) (1983); *Sharp v. Teague*, 113 N.C. App. 589, 593, 439 S.E.2d 792, 794 (1994), *disc. review improvidently allowed*, 339 N.C. 730, 456 S.E.2d 771 (1995). This statute creates a statute of limitations and a statute of repose, both of which accrue on the date of the "last act of the defendant giving rise to the cause of action." *Id.* at 593, 439 S.E.2d at 795.

In this case, plaintiffs had two distinct causes of action against defendant, one arising out of defendant's alleged negligence in failing to procure the transfer of Lot 3 in 1985, and the other arising out of defendant's alleged negligence in procuring a deed to Lot 3 in 1990 after the Weisses had filed for bankruptcy. We find that while the first cause of action is barred by section 1-15(c), the second is not.

In 1985, McGahren and his partner, Weiss, contracted with defendant to prepare a deed transferring title to various pieces of real property, including Lot 3, from the partnership to McGahren. Defendant failed to include Lot 3 in the deed to McGahren. Defendant's last act giving rise to the cause of action was his delivery of the 1985 deed to McGahren, which we note necessarily occurred at some time prior to 25 June 1985, the date McGahren recorded the deed. *See Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (1994) (defendant attorney's last act giving rise to cause of action occurred when he supervised execution of will he had negligently drafted). At that time, McGahren had at least constructive knowledge of all the essential elements of a complete malpractice cause of action. *See Thorpe v. DeMent*, 69 N.C. App. 355, 362, 317 S.E.2d 692, 697, *aff'd per curiam*, 312 N.C. 488, 322 S.E.2d 777 (1984). Because plaintiffs did not institute their action within three years of defendant's 1985 negligence, that cause of action is barred by the statute of limitations.

However, in 1990 defendant allegedly committed a separate act of negligence in procuring for McGahren a deed to Lot 3 from the Weisses, who had filed for bankruptcy. Plaintiffs' complaint, filed in 1992, was clearly filed within three years of defendant's negligent act. Thus, the trial court erred in ruling that plaintiffs' claim was barred by the statute of limitations. Likewise, plaintiffs' claim for wanton negligence, which is based on the 1990 negligence of defendant, was not barred by the statute of limitations.

II.

[2] We do find, however, that summary judgment for defendant was proper as to plaintiffs' remaining claims, labeled "misrepresentation/fraud" and "intentional misrepresentation." Regarding these claims, plaintiffs' complaint refers to a letter from defendant containing allegedly false statements. Aside from these specific allegations regarding the letter, plaintiffs' remaining allegations merely restate the grounds for the legal malpractice cause of action. As such, these latter allegations do not support a cause of action for fraud. *Sharp*, 113 N.C. App. at 597, 439 S.E.2d at 797. The statements plaintiffs allege were fraudulently made are found in a letter from defendant to McGahren, dated 30 August 1991, wherein defendant stated that the bankruptcy trustee agreed with McGahren that the property was his, that the bankruptcy court made no claim to the property, and that the property was McGahren's.

The elements of fraud are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). In this case, plaintiffs, themselves, have shown that the fourth element is lacking. In his affidavit, McGahren states that as of March 1991 he knew that the 1990 deed was of no value, and that when he received defendant's 30 August 1991 letter, he knew that defendant's statements in the letter about the trustee's intentions regarding the property were "completely false." It is clear, then, that defendant's statements in the letter did not deceive McGahren. Thus, the fourth element of fraud was nonexistent. Accordingly, summary judgment for defendants on the misrepresentation claims was proper.

For the reasons stated, the judgment of the trial court is affirmed as to the misrepresentation claims and the 1985 negligence claim, and reversed as to the negligence claims arising from the 1990 deed.

Affirmed in part; reversed in part and remanded.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. WILLIAM DOUGLAS HODGE

No. 9410SC472

(Filed 2 May 1995)

Criminal Law § 107 (NCI4th)— fingerprint analysis—failure to provide results to defendant—no error

There was no merit to defendant's contention that the trial court erred in denying his motion for a mistrial or for a continuance because the State failed to provide defense counsel with notice that a fingerprint analysis had been performed on an evidentiary item and failed to provide defendant with such fingerprint analysis, since fingerprints on the bottle were smudged, no meaningful analysis could be conducted, and there was no exculpatory evidence for the State to suppress.

Am Jur 2d, Criminal Law § 799.

Right of accused in state courts to have expert inspect, examine, or test physical evidence in possession of prosecution—modern cases. 27 ALR4th 1188.

Appeal by defendant from judgment entered 10 November 1993 by Judge Coy E. Brewer, Jr., in Wake County Superior Court. Heard in the Court of Appeals 25 January 1995.

In 1993, defendant was charged with maintaining a dwelling for the keeping and selling of controlled substances in violation of N.C. Gen. Stat. § 90-108(a)(7) and possession with intent to sell and deliver crack/cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1).

The State's evidence tended to show that on 17 March 1993, law enforcement officers obtained a search warrant for defendant's residence. On 18 March 1993 at about 8:10 p.m., a team of officers gathered at various locations on defendant's property to conduct surveillance and to execute the search warrant.

Detective Kevin Herring testified that he was stationed in the middle of a path, among some junk vehicles. His first location was about thirty feet from a dump truck. After seeing a vehicle pull up, Herring saw a black male walk to the dump truck. The man fumbled around in the back of the dump truck, and Herring heard a clicking sound. The man then walked back towards the residence.

Herring further testified he later moved to within "twenty-one heel-to-toe steps" from the dump truck. He saw another vehicle pull into the front yard of the residence and saw the same black male exit the back door. With binoculars Herring was able to identify the black male as the defendant. Defendant was carrying a flashlight, and Herring saw him reach into the back of the dump truck and pull out a medicine bottle. Defendant removed the cap from the medicine bottle, and Herring heard the same clicking he had heard earlier. Defendant returned the bottle to the trash in the back of the dump truck.

Shortly after 11:00 p.m., the officers executed the search warrant. They found the medicine bottle in the back of the dump truck. It contained eighteen plastic baggies, each containing three rocks of crack cocaine.

Detective Ricky Stone testified, on recall, that he submitted the medicine bottle to the City-County Bureau of Identification, but that the bureau could not match any fingerprints on the bottle. He stated that because there were no matches, he received no report. On cross-examination Stone testified he called the bureau when he did not receive a report and was informed that the fingerprints were smudged and no matches could be made. Defendant moved for a mistrial alleging that the State did not provide him with certain exculpatory evidence as required in the rules of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). Alternatively, he moved for a mistrial or for a continuance. The trial court denied the motions.

The jury found defendant guilty of possession with intent to sell and deliver cocaine but found him not guilty of maintaining a dwelling for the keeping of controlled substances. From a judgment imposing a prison sentence of ten years, defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General James P. Erwin, Jr., for the State.

Gary L. Presnell for defendant appellant.

McGEE, Judge.

Defendant first argues that the trial court erred in denying his motion for a mistrial "when the State failed to provide defense counsel with notice that a fingerprint analysis had been performed on an evidentiary item and failed to provide defendant with such fingerprint analysis." We disagree.

N.C. Gen. Stat. § 15A-910 (1988) governs the regulation of discovery in criminal cases and empowers the court to apply sanctions for noncompliance, including declaring a mistrial upon a party's failure to comply with this Article. G.S. 15A-910(3a). Although the court has the authority to impose such discovery violation sanctions, it is not required to do so. *State v. Morrow*, 31 N.C. App. 654, 658, 230 S.E.2d 568, 571 (1976), *cert. denied*, 297 N.C. 178, 254 S.E.2d 37 (1979), *overruled on other grounds by State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984). "The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988).

Originally, defendant requested voluntary discovery and later moved for discovery pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). The State disclosed, among other things, that a seized medicine bottle was within its possession, but did not disclose that a fingerprint analysis had been attempted on the bottle. Under *Brady*, we must examine the State's conduct to determine whether, after a request by the defense, the State suppressed material evidence which is favorable to defendant. *State v. Gaines*, 283 N.C. 33, 45, 194 S.E.2d 839, 847 (1973).

The evidence as presented at trial showed the State attempted to perform a fingerprint analysis of the medicine bottle but was unsuccessful because the condition of the bottle was such that no fingerprint comparisons could be made. Nothing could be matched to defendant or anyone else because the fingerprints were smudged and there were fingerprints over fingerprints. The existence or nonexistence of defendant's fingerprints on the medicine bottle would have been significant, but in this case, a fingerprint analysis of the medicine bottle was not possible and no actual report was generated. Because no meaningful analysis could be conducted, there was no exculpatory evidence for the State to suppress. Therefore, defendant cannot show that the suppressed evidence was favorable to him.

The argument that defendant could have employed his own fingerprint expert to examine the bottle had defendant known of the State's analysis fails because defendant was notified of the existence of the bottle and was free to conduct his own tests independent from any tests attempted by the State. The defendant failed to meet his burden under the *Brady* analysis and we find the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

In the alternative to a mistrial, defendant argues that the trial court erred by denying his motion for a continuance under G.S. 15A-910(2). Specifically, defendant contends that his due process rights of notice and the opportunity to be heard were violated because the State did not notify him of the allegedly exculpatory fingerprint evidence. Consequently, defendant believes he was deprived of closer evaluation of the fingerprint evidence because he could have subpoenaed the State's fingerprint examiner to testify or he could have located a defense expert to conduct an independent evaluation of the fingerprints. We disagree.

Defendant argues *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981) supports his position. In *Silhan*, it was only upon cross-examination of a local crime scene technician that defendant learned of the existence of a Federal Bureau of Investigation fingerprint analysis report. This report concluded that none of the prints could be identified as being those of defendant. Based on this new information, the judge offered to give defendant "as much of a recess as he needed to deal adequately with the report." *Silhan* at 240, 275 S.E.2d at 465.

Silhan is distinguishable because in that case there was an actual report generated by the Federal Bureau of Investigation and the test results from that report were more conclusive than in this case. Our Supreme Court in *Silhan* discussed "a report from the Federal Bureau of Investigation which summarized the results of an analysis of fingerprints taken from the scene of the assaults. None of the prints could be identified as being those of defendant." *Id.* The condition of the medicine bottle in the present case prevented any meaningful analysis whatsoever of the fingerprints. No comparisons could be made because the fingerprints were smudged and there were prints on top of prints. The trial court did not abuse its discretion in denying defendant's motion for a continuance.

No error.

Judges LEWIS and WYNN concur.

DAVID RUSSELL AMBROSE, PLAINTIFF-APPELLANT v. UNIVERSITY OF NORTH CAROLINA AT ASHEVILLE, DEFENDANT-APPELLEE

No. COA94-725

(Filed 2 May 1995)

State § 55 (NCI4th)— student walking through window—no negligence by defendant's safety manager

Evidence was sufficient to support the Industrial Commission's findings of fact which in turn supported its conclusion that plaintiff's injuries which he sustained when he walked through a plate glass window at defendant university were not due to any negligence on the part of defendant's safety manager where the evidence tended to show that the safety manager was not responsible for the type of glass installed in the window and that she had no express or implied knowledge of the danger involved.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 675 et seq.

Appeal by plaintiff from Decision and Order of the Industrial Commission entered 20 April 1994. Heard in the Court of Appeals 23 March 1995.

Plaintiff filed an Affidavit and Claim for Damages under the Tort Claims Act, N.C. Gen. Stat. § 143-291 *et. seq.* (1993), seeking to recover for injuries allegedly arising as a result of the negligence of Robyn Hansen, defendant's safety manager. In his affidavit, plaintiff states that on 9 August 1991, when attempting to exit the Administration Building at the University of North Carolina at Asheville, he walked into a glass panel adjacent to an open door and that the panel shattered, causing injuries to his fingers. Plaintiff further states that the glass panel (1) was unmarked and gave no indication of its presence except by a border metal frame, (2) was improperly placed in relation to the surrounding walkway and walls, and (3) was the type of glass which is not reasonably safe.

The deputy commissioner denied plaintiff's claim. Plaintiff appealed to the Full Commission, which affirmed the deputy commissioner's decision by its Decision and Order entered 20 April 1994.

George W. Moore for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Richard L. Griffin, for defendant-appellee.

WALKER, Judge.

Our review of a decision of the Industrial Commission in a case arising under the Tort Claims Act is limited to determining whether there was any competent evidence before the Commission to support its findings of fact and whether its findings of fact justify its legal conclusion and decision. *Paschall v. N.C. Dept. of Correction*, 88 N.C. App. 520, 364 S.E.2d 144, 145, *disc. review denied*, 322 N.C. 326, 368 S.E.2d 868 (1988).

The Commission made the following pertinent findings of fact:

> 3. . . . In the process of exiting the building, [plaintiff] walked through a plate glass window which shattered and caused him to sustain serious injuries. The window was beside a set of glass double doors which were propped open to let air into the unair-conditioned building. The window was framed but was as tall as the doors. It was located directly in front of the hallway which plaintiff had walked. In order to go out of the doors, he would have had to have veered to his left as he walked past the stairway which came down to the entry way to the left of where he was walking.
>
> 4. The window through which plaintiff walked was very clean and had no decals or posters on it. There were no obstructions in front of it. He walked through it because he assumed that it was an open doorway.
>
> 5. [The Administration Building] was built in the early 1960's when safety glass was not required by the North Carolina Building Code. The window in question complied with the building code in existence at that time and it had not been replaced prior to the incident in question. . . . By 1978 the building code required windows of this nature to have safety glass, but buildings built before that time did not have to be modified to comply with code.
>
> 6. Other people had walked into the window prior to plaintiff's injury, although it had never broken and apparently no one had gotten hurt. . . . Robyn Hansen, the safety manager for the

> University, was unaware of the problem. She worked in another building on campus. No one had reported to her that on occasion people had been bumping into the glass.
>
> . . .
>
> 9. . . . In view of the large number of people who had entered and exited the building over the years without reported incident, the fact that no one had reported a problem with people bumping into this window to her and the fact that the danger was not apparent, Ms. Hansen could not have reasonably anticipated plaintiff's injury.

The Commission also found that the danger involved was not one of which Ms. Hansen had express or implied knowledge and that although plaintiff was a licensee on campus and was subject to a lower duty of care, there would have been no breach of duty of care had he been an invitee. Based on these findings, the Commission concluded that plaintiff's injuries were not due to any negligence on the part of Robyn Hansen and thus denied plaintiff's claim.

Having reviewed the record, we find that the Commission's findings were supported by competent evidence. Thus, the question to be resolved on appeal is whether the Commission's findings justify its legal conclusion and decision.

Under the Tort Claims Act, recovery is permitted for injuries resulting from the negligence of a State employee while acting within the scope of his employment under circumstances where the State, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. *Phillips v. N.C. Dept. of Transportation*, 80 N.C. App. 135, 137, 341 S.E.2d 339, 341 (1986); N.C. Gen. Stat. § 143-291 (1993). A landowner owes an invitee a "duty of ordinary care to maintain his premises in a safe condition and to warn of hidden dangers that had been or could have been discovered by reasonable inspection." *Mazzacco v. Purcell*, 303 N.C. 493, 498, 279 S.E.2d 583, 587 (1981). The Commission's finding of fact number 5 establishes that defendant's safety manager was not responsible for the kind of glass which was installed in the Administration Building in the 1960's and thus did not create the risk of injury to plaintiff. Moreover, the Commission's findings support the conclusion that defendant's safety manager neither knew nor should have known of the danger to plaintiff. Thus, assuming *arguendo* that plaintiff was an invitee, we hold that the facts found by the Commission justify its legal conclu-

sion that plaintiff's injuries were not due to any negligence on the part of defendant's safety manager. *Cf. Waugh v. Duke Corporation*, 248 F. Supp. 626, 631 (1966) (in holding defendant negligent for failing to warn infant guest of hidden danger of glass panel or to place markings thereon which would indicate the presence of glass to the infant or for failing to construct guards around glass panels and that such negligence proximately caused injuries suffered by six-year-old child who walked into glass panel, believing it to be an open space to the courtyard, the court noted that while adults can be expected to employ discretion and care to recognize and avoid the panels, such cannot reasonably be expected of a child coming upon a panel in defendants' motel for the first time).

Affirmed.

Judges EAGLES and MARTIN, JOHN C. concur.

IN THE MATTER OF NICKDON STOWE

No. COA94-773

(Filed 2 May 1995)

1. Infants or Minors § 117 (NCI4th)— armed robbery by juvenile—sufficiency of evidence

The State presented sufficient evidence of danger or threat to the life of the victim to support an adjudication of delinquency based on a juvenile's commission of armed robbery where the evidence tended to show that the juvenile had in his pocket a gun which had just been fired into the air by another person; the juvenile approached the prosecuting witness, gestured toward his pocket where he had the gun, and demanded that the witness give him candy; and the witness gave the juvenile candy because he was afraid that the juvenile might shoot him.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 54.

2. Infants or Minors § 79 (NCI4th)— signing of juvenile petition by assistant district attorney—no error

There was no merit to the juvenile's contention that N.C.G.S. § 7A-561(a) does not permit an assistant district attorney to sign

the juvenile petition as "complainant," since the term "complainant" is not defined in the Juvenile Code; there is no language in the Code which specifically excludes an assistant district attorney from signing a petition as complainant; the statute requires only that the person signing as complainant have knowledge of the matter alleged in the petition and that he or she be able to verify the information contained therein; and an assistant district attorney's signing of the petition does not contravene his or her role in the juvenile adjudication process.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 40-42.

Appeal from final juvenile adjudication order entered 24 February 1994 by Judge William G. Jones in Mecklenburg County Juvenile Court. Heard in the Court of Appeals 6 April 1995.

Attorney General Michael F. Easley, by Associate Attorney General Carol K. Barnhill, for the State.

Marjory J. Timothy for juvenile-appellant.

WALKER, Judge.

A juvenile petition was issued pursuant to N.C. Gen. Stat. § 7A-517(12) (1994) alleging that the juvenile Nickdon Antonio Stowe was delinquent in that "on or about the 27th day of October, 1993, the juvenile unlawfully, willfully, and feloniously did steal, take, and carry away another's personal property, candy of the value of [$0.45], from the person and presence of William Lamar Black" in violation of N.C. Gen. Stat. § 14-87 (1994).

On 29 November 1993, Assistant District Attorney Judith C. Emken signed the petition and verified the matters contained therein before Judy S. Price, Deputy Clerk of Superior Court, Mecklenburg County. On 30 November 1993, juvenile intake counselor C.H. Stewart approved the petition for filing.

During the adjudicatory hearing on 23 February 1994, the juvenile's motion to dismiss at the close of the State's evidence was denied. The juvenile presented no evidence and was adjudicated delinquent on the charge of armed robbery.

[1] The juvenile first contends that the trial court erred in denying his motion to dismiss and adjudicating him delinquent because the State

failed to prove all the elements of the offense of armed robbery. In ruling on a motion to dismiss, all evidence admitted must be considered in the light most favorable to the State, giving the State the benefit of all reasonable inferences to be drawn therefrom. *State v. Worsley*, 336 N.C. 268, 274, 443 S.E.2d 68, 70-71 (1994). A defendant's motion to dismiss should be denied " 'if the evidence, when viewed in the above light, is such that a rational trier of fact could find beyond a reasonable doubt the existence of each element of the crime charged.' " *Id.* at 68, 443 S.E.2d at 71 (citation omitted).

To obtain a conviction for the offense of armed robbery, the State must prove three elements: "(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means'; and (3) danger or threat to the life of the victim." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978) (citation omitted). *See also* N.C. Gen. Stat. § 14-87(a) (1994).

The State's evidence tended to show the following: On 27 October 1993, the prosecuting witness William Black was at the bus stop with several individuals. While they waited for the school bus, Black walked over to the juvenile. Terry Johnson walked up and began talking to the juvenile about a gun. Terry then produced a gun and shot it into the air. Terry continued to hold the gun and pointed it at an approaching bus. At the juvenile's request, Terry handed him the gun, which the juvenile put in his pocket. A few minutes later, the juvenile approached Black, who was unwrapping a candy bar. The juvenile placed his hand "[i]n [the] vicinity of where the gun was" and held it there while demanding that Black give him some candy. Black complied with this demand; he testified that he gave the juvenile the candy because he was scared "[t]hat if [he] didn't, [the juvenile] might shoot [him]."

The juvenile challenges the sufficiency of the State's evidence as to the third element of armed robbery, danger or threat to the life of the victim. He relies on *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981) for the proposition that mere possession of a weapon does not satisfy the element of threat or danger to the life of the victim. Here, the State's evidence showed more than "mere possession" of the weapon. The gun was fired into the air shortly before the juvenile demanded candy from Black. The juvenile deliberately gestured toward the gun in his pocket while demanding the candy, and Black was scared that if he did not comply, the juvenile might shoot him.

Based on this evidence the trial court determined that the State had established the element of danger or threat to Black's life. We hold that the trial court did not err in denying the juvenile's motion to dismiss and adjudicating him delinquent on the armed robbery charge.

[2] The juvenile next contends that the trial court lacked subject matter jurisdiction because "the complainant failed to sign and verify his signature on the juvenile petition." Specifically, the juvenile argues that N.C. Gen. Stat. § 7A-561(a) (1994) does not permit an assistant district attorney to sign the petition as "complainant." We disagree.

N.C. Gen. Stat. § 7A-561(a) (1994) sets forth the procedure for filing a juvenile petition:

> All reports concerning a juvenile alleged to be delinquent or undisciplined shall be referred to the intake counselor for screening. Thereafter, if it is determined by the intake counselor that a petition should be drawn and filed, the petition shall be drawn by the intake counselor or the clerk, signed by the complainant and verified before an official authorized to administer oaths.

The term "complainant" is not defined in the Juvenile Code, and there is no language in the Code which specifically excludes an assistant district attorney from signing a petition as complainant. The statute requires only that the person signing as complainant have knowledge of the matter alleged in the petition and that he or she be able to verify the information contained therein.

The juvenile also argues that an assistant district attorney cannot sign the petition as complainant because to do so would contravene the assistant district attorney's role in the juvenile adjudication process. In support of this argument the juvenile cites numerous provisions in the Juvenile Code which address the assistant district attorney's role in this process. These provisions include N.C. Gen. Stat. §§ 7A-531, 7A-533, 7A-535, and 7A-536 (1994), which relate to the duties of the prosecutor to assist the intake counselor in evaluating the sufficiency of the evidence and to review the intake counselor's decision not to file a petition. The juvenile has not demonstrated how these duties are hindered by the fact that the assistant district attorney signs the petition as complainant. As long as the intake counselor follows the statutory procedures before the signing of the petition, and the assistant district attorney does not encroach upon the impor-

tant role of the intake counselor, the assistant district attorney may sign the petition as complainant.

Finally, the juvenile argues that the petition was not properly verified. However, the record fully supports a finding that the signature of the assistant district attorney was verified before the deputy clerk of court. The juvenile has not alleged that the verification was false or unsupported by sufficient knowledge of the facts. *In re Green*, 67 N.C. App. 501, 313 S.E.2d 193 (1984), on which the juvenile relies, involved a petition which was neither signed nor verified and is therefore inapposite to the present case, in which both requirements were met.

Affirmed.

Judges EAGLES and MARTIN, JOHN C. concur.

MARY B. BLACKMON, ADMINISTRATRIX OF THE ESTATE OF BOBBY T. BLACKMON, DECEASED, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, EMPLOYER; AND/OR NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

No. 9410IC558

(Filed 16 May 1995)

Workers' Compensation §§ 41, 57 (NCI4th)— death of inmate—entitlement to workers' compensation benefits—wrongful death claim under Tort Claims Act barred

Because an inmate suffered accidental death arising out of and in the course and scope of the employment to which he had been assigned by the Department of Corrections, plaintiff was entitled to compensation under the Workers' Compensation Act and was thus barred by N.C.G.S. § 97-10.1 from pursuing her wrongful death claim under the Tort Claims Act. N.C.G.S. § 97-13(c).

Am Jur 2d, Workers' Compensation §§ 62, 64-66, 162.

Judge GREENE dissenting.

Appeal by defendants from order filed 15 March 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 October 1994.

Hugh B. Lewis for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Richard L. Griffin, for defendant-appellants.

JOHN, Judge.

Defendants appeal an award by the North Carolina Industrial Commission (the Commission) of damages to plaintiff under the North Carolina Tort Claims Act (the Tort Claims Act). For the reasons set forth herein, we reverse the decision of the Commission.

Pertinent facts and procedural information are as follows: Decedent Bobby Blackmon (Blackmon) was an inmate incarcerated within the North Carolina Department of Correction (DOC) at Yancey Correctional Center. Blackmon worked with a medium custody road crew assigned to the Madison County Section of the North Carolina Department of Transportation (DOT).

On 6 November 1990, the DOT foreman supervising Blackmon's crew instructed the inmates to break up and remove road salt from a double storage bin, a wooden structure built of treated lumber and located on the side of a mountain immediately above the DOT maintenance yard. The bin is raised eight (8) feet from the ground on stilts, and measures 34 feet from side to side, 17 feet from front to back, and 14 feet from top to bottom. It consists of two large compartments, each capable of holding approximately 75 tons of road salt. Access to the top of the bin is through plywood doors. Removal of salt is accomplished by backing a truck beneath the bin and opening metal doors on the bottom so as to allow salt to fall through a chute.

Because the bin is neither airtight nor waterproofed, salt stored therein tends to harden and crystallize and often will not fall readily through the chute. Standard DOT procedure for dealing with this circumstance is for workers to stand inside the bin atop the hardened salt smashing it with crowbars until the salt flows evenly.

Blackmon and another inmate were directed to loosen salt in the foregoing manner. As Blackmon moved along the salt crust surface, it suddenly broke beneath him and he dropped into the salt pile. Although other inmates attempted to extricate Blackmon, he eventually disappeared from view. Further rescue efforts were ineffectual, and Blackmon subsequently died from asphyxiation.

Mary Blackmon, Blackmon's mother and administratrix of his estate, instituted this action 11 February 1991 by filing an affidavit with the Commission alleging a tort claim against DOT and DOC and seeking $100,000.00 in damages for the wrongful death of Blackmon. Defendants answered 11 March 1991 disavowing any liability, and further moved to dismiss based upon lack of subject matter jurisdiction 4 April 1991. The motion asserted that provisions of the Workers' Compensation Act (the Act) barred plaintiff from proceeding under the Tort Claims Act for wrongful death. Defendants' motion was denied by Deputy Commissioner Edward Garner, Jr. 13 August 1991.

On 18 March 1992, plaintiff's claim was heard on its merits before Deputy Commissioner Gregory M. Willis. He concluded "[p]laintiff has failed to prove that [state employees] injured the decedent as a result of their negligence while acting within the scope of their employment with the Department of Transportation or Department of Correction . . . ," and awarded no damages to plaintiff. Plaintiff appealed this decision to the full Commission.

The Commission, in an order written by Commissioner James J. Booker, concluded the following:

> 1. N.C.G.S. §97-13(c) is not a bar to an action for wrongful death of a prisoner brought under the North Carolina Tort Claims Act. Ivey v. North Carolina Prison Dept., 252 N.C. 615, 114 S.E.2d 812 (1960).
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> . . . .
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> 4. The North Carolina Industrial Commission is to determine negligence under the Tort Claims Act by using the same rules as those applicable to private parties. N.C.G.S. §143-291; Bolkhir v. North Carolina State Univ., 321 N.C. 706, 365 S.E.2d 898 (1988). Negligence is the failure to exercise the degree of care for others' safety which a reasonably prudent person, under like circumstances, would exercise. Sparks v. Phipps, 255 N.C. 657, 122 S.E.2d 496 (1961).
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> . . . .
>
> 6. The undersigned are persuaded by the accident investigation report by Ed Preston which concluded that the procedure used for cleaning the salt bins posed a serious risk of injury or death to workers. As such, defendants were negligent in using such a procedure, given the design of the bins, that no safety

equipment was used or was even made available to workers, and that there was no possible way to rescue someone without putting the rescuers in serious danger themselves.

7. Because defendants' negligence caused the wrongful death of decedent, the claimant is entitled to compensation under the North Carolina Tort Claims Act at the present value loss of earnings, fringe benefits, and household services of decedent.

Based on these determinations, the Commission awarded plaintiff $73,685.00 in damages. Defendants gave notice of appeal to this Court 30 March 1994.

Defendants' basic assignment of error focuses upon Commissioner Booker's conclusion that N.C. Gen. Stat. § 97-13(c) does not operate to bar plaintiff's wrongful death action brought under the Tort Claims Act.

The statute at issue provides in pertinent part:

> This Article shall not apply to prisoners being worked by the State . . . , except to the following extent: Whenever any prisoner assigned to the State Department of Correction shall suffer . . . accidental death arising out of and in the course of the employment to which he had been assigned, if there be death . . . the dependents or next of kin . . . may have the benefit of this Article by applying to the Industrial Commission as any other employee; provided, such application is made within 12 months from the date of the discharge; and provided further that the maximum compensation to . . . the dependents or next of kin of any deceased prisoner shall not exceed thirty dollars ($30.00) per week and the period of compensation shall relate to the date of his discharge rather than the date of the accident. . . . The provisions of G.S. 97-10.1 and 97-10.2 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said section applies to employees and employers.

N.C. Gen. Stat. § 97-13(c) (1991).

N.C. Gen. Stat. § 97-10.1 (1991) states:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin,

> or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

Read *in pari materia*, the terms of these statutes indisputably dictate two major consequences in the circumstances *sub judice*: 1) because Blackmon suffered accidental death arising out of and in the course of the employment to which he was assigned, plaintiff "may have the benefit" of the Workers' Compensation Act; and 2) if such opportunity to seek redress constitutes being "entitled to compensation" under the Act, plaintiff is excluded from maintaining a wrongful death action against defendants "at common law or otherwise," *i.e.*, under the Tort Claims Act. Should the latter issue be resolved against plaintiff, her appeal fails. We conclude plaintiff's action is indeed barred.

Plaintiff emphasizes the word "may" in the statute and asserts use of the term constitutes a permissive option, allowing her a choice of claiming under the Act or proceeding under the Tort Claims Act. While "may" indisputably leaves the decision regarding whether or not to file *any* workers' compensation claim with plaintiff, her argument takes the word "may" out of context and further ignores the implications of the phrase "entitled to compensation."

G.S. § 97-13(c) commences with the prohibitory statement that it "shall not apply to prisoners being worked by the State." Only thereafter does it set out those instances in which prisoners "may have the benefit" of the Act. Finally, it provides that the exclusive remedy provisions of G.S. § 97-10.1 "*shall apply* to prisoners . . . *entitled to compensation*" under the section.

"Where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or clearly indicated by the context in which they are used." *State v. Koberlein*, 309 N.C. 601, 605, 308 S.E.2d 442, 445 (1983) (citing *Lafayette Transportation Service, Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E.2d 770 (1973)). "Entitle" is defined as to "qualify (one) for something" or to "furnish with proper grounds for seeking or claiming something." Webster's Third New International Dictionary 758 (1966).

When the statutory exceptions to non-applicability of the Act as set out in G.S. § 97-13(c) are met, the dependents or next of kin of a deceased inmate possess the "proper grounds for seeking or claiming" benefits thereunder and are therefore qualified, or more specifically "*entitled*," to compensation under the Act. Because Blackmon was a prisoner who suffered "accidental death arising out of and in the course of the employment to which he had been assigned," his dependents or next of kin are statutorily "entitled" to specific benefits under the Act. Therefore, plaintiff, as a consequence of G.S. § 97-10.1, may not maintain a wrongful death action against defendants under the Tort Claims Act.

However, plaintiff and the dissent assert, as did the Commission, that *Ivey v. Prison Department*, 252 N.C. 615, 114 S.E.2d 812 (1960), requires a contrary result. Inmate Ivey was ordered by a camp Assistant Superintendent to help a department employee transport a sick prisoner to the prison hospital. *Id.* at 616, 114 S.E.2d at 813. While *en route* in a department truck, the employee failed to slow for a turn and lost control of the vehicle. *Id.* Ivey sustained severe injuries which eventually caused his death. *Id.* at 617, 114 S.E.2d at 813.

The administrator of Ivey's estate initiated a civil tort claim against the North Carolina Prison Department for wrongful death. The Department sought dismissal of the action on grounds that the prisoner's workers' compensation remedy was exclusive. *Id.* at 616, 114 S.E.2d at 812-13. This motion was allowed and the dismissal was later affirmed by the full Commission as well as the Superior Court. *Id.* at 617, 114 S.E.2d at 813.

At the time *Ivey* was appealed to the Supreme Court, G.S. § 97-13(c) read as follows:

> Whenever any prisoner assigned to the State Prison Department shall suffer accidental injury arising out of and in the course of the employment to which he had been assigned, if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this article, then such discharged prisoner may have the benefit of this article by applying to the Industrial Commission as any other employee; provided, such application is made within twelve months from the date of discharge; and provided, further, . . . *no award other than burial expenses shall be made for any prisoner whose accident results in death* . . . .

G.S. § 97-13(c) (1958) (emphasis added). The statute had been amended in 1957 to provide further that N.C. Gen. Stat. § 97-10 applied to prisoners "entitled to compensation." G.S. § 97-10, predecessor to G.S. § 97-10.1, stated that plaintiff's remedy under the Workers' Compensation Act was exclusive of all other remedies.

The *Ivey* Court emphasized that the 1957 amendment applied only to prisoners "entitled to compensation," and that the term "compensation" meant "the money allowance payable to an employee or to his dependents as provided for in this article, and includes funeral benefits provided herein." N.C. Gen. Stat. § 97-2(11) (1958); *Ivey*, 252 N.C. at 619, 114 S.E.2d at 815. The Court concluded payment of burial expenses as provided in G.S. § 97-13(c) was at best only a part of compensation:

> To be sure, the definition [of compensation] includes burial expenses, but it takes the whole to constitute compensation and not one of its parts. A vest is a part of a suit of clothes, but a vest cannot be called a suit. Surely compensation for wrongful death involves more than the burial of the body.

Id. at 620, 114 S.E.2d at 815. Accordingly, the Court ruled Ivey was not a prisoner "entitled to compensation" and the exclusive remedy provisions in G.S. § 97-10 did not apply.

However, G.S. § 97-13(c) was thereafter amended in 1971 to delete the burial expenses limitation of workers' compensation relief for prisoners killed in the scope of employment with DOC. The statute now provides for payment of $30.00 per week to the dependents or next of kin of a deceased prisoner, which provision comports with the unamended statutory definition of compensation. *See* G.S. § 97-2(11) (1994). " 'Compensation,' in the connection in which it is used in the Act, means a money relief afforded according to the scale established and for the persons designated in the Act," *Branham v. Panel Co.*, 223 N.C. 233, 236, 25 S.E.2d 865, 867 (1943), and the amount to be awarded a claimant is based on lost earning capacity, *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 83, 155 S.E.2d 755, 761 (1967) (citation omitted).

" 'When courts are called upon to interpret [statutes], the words selected by the Legislature should be given their generally accepted meaning unless it is manifest that such definition will do violence to legislative intent.' " *Bear v. Bear*, 3 N.C. App. 498, 504, 165 S.E.2d 518, 522 (1969) (quoting *Bleacheries Co. v. Johnson, Comm'r of Revenue*,

266 N.C. 692, 694, 147 S.E.2d 177, 179 (1966)). Construing the 1971 amendment as providing compensation under the Act does no violence to legislative intent. "It is well settled that the intent of the Legislature controls the interpretation of a statute." *Pipeline Co. v. Neill*, 296 N.C. 503, 508, 251 S.E.2d 457, 460 (1979) (citing *Underwood v. Howland*, 274 N.C. 473, 164 S.E.2d 2 (1968)). "In construing a statute with reference to an amendment, it is presumed that the Legislature intended either (1) to change the substance of the original act or (2) to clarify the meaning of it." *Id.* at 509, 251 S.E.2d at 461 (citing *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E.2d 481 (1968)). As there was no ambiguity in the restriction by previous G.S. § 97-13(c) of compensation to burial expenses, it follows that the 1971 amendment was intended to change the substance of the Act. *See Insurance Co. v. Insurance Co.*, 276 N.C. 243, 249-50, 172 S.E.2d 55, 59 (1970).

Moreover, it is appropriate to assume the legislature is aware of any judicial construction of a statute. *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 648, 362 S.E.2d 294, 301 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988) (citation omitted). The *Ivey* Court determined that mere recovery of burial expenses under the Act did not constitute "compensation." The subsequent legislative decision to provide weekly monetary benefits to inmates killed in the course of employment with DOC may logically only be interpreted as affording such claimants "compensation," thereby bringing them under the limitations of G.S. § 97-10.1 "in the same manner" as all other employees.

Finally, this interpretation of G.S. § 97-13(c) is in accordance with the policy behind workers' compensation and the spirit of the Act.

> The Act represents a compromise between the employer's and employee's interests. The employee surrenders his right to common law damages in return for guaranteed, though limited, compensation. The employer relinquishes the right to deny liability in return for liability limited to the employee's loss of earning capacity.

Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 98-99, 348 S.E.2d 336, 341 (1986). Restricting "compensation" to loss of the decedent inmate's earning capacity, however limited by the fact of incarceration, effectuates the statutory compromise between employer and employee.

Plaintiff nevertheless insists the 1971 amendment (providing compensation in the amount of $20.00 per week) affords deceased prisoners in the situation of Blackmon a "full suit of clothes, but with short pants," and cites *Oxendine v. Dept. of Correction*, I.C. No. TA-12513 at 4 (December 16, 1992) as support for her challenge to the sufficiency of such benefits. We first emphasize that conclusions from the Commission are not binding upon appellate courts, *see Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 139 (1944), and also point out that policy decisions such as the amount of benefits are matters for the legislative branch of government and not the judicial. *Gardner v. N. C. State Bar*, 316 N.C. 285, 293, 341 S.E.2d 517, 522 (1986) (citation omitted).

In addition, plaintiff makes passing reference to a constitutional argument alleging denial of her rights guaranteed under the Equal Protection Clause of the Fourteenth amendment. As this issue was not raised below, we do not consider it here. N.C.R. App. P. 10(b)(1). Further, as plaintiff has asserted no claim under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), we likewise do not address the effect of the exclusivity provisions of G.S. § 97-10.1 on such claim.

Finally, plaintiff cites this Court's opinion in *Tanner v. Dept. of Correction*, 19 N.C. App. 689, 200 S.E.2d 350 (1973) in support of her proposition that she is entitled to pursue a negligence claim under the Tort Claims Act. First, the *Tanner* decision in no way addresses the fundamental question at issue herein. Moreover, Tanner's claim was for injury, not accidental death, and it is unclear whether he was "discharged" at the time of pursuing his tort claim so as arguably to implicate G.S. § 97-13(c) and G.S. § 97-10.1. *Tanner* is thus inapposite to the circumstance *sub judice*. We hold only that because DOC inmate Blackmon suffered accidental *death* arising out of and in the course and scope of the employment to which he had been assigned by DOC, plaintiff is "entitled to compensation" under the Act and is thus barred by G.S. § 97-10.1 from pursuing her wrongful death claim under the Tort Claims Act.

Based on the foregoing, the award by the Commission to plaintiff of damages under the Tort Claims Act is reversed.

Reversed.

Judge WYNN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's opinion that the provisions of the Workers' Compensation Act bar plaintiff's wrongful death claim under the Tort Claims Act.

The majority correctly points out that when *Ivey* was decided, Section 97-13(c) only allowed "burial expenses . . . for any prisoner whose accident results in death." Although our Supreme Court did determine that burial expenses are not compensation, this determination was not the basis for the Supreme Court's decision in *Ivey* to allow a prisoner who accidentally died while on assigned work to bring a claim under the Tort Claims Act. The Court was explicit in holding:

> the plaintiff's right to have the tort claim heard and passed on has not been withdrawn [by the amendment to 97-13 which provided the exclusivity provisions of 97-10 apply to prisoners "entitled to compensation"]. If the Legislature intended to exclude prisoners, all it had to do was pass a simple amendment to the Tort Claims Act saying, "prisoners assigned by the courts to work under the State Prison Department are excluded." Intention to withdraw a prisoner's right to assert a tort claim cannot be presumed as a result of the amendment to the Work[er]'s Compensation Act in its present form and setting.

Ivey, 252 N.C. at 620, 114 S.E.2d at 815.

Although the Workers' Compensation Act has been amended to delete the burial expenses limitation when a prisoner is accidentally killed, this amendment does not address the concerns expressed by the Court in *Ivey* or the reasons for its decision. Despite the decision in *Ivey* which makes a clear call to the Legislature to amend the Tort Claims Act if it wants to exclude prisoners from coverage, and despite having amended both the Workers' Compensation Act and the Tort Claims Act since *Ivey*, the Legislature, for more than thirty years since the *Ivey* decision, has not acted to exclude prisoners from the provisions of the Tort Claims Act. *See Hewitt v. Garrett*, 274 N.C. 356, 361, 163 S.E.2d 372, 375 (1968) (failure of Legislature to change statute in more than thirty years following Supreme Court's interpretation of statute suggest that the "law-making body is satisfied with the [Court's] interpretation). Furthermore, the Legislature has not altered the basic framework of 97-13(c) which creates an exception to the Workers' Compensation Act to allow coverage for prisoners

accidentally injured or killed while on assigned work and which then places limitations on that coverage. N.C.G.S. § 97-13(c). Section 97-13(c) is today, as it was at the time of *Ivey*, a "jumbled and confusing subsection which is an exception followed by two provisos to the section of the Work[er]'s Compensation Act." *Ivey*, 252 N.C. at 619, 114 S.E.2d at 815. Therefore, if the Legislature desires the Workers' Compensation Act to be the exclusive remedy for prisoners accidentally injured or killed while on assigned work, it either needs to amend the Tort Claims Act as suggested by the Court in *Ivey* or change Section 97-13(c) to treat working prisoners as regular employees rather than as an exception to the Workers' Compensation Act. Because the Legislature has not amended the Tort Claims Act to exclude working prisoners, and the treatment of working prisoners under the Worker's Compensation Act as an exception is still in place, the concerns expressed by the Court in *Ivey* continue to exist. For these reasons, I would affirm the Industrial Commission's decision that the claimant is entitled to compensation under the Tort Claims Act.

DONALD BURTON, APPELLANT v. THE CITY OF DURHAM, TREVOR HAMPTON, C. M. TIFFIN, T. M. TAYLOR AND C. M. ALLEN IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, APPELLEES

No. 9414SC365

(Filed 16 May 1995)

1. **Judgments § 226 (NCI4th)— defense of collateral estoppel—mutuality of parties not required**

   Mutuality of parties is not required when collateral estoppel is used defensively.

   Am Jur 2d, Judgments §§ 514-523.

2. **Judgments § 314 (NCI4th)— civil rights action—matters previously determined in criminal proceeding—collateral estoppel applicable**

   Collateral estoppel may be used to preclude relitigation in a civil rights action of issues previously determined in a prior criminal proceeding.

   Am Jur 2d, Judgments §§ 614 et seq.

3. Judgments § 314 (NCI4th)— abridgement of free speech by arrest—issue previously determined in criminal prosecution

Plaintiff was collaterally estopped to assert that defendant police officers violated his free speech rights under the First Amendment in that they arrested him under N.C.G.S. § 14-223 merely because he verbally protested his arrest, since that issue was conclusively established against plaintiff by his conviction in superior court for three counts of assault on a law enforcement officer.

Am Jur 2d, Judgments §§ 614 et seq.

4. Judgments § 314 (NCI4th)— violation of civil rights alleged—lawfulness of detention and arrest—issues previously determined

In plaintiff's action alleging violation of his civil rights during an arrest, issues as to whether the detention and arrest were lawful had already been litigated in plaintiff's criminal prosecution, and summary judgment for defendants on plaintiff's claims of unreasonable search and seizure and use of excessive force in the arrest was proper.

Am Jur 2d, Judgments §§ 614 et seq.

5. Constitutional Law § 86 (NCI4th)— no violation of civil rights during arrest

There was no merit in plaintiff's allegation that his civil rights under North Carolina law were violated during an arrest because he was arrested for committing the infraction of exceeding a safe speed, officers conducted a registration check pursuant to a stop for exceeding safe speed, and officers used handcuffs during the arrest since (1) officers lawfully arrested plaintiff for resisting or obstructing an officer; (2) plaintiff's conviction in district court of exceeding safe speed established that there was probable cause to stop plaintiff for this infraction, and an officer could lawfully do a registration check when he had probable cause to stop plaintiff for an infraction; and (3) it was established that officers did not use excessive force in arresting plaintiff, and the use of handcuffs was not unauthorized or unreasonable.

Am Jur 2d, Civil Rights §§ 3, 4.

6. Conspiracy § 12 (NCI4th)— conspiracy to violate constitutional rights—insufficiency of evidence

Evidence was insufficient to show that defendant police officers had a meeting of the minds with racial animus to deprive plaintiff of his constitutional rights where it was established that defendants had probable cause to arrest plaintiff, the arrest was not achieved with excessive force, and plaintiff's First Amendment rights were not violated; defendants did not conspire to make a racial slur which plaintiff contended one defendant made; and none of the evidence presented by plaintiffs supported an inference that defendants as a group had the racial animus required under 42 U.S.C. § 1985(3).

Am Jur 2d, Conspiracy §§ 68, 69.

Appeal by plaintiff from order signed 22 November 1993 and filed 29 November 1993 by Judge Dexter Brooks in Durham County Superior Court. Heard in the Court of Appeals 2 February 1995.

Irving Joyner for plaintiff-appellant.

Faison & Fletcher, by Reginald B. Gillespie, Jr., Keith D. Burns, and O. William Faison, for defendants-appellees City of Durham, Trevor Hampton, T. M. Taylor, and C. M. Allen and Maxwell & Hutson, by James B. Maxwell, for defendant-appellee C. M. Tiffin.

LEWIS, Judge.

Plaintiff appeals from the grant of summary judgment for defendants and from the denial of his motion for summary judgment. Plaintiff seeks relief under 42 U.S.C. §§ 1981, 1983, and 1985 claiming that defendants violated his rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution and comparable rights under the North Carolina Constitution. Plaintiff alleges that these violations occurred during the course of his detention and arrest by defendants, police officers employed by the City of Durham.

Defendants' evidence shows the following: On 2 January 1990 plaintiff was stopped for speeding by defendant Tiffin. After a pursuit with blue lights, plaintiff stopped his car in a parking lot in Durham. Officer Tiffin asked for plaintiff's driver's license and registration. Plaintiff did not have the registration papers so Officer Tiffin asked plaintiff to wait while he checked the information by radio. Plaintiff

approached the patrol car and began questioning Officer Tiffin repeatedly in a loud voice. Officer Tiffin asked plaintiff several times to stop interfering and return to his car. After plaintiff continued his protestations, Officer Tiffin told him he was under arrest for resisting, delaying, and obstructing a law enforcement officer. Plaintiff refused to submit to the arrest, folding his arms across his chest and leaning back against the patrol car. Officer Tiffin radioed for assistance and Officers Taylor and Allen responded. As plaintiff resisted attempts by the three officers to arrest him, Officer Taylor struck plaintiff twice on the wrist with a nightstick to subdue him. Eventually plaintiff was handcuffed.

Evidence presented by plaintiff shows the following: He was driving at the proper speed prior to the stop. After being stopped by Officer Tiffin, plaintiff protested the arrest repeatedly and loudly and asked to speak to a superior officer. All three officers physically subdued plaintiff. Officer Taylor struck plaintiff on the head and neck with his nightstick. Officer Taylor stepped on plaintiff's wrist to close the handcuff and when plaintiff complained that the cuffs were too tight and his wrist was broken, Officer Taylor said, "[W]ell, I hope you broke it, you damn nigger, for hurting my hand."

As a result of the above incident, plaintiff was charged and convicted in Durham County District Court of exceeding a safe speed and three counts of assault on a law enforcement officer. Plaintiff was also charged with resisting, obstructing, or delaying an officer in the performance of his duties under N.C.G.S. § 14-223. It is not clear from the record whether plaintiff was convicted of this offense in district court. On appeal to superior court, the jury found plaintiff guilty of three counts of assault on a law enforcement officer under N.C.G.S. § 14-33(b)(4) (now renumbered as section 14-33(b)(8)). The resisting, obstructing, or delaying an officer and exceeding safe speed charges were dismissed. On appeal, this Court held no error. *State v. Burton*, 108 N.C. App. 219, 423 S.E.2d 484 (1992), *appeal dismissed and disc. review denied*, 333 N.C. 576, 429 S.E.2d 574 (1993).

On 31 December 1990, plaintiff filed this civil rights action. Summary judgment was granted to defendants by order filed 29 November 1993.

The issue on appeal is whether the trial court erred in granting summary judgment to defendants and denying summary judgment to plaintiff. We affirm.

Defendants claim that plaintiff is collaterally estopped from litigating the issues underlying his claims. Plaintiff claims that lack of mutuality of parties prevents the application of collateral estoppel here.

[1] Neither the United States Supreme Court nor our Supreme Court requires mutuality of parties when collateral estoppel is used defensively, as defendants seek to do here. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28, 58 L. Ed. 2d 552, 560 (1979) *and Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986). Collateral estoppel precludes relitigation of an identical issue actually litigated and necessary to the outcome in a prior action that resulted in a final judgment on the merits. *Parklane Hosiery Co.*, 439 U.S. at 326 n.5, 58 L. Ed. 2d at 559 n.5; *Thomas M. McInnis & Assoc., Inc.*, 318 N.C. at 428-29, 349 S.E.2d at 557.

[2] This Court has upheld collateral estoppel of an issue in a civil suit when that issue was previously established as an element in a criminal conviction. *See Hill v. Winn-Dixie Charlotte, Inc.*, 100 N.C. App. 518, 397 S.E.2d 347, 349 (1990) (plaintiff's conviction in district court is conclusive as evidence of probable cause in a subsequent civil case for malicious prosecution unless plaintiff can produce evidence that the conviction was procured by fraud or unfair means). Indeed, the United States Supreme Court has upheld the use of collateral estoppel to preclude relitigation in a civil rights action of issues previously determined in a prior criminal proceeding. *See Allen v. McCurry*, 449 U.S. 90, 103-05, 66 L. Ed. 2d 308, 318-20 (1980).

We now apply these principles to determine the propriety of summary judgment on plaintiff's claims.

First Amendment Claim

[3] Plaintiff claims that defendants violated his free speech rights under the First Amendment of the United States Constitution in that they arrested him under N.C.G.S. § 14-223 merely because he verbally protested the arrest.

Section 14-223 makes it a misdemeanor for any person to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office." N.C.G.S. § 14-223 (1993). " '[M]erely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty does not amount to obstructing, hindering, or interfering with an officer' " under this section. *State v. Allen*, 14 N.C. App. 485, 491, 188 S.E.2d

568, 573 (1972) (quoting 58 Am. Jur. 2d, *Obstructing Justice* §§ 12 and 13, pp. 863, 864). Communications simply intended to assert rights, seek clarification or obtain information in a peaceful way are not chilled by section 14-223. *State v. Singletary*, 73 N.C. App. 612, 615, 327 S.E.2d 11, 13 (1985) (citing *State v. Leigh*, 278 N.C. 243, 251, 179 S.E.2d 708, 713 (1971)). Only those communications intended to hinder or prevent an officer from carrying out his duty are discouraged by this section; and the section's restrictions on such communication do not violate the First or Fourteenth Amendments. *Id.*

Defendants argue that the issue of whether plaintiff's First Amendment rights were violated has been conclusively established against him by his conviction in superior court for three counts of assault, which superior court conviction was upheld by this Court on appeal. At the superior court criminal trial, plaintiff litigated the issue of whether he was arrested merely for his verbal protests. The court instructed the jury that they must find that the arrest was lawful as an element of the offense of assault on a law enforcement officer. The instruction on this element was as follows:

> And, fourth, that this arrest was a lawful arrest. The arrest would be lawful if at the time the officers made it, the officer had probable cause to believe that the defendant had committed a criminal offense in his presence. Delaying or obstructing a public officer in discharging a duty of his office is a criminal offense. I repeat, that the officer must have had probable cause to believe that the defendant had committed the offense of delaying and obstructing a public officer in discharging a duty of his office. Such probable cause would exist if the circumstances surrounding the defendant's conduct were sufficient to warrant a prudent person in believing that the defendant was committing the criminal offense in question. *Merely remonstrating with an officer, protesting, objecting, questioning or criticizing an officer when he is performing his duties, does not amount to delaying and interfering an officer, they, in temperance [sic] language, used without apparent purpose is not sufficient, although force or threatened force is not always an indispensable ingredient of the offense of interfering with an officer in the discharge of his duty, mere remonstrating or criticizing an officer is not usually held to be the equivalent of unlawful interference.*

(Emphasis added). As the instruction shows, the jury was required to find probable cause to arrest and that plaintiff was <u>not</u> arrested for

"merely remonstrating" with the officer, in order to find that the arrest was lawful. Since, after full litigation of this issue, the jury necessarily found that plaintiff was not arrested for his verbal protests, plaintiff is precluded from litigating it again here. Summary judgment for defendants on plaintiff's claim under the First Amendment is affirmed.

Fourth and Fourteenth Amendment (Due Process) Claims

[4] Plaintiff claims that defendants violated his rights under the Fourth Amendment of the United States Constitution to be free from unreasonable search and seizure by stopping him without reasonable suspicion and arresting him without probable cause and with excessive force. He also claims that defendants violated his due process rights under the Fourteenth Amendment by the use of excessive force in the arrest. We affirm summary judgment for defendants on these claims.

The existence of probable cause is an absolute bar to a civil rights claim for false arrest. *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985). This court has already determined that there was reasonable suspicion to stop plaintiff's vehicle. *Burton*, 108 N.C. App. at 226, 423 S.E.2d at 488. Probable cause to arrest and the fact that the officers did not use excessive force have also been established by the superior court jury finding that the arrest was lawful. *Id.* at 226-27, 423 S.E.2d at 488-89. Since the issues of whether the detention and arrest were lawful have already been litigated by plaintiff and necessarily decided in the criminal case, they may not now be relitigated. Summary judgment for defendants on plaintiff's Fourth Amendment and Fourteenth Amendment (due process) claims was proper.

Other Illegal Detention Claims

[5] Plaintiff claims that North Carolina law prohibits his arrest for committing the infraction of exceeding a safe speed. However, plaintiff was not arrested for that infraction. It has already been established that defendants had probable cause to arrest plaintiff for resisting, delaying or obstructing an officer. *Id.* The fact that he may also have been cited for an infraction does not invalidate the lawful arrest. This claim is without merit.

Plaintiff also claims that his rights under North Carolina law were violated by the registration check pursuant to the stop for exceeding safe speed. Plaintiff's conviction in district court of exceeding safe speed establishes that there was probable cause to stop plaintiff for

this infraction. This is true even though the district court conviction was appealed to and dismissed by the superior court. *See Myrick v. Cooley*, 91 N.C. App. 209, 213-14, 371 S.E.2d 492, 495, *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988). N.C.G.S. § 15A-1113 (1988) authorizes an officer who has probable cause to believe that a person has committed an infraction to detain that person for a reasonable period in order to issue and serve him a citation. Plaintiff cites no North Carolina cases that construe this statute to mean that an officer cannot do a registration check when he has probable cause to stop a person for an infraction. We see no reason to read such a limitation into the North Carolina statute.

Plaintiff's claim that defendants violated his rights by handcuffing him is also without merit. An officer may use handcuffs in an arrest, and the use of handcuffs is reasonable in many arrest situations. *See Soares v. State of Connecticut*, 8 F.3d 917, 921 (2nd Cir. 1993) *and State v. Robinson*, 40 N.C. App. 514, 519, 253 S.E.2d 311, 315 (1979). The handcuffs were used to subdue plaintiff after he resisted. It has already been established that defendants did not use excessive force in arresting plaintiff. Given this finding, we see no basis for plaintiff's claim that the use of handcuffs, under these facts, was unauthorized or unreasonable.

We affirm the grant of summary judgment for defendants as to these other grounds offered by plaintiff to challenge the arrest, the registration check, and the use of handcuffs.

Conspiracy Claim

[6] In his 42 U.S.C. § 1985(3) claim, plaintiff contends that defendants conspired to violate his constitutional rights. Plaintiff specifically argues that defendants violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by enforcing section 14-223 in a discriminatory manner. To show a section 1985(3) violation, a plaintiff must prove:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby the person is either injured in his person or property or deprived of any right of a citizen of the United States.

Mian v. Donaldson, Lufkin & Jenrette Securities Corp., 7 F.3d 1085, 1087 (2nd Cir. 1993). The second element requires a showing of some

racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. *Griffin v. Breckenridge*, 403 U.S. 88, 102, 29 L. Ed. 2d 338, 348 (1971).

The issue of whether there was a conspiracy should go to the jury if it is possible that a jury could "infer from the circumstances" that the alleged conspirators had a " 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's goals. *Adickes v. Kress & Co.*, 398 U.S. 144, 158, 26 L. Ed. 2d 142, 155 (1970). To support his section 1985(3) claim plaintiff offers evidence that defendants joined together to arrest and subdue plaintiff. To show racial animus and conspiracy, plaintiff also offers the uncorroborated testimony of plaintiff who states that, after plaintiff was handcuffed, Officer Taylor, referring to plaintiff's wrist, stated, "[W]ell, I hope you broke it, you damn nigger, for hurting my hand." Defendants point out that Officer Taylor denied making this slur, and plaintiff's own witnesses, Derrick Burton and Tommy Holder, did not hear the officers make any racial slurs.

Plaintiff also offers statistical evidence based on arrest/detention reports showing that thirty-nine of the forty-two people arrested by Officer Taylor for resisting, obstructing or delaying an officer during 1988-1992 were black and that ten of thirteen people arrested by Officer Allen for this charge during this period were black. However, this statistical evidence fails to show what percentage of persons in the patrol area of these officers were black or otherwise. In addition, it was Officer Tiffin who first told plaintiff he was under arrest for resisting, obstructing or delaying an officer. Officers Taylor and Allen arrived later.

Plaintiff has failed to show facts which would permit a jury to infer that defendants had a meeting of the minds with racial animus to deprive plaintiff of his constitutional rights. It has already been established that defendants had probable cause to arrest plaintiff, the arrest was not achieved with excessive force, and that plaintiff's First Amendment rights were not violated. As to the racial slur allegedly made by Officer Taylor, none of the evidence presented by plaintiff supports an inference that the defendants conspired to make the slur or that the defendants as a group had the racial animus required under § 1985(3). Since plaintiff has not produced evidence showing a conspiracy to commit an act that deprives him of his constitutional rights, summary judgment for defendants on plaintiff's section 1985(3) claim was proper.

Municipal or Supervisory Liability Claims

Plaintiff seeks to establish municipal and supervisory liability of the City of Durham and Chief Trevor Hampton, respectively, under 42 U.S.C. § 1983 for violation of his constitutional rights. Plaintiff attempts to show that training omissions by the City and Chief Hampton caused the violation of his rights. A municipality cannot be held liable under section 1983 unless action pursuant to official municipal policy caused a constitutional tort. *Pembaur v. Cincinnati*, 475 U.S. 469, 477, 89 L. Ed. 2d 452, 461 (1986). Correspondingly, a supervisor cannot be held liable under this section unless his breach of duty caused the deprivation under color of law of a federally secured right. *McClelland v. Facteau*, 610 F.2d 693, 695-97 (10th Cir. 1979). Since plaintiff has failed to establish a genuine issue of material fact that any of his constitutional rights were violated, his claims against the City and Chief Hampton for municipal and supervisory liability, respectively, must fail. Summary judgment for defendants on these claims is affirmed.

Other Claims

To the extent that plaintiff has assigned error to the summary judgment order based on other violations of his rights, including but not limited to those arising under the United States and North Carolina Constitutions, these have been abandoned by plaintiff's failure specifically to argue them in his brief. N.C.R. App. P. 28(a) (1995).

For the reasons stated, the order granting summary judgment for defendants and denying summary judgment for plaintiff is affirmed.

Affirmed.

Judges COZORT and GREENE concur.

TONY ONLEY, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY AND EMPLOYERS MUTUAL CASUALTY COMPANY, DEFENDANTS

No. COA94-804

(Filed 16 May 1995)

1. Insurance § 528 (NCI4th)— UIM coverage—intrapolicy and interpolicy stacking allowed

N.C.G.S. § 20-279.21(b)(3) and (4), as they were in effect for this case, permitted plaintiff, who was a resident of the households of both his parents and his grandparents, to intrapolicy stack the UIM coverage provided in his parents' policy and to interpolicy stack the UIM limits of his grandparents' policy on top of the limits of his parents' policy for the purpose of determining whether the tortfeasor's vehicle was an underinsured vehicle.

Am Jur 2d, Automobile Insurance § 322.

Combining or "stacking" uninsured motorist coverages provided in separate policies issued by the same insurer to different insureds. 23 ALR4th 108.

2. Insurance § 528 (NCI4th)— two UIM carriers—pro rata credit for payment from tortfeasor's carrier

Where two UIM carriers provide coverage in different amounts, they are to share pro rata a credit for payment made by the tortfeasor's insurance carrier.

Am Jur 2d, Automobile Insurance § 322.

Combining or "stacking" uninsured motorist coverages provided in separate policies issued by the same insurer to different insureds. 23 ALR4th 108.

Appeal by defendants from order entered 5 May 1994 in Mecklenburg County Superior Court by Judge Loto G. Caviness. Heard in the Court of Appeals 18 April 1995.

Parker, Pollard & Brown, P.C., by George C. Piemonte, for plaintiff-appellee.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by Rex C. Morgan, for defendant-appellant Nationwide Mutual Insurance Company.

Caudle & Spears, P.A., by L. Cameron Caudle, Jr. and Timothy T. Leach, for defendant-appellant Employers Mutual Casualty Company.

GREENE, Judge.

Defendants, Nationwide Mutual Insurance Company (Nationwide) and Employers Mutual Casualty Company (Employers) appeal from an order entered 5 May 1994 in Mecklenburg County Superior Court allowing Tony Onley's (plaintiff) motion for summary judgment in his declaratory judgment action to determine entitlement to underinsured motorist (UIM) coverage.

The parties stipulated to the following facts: On 24 January 1988, plaintiff was operating a 1984 Chevrolet automobile owned by Shawn Bonner with the knowledge and consent of its owner when he was involved in a collision with a 1979 Chevrolet automobile owned by William Worthen and being operated by Ruth Worthen. At the time of the accident, the Worthen automobile was insured by St. Paul Fire & Marine Insurance Company (St. Paul) which paid its policy limits of $100,000 to plaintiff. Also at the time of the accident, plaintiff was twenty-two years of age and resided with his parents Robert and Barbara Onley. Plaintiff's parents had in effect at the time of the accident an insurance policy with Nationwide which provided UIM coverage in the amount of $100,000 per person with a limit of $300,000 per occurrence and insured two separate vehicles. Plaintiff's grandparents, Walter and Lucille Reynolds, had in effect at the time of the accident an insurance policy with Employers which provided UIM coverage in the amount of $50,000 per person with a limit of $100,000 per occurrence and insured two separate vehicles.

Under both the Nationwide and Employers' policies, an insured person under Uninsured/Underinsured motorist (UM/UIM) coverage is "You or any family member." The term "family member" is defined as "a person related to you by blood, marriage or adoption who is a resident of your household." There are no exclusions under the poli-

cies which would exclude plaintiff from coverage. Both policies also contain the following:

> **OTHER INSURANCE** If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy.
>
> In addition, if there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

In December 1993, plaintiff filed a complaint pursuant to the North Carolina Declaratory Judgment Act in Mecklenburg County Superior Court and requested the court to enter an order declaring the rights of the parties "with respect to the personal automobile liability insurance policies referred to and for a declaration that the total policies therein constitute 'stacking' coverage thereby insuring the Plaintiff to the extent of Three Hundred Thousand Dollars ($300,000.00) for any injuries resulting from the aforementioned collision." In March 1994, plaintiff and both defendants filed motions for summary judgment. In support of his motion, plaintiff filed affidavits from his grandparents stating that plaintiff resided with them at the time of the accident.

By order filed 11 May 1994, the court denied defendants' motions for summary judgment, allowed plaintiff's motion for summary judgment, and ordered that defendants "are entitled to a credit for the amount of paid by the tortfeasor's insurance carrier to be divided one third (1/3) to Defendant, Employers, and two thirds (2/3) to Defendant, Nationwide" and "[a]s between the Defendants, any liability to the Plaintiff for UIM coverage shall be on a pro[ ]rata basis upon the ratio of each defendant's UIM limits to the total UIM coverage available." In reaching this decision, the trial court necessarily determined that the tortfeasor's vehicle was an "underinsured highway vehicle" within the meaning of Section 20-279.21(b)(4), and plaintiff was a person living in both his parents' and grandparents' households so that he was entitled to intrapolicy and interpolicy stack the UIM coverages of his parents' and grandparents' policies.

The issues presented are whether (I) plaintiff is entitled to both intrapolicy and interpolicy stack the UIM coverages in his parents' and grandparents' policies for the purpose of determining whether the tortfeasor's vehicle is an "underinsured highway vehicle" under Section 20-279.21(b)(4); and (II) two different insurance companies providing UIM coverage in different amounts should receive equal credit for any payment made by the tortfeasor's insurance carrier.

I

[1] Nationwide and Employers do not dispute that plaintiff was a resident of both his parents' household and his grandparents' household at the time of the accident. Nationwide, however, contends plaintiff should not be allowed to intrapolicy stack the UIM coverage provided in his parents' policy, and Employers argues plaintiff is not entitled to interpolicy stack the UIM limits of the Employers policy "on top of the limits of the Nationwide policy" for the purpose of determining whether the tortfeasor's vehicle is an "underinsured highway vehicle." We disagree with both arguments.

North Carolina General Statute §§ 20-279.21(b)(3), (4), as they were in effect for this case, "required that a person living in the household with relatives be allowed to aggregate or stack, both interpolicy and intrapolicy, the underinsured motorist coverages of the relatives and to collect on those stacked coverages." *Mitchell v. Nationwide Mut. Ins. Co.*, 335 N.C. 433, 435, 439 S.E.2d 110, 111 (1994) (*citing Harrington v. Stevens*, 334 N.C. 586, 434 S.E.2d 212 (1993)). It follows that plaintiff is entitled to aggregate, both interpolicy and intrapolicy, the UIM coverages in his parents' and grandparents' policies in determining whether the tortfeasor's vehicle is an underinsured highway vehicle under Section 20-279.21(b)(4). Intrapolicy stacking of Nationwide's UIM coverage of $100,000 per person provides $200,000 in UIM coverage available to plaintiff because this policy covered two separate vehicles. Intrapolicy stacking of Employers' UIM coverage of $50,000 per person provides $100,000 in UIM coverage available to plaintiff because this policy covered two separate vehicles. Interpolicy stacking of the UIM coverages available to plaintiff therefore provides him with a total UIM coverage of $300,000. Because the tortfeasor's policy had a liability limit of $100,000 and was therefore less than the applicable limits of UIM coverage for plaintiff at the time of the accident, the tortfeasor's vehicle constituted an "underinsured highway vehicle" under Section 20-279.21(b)(4).

II

[2] In this case, the language in both the Nationwide and Employers' policies mandates under the "other insurance" provision that "any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance." These identical "excess" clauses contained in both Nationwide and Employers' policies "are deemed mutually repugnant and neither excess clause will be given effect"; therefore, "we read the policies as if those clauses were not present." *North Carolina Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 511, 512, 369 S.E.2d 386, 388, 389 (1988); *see also* 7A Am. Jur. 2d *Automobile Ins.* § 434 (1980) (if literal effect were given to both "excess clauses," neither policy would cover loss, thereby producing "an unintended absurdity"). We are then left with the language in both policies under the "other insurance" provision that "we will only pay our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits." This language compels the conclusion that Nationwide and Employers must share any liability to plaintiff for UIM coverage on a pro rata basis. *Hilliard*, 90 N.C. App. at 512, 369 S.E.2d at 389. This holding is not disputed by Nationwide or Employers.

North Carolina General Statute § 20-279.21(b)(4) in effect at the time of the accident provides that UIM coverage does not apply until

> all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. . . . Underinsured motorist coverage shall be deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant pursuant to the exhausted liability policy.
>
> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the 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.

N.C.G.S. § 20-279.21(b)(4) (1989). Under the terms of the statute, a UIM carrier is entitled to credit for the amounts paid to a claimant under the tortfeasor's liability policy. *See Sproles v. Greene*, 100 N.C. App. 96, 102-03, 394 S.E.2d 691, 695 (1990) (UIM carriers should

receive credit for amounts paid by tortfeasor's carrier because claimant, under terms of 1983 version of G.S. 20-279.21(b)(4) should not collect more than his actual loss), *aff'd in part, rev'd in part on other grounds*, 329 N.C. 603, 407 S.E.2d 497 (1991).

Employers, citing *Sproles*, contends that any recovery from the tortfeasor's carrier must be credited equally between Nationwide and Employers to reduce the exposure of their UIM liability by the same amount, and the new UIM limits resulting from the credit are then used to determine what the pro rata basis of sharing UIM coverage will be. Under Employers' position, both it and Nationwide would be credited with $50,000 because St. Paul paid plaintiff $100,000; therefore, Nationwide's available UIM coverage would be reduced from $200,000 to $150,000, and Employers' available UIM coverage would be reduced from $100,000 to $50,000. The total UIM coverage available would then be $200,000, and in comparing each of the defendant's UIM limits after giving credit for the St. Paul payment, Nationwide would be responsible for seventy-five percent of any entitlement plaintiff has to UIM coverage, and Employers would be responsible for twenty-five percent of any entitlement plaintiff has to UIM coverage. Employers' reliance on *Sproles*, however, is misplaced.

In *Sproles*, there were two UIM coverages of $100,000 each available to the plaintiff, and the tortfeasor's insurance carrier had paid plaintiff $25,000. This Court held that "the aggregate amount of $200,000 should have been reduced by $25,000, the only payment [the torfeasor's carrier] made, rather than $50,000; the maximum liability of each carrier should have been reduced by $12,500 rather than $25,000." *Id.* at 103, 394 S.E.2d at 695. *Sproles* therefore determined that when there are two insurance companies providing UIM coverage *in the same amount*, and the tortfeasor's insurance company has paid the plaintiff $25,000, the maximum liability of each UIM carrier should have been reduced equally by $12,500. *Id.* This holding does not mandate that where two UIM carriers provide coverage *in different amounts*, they are required to share equally a credit for payment made by the tortfeasor's insurance carrier. Indeed, a proper reading of *Sproles* is that the multiple UIM carriers are to share the credit pro rata. This is consistent with the language of Nationwide and Employers' policies which both require sharing the loss based on the proportion their respective liabilities bear to the "total of all applicable limits." Furthermore, to share the liability in proportion to the coverage but not the credit in a like manner is irrational.

Based on these principles, because "the total of all applicable limits" for UIM coverage is $300,000, representing $200,000 from Nationwide and $100,000 from Employers, and Nationwide's [UIM] limit represents two-thirds of "all applicable [UIM] limits," it is entitled to a credit of $66,666.67, representing two-thirds of the $100,000 paid by St. Paul to plaintiff, and Employers is entitled to a credit of $33,333.33, which is one-third of St. Paul's payment to plaintiff. The trial court therefore correctly divided credit for St. Paul's payment between Nationwide and Employers. Under the same principles, the trial court correctly concluded that any future entitlement of plaintiff to UIM coverage should be shared on a pro rata basis based on "the ratio of each defendant's UIM limits to the total UIM coverage available." For these reasons, plaintiff has met its summary judgment burden of showing a lack of any triable issue, *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 341-42 (1992) (party moving for summary judgment has burden to show lack of any triable issue), and the decision of the trial court is

Affirmed.

Judges LEWIS and MARTIN, MARK D., concur.

EASTERN APPRAISAL SERVICES, INC., PLAINTIFF v. THE STATE OF NORTH CAROLINA; JAMES E. LONG AS COMMISSIONER OF INSURANCE OF NORTH CAROLINA; AND THE NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, DEFENDANTS

No. 9410SC501

(Filed 16 May 1995)

Constitutional Law § 103 (NCI4th)— files belonging to plaintiff—use by defendant to settle claims against insolvent insurer—no taking of personal property

Where plaintiff was engaged in the business of appraising damages and attempting settlements of claims asserted by claimants and insureds against an insurance company which became insolvent, and in the course of performing this work developed and maintained files containing information and documentation relating to the claims, the actions of the Insurance Commissioner and the Guaranty Association in securing an order enjoining plaintiff from destroying the files and requiring plaintiff

to turn the files over to the Commissioner did not amount to a taking of plaintiff's personal property which entitled plaintiff to compensation, since the Commissioner's seeking custody of the files was well within the usual scope of police power activity conducted to protect the general welfare; the interference with plaintiff's ownership interest in the claim files was reasonable; defendant Guaranty Association should have received from plaintiff the same treatment accorded the insolvent insurer; the Commissioner was entitled by statute to seek an injunction when necessary to prevent the withholding of all documents and records related to the business of the insurer; and the alleged diminution in value of the claim files was the direct result of the insurance company's insolvency rather than the order granting their custody to the Commissioner or their subsequent use by the Association to expedite processing of the remaining claims against the insurer.

Am Jur 2d, Constitutional Law §§ 804 et seq.

Appeal by plaintiff from order entered 25 February 1994 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 26 January 1995.

Plaintiff, prior to 5 March 1990, was engaged in the business of appraising damages and attempting settlements of claims asserted by claimants and insureds against Interstate Casualty Insurance Company ("Interstate"). In the course of performing this work, plaintiff developed and maintained files containing information and documentation relating to the claims.

On 5 March 1990, upon petition of James E. Long, North Carolina Commissioner of Insurance ("the Commissioner"), Interstate was determined by the Superior Court of Wake County to be insolvent and an order was entered placing the company in rehabilitation pursuant to N.C. Gen. Stat. Chapter 58, Article 30. On 9 April 1990, the court entered an order of liquidation, and the Commissioner was appointed as Liquidator of Interstate. Defendant North Carolina Insurance Guaranty Association ("the Association") moved to intervene in the proceeding and was made a party.

As a part of the process of liquidation and in order to facilitate the processing of claims made under policies issued by Interstate, the Association requested the Commissioner to obtain access to plaintiff's claim files. Plaintiff, through its president and sole shareholder,

William R. Shackleford, refused to permit voluntary access to the claim files without the payment of compensation, and threatened to destroy the files. Upon motion of the Commissioner, and following a hearing, the Superior Court of Wake County entered an order enjoining plaintiff from disposing of the plaintiff's open claim files, requiring plaintiff to produce the files to the Commissioner, and granting the Commissioner the exclusive right to custody and control of the documents for a period of 120 days, after which they were to be returned to plaintiff. The order was entered without prejudice to plaintiff's right "to assert a claim for just compensation or any other claim" in connection with the liquidation of Interstate. Plaintiff complied by delivering the claim files to defendants shortly thereafter. Employees of the Association looked through the files and made copies of pertinent documents, which were used by the Association in its processing of claims made under Interstate policies. The claim files were subsequently returned to plaintiff.

Contending that the actions of the Commissioner and the Association amounted to a condemnation of its personal property, plaintiff filed its complaint in this action seeking just compensation for the taking of its claim files. Plaintiff appeals the entry of summary judgment dismissing its claims against all defendants.

Yeargan, Thompson & Mitchiner, by W. Hugh Thompson, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas D. Zweigart and Assistant Attorney General Sue Y. Little, for the State of North Carolina and defendant-appellee James E. Long as Commissioner of Insurance of North Carolina.

Moore & Van Allen, PLLC, by Joseph W. Eason and Christopher J. Blake, for defendant-appellee North Carolina Insurance Guaranty Association.

MARTIN, John C., Judge.

Summary judgment is appropriate when no genuine issues of material fact exist and a party is entitled to judgment as a matter of law. N.C. Gen. Stat. 1A-1, Rule 56; *Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 439 S.E.2d 797 (1994). There are no genuine issues of material fact present in the case before us. The sole question for our determination is whether defendants' actions constituted a taking

of plaintiff's property, entitling plaintiff to just compensation under the constitutions of the United States and North Carolina. We hold that no compensable taking occurred and affirm the judgment of the trial court.

Plaintiff argues that the 1,638 claim files in question are its personal property, created by plaintiff's employees at plaintiff's own expense of approximately $275 per file. Plaintiff claims that defendants obtained custody of and used the claim files, enabling defendant Association to avoid the time and expense of gathering for itself the information contained therein, and that the claim files had no further value after defendants' use.

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, *inter alia*, "private property [shall not] be taken for public use without just compensation." *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979 (1897). Similarly, the "law of the land" clause in Article I, § 19 of the North Carolina Constitution has been interpreted by our Supreme Court as providing a fundamental right to just compensation for the taking of private property for a public purpose. *Finch v. City of Durham*, 325 N.C. 352, 384 S.E.2d 8, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989).

A "taking" has been defined as "entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Stillings v. Winston-Salem*, 311 N.C. 689, 692, 319 S.E.2d 233, 236 (1984). If, however, the injury is determined to have arisen from the exercise of police power, the owner is not entitled to compensation because "it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." *Orange County v. Heath*, 14 N.C. App. 44, 47, 187 S.E.2d 345, 347, *aff'd*, 282 N.C. 292, 192 S.E.2d 308 (1972).

> The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable. The state must compen-

> sate for property rights taken by eminent domain; damages resulting from the exercise of police power are noncompensable.

Department of Transportation v. Harkey, 308 N.C. 148, 153, 301 S.E.2d 64, 67 (1983). (Citation omitted.) The question of whether a particular governmental action is a legitimate exercise of the police power is resolved through an "ends-means" analysis, in which the court must first look to the goal of the governmental action to determine whether the ends sought are within the scope of the police power, and then must determine whether the "means", i.e., the extent to which the exercise of the power interferes with the owners property rights, is reasonable. *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983). A failure in either step results in a compensable taking. *Weeks v. N.C. Dept. of Nat. Resources & Comm. Dev.*, 97 N.C. App. 215, 388 S.E.2d 228, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990). The cases applying the "ends-means" analysis have involved review of legislative action, primarily zoning regulation, however we believe the analysis to be equally applicable and helpful to a resolution of the issue before us here.

Protection of the public health, safety, morals and general welfare are the goals or "ends" usually recognized as being within the legitimate scope of police power activity "exercised without payment of compensation to the owner, even though the property is thereby rendered substantially worthless." *Orange County*, 14 N.C. App. at 48, 187 S.E.2d at 348. The "means", however, are not reasonable where 1) the owner has been deprived of all practical use of the property and 2) the property has been stripped of all reasonable value. *Weeks*, 97 N.C. App. at 225, 388 S.E.2d at 234. But, "mere restriction of 'practical uses' or diminishment of 'reasonable value' does not result in a 'taking.' " *Id.* The United States Supreme Court has applied a similar analysis under the Fifth Amendment, and "has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 73 L. Ed. 2d 868, 876 (1982); *see Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631 (1978).

"It has long been established that the insurance business is charged with a public interest, and that its regulation is constitutional." *Hunt v. Reinsurance Facility*, 302 N.C. 274, 297, 275 S.E.2d 399, 410 (1981). In order to protect the public welfare, the General Assembly has granted the Commissioner of Insurance the power to

rehabilitate and liquidate insurance companies which are dangerously close to being, or have become, insolvent. N.C. Gen. Stat. § 58-30-1. The Association was established to provide a mechanism for the payment of covered claims for an insolvent insurer to avoid excessive delay and financial loss as a result of the insolvency. N.C. Gen. Stat. § 58-48-5.

As Interstate's liquidator, the Commissioner is charged with prosecuting and defending appropriate claims against the insolvent insurance company, as well as abandoning the prosecution of claims deemed unprofitable to pursue. N.C. Gen. Stat. § 58-30-120(12). Similarly, the Association is charged with a duty to

> (4) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation and deny all other claims and may review settlements, releases and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which such settlements, releases and judgments may be properly contested.

N.C. Gen. Stat. § 58-48-35(a)(4). In order to determine which claims to pursue and which to abandon it was necessary for the Commissioner and the Association to review plaintiff's claim files, just as the insolvent insurer would have done in making its determinations regarding the settlement and prosecution of claims. Thus, we conclude that the Commissioner's seeking custody of the files was well within the usual scope of police power activity conducted to protect the general welfare.

The interference with plaintiff's ownership interest in the claim files was also reasonable. "The reasonableness of an exercise of the police power is to be determined by the court and is based on human judgment, natural justice and common sense in view of all the facts and circumstances." *Butler v. Peters, Comr. of Motor Vehicles*, 52 N.C. App. 357, 359-60, 278 S.E.2d 283, 285, *appeal dismissed*, 303 N.C. 543, 281 S.E.2d 391 (1981). Defendants' possession and use of the claim files was temporary, at the conclusion of which all of the file materials were returned to plaintiff. Upon Interstate's insolvency, the Association became liable to Interstate's covered claimants, and following satisfaction of the claim, the claimant's rights under the insolvent insurance company's policy are assigned to the Association. N.C. Gen. Stat. § 58-48-50. In essence, the Association is substituted for the insolvent insurer vis-à-vis its obligations to claimants and insureds.

As such, the Association should have received from plaintiff the same treatment accorded Interstate. Affidavits of two of plaintiff's former employees admit that Interstate was routinely given access to the claim files, which contained information both provided by Interstate and generated by plaintiff's efforts. The Commissioner as liquidator of Interstate is entitled by statute to seek an injunction when necessary to prevent the withholding of all documents and records related to the business of the insurer, N.C. Gen. Stat. § 58-30-20(10), and as an agent of Interstate, plaintiff is required by statute to cooperate with the Commissioner and make available "any books, accounts, documents, or other records or information or property of or pertaining to the insurer and in his possession, custody, or control." N.C. Gen. Stat. § 58-30-25(a).

Finally, we note that after the order of liquidation was entered as to Interstate, the claim files had essentially no value except as proof of the validity of any claim for its accounts receivable which plaintiff may have elected to file as a general creditor of Interstate pursuant to N.C. Gen. Stat. § 58-30-190. The diminution in the value of the claim files was the direct result of Interstate's insolvency, rather than the order granting their custody to the Commissioner or their subsequent use by the Association to expedite processing of the remaining claims against Interstate.

The trial court's order granting summary judgment in favor of defendants is affirmed.

Affirmed.

Judges COZORT and JOHN concur.

IN RE: APPEAL OF FRANK H. HARPER, CANDIDATE, DEMOCRATIC PRIMARY FOR GREENE COUNTY COMMISSIONER MAY 3, 1994; ROM W. (BILLY) BEAMAN, III, APPELLEE

No. COA94-1143

(Filed 16 May 1995)

Elections § 86 (NCI4th)— ineligible voters—consideration of testimony in contested election

While the Court believes that public policy should not allow consideration of the affidavits or testimony of ineligible, or illegal, voters to influence the outcome of an election, the Court

must follow the established law of this state which holds that such testimony is proper.

Am Jur 2d, Elections §§ 298-302.

Judge GREENE concurring in the result.

Appeal by Frank H. Harper and the State Board of Elections from order entered 6 September 1994 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 7 April 1995.

Beaman and King, P.A., by Stephen L. Beaman and Charlene Boykin King, for petitioner-appellee Rom W. Beaman, III.

Attorney General Michael F. Easley, by Special Deputy Attorney General Charles M. Hensey, for appellant State Board of Elections.

Tharrington, Smith & Hargrove, by Michael Crowell and Jaye P. Meyer, for appellant Frank H. Harper.

LEWIS, Judge.

This appeal arises out of a complaint filed with the Greene County Board of Elections (hereinafter the "County Board") by Frank H. Harper, a candidate for re-election to the Greene County Board of Commissioners. The undisputed facts are as follows: Six candidates, including Beaman and Harper, ran in the 3 May 1994 Democratic primary for the Greene County Board of Commissioners. Each voter could vote for three candidates, and the three having the highest vote totals would be the Democratic nominees in the general election. After a recount, conducted by the County Board on its own initiative, the vote totals for the candidates were:

Sanford N. Corbett	1,485
Jasper E. Ormond	1,395
Rom W. (Billy) Beaman, III	1,316
Frank H. Harper	1,303
J. Ivey Smith	872
Early Whaley	330

On 9 May 1994, Harper filed a complaint with the County Board, alleging that certain ineligible voters were allowed to vote in the election. The County Board held a hearing and found that thirteen ineligible voters (8 registered Republican and 5 registered unaffiliated) cast ballots in the primary. At the hearing, the County Board considered

the affidavits of three of the ineligible voters. Each of the three stated that he or she had voted for both Beaman and Harper. When these three votes were subtracted from the totals of Beaman and Harper, Beaman still led Harper by thirteen votes. Therefore, the County Board found, no matter how the remaining ten ineligible voters voted, when those ten votes were excluded, Beaman could not have finished less than three votes ahead of Harper. The County Board concluded, pursuant to N.C. Admin. Code tit. 8, r. 2.0005(b)(2)(C) (November 1984), that the complaint should be dismissed because there was not substantial evidence that the alleged violation, irregularity, or misconduct was sufficiently serious to cast doubt on the results of the election.

Harper then appealed to the State Board of Elections (hereinafter the "State Board"). After hearing the arguments of counsel, the State Board adopted the findings of the County Board, but ordered that a new election be conducted between Beaman and Harper. Beaman petitioned the Superior Court of Wake County for review of the State Board's decision. The trial court reversed the order of the State Board and reinstated the County Board's order dismissing Harper's complaint. From the order of the trial court, Harper and the State Board appeal.

The standard and scope of review for the trial court of an order of the State Board is found in the provisions of Chapter 150B of the General Statutes, the Administrative Procedure Act. *In re Brown*, 56 N.C. App. 629, 630, 289 S.E.2d 626, 626-27, *cert. denied and appeal dismissed*, 305 N.C. 760, 292 S.E.2d 574 (1982). The trial court may reverse the agency's decision if the substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1991). The task of this Court in reviewing the trial court is to determine (1) whether the trial court exercised the appropriate scope of review and, if so, (2) whether the trial court did so properly. *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994). Here, the trial court concluded that the order of the State Board was not supported by substantial evidence, was affected by other error of law, or was arbitrary and capricious. This was the appropriate scope of review, and for the following reasons, we conclude that the trial court properly exercised the review.

The State Board's apparent basis for ordering a new election was that it did not agree with the propriety of the County Board's reliance on the affidavits of the ineligible voters to show the effect of those votes on the outcome of the election. While we agree that public policy should not allow consideration of the affidavits or testimony of ineligible, or illegal, voters to influence the outcome of an election, we must follow the established law of this state which holds that such testimony is proper. We therefore hold that the trial court was correct in reversing the order of the State Board.

In *Boyer v. Teague*, 106 N.C. 576, 625, 11 S.E. 665, 679 (1890), our Supreme Court established that "[a]s between contestants for office . . . the testimony of the elector [i.e., the voter], if pertinent and relevant, is always admissible." In fact, the Court held, while an honest voter may not be compelled to disclose for whom he voted, as such compulsion would intrude upon the sanctity of the secret ballot system, an illegal voter may be so compelled, save an invoking of his right against self-incrimination. *Id.* Harper argues, however, that *Boyer* is not controlling because it was decided before the current election statutes with secret ballot provisions were adopted. We do not believe this fact to be dispositive, as the Court in *Boyer* made specific reference to the importance of the secret ballot system in its discussion of whether a voter could disclose for whom he voted. *See id.* Further, in *Jenkins v. State Board of Elections*, 180 N.C. 169, 104 S.E. 346 (1920), the Supreme Court, in upholding the constitutionality of the absentee voters law, held that the privilege to vote by secret ballot does not prevent a voter from disclosing for whom he voted: "Public policy requires that the veil of secrecy shall be impenetrable *unless the voter himself voluntarily determines to lift it.*" *Id.* at 171-72, 104 S.E. at 347-48 (citing *Boyer*, 106 N.C. at 625, 11 S.E. at 679). Thus, the law of this state is that a voter may disclose for whom he

voted. Harper points to no North Carolina case which holds to the contrary, and we have found none.

When an unsuccessful candidate seeks to invalidate an election, the burden of proof is on him to show that he would have been successful had the irregularities not occurred. *In re Clay County General Election*, 45 N.C. App. 556, 570, 264 S.E.2d 338, 346, *disc. review denied*, 299 N.C. 736, 267 S.E.2d 672 (1980). In this case, Harper did not come forward with any evidence to show that he would have been successful had the thirteen ineligible voters not been allowed to vote. In fact, it was Beaman who presented the affidavit evidence which showed that Harper would not have been successful. Thus, Harper failed to meet his burden of proof. There was no evidence before the State Board to support its decision to reverse the County Board. Further, the State Board erred as to an issue of law when it concluded that the County Board should not have considered the affidavits of the ineligible voters. The State Board's order was therefore unsupported by substantial evidence, was arbitrary and capricious, and was affected by other error of law. The superior court correctly reversed the State Board's order.

We wish to emphasize that, although we are bound to follow the established law of this state, we believe that public policy would require us to reach different conclusions on the issues in this case. First, a person who has voted illegally in an election should not be allowed to testify for which candidate he voted and thereby influence the outcome.

> If the voter who cast an illegal vote is allowed to testify for whom he voted, a golden opportunity for further fraud exists because the corrupt voter might well identify the opposing candidate as his pick and, if believed, the victimized candidate would be victimized again—the illegal vote would be counted twice. For this reason, some commentators have argued that no voter should be allowed to testify about his vote.

Gary R. Correll, *Elections—Election Contests in North Carolina*, 55 N.C.L. Rev. 1228, 1237 (1977) (citing George W. McCrary, *A Treatise on the American Law of Elections* §§ 485, 491 (4th ed. 1897)). We see no distinction between the present situation and the Court's discussion in *Boyer* as to the evils in allowing voters who were erroneously prevented from voting to testify how they would have voted: " '[I]t would obviously be dangerous to receive and rely upon their subsequent statements as to their intentions, after it is ascertained pre-

cisely what effect their votes would have upon the result.' " *Boyer*, 106 N.C. at 628, 11 S.E. at 680 (quoting Cooley, *Constitutional Limitations* 620-21).

Because illegal voters should not be allowed to testify in an election contest as to how they cast their vote, we consequently do not believe that the unsuccessful candidate's burden should be to show that he would have won had the illegal voters not participated. This burden necessarily requires a determination of which candidate received the illegal votes, which in turn requires the unsuccessful candidate to present the testimony of the illegal voters as to how they voted. To invalidate an election, the unsuccessful candidate should only be required to show that the number of illegal votes is greater than or equal to the number of votes separating him and the winner. Under this rule, the outcome of the election would not be dependent on the testimony of illegal voters. A new election should then be held between the candidates affected.

Nevertheless, for the reasons stated above, we must affirm the order of the trial court. We note that our holding makes it unnecessary to address Beaman's cross-assignment of error.

Affirmed.

Judge MARTIN, Mark D. concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result.

I fully concur with the holding of the majority that an unsuccessful candidate who seeks to invalidate an election has the burden of showing that he would have been successful in the absence of some proven irregularity. *In re Clay*, 45 N.C. App. at 570, 264 S.E.2d at 345-46. I further agree that the unsuccessful candidate, in order to meet his burden, may present the testimony of voters in that election. *Boyer*, 106 N.C. at 625, 11 S.E. at 330-31. Finally, I agree that in this case the unsuccessful candidate, Frank H. Harper, having shown some irregularities, has failed in his burden of showing that those irregularities altered the result of the election. Thus, the order of the superior court dismissing the complaint of Frank H. Harper must be affirmed.

I do not join with the majority in its expression of opinion that this result and the law on which it is based represents bad public policy. The judicial system regularly has to sort out truthful and untruthful testimony, and I know of no reason why it cannot be done in cases of this type. To concede our inability to do so would require new elections in every case upon a mere showing that there has been some irregularity that *may possibly* have affected the election. This, in my opinion, would not represent sound public policy. Furthermore, it is inconsistent with the law of this state which holds that evidence based on "conjecture, surmise and speculation" is not sufficient to support a verdict. *Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990).

PERCELL RICHARDSON, EMPLOYEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANT

No. COA94-737

(Filed 16 May 1995)

Workers' Compensation § 41 (NCI4th)— prisoner injured while "on the job"—workers' compensation as exclusive remedy

A prisoner's exclusive remedy for accidental injury arising out of and in the course of the employment to which he has been assigned, whether he is incarcerated or released, arises under the provisions of the Workers' Compensation Act, and the Industrial Commission therefore properly concluded that plaintiff's claims under the Tort Claims Act were barred by the Workers' Compensation Act. N.C.G.S. § 97-13(c).

Am Jur 2d, Workers' Compensation § 162.

Judge GREENE dissenting.

Appeal by plaintiff from order filed 31 March 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 March 1995.

J. Henry Banks for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Don Wright, for defendant-appellee.

LEWIS, Judge.

Plaintiff was permanently injured while working on a silage harvesting machine at Caldonia Farm in Tillery, North Carolina, operated by the North Carolina Department of Correction. On 23 September 1991, plaintiff filed a claim with the North Carolina Industrial Commission under the Tort Claims Act, N.C.G.S. §§ 143-291 to -300.1. In its amended answer, defendant moved to dismiss plaintiff's claim on the grounds that workers' compensation was plaintiff's exclusive remedy. By order filed 6 January 1993, Deputy Commissioner Jan N. Pittman granted defendant's motion to dismiss. Plaintiff appealed to the Full Commission, which, after a de novo hearing, by order filed 31 March 1994 affirmed the decision of Deputy Commissioner Pittman two to one. Plaintiff then appealed the Full Commission's order.

The issue on appeal is whether the Full Commission erred in concluding that N.C.G.S. § 97-13(c) (1991) bars plaintiff's claims under the Tort Claims Act. We affirm.

Section 97-13(c) permits prisoners to apply for workers' compensation if they suffer accidental injury arising out of and in the course of assigned employment and if the accident results in disabling injuries that continue after discharge from prison. Dependents and kin of prisoners who suffer accidental death may also apply for workers' compensation under this section. Section 97-13(c) further provides that N.C.G.S. §§ 97-10.1 and 97-10.2 apply to prisoners and discharged prisoners entitled to compensation under section 97-13(c) and to the State "in the same manner" as these sections apply to ordinary employees and employers. Section 97-10.1 sets forth the general rule that workers' compensation is the exclusive remedy for injured workers. By treating prisoners "in the same manner" as other employees under section 97-10.1, section 97-13(c) effectively provides that workers' compensation is a prisoner's exclusive remedy to the same extent as it is for other employees.

Ivey v. North Carolina Prison Department, 252 N.C. 615, 114 S.E.2d 812 (1960), relied upon by plaintiff, is distinguishable from the case at bar. In *Ivey*, our Supreme Court refused to read section 97-13(c) as barring recovery by a prisoner's estate under the Tort Claims Act. *Id.* at 620, 114 S.E.2d at 815-16. At the time *Ivey* was decided, section 97-13(c) only provided burial expenses when a prisoner suffered accidental death. *See id.* at 618, 114 S.E.2d at 814. *Ivey* held that "burial expenses" were not "compensation" as meant by the clause "entitled to compensation" in section 97-13(c). *Id.* at 619-20,

114 S.E.2d at 815. Since only those prisoners who were "entitled to compensation" could be barred by the section 97-13(c) reference to former section 97-10 (now rewritten as section 97-10.1), section 97-13(c) did not bar tort claims arising from the death of a prisoner. *See id.* Section 97-13(c) was amended in 1971 to grant compensation for death as well as for injury. 1971 N.C. Sess. Laws ch. 1176, § 1. At the time of *Ivey*, regular employees and prisoners had the same benefits potential for injuries but not for death. Since the 1957 and 1971 amendments of section 97-13(c), prisoners with assigned employment are entitled to pursue their rights under the Workers' Compensation Act "in the same manner" as other employees. *Id.*; 1957 N.C. Sess. Laws ch. 809, § 2. Since *Ivey* was a pre-1971 amendment death case in which the dead prisoner was not entitled to workers' compensation, its holding does not apply to plaintiff who is an injured employee who may elect to pursue compensation under the present version of the Workers' Compensation Act.

The other cases relied on by plaintiff are also inapposite. *Gould v. North Carolina State Highway & Public Works Commission*, 245 N.C. 350, 95 S.E.2d 910 (1957), is distinguishable from the case at bar because it dealt with the death of a non-working prisoner. *See id.* at 352, 95 S.E.2d at 911. *Lawson v. North Carolina State Highway & Public Works Commission*, 248 N.C. 276, 103 S.E.2d 366 (1958), is also not applicable here since it dealt with the law prior to the 1957 amendment of section 97-13(c), which applied the exclusivity provisions of former section 97-10 to prisoners. *Id.* at 280, 103 S.E.2d at 370. In addition, *Brewington v. North Carolina Department of Correction*, 111 N.C. App. 833, 433 S.E.2d 798, *disc. review denied*, 335 N.C. 552, 439 S.E.2d 142 (1993), is not controlling here because the issue of whether workers' compensation is a prisoner's exclusive remedy was not an issue on appeal in that case.

The benefits given prisoners under workers' compensation are not insubstantial. The defendant noted in its oral argument, and plaintiff did not contest, that prisoners, in addition to their weekly compensation payments may be entitled to vocational rehabilitation and lifetime medical benefits under workers' compensation to the same extent as are employees who are covered. If we were to adopt the plaintiff's position, prisoners would have the workers' compensation remedy and the right to sue under the Tort Claims Act, as well as any other actions, such as actions against state employees as individuals or product liability actions, which might lie in superior court.

Our courts have refused to construe statutes so as to result in "palpable injustice" when the statutory language is "susceptible to another reasonable construction which is just and is consonant with the purpose and intent" of the act. *Wagoner v. Butcher*, 6 N.C. App. 221, 229, 170 S.E.2d 151, 156 (1969). We do not believe, as suggested by the dissent, that the legislature, through use of the word "may" in section 97-13(c), intended to vest prisoners with a greater election of remedies than available to those employees not serving prison sentences. We do believe that the legislature intended, by enacting section 97-13(c), to make recovery of disability "cash" benefits available to prisoners, as their exclusive remedy, after being released from custody. Otherwise, a prisoner, who is already provided with the custodial benefits of food, lodging, and medical care, could potentially receive a "double recovery" not available to employees generally. Section 97-13(c) clearly sets forth the legislative policy that prisoners be treated "in the same manner" as employees in regard to the limitation in section 97-10.1. Accordingly, a prisoner's exclusive remedy for "accidental injury . . . arising out of and in the course of the employment to which he had been assigned," whether he is incarcerated or released, as with other employees, arises under the provisions of the Workers' Compensation Act. *See* N.C.G.S. 97-13(c). Workers' compensation is the plaintiff's sole remedy.

We further dismiss plaintiff-appellant's equal protection argument as being without merit.

For the reasons stated, the order of the Full Commission is affirmed.

Affirmed.

Judge MARTIN, Mark D. concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's opinion that the Industrial Commission's dismissal of plaintiff's claim under the Tort Claims Act was proper.

North Carolina General Statute § 97-13(c) of the Worker's Compensation Act provides:

> This Article shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Department of Correction shall suffer accidental injury or accidental death arising out of and in the course of the employment to which he had been assigned, if there be death **or if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability** as defined in this Article, then such discharged prisoner or the dependents or next of kin of such discharged prisoner may have the benefit of this Article by applying to the Industrial Commission . . . . The provisions of G.S. 97-10.1 and 97-10.2 shall apply to prisoners and discharged prisoners **entitled to compensation under this subsection** and to the State in the same manner as said section applies to employees and employers.

N.C.G.S. § 97-13(c) (1991) (emphases added). North Carolina General Statute § 97-10.1 provides:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

N.C.G.S. § 97-10.1 (1991). By the terms of Section 97-13(c), a prisoner who survives an accidental injury amounting to a disability that occurred while on assigned work cannot bring a claim under the Workers' Compensation Act until he is discharged. *Horney v. Pool Co.*, 267 N.C. 521, 527, 148 S.E.2d 554, 559 (1966) ("[w]hether the prisoner, if he had survived his injury, would be entitled to compensation under G.S. 97-13(c) could not be determined until the date of his discharge"). Therefore, because a prisoner accidentally injured while on assigned work cannot be "entitled to compensation under this subsection [97-13(c)]" while he is incarcerated, the exclusivity provision of Section 97-10.1 does not apply. An incarcerated prisoner should thus be allowed to pursue a claim under the Tort Claims Act for accidental injury occurring while on assigned work and resulting from the negligence of "any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority." N.C.G.S. § 143-291 (1993).

In this case, there was no evidentiary hearing; therefore, the question presented on the pleadings is whether the Workers' Compensation Act is plaintiff's exclusive remedy. The pleadings do not show whether plaintiff was still incarcerated or discharged when he filed his claim under the Tort Claims Act. If incarcerated, plaintiff, in fact, has no remedy under the Workers' Compensation Act pursuant to the provisions of Section 97-13(c), and his only remedy while he is in prison is under the Tort Claims Act. *See Brewington v. North Carolina Dep't of Correction*, 111 N.C. App. 833, 433 S.E.2d 798 (appeal by prisoner injured while working in Central Prison kitchen from decision of Industrial Commission on plaintiff's claim under Tort Claims Act that there was no negligence on part of named employees and officers), *disc. rev. denied*, 355 N.C. 552, 439 S.E.2d 142 (1993); *Baker v. North Carolina Dep't of Correction*, 85 N.C. App. 345, 354 S.E.2d 733 (1987) (appeal by prisoner injured while washing dormitory windows on assigned work from decision of Industrial Commission under Tort Claims Act that there was no negligence on part of another inmate). Therefore, the Industrial Commission's dismissal of plaintiff's claim under the Tort Claims Act was improper, and that order must be reversed.

GEORGINA ANNE PADILLA, FORMERLY LUSTH, PLAINTIFF v. JOHN CURTIS LUSTH, DEFENDANT

No. 9415DC560

(Filed 16 May 1995)

Divorce and Separation § 439 (NCI4th)— modification of child support—decrease in supporting parent's income—change in child's expenses not threshold requirement

The trial court erred in concluding in its written order that a finding of change in child-oriented expenses is a threshold requirement that must be satisfied before a court can modify a support order because of a change in the supporting party's circumstances.

Am Jur 2d, Divorce and Separation §§ 1078, 1082-1087.

Appeal by defendant from order entered 24 January 1994 by Judge Lowry Betts in Orange County District Court. Heard in the Court of Appeals 22 February 1995.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by James H. Johnson, III and Andrew T. Landauer, for plaintiff-appellee.

Vosburg and Fullenwider, by Ann Marie Vosburg, for defendant-appellant.

LEWIS, Judge.

Defendant appeals the court's denial of his motion to modify a child support order.

Plaintiff and defendant were divorced on 20 October 1989. On 15 March 1991, defendant was ordered to pay child support of $1318 per month. This support payment was reduced to $1246 per month by order of the court on 7 October 1991. Defendant again moved for reduction of child support based on changed circumstances. In a hearing held on 17 December 1993, the court denied this motion. By written order entered 24 January 1994, the court set out findings of fact and conclusions of law supporting the denial of defendant's motion.

Defendant has a bachelor's degree in chemistry and a master's degree in computer science. After receiving his master's, defendant worked for Southwest Research Institute. Then, in 1987, he began work in the computer science field of artificial intelligence at Becton-Dickinson Research Center (hereinafter "Becton-Dickinson"). In November 1992, defendant applied for acceptance into the Ph.D program in computer science at North Carolina State University and was accepted in early 1993. On 30 September 1993 defendant, along with others in the artificial intelligence department, was terminated from his job at Becton-Dickinson. Following his termination, defendant enrolled in the Ph.D program described above and began working part-time as a teaching assistant. He then obtained a part-time student job at SAS Institute Inc. where he was working 24 hours a week at $15 per hour at the time of the 17 December 1993 hearing.

Evidence presented at the hearing tended to show that job opportunities in the field of artificial intelligence are virtually nonexistent. After losing his job at Becton-Dickinson, defendant sent out resumes and cover letters seeking employment. In these letters, defendant stressed his enrollment in the Ph.D program and stated that he was looking for a part-time job or individual project work.

At the conclusion of the hearing, Judge Betts ruled in open court that since no evidence of the children's expenses was offered, he

would assume their needs had not changed. He also ruled that, since there was insufficient evidence that defendant had made a reasonable effort to find full-time employment in an area in which he was competent and trained to work, defendant's motion was denied.

In the written order entered 24 January 1994, Judge Betts made findings of fact, *inter alia*, that:

> 12. Defendant failed to satisfy the court that job opportuntied [sic] as a computer programmer in fields other than artificial intelligence were not available to him.
>
> 12. Since the termination of his employment at Becton-Dickinson Company defendant has sent only two job applications to prospective full-time employers, dated September 23, 1993 and October 10, 1993, respectively. Both of those letters contained language to this effect: However I am looking for a part-time position or individual project work so that I may continue solving real word [sic] problems as I pursue my Ph.D. Defendant presented no evidence tending to show that he has placed his resume or listed his name with any placement agency, or taken any other usual and customary steps to find full-time employment as a computer programmer in some other field at a salary that would enable him to pay child support in the amount ordered.
>
> 13. Neither party presented evidence tending to show any substantial change *in the child-oriented expenses of the children* since the entry of the last order.

(Emphasis added). In this order, Judge Betts made the following conclusions of law:

> 1. An order for support of a minor child may be modified upon motion in the cause and *a showing of change in the child's circumstances.* N.C.G.S. 50-13.7.
>
> 2. *The change in circumstances required in N.C.G.S. 50-13.7 refer to child-oriented expenses . . . ; and this threshold requirement of a change in child-oriented expenses must be satisfied before the court can modify a support order because of a change in the supporting party's circumstances, including a change in his income, ...*
>
> 3. The burden of showing a change in circumstances is on the party seeking modification . . . .

4. Defendant has failed *to show a substantial change in the child-oriented expenses of his three children* since the entry of the last order; therefore, he is not entitled to a decrease in the amount of his child support obligation.

5. *Because of the foregoing conclusions it is not necesssary [sic] for the court to consider defendant's remaining contentions.*

(Emphasis added).

We first note that defendant has failed to comply with Appellate Rule 28(b)(5) (1995) which requires him to reference his assignments of error following the question presented in his brief. However, we exercise our discretion to review the issue raised in defendant's question presented. *See* N.C.R. App. P. 2 (1995). The question presented in defendant's brief deals solely with the issue raised by defendant's first assignment of error. Since defendant has declined to present, give reasons, or cite authority supporting his remaining assignments of error, these are abandoned. N.C.R. App. P. 28(a) (1995).

The issue on appeal is whether the court erred in its findings of fact, conclusions of law, and entry of its written order finding that a change in child-oriented expenses is a threshold requirement that must be satisfied before the court can modify a support order based on a change in circumstances.

A court order awarding child support "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances." N.C.G.S. § 50-13.7(a) (1987). The moving party has the burden of showing changed circumstances. *Searl v. Searl*, 34 N.C. App. 583, 587, 239 S.E.2d 305, 308 (1977). A substantial increase or decrease in the child's needs is one way to show changed circumstances. *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531, 536 (1995). However, it is now well settled that a significant involuntary decrease in a child support obligor's income also can satisfy the necessary showing of changed circumstances <u>even in the absence</u> of any evidence showing a change in the child's needs. *Hammill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539, 541 (1995); *McGee*, 118 N.C. App. at 27, 453 S.E.2d at 536; *Pittman v. Pittman*, 114 N.C. App. 808, 810-11, 443 S.E.2d 96, 98 (1994); *O'Neal v. Wynn*, 64 N.C. App. 149, 151-53, 306 S.E.2d 822, 823-24 (1983), *aff'd per curiam*, 310 N.C. 621, 313 S.E.2d 159 (1984).

Appellee argues that *Pittman* is not binding authority here since it is contrary to prior law and was filed after the 17 December 1993 hearing in this case. However, *O'Neal*, which also permitted a finding of changed circumstances absent a showing of a change in the child's needs, was filed prior to the date of the hearing in this case. This Court's holding in *O'Neal* was affirmed on appeal by our Supreme Court, which stated that "the rationale and supporting authorities cited in the majority decision constitute a correct statement of the law and a correct application of the law to the facts of this case." *O'Neal*, 310 N.C. at 621-22, 313 S.E.2d at 159. Furthermore, we find no compelling reason why *Pittman* should be given only prospective effect. *See Faucette v. Simmerman*, 79 N.C. App. 265, 271, 338 S.E.2d 804, 808-09 (1986).

Thus, we hold that the court erred in concluding in its written order that a finding of change in child-oriented expenses is a threshold requirement that must be satisfied before a court can modify a support order because of a change in the supporting party's circumstances. In drawing this conclusion in its written order, the district court misquoted and misconstrued *Davis v. Risley*, 104 N.C. App. 798, 411 S.E.2d 171 (1991). In *Davis*, we stated that showing changed circumstances is a threshold issue that is determined prior to application of the North Carolina Child Support Guidelines. *Davis*, 104 N.C. App. at 800, 411 S.E.2d at 173. This does not mean a change in the children's needs must always be shown. Proving changed circumstances based on a decrease in income was not a viable option for the supporting party in *Davis* because his income had increased. Thus, he needed to show changed circumstances by some other means, such as showing a change in the children's needs. *See Davis*, 104 N.C. App. at 809-10, 411 S.E.2d at 172-73; *see also Pittman*, 114 N.C. App. at 810, 443 S.E.2d at 97 (distinguishing *Davis*). Defendant Lusth, in contrast, did present evidence of a decreased income that could possibly support a modification based on changed circumstances.

Since the written order does not contain findings of fact and conclusions of law on whether defendant has shown changed circumstances based on a change in his circumstances, we reverse and remand for findings and conclusions on whether defendant has made the required showing and whether he is entitled to modification.

For the reasons stated, the order denying defendant's motion for modification of child support is reversed and remanded.

Reversed and remanded.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. JOHN RANDALL CLAYPOOLE

No. COA94-883

(Filed 16 May 1995)

1. Kidnapping and Felonious Restraint § 21 (NCI4th)— kidnapping for terrorizing or committing sexual assault upon victim—sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury in a prosecution of defendant for kidnapping for the purpose of terrorizing the victim and to facilitate the commission of a sexual assault where it tended to show that defendant forced the victim to drive to a secluded area and threatened to kill her twice along the way; at the secluded area defendant instructed the victim to get out of the car, stood in front of her, touched her face, and told her she looked "pretty good"; the victim was so scared that she did not get a look at defendant until she got out of the car; and as the victim ran to safety, defendant tried to stop her by grabbing her arm.

Am Jur 2d, Abduction and Kidnapping §§ 29 et seq.

2. Kidnapping and Felonious Restraint § 26 (NCI4th)— lesser-included offense of false imprisonment—insufficiency of evidence

Where the evidence indicated that defendant confined, restrained, and removed the victim in order to terrorize and sexually assault her and there was no evidence indicating that he acted for any other purpose, the trial court did not err in failing to instruct on the lesser-included offense of misdemeanor false imprisonment.

Am Jur 2d, Abduction and Kidnapping §§ 27, 28, 52.

False imprisonment as included offense within charge of kidnapping. 68 ALR3d 828.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

3. Criminal Law § 1117 (NCI4th)— sentence in excess of presumptive term—error

In a prosecution of defendant for second-degree kidnapping, the trial court erred when it improperly considered the seriousness of the offense in determining whether to increase the presumptive term.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment and commitment entered 15 February 1994 by Judge Marcus L. Johnson in Catawba County Superior Court. Heard in the Court of Appeals 4 April 1995.

Attorney General Michael F. Easley, by Assistant Attorney General David N. Kirkman, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-apppellant.

WALKER, Judge.

Defendant was indicted for second degree kidnapping pursuant to N.C. Gen. Stat. § 14-39 (1993). The jury found defendant guilty of kidnapping Betsy Hicks for the purposes of committing a sexual assault and of terrorizing her. The trial court sentenced defendant to a term of twenty-seven years.

The State's evidence tended to show that on the morning of 16 June 1993, as Ms. Hicks was driving her car out of the parking lot of a convenience store, she felt a blunt, round object in her right side which she initially thought was a gun. Ms. Hicks then heard defendant's voice from behind her seat telling her to drive to 321 toward Boone or he would kill her. Ms. Hicks complied with defendant's instructions. Along the way, she informed defendant that she didn't have enough gas and defendant said he was sure she had plenty of money. Ms. Hicks started emptying her purse. When defendant saw that she did not have any money, he told her that she would do just fine.

Defendant continued to give directions to Ms. Hicks. Defendant ordered her to turn into an area called Rotary Park, where two other cars were parked. He then instructed her to turn around and go back the way she came to the other park, called Glenn Hill Park. As they entered Glenn Hill Park, they passed a couple of joggers. Defendant

told Ms. Hicks not to say anything or he would kill her. Up to this point, Ms. Hicks had not turned to look at defendant because she was "scared to death." Pursuant to defendant's instructions, Ms. Hicks drove the car to an isolated area of the park where she stopped the car. He told her in a "very chilling" tone of voice to get out of the car. When Ms. Hicks got out of the car, defendant stood in front of her, touched her face and told her that he thought she looked "pretty good." This was the first time Ms. Hicks had looked at defendant. Upon discovering that he was not holding a weapon, she started running. Defendant grabbed her arm but she broke free and continued running. Ms. Hicks met the two joggers which she had seen upon entering the park and told them what happened. They called 911 and waited for the police to arrive.

Defendant's evidence attempted to show that he could not have committed the offense because he was somewhere else at the time. Defendant argues that the court erred by denying his motion to dismiss for insufficient evidence and his request for instruction on the lesser-included offense of false imprisonment and that the trial court abused its discretion in imposing a sentence in excess of the presumptive. For the reasons discussed herein, we find no error in the denial of defendant's motion to dismiss and request for instruction. However, we agree that the trial court committed error in the sentencing phase and remand for a new sentencing hearing.

When ruling upon a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the offense charged. *State v. Vines*, 317 N.C. 242, 253, 345 S.E.2d 169, 175 (1986). If the State has offered substantial evidence of each essential element of the crime charged, defendant's motion to dismiss must be denied. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). All of the evidence actually admitted, both competent and incompetent, and which is favorable to the State, may be considered by the reviewing court. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975). The evidence is to be considered in the light most favorable to the State, and the State is given the benefit of every reasonable intendment and inference to be drawn therefrom. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983).

Pursuant to N.C. Gen. Stat. § 14-39(a) (1993), kidnapping is an unlawful, nonconsensual confinement, restraint or removal from one place to another for the purpose of committing specified acts. The State need only prove that defendant intended to commit one of the specified acts in order to sustain its burden of proof as to that element of the crime. *State v. Surrett*, 109 N.C. App. 344, 348-49, 427 S.E.2d 124, 126 (1993). In the case *sub judice*, the State charged defendant with kidnapping Betsy Hicks for the purpose of terrorizing her and to facilitate the commission of a felony, to wit: sexual assault. *See* N.C. Gen. Stat. § 14-39(a)(2) & (3). Defendant argues that the court should have granted his motion to dismiss because the State failed to produce substantial evidence that he kidnapped Ms. Hicks for either of these purposes. We disagree.

"Intent is a condition of the mind ordinarily susceptible of proof only by circumstantial evidence. Evidence of a defendant's actions following restraint of the victim is some evidence of the reason for the restraint." *State v. Pigott*, 331 N.C. 199, 211, 415 S.E.2d 555, 562 (1992). Intent to terrorize means more than an intent to put another in fear. It means an intent to "[put] that person in some high degree of fear, a state of intense fright or apprehension." *State v. Surrett*, 109 N.C. App. 344, 349, 427 S.E.2d 124, 127 (1993).

[1] The evidence tends to show that defendant forced Ms. Hicks to drive to a secluded area and threatened to kill her twice along the way. At the secluded area, defendant instructed Ms. Hicks to get out of the car, stood in front of her, touched her face, and told her she looked "pretty good." Ms. Hicks was so scared that she did not get a look at defendant until she got out of the car. As Ms. Hicks ran to safety, defendant attempted to stop her by grabbing her arm. Considering the evidence in the light most favorable to the State, this evidence would support a finding that defendant intended by his actions and commands to put the victim in a state of intense fright or apprehension and to sexually assault the victim and that he kidnapped her for these purposes.

[2] Defendant also argues that the trial court erred in refusing to instruct the jury on the lesser-included offense of misdemeanor false imprisonment. Where there is no evidence from which the jury could find that the crime of lesser degree was committed, the trial court need not instruct on a lesser-included offense. *State v. Surrett*, 109 N.C. App. at 351, 427 S.E.2d at 128. The difference between kidnapping and the lesser-included offense of false imprisonment is the pur-

pose of the confinement, restraint, or removal of another person. If the purpose of the restraint was to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39, then the offense is kidnapping. However, if the unlawful restraint occurs without any of the purposes specified in the statute, the offense is false imprisonment. *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 562 (1992). Since the evidence indicated that defendant confined, restrained, and removed the victim in order to terrorize and sexually assault her and there was no evidence indicating that defendant acted for any other purpose, we find the trial court did not err in failing to instruct on the lesser-included offense. *See Surrett*, 109 N.C. App. at 351, 427 S.E.2d at 128.

[3] Finally, we consider defendant's argument that the trial court abused its discretion in imposing a sentence which exceeds the presumptive term of nine years. At the sentencing hearing, the trial court found as an aggravating factor that defendant has prior convictions for criminal offenses punishable by more than 60 days in confinement and found no mitigating factors. The court then found that the aggravating factors outweigh the mitigating factors and stated that it "appears to the Court that the appropriate sentence for gravity of this offense and considering that the jury has found by a unanimous verdict that you committed this offense on two separate and distinct alternative theories, I believe that the appropriate sentence here would be three times the presumptive which is twenty-seven years." The court then ordered that defendant be committed to custody of the Department of Corrections for twenty-seven years.

Where the trial judge has determined that aggravating factors outweigh mitigating factors, the question of whether to impose a sentence which exceeds the presumptive term, and if so, to what extent is within the trial judge's discretion. *State v. Watson*, 311 N.C. 252, 258, 316 S.E.2d 293, 297 (1984). Defendant argues that the trial judge abused his discretion by considering the gravity of the offense as a factor in imposing a sentence three times the presumptive term of nine years. A trial judge may not consider the seriousness of a crime as a factor in aggravation; this factor was presumably considered by the Legislature in determining the presumptive sentence for this offense. *State v. Blackwelder*, 309 N.C. 410, 418, 306 S.E.2d 783, 789 (1983). "Rather, the 'seriousness' of a crime may be measured in terms of *specific* statutory or nonstatutory aggravating or mitigating factors related to the character or conduct of the offender or focusing on the victim." *Id.*

The court's comments indicate that it improperly considered the seriousness of the offense in determining whether to increase the presumptive term. We thus remand for a new sentencing hearing. *State v. Shaw*, 106 N.C. App. 433, 442, 417 S.E.2d 262, 268-69, *cert. denied*, 333 N.C. 170, 424 S.E.2d 914 (1992). *See also State v. Cannon*, 326 N.C. 37, 39-40, 387 S.E.2d 450, 451 (1990) (failure to formally document a finding in aggravation does not insulate court's remarks from appellate review; defendant entitled to new sentencing hearing where it can reasonably be inferred from the language of the trial judge that he imposed the sentence at least in part for an improper reason).

Guilt/Innocence Phase: No error.

Sentencing Phase: Remanded for new sentencing hearing.

Judges EAGLES and MARTIN, JOHN C. concur.

ALBERT JONES, EMPLOYEE, PLAINTIFF v. CANDLER MOBILE VILLAGE, EMPLOYER, AND MARYLAND CASUALTY INS. CO., CARRIER, DEFENDANTS

No. 9410IC547

Filed 16 May 1995

Workers' Compensation § 425 (NCI4th)— back injury—subsequent depression—no change of condition found—no error

The Industrial Commission did not err in finding that plaintiff had not experienced a substantial change in condition after an award for a back and leg injury, though plaintiff did offer evidence that he experienced depression, since there was no evidence that plaintiff's injury had caused disabling depression.

Am Jur 2d, Workers' Compensation §§ 652-657.

Appeal by plaintiff from an award of the Industrial Commission entered on 2 March 1994. Heard in the Court of Appeals on 20 February 1995.

Ganly, Ramer & Finger, by Thomas F. Ramer, for the plaintiff.

Harrell & Leake, by Larry Leake, for the defendant Candler Mobile Village, Inc.

WYNN, Judge.

Plaintiff, Albert Jones, was employed by defendant, Candler Mobile Village, Inc., as a mobile home salesman when he suffered an injury to his back on 2 December 1989 which was compensable under the Workers' Compensation Act. Plaintiff was examined by Dr. Lawrence Van Blaricom and complained of pain in his lower back and left leg. He continued to suffer from pain after Dr. Van Blaricom performed surgery to correct a herniated disc in his back. Even though he continued to experience pain and weakness in his legs, Dr. Van Blaricom determined that plaintiff had reached maximum medical improvement and released him to return to work on 22 January 1991.

In February 1991, plaintiff changed jobs and began working for A & N Mobile Home Sales. On 15 May 1991, plaintiff entered into a settlement agreement with defendant in which it agreed to compensate plaintiff for a ten percent permanent partial disability to his back. Two days later, on 17 May 1991, plaintiff was laid off by his employer.

Plaintiff continued to suffer from pain in his lower back and left leg and was examined by Dr. Van Blaricom in July, October, and November 1991. Dr. Van Blaricom determined that plaintiff was depressed as a result of the chronic pain and recommended that he consult with the Blue Ridge Mental Health Center and seek treatment from a chronic pain program. Plaintiff did not follow up on these recommendations.

Dr. Van Blaricom testified that plaintiff's wife called him several times after plaintiff's last visit in November 1991 concerned that her husband was depressed and constantly suffering from back pain. Dr. Van Blaricom stated that plaintiff's disability rating had not changed and that his opinion that plaintiff suffered from depression was based upon the information he received from plaintiff's wife. Dr. Van Blaricom also testified that he had no way of knowing whether plaintiff was actually depressed.

Dr. Robert Ray Jolley testified that he examined plaintiff and performed a psychiatric disability determination evaluation for Social Security purposes. Dr. Jolley stated that plaintiff suffered from depression but did not have an opinion as to whether this depression was disabling.

The Industrial Commission made the following conclusions:

> 1. Plaintiff has not experienced a substantial change in his condition as the same existed on May 15, 1991 when he entered into a

settlement agreement, Form 26, for a ten percent permanent partial disability to his back as a result of an injury by accident on December 2, 1989. Neither has the plaintiff sustained a substantial change in his condition since July 8, 1991, which was the date that the North Carolina Industrial Commission approved the Form 26 Agreement entered into by the parties as a result of plaintiff's ten percent permanent partial disability to his back.

2. Any depression from which the plaintiff may be suffering as a result of his December 2, 1989 compensable injury by accident is not disabling and has not prevented him from returning to employment similar to that which he held at the time of his compensable injury by accident or even during the early months of 1991.

3. Plaintiff is not entitled to further compensation pursuant to the Workers' Compensation Act.

From this determination, plaintiff appeals.

I.

Plaintiff first assigns error to the Commission's finding that he did not experience a substantial change in condition. Plaintiff contends he presented sufficient evidence that he suffered from depression and that this depression reduced his earning ability. We disagree.

When reviewing appeals from the Industrial Commission, this Court's inquiry is limited to two questions of law: "(1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's findings of fact justify its legal conclusions and decision." *Sanderson v. Northeast Constr. Co.*, 77 N.C. App. 117, 120, 334 S.E.2d 392, 394 (1985); *Watkins v. City of Asheville*, 99 N.C. App. 302, 392 S.E.2d 754, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). The Commission's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). The Commission's findings of fact may be set aside on appeal only where there is a complete lack of competent evidence to support them. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980).

N.C. Gen. Stat. § 97-47 provides that "on the grounds of a change in condition" the Commission may review any award and end, dimin-

ish, or increase the compensation previously awarded. N.C. Gen. Stat. § 97-47 (1991). As our Supreme Court explained:

> Change of condition "refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition." . . . Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings.

McLean v. Roadway Express, Inc., 307 N.C. 99, 103-4, 296 S.E.2d 456, 459 (quoting *Pratt v. Central Upholstery Co.*, 252 N.C. 716, 722, 115 S.E.2d 27, 33-34 (1960) (citation omitted)); *see Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 360 S.E.2d 109 (1987). This Court has held that if an employee receives a compensable injury and as a result suffers from depression which adversely affects the employee's ability to work, the depression is a change of condition under N.C. Gen. Stat. § 97-47. *See Lucas v. Bunn Mfg. Co.*, 90 N.C. App. 401, 368 S.E.2d 386 (1988); *Haponski*, 87 N.C. App. at 105, 360 S.E.2d at 114; *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 282 S.E.2d 539 (1981), *disc. review denied*, 304 N.C. 725, 288 S.E.2d 380 (1982).

In the instant case, the Commission found that plaintiff had not established that his injury had caused disabling depression. Dr. Jolley testified that plaintiff suffered from depression, but had no opinion as to whether plaintiff was capable of working.

Dr. Van Blaricom testified that plaintiff's back condition had not changed, but that plaintiff suffered from overlying depression which made his condition worse. The Commission, however, found that any depression from which plaintiff has been suffering is not disabling and has not prevented him from working. The Commission essentially discounted Dr. Van Blaricom's testimony because he relied mainly upon information from plaintiff's wife in reaching his determination that plaintiff suffered from depression and this diagnosis was not based upon his examination of plaintiff. The Commission is the sole judge of the credibility of a witness and the weight to be given to his testimony. *Gosney v. Golden Belt Mfg.*, 89 N.C. App. 670, 366 S.E.2d 873, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 276 (1988). There is competent evidence in the record to support this finding. This assignment of error is without merit.

II.

Plaintiff next assigns error to the Commission's finding that his back and leg pain did not change after he signed the compensation agreement with defendant. Plaintiff argues that the Commission ignored its own finding that he was terminated because his condition had deteriorated. We disagree.

The Commission found that plaintiff's condition had not changed, as provided by N.C. Gen. Stat. § 97-47, since plaintiff's disability rating had not changed. Dr. Van Blaricom testified as follows:

> Q. Dr. Van Blaricom, did you form an opinion as to whether or not Mr. Jones's physical and mental condition had changed from the time you rated him in January until the time you dictated your 12/11/91 note?
>
> A. I felt that his basic back pathology or condition had not changed, but he was definitely worse off because of an overlying depression that had gotten worse.

While both Dr. Van Blaricom and Dr. Jolley testified that plaintiff was depressed because of his injury, there was no evidence that this depression prevented plaintiff from working which is essential in order to show a change of condition under N.C. Gen. Stat. § 97-47. *See Lucas*, 90 N.C. App. at 404, 368 S.E.2d at 388 (The plaintiff's increased pain changed her "from a person capable of working and earning wages five days a week to one incapable of working at all and earning anything."). This assignment of error is without merit.

Accordingly, the award of the Industrial Commission is

Affirmed.

Chief Judge ARNOLD and Judge MARTIN, John C. concur.

STATE OF NORTH CAROLINA v. CURTIS BALDWIN SHOFF

No. 9428SC643

(Filed 16 May 1995)

Appeal and Error § 115— motion to dismiss—denial—appeal interlocutory

Pursuant to the statutory limitations contained in N.C.G.S. § 15A-1444(d) and the reasoning in *State v. Joseph*, 92 N.C.App. 203, defendant's appeal from the denial of his motion to dismiss made on double jeopardy grounds is dismissed as interlocutory and nonappealable.

Am Jur 2d, Appellate Review §§ 237, 239, 244.

Appeal by defendant from order entered 23 February 1994 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 30 January 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Wade Hall for defendant-appellant.

MARTIN, MARK D., Judge.

Defendant was charged with driving while impaired. On 17 November 1993 he was found guilty in District Court of Buncombe County, and he appealed to superior court. Defendant's case was called for trial on 3 January 1994. A jury was empaneled and the State presented two witnesses. Following recess of the trial for the day, three to six inches of snow fell in Buncombe County. Defendant's attorney and several of the jurors were unable to return to court on the next day. Defendant's case was rescheduled for trial on 6 January 1994, and was empaneled with a different jury. Defendant objected to the new jury. Because of the inability of the original jury to return to complete the case, Judge Allen declared a mistrial, and the case was continued until 23 February 1994. Defendant then moved to dismiss the charge on the ground of double jeopardy. Defendant's motion was denied, and he gave notice of appeal.

On appeal defendant contends the trial court erred in denying his motion to dismiss the charge of driving while impaired after defendant pled the bar of double jeopardy.

We must first determine whether a statutory right to appeal exists in the present case. Defendant contends this issue has not been preserved for appellate review. The duty of an appellate court to dismiss an appeal for lack of jurisdiction is not contingent upon whether the issue has been preserved for appellate review. *See Waters v. Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978); *Pasour v. Pierce*, 46 N.C. App. 636, 639, 265 S.E.2d 652, 653 (1980).

The right to appeal in a criminal proceeding is purely statutory. *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 658 (1977). Generally, there is no right to appeal in a criminal case except from a conviction or upon a plea of guilty. *State v. Howard*, 70 N.C. App. 487, 488, 320 S.E.2d 17, 18 (1984) (*quoting State v. Webb*, 155 N.C. 426, 430, 70 S.E. 1064, 1065-1066 (1911)). The order of the trial court denying defendant's motion to dismiss is not a final judgment and is, therefore, interlocutory. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381-382, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). We conclude defendant's appeal should be dismissed because it arises from a nonappealable interlocutory order.

Section 15A-1444(d) of the Criminal Procedure Act, enacted in 1977, provides the exclusive statutory authority for appeals in criminal proceedings:

> Procedures for appeal to the appellate division are as provided in this Article [15A], the rules of the appellate division, and Chapter 7A of the General Statutes. <u>The appeal must be perfected and conducted in accordance with the requirements of those provisions</u>.

N.C. Gen. Stat. § 15A-1444(d) (1988) (emphasis added). Under the North Carolina Rules of Appellate Procedure an appeal may be had by "[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action . . . ." N.C.R. App. P. 4(a). Chapter 7A limits appeals in criminal proceedings to those taken from a final judgment. N.C. Gen. Stat. § 7A-27(b) (1989). Likewise, Chapter 15A limits appeals in criminal actions to those taken from a final judgment. *See* N.C. Gen. Stat. §§ 15A-1444(a), *et seq.*; *but see* N.C. Gen. Stat. § 15A-1432(d)-(e) (statutory exception to final judgment rule where superior court reinstates charges dismissed in district court or affirms dismissal of charges by district court).

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[118 N.C. App. 724 (1995)]

Under these statutes defendant has no right to immediate review of the order denying his motion to dismiss. However, in a series of decisions rendered by this Court, it has been held that the denial of a motion to dismiss on double jeopardy grounds affects a substantial right and is immediately appealable under N.C. Gen. Stat. § 1-277. *See State v. Montalbano*, 73 N.C. App. 259, 260, 326 S.E.2d 634, 635, *disc. review denied and appeal dismissed*, 313 N.C. 608, 332 S.E.2d 182 (1985); *State v. Major*, 84 N.C. App. 421, 422-423, 352 S.E.2d 862, 863 (1987); State v. Johnson, 95 N.C. App. 757, 758, 383 S.E.2d 692, 693 (1989). We take this opportunity to review our prior decisions regarding the appealability of interlocutory orders in criminal proceedings.

In *Montalbano*, this Court relied on a substantial rights analysis under Sections 1-277 and 7A-27 to support the defendant's right to appeal. The Court held that the issue of whether a defendant will be subjected to double jeopardy constituted a substantial right, therefore immediate review was permitted. *Montalbano*, 73 N.C. App. at 260, 326 S.E.2d at 635. In *Major* this Court determined that previous rulings permitted an immediate appeal from an interlocutory order in a criminal case where the order "may destroy or impair or seriously imperil some substantial right of the appellant." *Major*, 84 N.C. App. at 422, 352 S.E.2d at 863, *(quoting State v. Bryant*, 280 N.C. 407, 411, 185 S.E.2d 854, 856 (1972)); *see also State v. Childs*, 265 N.C. 575, 578, 144 S.E.2d 653, 655 (1965) (per curiam) (although the Court in *Childs* determined that no substantial right was affected by the order appealed from, an analysis based on Section 1-277 was applied).

The holdings in *Montalbano* and *Major* were reviewed by this Court in *State v. Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988), *cert. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989). The *Joseph* Court noted that Section 15A-1444, which effectively precluded any substantial rights analysis under Section 1-277, was enacted subsequent to the holdings in *Childs* and *Bryant*. *Id.* at 206, 377 S.E.2d at 134. Accordingly, the Court concluded that enactment of Section 15A-1444(d) superseded the Supreme Court rulings in *Childs* and *Bryant*, and thereafter eliminated any statutory basis for applying Section 1-277 to the appeal of interlocutory orders issued in criminal proceedings. *Id.* at 206, 377 S.E.2d at 134-135.

In *State v. Johnson*, 95 N.C. App. 757, 383 S.E.2d 692 (1989), filed subsequent to the *Joseph* decision, this Court again applied a substantial rights analysis under Section 1-277 to an appeal in a criminal proceeding. Although concluding the trial court had entered a final

judgment, the *Johnson* Court nonetheless invoked the provisions of Section 1-277 to establish the statutory basis for appellate review rather than the provisions of Section 15A-1444(d). *Id.* at 758, 383 S.E.2d at 693.

We believe the holding in *State v. Joseph*, *supra*, represents the better view in that reliance upon a substantial rights analysis as the basis for appellate review appears contrary to the plain and unambiguous language of the statutes governing criminal appeals. *See generally* J. Brad Donovan, *The Substantial Rights Doctrine and Interlocutory Appeals*, 17 Campbell L. Rev. 71 (1995).

Accordingly, pursuant to the statutory limitations contained in N.C. Gen. Stat. § 15A-1444(d) and the reasoning in *State v. Joseph*, *supra*, defendant's appeal is dismissed as interlocutory and nonappealable.[1]

Dismissed.

Judges LEWIS and JOHN concur.

HENRY PLUMMER, EMPLOYEE v. HENDERSON STORAGE COMPANY, EMPLOYER; AETNA LIFE & CASUALTY COMPANY, CARRIER

No. COA94-738

Filed 16 May 1995

1. Workers' Compensation § 435 (NCI4th)— authority of deputy commissioner to rescind award

The Workers' Compensation Act vested the deputy commissioner with the inherent authority to set aside his opinion and award, and the deputy commissioner did not abuse his discretion in rescinding his inadvertently issued opinion and award to give defendants the opportunity to depose plaintiff's physician.

Am Jur 2d, Workers' Compensation § 651.

1. Because defendant appeals solely pursuant to statute, we decline to address the question of whether appropriate circumstances exist for the issuance of any extraordinary writ. See N.C. Gen. Stat. § 7A-32; N.C.R. App. P. 21, *et seq.*

2. Workers' Compensation § 454 (NCI4th)— claimant's credibility—denial of claim proper

The Industrial Commission did not err in denying plaintiff's claim on the ground that plaintiff's testimony was not credible, since the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony and may reject a witness's testimony entirely if warranted by disbelief of that witness.

Am Jur 2d, Workers' Compensation §§ 708, 709.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 22 March 1994. Heard in the Court of Appeals 23 March 1995.

J. Henry Banks for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Steven M. Sartorio, for defendant-appellee.

MARTIN, MARK D., Judge.

Plaintiff suffered an injury while performing his duties as an employee of defendant Henderson Storage Company (Henderson) and filed a claim for compensation with the Industrial Commission. On 12 May 1993 the Deputy Commissioner entered an Opinion and Award finding plaintiff's claim compensable. On 21 July 1993 the Deputy Commissioner rescinded his earlier Opinion and Award. On 26 October 1993 the Deputy Commissioner entered an Opinion and Award denying plaintiff's claim. The Full Commission affirmed the Deputy Commissioner's Opinion and Award denying plaintiff's claim. We affirm.

In 1991 plaintiff was a manager at Henderson Storage Company. On 8 October 1991 plaintiff allegedly injured his left knee while running to answer the telephone at Henderson. Plaintiff thereafter filed a claim under the North Carolina Workers' Compensation Act. On 23 March 1993 a hearing was held before Deputy Commissioner Edward Garner, Jr.

On 31 March 1993 Deputy Commissioner Garner entered an order allowing defendants thirty days to depose Dr. Michael Smith, the physician who initially saw the plaintiff for his complaints of left knee pain. Dr. Smith was not available for deposition until 11 May 1993. By letter dated 23 April 1993, defendants asked Deputy Commissioner

Garner for an extension until 11 May 1993 to depose Dr. Smith. On 10 May 1993 Dr. Smith's office notified defendants that he would not be able to attend his deposition the next day. Defendants alerted Deputy Commissioner Garner by hand-delivered letter, and plaintiff's counsel by phone, that Dr. Smith's deposition had been postponed. Nevertheless, on 12 May 1993, Deputy Commissioner Garner entered an Opinion and Award finding plaintiff's injuries compensable. Defendants did not appeal from the Opinion and Award. Rather, defendants informed Deputy Commissioner Garner by phone that they had not yet deposed Dr. Smith. Deputy Commissioner Garner informed defendants that after Dr. Smith was deposed, he would either amend his Opinion and Award or enter a final Opinion and Award. Subsequently, defendants rescheduled Dr. Smith's deposition on several occasions, two of which were at the request of plaintiff's attorney. Defendants finally deposed Dr. Smith on 24 June 1993.

On 21 July 1993 Deputy Commissioner Garner filed an order rescinding his Opinion and Award dated 12 May 1993 stating, "[the 12 May 1993] Opinion and Award was inadvertently done. The undersigned had previously promised counsel that they would be allowed an opportunity to depose Dr. Smith. The Opinion and Award was entered prior to receiving Dr. Smith's deposition." On 9 August 1993 plaintiff filed a motion to set aside the order of 21 July 1993 and have it declared null and void, and requested sanctions under N.C. Gen. Stat. § 97-18(e). On 26 October 1993 Deputy Commissioner Garner filed an Opinion and Award denying plaintiff's claim for workers' compensation benefits. The Full Commission affirmed the Deputy Commissioner's Opinion and Award denying plaintiff's claim.

The questions presented on this appeal are (1) whether the Deputy Commissioner had jurisdiction to rescind his 12 May 1993 order, and if so, did the Deputy Commissioner abuse his discretion; and (2) whether the Commission erred in concluding plaintiff's injury was noncompensable.

[1] Plaintiff first contends Deputy Commissioner Garner did not have jurisdiction to rescind his order of 12 May 1993. Plaintiff further contends that if Deputy Commissioner Garner had jurisdiction, he abused his discretion by rescinding his previous Opinion and Award.

Our Courts have recognized the Industrial Commission's judicial powers to administer the Workers' Compensation Act. *See Butts v. Montague Bros.*, 208 N.C. 186, 188, 179 S.E. 799, 801 (1935) (Industrial Commission has power to order a rehearing on the basis of newly dis-

covered evidence); *Neal v. Clary*, 259 N.C. 163, 166-167, 130 S.E.2d 39, 41 (1963) (Industrial Commission has the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud). In *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985), our Supreme Court held "[t]he Commission has inherent power, analogous to that conferred on courts by Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a claim requires it." *Id.* at 129, 337 S.E.2d at 478. The *Hogan* Court further stated, "[b]ecause the power to set aside a former judgment is vital to the proper functioning of the judiciary, we believe the legislature impliedly vested such power in the Commission in conjunction with the judicial power the legislature granted it to administer the Workers' Compensation Act." *Id.* at 140, 337 S.E.2d at 484.

We find *Hogan*, *supra*, is dispositive of this case. In order to allow defendants to depose Dr. Smith, Deputy Commissioner Garner entered an order to keep the record open. Nevertheless, on 12 May 1993, before defendants had an opportunity to depose Dr. Smith, Deputy Commissioner Garner entered an Opinion and Award. Once informed of the omission of Dr. Smith's testimony, however, Deputy Commissioner Garner rescinded his 12 May 1993 Opinion and Award to give defendants the "opportunity to depose Dr. Smith." We hold the Workers' Compensation Act vested Deputy Commissioner Garner with the inherent authority to set aside his Opinion and Award of 12 May 1993. We also conclude Deputy Commissioner Garner did not abuse his discretion because the rescission of his inadvertently issued Opinion and Award fostered the "just and proper determination of [plaintiff's] claim," *Hogan*, 315 N.C. at 129, 337 S.E.2d at 478.

[2] Finally, plaintiff contends the Commission erred in denying plaintiff's claim on the grounds that plaintiff's testimony was not credible.

The standard of review of a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law. *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993). The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). In weighing the

evidence the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony and may reject a witness' testimony entirely if warranted by disbelief of that witness. *Russell v. Lowe's Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

The Industrial Commission has made explicit findings of fact and conclusions of law regarding the credibility of plaintiff's testimony. Having reviewed the record, we find sufficient evidence to support the Industrial Commission's findings of fact, and we hold that those findings support the conclusions of law.

Affirmed.

Judges GREENE and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS
FILED 2 MAY 1995

Case	County	Disposition
CLEMMONS v. CLEMMONS No. 94-491	New Hanover (93CVD754)	Vacated
COGHILL v. COGHILL No. 94-526	Guilford (93CVD3959)	Dismissed
DEPT. OF TRANSPORTATION v. SHELLA No. 94-1135	Guilford (92CVS6234)	No Error
DICKEY v. FITZGERALD No. 94-569	Moore (91CVD741)	Affirmed
GRACE v. GRACE No. 94-600	Wake (92CVD01450)	Affirmed
HALIFAX COUNTY DSS ex rel. WHITAKER v. RICHARDSON No. 94-673	Halifax (86CVD1031)	Affirmed
HARRISON v. BUSINESS FACTS, INC. No. 94-1210	Guilford (93CVD1818)	No Error
IN RE TAYLOR No. 94-723	Catawba (92J191) (92J192) (92J193)	Affirmed
KEITH v. VENTURE EXPRESS, INC. No. 94-760	Lee (93CVD097)	Reversed & Remanded
McGAHREN v. BALEY No. 94-567	Buncombe (93CVS897)	Reversed & Remanded
MOORE v. G. A. DISTRIBUTION STORAGE No. 94-384	Ind. Comm. (906056)	Affirmed
PRINCE v. BURNETT No. 93-1252	New Hanover (91CVD317)	Reversed & Remanded
STATE v. ABRAMS No. 94-1005	Forsyth (93CRS37292) (93CRS37268) (93CRS27414)	No Error

STATE v. BASNIGHT No. 94-1081	Tyrrell (93CRS644)	No Error
STATE v. BASS No. 94-563	Richmond (80CRS2904) (91CRS3253) (93CRS0236) (93CRS5319) (93CRS5320)	Appeal Dismissed
STATE v. BRITT No. 94-531	Lenoir (89CRS4791)	Affirmed
STATE v. COTHRAN No. 94-514	Buncombe (92CRS67518) (92CRS67519)	Affirmed
STATE v. COX No. 94-515	Randolph (93CRS5830)	No Error
STATE v. DAVIS No. 94-948	Edgecombe (94CRS6203) (94CRS6208) (94CRS6209)	94CRS6203— Appeal Dismissed 94CRS6208— No Error 94RS6209— No Error
STATE v. HOME LOAN MORTGAGE ASSISTANCE No. 94-566	Wake (92CVS6083)	Remanded for further proceedings consistent with this opinion
STATE v. HURLEY No. 94-578	Guilford (93CRS67188) (93CRS67189) (93CRS67190)	No Error
STATE v. LAWRENCE No. 94-513	Mecklenburg (94CRS46693)	No Error
STATE v. LONCAR No. 94-937	Mecklenburg (93CRS43813) (93CRS43814)	No Error
STATE v. McMILLAN No. 94-667	Moore (93CRS2419) (93CRS2421) (93CRS2422) (93CRS2597)	No Error
STATE v. MOFFITT No. 94-956	Chatham (93CRS1165)	No Error

STATE v. PRICE No. 94-1067	Forsyth (94CRS8791)	No Error
STATE v. RAWLEY No. 94-512	Forsyth (93CRS33633)	No Error
STATE v. TONEY No. 94-980	Guilford (93CRS48707)	No Error
STATE v. WAGNER No. 94-641	Orange (91CRS7827)	No Error
STATE v. WARD No. 94-732	Beaufort (78CRS9542)	No Error
STATE v. WILLIAMS No. 94-511	Gaston (92CRS027334)	No Error
STATE v. WILLIAMS No. 94-414	Nash (93CRS3804) (93CRS3805)	Dismissed in part, Affirmed in part
STATE v. WILLIAMS No. 94-638	Wayne (92CRS12054) (92CRS12055) (93CRS70) (93CRS4306)	No Error
STATE v. WINSTON No. 94-662	Guilford (93CRS45759)	No Error
STATE v. YELVERTON No. 94-594	Greene (89CRS1736) (89CRS1737)	No Error
THOMPSON v. GALVAN INDUSTRIES No. 94-487	Ind. Comm. (966793)	Appeal Dismissed

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ADAMS v. MOORE No. 94-265	Buncombe (93CVD2649)	Reversed & Remanded
ARMFIELD v. SURRY INDUSTRIES No. 94-535	Surry (91CVS292) (91CVS193)	Affirmed
BAILEY v. CELOTEX CORP. No. 94-494	Ind. Comm. (167328)	Affirmed
BATTLE v. PETERSON No. 94-686	Edgecombe (92CVS1362)	Affirmed

BENNETT v. BRANCH BANKING & TRUST CO. No. 93-1306	Moore (91CVD346)	Reversed
BURTON v. O'CONNOR No. 94-1103	Randolph (91CVD1377)	Affirmed
FOSTER v. HOLLY FARMS/ TYSON FOODS No. 94-1214	Ind. Comm. (961247)	Dismissed
IN RE FORECLOSURE OF MOCK No. 94-1079	Randolph (93SP227)	Affirmed
IN RE TURNER No. 94-740	Carteret (93J48)	Affirmed
IN RE WILL OF LOWE No. 94-506	Hyde (93SP5)	Affirmed
IVESTER v. KESLER CORP. No. 94-793	Mecklenburg (91CVS11438)	Affirmed
JOHNSON v. COOLEY No. 93-596	Rutherford (91CVD1020)	No Error
JONES v. SAFELITE GLASS CORP. No. 94-521	Ind. Comm. (100446)	Affirmed
MUNN v. C & S ENTERPRISES No. 94-1168	Cabarrus (93CVS1488)	Dismissed
PEPLINSKI v. N.C. DIV. OF MOTOR VEHICLES No. 94-1204	Moore (93CVS1037)	Affirmed
PETTIGREW v. BURLINGTON INDUSTRIES No. 94-705	Ind. Comm. (553818)	Affirmed
PITTS v. WARCUP No. 94-403	Cumberland (91CVS4216)	No Error
SAMS v. WACKENHUT CORP. No. 94-975	Ind. Comm. (115406)	Dismissed
SAPPINGTON v. NORRIS No. 94-796	Forsyth (93CVS2519)	Dismissed
SMITH v. WASHINGTON No. 94-834	Durham (87CVD3862)	Affirmed
STATE v. BALDWIN No. 94-1295	Buncombe (93CRS6123) (93CRS60245) (93CRS60247)	No Error

STATE v. BECTON No. 94-920	Lenoir (83CRS7953) (83CRS7954)	No error at trial; Resentencing Affirmed
STATE v. BURWELL No. 94-713	Rutherford (93CRS8823)	Affirmed
STATE v. CHARLES No. 94-413	Nash (92CRS017121)	No Error
STATE v. DAVIS No. 94-543	Mecklenburg (91CRS78702) (91CRS78703)	No Error
STATE v. FELTON No. 93-813	Wake (92CRS87885)	No Error
STATE v. FUNDERBURK No. 94-1011	Union (92CRS010028)	No Error
STATE v. HARTSELL No. 94-1203	Gaston (93CRS18916) (93CRS18917) (93CRS18974) (93CRS18977) (93CRS18978)	No error in part, vacated in part, and remanded
STATE v. KINSEY No. 94-607	Pitt (93CRS17149)	No Error
STATE v. MOSES No. 94-855	Forsyth (94CRS40119) (94CRS40120) (94CRS40121) (94CRS40122)	No Error
STATE v. NOWELL No. 94-947	Orange (92CRS3447) (92CRS3496)	No Error
STATE v. O'NEAL No. 94-679	Wake (93CRS11517)	No Error
STATE v. RAMSEY No. 94-832	Beaufort (87CRS6436)	No Error
STATE v. SYKES No. 94-299	Robeson (92CRS5542) (92CRS5543)	No Error
STATE v. WILLIAMS No. 94-842	Orange (93CRS5140) (93CRS5141) (93CRS5142)	No Error

STEED v. WEST MAIN ASSOC. No. 94-653	Durham (93CVS01615)	Affirmed
TREECE v. BERNTHAL No. 94-324	Stanly (88CVD85)	Affirmed
VANHOOZER v. MARYLAND NATIONAL BANK No. 94-534	Bertie (92CVS314)	Affirmed in part, Reversed in part & Remanded
WILLIAMS v. PHAR-MOR, INC. No. 94-1022	Ind. Comm. (146213)	Affirmed
YOUNTS v. McDONALD No. 94-1172	Orange (92CVS1810)	Affirmed

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ADMINISTRATIVE LAW AND PROCEDURE

§ 44 (NCI4th). Final decisions or orders

The State Personnel Commission's order dismissing a State employee for just cause stated with sufficient specificity the reasons it did not adopt the administrative law judge's recommendation that the employee be disciplined and reinstated. **Ritter v. Dept. of Human Resources,** 564.

§ 72 (NCI4th). Appeal from judgment on review generally

Where plaintiff's assignments of error raised only the issue of whether an agency order was supported by the findings of fact, appellate review of the order was de novo. **Associated Mechanical Contractors v. Payne,** 54.

§ 77 (NCI4th). Application for presentation of new evidence

The trial court did not err by denying the application of a State employee who was dismissed for personal misconduct to remand his case to the Office of Administrative Hearings to take additional evidence about his successful completion of an alcohol recovery program. **Ritter v. Dept. of Human Resources,** 564.

ADOPTION OR PLACEMENT FOR ADOPTION

§ 4 (NCI4th). Jurisdiction

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody between nonparents with regard to the child who is the subject of the adoption petition. **Griffin v. Griffin,** 400.

APPEAL AND ERROR

§ 115 (NCI4th). Appealability of orders denying motions to dismiss; double jeopardy claims

An order denying defendant's motion to dismiss made on double jeopardy grounds is interlocutory and nonappealable. **State v. Shoff,** 734.

§ 118 (NCI4th). Appealability of summary judgment orders; summary judgment denied

An order denying motions for summary judgment by plaintiff and by one defendant is interlocutory and not immediately appealable. **Tart v. Prescott's Pharmacies, Inc.,** 516.

§ 175 (NCI4th). Mootness of other particular questions

Because plaintiff entered a dismissal in her action for claim and delivery of breast implants which had been surgically removed from her body at defendant hospital, her argument that the trial court erred in entering a protective order concerning possession of the implants was moot. **Doe v. Duke University,** 406.

§ 180 (NCI4th). Effect of appeal on power of trial court; motion for relief from judgment or order

The trial court had the authority to correct a judgment where defendant's motion to correct the judgment was filed on 30 March, the order correcting the judgment was entered on 11 April, and the judgment was docketed on 24 April. Although plaintiff argued that the trial court had no authority to correct the judgment because plaintiff had filed in the Court of Appeals an order extending the time to contract with the court reporter for a transcript, an appeal is docketed upon the filing of the record on appeal. **Watson v. Watson,** 534.

ARBITRATION AND AWARD

§ 4 (NCI4th). Effect of arbitration agreement on right to seek judicial relief

Arbitration in this case was not invalidated by G.S. 22B-10 since an agreement to arbitrate is not an unenforceable contract requiring waiver of a jury, and defendants did not waive arbitration by their delay in demanding arbitration since there was no showing of prejudice to plaintiffs. **Miller v. Two State Construction Co.,** 412.

ARREST AND BAIL

§ 82 (NCI4th). Right of private persons to detain suspects generally

The jury could find that a homicide victim had statutory authority to detain defendant, for purposes of determining whether defendant acted in self-defense in shooting the victim, where the jury could find from the State's evidence that the victim had cause to believe that the felony of burglary was being committed by defendant in his presence and that defendant's vehicle posed a substantial threat of injury to him. **State v. Gilreath,** 200.

ASSAULT AND BATTERY

§ 101 (NCI4th). Instructions; issue of whether defendant was aggressor

Any error by the trial court's failure to give defendant's requested instruction in a prosecution for assaults with a firearm on two deputies that the jury should not consider defendant's conduct before the deputies arrived in determining whether defendant was the aggressor was harmless where the evidence showed that defendant was the aggressor at the time of the shooting and could not claim self-defense. **State v. Price,** 212.

§ 112 (NCI4th). Accident or misadventure; instruction not required

Hearsay statements by defendant that he didn't "mean" to injure the victims and that he "accidentally" ran over them did not constitute substantial evidence that required the trial court to instruct the jury on the defense of accident. **State v. Thompson,** 33.

ATTORNEYS AT LAW

§ 47 (NCI4th). Professional malpractice; grounds; failure to timely commence action

The trial court properly entered summary judgment for defendants on plaintiff's legal malpractice claim where plaintiff failed to show that she would have won her underlying slip and fall case against a church if it had been timely filed by defendants. **Byrd v. Arrowood,** 418.

AUTOMOBILES AND OTHER VEHICLES

§ 452 (NCI4th). Family purpose doctrine; who is family member for purposes of doctrine

The trial court properly granted summary judgment for defendant in an action arising from an automobile accident where plaintiff sought to impute negligence to defendant under the family purpose doctrine although the car had been purchased by defendant's wife, from whom he was separated and driven by his daughter, who lived with his wife. **Taylor v. Brinkman,** 96.

AUTOMOBILES AND OTHER VEHICLES—Continued

§ 623 (NCI4th). Contributory negligence of guest or passenger; riding with intoxicated driver

Plaintiff's allegation that defendant was under the influence of alcohol while he was operating a truck in which plaintiff's intestate was a passenger did not constitute an assertion that the passenger was contributorily negligent, and the evidence did not establish the passenger's contributory negligence as a matter of law where it showed that the passenger knew that defendant had been drinking earlier in the evening but did not establish that he knew defendant was under the influence of alcohol. **Ayscue v. Weldon,** 636.

§ 766 (NCI4th). Instructions to jury; sudden emergency brought about by own negligence

The trial court erred by submitting the issue of sudden emergency to the jury where the sudden emergency upon which defendant relied was brought about, at least in part, by his own inattention and failure to maintain a proper lookout. **Holbrook v. Henley,** 151.

§ 813 (NCI4th). Driving under influence of impairing substance; requirement of alcohol test

Defendant's right to have a witness view a breathalyzer test was violated, and the test results were inadmissible, where defendant asked that his wife be present at the test but the officer said that might not be a good idea because she had also been drinking. **State v. Myers,** 452.

§ 818.1 (NCI4th). Penalty for habitual impaired driving

The trial court's failure in a prosecution for habitual impaired driving to formally arraign defendant upon the charge alleging the previous convictions and failure to inform defendant that he could admit the previous convictions, deny them, or remain silent, as required by G.S. 15A-928(c), was not reversible error. **State v. Jernigan,** 240.

§ 849 (NCI4th). Driving under influence of impairing substance; proof of highway and public vehicular area

The trial court erred by instructing the jury in a driving while impaired case that a nightclub's parking lot was a public vehicular area as a matter of law where the evidence on this issue was contradictory. **State v. Snyder,** 540.

BANKRUPTCY AND INSOLVENCY

§ 12 (NCI4th). Debts and liens discharged

An action seeking specific performance by defendant of his obligation under a separation agreement to pay two joint debts is remanded for findings as to when plaintiff learned of defendant's bankruptcy petition and a determination as to whether defendant's debt to plaintiff had been discharged in bankruptcy. **Cato v. Cato,** 569.

BURGLARY AND UNLAWFUL BREAKINGS

§ 57 (NCI4th). Sufficiency of evidence; first-degree burglary

Evidence of first-degree burglary was sufficient to be submitted to the jury where it tended to show that defendant entered a home occupied by the victim and her daughter at 1:30 a.m. **State v. Gilreath,** 200.

COMPROMISE AND SETTLEMENT

§ 9 (NCI4th). Nonsuit; summary judgment

Plaintiffs' claims for strict liability under the Oil Pollution and Hazardous Substances Control Act, negligence, nuisance, and trespass were not barred by the parties' settlement agreement where the settlement was contingent upon defendant's payment of $15,000 and drilling of a new well which provided clean water, but defendant failed to meet this contingency within a reasonable time. **James v. Clark**, 178.

CONSPIRACY

§ 12 (NCI4th). Sufficiency of evidence as to specific civil conspiracies

The trial court properly granted summary judgment in plaintiff's civil conspiracy action against members of the board of directors of a homeowners association who imposed a fine against plaintiff for altering the appearance of the entrance to her condominium unit. **Stewart v. Kopp**, 160.

The evidence was insufficient to show that defendant police officers had a meeting of the minds with racial animus to deprive plaintiff of his constitutional rights. **Burton v. City of Durham**, 676.

CONSTITUTIONAL LAW

§ 86 (NCI4th). Civil rights; state and federal aspects of discrimination

Plaintiff's civil rights under North Carolina law were not violated during an arrest on grounds that he was arrested for committing the infraction of exceeding a safe speed, officers conducted a registration check pursuant to a stop for exceeding safe speed, and officers used handcuffs during the arrest. **Burton v. City of Durham**, 676.

§ 103 (NCI4th). Prohibition against taking of property generally; remedy for unlawful taking

Where plaintiff was engaged in the business of appraising damages and attempting settlements of claims asserted against an insurance company which became insolvent, and in the course of performing this work maintained files containing information and documentation relating to the claims, the actions of the Insurance Commissioner and the Guaranty Association in securing an order enjoining plaintiff from destroying the files and requiring plaintiff to turn the files over to the Commissioner did not amount to a taking of plaintiff's personal property which entitled plaintiff to compensation. **Eastern Appraisal Services v. State of North Carolina**, 692.

§ 248 (NCI4th). Discovery; witnesses' statements or reports

In a prosecution of defendant for sexual abuse of children in a day care center, the trial court erred in refusing defendant's request to conduct an in camera review of files of medical and therapy notes on the children involved in order to determine if any material evidence existed in the files where a pretrial order had been entered directing the State to file and present to the trial court for in camera review medical, psycotherapeutic and DSS files with respect to the children, and this order was affirmed by the N. C. Supreme Court. **State v. Kelly**, 589.

The State did not violate *Brady v. Maryland*, 373 U.S. 83, by withholding favorable evidence in its possession since defendant was not entitled to such information in the State's possession until trial, and the State complied after jury selection by providing the defense with notes in its possession on all children who testified at trial; however, the trial court violated defendant's due process rights by failing to conduct a review of

CONSTITUTIONAL LAW—Continued

privileged materials brought forth for in camera review pursuant to a judge's pretrial order. **State v. Wilson,** 616.

§ 345 (NCI4th). Presence of defendant at proceedings; pronouncement of sentence or judgment

The trial court erred by adding the aggravating factor that defendant's conduct created a great risk to public safety after the sentencing hearing was completed and outside of defendant's presence. **State v. Beasley,** 508.

CONTRACTS

§ 69 (NCI4th). Provisions regarding approval of architect

Where a subcontract between plaintiff and defendant general contractor designated the owner's architect as the judge of acceptable work, the parties were bound by his decision that masonry work performed by plaintiff was unacceptable. **Top Line Construction Co. v. J. W. Cook & Sons,** 429.

§ 111 (NCI4th). Termination generally

The trial court erred in granting summary judgment for defendant against third-party defendant for the amount defendant was backcharged by a building owner for masonry work where there was a genuine issue of fact as to whether there was a mutual termination or rescission of the subcontract between defendant and the third-party defendant. **Top Line Construction Co. v. J. W. Cook & Sons,** 429.

CORPORATIONS

§ 96 (NCI4th). Powers, duties, and liabilities of directors; liability to third persons for neglect of duties, mismanagement, or fraud

The individual defendants, shareholders and directors of a medical clinic, did not breach any fiduciary duty to plaintiffs, the landlord of the clinic, where payments were made to the individual defendants from the clinic's deferred compensation claim and the rent was not paid. **Whitley v. Carolina Clinic, Inc.,** 523.

§ 108 (NCI4th). Officers and agents; liability for neglect; mismanagement or depletion of assets

There was sufficient evidence to support the jury's award of $60,000 in damages in an action for misappropriation of corporate funds by defendants. **Outen v. Mical,** 263.

The evidence was insufficient to support a claim for misappropriation of corporate funds against plaintiff president where the evidence showed that the funds in question were used for corporate purposes. **Ibid.**

§ 146 (NCI4th). Shareholder derivations actions; who can bring action

The trial court erred in entering a judgment awarding damages to plaintiff corporate president individually instead of to the corporation in an action for misappropriation of funds of a Subchapter S corporation. **Outen v. Mical,** 263.

§ 151 (NCI4th). Inspection of corporate books and records generally

Defendant did not breach the parties' settlement and stock purchase agreement by failing to provide plaintiff with an audited financial statement within 120 days after the close of defendant's fiscal year and within fifteen days of notification of default

CORPORATIONS—Continued

since defendant was only required to provide plaintiff with a copy of its audited financial statement within 120 days after it came into defendant's hands, and the evidence showed that defendant did not have an audited financial statement in its possession 120 days prior to the date plaintiff served notice of default. **McClerin v. R-M Industries, Inc.**, 640.

§ 187 (NCI4th). Restrictions on share transfers generally

Plaintiffs waived any right they may have had to object to stock transfers to trustees pursuant to testator's will because of transfer restrictions in the company's charter and stock certificates requiring that shares first be offered to the company and the other shareholders where they had knowledge of testator's death and the restrictions, no shareholder asked to purchase testator's stock upon his death, and plaintiffs waited eighteen months to file this action. **Calton v. Calton,** 439.

COURTS

§ 5 (NCI4th). Subject matter jurisdiction generally

The trial court had subject matter jurisdiction of plaintiff's claims against defendants as the alter ego of a bankrupt corporation for negligent misrepresentation and breach of warranties of a weight loss drug. **Tart v. Prescott's Pharmacies, Inc.**, 516.

§ 14 (NCI4th). Grounds for personal jurisdiction

The trial court did not have personal jurisdiction under the long-arm statute pertaining to acts or omissions within this state over a nonresident truck driver in an action arising from an accident which occurred outside this state where there was no sworn verification in the record of an alleged agency relationship between the truck driver and the trucking company, which had a place of business in this state, and where there was no allegation or evidence that defendant's alleged failure to inspect the vehicle occurred within this state. **Godwin v. Walls,** 341.

The claims of plaintiffs for negligent infliction of emotional distress and loss of consortium are "injuries to person or property" within the purview of G.S. 1-75.4(4) conferring personal jurisdiction for acts occurring outside North Carolina provided service activities were carried on within North Carolina, and the trial court had jurisdiction over a nonresident truck driver for an accident in another state where the driver's own affidavit showed that he picked up or delivered pharmaceuticals in North Carolina on two occasions each week. **Ibid.**

§ 15 (NCI4th). Personal jurisdiction; presence, domicil, or substantial activity within state

G.S. 1-75.4(1) did not confer personal jurisdiction over a nonresident defendant with respect to plaintiffs' claims for wrongful death and property damage where plaintiffs did not make a prima facie showing that defendant was engaged in substantial activity within this state when service of process was made upon him. **Godwin v. Walls,** 341.

The nonresident defendant had sufficient contacts with this state so that the exercise of personal jurisdiction over him did not violate due process where defendant entered into an employment arrangement with a North Carolina based company and traveled to this state twice weekly over an eight-month period hauling pharmaceuticals for another company with offices in North Carolina. **Ibid.**

The trial court had authority under G.S. 1-75.4(4) to exercise personal jurisdiction over the nonresident defendants who were officers, directors and the alter ego of a

COURTS—Continued

Florida corporation which supplied a weight loss drug to defendant pharmacy in this state, and the nonresident defendants had sufficient minimum contacts with this state so that the exercise of personal jurisdiction over them did not violate due process. **Tart v. Prescott's Pharmacies, Inc.**, 516.

§ 18 (NCI4th). Personal jurisdiction; joinder of causes in same action

Claims of wrongful death and property damage could not be joined in an action for negligent infliction of emotional distress and loss of consortium against a nonresident truck driver for an accident which occurred in another state. **Godwin v. Walls**, 341.

CRIMINAL LAW

§ 14 (NCI4th). Willfulness

The trial court erred in instructing the jury that willful means intentional without also informing the jury that to be willful, the act or inaction must also be purposely and designedly in violation of law. **State v. Whittle**, 130.

§ 37 (NCI4th). Statute of limitations for misdemeanors

An indictment for a misdemeanor committed more than two years prior to the indictment is not outside the two-year statute of limitations period when the grand jury has returned a presentment within two years of the crime. **State v. Whittle**, 130.

§ 107 (NCI4th). Discovery proceedings; reports not subject to disclosure by State

The trial court did not err in denying defendant's motion for a mistrial or for a continuance on the ground the State failed to provide defense counsel with an analysis of fingerprints on a bottle where the fingerprints were smudged, no meaningful analysis could be conducted, and there was no exculpatory evidence for the State to suppress. **State v. Hodge**, 655.

§ 275 (NCI4th). Continuance; absence of witness; failure to subpoena witness

The trial court did not err in the denial of defendant's motion for a continuance to secure the presence of a defense witness where the whereabouts of the witness were unknown, and no subpoena for the witness was issued prior the original trial date. **State v. Jernigan**, 240.

§ 427 (NCI4th). Argument of counsel; defendant's failure to testify; comment by prosecution

The prosecutor's comments during his closing argument that defendant was "hiding behind the law" and that he was "sticking the law in somebody's eye" were improper references to defendant's exercise of his right to a jury trial, defendant's failure to testify, or both, but the trial court's failure to take curative measures was harmless in light of the overwhelming evidence of defendant's guilt. **State v. Thompson**, 33.

§ 431 (NCI4th). Argument of counsel; statements contrary to evidence or unsupported, generally

Assuming the prosecutor's reference to defendant as a "coward" in his closing argument was not based upon any evidence, it was improper, but the effect of the remark was de minimis. **State v. Thompson**, 33.

CRIMINAL LAW—Continued

§ 462 (NCI4th). Argument of counsel; comment on matters not in evidence; requiring court action ex mero motu

The trial court erred in not intervening ex mero motu when the prosecutor, under the guise of explaining the law on collateral matters during his closing argument, contradicted defendant's answer during the trial that she had not stolen money. **State v. Wilson,** 616.

§ 468 (NCI4th). Argument of counsel; miscellaneous comments

The prosecutor's argument that a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof constitutes an improper comment on defendant's exercise of his Sixth Amendment right to a jury trial. **State v. Thompson,** 33.

The prosecutor's comments during his closing argument that defendant was "hiding behind the law" and that he was "sticking the law in somebody's eye" were improper references to defendant's exercise of his right to a jury trial, defendant's failure to testify, or both, but the trial court's failure to take curative measures was harmless in light of the overwhelming evidence of defendant's guilt. **Ibid.**

§ 626 (NCI4th). Sufficiency of evidence to overrule nonsuit; identity of defendant as perpetrator

The victim's identification of defendant as the driver of the vehicle from which the codefendant shot at the victim was not inherently incredible so as to require the dismissal of charges against defendant for assault with a deadly weapon with intent to kill and discharging a firearm into occupied property. **State v. Beasley,** 508.

§ 816 (NCI4th). Instructions on witness credibility generally

The trial court did not err by refusing defendant's request to give the former pattern jury instruction on jury identification which enumerated relevant factors to be considered in evaluating a witness's identification of defendant where the court gave the current pattern instruction on the State's burden of proving defendant's identity. **State v. Beasley,** 508.

§ 865 (NCI4th). Instruction on reasoning together

The trial court did not abuse its discretion by refusing to give the jury the instructions on reasoning together set forth in G.S. 15A-1235(b) before the jury retired to deliberate. **State v. Beasley,** 508.

§ 1067 (NCI4th). Evidence of victim at sentencing hearing

The trial court erred by adding the aggravating factor that defendant's conduct created a great risk to public safety after the sentencing hearing was completed and outside of defendant's presence. **State v. Beasley,** 508.

§ 1081 (NCI4th). Consideration of aggravating and mitigating factors where mitigating factors outnumber aggravating factors

There was no abuse of discretion in a resentencing hearing for second-degree murder and assault with a deadly weapon inflicting serious injury where the court found that the aggravating factor outweighed the mitigating factors and imposed a fifty-two year sentence. **State v. Mixion,** 559.

§ 1115 (NCI4th). Nonstatutory aggravating factors under Fair Sentencing Act; absence of cooperation

The trial court did not err in finding as an aggravating factor for second-degree murder that defendant provided a false alibi to law enforcement officers with investigative jurisdiction. **State v. Harrington,** 306.

CRIMINAL LAW—Continued

§ 1117 (NCI4th). Nonstatutory aggravating factors under Fair Sentencing Act; seriousness of crime

The trial court erred in considering the seriousness of the offense of second-degree kidnapping in determining whether to increase the presumptive term. **State v. Claypoole,** 714.

§ 1123 (NCI4th). Nonstatutory aggravating factors under Fair Sentencing Act; premeditation

The trial court did not err in finding as an aggravating factor for kidnapping that the offense was premeditated and deliberated. **State v. Hammond,** 257.

§ 1142 (NCI4th). Statutory aggravating factors under Fair Sentencing Act; disruption or hinderance of governmental function or enforcement of laws generally

The trial court erred in finding as an aggravating factor against defendant that his codefendant was motivated to retaliate against an assault victim for seeking child support from the codefendant. **State v. Beasley,** 508.

§ 1144 (NCI4th). Statutory aggravating factors under Fair Sentencing Act; offense against persons performing official duties; same evidence used to support more than one factor

Where defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and assault on a law enforcement officer with a firearm, the trial court could properly find as statutory aggravating factors that the offenses were committed to hinder the lawful exercise of a governmental function or enforcement of the laws and that the offenses were committed against a law enforcement officer in the performance of his official duties since the evidence establishing the aggravating factors was not necessary to prove an element of the offenses, and the two aggravating factors did not address the same conduct. **State v. Price,** 212.

§ 1145 (NCI4th). Statutory aggravating factors under Fair Sentencing Act; especially heinous, atrocious, or cruel offense generally

The trial court erred by finding as an aggravating factor for assault with a deadly weapon with intent to kill and discharging a firearm into occupied property that defendant's conduct was heinous because the victim was the mother of defendant's nephew. **State v. Beasley,** 508.

§ 1149 (NCI4th). Statutory aggravating factors under Fair Sentencing Act; use of weapon normally hazardous to lives of more than one person generally

The trial court did not err in finding as an aggravating factor for second-degree murder and impaired driving that defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person based upon his reckless operation of an automobile while intoxicated. **State v. McBride,** 316.

§ 1156 (NCI4th). Statutory aggravating factors under Fair Sentencing Act; use of or armed with deadly weapon; other offenses

The trial court erred in finding as an aggravating factor that the crimes of assault with a deadly weapon with intent to kill and discharging a firearm into occupied property were committed with a gun. **State v. Beasley,** 508.

CRIMINAL LAW—Continued

§ 1177 (NCI4th). Statutory aggravating factors under Fair Sentencing Act; position of trust or confidence generally

The trial court erred in finding as an aggravating factor for rape and kidnapping that defendant took advantage of a position of trust where the evidence showed that the only relationship between the victim and defendant was that of having worked at the same place of employment. **State v. Hammond,** 257.

§ 1185 (NCI4th). Statutory aggravating factors under Fair Sentencing Act; what constitutes a prior conviction

The trial court did not err in resentencing defendant for second-degree murder and assault with a deadly weapon inflicting serious injury by finding the aggravating factor of prior convictions based upon drug convictions which were subsequent to the murder and assault convictions but before the resentencing for the murder and assault convictions. **State v. Mixion,** 559.

§ 1203 (NCI4th). Nonstatutory mitigating factors under Fair Sentencing Act generally; proof of nonstatutory mitigating factor

The trial court did not err in failing to find any mitigating factors where defendant offered no uncontradicted or substantial evidence to support the mitigating factors he offered to the trial court. **State v. Beasley,** 508.

§ 1236 (NCI4th). Statutory mitigating factors under the Fair Sentencing Act; victim's voluntary participation or consent

There was no error in resentencing defendant for second-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury where the court failed to find ex mero motu as a mitigating factor that the victims were more than sixteen years old and voluntary participants in defendant's conduct. **State v. Mixion,** 559.

§ 1286 (NCI4th). Repeat or habitual offender; evidence of prior convictions of felony offenses

A habitual felon charge should have been dismissed for insufficient evidence because the State failed to show that a New Jersey conviction upon which the State relied was for a felony. **State v. Lindsey,** 549.

§ 1430 (NCI4th). Restitution generally

The trial court did not err in recommending that defendant be required to pay restitution to an injured assault victim which consisted of $19,900 for the purchase of a special van required by his injury and paralysis and $1,000 in uncompensated medical expenses. **State v. Price,** 212.

DEATH

§ 14 (NCI4th). Declaration of desire for natural death; reliance by physician

The trial court erred in granting summary judgment for plaintiff nursing home in an action to recover for services rendered to a patient who was kept alive by means of a nasogastric tube and who had executed a living will where genuine issues existed as to whether the attending physician directed the removal of the nasogastric tube and whether a second physician confirmed the attending physician's conclusion that the patient's condition was terminable and incurable as was required by the living will statute before the tube was removed by court order. **First Healthcare Corp. v. Rettinger,** 600.

DECLARATORY JUDGMENT ACTIONS

§ 7 (NCI4th). Requirement of actual justiciable controversy

There was no justiciable controversy in a declaratory judgment action to determine the validity of stock transfers to trustees necessitated by testator's will in light of the transfer restrictions set out in the company's charter and stock certificates requiring that shares first be offered to the company and the other shareholders where plaintiffs neither alleged nor presented any evidence that any shareholder exercised or intended to exercise his right to purchase the stock. **Calton v. Calton,** 439.

§ 27 (NCI4th). Appeal

The administratrix who filed a wrongful death action against the tortfeasor had a right to appeal a declaratory judgment that the tortfeasor was not insured by a homeowners policy even though the tortfeasor did not appeal. **Nationwide Mutual Ins. Co. v. Anderson,** 92.

DISCOVERY AND DEPOSITIONS

§ 55 (NCI4th). Motion for order compelling discovery generally

The trial court erred in a class action seeking compensation for unused vacation days by compelling discovery where there was no outstanding discovery request. **Hamilton v. Memorex Telex Corp.,** 1.

DIVORCE AND SEPARATION

§ 37 (NCI4th). Separation agreements; enforcement generally

An action seeking specific performance by defendant of his obligation under a separation agreement to pay two joint debts is remanded for findings as to when plaintiff learned of defendant's bankruptcy petition and a determination as to whether defendant's debt to plaintiff had been discharged in bankruptcy. **Cato v. Cato,** 569.

§ 112 (NCI4th). Distribution of marital property; property subject to distribution, generally

Where plaintiff executed a quitclaim deed after the parties' separation and the property was titled in both names on the date of separation, the quitclaim deed did not withdraw the property from the marital estate or affect the distribution. **Stanley v. Stanley,** 311.

§ 117 (NCI4th). Distribution of marital property; court's duty to classify property

The trial court in an equitable distribution action erred in failing to classify the property as marital or separate and to value the property. **Stanley v. Stanley,** 311.

§ 122 (NCI4th). Distribution of marital property; classification of property; intraspousal gifts

Even if property acquired by deed from defendant husband's parents was a gift only to defendant from his parents, a gift by defendant to the marital estate is presumed from defendant's direction that the title be placed in the names of both parties as tenants by the entirety, and the trial court properly concluded that the entire property is marital property. **Loving v. Loving,** 501.

DIVORCE AND SEPARATION—Continued

§ 147 (NCI4th). Distribution of marital property; distribution factors; liabilities

The trial court distributed a $9,000 marital debt (an amount owed on marital property) to plaintiff wife where the court placed a value on the property that was $9,000 less than its actual value and distributed the property to plaintiff. **Loving v. Loving,** 501.

§ 148 (NCI4th). Distribution of marital property; distribution factors; post-separation payments on marital debts

The trial court had the discretion to treat the post-separation payment of a marital debt by the spouse not receiving distribution of the debt as a distributional factor. **Loving v. Loving,** 501.

Where a marital debt distributed to plaintiff wife was valued at $9,000 on the date of separation but was paid in full by defendant husband after the date of separation and had a value of zero on the date of distribution, the trial court was required to consider this decrease in value as a distributional factor. **Ibid.**

§ 164 (NCI4th). Distribution of marital property; agreements dividing property; oral agreements

The trial court correctly entered a judgment in an equitable distribution action where the parties informed the court that they had agreed to entry of judgment in accordance with one of two alternative draft judgments; defendant's attorney explained several changes; the court asked both parties whether they understood what the attorney had said and whether they agreed to entry of the order; and both parties replied affirmatively. The trial court was not required to read to the parties in open court the terms of the proposed distribution of marital property under the circumstances in this case, which included representation by counsel, a prior hearing, service on opposing counsel of the alternative draft motion, and an indication by the parties that they had either read or understood the terms of the proposed distribution. **Watson v. Watson,** 534.

§ 168 (NCI4th). Distribution of marital property; pension, retirement, or deferred compensation benefits; determination of award

The trial court's judgment awarding defendant post-separation gains and losses on her portion of plaintiff's 401(k) plan were consistent with both the parties' agreement and the law of this state. **Allen v. Allen,** 455.

§ 385 (NCI4th). Child support generally

The trial court's recommendation in a child support modification order that the father be allowed visitation with the children did not condition the receipt of child support upon visitation and was not improper. **McGee v. McGee,** 19.

§ 392 (NCI4th). Amount of child support generally

The trial court did not err by finding that the temporary child support amounts defendant father was ordered to pay during the pendency of this action to modify a child support order constituted the total support obligation during such time even though the amount was less than that required under the prior order. **McGee v. McGee,** 19.

The trial court erred in classifying the child support ordered from the date defendant filed her claim for child support to the date the hearing on the issue was held as retroactive child support and used the incorrect test in determining what child support should be awarded. **Taylor v. Taylor,** 356.

DIVORCE AND SEPARATION—Continued

§ 392.1 (NCI4th). Child support guidelines

The child support guidelines apply to modification of child support orders as well as to the initial orders. **Hammill v. Cusack,** 82.

The child support guidelines did not apply to a determination of child support where the parties' combined income was $400,000 per year. **Taylor v. Taylor,** 356.

§ 400 (NCI4th). Ability to support child; consideration of parties' actual income

The trial court erred in using the amount of income allocated to plaintiff by a Subchapter S corporation in which plaintiff was a shareholder in calculating his income rather than a lower cash amount actually distributed to him. **Taylor v. Taylor,** 356.

§ 403 (NCI4th). Ability to support child; determination of parents' reasonable expenses

Loan payments to plaintiff's father were properly excluded by the trial court in determining plaintiff's income for child support purposes where the payments have been deferred, but the court erred in excluding plaintiff's monthly payments to a trust for debt incurred to purchase defendant's stock in a Subchapter S corporation under an equitable distribution settlement. **Taylor v. Taylor,** 356.

§ 415 (NCI4th). Child support; what constitutes past due payment generally

Because plaintiff did not abide by her obligation under a court order to give timely notice of child support increases based on the consumer price index to the clerk of court, she cannot now be heard to complain of any alleged arrearages for the years she did not give notice. **Snipes v. Snipes,** 189.

§ 417 (NCI4th). Past due child support vested

Plaintiff's act of notifying the clerk of court in January 1992 of claimed increases in child support affecting calendar years through 1991 did not cause the alleged increased amounts to become past due child support and thus did not cause her right to payment to be vested at the time of the 3 August 1992 hearing. **Snipes v. Snipes,** 189.

§ 430 (NCI4th). Child support; modification of foreign orders

Upon registration of a foreign child support order, the courts of this state have subject matter jurisdiction to modify the foreign support order on the basis of changed circumstances. **McGee v. McGee,** 19.

Registration of a foreign child support order results in treatment of the order as if issued by a court in this state, and a party may thereafter seek modification of the order. **Hammill v. Cusack,** 82.

§ 435 (NCI4th). Modification of child support order; increase in cost of living or cost of supporting child

The provision of a judgment which ordered automatic child support increases based on the consumer price index was void. **Snipes v. Snipes,** 189.

§ 439 (NCI4th). Modification of support order; decrease in non-custodial parent's income

The trial court erred in concluding that a finding of change in child-oriented expenses is a threshold requirement that must be satisfied before a court can modify a support order because of a change in the supporting party's circumstances. **Padilla v. Lusth,** 709.

DIVORCE AND SEPARATION—Continued

§ 445 (NCI4th). Modification of child support order; changed circumstances; decrease in non-custodial parent's income

A significant involuntary decrease in a child support obligor's income satisfies the showing of substantial changed circumstances which justifies a reduction in the support obligation without any findings of any change affecting the child's needs. **McGee v. McGee**, 19; **Hammill v. Cusack**, 82.

The trial court's finding that the father's income had been involuntarily reduced from $24,000 per month to $2,083 per month was sufficient to support its conclusion of changed circumstances warranting a reduction in the father's child support obligation. **McGee v. McGee,** 19.

The trial court did not err by reducing a child support obligation based upon a substantial involuntary reduction in the obligor's income without making findings and conclusions concerning the child's needs and expenses absent a party's request in advance for deviation from the child support guidelines. **Hammill v. Cusack,** 82.

§ 551 (NCI4th). Counsel fees and costs; sufficiency of evidence and findings to support award

The trial court erred in denying defendant's motion for attorney's fees by finding that defendant had sufficient means to defray litigation expenses and that plaintiff did not refuse to pay child support where the court failed to find whether plaintiff refused to pay adequate child support under the circumstances and made findings only as to value of defendant's estate. **Taylor v. Taylor,** 356.

ELECTIONS

§ 86 (NCI4th). Determining election results; canvasing returns; by county Board of Elections

The affidavits or testimony of ineligible voters in an election may be considered to show the effect of those votes on the outcome of the election. **In re Appeal of Harper,** 698.

EMINENT DOMAIN

§ 24 (NCI4th). Who may exercise power; municipality, county, other local government units and their agencies, or other public condemnors, generally

A local board of education is permitted by G.S. 115C-517 to condemn land for use as wetlands mitigation and a source of fill. **Dare County Bd. of Education v. Sakaria,** 609.

A county board of education's decision that defendants' lots were necessary for wetlands mitigation and a source of fill in the construction of its athletic facilities was not an arbitrary abuse of discretion. **Ibid.**

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 84 (NCI4th). Hazardous or toxic substances; liability; damage caused by statutory violation; penalties

The evidence forecast by plaintiffs was sufficient to create a genuine issue of material fact as to whether defendant's underground storage tank system was the source of the contamination of plaintiffs' well water with gasoline. **James v. Clark,** 178.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION—Continued

§ 124 (NCI4th). Sedimentation; violations of law; enforcement; remedies

A complaint was sufficient to state a claim to enforce civil penalties for violations of the Sedimentation Pollution Control Act. **State ex rel. Cobey v. Cook,** 70.

The statutory authority of the Department of E.H.N.R. to assess civil penalties for violations of the Sedimentation Pollution Control Act remains a constitutional delegation of legislative power even though the Department is now authorized to issue a stop-work order under certain circumstances. **Ibid.**

Defendant polluter had no right to require the Department of E.H.N.R. to utilize a stop-work order rather than a civil penalty. **Ibid.**

ESTOPPEL

§ 15 (NCI4th). Equitable estoppel; acceptance of benefits

The trial court did not err in failing to rule that the hospital petitioners are entitled to challenge respondents' actions in executing preferred provider contracts with the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan even though petitioners executed the contracts under protest because the record is clear that petitioners benefitted from the contracts by retaining Plan members as customers. **Carolina Medicorp v. Bd. of Trustees of the State Medical Plan,** 485.

EVIDENCE AND WITNESSES

§ 124 (NCI4th). Evidence of sexual behavior between complainant and defendant

The trial court in a rape case did not err in denying defendant's request to cross-examine the victim about her pregnancy and whether she told defendant he was the father of the child. **State v. Graham,** 231.

§ 364 (NCI4th). Other crimes, wrongs, or acts; to show common plan as part of same chain of circumstances

Questions about defendant's conduct prior to a confrontation with two deputies and a videotape depicting this conduct was admissible as part of the chain of events leading up to the arrival of the deputies and to show defendant's state of mind immediately prior to the deputies being called to the scene. **State v. Price,** 212.

§ 437 (NCI4th). Pretrial identification procedures; identification from photographs generally

The trial court did not err by finding that no single photograph of defendant was ever shown to a robbery victim prior to a pretrial photographic lineup and that the photographic identification procedure was not impermissibly suggestive, even though the victim testified that he was shown a single photograph of defendant prior to the photographic lineup. **State v. Lindsey,** 549.

§ 468 (NCI4th). In-court identifications subsequent to improper pretrial identification procedures; independent origin; observation of defendant during commission of robbery

The trial court did not err by finding that a robbery victim's in-court identification of defendant was based upon what he observed the night of the robbery at a bank teller machine and was of independent origin from a pretrial photographic identification. **State v. Lindsey,** 549.

EVIDENCE AND WITNESSES—Continued

§ 981 (NCI4th). Exceptions to hearsay rule; declarant unavailable

The trial court did not err in admitting hearsay testimony of witnesses concerning statements a child sexual abuse victim made to them which identified defendant as the person who sexually abused her where the victim's testimony showed she was neither cooperative nor responsive and was therefore "unavailable" for purposes of testifying at trial. **State v. Ward,** 389.

§ 1426 (NCI4th). Propriety of admitting matters relating to real evidence which has been destroyed by government

Defendant's due process rights were not denied by the destruction of the rape kit and all articles of clothing worn by the victim on the night of the rape after a computer printout indicated that the case had been voluntarily dismissed. **State v. Graham,** 231.

The trial court did not abuse its discretion by failing to suppress expert testimony comparing body fluids and hairs contained in a rape kit with those of the defendant as a sanction under G.S. 15A-910 for the State's destruction of the rape kit. **Ibid.**

§ 2068 (NCI4th). Opinion testimony by lay persons; characterizations of actions or behavior

In a prosecution of defendant for sexual abuse of children in a day care center, the trial court erred in allowing into evidence improper lay opinion testimony of the testifying children's parents about child abuse and particular behaviors resulting from that abuse; the motives, intentions and opinions of the children; that the children were not fantasizing or making up abuse allegations; the opinions of others; and that the children knew more than they said. **State v. Kelly,** 589.

§ 2338 (NCI4th). Credibility of child victims; mentally retarded child

The trial court committed plain error in allowing an expert witness to express an opinion that a mentally retarded rape and indecent liberties victim was telling the truth about having sex with defendant. **State v. Hannon,** 448.

§ 2542 (NCI4th). Competency of witnesses; children; age of child

The trial court did not err in finding that a sexual abuse victim, who was two years old at the time of the offense and four years old at the time of trial, was competent to testify even though there were some contradictions in her testimony as to her knowledge of the difference in telling the truth and telling a "story." **State v. Ward,** 389.

§ 2594 (NCI4th). Competency of witnesses; criminal prosecutions; former attorney

The trial court erred in allowing defendant's former attorney in a prosecution for sexual abuse of children in a day care center, who withdrew as counsel after his son was named as a potential victim, to refer to his former attorney-client relationship with defendant and to testify that "I've never been so shattered" and "I had to believe in his innocence." **State v. Kelly,** 589.

§ 2927 (NCI4th). Basis for impeachment; prior inconsistent statement

The State did not violate the rule that impeachment by a prior inconsistent statement may not be permitted where it is used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible. **State v. Price,** 212.

EVIDENCE AND WITNESSES—Continued

§ 3022 (NCI4th). Basis for impeachment; indictment

The trial court erred in allowing the State to elicit testimony from a defense witness that he was in jail awaiting trial at the time of his testimony, but this error was not prejudicial where several witnesses gave similar testimony and the jury was not told the nature of the pending charge. **State v. Graham,** 231.

§ 3052 (NCI4th). Basis for impeachment; specific instances of conduct; drug use or addiction

The trial court erred in allowing the prosecutor in a sexual abuse trial to cross-examine defendant about her drug knowledge and use. **State v. Wilson,** 616.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 38 (NCI4th). Summary judgment; jury questions

Summary judgment was properly entered for defendant on plaintiffs' claim for fraud based on a letter written by defendant, even if it did contain false statements intended to deceive, where plaintiffs' affidavit showed that plaintiffs were not deceived by defendant's letter. **McGahren v. Saenger,** 649.

GUARANTY

§ 17 (NCI4th). Discharge of guarantor

The trial court did not err by granting summary judgment for plaintiff in an action to enforce a guaranty where defendants claimed that they should be relieved of any liability because plaintiff deviated from the terms of the guaranty by making advances in excess of the agreement but plaintiff did not deviate from the original agreement upon which the guaranty was based. **NationsBank of North Carolina v. Brown,** 576.

HOMICIDE

§ 220 (NCI4th). Effect of lapse of time between wound and death

A pathologist's testimony in a voluntary manslaughter prosection that the cause of death "all began with the bullet wound" was sufficient evidence from which the jury could find that the victim's gunshot wound caused or directly contributed to his death two years later even though he died during surgery he underwent against medical advice. **State v. Gilreath,** 200.

§ 379 (NCI4th). Sufficiency of evidence to establish defenses; effect of evidence inconsistent with defense of self-defense or defense of others

The State presented substantial evidence that defendant failed to act in self-defense, and this issue was properly submitted to the jury. **State v. Gilreath,** 200.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 12 (NCI4th). Certificate of need; application; criteria for review

It is not the intent of G.S. 131E-183(a) to compare competing applications for a certificate of need under Criterion 4, that applicant shall demonstrate that the least costly or most effective alternative has been proposed, but rather to judge each application individually under Criterion 4, as well as the remaining criteria set forth in the statute, and only thereafter analyze the competing proposals to determine which is better overall. **Britthaven, Inc. v. N.C. Dept. of Human Resources,** 379.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS—Continued

The method of determining where nursing beds should be located in this certificate of need proceeding, including a subcounty analysis, was supported by substantial evidence and was not arbitrary or capricious. **Ibid.**

§ 15 (NCI4th). Certificate of need; administrative review

A nursing facility owner was not entitled to a de novo proceeding by an administrative law judge when it petitioned for a contested case hearing challenging an agency's denial of its application for a certificate of need for additional nursing beds in its facility, and the agency's initial decision was properly reviewed by the administrative law judge. **Britthaven, Inc. v. N.C. Dept. of Human Resources,** 379.

HOUSING, AND HOUSING AUTHORITIES AND PROJECTS

§ 74 (NCI4th). Condominium management; assessments and liens

A homeowners association had the power to impose a fine for each day that plaintiff continued to violate condominium documents by altering the appearance of the entrance to her unit. **Stewart v. Kopp,** 160.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 38 (NCI4th). Amendment to change or add offense

The trial court erred by permitting the State to amend an indictment for driving while impaired which alleged that defendant drove on a "street or highway" to allege that defendant drove on a "highway or public vehicular area." **State v. Snyder,** 540.

§ 40 (NCI4th). Amendment of other particular matters

The trial court erred by permitting the State to amend an embezzlement indictment to change ownership from an individual to a corporation. **State v. Hughes,** 573.

INFANTS OR MINORS

§ 9 (NCI4th). Delinquent children; petition

An assistant district attorney may sign a juvenile petition as complainant. **In re Stowe,** 662.

§ 72 (NCI4th). Retention of jurisdiction

The issue of whether the superior court erred by denying defendant's motion to dismiss for lack of subject matter jurisdiction was moot where defendant was twelve or thirteen at the time of the alleged act, sixteen when he was indicted, and eighteen at the time of this appeal. Defendant aged out of the district court's jurisdiction over the person and the subject matter when he turned eighteen pending appeal and is now an adult subject to the jurisdiction of the superior court. **State v. Dellinger,** 529.

§ 117 (NCI4th). Delinquency; evidence sufficient

The State presented sufficient evidence of danger or threat to the life of the victim to support an adjudication of delinquency based on a juvenile's commission of armed robbery where the juvenile gestured toward his pocket where he had a gun that had just been fired by another person and demanded that the victim give him candy. **In re Stowe,** 662.

INSURANCE

§ 101 (NCI4th). What law governs; effect of negotiation and execution in state in which insured is resident

Tennessee law governed coverage of an automobile policy where the injuries occurred in North Carolina, the contract was made in Tennessee, and the parties to the contract resided in Tennessee. **Johns v. Automobile Club Ins. Co.,** 424.

§ 353 (NCI4th). Accident insurance generally; definitions and distinctions

The term "children" as used in defendant's accidental death insurance policy issued to plaintiff includes her grandchild who was in her custody pursuant to a court order, was primarily dependent on plaintiff for support, and lived in a parent-child relationship with plaintiff. **Leach v. Monumental Life Ins. Co.,** 434.

§ 436 (NCI4th). Automobile personal injury policy; provisions as to medical payments generally

The trial court did not err by granting summary judgment for plaintiffs in an action to recover medical expenses resulting from an automobile accident in New York where the insurer was required under New York law to pay medical providers directly and plaintiffs filed for medical damages in North Carolina. **Wherlen v. Amica Mut. Ins. Co.,** 64.

§ 439 (NCI4th). Who comes within provision covering medical payments; exclusion for persons in insured's household

The contract of insurance between plaintiff and defendant parents could properly be construed so as to provide UM coverage for their claim for medical expenses incurred by their unemancipated minor son grounded upon the parental support obligation, and the parents' claim was not barred by the "family member" exclusion for UM coverage in their policy since it was repugnant to the purpose of UM and UIM coverage and therefore invalid. **Nationwide Mutual Ins. Co. v. Lankford,** 368.

§ 528 (NCI4th). Extent of underinsured coverage

Intrapolicy stacking of underinsured motorist coverages was allowed where the policy at issue was a nonfleet policy covering only private passenger motor vehicles, even though it covered five vehicles owned by the insured, and where the accident in question occurred in 1990 so that this case was governed by the pre-1991 version of G.S. 20-279.21(b)(4). **McCaskill v. Pennsylvania National Mut. Cas. Ins. Co.,** 320.

Plaintiff, who was a resident of the households of both his parents and his grandparents, could intrapolicy stack the UIM coverage provided in his parents' policy and could interpolicy stack the UIM limits of his grandparents' policy on top of the limits of his parents' policy for the purpose of determining whether the tortfeasor's vehicle was an underinsured vehicle. **Onley v. Nationwide Mutual Ins. Co.,** 686.

Where two UIM carriers provide coverage in different amounts, they are to share pro rata a credit for payment made by the tortfeasor's insurance carrier. **Ibid.**

§ 554 (NCI4th). Automobile insurance; vehicles covered

A pickup truck involved in an accident was not covered under a personal automobile policy where the truck was registered to a business, was being driven within the scope and course of the driver's employment with the business, was insured under a business auto policy, and the owner of the company had a personal auto policy which did not list the truck. **N.C. Farm Bureau Mut. Ins. Co. v. Welch,** 554.

INSURANCE—Continued

§ 572 (NCI4th). Use of other automobile clause; exclusion if vehicle used in insured's business or occupation

An exception to an exclusion in a personal auto policy did not provide coverage for a pickup truck used in a business where a defendant contended that the exception was ambiguous and should be resolved to provide coverage. **N.C. Farm Bureau Mut. Ins. Co. v. Welch,** 554.

§ 606 (NCI4th). Persons whose injuries are covered or excepted; members of family or household of insured

Pursuant to Tennessee law, the family member exclusion in plaintiff's automobile policy excluded her recovery of uninsured/underinsured motorist benefits under her own policy for an accident that occurred while she was a passenger in her son's vehicle. **Johns v. Automobile Club Ins. Co.,** 424.

§ 690 (NCI4th). Propriety of award of prejudgment interest

The court did not err by granting summary judgment for defendant insurance company in a declaratory judgment action to determine the applicability of prejudgment interest. **Ledford v. Nationwide Mutual Ins. Co.,** 44.

§ 719 (NCI4th). Fire and homeowner's insurance; parties insured

An eighteen-year-old child of insured's live-in girlfriend was "in the care of" the insured and was thus covered by the insured's homeowners policy, even though he had a full-time job and paid some of his own support, where he was a resident of the insured's household, and the child was still dependent on the insured and his mother for the basic necessities of food, clothing and shelter. **Nationwide Mutual Ins. Co. v. Anderson,** 92.

§ 822 (NCI4th). Fire and homeowner's insurance; loss arising out of ownership or maintenance of motor vehicle

A homeowner's policy provided coverage for the insured's granddaughter's injuries suffered after she had left the insured's van where the use of the van was not the sole proximate cause of the accident. **Nationwide Mutual Ins. Co. v. Davis,** 494.

§ 1155 (NCI4th). Automobile insurance; sufficiency of evidence to show injury or damages in particular situations from use of vehicle

An insured's van was in use at the time her granddaughter was struck by a truck as she left the van and an automobile policy providing coverage for ownership, maintenance, or use provided coverage. **Nationwide Mutual Ins. Co. v. Davis,** 494.

JUDGMENTS

§ 95 (NCI4th). Clerical errors; what changes are permissible

There was no error where the trial court corrected a judgment in an equitable distribution action to reflect that it was entered into with the parties' consent. **Watson v. Watson,** 534.

§ 119 (NCI4th). Consent judgment; nature and essentials generally

A consent judgment was not void because it contained no findings of fact and conclusions of law. **In re Estate of Peebles,** 296.

JUDGMENTS—Continued

§ 123 (NCI4th). What constitutes consent judgment

Where the parties, their attorneys, and the judge all signed a handwritten consent judgment which was filed in the clerk's office, the entry of the consent judgment occurred when the judge signed it, and the caveator could not thereafter withdraw consent to the judgment. ***In re* Estate of Peebles,** 296.

§ 208 (NCI4th). Collateral estoppel distinguished from res judicata

While res judicata precludes a subsequent action based on the same claim, collateral estoppel bars subsequent determination of the same issue even though the action may be premised upon a different claim. **Edwards v. Edwards,** 464.

A finding of the reasonableness of plaintiff nursing home's refusal to remove a feeding tube from defendant's husband without a court order was not necessary for a judge to conclude that the requirements of the living will statute had been met and that the tube should be removed, and collateral estoppel thus did not prevent defendant from litigating the issue of the reasonableness of plaintiff's conduct in plaintiff's action to recover for nursing home services rendered to defendant's husband after defendant had requested removal of the feeding tube. **First Healthcare Corp. v. Rettinger,** 600.

§ 226 (NCI4th). Res judicata and collateral estoppel; necessity of mutuality; defensive use

Mutuality of parties is not required when collateral estoppel is used defensively. **Burton v. City of Durham,** 676.

§ 274 (NCI4th). Determination of whether collateral estoppel applies to specific issues

Plaintiff's indemnification claim was not barred by the principle of collateral estoppel where plaintiff and defendant executed a separation agreement which provided that the defaulting party would indemnify the other for expenses involved in collecting obligations or enforcing rights; plaintiff successfully filed suit seeking specific enforcement of a provision requiring that the homeplace be listed for sale; and plaintiff filed a subsequent motion seeking reimbursement under the indemnity clause for attorney fees. **Edwards v. Edwards,** 464.

§ 298 (NCI4th). Preclusion of relitigation of issues; proceedings involving divorce, custody, visitation and the like

Plaintiff's claim was not barred by res judicata where plaintiff and defendant executed a separation agreement which provided that the defaulting party would indemnify the other for expenses involved in collecting obligations or enforcing rights, including attorney fees; plaintiff successfully filed suit seeking specific enforcement of a provision requiring that the homeplace be listed for sale; and plaintiff subsequently filed a motion seeking reimbursement under the indemnity clause for the attorney fees. **Edwards v. Edwards,** 464.

§ 314 (NCI4th). Judgments in criminal prosecutions as bar to civil action generally

Collateral estoppel may be used to preclude relitigation in a civil rights action of issues previously determined in a prior criminal proceeding. **Burton v. City of Durham,** 676.

Plaintiff was collaterally estopped to assert that defendant police officers violated his free speech rights on the ground they arrested him under G.S. 14-223 merely

JUDGMENTS—Continued

because he verbally protested his arrest where that issue was established against plaintiff by his conviction in superior court for three counts of assault on a law officer. **Ibid.**

Issues as to whether the detention and arrest of defendant were lawful had already been litigated in plaintiff's criminal prosecution, and summary judgment was properly entered for defendants on plaintiff's civil rights claims based upon unreasonable search and seizure and use of excessive force in the arrest. **Ibid.**

§ 396 (NCI4th). Propriety of setting aside consent judgment as to less than all parties

Where a consent judgment was entered against two defendants without one defendants's consent, the trial court should have set aside the consent judgment as to both defendants. **Brundage v. Foye,** 138.

§ 523 (NCI4th). Time within which relief must be sought generally; requirement that motion be brought within reasonable time

Plaintiffs' Rule 60(b) motion for relief was not made within a reasonable time where plaintiffs waited an entire year before filing it, and this motion followed the dismissal of their appeal from the judgment itself and the dismissal of their appeal from the order dismissing their appeal from the judgment. **Jenkins v. Richmond County,** 166.

§ 649 (NCI4th). Right to interest generally

Where defendant Nationwide tendered to plaintiff in an action arising from an automobile accident a figure which exceeded Nationwide's limits of liability for damages unless the portion of damages awarded as prejudgment interest was found to constitute a cost, the trial court did not err in a subsequent declaratory judgment action by granting plaintiff's motion for summary judgment and stating that the prejudgment interest constituted a portion of the judgment and was not a cost. **Ledford v. Nationwide Mutual Ins. Co.,** 44.

In an action arising from an automobile accident in which the question of whether prejudgment interest was a cost or a part of the judgment arose in a subsequent action for declaratory judgment, the inclusion of an assessment of prejudgment interest in the trial judge's order on plaintiff's bill of costs did not affect the Court of Appeals holding that prejudgment interest constituted a portion of the damage award. **Ibid.**

In an action arising from an automobile accident in which the question of whether prejudgment interest was a cost or a part of the judgment arose in a subsequent action for a declaratory judgment, the declaratory judgment judge did not impermissibly overrule the trial judge. **Ibid.**

JURY

§ 69 (NCI4th). Effect of alternate juror in jury room after deliberations have begun

The trial court did not err in failing to declare a mistrial because an alternate was in the jury room when the jury selected a foreman while counsel argued for corrections to the charge where the jury did not discuss the case, the jurors returned to the courtroom for further instructions, and the court then excused the alternate. **State v. Jernigan,** 240.

JURY—Continued

§ 192 (NCI4th). Effect of refusal to permit challenges for cause where jurors were excused by peremptory challenges

The trial court's erroneous denial of a challenge for cause was prejudicial to defendant because it stripped him of a peremptory challenge and prevented him from excusing another unacceptable juror. **State v. Shope,** 270.

§ 202 (NCI4th). Challenges for cause; effect of preconceived opinions, prejudices, or pretrial publicity

The trial court erred in denying defendant's challenge for cause of a prospective juror who clearly stated that she believed defendant was guilty and that the burden would be on defendant to prove his innocence. **State v. Shope,** 270.

KIDNAPPING AND FELONIOUS RESTRAINT

§ 21 (NCI4th). Confinement, restraint, or removal; for purpose of doing serious bodily harm to or terrorizing person

The State's evidence was sufficient for submission to the jury in a prosecution of defendant for kidnapping for the purpose of terrorizing the victim and to facilitate the commission of a sexual assault although the victim escaped from defendant before being sexually assaulted. **State v. Claypoole,** 714.

§ 26 (NCI4th). Instructions to jury; lesser offenses

The trial court did not err in failing to instruct on the lesser-included offense of misdemeanor false imprisonment where the evidence indicated that defendant confined, restrained, and removed the victim in order to terrorize and sexually assault her. **State v. Claypoole,** 714.

LABOR AND EMPLOYMENT

§ 34 (NCI4th). Enforcement of Occupational Safety and Health Act; penalties

Findings by the Safety and Health Review Board supported its conclusion that plaintiff employer committed an OSHA violation by failing to adequately instruct its employees in the recognition and avoidance of unsafe conditions, but the Review Board's findings were insufficient to support its conclusion that the violation was serious. **Associated Mechanical Contractors v. Payne,** 54.

Findings by the Safety and Health Review Board were insufficient to support its conclusion that plaintiff employer's serious violation of the OSHA sloping requirements for trench excavation was willful. **Ibid.**

§ 56 (NCI4th). Compensation and benefits generally; contract provisions

The trial court properly found that defendant's refusal to pay plaintiffs for vacation days earned under a changed policy was a violation of the Wage and Hour Act because the employer may not rescind wages and benefits earned under the Wage and Hour Act except under forfeiture provisions of which the employee is notified prior to the time he or she earns such benefits. **Hamilton v. Memorex Telex Corp.,** 1.

The trial court did not err in an action to recover payment for unused vacation time lost when defendant changed its vacation accrual policy and then terminated plaintiffs by finding that defendant had breached a unilateral contract with plaintiffs. **Ibid.**

LABOR AND EMPLOYMENT—Continued

The trial court erred by holding defendant liable for unused vacation time for employees terminated after 31 December 1989 where defendant changed its vacation policy from accumulating vacation days to advancing vacation days on 1 January and none of the employees still employed after 31 December 1989 had any vacation days to carry over from the old policy. **Ibid.**

The trial court did not err in an action to recover the value of unused vacation days for which defendant refused to pay plaintiffs when they were terminated by making determinations of damages during the liability phase of the trial. **Ibid.**

The trial court did not err in an action to recover the value of unused vacation days by concluding that plaintiffs were entitled to recover payment for their unused days at their respective pay rates on the date of termination rather than the rates at the earlier date when defendant's policy on vacation accrual was changed. **Ibid.**

The trial court did not err in an action by terminated employees to recover the value of unused vacation days by awarding damages to employees who had begun their employment within six months of January 1989 but who had been employed by defendant for at least six months prior to their termination where defendant's new vacation policy advancing leave for the year conditioned on six months employment took effect on 1 January 1989. **Ibid.**

The trial court did not err by awarding liquidated damages to plaintiffs in an action to recover the value of unused vacation days lost when defendant changed its vacation policy and subsequently terminated plaintiffs. **Ibid.**

The trial court did not err in allowing attorneys' fees for parties who recovered in a class action on common law contract claims but not on wage and hour claims for unused vacation days for which they were not paid on termination. **Ibid.**

The trial court erred in an action to recover the value of unused vacation days after defendant changed its vacation policy and terminated plaintiffs by failing to order defendant to pay certain employees the vacation leave promised under the old and new policies. **Ibid.**

§ 164 (NCI4th). Unemployment compensation; what constitutes suitable work

The distance from respondent employee's residence to the available work (270 miles), the disconnected work schedule, and the transportation available to the employee supported the ESC's conclusion that available work was not suitable and that respondent was not disqualified from receiving unemployment benefits. **Housecalls Nursing Services v. Lynch,** 275.

LANDLORD AND TENANT

§ 25 (NCI4th). Leases; breach, generally; right to damages

The trial court erred by denying plaintiff's motion for partial summary judgment in an action for breach of a lease at a medical clinic where it is undisputed that the Clinic ceased making payments on a lease. **Whitley v. Carolina Clinic, Inc.**, 523.

LIMITATIONS, REPOSE, AND LACHES

§ 26 (NCI4th). Attorney and accountant malpractice

Plaintiffs' legal malpractice claim filed in 1992 which arose out of defendant attorney's alleged negligence in failing to procure the transfer of a lot in 1985 was barred by the statute of limitations, but their claim filed in 1992 which arose out of

LIMITATIONS, REPOSE, AND LACHES—Continued

defendant's alleged negligence in procuring a deed to the lot in 1990 after plaintiffs' business partners had filed for bankruptcy was not barred by the statute of limitations. **McGahren v. Saenger,** 649.

§ 42 (NCI4th). Trespass or nuisance; recurring damages

Plaintiffs' pollution and negligence claims were not barred by the statute of limitations where there was no reason why plaintiffs should have known that their well was contaminated with gasoline before 1986, which was within three years of the filing of this action, even though they had stopped drinking their well water several years earlier. **James v. Clark,** 178.

Where plaintiffs' well was contaminated when this action was filed and indicated continuing gasoline leakage at that time, the trespass was recurrent, and plaintiffs' trespass and nuisance claims were not barred by G.S. 1-52(3). **Ibid.**

§ 113 (NCI4th). Wages and salaries

Plaintiffs' action was not barred by the statute of limitations where plaintiffs brought the action under the Wage and Hour Act to recover the value of vacation days they had not used before they were terminated following a change in vacation policy. **Hamilton v. Memorex Telex Corp.,** 1.

MORTGAGES AND DEEDS OF TRUST

§ 44 (NCI4th). Transfer of property mortgaged; personal liability for mortgage debt generally

Defendant was required to make the mortgage payments on the parties' marital home pursuant to a divorce order even though defendant, subsequent to the divorce, presented plaintiff with a deed to the home which contained an assumption clause and plaintiff accepted and recorded the deed. **Marrow v. Marrow,** 332.

§ 120 (NCI4th). Disposition of proceeds generally

A trustee conducting a sale of real property pursuant to an express power of sale contained in a mortgage or deed of trust is not required to receive court approval of the amount of the disbursements made pursuant to G.S. 45-21.31(a), including the trustee's commission and attorney's fees. **In re Foreclosure of Ferrell Brothers Farms,** 458.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 34 (NCI4th). Relationship of various crimes; crimes as separate and distinct

Defendant was not put twice in jeopardy by being sentenced both for trafficking in cocaine by possession and for failure to pay excise tax on a controlled substance. **State v. Morgan,** 461.

NEGLIGENCE

§ 6 (NCI4th). Negligent infliction of emotional distress

The trial court properly granted summary judgment for defendant board of education in plaintiff's action for negligent infliction of emotional distress based on the fact that she was not named class valedictorian because of defendant's ranking system. **Townsend v. Bd. of Education of Robeson County,** 302.

PARENT AND CHILD

§ 37 (NCI4th). Retroactive child support; fees

An order for retroactive child support was not supported by sufficient findings where it did not include findings with regard to the actual expenditures made on behalf of the child for the period in question and there was no determination that the actual expenditures were reasonably necessary. **McCullough v. Johnson,** 171.

In determining retroactive child support, the trial court must calculate defendant's share of the monies actually expended by plaintiff for the care of the child during the relevant period rather than rely on the child support guidelines. **Stanley v. Stanley,** 311.

§ 45 (NCI4th). Income withholding in IV-D cases

Statutory provisions for mandatory income withholding for child support when services are being provided by a child support enforcement agency apply with equal force to orders for current support and orders directing payment of an arrearage. **McGee v. McGee,** 19.

§ 47 (NCI4th). Income withholding; contents of support orders; IV-D cases

Where a child support enforcement agency was providing services to the mother, the trial court erred by allowing the father's child support arrearages to be satisfied by two payments of $5,000 and $40,000 over a two-year period rather than requiring income withholding. **McGee v. McGee,** 19.

§ 80 (NCI4th). Uniform Reciprocal Enforcement of Support Act; jurisdiction

The duty of support is the only subject matter covered by URESA, and a provision of the trial court's order which conditioned child support payments under a Florida order on plaintiff's compliance with visitation rights was null and void for lack of subject matter jurisdiction. **VanBuren County DSS ex rel. Swearengin v. Swearengin,** 324.

PARTIES

§ 80 (NCI4th). Requisites for class action; notice to class members

The trial court did not err by including in its judgment in a class action to recover the value of unused vacation days those class members whose notices were returned undelivered. **Hamilton v. Memorex Telex Corp.,** 1.

PLEADINGS

§ 62 (NCI4th). Standard for imposing sanctions

The trial court properly denied defendant's motion for Rule 11 sanctions where there was no evidence that the complaint was filed for an improper purpose or that plaintiff knew that the complaint was not well grounded in fact or law. **McClerin v. R-M Industries, Inc.,** 640.

PROCESS AND SERVICE

§ 74 (NCI4th). Service in foreign country

The trial court did not err in entering default judgment against defendant in an action in which service of process was made to the address of defendant's mother in South Africa rather than to the address of defendant where the return receipt was signed by defendant. **Hocke v. Hanyane,** 630.

PUBLIC WORKS AND CONTRACTS

§ 29 (NCI4th). Purchases required to be by competitive bidding

The trial court did not err by failing to conclude that respondents violated the public contracting statutes concerning competitive bids when they executed preferred provider contracts with petitioners for the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan. Even assuming that the public contracting laws applied, the State Purchasing Officer still had the authority to exempt the preferred provider contracts. **Carolina Medicorp v. Bd. of Trustees of the State Medical Plan,** 485.

The trial court did not err in ruling that petitioners were not entitled to recoup from respondents money they allegedly lost by providing discounts to hospital patients under preferred provider contracts which were lawfully entered into. **Ibid.**

The trial court did not err by dismissing the individual petitioners' claims challenging preferred provider contracts executed by the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan where the individual petitioners were not named in the petitions in their capacity as taxpayers. **Ibid.**

§ 67 (NCI4th). State personnel system; disciplinary actions; what constitutes "just cause"

A decision by the State Personnel Commission to dismiss a State employee for unacceptable personal conduct based upon his request that a sheriff write a letter discrediting one of the employee's subordinates and his abusive behavior toward the sheriff when he refused to write such a letter was supported by the whole record. **Ritter v. Dept. of Human Resources,** 564.

The State Personnel Commission's decision that the North Carolina Wildlife Resources Commission had met its burden of showing just cause for the dismissal of petitioner on the basis of unacceptable personal conduct was not supported by the whole record where the dismissal was based upon falsifying hours and giving false information as to his location to his supervisor, but the evidence also indicated that petitioner was following what had become an accepted standard of reporting and performing work. Disciplinary action by petitioners's supervisors would have propelled this behavior into the category of unsatisfactory job performance, for which petitioner would have been afforded certain warnings before being terminated. **Wilkie v. N.C. Wildlife Resources Commission,** 475.

RAPE AND ALLIED OFFENSES

§ 195 (NCI4th). Instructions on lesser offenses; first-degree rape; attempt

The trial court in a prosecution for first-degree sexual offense and first-degree statutory rape did not err in refusing to instruct the jury on attempted first-degree sexual offense and attempted first-degree rape where testimony elicited by defendant merely showed that he touched the victim in addition to committing acts sufficient to convict for the charged offenses. **State v. Ward,** 389.

§ 200 (NCI4th). Instructions on lesser offenses; second-degree rape; attempt

The trial court did not err in refusing to instruct the jury on attempted second-degree rape where the only conflict in the evidence involved consent. **State v. Graham,** 231.

SANITATION AND SANITARY DISTRICTS

§ 8 (NCI4th). Solid and hazardous waste management generally

The Dept. of E.H.N.R. could appropriately assess a penalty against petitioner for failing to determine whether a solid waste shipped to North Carolina in drums was hazardous even though testing subsequent to the penalty period showed that the solid waste was not hazardous. **Air-A-Plane Corp. v. N.C. Dept. of E.H.N.R.,** 118.

The Dept. of E.H.N.R. did not exceed its statutory authority in assessing a penalty against petitioner for failing to determine whether a solid waste was hazardous because it did not allow petitioner to choose the means of compliance. **Ibid.**

In issuing a compliance order and assessing a $225,000 penalty against petitioner, the Dept. of E.H.N.R. did not use unlawful procedure in its notification of violation or in its calculation of the amount of the civil penalty. **Ibid.**

SCHOOLS

§ 90 (NCI4th). Selection of school sites

A county board of education's decision that defendants' lots were necessary for wetlands mitigation and a source of fill in the construction of its athletic facilities was not an arbitrary abuse of discretion. **Dare County Bd. of Education v. Sakaria,** 609.

§ 165 (NCI4th). Other school employees

A former high school basketball and football coach could not recover for breach of his contract to teach and coach because he was assigned no coaching duties based upon a sentence in an addendum to his contract stating that "changes in coaching duties shall be with mutual consent of both parties." **Babb v. Harnett County Bd. of Education,** 291.

A former basketball and football coach had no property interest in coaching pursuant to the plain language of his contract with defendant board of education, and the coach had no due process claim based upon defendant principal's failure to assign coaching duties to him. **Ibid.**

A former coach failed to substantiate his claim of retaliation when he was not assigned coaching duties and was then reassigned from his job as a health and P.E. teacher to duties as a competency lab teacher. **Ibid.**

SEARCHES AND SEIZURES

§ 2 (NCI4th). Determination of reasonableness of search or seizure

A warrantless search of defendant was intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment where police searched defendant in the middle of an intersection at 1:30 a.m. by pulling his pants down far enough that an officer could see the corner of a small paper towel underneath defendant's scrotum. **State v. Smith,** 106.

§ 7 (NCI4th). What constitutes seizure of person

The evidence and findings supported the trial court's conclusion that defendant was not involuntarily detained or seized when officers boarded the bus on which defendant was a passenger and questioned him or when they escorted defendant from the bus. **State v. James,** 221.

§ 26 (NCI4th). Search and seizure on probable cause

Officers had probable cause to conduct a warrantless search of defendant for drugs at an intersection based upon information from an informant and independent

SEARCHES AND SEIZURES—Continued

corroboration of the information by officers, and exigent circumstances existed to make the warrantless search valid. **State v. Smith,** 106.

§ 65 (NCI4th). Search and seizure by consent; effect of age or mental deficiency on voluntariness of consent

Notwithstanding evidence of defendant's mental limitations and his tendency to cooperate unilaterally with police officers, competent evidence was presented to support the trial court's findings that defendant voluntarily agreed to talk to police officers who boarded a bus on which defendant was a passenger and to a search of his person and luggage. **State v. James,** 221.

SECURED TRANSACTIONS

§ 123 (NCI4th). Persons liable under guaranty, endorsement, or repurchase agreement

The trial court's findings supported its conclusion that a "repurchase agreement" between an automobile dealer and the bank to which the dealer sold a security agreement was a trade term in the industry that required the dealer to repurchase the secured vehicle from the bank only if the bank tendered the vehicle to the dealer within 90 days of the buyers' default. **First Union National Bank v. Bob Dunn Ford, Inc.,** 444.

STATE

§ 39 (NCI4th). State Tort Claims Act; exclusive jurisdiction

The Industrial Commission did not err by dismissing plaintiff's claims against the North Carolina Parole Commission because the Act allows a suit against the State only for ordinary negligence in the forum of the Industrial Commission and plaintiff alleged gross negligence and wanton, reckless and malicious conduct. **Collins v. North Carolina Parole Commission,** 544.

§ 55 (NCI4th). State Tort Claims Act; sufficiency of evidence; other types of actions

The evidence and findings supported the Industrial Commission's conclusion that plaintiff's injuries sustained when he walked through a plate glass window at defendant university were not due to any negligence on the part of defendant's safety manager. **Ambrose v. University of N.C. at Asheville,** 659.

TORTS

§ 20 (NCI4th). Grounds for relief from release; fraud

The trial court did not err by granting summary judgment for defendants where plaintiffs filed an action for breach of contract, fraud, and various other causes of action based on the sale of the tool distributorship but plaintiffs had earlier signed a release. **Talton v. Mac Tools, Inc.,** 87.

TRESPASS

§ 49 (NCI4th). Sufficiency of evidence to support verdict

Plaintiffs' forecast of evidence was sufficient to create a genuine issue of material fact as to whether defendant's underground storage tank system was the source of the contamination of their well water with gasoline. **James v. Clark,** 178.

TRIAL

§ 564 (NCI4th). Grounds for a new trial; excessive or inadequate damages; effect of court entering remittitur or additur

There was no prejudice in an action arising from an automobile accident where the trial judge granted an additur and then denied plaintiff's motion for a new trial. The trial court in deciding a motion for a new trial is limited to a determination of whether the award of damages is inadequate, but plaintiff did not show that a different result would have likely occurred had the trial court properly based its ruling on the jury award. **Allen v. Beddingfield,** 100.

TRUSTS AND TRUSTEES

§ 85 (NCI4th). Distribution of corpus generally

The trial court properly determined that a trust beneficiary's "issue," as used in the distributive provisions of the trust instrument, were the children of the beneficiary who were living at the time of her death and the then living issue of any deceased child, per stirpes. **Wachovia Bank v. Willis,** 144.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 12 (NCI4th). Transactions subject to unfair competition statute; leases and rentals

A landlord's rental of residential property is "in or affecting commerce," and the landlord thus may be liable under G.S. 75-1.1 for an unfair trade practice even though the landlord rents only two properties. **Stolfo v. Kernodle,** 580.

WORKERS' COMPENSATION

§ 25 (NCI4th). Status of particular persons; firefighters

Volunteer firemen are implicitly to be treated as employees under the Workers' Compensation Act, and such firemen are foreclosed from bringing a common law negligence action against a fellow member for injuries sustained in the course and scope of their duties as firemen. **Hix v. Jenkins,** 103.

§ 41 (NCI4th). Prisoners

Plaintiff was entitled to recover workers' compensation for the accidental death of a prison inmate which arose out of and in the course of the employment to which he had been assigned by the Department of Correction, and plaintiff was thus barred from pursuing her wrongful death claim under the Tort Claims Act. **Blackmon v. N.C. Dept. of Correction,** 666.

A prisoner's exclusive remedy for accidental injury arising out of and in the course of the employment to which he has been assigned, whether he is incarcerated or released, arises under the provisions of the Workers' Compensation Act, and plaintiff's claims under the Tort Claims Act were barred by the Workers' Compensation Act. **Richardson v. N.C. Dept. of Correction,** 704.

§ 46 (NCI4th). Statutory employer; contractor's duty to remote employees

Where plaintiff's employer, a subcontractor, did not have workers' compensation insurance and plaintiff sought and received workers' compensation benefits from defendant's carrier, defendant was plaintiff's statutory employer, and benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. **Rich v. R. L. Casey, Inc.,** 156.

WORKERS' COMPENSATION—Continued

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

Plaintiff's complaint was sufficient to state a *Woodson* claim against defendant employer for injuries suffered when his arm and body were caught in a paint machine as he attempted to clean the drum where he alleged that defendant failed to inform plaintiff that emergency switches on his machine were not functioning and that this particular machine had caused previous injury and deaths. **Regan v. Amerimark Building Products,** 328.

§ 65 (NCI4th). Applicability of exclusiveness of remedy provision of Act

Volunteer firemen are implicitly to be treated as employees under the Workers' Compensation Act, and such firemen are foreclosed from bringing a common law negligence action against a fellow member for injuries sustained in the course and scope of their duties as fireman. **Hix v. Jenkins,** 156.

§ 69 (NCI4th). Remedies against fellow employees; intentional torts

Plaintiff's complaint was sufficient to state a claim against his fellow employees who were his supervisors for willful and wanton negligence in assigning plaintiff to clean a paint machine when they knew the emergency switches on the machine were not functioning and that this particular machine had caused previous injury and deaths. **Regan v. Amerimark Building Products,** 328.

§ 97 (NCI4th). Refusal to accept suitable employment

The evidence and findings supported the Industrial Commission's conclusion that plaintiff unjustifiably refused employment suitable to his capacity which was offered to him and procured for him by his employer. **Benavides v. Summit Structures, Inc.,** 645.

§ 109 (NCI4th). Definition of accident; accidental origin of injury

There was competent credible evidence to support the Industrial Commission's findings of fact that plaintiff had sustained an accident within the meaning of the Workers' Compensation Act where plaintiff, a nursing assistant at a nursing home, suffered injuries during a bed-to-wheelchair transfer of a patient. **Alva v. Charlotte Mecklenburg Hospital Authority,** 76.

§ 114 (NCI4th). Employment as contributing proximate cause of injury; particular applications

The evidence was sufficient to support the Industrial Commission's finding that plaintiff who suffered a heart attack while driving a truck for defendant did not sustain an injury by accident or occupational disease. **Dye v. Shippers Freight Lines,** 280.

§ 115 (NCI4th). Relation of injury or accident to employment; where cause of injury or death is unknown

Where death occurred within the decedent's course of employment as a traffic light technician and circumstances bearing on the work-relatedness of his death were unknown, the Industrial Commission correctly invoked the presumption of compensability. **Melton v. City of Rocky Mount,** 249.

WORKERS' COMPENSATION—Continued

§ 118 (NCI4th). Effect of employee's preexisting condition; prior injury, disease or condition

The Industrial Commission did not err in finding plaintiff's claim to be compensable where plaintiff, a nursing home nurse's aide, was injured while moving a patient from a bed to a wheelchair, defendant contended that plaintiff had a preexisting condition, and there was medical testimony that this incident was the cause of plaintiff's condition and that she had no preexisting problem of any significance. **Alva v Charlotte Mecklenburg Hospital Authority,** 76.

§ 246 (NCI4th). Recovery for scheduled injuries; injury to other organs or body parts

The Industrial Commission did not abuse its discretion by awarding plaintiff $15,000 for the loss of her uterus. **Alva v. Charlotte Mecklenburg Hospital Authority,** 76.

The Industrial Commission did not abuse its discretion by awarding plaintiff $11,000 for bladder damage. **Ibid.**

§ 252 (NCI4th). Determination of total temporary disability in particular cases

Testimony by a physician, a therapist, and two vocational rehabilitation specialists supported the Industrial Commission's determination that plaintiff was entitled to continued benefits for temporary total disability. **Moore v. Davis Auto Service,** 624.

§ 425 (NCI4th). Modification of award upon change of condition; requirement of change in employee's earning capacity or medical condition

The Industrial Commission did not err in finding that plaintiff had not experienced a substantial change in condition after an award for a back and leg injury, though plaintiff offered evidence that he experienced depression, since there was no evidence that plaintiff's injury had caused disabling depression. **Jones v. Candler Mobile Village,** 719.

§ 435 (NCI4th). Industrial Commission's authority to set aside its own judgment

A deputy commissioner had authority to set aside his opinion and award and did not abuse his discretion in rescinding his inadvertently issued opinion and award to give defendants the opportunity to depose plaintiff's physician. **Plummer v. Henderson Storage Co.,** 727.

§ 454 (NCI4th). Conclusiveness of Industrial Commission's findings of fact; credibility determinations

The Industrial Commission did not err in denying plaintiff's claim on the ground that plaintiff's testimony was not credible. **Plummer v. Henderson Storage Co.,** 727.

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§ 66 (NCI4th). Discretion of zoning board to grant special permits

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