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2. Recalled 1 September 1995.

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2. Appointed and sworn in 30 January 1996.
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1. Appointed and sworn in 26 February 1996 to a new position.
2. Appointed and sworn in 26 January 1996 to a new position.

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. TIMOTHY TYRONE SESSOMS

No. 946SC354

(Filed 6 June 1995)

Jury §§ 255, 259 (NCI4th)— *Batson* hearing—prosecutor on witness stand—justification of peremptory challenge

There was no error where a prosecution for conspiracy to traffic in cocaine had been remanded for a *Batson* hearing because the prosecutor had peremptorily challenged juror Beverly Askew, a black woman, after asking the clerk prior to his examination of Ms. Askew whether there was a white male in the venire; the prosecutor on remand took the witness stand and offered his explanation in a question and answer format without being sworn and without being subject to cross-examination; the explanation was that a deputy had told the prosecutor that Ms. Askew did not appear to be a leader, that she lived with people connected with drugs, and that the white male remaining in the pool would make a good leader; and the court found that the prosecutor's explanation was racially neutral. Defendant waived his right to argue the issue that the trial court erred by allowing the prosecutor to testify without first being sworn by failing to object after the prosecutor took the stand; under *State v. Jackson*, 322 N.C. 251, defendant had no right to cross-examine the prosecutor; and the prosecutor's proffered explanations for exercising the peremptory strike were not merely pretextual.

Am Jur 2d, Jury § 244.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

Judge MARTIN concurs in the result only with a separate opinion.

Judge JOHNSON dissents.

Appeal by defendant from judgment entered 12 July 1990 by Judge Orlando Hudson in Hertford County Superior Court. Heard in the Court of Appeals 23 January 1995.

Defendant was convicted of two counts of conspiracy to traffick in cocaine on 12 July 1990. During jury selection, defendants objected twice under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The first objection occurred immediately after the clerk called juror Beverly Askew. At that time the prosecutor asked the clerk if there was a white male out there, there being the venire. The second objection occurred after the prosecutor questioned and excused Askew. Each time the court determined that a prima facie showing of a *Batson* violation had not been made.

On appeal, we stated that "[s]tanding alone, the prosecutor's peremptory challenge of Askew would not amount to a prima facie showing of purposeful discrimination." *State v. Hall*, 104 N.C. App. 375, 383, 410 S.E.2d 76, 81 (1991). We concluded, however, that "[t]he prosecutor's question of the clerk prior to his examination of Askew . . . is a relevant circumstance which, when combined with the prosecutor's subsequent peremptory challenge of Askew, a black woman, raises an *inference* of purposeful discrimination on the prosecutor's part thereby establishing a prima facie showing." *Id.* (emphasis in original). We remanded for an evidentiary hearing to determine whether the prosecutor's explanation for his peremptory challenge of Askew was race-neutral.

On remand, Judge Hudson, who had presided over defendant's trial, presided over the *Batson* hearing. Debra Graves from the North Carolina Department of Justice represented the State. Before the State offered the prosecutor's explanation, the following colloquy took place:

> [MS. GRAVES]: So what we'd like to do is go ahead and . . . put Mr. Beard [the prosecutor] on the witness stand to state his explanation for the remark and his explanation for the excusal of Ms. Askew.

THE COURT: All right. And the parameters will be what, as far as what defense counsel can ask, if anything, first of all?

MS. GRAVES: Well, I don't believe that his attorney has any right to cross-examine the prosecutor.

THE COURT: Well, I don't either, that's why I asked you.

MS. GRAVES: North Carolina law does not permit that and we would not agree to it.

. . .

MR. WARMACK: . . . [w]hat I'm saying is in relation to the court's addressing the issue of my being able to cross-examine the district attorney, as to not what he said at that point in time, but presumably now he is going to take the stand and testify as to his reasons for excusing Ms. Askew.

THE COURT: Yeah.

MR. WARMACK: My position is that we would be entitled to cross-examine him because he is taking the witness stand as a witness under oath, not just standing up in front of the court saying this is why I did what I did.

THE COURT: I understand but I don't think that's a determining factor. The bottom line on it is some states let you do it, North Carolina is not one of those states. . . .

After more discussion, the prosecutor took the witness stand and offered his explanation in a question and answer format. He was not sworn, nor was he subjected to cross-examination.

The trial court found that the prosecutor's explanation was race-neutral. Defendant then offered the testimony of Luther Culpepper, a summer associate, and Rob Lewis and Larry Overton, attorneys at the original trial. The trial court found that the prosecutor's excusal of Askew was a legitimate use of a peremptory challenge and concluded defendant had not carried his burden of showing that the State's explanations were pretextual. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Debra C. Graves, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charles L. Alston, Jr., and Assistant Appellate Defender Benjamin Sendor, for defendant appellant.

ARNOLD, Chief Judge.

Defendant contends the trial court erred by allowing the prosecutor to testify without first being sworn. Defendant waived his right to argue this issue, having failed to object after the prosecutor took the stand without being sworn. *State v. Robinson*, 310 N.C. 530, 313 S.E.2d 571 (1984) (holding that the failure to object at the appropriate time is fatal to defendant's argument).

Defendant also contends that the trial court erred in refusing to allow him to cross-examine the prosecutor. But defendant had no right to cross-examine the prosecutor. In *State v. Jackson*, our Supreme Court held unequivocally that "a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney. . . . The presiding judges are capable of passing on the credibility of the prosecuting attorneys without the benefit of cross-examination." *State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). The Court added "[w]e know of no reason why the defendant should be allowed to examine a prosecuting attorney at a post trial hearing if he could not do so at trial." *Id; see also State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989); *State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990).

Defendant relies on the fact that the prosecutor was positioned on the witness stand rather than counsel's table, and that he tendered his explanation in a question and answer format to distinguish *Jackson*. These facts do not change *Jackson's* clear holding, nor alter the reasoning behind that holding.

In *Hall* we determined that defendant met his burden of establishing a prima facie showing under *Batson*, and remanded for a *Batson* hearing to "determine whether the prosecutor's explanation for his peremptory challenge of Askew was race-neutral." *Hall*, 104 N.C. App. 375, 384, 410 S.E.2d 76, 81. At the time, the only "explanation" offered by the prosecutor came *before* he even questioned Askew. *After* excusing Askew, when defendant moved again under *Batson*, the prosecutor was not asked for, nor did he give, an explanation for excusing her. On remand he explained her excusal for the first time and, in doing so, restated and elaborated on his explanation for asking the clerk whether there was a white man out there.

The trial court did not err in accepting additional explanations. The prosecutor in this case has been accused of using a peremptory challenge in a racially discriminatory manner. He should not be pre-

vented from explaining why he excused Askew and more fully explaining his statements in general. His additional explanations do not reveal that his proffered explanations were merely pretextual.

In determining whether the prosecutor's explanations are legitimate or merely pretextual, the following is instructive:

> The State must rebut with a " 'clear and reasonably specific' explanation 'related to the particular case to be tried.' " This explanation need not rise to the level required to justify exercising a challenge for cause. . . . [J]ury selection is "more art than science," and "[s]o long as the motive does not appear to be racial discrimination, the prosecutor may exercise peremptory challenges on the basis of 'legitimate "hunches" and past experience.' "
>
> We have held that it is permissible for the district attorney to explain to the court prior to jury selection that he "wanted a jury that was 'stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures.' " We have also held that the ultimate racial makeup of the jury is relevant but not dispositive. Finally, . . . we have held that the State may rebut a charge of discrimination with evidence that the State accepted black jurors, that the State did not use all of its peremptory challenges, or that the early pattern of strikes does not indicate discriminatory intent.

State v. Smith, 328 N.C. 99, 124, 400 S.E.2d 712, 726 (1991) (citations omitted).

The prosecutor testified that Deputy Cowan told him that Askew did not appear to be a leader, and that she lived with people connected with drugs. Deputy Cowan also told the prosecutor that the white man remaining in the pool would make a good leader. The prosecutor explained that when Askew was called, his statement "was there a white man out there" was his attempt to distinguish the individuals remaining in the pool.

It seems obvious that the prosecutor had determined that he wanted the man whom Deputy Cowan had told him would make a good leader, and that he excused Askew, in reliance upon Deputy Cowan, in order to reach that man. Choosing the juror whom Deputy Cowan had indicated would make a good leader does not equate with discriminating against Askew on the basis of race. Judge Hudson

failed to see or hear anything racial or pretextual in the prosecutor's statements, and deference should be given to Judge Hudson's ruling.

We can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.

The trial judge's findings, therefore, which turn in large part on the credibility of the witnesses, must be given great deference by this Court. *Porter*, 326 N.C. 489, 391 S.E.2d 144. "Because the trial court [is] in the best position to assess the prosecutor's credibility, we will not overturn its determination absent clear error." *State v. Williams*, 339 N.C. 1, 17, 452 S.E.2d 245, 255 (1994). Under the standard articulated above, we see no clear error.

In addition, there is nothing inherently suspect in the prosecutor's statement that he relied on advice from Deputy Cowan in deciding to strike Askew. Prosecutors frequently rely on investigators and others familiar with members of the venire in conducting jury selection. *See State v. Martin*, 105 N.C. App. 182, 412 S.E.2d 134, *appeal dismissed and disc. review denied*, 331 N.C. 556, 418 S.E.2d 670 (1992) (prosecutor excused one juror because investigator did not like that the juror had never held a professional position and another, in part, because investigator did not like his body language and demeanor); *State v. McNeil*, 99 N.C. App. 235, 393 S.E.2d 123 (1990) (juror excused because veteran detective did not feel comfortable with him). The prosecutor was not required to test the accuracy of Cowan's advice by questioning Askew, nor was his failure to question her along those lines evidence that his explanations were merely pretextual. In fact, the man whom Deputy Cowan said would make a good leader was elected foreman by the jury.

Clearly the panel, as ultimately composed, is not indicative of discriminatory intent on the prosecutor's part to exclude black jurors. *See Porter*, 326 N.C. 489, 391 S.E.2d 144. When Askew was called to the box, eleven jurors already had been seated, eight of whom were black. The empaneled jury consisted of eight black jurors, four white jurors and three black alternates, which strongly belies any suggestion of discriminatory intent on the prosecutor's part.

How plausible is it that the prosecutor would use racially discriminatory tactics to exclude blacks where not only defendant, but Judge Hudson, Deputy Cowan, and two of the State's key witnesses were also black? If we may reason from inference, it was most unlikely. Common sense irresistibly indicates that it was not in this prosecutor's best interest to use discriminatory practices. *See Williams*, 339 N.C. 1, 17-18, 452 S.E.2d 245, 255 (stating "[t]hat a black witness played such a key role in defendant's prosecution substantially undercuts any incentive on the prosecutor's part to remove blacks on the basis of their race"); *Jackson*, 322 N.C. 251, 368 S.E.2d 838 (stating that court could consider that the prosecutor's key witness was black).

Moreover, as to defendant's contention that the prosecutor's explanation was clearly pretextual simply because he passed on other jurors with similar traits, we have long recognized that this strategy is of little use as it "fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State." *Porter*, 326 N.C. at 501, 391 S.E.2d at 152-153. Nor does the brevity of Askew's questioning suggests an improper intent to excuse her. Although it seems irrelevant, others were questioned similarly and also excused.

The order appealed from should be

Affirmed.

Judge MARTIN, Mark D., concurs in the result only with separate opinion.

Judge JOHNSON dissents with separate opinion.

Judge MARK D. MARTIN concurring in the result only.

The present appeal arises out of the hearing conducted by the trial court on remand, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), to determine whether the prosecutor's explanation for his peremptory challenge of juror Beverly Askew was race-neutral. I write separately to express my belief that the procedures used at the hearing violated defendant's right to reciprocal fairness.

At the hearing all of defendant's witnesses, upon taking the witness stand, were required to take an oath and were subjected to cross-examination by the State. On the other hand, when the State's

only witness, the prosecutor, was called to the stand, he was not required to take an oath and was not subjected to cross-examination, despite the defendant's ultimate burden of proving the existence of purposeful discrimination. *See Batson v. Kentucky*, 476 U.S. at 98, 90 L. Ed. 2d at 88-89.

Defendant contends the trial court's differing treatment of the State's witness, as opposed to the defendant's witnesses, violated the defendant's right to reciprocal fairness. I agree. Like the majority, however, I believe the procedural aspects of this case are governed by the clear and unequivocal holding of our Supreme Court in *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989).

Defendant argues persuasively that the trial court erred by failing to require the prosecutor to be sworn, and in addition, by refusing to allow the prosecutor to be cross-examined.

North Carolina courts have consistently held a defendant is entitled to have the testimony offered against him given under the sanction of an oath. *See, e.g., In re Byers*, 295 N.C. 256, 258, 244 S.E.2d 665, 667 (1978) ("it is well established that before a witness can testify he must swear or affirm to tell the truth"); *State v. Dixon*, 185 N.C. 727, 730, 117 S.E. 170, 172 (1923) ("defendant is entitled to have the testimony offered against him given under the sanction of an oath"); *State v. Davis*, 69 N.C. 383 (1873).

The North Carolina Rules of Evidence provide that: "[b]efore testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." N.C.R. Evid. 603. A witness is one who is called to testify before a court. *Black's Law Dictionary* 1603 (6th ed. 1990). North Carolina Rule of Evidence 603 is applicable to all actions and proceedings of the court except where excluded by statute or North Carolina Rule of Evidence 1101(b). Neither statute nor Rule 1101(b) expressly exclude *Batson* hearings from the rules of evidence. Therefore, I believe it is clear that a prosecutor who voluntarily elects to take the witness stand, like any other witness, must be sworn before he or she testifies.

I believe the prosecutor in the instant case was serving in the capacity of a witness and should have been required to take an oath. The prosecutor requested Ms. Graves appear at the hearing on behalf

of the State. Ms. Graves "call[ed]" the prosecutor to the witness stand to give his explanation for the peremptory challenge. The prosecutor voluntarily took the witness stand and proceeded through direct examination to offer his explanation for the peremptory challenge. At one point during direct examination, defendant raised a hearsay objection, which the trial court overruled. All parties proceeded as if the prosecutor were an ordinary witness. At the end of Ms. Graves' direct examination of the prosecutor, defendant's attorney renewed his objection to the manner in which the hearing was conducted, and once again was overruled by the trial court.

Within the context of the present case, however, I agree with the majority opinion that the defendant waived his right to have the prosecutor sworn by failing to make any objection to the trial court's failure to administer an oath.

Defendant also contends the trial court erred in not allowing the prosecutor to be cross-examined.

In *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989), our Supreme Court held defendant did not have the right to cross-examine the prosecuting attorney during a *Batson* hearing. The Court explained:

> In balancing the arguments for and against such an examination, we believe the disruption to a trial which could occur if an attorney in a case were called as a witness overbears any good which could be obtained by his testimony. We do not believe we should have a trial within a trial. The presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross-examination.

Id. at 258, 368 S.E.2d at 842. The Court indicated this same rule would apply to the prosecutor appearing as counsel at a post-trial hearing. *Id.* The holding in *State v. Jackson* was followed in *State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989).

The right of confrontation includes the right to cross-examine witnesses, *State v. Perry*, 210 N.C. 796, 797, 188 S.E. 639, 640 (1936), on any subject covered in their direct examination. *Id.* at 798, 188 S.E. at 640; *State v. Dixon, supra. Compare* N.C.R. Evid. 611(b) ("witness may be cross-examined on any matter relevant to any issue in the case, including credibility"). Indeed, the right of cross-examination is a common law right and is guaranteed by the North Carolina Constitution and the United States Constitution. *State v. Watson*, 281

N.C. 221, 232, 188 S.E.2d 289, 295, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972); *State v. Bumper*, 275 N.C. 670, 674, 170 S.E.2d 457, 460 (1969).

During the *Batson* hearing Assistant Attorney General Debra Graves acted as counsel for the State. In order to explain why the prosecutor had excused Askew during *voir dire* examination, Ms. Graves "call[ed]" the prosecutor as a witness. Ms. Graves conducted a direct examination of the prosecutor. At one point during the direct examination of the prosecutor, defendant's attorney raised a hearsay objection which the trial judge overruled. Put simply, all parties behaved as if the prosecutor were an ordinary witness.

The State voluntarily elected to call the prosecutor to the witness stand and conducted direct examination. Arguably, the prosecutor "waived" his right under *State v. Jackson* to not be subjected to cross-examination by voluntarily taking the stand and subjecting himself to direct examination. Because the trial court subjected all of defendant's witnesses to cross-examination, I find the defendant's argument persuasive that this same procedure should have been followed when the State's only witness, the prosecutor, voluntarily elected to take the witness stand.

The reciprocal unfairness inherent where the prosecutor is not subjected to cross-examination has been recognized. In *Williams v. State*, 767 S.W.2d 872 (Tex. App. 1989), the Texas Court of Appeals held that in order to provide defendant with an opportunity to rebut the prosecutor's race-neutral explanation for exercising peremptory strikes, the accused should be permitted to cross-examine the prosecutor. *Id.* at 874. The *Williams* court reasoned that, "the denial or improper curtailment of cross-examination denies the accused the right to a fair trial." *Id.*

I believe the formulation of appropriate procedures to resolve *Batson* inquiries is generally best left in the sound discretion of the trial courts, *see United States v. Garrison*, 849 F.2d 103, 107 (4th Cir. 1988), *cert. denied*, 488 U.S. 996, 102 L. Ed. 2d 591 (1988); *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1987), *cert. denied*, 490 U.S. 1105, 104 L. Ed. 2d 1018 (1989), which must be allowed considerable discretion in conducting *Batson* hearings. *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987), *cert. denied*, 483 U.S. 1007, 97 L. Ed. 2d 740 (1987). Likewise, I believe it is clear a defendant is not absolutely entitled to an evidentiary hearing on a *Batson* objection in every case. *United States v. Tindle*, 860 F.2d 125 (4th Cir.

1988), *cert. denied*, 490 U.S. 1114, 104 L. Ed. 2d 1038 (1989); *United States v. Garrison*, 849 F.2d 103 (4th Cir. 1988).

Nevertheless, where the defendant makes a *prima facie* showing of purposeful discrimination in the selection of the jury, as this Court concluded in *Hall*, I believe fundamental reciprocal fairness mandates that all witnesses be treated equally at any evidentiary hearing conducted to determine whether the defendant has carried his ultimate burden of proving the existence of purposeful discrimination. Put simply, either all witnesses should be sworn and subjected to cross-examination, or no witness should be sworn and subjected to cross-examination. Otherwise we sanction procedures which derogate from longstanding fundamental principles of reciprocal fairness inherent within our adversarial system of justice. Nonetheless, I believe this Court is bound by our Supreme Court's clear and unequivocal holding in *State v. Jackson*. I therefore concur in the result of the majority opinion.

Judge JOHNSON dissenting.

I dissent from the majority opinion which holds that (1) defendant waived his right to argue the issue that the trial court erred by allowing the prosecutor to testify without first being sworn; (2) defendant had no right to cross-examine the prosecutor; and (3) the prosecutor's proffered explanations for exercising the peremptory strike of Ms. Askew challenged under *Batson* were not merely pretextual.

(1) and (2)

At the *Batson* hearing, the State was represented by Debra Graves from the Attorney General's Office. After preliminary matters, the State prepared to proceed to give the prosecutor's explanation for his peremptory challenge of Askew, to-wit:

> [THE STATE]: So what we'd like to do is go ahead and . . . put [the prosecutor] on the witness stand to state his explanation for the remark and his explanation for the excusal of Ms. Askew.
>
> THE COURT: All right. And the parameters will be what, as far as what defense counsel can ask, if anything; first of all?
>
> [THE STATE]: Well, I don't believe that his attorney has any right to cross-examine the prosecutor.
>
> THE COURT: Well, I don't either, that's why I asked you.

> [THE STATE]: North Carolina law does not permit that and we would not agree to it.
>
> . . . [much discussion] . . .
>
> [DEFENDANT'S ATTORNEY]: . . . [W]hat I'm saying is in relation to the court's addressing the issue of my being able to cross-examine the district attorney, as to not what he said at that point in time, but presumably now he is going to take the stand and testify as to his reasons for excusing Ms. Askew.
>
> THE COURT: Yeah.
>
> [DEFENDANT'S ATTORNEY]: My position is that we would be entitled to cross-examine him because he is taking the witness stand as a witness under oath, not just standing up in front of the court saying this is why I did what I did.
>
> THE COURT: I understand but I don't think that's a determining factor. The bottom line on it is some states let you [cross-examine the prosecutor], North Carolina is not one of those states. . . .
>
> . . .
>
> THE COURT: [T]he mere fact that [the prosecutor] [is] not on the witness stand is irrelevant because if that were the determining factor, you could put him on the witness stand. I mean what stops you from putting him on the witness stand when he stands up and gives [his] explanation . . . [?] [The courts] say you can't do that.

After more discussion, the defense objected to the court allowing the State's attorney to call the prosecutor to the witness stand for direct examination but not subject to any cross-examination. The prosecutor was then called to the witness stand without being sworn. Ms. Graves proceeded to ask the prosecutor a series of questions which the prosecutor answered. During this direct examination, defendant's attorney raised an objection which was ruled upon by the trial judge. At the end of the colloquy, defendant's attorney renewed his objection.

The majority holds that because defendant at no point objected to the fact that the prosecutor was not sworn, defendant has waived his right to object to the prosecutor's unsworn explanation now. The majority cites *State v. Robinson*, 310 N.C. 530, 313 S.E.2d 571 for the proposition that a failure to object is fatal to an argument regarding the absence of an oath because it constitutes a waiver. This holding is a

circular one—if, as the State argued, the trial court ruled, and the majority holds, the prosecutor is not a witness, why would he have been sworn? Defendant objected when the trial judge stated that defendant would not be permitted to cross-examine the prosecutor. I believe that by objecting to the manner in which the prosecutor was being permitted to give his explanation, defendant preserved this argument for review by this Court.

I believe the first holdings of the majority I have referenced above can be resolved by a resolution of whether the prosecutor was serving as a witness by *voluntarily* taking the witness stand for the purpose of subjecting himself to direct examination. Defendant maintains that the prosecutor was "serving in the capacity of a witness" for the State because of the *manner* in which the prosecutor conveyed his explanation of the peremptory challenge, i.e., from the witness stand. On the other hand, the State argues that

> [t]he prosecutor did not intend to, and did not in fact, offer testimony in this case. He merely offered his explanation for excusing Ms. Askew. The explanation was given by way of a colloquy with Ms. Graves because, in light of the unusual posture of this hearing (on remand [three] years after the trial), the colloquy provided the best vehicle to inform the trial court on the record. This goal could have been accomplished through any number of procedures, including having the prosecutor to make a lengthy speech, or having the prosecutor to engage in the colloquy from his seat at the prosecutor's table.

After much review, several factors convince me that the prosecutor in the instant case was "serving in the capacity of a witness." Ms. Graves stated that she was at the hearing at the request of the prosecutor to represent the State in the *Batson* matter, although the prosecutor was also seated at the State's table. When the time came for the prosecutor to give his explanation, Ms. Graves announced to the trial court that she would like to "call" the prosecutor. The prosecutor voluntarily took the witness stand and proceeded, through a series of questions and answers, to offer his explanation for the peremptory challenge. At one point while the prosecutor was undergoing direct examination, defendant's attorney interrupted with an objection to one of Ms. Graves' questions, and the trial court overruled defendant's objection. At the end of the State's questioning, defendant's attorney renewed his objection, which the trial court denied. I believe that the manner in which the prosecutor's explanation took place put

the prosecutor in the position of a witness and that therefore, defendant should have been allowed to cross-examine the prosecutor at the conclusion of direct examination.

I recognize *State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 from which the majority quotes that "a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney[.]" In *Jackson*, as in the case *sub judice*, a *Batson* hearing was held after a trial on remand. Defendant's trial attorneys and the prosecutors stipulated what had happened at the trial. Defendant attempted to subpoena the prosecutors; these subpoenas were quashed and defendant appealed because of this assignment of error. Therefore, defendant was not allowed to put on evidence at the hearing. On appeal, the Court stated that the question raised by this particular assignment of error was "whether the defendant had the right to examine the prosecutors in a hearing to determine if there has been a *Batson* violation." *Id.* at 257, 368 S.E.2d at 841. The Court held that

> a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney. In balancing the arguments for and against such an examination, we believe the disruption to a trial which could occur if an attorney in a case were called as a witness overbears any good which could be obtained by his testimony. We do not believe we should have a trial within a trial. The presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross-examination.

Id. at 258, 368 S.E.2d at 842. In so finding, the Court noted that "defendant could . . . have offered evidence to strengthen his case after the State had made its showing." *Id. Jackson* is distinguishable. The Court warns of the evil which "could occur *if an attorney in a case were called as a witness*[.]" For whatever reason, in the instant case, the prosecutor voluntarily allowed himself to be called as a witness, by the State. And once voluntarily subjecting himself as a witness, the prosecutor, under the circumstances of this case, was subject to cross-examination. The trial court in the instant case was of the belief that under no circumstances would the prosecutor be subject to cross-examination by the defense. However, I believe that by voluntarily taking the witness stand, the prosecutor waived the protection given him by *Jackson* prohibiting examination of him by the defense. He thereby subjected himself to cross-examination.

Therefore, I believe defendant's rights to due process and equal protection of the laws under the United States Constitution, the North Carolina Constitution, and the North Carolina Rules of Evidence have been violated because the prosecutor, as a witness, was permitted to testify during the hearing without first being sworn, and because defendant did not have the right to cross-examine the prosecutor. However, notwithstanding the trial court's erroneous rulings regarding the witness oath and cross-examination, the record is sufficient and abundantly clear for appellate review to decide the *Batson* issue.

(3)

Next, I address the majority's holding that the prosecutor's proffered explanations for exercising the peremptory strike of Ms. Askew challenged under *Batson* were not merely pretextual. In the first appeal of this case, *State v. Hall*, 104 N.C. App. 395, 410 S.E.2d 76, the only explanatory statement the prosecutor offered as his race-neutral explanation for his alleged discrimination was as follows:

> And as far as—my impression—my impression when I came up there, it was my impression there was a black juror and a white—and a white juror left in the jury panel and there was not a black female or a female at all left.
>
> I was trying to determine who—who was left. I had three left and two were—two were men and one was a woman, and I had—and apparently there were two women and one men—one man. And I had it backwards, and that's what I was trying to determine who was left as best I could.

Id. at 378-79, 410 S.E.2d at 78. This Court noted that the prosecutor's explanatory statement was not offered during the *voir dire* examination, but was made during the trial court's hearing on the *Batson* violation. This Court then stated:

> The prosecutor's statement may have adequately explained the meaning of his question [if "there was a white male out there"], but the trial court should have considered the statement, not for whether the defendant made a prima facie showing, but for whether the prosecutor adequately rebutted the [defendant's] prima facie showing.

Id. at 384, 410 S.E.2d at 81.

In that this Court concluded that the trial court did not consider the prosecutor's proffered race-neutral explanation for his alleged

discrimination in the proper context, the Court remanded the case to the trial level for a trial judge to determine

> whether the prosecutor's explanation [within the record] for his peremptory challenge of Askew was race-neutral. If the trial court finds that the prosecutor's explanation [within the record] was not race-neutral, [defendant] is entitled to a new trial. If the trial court finds that the prosecutor's explanation for his peremptory challenge was race-neutral, [defendant] shall be given an opportunity to demonstrate that the explanation was a mere pretext. If [defendant] meets his ultimate burden of proving purposeful discrimination, he is entitled to a new trial. If not, the trial court will order commitment to issue in accordance with the judgment appealed from and entered on 12 July 1990.

State v. Hall, 104 N.C. App. at 384, 410 S.E.2d at 81.

I take issue with the majority's statement that, in *Hall*, our Court remanded "for an evidentiary hearing" to determine whether the prosecutor's explanation for the peremptory challenge was race-neutral. The mandate in *Hall* was for the trial court to determine "whether the prosecutor's explanation [within the record] for his peremptory challenge of Askew *was* race-neutral." (Emphasis added.) It is clear in *Hall* that this Court did not intend for the trial court, on remand, to have the prosecutor restate and certainly not to embellish his prior explanatory statement for his alleged discrimination and peremptory challenge of Ms. Askew. The prosecutor had three years to consider the issue involved. In short, the *Hall* Court concluded that the trial court erred in not considering the prosecutor's statement in the proper context, that is, whether his explanatory statement adequately rebutted the prima facie case shown by defendant. The trial court had only considered it in the context of whether defendant had made out a prima facie case of discrimination. Because of that error, this Court remanded the case for the trial court to consider the prosecutor's statement of record in the proper context. Perhaps the prosecutor would have been better off not to have proffered additional explanatory statements three years later, that were never mentioned or even alluded to in the least, at the original trial when he gave his explanatory statement. A more appropriate time would have been at the time of the trial when the matters unquestionably should have been fresh in his memory. Attempting to restate his original explanation, which was of record, and giving additional explanatory statements, were

neither warranted by the prosecutor nor intended by this Court's remand.

As this Court noted in *Hall*, the prosecutor's *original* statement, considered in the proper context, may have adequately explained the meaning of his question, thereby refuting an inference of discrimination. However, on remand, the trial court conducted a full *Batson* hearing from beginning to end, resulting in not only the consideration of the prosecutor's original statement, but also his two additional explanatory statements. After considering the prosecutor's explanatory statements, the trial court found and concluded that the statements were race-neutral; that defendant had failed to carry his burden of showing that the prosecutor's explanations were pretextual; and that the prosecutor's excusal of Ms. Askew was a legitimate use of a peremptory challenge.

Now, we address the issue of whether purposeful discrimination occurred. It is interesting to note that the prosecutor's original explanatory statement was that he was trying, as best he could, to determine who was left in the jury pool; that it was his impression there was a black juror and a white juror left and that neither of the two was a female. The prosecutor further stated that it was his impression that there were two men and one woman left in the pool, but that apparently he had it backwards because there were two women and one man left in the pool.

When questioned at the hearing as to what he asked the clerk and what he meant by his question prior to excusing Ms. Askew, the prosecutor responded:

> Because I think at this point in time, the defense had released—they had used up their last challenge, as I recall. I was looking for a leader on the jury panel, someone who would be able to be the leader. And in my opinion, the ones that were up there, that we had selected, would be good jurors. But I thought that the nature of this case with three defense lawyers and the fact of the type of case that it was, I was interested in hopefully having someone—looking for someone who would be a foreman or a foreperson.
>
> [THE STATE:] What did you mean when you asked that question to the [clerk] about was there a white man out there?
>
> [THE PROSECUTOR:] I thought—I was not sure approximately how many folks were out there. There was two women and one man or two men and one woman. And Mr. Cowan had told me—we

had gotten toward the end and Mr. Cowan had told me there was a white person who was out there and this person would make a good leader and that was toward the end of the jury selection.

It is clear from the prosecutor's response on remand above that he had two stated concerns which prompted him to make his questionable remark to the clerk: (1) he was looking for a leader on the jury panel and Mr. Cowan had told him about a white person in the jury pool who would make a good leader; and (2) he was confused about the number of persons remaining in the jury pool. The prosecutor's statement about looking for a leader and what Mr. Cowan told him is a more direct response to his question to the clerk than his statement about being confused about the number of persons remaining in the jury pool. However, when called upon at trial to explain his remark that he had made to the clerk, his *sole* response was in essence that he was confused about the number of persons remaining in the jury pool. It is most interesting to note that when the matter was fresh on his mind at trial, his explanatory statement never included anything about looking for a leader or anything that Mr. Cowan or anyone else had told him. His stated concern about leadership was made for the first time three years thereafter. Most assuredly his recall was better at trial as opposed to three years later.

As to the specific question at the hearing regarding his excusal of Ms. Askew, the prosecutor was asked and responded:

[THE STATE:] All right. Now specifically when it came to your examination of Ms. Askew, can you recall why you excused Ms. Askew?

[THE PROSECUTOR:] Well, the thing with Ms. Askew as I recall, also from looking at the transcript, I think that she had testified in the voir dire she said that she worked at Perdue for about eight years. She was single and had one son, seven years old. There were two things that concerned me about Ms. Askew, one is that she did not appear to be a leader, would not appear to be a leader on this particular jury. And the second thing that concerned me was that Mr. Cowan had told me that . . . where she resided, there was some people in the home in which she resided that had to do with drugs. And I was concerned about any juror who would be on—any juror who had in [sic] connection with drugs or involved with drugs whatsoever. And that also concerned me. For those two reasons, I excused her.

Here it appears that at the hearing the prosecutor had two stated concerns with Ms. Askew, neither of which appears in any manner on the record of jury selection: (1) that she did not appear to be a leader, and (2) that a reliable source had told him that there were people in the home in which she lived that had a connection with drugs. The prosecutor's first concern was apparently just a "hunch." No questions were asked of Ms. Askew to determine if she was a leader or possessed leadership-type qualities, although these questions were asked to other potential jurors. Because the prosecutor did not make any inquires to determine whether Ms. Askew was a leader or possessed leadership-type qualities, there is nothing on the record showing that this "hunch" was race-neutral. *Compare U.S. v. Horsley*, 864 F.2d 1543 (11th Cir. 1989) (where the prosecutor's explanation that "I just got a feeling about him" was legally insufficient to refute a prima facie case of purposeful racial discrimination). Further, I find persuasive the testimony by Mr. Overton, one of the defense attorneys involved in the trial of the case. Mr Overton testified that immediately after the clerk of court called the name of Ms. Askew, "I recall [the prosecutor] getting up at that point and coming towards the bench where the two clerks were sitting. My recollection of what he said was that . . . he said, you were supposed to call the white man or you should have called the white man." It appears that the prosecutor asked his question of the clerk immediately upon recognizing that Ms. Askew was black. Apparently the prosecutor had this "hunch" before he even asked Ms. Askew a single question.

The prosecutor's second concern, similarly, does not appear in any manner on the record of jury selection. There was not a single question asked to Ms. Askew which related to drugs or drug use. I recognize that the prosecutor's explanation for this was that Deputy Cowan had told him this information about Ms. Askew. I also recognize that the prosecutor was not required to ask Ms. Askew any questions about anything. However, the record shows that four people ultimately seated on the jury were related to or had friends who were not just known to use drugs, but who had been criminally charged with drug violations. Under these circumstances, and considering the prosecutor's stated concerns, I find very troublesome the absence of any questions, within the record of jury selection, related to drug use during questioning of Ms. Askew and the absence of any reference to anything Deputy Cowan allegedly told the prosecutor.

The prosecutor excused Ms. Askew without the first question that would indicate her leadership abilities or lack thereof. He did not ask

Ms. Askew any questions regarding the rumor Deputy Cowan told him about people in her home having a connection with drugs. I also note that at trial the prosecutor had ample opportunity to bring to the court's attention any concerns that he had as a result of any information given to him by Deputy Cowan. In the first appeal of this case, this Court noted that the jury was excused from the courtroom immediately after the prosecutor asked his question of the clerk regarding "a white male" in order for the court to hear motions. Defendant then made a *Batson* motion, citing as support the question the prosecutor asked of the clerk.

It appears to me that if the prosecutor was genuinely concerned about alleged drug use in Ms. Askew's home or Mr. Phelps' leadership abilities, when attempting to explain his reason for his comment to the clerk, he would have stated or made some reference to those concerns contemporaneously with his first explanatory statement of record. Instead, the record is devoid of any reference to his subsequent two concerns which should have been fresh on his mind and not only subject to recall three years later. This is not plausible and flies in the face of credulity.

I recognize that "[s]o long as the motive does not appear to be racial discrimination, the prosecutor may exercise peremptory challenges on the basis of 'legitimate "hunches" and past experiences.' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (*quoting State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017, 100 L.Ed.2d 217 (1988)). I also note that while the ultimate racial makeup of the jury is not dispositive, it is relevant. *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991). However, the fact that the jury in the instant case contained eight black jurors does not address the issue at hand, whether the excusal of Ms. Askew was for racial reasons. *Batson* protects against the excusal of *any* juror for reasons of race, regardless of the racial make-up of the other members of the jury. I believe a review of the jury selection process shows that the prosecutor never intended to keep Ms. Askew, a black woman, on the jury. The prosecutor clearly intended to excuse Ms. Askew solely for the purpose of seating a "white male" on the jury. His actions were clearly racially motivated. This is buttressed by the further fact that, although the prosecutor asked Mr. Phelps more detailed questions than he asked Ms. Askew, he did not ask Mr. Phelps any question that would tend to show his leadership abilities or lack thereof. *Batson* is to protect against this type of purposeful discrimination.

The majority asks, "How plausible is it that the prosecutor would use racially discriminatory tactics to exclude blacks where not only defendant, but Judge Hudson, Deputy Cowan, and two of the State's key witnesses were also black?" My response to that question is, how plausible is it that the prosecutor, immediately after recognizing that the next juror called was black, would ask, "is there a white male out there?", in front of eight black jurors, defendant, Judge Hudson, Deputy Cowan, and two of the State's key witnesses, all of whom were also black? I guess the majority would answer, not very plausible! But yet, it happened. The majority opinion overlooks the fact that discrimination does not always take place in an overt form. As a matter of fact, in today's time it seldom does. It can, and often does take place in a quiet, subliminal or subtle fashion. I ask, is the emperor wearing new clothes? The answer is no. As much as we would like to have a society in which discrimination does not exist, we are not there.

As previously stated, this Court held that the prosecutor's original explanatory statement, considered in its proper context, may have adequately explained the meaning of his question to the clerk and his subsequent peremptory challenge of Ms. Askew. *See State v. Hall.* In my opinion, although the prosecutor's original explanatory statement seems confusing and totally unrelated to the question he asks the clerk, it appears to be race-neutral. A prosecutor's explanatory statements do not have to make sense so long as they are race-neutral. *Purkett v. Elem*, 63 U.S.L.W. 3814 (U.S. May 15, 1995) (No. 94-802). The evidence is manifestly clear and uncontradicted that the prosecutor's action was racially motivated; and, a review of the jury selection process, *all* of the prosecutor's explanatory statements, and defendant's evidence in rebuttal leads to the inescapable conclusion that the prosecutor's explanatory statements were pretextual.

The prosecutor's comment to the clerk and his subsequent action are unfortunate. To my knowledge, they appear to be out of character for this prosecutor. However, the record speaks for itself and we must view the record as it in fact appears before us.

Since *Batson* was decided, no case in this State has been found to have a *Batson* error. Although I do not quarrel with those decisions, if *Batson* is to have any meaning, then the facts of this case most assuredly fit a *Batson* violation.

I therefore vote to award defendant a new trial.

STATE OF NORTH CAROLINA v. JAMES VERNON EASTERLING

No. COA94-999

(Filed 6 June 1995)

1. Evidence and Witnesses §§ 732, 1256 (NCI4th)— rape—confession—invocation of right to counsel—further question from officer—subsequent statement by defendant

There was no prejudicial error in a prosecution for multiple counts of rape and sexual offense, and for robbery and kidnapping, where a detective approached defendant in an interview room at police headquarters, stated that he wanted to talk to defendant about an investigation, and advised defendant of his rights; defendant stated that he felt he needed to talk to a lawyer; the detective stopped the interview and informed defendant that he would have to go for his first appearance where the court would appoint an attorney; the detective left the room and returned not more than five or ten minutes later; he informed defendant that officers would be taking him to the magistrate's office to be served with warrants; the detective asked "Who was Sherman"; defendant answered "White"; defendant indicated a few moments later that he wanted to talk about the case; the detective again informed defendant of his rights; defendant indicated that he wanted to go ahead and talk about the case; defendant made and signed an inculpatory statement, including language indicating that the statement was given of his own free will and that he did not want an attorney; and defendant testified at trial, giving testimony that was consistent with his statement. The question "Who was Sherman" constituted an interrogation by police in violation of *Edwards v. Arizona*, 451 U.S. 436, because it was designed to elicit an incriminating response and defendant's statement made only "a few moments" later was nothing more than a continuation of the police-initiated interrogation; however, there was no prejudice because defendant's decision to testify was induced by the strength of the State's case and not by the erroneous admission of defendant's statement.

Am Jur 2d, Appeal and Error §§ 797-801, 803; Criminal Law §§ 788 et seq; Evidence §§ 749, 750.

Comment Note.—Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation. 10 ALR3d 1054.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

What constitutes assertion of right to counsel following *Miranda* warnings—state cases. 83 ALR4th 443.

Necessity that *Miranda* warnings include express reference to right to have attorney present during interrogation. 77 ALR Fed. 123.

Supreme Court's views as to what constitutes valid waiver of accused's federal constitutional right to counsel. 101 L. Ed. 2d 1017.

2. Jury § 260 (NCI4th)— rape—jury selection—peremptory challenges—not racially discriminatory

Defendant's *Batson* challenge in a rape prosecution was properly denied where the State voluntarily proffered explanations for its peremptory challenges of African-American jurors, so that the Court did not need to address the trial court's conclusion that defendant failed to make a prima facie case of discrimination and could proceed as if defendant had met his burden; the State explained that it was looking for a certain type of juror with a family, a job that had been maintained for a substantial amount of time, and roots in the community; and none of the jurors excused by the State had the employment or family history which the State was seeking.

Am Jur 2d, Jury §§ 235, 244.

Jury: membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. 63 ALR3d 1052.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-*Batson* state cases. 20 ALR5th 398.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-*Batson* federal cases. 110 ALR Fed. 690.

3. Rape and Allied Sexual Offenses § 151 (NCI4th)— first-degree rape—serious personal or bodily injury—instructions

The trial court did not err in a first-degree rape prosecution by failing to give defendant's specific written request for an instruction on serious personal injury where the instruction given accurately reflects the applicable law. Under *State v. Boone*, 307 N.C. 198, in order for a mental injury to constitute serious personal injury and elevate second-degree rape and second-degree sexual offense to first-degree, the mental injury must be more than the *res gestae* present in every forcible rape and sexual offense and the State must ordinarily offer proof that such injury was not only caused by the defendant but extended for some appreciable time beyond the incidents surrounding the crime itself. However, *Boone* does not place an additional burden on the State to show that a mental injury must be more than that normally experienced in every forcible rape in addition to showing that the mental injury extended for some appreciable time. If a mental injury extends for some appreciable time, it is therefore a mental injury beyond that normally experienced in every forcible rape.

Am Jur 2d, Rape §§ 108 et seq.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge. 92 ALR3d 866.

4. Kidnapping and Felonious Restraint § 18 (NCI4th)— kidnapping—facilitating robbery—evidence sufficient

The evidence was sufficient to support first-degree kidnapping for the purpose of facilitating robbery where the State's evidence tended to show that defendant got in the victim's car and began choking her with both hands; he pulled her back in the car when she tried to escape and then dragged her by her hair over the stick shift and out the other side of the car and across the gravel parking lot to an accomplice's car; the accomplice went through the victim's pocketbook while she was in his car; and defendant stole her jewelry. These acts constituted neither a mere technical asportation nor an inherent and integral part of the robbery.

Am Jur 2d, Abduction and Kidnapping § 32.

What is "harm" within provisions of statutes increasing penalty for kidnapping where victim suffers harm. 11 ALR3d 1053.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

5. Rape and Allied Sexual Offenses § 173 (NCI4th)— second-degree sexual offense—evidence sufficient

The trial court did not err in denying defendant's motion to dismiss a charge of second-degree sexual offense for insufficient evidence where the victim testified that defendant made her perform oral sex on him but that she gagged herself so he would let her stop and that defendant forced her head down and made her place her mouth around his penis and then she tried to throw up.

Am Jur 2d, Rape §§ 108 et seq.

6. Criminal Law §§ 1113, 1120 (NCI4th)— rape, kidnapping, and robbery—sentencing—conduct during pretrial confinement—impact of crime on victim and society—court's comments not a nonstatutory aggravating factor

There was no error in a sentencing hearing for first-degree rape, first and second-degree sexual offense, first-degree kidnapping, and robbery where the court, before sentencing defendant, noted defendant's disruptive conduct during pretrial confinement and trial and the especially destructive effect of the crimes on the victim, her parents, other women, and the fabric of society, but went on to state that it considered only the evidence in sentencing defendant. The court's comments indicate that it did not consider or apply defendant's disruptive conduct or the effects of the crime as nonstatutory aggravating factors.

Am Jur 2d, Criminal Law §§ 612, 613.

Appeal by defendant from judgments entered 21 February 1994 in Guilford County Superior Court by Judge W. Douglas Albright. Heard in the Court of Appeals 18 April 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Valerie B. Spalding, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant-appellant.

GREENE, Judge.

James Vernon Easterling (defendant) appeals from judgments and commitments entered after a jury convicted him of eight counts of first-degree rape, six counts of first-degree sexual offense, one count of second-degree sexual offense, three counts of first-degree kidnapping, and one count of common law robbery during the 15 February 1993 Mixed Session of Guilford County Superior Court. Judge W. Douglas Albright imposed fourteen consecutive life sentences for the first-degree rapes and first-degree sexual offenses, a concurrent forty year sentence for first-degree kidnapping, and a concurrent ten year sentence for common law robbery. Judge Albright arrested judgment on the remaining two kidnapping convictions.

The indictment for the first count of first-degree kidnapping against defendant provided that defendant confined the victim in a motor vehicle "for the purpose of facilitating the commission of the felony of Robbery . . . . The victim . . . was not released in a safe place by the Defendant, but was taken away from the scene of the abduction."

On 14 February 1994, defendant filed a motion to suppress oral admissions and a written statement made by defendant to law enforcement officers while in custody. In this motion and defendant's affidavit supporting the motion, defendant alleged that those statements, "were not freely and voluntarily made but were coerced and were the result of persistant [sic] and repeated interrogations by numerous skillful law enforcement officers and in the absence of counsel and without an intelligent or knowing waiver of counsel."

At the voir dire hearing on defendant's motion, Detective J.F. Whitt (Detective Whitt) testified that he approached defendant in an interview room at police headquarters, stated he "wanted to talk to him about the investigation that was currently underway," and verbally advised him of his rights as required under *Miranda v. Arizona*. Detective Whitt testified that after he had read defendant his rights, and defendant had initialed and signed the form listing these rights, defendant "indicated at that point that he felt like that he needed to talk to a lawyer." Detective Whitt stopped the interview at that point and informed defendant that although he could not appoint him an attorney, defendant "would have to go for his first appearance through the court process" where the court would appoint an attorney for him.

Detective Whitt left the room, and when he returned not more than five or ten minutes later, he informed defendant "that the officers would be taking him across to the magistrate's office to formally be served with the warrants. At that point, . . . I made the comment, 'Who was Sherman?' And he indicated just shortly thereafter, 'White.' And just a few moments later he indicated that he wanted to go ahead and talk to me about the case." Detective Whitt therefore informed defendant again of his rights, "that the rights had been read to him, and that he understood them; that the waiver of rights, that I had marked on there that he had refused. I informed him, you know, if he wanted an attorney that we would make every effort to assist him in locating one by providing him with a phone to do that. At which time, he indicated he wanted to go ahead and talk with me about the case." At the conclusion of the interview, defendant signed his statement which also contained the following: "I am giving this statement of my own free will. I have not been promised or threatened in any way or been made to give this statement. I do not want a lawyer present with me during the time I spoke with Detective Whitt."

By order dated 17 February 1994, the trial court found in pertinent part that Detective Whitt gave *Miranda* warnings to defendant which he indicated he understood, defendant invoked his right to counsel, and Detective Whitt ceased the interrogation. Subsequently, Detective Whitt asked defendant "Who Sherman was" and defendant responded "White":

> 18. Some further appreciable time elapsed and the officers started to take the defendant to the magistrate's office. Whereupon, the defendant indicated to the officer in no uncertain terms that he wanted to talk to him without a lawyer present and said, "he wanted to talk." Officer Whitt responded, "Are you sure?" The defendant made it abundantly clear that he was. At this point, Detective Whitt readvised the defendant of all of his constitutional rights as required by the Miranda decision as he gave before . . . . The defendant again acknowledged his awareness and understanding of each of these rights and reaffirmed his desire to talk to the officer without a lawyer present by signing the Waiver of Rights. The defendant acknowledged in writing that he had read the statement of rights and had his rights explained to him by a police officer, and that knowing these rights he did not want a lawyer at this time. The defendant waived those rights knowingly and willingly agreed to answer questions and/or make a statement;

19. The defendant affirmatively, understandingly, knowingly and voluntarily waived his right to the presence of counsel, retained or appointed, during questioning in writing;

20. . . . Under the totality of the circumstances, it is clear that this defendant wanted to talk to the officer without a lawyer present and wanted to do so then and there before being taken to the magistrate's office by the officers . . . .

Based upon these findings, the court concluded "defendant's statement was freely, voluntarily, understandingly and knowingly made without coercion, duress, threat or intimidation" and therefore denied his motion to suppress; however, the court ordered "that the question by Detective Whitt to the defendant to the effect 'Who is Sherman?' and the defendant's answer, 'White,' be" suppressed.

During jury selection, the prosecutor, Mr. Panosh, exercised three of his six peremptory challenges to exclude three of the five African-Americans called into the jury box, and defendant's counsel, Mr. Jennings, made a motion for a mistrial based upon *Batson v. Kentucky* that Mr. Panosh had exercised his peremptory challenges in a racially discriminatory manner. Mr. Panosh explained why he exercised three peremptory challenges against prospective African-American jurors:

MR. PANOSH: . . . We would submit that he has not set forth a prima facie—sufficient evidence to show a prima faci[e] case of discrimination. However, for the record, juror No. 4, Sherman Hughes was a black male, appeared to be young, in his early twenties, . . . he is a shipping clerk for Odell Hardware, that he's worked there for less than a year, that his prior occupation was janitorial staff, he worked there for less than three years, and that he was single. Based upon what I saw of him and the answers to those questions, I determined that he was not the type of juror that I was seeking. I was seeking a juror who was from the mainstream of our community, who was employed for a substantial period of time, had a family and had roots in the community.

Juror No. 6, Edith Allred, indicated that she was also single, that she had worked for the coliseum for three months, that before that her occupation was B&B Temporary Services. Again, this juror did not fit the profile of the type of juror that I was looking for, a person who was employed for a substantial period of time, and who had roots in the community, and was a family individual.

> Juror No. 12, Selena Hampton, indicated that she was a student at A&T, studied English, she was not employed, and that she was single. Again, this juror did not fit the profile I was looking for. She was not from the mainstream of our community. She was not employed in a steady occupation, was not married, was not the type of person that I was looking for who could listen to the evidence in this particular case and come to a rational conclusion.

The court, in denying defendant's motion, found that defendant "has failed to make out any prima facie showing that the district attorney discharged jurors in a racially discriminatory manner or for racially discriminatory purposes," "the exercise of the peremptory challenges by the State rested upon racially neutral reasons, and upon an articulable basis set forth by the district attorney that is racially neutral in nature," none of the questions of Mr. Panosh "were protectional or designed to eliminate black jurors for racially discriminatory reasons," and "at this time two black females remain upon the panel." The final jury consisted of two African-American females, six white females, and four white males.

At trial, the alleged victim (Elizabeth), a college student, testified for the State as to the following: On 14 April 1993, she left her part-time job at Bennigan's restaurant in Greensboro just before 2:30 a.m. As she was stopped at a red light at the intersection of Chapman and Spring Garden, a car that had been following her "just plowed right into" her car. Elizabeth pulled over into a parking lot of a hair shop, rolled down her window, and kept her car running while the other car came into the parking lot. She saw defendant get out of the other car and come up to her side window. He reached through the window and punched her in the jaw. The punch must have knocked her unconscious, and when she regained consciousness, defendant was in her car choking her with his hands around her throat.

Elizabeth "tried to get out on the passenger's side and run, and [defendant] pulled [her] back in by [her] hair." After a while, defendant pulled Elizabeth by her hair out of her car, across the gravel parking lot on which she hit her hands, bottom and legs, and put her into the back seat of the car that ran into her car. Sherman White (White) was sitting in the front seat and had Elizabeth's pocketbook. "[T]hey were going through [her] pocketbook to see how much money [she] had, and meanwhile [defendant] was taking off [her] jewelry." Defendant was in the back seat with Elizabeth and continued to hit

her. Defendant took Elizabeth's paycheck out of the front right-hand pocket of her shorts. Both men stated they would kill her if she did not "shut up" and keep her head down. While in the back seat of the car, defendant, "[a]t least four" times, stuck his finger in Elizabeth's vagina and fondled both of her breasts "[t]wo or three times." Both men wanted to take Elizabeth to Kroger's to cash her paycheck but decided she was too upset.

After this discussion about Kroger's, defendant said to White to take Elizabeth to Heath Park. Defendant and White tied Elizabeth's hands behind her back. Once they arrived at the park, defendant pulled her out of the car and down a hill where she was thrown to the ground. The men then used her suspenders to tie her legs, and "kept violently pushing [her] head down so that [she] wouldn't look at them." The men discussed what to do with Elizabeth, and defendant "wanted to kill [her]. He was the one who definitely wanted [her] gone." The men untied her, "threw" her into the car, and took her to another park.

At the other park, defendant pulled Elizabeth out of the car and down a hill while White followed them. Defendant then "took off [her] clothes and he threw [her] on the ground and he raped" her. At the same time, White was trying to make her perform oral sex on him. White then raped Elizabeth while defendant rubbed his penis on her bottom. Both men put their tongues in her vagina before they had intercourse with her. Defendant threw Elizabeth back into the car, and Sherman drove them somewhere. Defendant then dragged Elizabeth out of the car, through some back yards and to a house. When defendant could not open the door to the house, he hid Elizabeth in an old car, knocked on the front door of the house, and his mother opened it. Defendant ran back and got Elizabeth and carried her through the house and told her to "not say a word." Sherman had left.

Defendant took Elizabeth to his bedroom and raped her on the bed. He put his tongue in her vagina both before and during the sexual intercourse. She noticed a horseshoe-shaped scar on defendant's left arm. Defendant placed Elizabeth on the floor and raped her again. He also placed his tongue in her vagina both before and during this sexual intercourse. Defendant made Elizabeth hide under the bed while his mother left for work. Elizabeth did not scream or cry out because she was afraid defendant would kill her. After defendant's mother left, defendant took Elizabeth to a back bedroom that was

blue and raped her on the bed. Defendant put his tongue in her vagina both before and during this sexual intercourse. "[It] was light at that time. . . . [She] had seen [defendant's] face by then, but [she] kept [her] eyes covered." Defendant then took Elizabeth to the front room, and raped her again on the couch and put his tongue in her vagina.

Sherman came to the house, and he and defendant discussed what to do with Elizabeth, and she pleaded for them not to kill her. Sherman and defendant went to the back blue bedroom to watch television, and they made Elizabeth "sit on the bed in there and watch" television. They were waiting to see if Elizabeth appeared on the news. Sherman left to get some food. Defendant then made her take a shower and douche. Afterwards, "he made [her] perform oral sex on him, but [she] gagged [her]self so he would let [her] stop. . . . He forced [her] head down and made [her] place [her] mouth around his penis, and then [she] proceeded to try and throw up." Defendant raped Elizabeth on the bed and put his tongue in her vagina. Defendant ejaculated which he had not done on any of the previous rapes of Elizabeth. He then said he was going to kill her and choked her until she lost consciousness.

Sherman came back. He and defendant gave Elizabeth clothes to wear and sunglasses and told her they were going to let her go. Defendant wiped off her wallet, credit cards and ATM card, and gave her the wallet, her watch, and a quarter so she could make a phone call. They dropped her off in the back parking lot of a hotel, and she ran to the hotel's front office and called her landlord. He and one of Elizabeth's roommates picked her up at the hotel. Elizabeth met with the Greensboro police and was examined at a hospital. She identified for the jury photographs of her car, her jewelry, the locale where defendant had first attacked her, the car which Sherman and defendant were driving, the two parks, defendant's house and rooms of that house, and her injuries. She identified defendant in court, and the horseshoe-shaped scar on his arm was shown to the jury. She stated she heard defendant call the other perpetrator "Sherman."

Defendant's statement to Detective Whitt was introduced at trial. In the statement, defendant stated he and White rammed Elizabeth's car, defendant took Elizabeth and put her in White's car, and they took her to a park where both of them sexually assaulted her and had sexual intercourse with her. Defendant stated they took Elizabeth to defendant's house and kept her there until the next day, at which time they took her to a motel parking lot and let her go. The statement did

not contain anything about sexual assaults on Elizabeth when at defendant's parents' house.

Carl Allen, Jr. (Allen), a physician's assistant accepted as an expert in the field of emergency medicine, testified for the State that he was on duty when Elizabeth came in on 15 April 1993. She told Allen what had happened, and he related this to the jury. Upon giving Elizabeth a physical examination and obtaining samples for a rape kit, Allen found that Elizabeth's throat was red, and she had bruises on her throat, left shoulder, both sides of her rib, and her left lower thigh, and an abrasion on her right arm and some on her vertebrae. Her vaginal area was very tender, and nonmodal sperm were present on Elizabeth's vaginal swabs. Allen stated that in his opinion, Elizabeth had sexual intercourse in the hours before he examined her, and she had suffered severe bodily trauma.

Special Agent David Mishoe (SA Mishoe), accepted as an expert in the field of latent fingerprinting, testified he found a palm print behind the driver's door of Elizabeth's car which, in his opinion, matched defendant. He examined White's car and found a print which matched defendant.

Special Agent Peter Deaver (SA Deaver), accepted as an expert in the field of forensic serology, testified that he analyzed the items in the sexual assault kit taken from Elizabeth and her clothing and found spermatozoa on Elizabeth's panties and shorts and on her vaginal swabs.

Special Agent Michael Budzynski (SA Budzynski), accepted as an expert in the field of DNA comparison and analysis, explained the procedure involved in DNA comparison and analysis to the jury. He then testified that the DNA profile obtained from the male fraction of deposit on Elizabeth's shorts matched the DNA profile obtained from defendant's blood sample. SA Budzynski stated that the probability of finding another individual with the same DNA profile was "one in more than [5.5] billion for the North Carolina white population, one in [430] million for the North Carolina black population, and one in [5] billion for the North Carolina Lumby [sic] Indian population."

At the close of the State's evidence, defendant moved to dismiss count four, the charge of first-degree sexual offense of forcing Elizabeth to engage in fellatio against her will with defendant. The State conceded this charge "should be submitted to the jury on second degree sexual offense, because all the evidence indicates that at

the time the fellatio occurred, Mr. Sherman White was not present and no deadly weapon was used." The court therefore ordered count four to be a charge of second-degree sexual offense and denied defendant's motion to dismiss. At the close of all the evidence, defendant moved to dismiss two of the three kidnapping charges against defendant "being the defendant's position that there was only one kidnapping." The court denied this motion.

Defendant stated he wished to testify even though his counsel strongly advised him not to. On direct examination, defendant stated "the reason for my sitting here was to say yeah, part of this case I'm guilty of. But there's a great portion of it that I'm not. And that's the reason I'm sitting here is for the part that I'm not guilty of. The first part of this case, yes, I'm guilty of it and I apologize for it. . . . And as a result, I have to pay. I have no problem with that. But the rest of this, the part at my house—and I'll go past the rest of this because that's the part that I came here to testify about." Defendant admitted his involvement in the "first part of the case," referring to the ramming of Elizabeth's car, taking her to the park, and sexually assaulting her there, but denied assaulting her at his parents' house. He acknowledged he "did have sex with her" at his house, but claimed it was not "under force." On cross-examination, however, he answered some questions but refused to answer others. After being admonished by the court to answer, defendant then refused to answer any more questions on cross-examination. At the request of the State, cross-examination was terminated, and the court ordered the testimony to stand as is.

On rebuttal for the State, Elizabeth's sister testified that she and her husband took Elizabeth to stay with them immediately after the attack because Elizabeth was afraid defendant would kill her and her family. The sister stated Elizabeth is still afraid of retaliation from defendant and White and will not stay in Greensboro. Elizabeth stayed with her sister for about six to eight weeks after the attack, at which time Elizabeth transferred to a school in Wilmington. During the time she stayed with her sister, Elizabeth would not go out in public by herself, refused to sleep alone, had nightmares, took medication to help her sleep, sought help from a psychiatrist and a group specializing in counseling for sexual assault victims, would not drive anywhere by herself, and refused to be left alone. The sister stated she has kept in close contact with Elizabeth and knows she still has symptoms. For example, Elizabeth has "not driven by herself until this past December" and "the weekends her roommates have gone . . .

somebody has had to drive to Wilmington or she's had to drive from Wilmington with somebody to pick her up, because she's scared to stay by herself."

The transcript of the trial proceedings before this Court contains the following exchange:

> (Closing argument on behalf of the defendant by Mr. Jennings)
>
> (During Mr. Jennings' argument, Mr. Panosh objected to comments made by Mr. Jennings about mandatory life imprisonment; both counsel approached the bench; the objection was sustained.)

After the closing arguments, the court instructed the jury. In its instruction to the jury on first-degree rape, the court stated:

> I further instruct you that proof of the element of infliction of serious personal injury may be met by showing of mental injury as well as bodily injury. I must tell you, however, and so charge you, that in order to support a jury finding of serious personal injury, because of injury to the mind or a nervous system, the State must offer proof that such injury was not only caused by the defendant, but that the injury extended through some appreciable time beyond the incidents surrounding the crime itself.

The trial court instructed the jury that to find defendant guilty of first-degree kidnapping, the State must prove beyond a reasonable doubt:

> [F]irstly, that the defendant unlawfully confined the person. That is, imprisoned her within a given area.
>
> Secondly, the State must prove that the person did not consent to this confinement. . . .
>
> Thirdly, the State must prove that the defendant confined that person for the purpose of facilitating his commission of robbery. . . .
>
> Fourthly, the State must prove that this confinement was a separate, complete act, independent of and apart from the robbery.
>
> And finally, members of the jury, the State must prove that the person so confined was either not released by the defendant in a safe place or had been sexually assaulted.

After the court gave its charge to the jury, the court heard requests for corrections or additional matters to the charge. Defendant requested in writing a specific instruction from *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982) "that proof of an element of infliction of serious personal injury, as required by G.S. 14-27.22(b) and G.S. 14-27.42(b), may be met by the showing of mental injury as well as bodily injury, but this must be more than the results present in any forcible rape or sexual offense." The court denied defendant's instruction request because it had given the "substance" of the requested instruction.

At defendant's sentencing hearing, the court, before sentencing defendant, noted defendant's disruptive and assaultive conduct in pretrial confinement, including his being charged with possession of a weapon in the local jail and his attempt to escape, defendant's disruptive conduct during trial, including cursing both the district attorney and his own counsel and glowering at and intimidating the prosecuting witness, and defendant's "manifestly contemptuous and disrespective" behavior towards the court. The court then stated:

> I dare say that no parents should have to see or have to hear what these parents' eyes have seen and heard. I dare say the Court has no real way to measure the devastating impact the matters and circumstances described in this testimony have had, and I would not attempt to speculate and will not sentence the defendant on speculation in that respect. But I dare say they want to know, as I think most folks want to know, can brutal rape be punished? Is there any strength left in our law? Are any of our women safe? Have we lost our will to punish criminal violence? Do we have the resolve to resist criminal violence? Or are we simply helpless?

The court also noted the unspeakable violence and atrocities revealed by Elizabeth's testimony "too sor[did] to be repeated in civilized society."

The court then stated "I limit my consideration on the question of punishment to the matters in evidence before the Court." The court took into account defendant's criminal history as an aggravating factor and gave the defendant "credit as a mitigating factor that he made that statement at an early stage, even though he now repudiates that statement." The court also found "as a nonstatutory factor that he identified the codefendant at an early stage." In imposing defendant's sentence, the court found that factors in aggravation substantially outweigh any factors in mitigation.

The issues presented are whether (I) defendant's confession was illegally obtained and therefore erroneously admitted; (II) the State's exercise of three peremptory strikes against potential jurors of African-American descent violated defendant's constitutional right to a jury selected without regard to race; (III) defendant was entitled to have the jury instructed on his requested definition of serious personal injury; (IV) the evidence was sufficient to support a conviction for kidnapping; (V) the evidence was sufficient to support a conviction for second-degree sexual offense; and (VI) defendant is entitled to a new sentencing hearing where the trial court noted defendant's conduct during pretrial confinement and trial and the destructive effect of his crimes on other women and society.

I

[1] Defendant's first argument is that "the question posed to defendant as to [the] identity of Sherman was reasonably likely to result in" incriminating statements, i.e., the answer to this question and defendant's subsequent confession to Detective Whitt, therefore violating defendant's constitutional right to counsel and entitling him to a new trial.

Once an accused has invoked his right to counsel, "the interrogation must cease until an attorney is present," *Miranda v. Arizona*, 384 U.S. 436, 474, 16 L. Ed. 2d 694, 723, *reh'g denied by California v. Stewart*, 385 U.S. 390, 17 L. Ed. 2d 121 (1966), and "a valid waiver of that right cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards v. Arizona*, 451 U.S. 477, 484, 68 L. Ed. 2d 378, 386, *reh'g denied*, 452 U.S. 973, 69 L. Ed. 2d 984 (1981). Once the interrogation is ceased after defendant's invocation of the right to counsel, it can only be recommenced under two sets of circumstances: (1) "reinitiation of conversation by defendant and a knowing and intelligent waiver of the right to counsel by defendant"; and (2) "police-initiated interrogation *once counsel is present.*" *State v. Morris*, 332 N.C. 600, 610, 422 S.E.2d 578, 584 (1992); *see also Minnick v. Mississippi*, 498 U.S. 146, 112 L. Ed. 2d 489 (1990). This rule from *Edwards* and its progeny is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights," *Michigan v. Harvey*, 494 U.S. 344, 350, 108 L. Ed. 2d 293, 302 (1990), "ensures that any statement made in subsequent interrogation is not the result of coercive pressures," *Minnick*, 498 U.S. at 151, 112 L. Ed. 2d at 496, and provides " 'clear and unequivo-

cal' guidelines to the law enforcement profession." *Arizona v. Roberson*, 486 U.S. 675, 682, 100 L. Ed. 2d 704, 714 (1988).

We initially note that the question "Who was Sherman," because it was designed to elicit an incriminating response, constituted an interrogation by the police in violation of *Edwards*; therefore, the trial court properly suppressed Detective Whitt's question, "Who was Sherman" and defendant's subsequent response, "White." *See State v. Washington*, 330 N.C. 188, 410 S.E.2d 55 (1991) (interrogation occurs when objective observer with same knowledge of suspect as police officer would, on sole basis of hearing officer's remarks, infer remarks were designed to elicit incriminating response). The question then is whether defendant's subsequent statement made only "a few moments" later that he wanted to talk to the police was a "reinitiation of conversation by defendant" within the meaning of *Edwards*. We do not believe so. As noted, *Edwards* was designed to ensure against "coercive pressure," and the lapse of "a few moments" between illegal police-initiated interrogation and the request of a defendant to talk is not sufficient to dissipate the effect of the "coercive pressure." In this event, the defendant's request to talk is nothing more than a continuation of the police-initiated interrogation. Defendant's confession was therefore illegally obtained, and the trial court erred in admitting the confession. Although this erroneous admission involves a constitutional violation, a new trial is not required if the State can demonstrate that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *Morris*, 332 N.C. at 610, 422 S.E.2d at 584.

Defendant argues that the State can meet this burden only if it can show that his subsequent decision to testify at trial was not induced by admission of his confession. The United States Supreme Court has held that "the same principle that prohibits the use of confessions [illegally] procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree." *Harrison v. United States*, 392 U.S. 219, 222, 20 L. Ed. 2d 1047, 1051 (1968). The burden is on the State to show that the introduction of the illegally obtained confession did not induce the defendant's subsequent testimony at trial in that the "testimony was obtained 'by means sufficiently distinguishable' from the underlying illegality 'to be purged of the primary taint.' " *Id.* at 226, 20 L. Ed. 2d at 1053. The *Harrison* Court therefore determined that where a defendant has been "induced" at a former trial to testify by the prosecution's introduction in evidence of unlawfully obtained confessions, his testimony, so

induced, may not be admitted in evidence against him at a retrial on the same charge over his objection upon the ground that it was so induced. *Id.* Our Supreme Court, however, determined that where an unconstitutionally obtained confession is introduced in evidence over defendant's objection, the error is cured when the defendant takes the stand in his own behalf at the same trial and testifies to the same facts in the confession, the State having introduced ample evidence apart from that erroneously admitted and the defendant having failed to claim his testimony was impelled by the trial court's errors. *State v. McDaniel*, 274 N.C. 574, 578-84, 164 S.E.2d 469, 471-75 (1968). Under those circumstances, the Court determined there is no violation of *Harrison* because the defendant's testimony was induced by the strength of the State's evidence and not by the erroneous admission of his confession. *Id.*

As in *McDaniel*, it is unrealistic to suppose that, confronted with the overwhelming evidence against him introduced by the State at trial, defendant was "induced" to testify solely because of the introduction of his confession. Furthermore, at no time in the trial court did the defendant or his counsel argue that his testimony was "induced" by the introduction of his confession or that defendant changed his trial strategy as a result of the error in admitting his confession. In addition, defendant's statement did not contain any "confession" concerning sexual assaults at his parents' house, he admitted to the Court he was guilty of the crimes of sexual assault that occurred at the park, and stated that he wished to testify only to deny the State's evidence that he had committed any crimes while he was at his parents' house. Therefore, his testimony at trial was consistent with his statement. We are satisfied that defendant's decision to testify in this case was induced by the strength of the State's evidence and not by the erroneous admission of defendant's statement. Therefore, the State has met its burden of showing that the erroneous admission of defendant's illegally obtained confession constituted harmless error.

II

[2] Defendant also argues his "constitutional right to a jury selected without regard to race was violated by the prosecutor's discriminatory use of peremptory strikes against potential jurors of African-American descent." We disagree.

Because the State voluntarily proffered explanations for its peremptory challenges of African-American jurors, we need not

address the trial court's conclusion that defendant failed to make a prima facie case of discrimination and proceed as if defendant had met his burden. *State v. Robinson*, 330 N.C. 1, 17, 409 S.E.2d 288, 297 (1991).

> In order to rebut a prima facie case of discrimination, the prosecution must "articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." These reasons " 'need not rise to the level justifying exercise of a challenge for cause.' " "So long as the motive does not appear to be racial discrimination, the prosecutor may exercise peremptory challenges on the basis of 'legitimate hunches and past experience.' " "Since the trial judge's findings . . . will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." [Citations omitted.]

Id. In this case, the State indicated that it "was seeking a juror who was from the mainstream of our community, who was employed for a substantial period of time, had a family and had roots in the community." The State explained that it exercised three of its peremptory challenges to exclude three of five African-American potential jurors because none of them "fit the profile" and were not the type of juror the State was seeking. The State explained that Juror No. 4 was a young single male who had worked at his current employment for less than a year, Juror No. 6 was a single female who had worked at her current employment for three months and worked for a temporary service before her current job, and Juror No. 12 was a single female unemployed college student.

Following the general principles established in *Robinson*, the State has met its burden of proffering neutral, nonracial explanations for each peremptory challenge. The State explained it was looking for a certain type of juror with a family, a job that had been maintained for a substantial amount of time, and roots in the community. None of the three jurors excused by the State had the employment history or family which the State was seeking. For these reasons, defendant's *Batson* challenge is denied.

III

[3] Defendant next contends that the trial court erred in denying his written request for "a specific instruction that any serious personal or

bodily injury that would elevate a second degree rape or sexual offense to first degree rape or sexual offense 'must be more than the results present in every forcible rape and sexual offense.' " We disagree.

Our General Assembly has determined that second-degree rape and second-degree sexual offense are elevated to the first degree if serious personal injury is inflicted. N.C.G.S. § 14-27.2 (first-degree rape); N.C.G.S. § 14-27.3 (second-degree rape); N.C.G.S. § 14-27.4 (first-degree sexual offense); N.C.G.S. § 14-27.5 (second-degree sexual offense). Our Supreme Court determined that in order for a mental injury to constitute "serious personal injury," the mental injury "must be more than the *res gestae* results present in every forcible rape and sexual offense. . . . [T]he State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself." *Boone*, 307 N.C. at 205, 297 S.E.2d at 590. We do not read *Boone* as placing an additional burden on the State to show a mental injury must be more than that normally experienced in every forcible rape in addition to showing the mental injury extended for some appreciable time, as defendant suggests. Rather, we read *Boone* as holding that if a mental injury extends for some appreciable time, it is therefore a mental injury beyond that normally experienced in every forcible rape. *See id*, 307 N.C. at 205, 297 S.E.2d at 590 (because only evidence of rape victim's condition was that she was hysterical in morning hours of day crime was committed, and no evidence of residual injury after morning of crime, insufficient evidence for serious personal injury); *State v. Baker*, 336 N.C. 58, 65, 441 S.E.2d 551, 555 (1994) (serious mental injury where rape victim's depression, loss of appetite and weight, counseling, nightmares, and insomnia continued for twelve months after rape); *State v. Davis*, 101 N.C. App. 12, 23, 398 S.E.2d 645, 652 (1990) (serious personal injury where victim suffered from physical pain, appetite loss, severe headaches, nightmares, and difficulty sleeping lasted for at least eight months), *appeal dismissed & disc. rev. denied*, 328 N.C. 574, 403 S.E.2d 516 (1991); *State v. Mayse*, 97 N.C. App. 559, 563-64, 389 S.E.2d 585, 587 (serious mental injury where victim's mental and emotional injuries continued for at least seven months after rape; victim quit work, quit school, moved from home, sought professional help), *disc. rev. denied*, 326 N.C. 803, 393 S.E.2d 903 (1990). Because the trial court's instruction accurately reflects the applicable law regarding "serious personal injury" as established by *Boone*, the trial court's charge on

"serious personal injury" was adequate, and the court did not err in failing to give defendant's specific written instruction request. *State v. Bogle*, 90 N.C. App. 277, 283, 368 S.E.2d 424, 428 (1988), *rev'd on other grounds*, 324 N.C. 190, 376 S.E.2d 745 (1989).

IV

[4] Defendant further challenges the sufficiency of the evidence to support the first-degree kidnapping conviction.

Kidnapping is "unlawfully confin[ing], restrain[ing], or remov[ing] from one place to another, any other person 16 years of age or over without the consent of such person" for the purpose of committing or facilitating the commission of certain specified acts. N.C.G.S. § 14-39(a) (1993). The only kidnapping conviction before this Court is based on kidnapping Elizabeth "for the purpose of facilitating the commission of the felony of Robbery." The other two judgments of first-degree kidnapping, one "for the purpose of facilitating the commission of the felonies of Rape or Sex Offense" and the other "for the purpose of facilitating the commission of the felonies of Rape, or Sex Offense, or Murder," were arrested by the trial judge.

Defendant argues there was no confinement separate from the robbery and relies on *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), in which our Supreme Court concluded that a "removal" which is an integral and inevitable part of some crime other than the kidnapping will not support a separate conviction for kidnapping. *Id.* at 103, 282 S.E.2d at 446.

In *Irwin*, defendant, in an armed robbery of a store, forced a clerk at knife point from the front to the back of the store to open a safe. The Court held that this was a "mere technical asportation" and "an inherent and integral part of the attempted armed robbery" which would not support a separate conviction for kidnapping. *Id.* "The key principle governing whether a kidnapping charge will lie, as expressed in *Irwin*, is whether '[u]nder such circumstances [the victim] is . . . exposed to greater danger than that inherent in the armed robbery itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.' " *State v. Tucker*, 317 N.C. 532, 535-36, 346 S.E.2d 417, 419 (1986) (*quoting Irwin*, 304 N.C. 93, 282 S.E.2d 429).

Similar to our Supreme Court in *Tucker*, we find *Irwin* distinguishable. The State's evidence tended to show defendant got in Elizabeth's car and began choking her with both hands. Defendant

pulled her back in the car when she tried to escape and then dragged her by her hair over the stick shift and out the other side of the car and across the gravel parking lot to White's car. While in White's car, White went through Elizabeth's pocketbook, and defendant stole her jewelry. These acts constituted neither a "mere technical asportation" nor "an inherent and integral part of the" robbery committed, and the evidence is therefore sufficient to support defendant's conviction of first-degree kidnapping.

Defendant also argues that the trial court improperly instructed the jury on the charge of first-degree kidnapping; however, because there is no assignment of error corresponding to the issue presented, we do not consider this matter. *State v. Thomas*, 332 N.C. 544, 554, 423 S.E.2d 75, 80 (1992); N.C. R. App. P. 10(a) (scope of appellate review is limited to those issues presented by assignment of error).

V

[5] Defendant also argues the trial court erred in denying the motion to dismiss the second-degree sexual offense charge because "[a]t no time did [Elizabeth] testify that defendant attempted to have her commit fellatio with him"; therefore, "the evidence simply did not support the charge in this indictment." We disagree.

One of the many indictments against defendant for first-degree sexual offense included a count of fellatio. At the charge conference, this charge was reduced to second-degree sexual offense because defendant acted alone. N.C.G.S. § 27.5 (second-degree sexual offense). In ruling on a defendant's motion to dismiss, the trial court, examining the evidence in the light most favorable to the State and giving the State every reasonable inference and intendment that can be drawn from the evidence, "must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). A person is guilty of a second-degree sexual offense if he or she "engages in a sexual act with another person . . . [b]y force and against the will of the other person." N.C.G.S. § 14-27.5(a)(1) (1993).

In this case, Elizabeth testified that after defendant made her take a shower and douche at his parents' house, "he made [her] perform oral sex on him, but [she] gagged [her]self so he would let [her] stop. . . . He forced [her] head down and made [her] place [her] mouth around his penis, and then [she] proceeded to try and throw up." This

testimony constituted "relevant evidence that a reasonable mind might accept as adequate to support [the] conclusion," *Olson*, 330 N.C. at 564, 411 S.E.2d at 595 (defining substantial evidence), that defendant forced Elizabeth to engage in fellatio against her will. The court, therefore, did not err in denying defendant's motion to dismiss the charge of second-degree sexual offense.

VI

[6] Defendant's final argument is that he "is entitled to a new sentencing hearing because the trial court erroneously found essentially a non-statutory aggravating factor of defendant's unrelated conduct during pretrial confinement and trial and of the especially destructive effect of his crimes on other women and on the fabric of society." Although the court discussed defendant's behavior as devastating upon Elizabeth, her parents and society and commented on how to protect women from brutal rape, the court also stated that it "would not attempt to speculate and will not sentence the defendant on speculation in that respect." The court went on to state that it considered only the evidence in sentencing defendant and took into account defendant's criminal history as an aggravating factor, his statement as a mitigating factor, and his identification of the codefendant at an early stage as a nonstatutory factor. The court's comments indicate it did not consider or apply defendant's disruptive conduct during pretrial confinement and trial and of the especially destructive effect of his crimes on Elizabeth, her parents, other women and on the fabric of society as nonstatutory factors in sentencing defendant. *Cf. State v. Shaw*, 106 N.C. App. 433, 442-43, 417 S.E.2d 262, 268-69 (where trial court's comments indicated he considered that victim is entitled to peace of mind and body in her home in imposing sentences greater than presumptive terms, such consideration is improper basis for increasing presumptive sentence, entitling defendant to new sentencing hearing), *disc. rev. denied*, 333 N.C. 170, 424 S.E.2d 914 (1992). Defendant, therefore, is not entitled to a new sentencing hearing.

Because defense counsel's closing argument is not transcribed in the record before this Court, we are precluded from addressing defendant's contention that "the trial court committed reversible error in sustaining an objection to defendant's closing argument regarding the mandatory life sentences defendant faced." *See State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 ("[a]n appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it"), *disc. rev. denied*, 315

N.C. 188, 337 S.E.2d 862 (1985). For the reasons stated in this opinion, we find no prejudicial error.

No error.

Judges LEWIS and MARTIN, MARK D., concur.

DANNY E. DAVIS AND ANN H. DAVIS, PLAINTIFFS v. LEONARD MESSER, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE WAYNESVILLE FIRE DEPARTMENT, THE TOWN OF WAYNESVILLE, A NORTH CAROLINA MUNICIPAL CORPORATION, THE WAYNESVILLE FIRE DEPARTMENT, AND HAYWOOD COUNTY, DEFENDANTS

No. 9230SC1336

(Filed 6 June 1995)

1. **Municipal Corporations § 444 (NCI4th)— municipal fire department—refusal to fight fire—governmental immunity—purchase of insurance**

Plaintiffs' complaint was sufficient to withstand defendant Town's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs alleged that they called 911 in response to a fire at their residence; the dispatcher confirmed their location and notified the fire department; the dispatcher inquired whether plaintiffs' residence fell within the Town's fire district; the fire fighter answering the call indicated that the Waynesville Fire Department would respond; the Department immediately sent trucks bearing appropriate equipment to the scene; as the firefighters approached plaintiffs' home, they saw a road sign indicating that they were entering another fire district; the fire chief, despite being within .4 mile and in sight of plaintiffs' burning residence, ordered his crew to return to the fire station; plaintiffs' home was ultimately completely destroyed; and the Town had valid and enforceable liability insurance covering the full dollar amount of claims asserted against it.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 37 et seq.

2. **Fires and Firemen § 21 (NCI4th)— fire call outside fire district—initial response halted at district line—action against town—N.C.G.S. § 160A-293 not applicable**

Plaintiffs' claim against defendant town was sufficiently stated so as to avoid preclusion by N.C.G.S. § 160A-293(b) under

defendant town's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs alleged that they called 911 in response to a fire at their residence; the dispatcher confirmed their location and notified the fire department; the dispatcher inquired whether plaintiffs' residence fell within the Town's fire district; the fire fighter answering the call indicated that the Waynesville Fire Department would respond; the Department immediately sent trucks bearing appropriate equipment to the scene; as the firefighters approached plaintiffs' home, they saw a road sign indicating that they were entering another fire district; the fire chief, despite being within .4 mile and in sight of plaintiffs' burning residence, ordered his crew to return to the fire station; and plaintiffs' home was ultimately completely destroyed. The complaint cannot be said to set forth facts which under N.C.G.S. § 160A-293(b) would constitute a "failure" to answer plaintiffs' call, does not allege "delay" by the Department, and plaintiffs' allegations are not related to any negligent "act or omission" of the Department and its employees in the course of "rendering fire protection services outside the Town's corporate limits."

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 662 et seq.

3. Fires and Firemen § 21 (NCI4th)— fire just outside municipal fire district—refusal to fight—liability of city—public duty doctrine

The trial court erred by granting the defendant Town's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs alleged that they called 911 in response to a fire at their residence; the dispatcher confirmed their location and notified the fire department; the dispatcher inquired whether plaintiffs' residence fell within the Town's fire district; the fire fighter answering the call indicated that the Waynesville Fire Department would respond; the department immediately sent trucks bearing appropriate equipment to the scene; as the firefighters approached plaintiffs' home, they saw a road sign indicating that they were entering another fire district; the fire chief, despite being within .4 mile and in sight of plaintiffs' burning residence, ordered his crew to return to the fire station; and plaintiffs' home was ultimately completely destroyed. Plaintiffs alleged facts sufficient to establish a *prima facie* case of negligence against the Town based upon its conduct, as well as sufficient for purposes of Rule 12(b)(6) to place plaintiffs' case within the "special duty" excep-

tion to the public duty doctrine and to withstand the Town's defenses.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 662 et seq.

4. Appeal and Error § 418 (NCI4th)— refusal of fire department to fight fire—negligence in programming 911 system—argument omitted from brief—abandoned

An argument concerning dismissal of a claim based upon alleged negligence in programming a 911 system was abandoned where no argument was presented in the brief.

Am Jur 2d, Appeal and Error §§ 693-696.

5. Fires and Firemen § 21 (NCI4th)— fire call outside fire district—initial response halted at district line—action against chief—N.C.G.S. § 160A-293 not applicable

Plaintiffs' action against a fire chief for not fighting a fire just outside his fire district was not barred by the first clause of N.C.G.S. § 160A-293(b) because the alleged act of negligence was neither a failure nor a delay in answering an emergency call and the purview of the second clause is limited to the municipality and not to officers and employees thereof.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 662 et seq.

6. Public Officers and Employees § 35 (NCI4th)— fire chief—refusal to fight fire outside district—public official immunity—not applicable

A fire chief was not immune from liability for negligence in the performance of his duties where plaintiffs alleged that they called 911 in response to a fire at their residence; the dispatcher confirmed their location and notified the fire department; the dispatcher inquired whether plaintiffs' residence fell within the Town's fire district; the fire fighter answering the call indicated that the Waynesville Fire Department would respond; the Department immediately sent trucks bearing appropriate equipment to the scene; as the firefighters approached plaintiffs' home, they saw a road sign indicating that they were entering another fire district; the fire chief, despite being within .4 mile and in sight of plaintiffs' burning residence, ordered his crew to return to the fire station; and plaintiffs' home was ultimately completely

destroyed. The record reveals no assertion by defendant chief of the affirmative defense of public official immunity and plaintiffs' complaint would have withstood the chief's dismissal motion even had defendant properly asserted the defense because the conduct described in the complaint extends beyond the realm of mere negligence.

Am Jur 2d, Public Officers and Employees §§ 358 et seq., 375.

7. Fires and Firemen § 21 (NCI4th)— fire just outside municipal fire district—refusal to fight—liability of fire chief—public duty doctrine

The trial court erred in granting a fire chief's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs alleged that they called 911 in response to a fire at their residence; the dispatcher confirmed their location and notified the fire department; the dispatcher inquired whether plaintiffs' residence fell within the Town's fire district; the fire fighter answering the call indicated that the Waynesville Fire Department would respond; the Department immediately sent trucks bearing appropriate equipment to the scene; as the firefighters approached plaintiffs' home, they saw a road sign indicating that they were entering another fire district; the fire chief, despite being within .4 mile and in sight of plaintiffs' burning residence, ordered his crew to return to the fire station; and plaintiffs' home was ultimately completely destroyed. Although the chief relied upon the public duty doctrine, plaintiffs have alleged facts adequate to establish a *prima facie* case of negligence as well as the substantive elements of the special duty exception sufficient to avoid the chief's defense.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 662 et seq.

8. Fires and Firemen § 21 (NCI4th)— fire department—capacity to be sued

A fire department was a component part of a town and, as such, lacked the capacity to be sued. Only persons in being may be sued, and there is no statute providing for recovery against a municipal fire department.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 662 et seq.

9. Counties § 126 (NCI4th)— negligence in programming 911 system—immunity—purchase of insurance

Summary judgment was properly granted for defendant county on a claim for negligently programming a 911 system in an action arising from a municipal fire department's refusal to fight a fire just outside its fire district where the record reveals but a single policy of insurance issued to the county which did not provide coverage for plaintiffs' injuries. The county did not waive immunity from this suit.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 37 et seq.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2d 1437.

Appeal by plaintiffs from order entered 19 October 1992 by Judge Forrest A. Ferrell in Haywood County Superior Court. Heard in the Court of Appeals 16 November 1993.

Dean & Gibson, by Michael G. Gibson and Brien D. Stockman, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by W. Bradford Searson, for defendant-appellees Leonard Messer and the Waynesville Fire Department.

Blue, Fellerath, Cloninger & Barbour, P.A., by Frederick S. Barbour, for defendant-appellee Town of Waynesville.

Killian, Kersten, Patton & Ellis, P.A., by Stephen G. Ellis, for defendant-appellee Haywood County.

JOHN, Judge.

In this negligence action based upon destruction of plaintiffs' residence by fire, plaintiffs contend the trial court erred by (1) dismissing their action pursuant to N.C.R. Civ. P. 12(b)(6) (1990) as to defendants Fire Chief Leonard Messer (Messer), the Waynesville Fire Department (the Department) and the Town of Waynesville (the Town); and (2) granting the summary judgment motion of defendant Haywood County (the County). We hold the court erred regarding plaintiffs' claims against the Town and Messer.

In a complaint filed 22 January 1992, plaintiffs claimed their residence had been destroyed as the result of defendants' negligence in the establishment and operation of emergency fire control services. In particular, plaintiffs alleged that prior to 28 January 1989 the County authorized establishment of an "enhanced" 911 emergency response system. Thereafter, by use of "map overlays" and relying in part on information provided by employees of defendant Town, agents of the County assigned each dwelling within the county to a specific fire district. Plaintiffs' residence on 841 Plott Creek Road was listed as being located within the Town's fire district. However, it is undisputed that plaintiffs' address was in actuality within the Saunook fire district. According to plaintiffs, the 911 system was thus negligently programmed by agents of the Town and the County.

Plaintiffs further alleged that a fire at their residence on 28 January 1989 prompted plaintiff Ann Davis to place a telephone call to the new 911 system for assistance. The dispatcher reached by Ms. Davis confirmed the location of the fire as being 841 Plott Creek Road and notified the Department. The 911 dispatcher inquired of the Department whether plaintiffs' residence fell within the Town's fire district; the fire fighter answering the call "indicated that the Waynesville Fire Department would respond to the fire."

According to plaintiffs, the Department immediately sent trucks bearing appropriate equipment to the scene. As they approached plaintiffs' home, however, fire fighters saw a road sign on Plott Creek Road indicating they were entering the Saunook fire district. At that point, despite being within .4 mile and "in sight of . . . [p]laintiffs' burning residence," defendant Messer ordered his crew to return the fire truck to the Department's fire station. Plaintiffs further alleged the Department was authorized to respond to a call outside the Town's district by virtue of a "mutual aid agreement."

In addition, plaintiffs claimed that initial assumption of responsibility for their 911 call by the Department "effectively precluded" any other agency from responding in time to extinguish the fire. More particularly, because they "relied upon the acceptance of the fire call by the Town of Waynesville Fire Department," plaintiffs did not attempt to obtain other assistance. Acceptance of the distress call by the Department coupled with plaintiff's reliance thereon created, according to plaintiffs' complaint, a "special duty" of the Department to plaintiffs. This included continuation of the initial response so as to assure that greater harm did not come to plaintiffs and their property.

Plaintiffs maintained that, as a direct and proximate result of the Department's action, the fire burned unimpeded for an additional 15 to 20 minutes and that ultimately their home was completely destroyed.

Plaintiffs further characterized the conduct of defendant Messer as "reckless, willful, [and] wanton," amounting to "a callous, malicious, willful and wrongful disregard for the property rights and safety of the Plaintiffs."

Plaintiffs sought recovery against all defendants on negligence theories and against Messer (individually and in his official capacity as Fire Chief) on the additional grounds that his conduct was "reckless, willful, wanton, malicious, and without just cause." Regarding the Town, the Department and the County, plaintiffs specifically alleged each entity had "waived governmental or sovereign immunity by the procurement of liability insurance which provides coverage to each of them for the full dollar amount of the claims asserted . . . ."

In their joint answer to the complaint, Messer and the Department moved to dismiss claims against them pursuant to Rule 12(b)(6) on grounds of immunity from liability as provided by N.C. Gen. Stat. § 160A-293 (1994). In its answer, the Town similarly moved to dismiss plaintiffs' action, and also asserted the affirmative defense of municipal immunity. The County likewise raised the affirmative defense of governmental immunity in its answer and specifically denied having waived immunity through the purchase of liability insurance. The County thereafter moved for summary judgment.

Hearing on defendants' various motions was held 19 October 1992. By order entered that same date, the trial court allowed the Rule 12(b)(6) motions of defendants Messer, the Department and the Town, and granted summary judgment in favor of the County. In pertinent part, the court's order provided as follows:

> 1. The 12(b)(6) motions are allowed primarily on the basis of N.C.G.S. 160A-293;
>
> 2. For purposes of this motion, the Court takes as true Plaintiffs' allegations that Defendants have applicable liability insurance.
>
> Regarding the County's Motion for Summary Judgment, the Court considered the record, including the applicable insurance policies and applicable statute, N.C.G.S. 153A-435.

Plaintiffs appeal each of the court's rulings.

I.

Plaintiffs' first assignment of error is directed at the trial court's dismissal pursuant to Rule 12(b)(6) of their claims against defendants Messer, the Department and the Town.

A Rule 12(b)(6) motion to dismiss presents the question of "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted . . . ." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted). In order to survive dismissal under the Rule, a party must "state enough to satisfy the substantive elements of at least some legally recognized claim . . . ." *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 378-79, 265 S.E.2d 890, 909 (citation omitted), *disc. review denied*, 301 N.C. 94 (1980). In ruling upon such motion, the complaint is to be liberally construed, *Jenkins v. Wheeler*, 69 N.C. App. 140, 142, 316 S.E.2d 354, 356, *disc. review denied*, 311 N.C. 758, 321 S.E.2d 136 (1984), and should not be dismissed unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Id.* (citations omitted).

In the case *sub judice*, plaintiffs sought to recover based upon the alleged negligence of the various defendants. In order to plead a *prima facie* case of actionable negligence, a plaintiff's complaint must set out allegations indicating that: (1) defendant owed plaintiff a duty of reasonable care; (2) defendant breached that duty; (3) said breach was an actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as a result thereof. *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123 124 (citations omitted), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 186 (1994). However, because different rules govern the potential liability of the several defendants herein, we examine separately the court's action as to each.

A. Town of Waynesville.

[1] The allegations of plaintiffs' complaint construed liberally, *see, e.g., Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) (citation omitted), contained two distinct claims of negligence against the Town. First, plaintiffs alleged the Department, a "department of the Town of Waynesville, was negligent by initially responding to the emergency call and thereafter not fighting the fire at

plaintiffs' residence. Second, plaintiffs asserted employees of the Town negligently provided incorrect information to the County which resulted in improper programming of the enhanced 911 system. The Town in response insisted it was immune from liability regarding both allegations of negligence.

1. Refusal to Fight the Fire.

(a.) Governmental Immunity.

The common law doctrine of governmental immunity protects a city or county from liability for injuries arising from governmental (as opposed to proprietary) activities. *See, e.g., Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985) (citations omitted); *see also Davis v. Town of Southern Pines*, 116 N.C. App. 663, 673-74, 449 S.E.2d 240, 246 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). Governmental activities have been described as those which promote the "health, safety, security or general welfare of its citizens." *Clark v. Scheld*, 253 N.C. 732, 735, 117 S.E.2d 838, 841 (1961) (citation omitted). The establishment of a 911 emergency system and provision of fire protection indisputably fall within this definition; thus, a municipality would not ordinarily be liable for the negligence of officers and employees undertaking or performing these activities. *See Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993) (fire protection services) (citations omitted), *disc. review denied*, 336 N.C. 77, 445 S.E.2d 46 (1994); *see also Valevais v. City of New Bern*, 10 N.C. App. 215, 218, 178 S.E.2d 109, 112 (1970) (fire protection services) (citation omitted).

However, a municipality may waive governmental immunity by the purchase of liability insurance, *see, e.g., Gregory v. City of Kings Mountain*, 117 N.C. App. 99, 103, 450 S.E.2d 349, 353 (1994) (citations omitted); but "[i]mmunity is waived only to the extent that the city or town is indemnified by the insurance contract from liability for the acts alleged." *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992) (citations omitted); *see also* N.C. Gen. Stat. § 160A-485 (1994).

In the case *sub judice*, plaintiffs' complaint alleged that on 28 January 1989 the Town had valid and enforceable liability insurance covering the full dollar amount of claims asserted against it. Taking this factual allegation as true, as we are required to do in reviewing a Rule 12(b)(6) dismissal, *see Lynn v. Overlook Development*, 98 N.C. App. 75, 79, 389 S.E.2d 609, 612 (1990), *aff'd in part, rev'd in part on*

other grounds, 328 N.C. 689, 403 S.E.2d 469 (1991), we hold its presence in the complaint is sufficient for purposes of the Town's motion to withstand the defense of governmental immunity.

(b.) Immunity under G.S. § 160A-293.

[2] The Town further argues plaintiffs' claims are in any event precluded under G.S. § 160A-293. Indeed, in its order dismissing plaintiffs' action, the trial court indicated its ruling was made "primarily on the basis of N.C.G.S. 160A-293." However, plaintiffs maintain the statute is inapplicable given the specific factual scenario alleged in the complaint. We agree with plaintiffs.

The statute provides in pertinent part as follows:

> [1] No city or any officer or employee thereof shall be held to answer in any civil action or proceeding for *failure or delay in answering calls* for fire protection outside the corporate limits, [2] nor shall any city be held to answer in any civil action or proceeding for the acts or omissions of its officers or employees in rendering fire protection services outside its corporate limits.

G.S. § 160A-293(b) (emphasis added).

According to plaintiffs' allegations, the Department promptly answered their emergency 911 call, proceeded without "further inquiry," dispatched "appropriate fire equipment" to the indicated address, and continued *en route* to a location within sight of the fire until the response was terminated upon order of Messer. "Failure" is defined as "omission of performance of an action or task." Webster's Third New International Dictionary 815 (1968). Liberally construed, *Dixon*, 85 N.C. App. at 340, 354 S.E.2d at 758 (citation omitted), plaintiffs' complaint states the Department answered Ms. Davis' call and immediately directed fire trucks to the scene of the fire at her home. Thus, the complaint cannot be said to set forth facts which under the statute would constitute a "failure" to *answer* plaintiffs' call.

Further, although assuring the 911 dispatcher it would respond, the municipality's fire department did not thereafter arrive at the scene of the fire. Indeed, according to plaintiffs' allegations, the Department made *no* attempt to reach 841 Plott Creek Road with firefighting aid once it ascertained that address fell within another fire district. Webster indicates that to "delay" is to "prolong the time of" or to "detain[] or hinder for a time," and points out that "delay implies a holding back, as by interference, esp. from completion or arrival."

See Webster's at 595. Plaintiffs' complaint presents facts describing a conscious decision by the Department through Messer to turn its fire truck away from the fire as opposed to any prolongation of the time involved in answering plaintiffs' call. As such, the complaint does not allege "delay" by the Department.

Therefore, because the Department's alleged acts of negligence cannot fairly be characterized as either a "failure" or a "delay" under the statute in answering plaintiffs' 911 call, the *first clause* of the section is inapplicable to the circumstances set forth in plaintiffs' complaint.

Defendants also maintain that "an objective reading of [plaintiffs'] complaint . . . shows that [they] seek to recover for alleged negligent acts or omissions of a municipal . . . fire department in rendering fire protection outside the [municipality's] corporate limits," and that plaintiffs' claim is therefore barred by the *second clause* of G.S. § 160A-293(b). We disagree.

The essence of plaintiffs' claim against the Town is that an agent of the Department made a decision *within* the municipality's corporate limits *not to render* fire protection to plaintiffs whose residence was located in the *Saunook* fire district. Plaintiffs' allegations against the Town thus are not related to any negligent "act or omission" of the Department and its employees *in the course of* "rendering fire protection services *outside* [the Town's] corporate limits." (Emphasis added).

Plaintiffs' claim against the Town (based upon the acts of Messer and the Department) as contained in the complaint is therefore sufficiently stated under Rule 12(b)(6) so as to avoid preclusion by G.S. § 160A-293(b).

(c.) The "Public Duty" Doctrine.

[3] We therefore proceed to a determination of whether the allegations of the complaint, construed liberally, are sufficient under Rule 12(b)(6) to set forth a claim for relief based upon the Town's negligence. *See, e.g., Lyon v. Continental Trading Co.*, 76 N.C. App. 499, 502, 333 S.E.2d 774, 775-76 (1985).

As aforementioned, in order to set out a *prima facie* case of actionable negligence, plaintiffs must allege facts indicating that: (1) defendant Town owed plaintiffs a duty of reasonable care; (2) defendant breached that duty; (3) said breach was an actual and proximate

cause of plaintiffs' injury; and (4) plaintiffs suffered damages as a result thereof. *Winters*, 115 N.C. App. at 694, 446 S.E.2d at 124 (citations omitted).

In the case *sub judice*, the Town maintains that because there is "an absence of law" in support of the "duty" element of plaintiffs' negligence claim, the action was properly dismissed pursuant to Rule 12(b)(6). *See, e.g., Home Electric Co. v. Hall and Underdown Heating & Air Cond. Co.*, 86 N.C. App. 540, 542, 358 S.E.2d 539, 540 (1987), *aff'd per curiam*, 322 N.C. 107, 366 S.E.2d 441 (1988). Plaintiffs respond that the Town and its fire department owed them a "special duty" to provide assistance in fighting the fire at their residence.

The Town relies upon the "public duty doctrine" according to which a municipality "ordinarily acts for the benefit of the public at large and not for a specific individual." *See, e.g., Coleman v. Cooper*, 89 N.C. App. 188, 193, 366 S.E.2d 2, 6 (citations omitted), *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988). More specifically, under this doctrine, "a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish . . . protection to specific individuals." *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991) (citation omitted), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). Thus, if applicable, the public duty doctrine would indeed operate to negate the first element of plaintiffs' *prima facie* negligence case—i.e., that the Town owed a duty to plaintiffs to use reasonable care. *See Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403-04, 442 S.E.2d 75, 77-78, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994).

As defendant Town correctly observes, the "defense" of public duty doctrine has been raised almost exclusively in cases involving allegations of negligence in the provision of police protection. *See, e.g., Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901-02; *Clark*, 114 N.C. App. at 404-05, 442 S.E.2d at 77-78; *Hull v. Oldham*, 104 N.C. App. 29, 36, 407 S.E.2d 611, 614-15, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991); *Coleman*, 89 N.C. App. at 192-93, 366 S.E.2d at 5-6. However, in a recent decision by this Court, the doctrine was applied where a plaintiff alleged the county animal shelter and its employees were negligent in the provision of animal control services. *See Prevette v. Forsyth County*, 110 N.C. App. 754, 757-58, 431 S.E.2d 216, 218, *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993). Fire protection services provided by a municipality through its fire depart-

ment are sufficiently similar to the protective services offered by a police department and an animal shelter to justify invocation of the public duty doctrine herein. Nonetheless, we hold the doctrine does not bar the Town's liability under the circumstances alleged in plaintiffs' complaint.

Although a city's duty is generally understood to be to the public at large, two exceptions to the public duty prohibition against municipal liability have emerged in our common law. First, liability may arise when a "special relationship" has formed between the injured party and the protective agency or department. An example would be between "a state's witness or informant who has aided law enforcement officers" and the police department. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. Second, liability exists when a municipality through its protective officers has created a "special duty" to a particular individual by "promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Id.* (quoting *Coleman*, 89 N.C. App. at 194, 366 S.E.2d at 6).

In the case *sub judice*, plaintiffs alleged that although the fire was outside the Town's fire district, the Department was authorized to respond by virtue of a mutual aid agreement. *See* N.C. Gen Stat. § 58-83-1 (1994). Moreover, when the 911 operator reported the fire in progress to the Department and specifically inquired whether 841 Plott Creek Road was within its district, a fire fighter indicated the Department would render assistance. According to plaintiffs' allegations, they thereafter relied upon the Department's promise of protection and hence did not attempt to contact any other fire department. However, although Messer and his crew promptly proceeded towards the fire, they never reached their destination because Messer ordered the fire truck returned to the station when only .4 mile from plaintiffs' address. Plaintiffs claimed the fire consequently burned unimpeded for an additional 15 to 20 minutes and ultimately consumed their home. More specifically, plaintiffs' allegations reflect that by accepting the 911 call and proceeding towards the scene of the fire, the Town (through the acts of its employee Messer and its Department) promised it would provide fire-fighting assistance and protection; the promised protection never arrived; and plaintiffs relied upon the promise to respond to the fire as their exclusive source of aid, resulting in the complete destruction of their home. Again taking plaintiffs' allegations as admitted, *see Warren v. Halifax County*, 90 N.C. App. 271, 272, 368 S.E.2d 47, 49 (1988), we hold they

"state enough to satisfy the substantive elements," *Orange County*, 46 N.C. App. at 378-79, 265 S.E.2d at 909 (citation omitted) of the "special duty" exception to the public duty doctrine.

In sum, because plaintiffs alleged facts sufficient to establish a *prima facie* case of negligence against the Town based upon its conduct on 28 January 1989, as well as sufficient for purposes of Rule 12(b)(6) to place plaintiffs' case within the "special duty" exception to the public duty doctrine and to withstand the Town's defenses, the trial court erred by granting the Town's motion to dismiss. *See, e.g., Clouse v. Motors, Inc.*, 14 N.C. App. 117, 119, 187 S.E.2d 398, 400 (1972).

2. Negligence in 911 Programming.

[4] In their brief, plaintiffs present no argument concerning dismissal of their claim based upon the Town's alleged negligence in contributing to the erroneous programming of the County's enhanced 911 system by providing incorrect information. Consequently, this claim is abandoned. *See* N.C.R. App. P. 28(a); *see also, e.g., Best v. Best*, 81 N.C. App. 337, 341, 344 S.E.2d 363, 366 (1986) (questions not argued in appellant's brief are deemed abandoned) (citations omitted), *disapproved on other grounds, Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994).

B. Fire Chief Messer.

Plaintiffs instituted the instant action against Messer in both his individual and official capacities, alleging his conduct in initially responding to the 911 call and subsequently refusing to provide assistance to plaintiffs was negligent and "reckless, willful, wanton, malicious, and without just cause." In reply, Messer argues plaintiffs' claim is barred by: (1) G.S. § 160A-293; (2) public official immunity; and (3) the public duty doctrine. Because our consideration of plaintiffs' complaint above reveals they have otherwise stated a valid negligence claim against Messer, we turn to a discussion of his assertions that liability is precluded.

1. G.S. § 160A-293.

[5] Determination of Messer's liability under G.S. § 160A-293 involves interpretation and application of the same statutory subsection at issue in our discussion of defendant Town's municipal immunity. *See supra* section I. A. 1.(b.).

Messer contends plaintiffs' action is barred by the "clear and unambiguous" language of G.S. § 160A-293(b). However, as our earlier analysis determined Messer's alleged act of negligence was neither a "failure" nor a "delay" in answering an emergency call, the first clause of G.S. § 160A-293(b) is inapplicable. Moreover, while the second clause of the statute establishes immunity for a municipality in certain circumstances, its purview is limited only to the municipality and not to officers and employees thereof. Messer's reliance upon the statutory section is thus unfounded.

2. Public Official Immunity.

[6] Messer next contends that because "[a]t all times referred to in the complaint, [he] was Chief of the Waynesville Fire Department," he was therefore "a public official immune from liability for negligence in the performance of his duties in such capacity." Conceding *arguendo* that a fire chief is a "public official," and further agreeing that Messer accurately states the rule regarding "public official immunity," *see Mullins v. Friend*, 116 N.C. App. 676, 681, 449 S.E.2d 227, 230 (1994) ("[A] public official [as opposed to a "public employee"] is immune from personal liability for mere negligence in the performance of his duties . . . ."), we nonetheless deem this doctrine unavailing to Messer in the case *sub judice*.

First, it is well-established that public official immunity is an affirmative defense. *See, e.g., Taylor*, 112 N.C. App. at 605-06, 436 S.E.2d at 278; *see also Burwell v. Giant Genie Corp.*, 115 N.C. App. 680, 684, 446 S.E.2d 126, 128-29 (1994). Moreover, the failure to plead an affirmative defense ordinarily results in waiver thereof. *See, e.g., Burwell*, 115 N.C. App. at 684, 446 S.E.2d at 129 (citation omitted).

Our review of the record reveals no assertion by Messer of the affirmative defense of public official immunity, but rather those of the alleged contributory negligence of plaintiffs and the provisions of G.S. § 160A-293. Further, the trial court's decision to dismiss plaintiffs' action for failure to state a claim was expressly based "primarily" upon the statutory defense of G.S. § 160A-293. In short, nothing of record indicates public official immunity was either raised in the pleadings or argued at the trial level; consequently, Messer may not raise this defense for the first time on appeal. *Northwestern Financial Group v. County of Gaston*, 110 N.C. App. 531, 534, 430 S.E.2d 689, 691, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993).

Second, in plaintiffs' complaint, Messer's conduct is not couched simply in terms of "mere negligence." *See, e.g., Messick v. Catawba County*, 110 N.C. App. 707, 717, 431 S.E.2d 489, 495, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). To the contrary, plaintiffs repeatedly refer to Messer's directive to turn the fire trucks around within sight of plaintiffs' burning home as being "malicious," "willful and wanton," "wrongful," "reckless," and "without just cause."

Our courts have held that public officials sued in their individual capacities are "shielded from liability" unless their actions are "corrupt or malicious," or they "acted outside of and beyond the scope of" their duties. *See, e.g., Wiggins*, 73 N.C. App. at 49, 326 S.E.2d at 43 (quoting *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952)); *see also Mullins*, 116 N.C. App. at 681, 449 S.E.2d at 230 (citations omitted); *see also Slade v. Vernon*, 110 N.C. App. 422, 428, 429 S.E.2d 744, 747 (1993) (citation omitted); *see also Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (Court included terms "in bad faith" and "willful and deliberate.") (citations omitted), *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993).

Construing the allegations of plaintiffs' complaint liberally, *Dixon*, 85 N.C. App. at 340, 354 S.E.2d at 758 (citation omitted), we believe Messer's conduct described therein extends beyond the realm of "mere negligence." As such, even had Messer properly asserted the affirmative defense of "public official immunity," plaintiffs' complaint would withstand his dismissal motion.

In the foregoing context, Messer argues the adjectives chosen by plaintiffs to describe his actions constitute "conclusions of law" or "unwarranted deductions of fact," and are not to be taken as admitted for purposes of a Rule 12(b)(6) motion to dismiss. *See Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). He further maintains those conclusions are not supported by any facts pleaded in the complaint. Suffice it to observe that for purposes of Rule 12(b)(6), we consider the complaint's factual allegations [e.g., that at a point .4 mile from plaintiffs' burning house, Messer (who indisputably had authority to provide emergency assistance) decided to abandon plaintiffs' emergency call and instead ordered his crew to return to the fire station] adequate to support a conclusion that Messer's behavior was "malicious," "willful and wanton," or "outside of and beyond the scope of" his official duties as Fire Chief.

3. Public Duty Doctrine.

[7] Messer also relies upon the "public duty doctrine." As aforementioned, under this doctrine, "a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish . . . protection to specific individuals." *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901.

Although the "defense" of public duty doctrine has traditionally been raised almost exclusively in cases involving allegations of negligence in the provision of police protection, *see, e.g., id.* at 370-71, 410 S.E.2d at 901-02, we acknowledged above that the doctrine is properly invoked herein concerning the obligations of a municipal fire department. *See supra* section I. A. 1.(c.). However, as with defendant Town, the doctrine does not operate to bar Messer's liability in the circumstances of the allegations *sub judice*.

Similar to our discussion in relation to the Town, we hold the allegations of plaintiffs' complaint liberally construed, *see Jenkins*, 69 N.C. App. at 142, 316 S.E.2d at 356, and taken as admitted, *see Warren*, 90 N.C. App. at 272, 368 S.E.2d at 49, are sufficient for purposes of Rule 12(b)(6) to establish the "special duty" exception to the public duty doctrine asserted by Messer. Specifically, plaintiffs' claim that by proceeding with his crew towards the scene of the fire immediately following acceptance of the 911 call, Messer (as Fire Chief and "responsible for the control and direction of the activities" of the Department) promised he and the Department would provide fire-fighting assistance and protection; that the promised protection never arrived at plaintiffs' residence as a consequence of Messer's order promulgated within sight of the burning dwelling; and that plaintiffs relied upon the promise to respond as their exclusive source of aid, resulting in the complete destruction of their home. In sum, because plaintiffs have alleged facts adequate to establish a *prima facie* case of negligence as well as the "substantive elements," *Orange County*, 46 N.C. App. at 378-79, 265 S.E.2d at 909, of the "special duty" exception sufficient to avoid Messer's asserted statutory defense, the trial court erred in granting Messer's Rule 12(b)(6) motion. *See, e.g., Clouse*, 14 N.C. App. at 119, 187 S.E.2d at 400.

C. The Waynesville Fire Department.

[8] "Unless a statute provides to the contrary, only persons in being may be sued." *Coleman*, 89 N.C. App. at 192, 366 S.E.2d at 5 (citation omitted). Plaintiffs cite no statute providing for recovery against a

municipal fire department and our research has discovered none. We hold the Department is a component part of defendant Town and, as such, lacks the capacity to be sued. *See id.* (no liability for a police department) (citations omitted). Accordingly, the Department's Rule 12(b)(6) motion was properly allowed.

II.

[9] In their second assignment of error, plaintiffs maintain the trial court erred by granting summary judgment in favor of defendant County. We disagree.

Plaintiffs' claim against the County is based upon allegations that certain county agents negligently programmed the enhanced 911 system by incorrectly identifying plaintiffs' residence as being located in the Town's fire district.

Summary judgment is properly granted only 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." *See* N.C.R. Civ. P. 56 (1990). The party moving for summary judgment (here, the County) bears the burden of establishing the lack of any triable factual issue. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992) (citations omitted). It may meet this burden either by: (1) demonstrating that an essential element of plaintiffs' claim is nonexistent; (2) establishing through discovery that plaintiffs cannot produce evidence to support an essential element of their claim; or (3) showing that plaintiffs cannot survive an affirmative defense, such as governmental (or sovereign) immunity. *Id.* at 63, 414 S.E.2d at 342.

The County relied in the trial court upon the third of the above-mentioned approaches. In particular, it contended that governmental immunity barred plaintiffs' negligence action, and further that it had not waived immunity by purchasing liability insurance covering "acts and losses as claimed by the Plaintiffs."

It is well-established that governmental immunity typically operates as a bar to negligence claims brought against a county, *see, e.g.*, *Messick*, 110 N.C. App. at 714, 431 S.E.2d at 493-94 (citations omitted), but that such immunity may be waived by the purchase of liability insurance. *See* N.C. Gen. Stat. § 153A-435 (1991). Nonetheless, "[i]mmunity is waived only to the extent that the [county] is indemni-

fied by the insurance contract for the acts alleged." *Combs*, 106 N.C. App. at 73, 415 S.E.2d at 92 (citation omitted).

The record *sub judice* reveals but a single policy of insurance issued to the County arguably in effect either at the time the 911 system was programmed or on the date of the fire. We have reviewed that policy (issued by Clarendon National Insurance Company) and agree with the trial court that it did not provide coverage for plaintiffs' injuries. Accordingly, the County did not waive governmental immunity from this tort suit by procuring insurance, and the court properly allowed summary judgment in its favor.

CONCLUSION

Upon our review of the record and applicable authorities, we hold the trial court erred in dismissing plaintiffs' action pursuant to Rule 12(b)(6) as to defendants Messer and the Town. The court's ruling with respect to said defendants is therefore reversed. The order of dismissal as to defendant Department and the entry of summary judgment in favor of defendant County are affirmed.

Affirmed in part; reversed and remanded in part.

Judges GREENE and MARTIN, John M. concur.

JOHN D. GRAY, PETITIONER v. ORANGE COUNTY HEALTH DEPARTMENT, RESPONDENT

No. 9310SC27

(Filed 6 June 1995)

1. Administrative Law and Procedure § 63 (NCI4th)— dismissal of health department employee—petition for judicial review—lack of specificity

The trial court erred by denying respondent's motion to dismiss petitioner's petition for judicial review of his dismissal as a county health department inspector, since the petition failed to meet the specificity requirements of N.C.G.S. § 150B-46 in that it lacked even a single exception to particular findings of fact or conclusions of law and set forth no basis for alleging that the final decision of dismissal was "arbitrary and capricious," except perhaps the statement that it contradicted the recommended deci-

sions of the administrative law judge and the State Personnel Commission which were advisory only.

Am Jur 2d, Administrative Law §§ 561, 562, 564.

2. Administrative Law and Procedure § 67 (NCI4th)—dismissal of health department employee—reversal of health department director's decision—error by trial court

The trial court erred in reversing the decision of the county health department director to dismiss petitioner who was a sanitation inspector where the petition for judicial review alleged no objection to any particular finding of fact in the Final Decision, and each of those findings was therefore binding on the superior court; the trial court's outright rejection of respondent's director's findings and conclusions, followed by adoption instead of the findings of the administrative law judge and the State Personnel Commission, therefore reflected improper application of the "whole record test" and erroneous substitution of the court's judgment for that of the agency as contained in the Final Decision; and proper application of the whole record test supported the conclusion that "just cause" existed to discharge petitioner from employment on grounds of unacceptable personal conduct in making romantic overtures and inappropriate sexually suggestive comments to regulated parties.

Am Jur 2d, Administrative Law §§ 417, 636, 642.

Judge GREENE concurring in part.

Appeal by respondent from order entered 1 October 1992 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 18 November 1993.

Crisp, Davis, Page, Currin & Nichols, by M. Jackson Nichols and Elizabeth T. Dierdorf, for petitioner-appellee.

Coleman, Gledhill & Hargrave, by Geoffrey E. Gledhill, for respondent-appellant.

JOHN, Judge.

Respondent-appellant Orange County Health Department (the Department) appeals an order of the superior court reversing the termination from employment of petitioner-appellee John D. Gray

(Gray). In its ruling, the court also ordered Gray reinstated to his former position and awarded him $5,047.33 in costs and $25,000.00 in attorney fees. Under the circumstances of this case, we believe the trial court erred.

Pertinent factual and procedural information is as follows: On 5 February 1990, Orange County Health Director Daniel B. Reimer (the Director, Reimer) suspended Gray with pay from the position of Registered Sanitarian pending investigation of several complaints. On 22 March 1990, Gray sought to contest his suspension by filing a Petition for Hearing in the Office of Administrative Hearings (OAH) pursuant to N.C. Gen. Stat. § 126-35 (1993) and Chapter 150B of our General Statutes (the Administrative Procedure Act).

Following Reimer's investigation, Gray was discharged from employment with the Department 7 May 1990 on grounds of unacceptable personal conduct. [Pertinent particulars of Gray's alleged conduct are detailed in the Final Decision quoted *infra.*] Gray thereafter filed a second OAH Petition 20 June 1990, claiming *inter alia* his dismissal was not grounded upon "just cause" and thus violated the State Personnel Act. Consolidation of the two petitions was subsequently allowed.

A four-day hearing on Gray's petitions commenced 16 April 1991, with Administrative Law Judge Peter J. Sarda (ALJ Sarda) issuing his Proposed Decision 12 September 1991. Sarda ruled the Department had failed to establish "just cause" for Gray's dismissal under G.S. § 126-35 and ordered his reinstatement. On 14 February 1992, the State Personnel Commission (SPC) issued its "Decision and Order" in the matter, expressly adopting as its own the findings of fact and conclusions of law reached by ALJ Sarda.

Pursuant to N.C. Gen. Stat. §§ 130A-41(b)(12) (1992) and 126-37 (1993), Director Reimer entered his Final Decision in this matter on 13 March 1992, pertinent portions of which read as follows:

> I. FINDINGS OF FACT
>
> A. **Complaint of Lynn Rollins**
>
> 1. On June 28, 1988, Mr. John Gray met with Ms. Lynn Rollins and conducted an initial inspection of the kitchen facility in which Ms. Rollins planned to conduct a catering business.
>
> . . . .

3. At this June 2[8], 1988 meeting, Mr. Gray suggested to Ms. Rollins that she go with him to the beach in a private airplane. Mr. Gray stated to Ms. Rollins that she would look great in a bathing suit. Mr. Gray also asked Ms. Rollins out to dinner. Mr. Gray seemed to be preoccupied with establishing a personal relationship with Ms. Rollins rather than dealing with her questions about establishing a catering operation.

4. Carol Layh . . . heard Mr. Gray invite Ms. Rollins out to dinner.

5. In Ms. Rollins' opinion and in Ms. Layh's opinion, Mr. Gray was "coming on" to Ms. Rollins.

. . . .

8. In May of 1989, the Health Department received a complaint from another Orange County regulated caterer that Ms. Rollins was operating her catering business from her home without a permit. This complaint was verified by Mr. Gray who instructed Ms. Rollins that she would have to stop catering in Orange County until she obtained the necessary permit.

. . . .

10. Ms. Rollins ceased doing catering work from her home and immediately thereafter called several restaurants and located three that were willing to share the use of their facilities. Ms. Rollins then called Mr. Gray and tried to set an appointment with him to inspect the three restaurants she had lined up. Mr. Gray told her that she was moving too fast and that her proposed arrangements would not be possible.

. . . .

12. Mr. Gray also told Ms. Rollins at this time that two regulated restaurant businesses could not operate out of the same kitchen facility.

13. In fact no law or regulation prohibited multiple use of one kitchen facility and the Health Department did not have a policy forbidding this practice.

14. As an alternative to sharing kitchen space, Ms. Rollins informed Mr. Gray that she had a small cottage on her property that she would be willing to renovate to use as a kitchen.

15. Without visiting Ms. Rollins' cottage, Mr. Gray informed her that he was sure such a proposal would not work and that he just could not conceive that it would work out.

16. Because of the lack of cooperation Ms. Rollins was receiving from Mr. Gray, . . . [she] called Mr. [Tony] Laws [Mr. Gray's supervisor].

17. Mr. Laws agreed to meet with Ms. Rollins at her home. During this visit he looked at the proposed cottage and felt that it could, with improvements, provide an acceptable facility for a catering operation.

18. It was during this visit that Ms. Rollins related her belief to Mr. Laws that Mr. Gray was not assisting her because she had previously rejected his advances.

19. . . . Ms. Rollins . . . was unwilling to [speak to Mr. Reimer about her situation and the conduct of Mr. Gray] . . . as she did not want to cause herself any unnecessary trouble while she was a regulated party subject to the oversight of Mr. Gray.

. . . .

21. On June 20, 1989, Mr. Laws, Mr. Jack Knight (District Sanitarian for the State), and Mr. Gray inspected the cottage facility and the kitchen facility located at Beaugart's restaurant as possible kitchen facilities for Ms. Rollins to use for her catering business. Both facilities were found acceptable by all three men, and a permit was issued to Ms. Rollins . . . .

22. At some later point, Ms. Rollins decided to operate her catering business in Durham [as opposed to Orange] County, North Carolina . . . [because] she did not want to operate in the county in which Mr. Gray worked.

B. **Complaint of Hillary Ensminger**

23. On June 21, 1989, Mr. Gray inspected the kitchen facility leased by Jeff and Hillary Ensminger . . . and issued a permit to them for the operation there of their catering business, the Wandering Feast.

. . . .

25. On June 27, 1989, Mr. Gray took a water sample from the kitchen facility which, upon examination by the State Health Lab, indicated the presence of fecal coliform.

26. On July 10, 1989, Mr. Gray took a second water sample which . . . again indicated the presence of fecal coliform.

27. During this visit by Mr. Gray on July 10, 1989, Mrs. Ensminger told Mr. Gray that she would need to confer with her husband about the problem with the water and its effect on their business. As she prepared to call him on the telephone, Mr. Gray remarked, "Well, we can see who's in authority in this relationship," or words to that effect. Mr. Gray then said, "Well, we can see who's on top in this relationship," or words to that effect. These two statements were then followed by Mr. Gray making a sexually related remark using the word "sex" or the phrase "sexual relationship." Mr. Gray then inquired of M[r]s. Ensminger how often she and her husband engaged in sexual relations.

28. These remarks made by Mr. Gray to Mrs. Ensminger were heard by John Wilson, then an employee of the Wandering Feast.

29. Mrs. Ensminger did not react to these comments at this time as she was shocked and because she had been raised to respect and trust persons in positions of authority.

30. Mrs. Ensminger did not bring these comments to the attention of her husband as she did not want to bring any trouble to their business and because the whole episode was unseemly to her.

31. But for Mr. Gray's position of authority over her business she would not have tolerated such conduct. She was intimidated by Mr. Gray because of his position as a health inspector.

. . . .

35. On October 10, 1989, after additional water samples showed the presence of fecal coliform, Mr. Gray . . . suspended the [Ensmingers'] restaurant permit.

36. On the same day, October 10, 1989, Mr. Gray also conducted the fourth quarter inspection of the premises and recorded a score of 88, or "B" grade.

37. The points deducted for the contaminated water supply from the inspection of the kitchen . . . were the difference between an "A" grade and a "B" grade.

38. Mr. Gray had the discretion to conduct this fourth quarter inspection at any time before December 31, 1989.

39. The Ensmingers did not receive an adequate explanation from Mr. Gray or from any representative of the Health Department justifying Mr. Gray's decision to inspect their facility while their restaurant permit was suspended and their business closed.

40. On December 10[,] 19[89], the suspension was lifted, but no inspection was performed by Mr. Gray. This resulted in the "B" grade . . . remain[ing] in effect. . . . As testified to by Mr. Ensminger, the receipt of anything lower than an "A" grade is very damaging to the business of a caterer and a restauranteur [sic].

41. Some time after December 10, 1989, Mr. Ensminger met with Mr. Laws and complained of several items relevant to Mr. Gray's conduct, including: 1) the fact that an inspection was conducted by Mr. Gray while their operating permit was suspended, and 2) the fact that he did not like Mr. Gray being around his wife . . . .

. . . .

C. The Investigatory Process

. . . .

47. . . . [Later,] Mr. Laws contacted Ms. Rollins and asked her if she would be willing to speak with Mr. Reimer concerning Mr. Gray's conduct. She agreed to do so, as she was no longer operating as a regulated party in Orange County.

. . . .

II. CONCLUSIONS OF LAW

. . . .

2. The allegations made by Ms. Rollins and Mrs. Ensminger to the Health Department concerning the behavior of Mr. Gray while acting in his professional capacity as an inspector are credible and were corroborated by independent witnesses.

3. Such conduct on the part of Mr. Gray constitutes unacceptable personal conduct, which is defined by State Personnel Regulation 01J .0604 of Title 25 N.C.A.C. and Section 4.2 of the Orange County Ordinance as that conduct for which, ". . . no reasonable person could, or should, expect to receive prior warn-

ings." Unacceptable personal conduct constitutes just cause for disciplinary action under the State Personnel Act, § 126-35.

4. The evidence presented on behalf of the Health Department meets the sufficiency standards for just cause to dismiss an employee.

5. Specifically, Respondent has shown that Petitioner was dismissed on the grounds of unacceptable personal conduct in that he was (1) flirtatious with Ms. Rollins, that he asked her out to dinner, that he invited her to go to the beach with him, and that he told her how great she would look in a bathing suit (the sum total of which was characterized by Ms. Rollins and Mrs. Layh as "coming on" to her), and (2) for making inappropriate, sexually oriented remarks to Mrs. Ensminger. Both Ms. Rollins and Mrs. Ensminger were regulated parties of the Health Department at such time.

After setting out in detail six reasons why he declined to accept the recommended decision of the ALJ and the SPC, Reimer affirmed the termination of Gray.

Gray thereafter filed a Petition for Judicial Review "in accordance with G.S. 150B, Article 4, and G.S. 126-37," requesting that the superior court reverse the Director's Final Decision and affirm the Recommended Decision and Order of ALJ Sarda as adopted by the SPC with slight modification. He further sought reinstatement to his previous position, or one comparable, as well as costs and attorney fees.

On 10 April 1992, the Department moved to dismiss Gray's petition "pursuant to Rule 12(b)(6) . . . , N.C. Gen. Stat. § 126-37 and N.C. Gen. Stat. § 130A-41," and for a change of venue pursuant to N.C.R. Civ. P. 12(b)(3) (1990).

By order entered 1 October 1992, the superior court reversed Director Reimer's Final Decision, stating in relevant part:

1. Respondent's motion to dismiss and for change of venue is denied.

2. The Court finds that the Orange County Health Director abused his discretion and was arbitrary and capricious in his rejection of the Recommended Decision of the State Personnel Commission.

3. The Court hereby adopts and affirms the Findings of Fact of the State Personnel Commission as its own.

4. The Court hereby adopts and affirms the Conclusions of Law and Recommended Decision of the State Personnel Commission and orders Petitioner's reinstatement and further orders Respondent to pay back pay, benefits, attorney's fees and costs.

5. The Court, having reviewed the affidavit of time and costs finds the costs of $5,047.33 and attorney fees of $25,000.00 are reasonable.

The Department raises seventeen (17) assignments of error to the trial court's ruling, but in its appellate brief has condensed these into five (5) arguments.

I.

[1] The Department first contends the trial court erred by denying its motion to dismiss Gray's petition for judicial review, alleging the petition failed to meet the specificity requirements of N.C. Gen. Stat. § 150B-46 (1991). We find this contention valid.

Under N.C. Gen. Stat. § 150B-43 (1991):

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article [Article 4 of Chapter 150B] . . . .

A party seeking judicial review must file a petition in Wake County Superior Court or the superior court of the county wherein the party resides, *see* N.C. Gen. Stat. § 150B-45 (1991), stating "explicitly . . . what exceptions are taken to the decision or procedure and what relief the petitioner seeks." G.S. § 150B-46. "Explicit" is defined in this context as "characterized by full clear expression: being without vagueness or ambiguity: leaving nothing implied." *Vann v. North Carolina State Bar*, 79 N.C. App. 173, 173-74, 339 S.E.2d 97, 98 (1986) (quoting Webster's Third New International Dictionary 801 (1968)).

In *Vann*, this Court upheld the trial court's dismissal of a petition for judicial review on grounds it failed to meet the requirements of G.S. § 150B-46. More particularly, we stated:

> *In his petition, Vann did not except to any finding of fact or conclusions of law, but made only generalized complaints* as to certain procedural aspects of the hearing before respondent. . . . [W]e . . . conclude that Vann's petition was not sufficiently explicit to allow effective judicial review of respondent's proceedings.

Vann, 79 N.C. App. at 174, 339 S.E.2d at 98 (emphasis added); *but cf. Save Our Rivers, Inc. v. Town of Highlands*, 113 N.C. App. 716, 723-24, 440 S.E.2d 334, 339, *disc. review allowed*, 336 N.C. 609, 447 S.E.2d 402 (1994); *O.S. Steel Erectors v. Brooks, Com'r of Labor*, 84 N.C. App. 630, 632, 353 S.E.2d 869, 871-72 (1987). Further, although Vann contended in his appellate brief that certain "explicit" allegations had in fact been included in the petition, we declined to accept "[s]uch generalized statements" as adequate to withstand the motion to dismiss. *Vann*, 79 N.C. App. at 174, 339 S.E.2d at 98.

A review of Gray's 13 March 1992 petition reveals it likewise was not "sufficiently explicit to [have] allow[ed] effective judicial review." *Id.* The sole portions touching upon Reimer's Final Decision are as follows:

> 8. Respondent has indicated that it will provide a final decision on the Recommended Decision by March 13, 1992 but Petitioner has not received this decision.
>
> 9. Petitioner anticipates that the Final Decision will be to deny reinstatement to Petitioner. If the Recommended Decision is to reinstate Petitioner, then this Petition will be dismissed.
>
> 10. Petitioner reserves the right to amend this Petition upon receipt of the Final Decision and address any issues included therein.
>
> . . . .
>
> EXCEPTIONS TO THE DECISION OF RESPONDENT
>
> 9. Upon information and belief, Petitioner believes that Respondent will deny him reinstatement and the award of attorney fees. Petitioner excepts to this Decision as being contrary to the Recommended Decision of the Administrative Law Judge and the State Personnel Commission . . . . Such Decision was arbitrary and capricious.
>
> 10. Petitioner shows unto the Court that his Petition meets all the requirements under G.S. 150B, Article 4 . . . .

Significantly, the petition lacked even a single exception to particular findings of fact or conclusions of law. Instead, it baldly asserted only that the Department's decision was "contrary to the Recommended Decision of the Administrative Law Judge and the State Personnel Commission." In addition, Gray set forth no basis in his petition for alleging that the Final Decision was "arbitrary and capricious," save perhaps the statement that it contradicted the recommended decisions.

Gray maintains, however, that he met the requirements of G.S. § 150B-46 by excepting broadly to "any [d]ecision of Reimer that was [c]ontrary to the Recommended Decision . . . ." Indeed, such a conclusion is mandated, he continues, by the rule that we are to construe liberally statutes allowing for judicial review in order to "preserve and effectuate that right." *See, e.g., James v. Board of Education*, 15 N.C. App. 531, 533, 190 S.E.2d 224, 226 ("primary purpose of the statute is to confer the right of review") (citation omitted), *disc. review allowed*, 282 N.C. 152, 191 S.E.2d 601, *appeal withdrawn*, 282 N.C. 672, 194 S.E.2d 151 (1972). Although Gray accurately states the general rule, it may not operate to salvage a petition which utterly disregards the statutory specificity requirements.

In the case *sub judice*, the Director's decision consisted of thirty (30) pages, containing eighty-one (81) findings of fact, twelve (12) conclusions of law, and six (6) carefully explained "specific reasons the Orange County Health Director declines to adopt the recommended decision of the Administrative Law Judge and the State Personnel Commission's adoption [thereof]." Particularly in light of the extremely detailed and thorough nature of Reimer's decision, it is difficult to imagine how Gray's petition could be less specific or explicit. Notably, Gray *expressly reserved the right to amend his petition*, signifying an awareness of the necessity to be "explicit." However, the record reflects no attempt at amendment.

Gray also points out that his petition does include specific exceptions to certain procedural violations (and resultant determinations) made by the ALJ and the SPC in their Recommended Decisions. However, G.S. § 150B-43 allows for judicial review of a *final* agency decision which in the case *sub judice* was that issued on 13 March 1992 by Reimer as the "local appointing authority." *See* G.S. § 130A-41. No significance therefore may be attached to exceptions, however "explicit," directed at recommended decisions of the ALJ and the SPC which were merely *advisory* to the appointing authority, *see*

§ 126-37(a); *see also* N.C. Gen. Stat. § 126-37(b1) (Cum. Supp. 1994), and which in any event were favorable to petitioner. *See, e.g., Prevette v. Bullis*, 12 N.C. App. 552, 553, 183 S.E.2d 810, 811 (1971).

Accordingly, as Gray's petition for judicial review "was not sufficiently explicit to permit effective judicial review" of the proceedings, *Vann*, 79 N.C. App. at 174, 339 S.E.2d at 98, we hold the Department's motion to dismiss should have been allowed.

II.

[2] By its next three arguments, the Department contends that even assuming *arguendo* the trial court properly undertook to consider Gray's petition, reversal of the Director's Final Decision was nonetheless error. We find the Department's reasoning persuasive, and believe it provides an additional basis for our decision to reverse the trial court's order.

Examination by this Court of a trial court's order reviewing an agency decision focuses upon determining whether that court properly applied the applicable review standards articulated in N.C. Gen. Stat. § 150B-51 (1991). *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 353 (1990) (citation omitted), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675-76, 443 S.E.2d 114, 118-19 (1994) (citations omitted). Moreover, we are "not required to accord any particular deference to the superior court's findings and conclusions concerning the [Final Decision]." *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 640, 362 S.E.2d 294, 296 (1987) (citation omitted), *disc. review denied*, 321 N.C. 746, 365 S.E.2d 296 (1988).

The Department correctly observes that the "whole record test" is the proper standard of review for the superior court when considering whether an agency decision is "arbitrary and capricious" (as alleged by Gray and found by the trial court herein). *See, e.g., Brooks, Com'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988) (citation omitted); *see also* G.S. § 150B-51. Application of the whole record test generally necessitates examination by the court of all competent evidence comprising the "whole record" so as to ascertain if substantial evidence therein supports the findings and

conclusions of the administrative agency. *See, e.g., Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted).

Although the court's order did not state the standard or scope of review utilized, *see Utilities Comm. v. Oil Co.*, 302 N.C. 14, 20-22, 273 S.E.2d 232, 236 (1981), we consider solely for purposes of this opinion that the court's language to the effect that "the Orange County Health Director abused his discretion and was arbitrary and capricious in his rejection of the Recommended Decision" indicates the court applied the whole record test and thus satisfied the first prong of the requisite twofold task. *See Amanini*, 114 N.C. App. at 675-76, 443 S.E.2d at 118-19 (citation omitted).

With respect to the second prong mandating *proper application* of the whole record test, *id.*, however, we believe the trial court's undertaking was deficient in several respects. First, we reiterate that Gray's petition for judicial review contained no exceptions or objections to *any* specific finding of fact set out in the Final Decision. On a previous occasion this Court has observed:

> [R]espondent did not object . . . to the . . . findings of fact at the superior court level. *The findings of fact were binding, therefore, at that appellate level, and are binding for purposes of our [Court of Appeals'] review.*
>
> . . . .
>
> The whole record test generally requires examination of the entire record, including the evidence which detracts from the agency's decision. Neither party here, however, called the court's attention to any dispute in the evidence by excepting to or assigning error to any of the findings of fact adopted by the [agency]. When an agency finds facts, it is required to resolve conflicting evidence. Since neither party objected to the findings adopted by the [agency], the superior court could reasonably assume that the [agency] had properly resolved these conflicts, and that the findings in each case accurately and properly reflected the whole record.

Walker, 100 N.C. App. at 502-03, 397 S.E.2d at 354 (emphasis added) (citations omitted). Accordingly, as Gray's petition alleged no objection to any particular finding of fact in the Final Decision, each of those findings was binding on the superior court. *See id.* at 502, 397 S.E.2d at 354 (citation omitted).

Moreover, the uncontested findings in the Final Decision constituted the "whole record" for review by the court, *id.* at 503, 397 S.E.2d at 354, which was constrained simply to "examine the conclusions of the [agency] and determine whether they were supported by substantial evidence in the record, as reflected by the findings of fact." *Id.* Stated otherwise, given Gray's failure to object to any findings of fact, the court in applying the whole record test was obligated to accept Reimer's findings as admitted and thereafter determine whether they supported the conclusions reached in the Final Decision. The court's outright rejection of the Director's findings and conclusions, followed by adoption instead of the findings of ALJ Sarda and the SPC, therefore reflects improper application of the "whole record test" and erroneous substitution of the court's judgment for that of the agency as contained in the Final Decision. *Crump v. Bd. of Education*, 79 N.C. App. 372, 374, 339 S.E.2d 483, 484 (citation omitted), *disc. review denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

Further, the court in its order stated simply: "the Orange County Health Director abused his discretion and was arbitrary and capricious in his rejection of the Recommended Decision of the State Personnel Commission." However, proper application of the "whole record test"—*i.e.*, examination of whether the agency's unchallenged findings in the Final Decision (the "whole record," *Walker*, 100 N.C. App. at 503, 397 S.E.2d at 354) support the conclusion that "just cause" existed to discharge Gray from employment on grounds of unacceptable personal conduct—mandates a result different from that reached by the trial court.

Local government employees (including Registered Sanitarians working with county health departments) are subject to the State Personnel Act. As such, they cannot be "discharged, suspended, or demoted for disciplinary reasons, except for just cause." G.S. § 126-35. Our cases have established that "just cause" for dismissal may be grounded upon either "(1) inadequate performance of duties or, (2) personal conduct detrimental to State service." *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 343, 342 S.E.2d 914, 918 (citation omitted), *disc. review denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). It is undisputed that Gray's dismissal was on the basis of unacceptable personal conduct. Our Administrative Code has defined "personal conduct discipline" in this context as "intended to be imposed for those actions for which no reasonable person could, or should, expect to receive prior warnings." *See* N.C. Admin. Code, T25: 01J .0604.

The Final Decision contains findings which, when summarized, indicate that while Gray was acting as a health inspector, he made romantic overtures towards a regulated party (Ms. Rollins), *see* Findings # 3, 4 and 5, and made inappropriate sexually suggestive comments to a second regulated party (Mrs. Ensminger). *See* Findings # 27 and 28. Both women operated small catering companies over which Gray exercised considerable authority. *See, e.g.*, Findings # 1, 10, 12, 13, 14, 15, 17, 19, 23, 30, 31, 36, 37, 38, and 40. The findings further reflect that Ms. Rollins and Mrs. Ensminger felt intimidated by Gray because of the power he possessed to affect their livelihood, *see, e.g.*, Findings # 18, 19, 22, 29, and 30, and suggest that the women's rejection of Gray's advances resulted in their being given inaccurate information and being accorded disparate treatment by Gray. *See, e.g.*, Findings # 10, 12, 13, 15, 17, 18, 21, 38, 39, and 40. Such findings adequately support the conclusion that "taking such liberties with the female clients of the Health Department does constitute improper personal conduct and . . . neither Mr. Gray nor any other person would need to be told in advance that they should not engage in such conduct." Accordingly, the agency's decision to terminate Gray, as reflected in the Final Decision, did not constitute an abuse of discretion and was not arbitrary and capricious. *See, e.g., Joyce v. Winston-Salem State University*, 91 N.C. App. 153, 156, 370 S.E.2d 866, 868 (An agency's determination is arbitrary and capricious "if it clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decisionmaking.") (citation omitted), *disc. review denied*, 323 N.C. 476, 373 S.E.2d 862 (1988).

We therefore reverse the order of the trial court and remand with instructions to reinstate in its entirety the Final Decision of the Department. Our resolution renders discussion of the trial court's award of costs and attorney fees unnecessary.

Reversed and remanded with instructions.

Judge MARTIN, John C. concur.

Judge GREENE concurring in part with separate opinion.

Judge GREENE concurring in part:

I agree with the majority that "Gray's petition for judicial review 'was not sufficiently explicit to permit effective judicial review' of the proceedings" and that the trial court erred in not allowing the

Department's motion to dismiss. For this reason, I would vacate the order of the trial court and remand for reinstatement of the Final Decision of the Department. Because the order of the trial court must be vacated, it is unnecessary to consider, as does the majority, the merits of the appeal to the trial court. I therefore express no opinion on those issues addresses by the majority in Part II of the opinion.

JOHN PAUL AGEE, EMPLOYEE-APPELLANT v. THOMASVILLE FURNITURE PRODUCTS, EMPLOYER, AND LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS-APPELLEES

No. COA94-813

(Filed 6 June 1995)

1. Workers' Compensation § 415, 416 (NCI4th)— master carver—injury to hand and elbow—appeal to full Commission—evidence not reconsidered—new evidence not allowed

There was no abuse of discretion in a workers' compensation action in which a master carver sought compensation for an injury to his elbow where plaintiff contended that the full Industrial Commission erred by failing to review the deputy commissioner's opinion and award *de novo* and by failing to allow plaintiff's motion for additional evidence. N.C.G.S. § 97-85 provides that the full Commission shall review the award and, if good ground be shown, reconsider the evidence and receive further evidence; whether good ground be shown is within the discretion of the Commission. Plaintiff has shown no abuse of discretion nor pointed to any facts indicating that the full Commission failed to make a thorough review of the deputy commissioner's opinion and award.

Am Jur 2d, Workers Compensation § 687.

2. Workers' Compensation § 460 (NCI4th)— master carver—maximum medical improvement—Commission's findings supported by evidence

The evidence in a workers' compensation hearing involving plaintiff's wrist and elbow injuries supported the Industrial Commission's finding that plaintiff's wrist had reached maximum medical improvement and the inferences that defendant employer had suitable work available for plaintiff, and that his wage loss after that date was not due to his compensable wrist

injury. Although plaintiff contended that the Commission should have included a finding that he was entitled to temporary total disability benefits since no evidence existed that defendant had a suitable job available, that the evidence did not support the finding that his wrist had reached maximum medical improvement, and that he sustained a wage loss due to the wrist injury, the evidence showed that plaintiff, a master carver employed by defendant, was released to return to work on 18 May 1992; the doctor's office notes indicate that plaintiff's wrist was doing very well and that any limitations were due to an elbow injury; no further treatment was offered for plaintiff's wrist; plaintiff sustained a noncompensable injury on the eve of his return to work; he was given four weeks leave; he did not return to work when that leave expired and was terminated by defendant employer; and plaintiff continued to see his doctor, who indicated on 16 July that plaintiff's wrist had reached maximum medical improvement.

Am Jur 2d, Workers' Compensation § 709.

3. Workers' Compensation § 454 (NCI4th)— master carver—elbow injury—not the result of accident arising out of employment—finding supported by evidence

The Industrial Commission did not err by concluding that plaintiff's elbow injury was not the result of an accident arising out of and in the course of his employment and that he was not entitled to compensation and treatment for the injury where the Commission, which is the sole judge of the weight and credibility of testimony, found that plaintiff's testimony was not credible, there was competent evidence to support the finding that plaintiff did not injure his elbow in an April 1991 accident as claimed, and there was competent evidence to support the finding that his testimony regarding the cause of an alleged September 1991 accident was not credible.

Am Jur 2d, Workers' Compensation §§ 611-614.

Judge EAGLES dissenting.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 1 May 1994 and amended 18 May 1994. Heard in the Court of Appeals 19 April 1995.

Donaldson & Horsley, P.A., by Kathleen G. Sumner, for plaintiff-appellant.

Brinkley, Walser, McGirt, Miller, Smith & Coles, L.L.P., by G. Thompson Miller, for defendants-appellants.

WALKER, Judge.

Plaintiff injured his wrist on 30 April 1991 while working as a master carver for defendant employer. He reported this injury to the company nurse the next day but did not seek further medical treatment at that time. On 3 September 1991, plaintiff allegedly injured his left elbow when he reached to pull his machine and felt something hot run up his arm. The next day, plaintiff was seen by Dr. Futrell, who referred plaintiff to Dr. Sypher for further treatment.

The parties entered into a Form 21 agreement to pay plaintiff temporary total disability benefits for a "strain to [left] wrist" arising out of the April 1991 injury by accident. Plaintiff received these benefits from 12 September 1991 until 18 May 1992, at which time Dr. Sypher released plaintiff to return to work. The day before his scheduled return to work, plaintiff broke his right little finger in an accident at home. He was given four weeks' leave of absence for the injury to his finger. At the end of that period, plaintiff did not report to work, and he was terminated on 26 June 1992. On 16 July 1992, Dr. Sypher determined that plaintiff's left wrist had reached maximum medical improvement and released him with a ten percent permanent partial disability of the left hand.

On 9 November 1992, plaintiff filed a new claim seeking compensation for an injury to his left elbow arising out of the incident on 3 September 1991. Defendants did not accept this claim. At the hearing, plaintiff contended that he injured his elbow in the April 1991 accident. Defendants disputed this contention and argued that the alleged incident in September 1991 either did not occur at all or did not occur in the manner alleged by plaintiff.

After further discovery, the deputy commissioner filed an Opinion and Award containing the following findings of fact:

> 1. On April 30, 1991, plaintiff injured his left wrist. . . . This injury admittedly resulted from an accident arising out of and in the course of his employment. . . . Plaintiff has now reached maximum medical improvement from this injury and has been released with a ten percent permanent partial disability rating of the left hand.

2. On or about September 3, 1991, plaintiff injured his left arm . . . while pulling on a lever on a machine at work . . . .

3. In a statement to the carrier taken on September 17, 1991, plaintiff stated that he was doing his normal job when the second injury occurred. When asked if there was something different or unusual, he said, "The same way I always do. I just reached and got it and pulled it to me and when I did it just felt like somebody shot a poker up through my arm pit." When asked again about nothing being different or unusual, he said, "Same old thing."

4. In a second statement to the carrier taken on December 14, 1992, he appears to attribute the elbow injury to an additional weight that was on the back of the machine he was operating. This statement is not credible. Johnny Webb, who was plaintiff's supervisor, and Tony Hoglen, who was on the safety committee, both checked the machine after the alleged accident and found no explanation for it sticking as plaintiff alleged. Even the plaintiff acknowledged in his hearing testimony that he could not say that there was additional weight on the machine causing it to stick and had no explanation for why it would stick. . . .

5. Although plaintiff told Johnny Webb immediately after the alleged accident that the machine stuck, such statement is not credible considering the inconsistent statements given the carrier and the lack of any explanation for the machine to stop.

6. Plaintiff also testified that he hurt his elbow on April 30, 1991 when his wrench slipped; however, he received no medical treatment until after his injury on September 3, 1991, and there is no credible evidence, medical or otherwise, that the elbow injury resulted from the first incident . . . .

The deputy commissioner concluded that "the elbow injury was not the result of an accident arising out of and in the course of [plaintiff's] employment" and that plaintiff was not entitled to compensation and medical treatment for the elbow injury.

[1] Plaintiff appealed to the Full Commission and moved to introduce additional evidence relating to medical treatment he had received since the deputy commissioner's decision. The Full Commission found no good ground to reconsider the evidence, receive further evidence, or amend the Opinion and Award, and affirmed and adopted the deputy commissioner's findings and conclusions.

Plaintiff argues that the Full Commission erred by failing to review the deputy commissioner's Opinion and Award *de novo* as required by N.C. Gen. Stat. § 97-85 and by failing to allow plaintiff's motion for additional evidence. N.C. Gen. Stat. § 97-85 (1991) provides that upon a timely appeal of an award of a deputy commissioner, "the full Commission shall review the award, and, *if good ground be shown therefor*, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, *if proper*, amend the award" (emphasis added). Whether "good ground be shown therefor" in any particular case is a matter within the sound discretion of the Commission, and its decision in that regard will not be reviewed on appeal absent a showing of abuse of discretion. *Thompson v. Burlington Industries*, 59 N.C. App. 539, 543, 297 S.E.2d 122, 125 (1982), *cert. denied*, 307 N.C. 582, 299 S.E.2d 650 (1983). Plaintiff has not shown any abuse of discretion in this case, nor has he pointed to any facts indicating that the Full Commission failed to make a thorough review of the deputy commissioner's Opinion and Award. Accordingly, these assignments of error are overruled.

[2] Plaintiff next argues that the Commission erred by failing to make appropriate findings of fact and conclusions of law. Specifically, plaintiff claims that (1) the Commission should have included a finding that plaintiff was entitled to temporary total disability benefits after 18 May 1992 since no evidence existed to show that defendant employer had a suitable job available for plaintiff; (2) the evidence did not support the Commission's finding that plaintiff's wrist had reached maximum medical improvement; and (3) the Commission should have found that plaintiff sustained a wage loss due to the wrist injury.

It is well settled that appellate review of an award of the Industrial Commission is limited to consideration of whether the Commission's findings of fact are supported by competent evidence and whether its findings of fact justify its conclusions of law. *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982); *Gilbert v. Entenmanns, Inc.*, 113 N.C. App. 619, 623, 440 S.E.2d 115, 118 (1994). After a careful review of the evidence, we find there was competent evidence to support the Commission's findings and these findings support its conclusions and award.

The evidence showed that Dr. Sypher released plaintiff to return to work on 18 May 1992. His office notes indicate that plaintiff's wrist

was doing very well and that any limitations were due to the elbow injury. No further treatment was offered for plaintiff's wrist after 18 May 1992. On the eve of plaintiff's return to work, he sustained a non-compensable injury to his right hand and was given four weeks' leave, which was to end on 22 June 1992. When this leave expired, plaintiff did not report to work and was terminated by defendant employer. Plaintiff continued to see Dr. Sypher, who indicated in his office notes from 16 July 1992 that plaintiff's wrist had reached maximum medical improvement. Dr. Sypher released plaintiff from his care on that date.

This evidence supports the Commission's finding that plaintiff's wrist had reached maximum medical improvement. It also supports the inferences that defendant employer had suitable work available for plaintiff on 18 May 1992, the date Dr. Sypher released him to light duty work, and that plaintiff's wage loss after that date was not due to his compensable wrist injury. Thus, the Commission was correct in not awarding plaintiff temporary total disability benefits after that date.

[3] Plaintiff next argues that the Commission erred by concluding that "the elbow injury was not the result of an accident arising out of and in the course of [plaintiff's] employment" and that plaintiff was not entitled to compensation and medical treatment for the elbow injury. Plaintiff argues that "[he] sustained a compensable left wrist and left arm injury on April 30, 1991, which was exacerbated by the September 3, 1991 accident which arose out of and in the course of his employment, when the cutter bar suddenly stopped, jerking plaintiff's left arm and left wrist." Alternatively, he argues that he injured his elbow on 3 September 1991 and that this injury was compensable because it resulted from an accident arising out of and in the course of his employment.

The Commission found that plaintiff's testimony regarding the cause of his alleged elbow injury was not credible. The Commission is the sole judge of the weight and credibility of testimony, and its findings of fact may be set aside on appeal only when there is a complete lack of evidence to support them. *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981).

We find there was competent evidence to support the Commission's finding that plaintiff did not injure his elbow in the April 1991 accident. Plaintiff did not seek medical treatment for any injury until after the alleged September 1991 incident. Following the April accident, plaintiff saw the company nurse, who gave him a wrist

splint. The Form 21 signed by plaintiff was for a strain to plaintiff's left wrist. There is no reference in any medical notes to an elbow injury except in connection with the alleged incident in September 1991, and there is no testimony from any medical provider that, to a reasonable degree of certainty, the April 1991 accident could or might have caused the elbow injury. The Commission found plaintiff's assertions to the contrary were not credible, and this finding will not be disturbed on appeal.

There was also competent evidence to support the finding that plaintiff's testimony regarding the cause of the alleged September 1991 injury was not credible. Plaintiff testified at the hearing that he injured his elbow when the machine stuck but that he had no explanation why the machine stuck. However, prior to the hearing plaintiff had made inconsistent statements in this regard to defendant carrier. In his first interview, plaintiff was asked whether, at the time he pulled the machine to him and felt the pull in his arm, there was "something different or unusual about the way that happened. . . ." Plaintiff replied, "The same way I always do. I just reached and got it and pulled it to me and when I did it just felt like somebody shot a poker up through my arm pit." Plaintiff made no mention of the machine sticking during this interview. In his second interview, plaintiff for the first time blamed his injury on the machine sticking due to added weights on the back of it. Plaintiff's supervisor testified that he examined the machine after plaintiff reported his elbow injury and could find no explanation for the machine sticking. This evidence would support a finding that plaintiff's testimony was not credible. Furthermore, the Commission's finding that the machine did not stick on 3 September 1991 amounts to a finding that plaintiff did not meet his burden of proving that his elbow injury resulted from an accident arising out of and in the course of plaintiff's employment and fully justifies the Commission's conclusion that plaintiff was not entitled to compensation for the elbow injury. *See* N.C. Gen. Stat. § 97-2(6) (Cum. Supp. 1994) ("injury" means "only injury by accident arising out of and in the course of the employment . . ."); *Swindell v. Davis Boat Works*, 78 N.C. App. 393, 397, 337 S.E.2d 592, 594 (1985) (no matter how great the injury, if it occurred under normal working conditions and the employee was injured while performing his regular duties in the usual and customary manner, no accident has occurred), *cert. denied and appeal dismissed*, 316 N.C. 385, 342 S.E.2d 908 (1986).

We have examined plaintiff's other assignments of error and find them to be without merit.

The Opinion and Award of the Full Commission is

Affirmed.

Judge EAGLES dissents.

Judge MARTIN, JOHN C. concurs.

Judge EAGLES dissenting:

I respectfully dissent from the majority's conclusion that plaintiff's injury did not result from an accident arising out and in the course of plaintiff's employment. Plaintiff contends that on 3 September 1991, he injured his left elbow while operating a master carver machine. The majority concludes that there is competent evidence in the record to support the Industrial Commission's finding (hereinafter Commission) that plaintiff's testimony regarding the cause of that accident was not credible and on that basis that compensation should not be awarded. I disagree.

Plaintiff testified:

> I was moving the machine back to change the stock in the machine. Then when I reached to pull the machine back to me, I pulled down on it. When I pulled it to me, the machine stopped. When it did, I felt like something just tore loose in my elbow, and it felt like something hot just ran up my arm, and I couldn't do anything else with it. That was all I done.

The Commission found that plaintiff's testimony was not credible, because plaintiff gave inconsistent statements to defendant's insurance carrier regarding the cause of the accident and the evidence revealed no explanation for the machine to stop.

A careful reading of the record and transcript reveals that plaintiff's statements to defendant's insurance carrier were not inconsistent. Plaintiff was interviewed by Gary Gibson of defendant Liberty Mutual Insurance Company to determine how plaintiff injured his elbow. Plaintiff testified on cross-examination that he told Gibson he injured his elbow on 3 September 1991 when he "loaded the machine back up and reached back over to get the machine like that, to pull the machine, and had to pull it down because of weight and pull it to you, that when you pulled it, you pulled this muscle in your elbow." Plaintiff also testified that when Gibson asked him whether he was

doing anything different or unusual at the time of the accident, plaintiff responded that he was doing "the same [sic] way I always do. I just reached and got it and pulled it to me; and, when I did, it just felt like somebody shot a poker up through my armpit." Plaintiff also gave a second statement to Gibson over the telephone concerning a statement that plaintiff made indicating that the weights on the back of the machine were different. Plaintiff testified on cross-examination that a large round weight that is usually on the front of the machine was missing. Plaintiff testified that he could operate the machine without the weight, but using the weight made it easier to use the machine. These statements are in no way inconsistent. In the first statement to Gibson, plaintiff described what he was doing when he injured his elbow; running the master carver machine "the same as I always do." In his second statement to Gibson, plaintiff described something unusual about the master carver machine, that one of the weights on the machine was missing.

The Commission also found that plaintiff's testimony was not credible because there was no explanation of what caused the machine to stop. While there may be no explanation of what caused the machine to stop, there is no evidence in the record to contradict plaintiff's testimony that the machine stopped while plaintiff was operating the machine. Defendant's evidence consists of testimony that defendant's employees could not cause the machine to stop in the manner that plaintiff described. The facts here are analogous to "unexplained-fall cases." In those cases, even though the reason for the fall which caused injury was unknown, our courts have found that the fall was an accident "arising out of" the employment. *See Slizewski v. International Seafood Inc.*, 46 N.C. App. 228, 264 S.E.2d 810 (1980); *see also Calhoun v. Kimbrell's Inc.*, 6 N.C. App. 386, 170 S.E.2d 177 (1969). Here, as in *Slizewski*, there is no finding that any force or condition independent of the employment caused the machine to stop. Plaintiff, in operating the master carver machine, was engaged in the duties of his employment and the only active force involved in the accident was plaintiff's exertions and the machine's malfunction. In these situations, our courts have liberally interpreted the Workers' Compensation Act to allow the inference that the accident arises out of plaintiff's employment. *Slizewski*, 46 N.C. App. at 233, 264 S.E.2d at 813.

The majority cites *Swindell v. Davis Boat Works*, 78 N.C. App. 393, 337 S.E.2d 592 (1985) for the proposition that plaintiff's injury was not the result of an "accident" arising out of and in the course of

plaintiff's employment. In *Swindell*, this Court stated, "No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by an accident." *Id.* at 397, 337 S.E.2d at 594. *Swindell*, however, is distinguishable on its facts.

Unlike the instant case, in *Swindell*, plaintiff injured his knee while attempting to side-step behind another employee in a small and cramped break area to reach a vending machine. Plaintiff's job involved working in confined areas in cramped conditions over seventy-five percent of the time. Plaintiff testified that he went to the break area every day and that there was nothing unusual about the number of employees present in the area and that he had side-stepped other employees in the same manner on other occasions. On appeal, this Court affirmed the Commission's conclusion that plaintiff did not sustain an injury by "accident" as defined under the Act. Our holding was based on plaintiff's testimony that there were no unusual circumstances at the time of plaintiff's injury. "There must be some new circumstance not a part of the usual work routine in order to find that an accident occurred." *Swindell*, 78 N.C. App. at 396, 337 S.E.2d at 594.

Here, plaintiff testified that when he reached to pull the machine back towards him, the machine stopped rolling forward and he felt "like something just tore loose in my elbow, and it felt like something hot just ran up my arm." The unusual circumstance was the machine not moving properly. There is no evidence that the machine did not stop moving. Plaintiff is not required to prove why the machine stopped moving to recover Workers' Compensation benefits. There is also no medical evidence that plaintiff's elbow injury could not have resulted from the machine stopping unexpectedly.

The majority also concludes that the there is sufficient evidence to support the Commission's finding that the 30 April 1991 injury to plaintiff's wrist had reached maximum medical improvement on 18 May 1992. I disagree. The term "maximum medical improvement" is not defined in the statutes and has been the source of some confusion. G.S. 97-31 provides compensation for temporary disability during the "healing period." The healing period ends when "after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 289, 229 S.E.2d 325, 329 (1976). The point at which the injury has stabilized is often called "maximum medical

improvement." *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 330 (1985). In *Carpenter*, this Court discussed the term "maximum medical improvement" and its relation to the termination of the "healing period" required by G.S. 97-31.

> [Maximum medical improvement] connotes that a claimant is only temporarily totally disabled and his body healing when his condition is steadily improving, and/or he is receiving medical treatment. Yet, recovery from injuries often entails a healing period of alternating improvement and deterioration. In these cases, the healing period is over when the impaired bodily condition is stabilized, or determined to be permanent, and not at one of the temporary high points. Moreover, in many cases the body is able to heal itself, and during convalescence doctors refrain from active treatment with surgery or drugs. Thus, the absence of such medical treatment does not mean that the injury has completely improved or that the impaired bodily condition has stabilized.

Id. at 311, 326 S.E.2d at 330 (1985). Here, plaintiff's physician, Dr. Robert Sypher, released plaintiff to return to light duty work on 18 May 1992. However, he did not state that plaintiff had reached maximum medical improvement until 16 July 1992. Dr. Sypher's notes dated 16 July 1992, indicate that plaintiff had reached maximum medical improvement as of the date of that examination.

In sum, plaintiff's injury to his left elbow resulted from an accident arising in the course of and in the scope of plaintiff's employment. Furthermore, plaintiff should receive temporary disability benefits for the 30 April 1991 injury to his left wrist until plaintiff reached maximum medical improvement on 16 July 1992. Accordingly, I would reverse the Opinion and Award of the Commission and remand for proceedings to determine the amount of compensation to which plaintiff is entitled for any permanent partial disability of plaintiff's elbow.

JOHN M. SOLES, PETITIONER-APPELLEE v. THE CITY OF RALEIGH CIVIL SERVICE COMMISSION, RESPONDENT AND THE CITY OF RALEIGH, INTERVENOR-APPELLANT

No. 9310SC235

Filed 6 June 1995

Constitutional Law § 105 (NCI4th); Municipal Corporations § 380 (NCI4th)— termination of employee without justifiable cause—burden of proof on employee—violation of due process

The trial court did not err in holding that the burden of proof placed upon an employee to establish that he was terminated without justifiable cause as stated in the Rules of the Raleigh Civil Service Commission violated petitioner's procedural due process rights, since petitioner possessed a constitutionally protected property interest in retaining his position with the city; the city could not deprive him of his job without due process; and the procedures in this case did not satisfy due process guarantees when considered in light of a balancing test involving the private interest affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional procedural safeguards, and the government's interest including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail.

Am Jur 2d, Constitutional Law §§ 804 et seq., 821, 822.

Appeal by intervenor from judgment entered 21 December 1992 by Judge W. Stephen Allen, Sr. in Wake County Superior Court. Heard in the Court of Appeals 6 January 1994.

City Attorney Thomas A. McCormick, by Associate City Attorney Lisa Harper Graham, for intervenor-appellant.

Law Offices of Jack B. Crawley, Jr., by Jack B. Crawley, Jr., for petitioner-appellee.

Edelstein & Payne, by M. Travis Payne, and North Carolina Civil Liberties Union, by William G. Simpson, Jr., appearing as amicus curiae.

JOHN, Judge.

Intervenor-appellant City of Raleigh (the City) appeals a judgment of the superior court finding Raleigh Civil Service Act Rule .0504

(Rule .0504) unconstitutional in having placed upon petitioner-appellee John M. Soles (Soles) the burden of proving his termination from employment with the City was "without justifiable cause." Based upon that determination, the trial court remanded the matter to respondent Raleigh Civil Service Commission (the Commission) for further proceedings consistent with the court's order. The City's sole argument on appeal is that the trial court's ruling with respect to Rule .0504 constitutes reversible error. We disagree.

Pertinent factual and procedural information is as follows: Soles was initially hired by the City on 5 April 1984 as an Engineering Aide I. On 13 August 1986, he was promoted to Engineering Aide II, a position he held until 2 December 1990 when the City terminated his employment for "personal conduct detrimental to City service" pursuant to City of Raleigh Standard Procedure 300-14, Rev. B, Section 4.2(k) (1984).

According to the City's Standard Procedures, "[a]n employee . . . may be . . . dismissed for just cause[,]" and "[t]he causes for . . . dismissal fall into two categories [including] . . . causes relating to personal conduct detrimental to City service." *See* Standard Procedure 300-14, Rev. B, §§ 3.1, 3.2 (1984). Among the examples of unsatisfactory personal conduct justifying dismissal listed in section 4.2 is the following:

> Report[ing] to work under the influence of alcohol or illegal use of drugs . . . where such would adversely reflect upon ability to perform assigned duties, or possession of or partaking of such items on the job.

Standard Procedure 300-14, Rev. B, § 4.2(k). Soles was discharged when the City Engineer's investigation produced corroboration of a co-employee's accusation that Soles had violated the foregoing provision.

Following written notification of his termination, Soles appealed unsuccessfully to the City Manager. He thereafter petitioned for an administrative hearing with the Commission on 12 April 1991. Soles alleged he had been "dismissed without justifiable cause" and requested reinstatement to his former position as Engineering Aide II, back pay and counsel fees.

Hearing on Soles' petition was conducted 17 and 31 July 1991. The Commission's proposed decision, entered 16 August 1991, included the following findings of fact and conclusions of law:

27. Mr. Soles was terminated on December 2, 1990, in accordance with City of Raleigh Standard Procedure 300-14, Rev. B, Sec. 4.2(k).

. . . .

CONCLUSIONS OF LAW

. . . .

The petitioner failed to establish by the greater weight of the evidence that he was terminated without justifiable cause.

The City of Raleigh adequately complied with its policies, procedures, and regulations regarding drug use by City employees and in the terminating of the employee in this case.

There was just cause sufficient to warrant the employees' [sic] termination from employment.

(Emphasis added). On 19 September 1991, the Commission issued its Final Decision, adopting *verbatim* the findings of fact and conclusions of law contained in the proposed decision.

On 11 October 1991, Soles appealed the Commission's Final Decision by filing a petition for judicial review with the Wake County Superior Court pursuant to "Section .0605 of the Rules of the City of Raleigh Civil Service Commission and N.C. General Statute Section 150B-43." *Inter alia*, Soles alleged the Commission's conclusion that he had "failed to establish by the greater weight of the evidence that he was terminated without justifiable cause" (based upon the Commission's application of the "burden of proof" set forth in Rule .0504) was "in violation of constitutional provisions." On 8 November 1991, the City moved to intervene as of right in the matter of Soles' petition, *see* N.C.R. Civ. P. 24(a) (1990), which motion was allowed.

After hearing arguments, the superior court entered judgment 16 December 1992, which included the following relevant language:

It further appearing to the Court that at the hearing before the City of Raleigh Civil Service Commission the Petitioner was required to establish, under Rule .0504 of the Rules of the Raleigh Civil Service Commission, that he was terminated without justifiable cause, the Court concludes that . . . requiring him to prove that his dismissal was unjustified is a violation of constitutional provisions of procedural due process.

It therefore is ORDERED that Rule .0504 of the Rules of the Raleigh Civil Service Commission shifting the burden of proof to Petitioner in these proceedings is a violation of constitutional provisions and this matter is remanded to the Raleigh Civil Service Commission for further proceedings consistent with the Court's determination that Rule .0504 of the Rules of the Civil Service Commission is unconstitutional.

The City's four assignments of error have been condensed in its appellate brief into one argument. Specifically, the City contends the court committed prejudicial error by ruling that the burden of proof established in Rule .0504 violated Soles' procedural due process rights under the Fourteenth Amendment to the United States Constitution. We are not persuaded by the City's argument.

It is uncontroverted that the threshold question in determining whether an individual is entitled to due process protection with respect to an occupation is whether that individual possesses a property interest or right in continued employment. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 501 (1985) (citations omitted). "A [constitutionally] protected property interest arises when one has a legitimate claim of entitlement as decided by reference to state law." *Dyer v. Bradshaw*, 54 N.C. App. 136, 139, 282 S.E.2d 548, 550 (1981) (citation omitted). If such an interest exists, a person cannot be deprived of employment unless the employer "first compl[ies] with appropriate procedural safeguards." *Nix v. Dept. of Administration*, 106 N.C. App. 664, 666, 417 S.E.2d 823, 825 (1992) (citation omitted).

Soles emphasizes that the Raleigh Civil Service Act (the Civil Service Act) and personnel policies enacted pursuant thereto establish that "just cause" must be shown before a City employee may be discharged. Because of such provisions, Soles continues, he indeed possessed a constitutionally protected property interest in continued employment as an Engineering Aide II. Soles' reasoning is valid.

An examination of North Carolina law, *see, e.g., id.*, reveals our courts have previously established that the "just cause" provision contained in the State Personnel Act, *see* N.C. Gen. Stat. § 126-35 (1993), creates a "property interest of continued employment . . . protected by the Due Process Clause of the United States Constitution." *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 348, 342 S.E.2d 914, 921 (citations omitted), *disc. review denied*, 318 N.C. 507, 349

S.E.2d 862 (1986); *see also Nix*, 106 N.C. App. at 666, 417 S.E.2d at 825; *see also Loudermill*, 470 U.S. at 538-39, 84 L. Ed. 2d at 501.

The Civil Service Act and related personnel policies governing Soles' employment likewise establish that "just cause" must be shown in order for a City employee to be terminated. *See, e.g., Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992) ("The Town's ordinance, in effect, is comparable to rights given State employees pursuant to N.C.G.S. § 126-35.")

For example, Raleigh Standard Procedure 300-14 (upon which Soles' discharge was based) in pertinent part provides that:

> 3.1 An employee, regardless of occupation, position, profession or work performed, may be warned, reprimanded, placed on probation, demoted, transferred, suspended or dismissed *for just cause.* The degree and kind of action to be taken will be based upon the sound and considered judgment of the appropriate authority in accordance with the provisions of this policy.
>
> 3.2 The *causes* for suspension or dismissal fall into two categories: (1) *Causes* relating to performance of duties; (2) *causes* relating to personal conduct detrimental to City service.
>
> . . . .
>
> 4.2 Personal Conduct—The following are examples of unsatisfactory personal conduct . . . :
>
> . . . .
>
> k. Report to work under the influence of alcohol or illegal use of drugs, . . . where such would adversely reflect upon ability to perform assigned duties, or possession of or partaking of such items on the job.

(Emphasis added).

In addition, the Commission itself expressly recognized the need for Soles' dismissal to be based upon "cause." First, the Chairman stated at the close of Soles' hearing that the Commission would make findings on "the issues of whether or not there was justifiable cause to terminate Mr. Soles . . . ." Further, the Commission included the following among the Conclusions of Law in its Final Decision: "[Soles] failed to establish by the greater weight of the evidence that he was terminated *without justifiable cause.*" (Emphasis added).

We therefore hold petitioner Soles possessed a constitutionally protected property interest in retaining his position as Engineering Aide II with the City. Consequently, the City "could not deprive [him] of [his job] without due process." *Loudermill*, 470 U.S. at 538, 84 L. Ed. 2d at 501; *Nix*, 106 N.C. App. at 666, 417 S.E.2d at 825 ("respondent could not rightfully take away this interest without first complying with appropriate procedural safeguards").

Notwithstanding, the City asserts that in adopting the Civil Service Act, our General Assembly permissibly narrowed the extent of the property interest granted City employees by providing limited procedures for termination of employment. In particular, the City maintains "[t]he North Carolina legislature gave the City a presumption of correctness by placing the burden of proof on the employee . . . to show 'by the greater weight' of the evidence that the administration's actions were wrong and that the City's discharge procedures were not properly followed." *See* Civil Service Act Rule .0504.

As support for its argument, the City relies upon the principle that employment relationships in North Carolina are generally "terminable at will." *See, e.g., Kearney v. County of Durham*, 99 N.C. App. 349, 351, 393 S.E.2d 129, 130 (1990) (citations omitted). Absent enactment of the Civil Service Act, the City explains, Soles would have had no property interest in continued employment and thus could have been dismissed at the will of his employer. Since the General Assembly by enacting the statute conferred upon Soles greater protection than "employment at will," the argument continues, the legislature was free in its discretion to tailor procedural safeguards associated with loss of his employment as it deemed appropriate.

However, Soles correctly responds that the United States Supreme Court has stated:

> "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Loudermill, 470 U.S. at 541, 84 L. Ed. 2d at 503 (alteration in original) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167, 40 L. Ed. 2d 15, 40-41

(1974)). Therefore, following the directive of *Loudermill*, we reject this portion of the City's argument.

Given Soles' constitutionally protected property interest in retaining his position with the City, the question remains as to the nature and composition of the procedural methodology which would satisfy due process guarantees. *Loudermill*, 470 U.S. at 541, 84 L. Ed. 2d at 503 (citation omitted). Rather than attempting to draft a rule for the municipality, we believe our proper role, *see, e.g., Lassiter v. Dept. of Social Services*, 452 U.S. 18, 32, 68 L. Ed. 2d 640, 652-53 (citation omitted), *reh'g denied*, 453 U.S. 927, 69 L. Ed. 2d 1023 (1981), is rather to address the narrower issue of whether the procedures followed in the case *sub judice* comported with the requirements of due process.

Raleigh Civil Service Act Rule .0504 provides:

> .0504 BURDEN OF PROOF
>
> (a) The employee has the burden to prove that the action taken against him was unjustified.
>
> . . . .
>
> (c) The employee must prove his case by the greater weight of the evidence; that is, over fifty percent of the evidence must favor the employee's position in the matter.

The parties agree that determining the composition of adequate process involves a balancing test. *See In re Lamm*, 116 N.C. App. 382, 385, 448 S.E.2d 125, 128 (1994) ("In resolving any claimed violation of procedural due process, a balance must be struck between the respective interests of the individual and the governmental entity seeking a remedy.") (citation omitted), *disc. review allowed*, 339 N.C. 613, 454 S.E.2d 253 (1995); *see also Mathews v. Eldridge*, 424 U.S. 319, 334-35, 47 L. Ed. 2d 18, 33 (1976) (citations omitted); *Lassiter*, 452 U.S. at 27, 68 L. Ed. 2d at 649 (citation omitted); *Loudermill*, 470 U.S. at 542-45, 84 L. Ed. 2d at 504-06 (citations omitted); *see also Santosky v. Kramer*, 455 U.S. 745, 754, 71 L. Ed. 2d 599, 607 (1982) (*Mathews* balancing test applied in context of determining whether statutory allocation of standard of proof violates due process).

The *Mathews* case, frequently cited by our courts, provides the following specification of factors necessarily involved in the balancing process:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 47 L. Ed. 2d at 33 (citation omitted).

In its suggested measurement of the foregoing factors, the City first asserts that Soles' interest is the "desire to have the presumption of correctness in his favor," and contends such interest "was no more at stake than [that of] any other employee." Further, the City argues Soles' interest was adequately protected because the "nature of the misconduct was not disclosed to the public[;] . . . [and Soles] was not faced with criminal sanctions. The City could not prosecute him for the alleged offense. And, he could not be put on probation, fined or incarcerated."

Additionally, the City claims its own "interest in insuring that employees were not using illegal drugs at work outweighed [Soles'] desire to have the presumption of correctness in his favor." As a matter of policy, the City urges us to accord greater weight to its need "to discipline and terminate employees who do not meet [its] standard . . . especially . . . when a question of drug use is involved."

Lastly, based upon the City Engineer's extensive investigation into the accusation against Soles and affording the latter two opportunities to respond, the City contends there was "substantial competent and material evidence" before the Commission to support its findings and conclusions. Thus, the City concludes, requiring Soles to show at the hearing that he was wrongfully discharged did not in any event prevent the Commission from making an "informative and correct" decision.

However, our balancing of the three factors enunciated in *Mathews* produces a different result. First, the "private interest" affected by the challenged procedure in the case *sub judice* must be considered. In this context, we again find guidance in the Supreme Court's *Loudermill* decision:

> [T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired

> worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Loudermill, 470 U.S. at 543, 84 L. Ed. 2d at 504 (citations omitted). Substantial weight must therefore be accorded Soles' interest in retaining the employment in which he possessed a constitutionally protected property right.

Regarding the second factor ("the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"), we agree with Soles that requiring the dismissed employee to prove that the "action taken against him was unjustified" significantly increases the risk of an erroneous deprivation of the right to retain employment. *See Speiser v. Randall*, 357 U.S. 513, 525, 2 L. Ed. 2d 1460, 1472 ("where the burden of proof lies may be decisive of the outcome"), *reh'g denied*, 358 U.S. 860, 3 L. Ed. 2d 95 (1958).

In addition, the risk of error would indisputably be minimized if the appropriate "substitute procedural safeguard" was employed in circumstances such as these—i.e., the City was required to carry the burden of proving its employee was terminated based upon cause. Indeed, as with the "significance of the private interest in retaining employment," *Loudermill*, 470 U.S. at 543, 84 L. Ed. 2d at 504, the "probable value" of such a substitute procedural safeguard "cannot be gainsaid." *Id.*

Concerning the third *Mathews* factor (the City's interest served by the particular procedures utilized), the City's legitimate interest in "insuring that employees [are] not using illegal drugs at work . . . [and in] maintain[ing] good and efficient employees for the efficient operation of the government" must be acknowledged. While the balancing test consequently becomes a much closer decision concerning this final factor, we nonetheless believe the scales tip in favor of an individual employee's right to retain constitutionally protected employment until the City proves cause exists for termination.

Moreover, while the City asserts "fiscal and administrative burdens" would be required upon implementation of the appropriate "substitute procedural safeguard," we are convinced that should any additional difficulty or expense be incurred by the City, such would be minimal. Stated otherwise, because the City previously conducted an investigation and compiled evidence it believed sufficient to war-

rant Soles' dismissal, requiring it thereafter to show just cause for his discharge would add little, if any, "fiscal and administrative burden."

Finally, in reaching our decision we are mindful that "[d]ue process of law formulates a *flexible concept, to insure fundamental fairness* in judicial or administrative proceedings which may adversely affect the protected rights of an individual." *Lamm*, 116 N.C. App. at 385, 448 S.E.2d at 128 (emphasis added) (citations omitted). We also share the trial court's stated concern that the requirements of procedural due process are heightened when, as here, an "employee is accused of misconduct which amounts to a criminal offense against the laws of the State of North Carolina . . . ." *See* N.C. Gen. Stat. § 90-95(a)(3) (1993).

For the reasons discussed hereinabove, we hold that the procedures utilized by the City and the Commission in terminating Soles' employment were constitutionally infirm. Specifically, requiring Soles to establish by the greater weight of the evidence that his termination was unjustified, *see* Rule .0504(a) and (c), violated his right to procedural due process. We therefore affirm the judgment of the superior court ordering that this matter be remanded to the Raleigh Civil Service Commission for further proceedings consistent with the court's determination that Rule .0504's allocation of the burden of proof is unconstitutional.

Affirmed.

Judges COZORT and GREENE concur.

JENNIE LOU STRICKLAND, MOTHER AND JERRY STRICKLAND, FATHER, OF GORDON G. STRICKLAND, EMPLOYEE, PLAINTIFF v. CAROLINA CLASSICS CATFISH, INC., EMPLOYER, & NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA94-781

(Filed 6 June 1995)

Workers' Compensation § 129 (NCI4th)— intoxication of employee—contributing but not proximate cause of death—sufficiency of evidence

The Industrial Commission did not err in finding as fact and concluding as a matter of law that the employee's intoxication

was not a proximate cause of his death where there was testimony that alcohol was a contributing circumstance, but there was also testimony that the accident could also have occurred even if the employee had not been drinking; and there was evidence that fatigue, shifting of load, excessive speed, difficulty of handling the truck on the curve, and an unused seat belt were contributing causes of the employee's death.

Am Jur 2d, Workers' Compensation § 256.

Judge GREENE dissenting.

Appeal by defendants from the Opinion and Award of the North Carolina Industrial Commission filed 11 April 1994. Heard in the Court of Appeals 7 April 1995.

Harrington, Edwards & Braddy, L.L.P., by Roberta L. Edwards and Peter J. M. Romary, for plaintiff-appellee.

Young Moore Henderson & Alvis P.A., by Joe E. Austin, Jr., for defendants-appellants.

LEWIS, Judge.

Gordon G. Strickland was killed in a highway accident which occurred while returning from a trip for his employer, defendant Carolina Classics Catfish, Inc. (hereinafter Catfish, Inc.). On 12 June 1990, Strickland began work at 8:00 a.m., drove over 200 miles to make a delivery of catfish fingerlings, and then began his return trip. He was driving a company truck with three storage tanks mounted on the truck bed. After the delivery, two tanks were empty and one contained dead catfish and water. At approximately 1:20 a.m. on 13 June 1990, as he was driving north along Highway 903, Strickland lost control of the truck in a sharp curve and was killed when his truck overturned. The regular speed limit on the road was 55 miles per hour but 35 miles per hour at the curve. It is undisputed that Strickland was driving about 50 miles per hour in the curve and about 40 miles per hour when the truck crashed, that he had a blood alcohol concentration of 100 milligrams percent (equivalent to .10 on a breathalyzer scale), that he was not wearing a seat belt at the time of the accident, and that Workers' Compensation applies. The evidence also tended to show that Strickland was thrown about in the truck and received fatal head injuries.

Strickland's parents, Jennie Lou Strickland and Jerry Strickland, gave notice of Strickland's death and their request for compensation to defendant Catfish, Inc. pursuant to N.C.G.S. § 97-22. The parties failed to reach an agreement, and claimants requested a hearing pursuant to N.C.G.S. § 97-83. Defendants contend that the claim is precluded by N.C.G.S. § 97-12, which bars workers' compensation when intoxication proximately causes the injury or death of the worker. Deputy Commissioner John Charles Rush heard evidence on whether Strickland was intoxicated and what factors caused the accident.

The key evidence presented on whether intoxication proximately caused Strickland's death was as follows:

Trooper Jerry Mumford, who arrived at the accident scene shortly after the accident, testified that there was a very slight odor of alcohol about the cab of the truck. On his accident report, he listed alcohol as a "contributing circumstance" and indicated that Strickland had been drinking but that he was unable to determine impairment. He stated that some persons are more tolerant of alcohol than others so that impairment must be determined based on a variety of factors and observations. He also testified that other factors such as speed, fatigue, and weight shift contributed to the accident.

Deputy Sheriff Thomas Wilson who lived near the curve testified that the curve was "treacherous" and would be "more severe" for a large vehicle like a truck. He also testified that he was aware of about seven or eight accidents having occurred at that curve.

Dr. Page Hudson, a forensic pathologist, testified that he thought Strickland was impaired because, in his view, anyone with a blood alcohol concentration of 100 milligrams percent was impaired. He noted that the condition of Strickland's liver indicated previous heavy use of alcohol. He further testified that alcohol was a contributing cause but that he could not say it was the sole cause, that speed was "a huge factor", and that speed, fatigue, weight shift, and alcohol all were probably factors causing the accident. On cross-examination, he conceded that the accident "could reasonably have happened without any one of" the factors of alcohol, speed, fatigue, lack of familiarity with the road, time of day, or the presence of liquids in the truck and that "any one of them [the factors], as far as I'm concerned, could have been dropped out and it [the accident] still could have happened."

Charles Manning, Jr., an accident reconstructionist called by defendants, testified that weight shift did not contribute to the accident, that speed was "the major contributing factor" causing the accident and that alcohol was a second factor. He also conceded that it was "possible" that the accident could have happened without alcohol consumption.

Barry Mitchell Hamill, an accident reconstructionist called by plaintiffs, testified that the curve was difficult and that weight shift and fatigue contributed to the accident. In describing the effect of weight shift, he testified that Strickland had control of the truck up until a certain point when the weight shifted and once that point was reached Strickland was "at a point of no return" and there was "nothing more" that could be done to control the vehicle at that point. He also testified that the baffles in the tanks were not designed to prevent water from shifting from side to side and that this design contributed to the weight shift causing the truck to turn over. As to the impact of alcohol use, he testified that he had "no way of knowing" whether alcohol use contributed to the accident because he could not know, absent further information and observations, what Strickland's alcohol tolerance was.

Strickland's sister, Sonya Pickler, testified that her brother was not a heavy drinker. She also testified that the truck was difficult to handle, her brother was uncomfortable driving it, and that the seat belt was not working two weeks prior to the accident. She further testified that her brother was more accustomed to driving a car, rather than the truck, around the curve.

Deputy Commissioner Rush awarded compensation to claimants after making the following findings of fact and conclusions of law, *inter alia*, on the issue of whether intoxication caused the accident:

FINDINGS OF FACT:

5. At about 1:20 a. m. on June 13, 1990, the deceased was travelling north on Highway 903 . . . . A 35-mile per hour speed sign was located south of the Bridge for northbound traffic . . . . The deceased continued on the highway and into the sharp curve. He was about two-thirds of the way through the curve when the truck started skidding sideways to the right. The truck skidded onto the right grassy shoulder of the highway where it continued to skid and then turned over landing in an upside down position

. . . . *The deceased was thrown about in the cab of the truck and sustained severe head injuries causing his instant death.*

6. . . . *The deceased was travelling about 50 miles per hour around the curve and about 40 miles per hour when the truck impacted.*

7. When State Highway Patrolman, Jerry Mumford, arrived at the scene about five minutes after the accident the deceased was still in the cab of the Nissan truck and *there was a slight odor of alcohol about the cab. There were no other signs of alcohol about the cab of the truck. The patrolman noted on his investigation report alcohol use and exceeding safe speed limit were a contributing circumstances [sic] and that the deceased had been drinking but he was unable to determine the impairment of the deceased.*

9. An autopsy report revealed the deceased had a blood alcohol of 100 mg% which is the same as .10 . . . . *There was [sic] fatty changes in the liver which indicated the deceased consumed considerable alcohol in the past. Since the deceased consumed alcohol to this extent he would have had a high tolerance to alcohol.* The cause of death on the report was multiple severe head injuries.

10. *At the time of the accident the deceased had been on duty with the defendant employer about 17 hours.* During about eight of these hours the deceased was driving the Nissan truck.

12. *The death of deceased was not proximately caused by his intoxication.*

CONCLUSIONS OF LAW:

1. The deceased sustained an injury by accident arising out of and in the course of his employment on June 13, 1990, and such injury by accident resulted in his immediate death. *The death of the deceased was not proximately caused by his intoxication. The plaintiffs, therefore, shall not be barred from receiving compensation in this case.* § G. S. 97-2(6), § G. S. 97-12.

(Emphasis added). Defendants requested review by the full Commission (hereinafter Commission). The Commission adopted Deputy Commissioner Rush's opinion and award.

The key issue on appeal is whether the Commission erred in finding as fact and concluding as a matter of law that Strickland's intoxication was not a proximate cause of his death. We affirm.

The scope of review of an appeal from the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by " 'any competent evidence,' " and " 'whether the Commission's findings of fact justify its legal conclusions and decision.' " *Roberts v. ABR Assocs., Inc.*, 101 N.C. App. 135, 138, 398 S.E.2d 917, 918 (1990) (quoting *Sanderson v. Northeast Constr. Co.*, 77 N.C. App. 117, 120-21, 334 S.E.2d 392, 394 (1985)). The Commission's findings of fact are conclusive on appeal if supported by competent evidence; its legal conclusions are reviewable on appeal. *Roberts*, 101 N.C. App. at 141, 398 S.E.2d at 920. In addition, the Commission, and not this Court, is "the sole judge of the credibility of the witnesses" and the weight given to their testimony. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

The employer bears the burden of establishing, pursuant to N.C.G.S. § 97-12, that intoxication was the proximate cause of the injury. *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993). To establish proximate cause under N.C.G.S. § 97-12, an employer must show that "it is more probable than not that intoxication was a cause in fact of the injury," but need not show that intoxication was "a sole cause." *Id.* In affirming the Commission's opinion and award, the *Sidney* court stated that "the opinion of the Industrial Commission . . . is conclusive on this Court *if it is supported by any competent evidence . . . and can only be set aside if there is a complete lack of competent evidence.*" *Id.* (emphasis added) (citations omitted).

After reviewing all of the evidence presented in this case, we hold that there is competent evidence to support the Commission's findings of fact and that these findings justify its conclusion of law that Strickland's death was not proximately caused by his intoxication. Patrolman Mumford's testimony that alcohol was a contributing circumstance was qualified by his further testimony that he could not determine impairment and that his listing of alcohol as a contributing circumstance simply meant that the investigation revealed that Strickland "had a determined amount of alcohol in his body at the time of the accident." Although Hudson and Manning suggested that intoxication was a contributing cause, their testimony was contra-

dicted by concessions on cross-examination that the accident could also have occurred even if Strickland had not been drinking. The weight and sufficiency of the evidence on these factors depended in large part on the credibility of the witnesses. Since Hudson and Manning equivocated on whether intoxication was a proximate cause of Strickland's death, we can reasonably conclude that Deputy Commissioner Rush and the Commission found their credibility wanting on this issue. *See Sidney*, 109 N.C. App. at 257, 426 S.E.2d at 427.

The record is also replete with evidence that fatigue, shifting of the water and catfish in the storage tanks, excessive speed, the difficulty of handling the truck on the curve, and the unused seat belt were contributing causes of Strickland's death. Manning and Hudson stated, respectively, that speed was "the major contributing factor" or "a huge factor." Mumford also stated that speed was a factor. Mumford, Hudson, and Hamill all stated that fatigue was a causal factor. Strickland's sister testified that the truck was difficult to handle, the seat belt was not working, and that her brother was uncomfortable driving the truck and not used to driving it around that curve. Furthermore, Hamill testified that once the truck reached a certain point in the curve and the weight shifted, there was nothing Strickland could have done to regain control of the vehicle. Both Mumford and Hudson confirmed that weight shift was a contributing factor. The Commission could reasonably have concluded that any of these factors proximately caused Strickland's death and that defendants did not meet their burden to prove that intoxication was a proximate cause.

Given the presence of competent evidence on both sides of the issue of whether intoxication was a proximate cause of death, we affirm the opinion of the Commission that the employer did not carry its burden on this issue.

Defendants also contend that the Commission failed to review the award as required pursuant to N.C.G.S. § 97-85 (1991). We conclude that this assignment of error is without merit.

For the reasons stated, the Opinion and Award of the Commission is affirmed.

Affirmed.

Judge MARTIN, Mark D. concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

Because some of the testimony in this case is legally insufficient to support a finding of fact that the "death of the deceased was not proximately caused by his intoxication" and because the Commission failed in its duty to identify in its Opinion and Award the portions of testimony on which its finding was based, I would reverse the Opinion and Award of the Commission.

There were four persons who testified with regard to the deceased's intoxication at the time of the accident. Hudson stated that "in [his] opinion [intoxication] did contribute" to the accident, but testified as follows on cross-examination:

> Q. . . . Considering all the factors that were at work here absent the alcohol—the speed, the fatigue, the truck, the fact that he was hauling liquids, the fact that it was late at night, the fact that he may or may not have been familiar with the road—isn't it entirely conceivable that this accident could have happened exactly the same way that it did absent any alcohol in his system.
>
> A. Yes, it could have happened—could reasonably have happened without any one of those factors. Any one of them, as far as I'm concerned, could have been dropped out and it still could have happened.

Manning testified that speed and alcohol, and not the shifting of the truck's weight due to the tank full of catfish and water, were the factors which contributed to Strickland's accident. He also admitted on cross-examination, however, that if Strickland were driving fifty-three miles per hour around the curve, in the same truck, at 1:30 a.m., "[i]t's possible" that the accident could have still occurred, even absent any alcohol consumption by Strickland. Mumford listed alcohol as a "contributing circumstance" on his accident report and also determined that speed, the time of day, and a shifting of the weight on the truck contributed to the accident. Hamill cited fatigue, weight shift, and speed as contributing causes, but stated that he had "no way of knowing whether" Strickland's alcohol use was a contributing factor based on the evidence available.

The dispositive question is whether this testimony can support the finding entered by the Commission that intoxication was not a proximate cause of the death of the employee. I do not disagree with the majority that this Court is bound by the finding if there is "any competent evidence" to support it. This "any competent evidence"

standard of review, however, does not mean that any evidence, without regard to its quantity, is sufficient to support a finding. In order to support a finding, the competent evidence must be of "minimum quantity." 3 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 80.10(c) [hereinafter *Larson*]. In the words of our Supreme Court, the question is whether there exist "sufficient competent evidence . . . to support [the] findings of fact [of the Commission]." *Walston v. Burlington Indus.*, 304 N.C. 670, 678, 285 S.E.2d 822, 827, *reh'g granted*, 305 N.C. 296, —— S.E.2d —— (1982) (making factual correction only); *Hildebrand v. Furniture Co.*, 212 N.C. 100, 109, 193 S.E. 294, 300 (1937); *see also Keller v. Wiring Co.*, 259 N.C. 222, 223, 130 S.E.2d 342, 342-43 (1963) (appellate court reviews evidence to determine whether it was "sufficient" to support the Commission's findings); *Aycock v. Cooper*, 202 N.C. 500, 504, 163 S.E. 569, 570 (1932) (there must be evidence of "sufficient probative force" to support the Commission's findings). Regardless of the phrase used to describe the "minimum quantity" of the evidence necessary to support a finding of the Commission, the finding "cannot . . . be based on speculation and conjecture," *Larson* at 80.00, and must be based on evidence that a reasonable mind might accept as adequate to support the finding. *See Garret v. Overman*, 103 N.C. App. 259, 262, 404 S.E.2d 882, 884, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 519 (1991). When there is a lack of sufficient competent evidence to support the Commission's findings of fact, this Court will set those findings aside. *See Hildebrand*, 212 N.C. at 112-13, 193 S.E. at 303.

The majority concludes that there is "competent evidence on both sides of the issue of whether intoxication was a proximate cause of death." The only testimony in this record that intoxication was not a cause of the death is that of Hudson and Manning given on cross-examination. Manning stated that the accident "possibl[y] could have happened absent alcohol." This testimony is nothing more than speculation and cannot support a finding of no causation. *See Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990) (sufficient evidence must reflect some degree of probability). Hudson was asked whether it was "conceivable" that alcohol may not have been a contributing factor. In response he stated that the accident "could" have happened even absent the use of alcohol. Although opinion testimony expressed in terms of "could" can be sufficient evidence, it "depends upon the general state of the evidence." 1 *Kenneth S. Broun, Brandis and Broun on North Carolina*

Evidence § 189 n.330 (4th ed. 1993). The opinion that the accident "could" have happened without alcohol was given in response to the question of whether it was "conceivable" that alcohol was not a contributing factor to the death. Conceivable is defined to mean "logically possible." Webster's *Third New International Dictionary* 469 (1968). The answer when read in the context of the question suggests nothing more than the possibility that the accident could have happened absent the use of alcohol and thus cannot support the finding of no proximate cause. *See State v. Robinson*, 310 N.C. 530, 534, 313 S.E.2d 571, 574-75 (1984) ("could" cause vaginal condition insufficient to support finding).

The findings entered by the Commission do not reveal whether the Commission based its proximate cause finding on the evidence which is inadequate to support that finding. *See Morgan v. Thomasville Furniture Indus., Inc.*, 2 N.C. App. 126, 128, 162 S.E.2d 619, 620 (1968) (Commission must make specific findings with regard to crucial facts). Accordingly, I would reverse the Opinion and Award of the Commission and remand for entry of a new Opinion and Award with directions that the testimony of Hudson and Manning given on cross-examination, as discussed herein, not be considered as sufficient to support a finding on proximate cause.

NCNB NATIONAL BANK OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. DELOITTE & TOUCHE, DEFENDANT-APPELLANT

No. COA94-785

(Filed 6 June 1995)

1. Accountants § 21 (NCI4th)— negligent misrepresentation—sufficiency of evidence

Evidence was sufficient to show that the tort of negligent misrepresentation occurred in this case and that plaintiff relied upon financial statements prepared by defendant accountant to its detriment where there was extensive testimony from plaintiff's bankers, defendant's records, and other reports that defendant prepared its client's 1986 audit knowing that the client intended to finance purchase of a competitor through funds borrowed from plaintiff.

Am Jur 2d, Accountants § 25.

2. Accountants § 20 (NCI4th)— negligent misrepresentation claim—applicable statute of limitations

The trial court properly denied defendant's motions for a directed verdict and a judgment n.o.v. on the grounds that the claims of plaintiff were barred by the applicable statute of limitations and statute of repose, since this was an action for negligent misrepresentation, not malpractice, and the cause of action therefore did not accrue until plaintiff suffered some harm because of the misrepresentation and discovered the misrepresentation, both of which events occurred within three years of plaintiff's filing of the suit.

Am Jur 2d, Accountants § 29.

Application of statute of limitations to actions for breach of duty in performing services of public accountant. 7 ALR5th 852.

Appeal by defendant from judgment entered 11 May 1993 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 April 1995.

Sumner & Hewes, by Stephen J. Anderson, and Maupin Taylor Ellis & Adams, P.A., by Daniel K. Bryson and Laura Kay W. Berry, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr. and Mack Sperling, for defendant-appellant.

JOHNSON, Judge.

This is an accountant's liability action brought by plaintiff NCNB National Bank of North Carolina against defendant Deloitte & Touche. Plaintiff sued defendant on 14 September 1989, asserting claims of (1) negligent misrepresentation and (2) breach of the audit contract between defendant and Specialty Retail Concepts, Inc. (SRC), to which plaintiff claimed it was a third party beneficiary. Defendant's motion to dismiss was denied by an order dated 30 January 1990 and defendant's motion for summary judgment was denied by an order dated 8 June 1992. After a jury trial, the court granted defendant's motion for a directed verdict as to plaintiff's contract claim.

The jury returned a verdict on 19 February 1993 in favor of plaintiff on its negligent misrepresentation claim on one of eight loans for which plaintiff had sued. The outstanding balance on that particular loan was $2,921,123.02; the jury awarded that amount as damages, but found that plaintiff could have mitigated damages in the amount of $2,535,324.30. A judgment against defendant in the amount of $385,809.72 was entered on 11 May 1993. Defendant's post-trial motions for a judgment notwithstanding the verdict and a new trial, made on 1 March 1993 and 13 May 1993, were denied by the trial court on 29 December 1993. Defendant gave notice of appeal to our Court.

THE FACTS

The facts of this case are as follows: SRC was a Winston-Salem based franchising company whose primary business was selling franchises for small, specialty food retail shops usually located in enclosed shopping malls. SRC also wholesaled products to these shops.

Defendant is an accounting firm which served as SRC's auditors from 1981 until 31 July 1987. As was the custom with its clients, an annual oral agreement was the basis for the services defendant provided to SRC.

Plaintiff was SRC's primary bank beginning in 1985. During 1985 and 1986, plaintiff made loans to SRC. Plaintiff relied upon many factors in determining to make loans to SRC, including the quality of SRC's management, SRC's unaudited quarterly financial information, public offering of SRC stock, and SRC's financial projections for the future. Each of the loans to SRC was subject to an approval process which began with Mr. Alan Pike, plaintiff's commercial loan officer in Winston-Salem, and culminated with plaintiff's regional executive and chairman of its regional loan committee. Review of SRC's audited financial statements was required by the loan agreements between plaintiff and SRC and was a substantial part of this approval process. The loan agreements imposing the requirement that SRC was required to provide plaintiff with audited annual financial statements were included by defendant in its permanent SRC audit files and specifically reviewed by defendant's auditors during each audit.

Defendant communicated with plaintiff about the status of SRC loans. For example, at times, SRC did not maintain the level of collateral required by the loan agreements. Before rendering an unqualified opinion regarding SRC's financial statements, defendant would

require assurances from plaintiff that they would not declare loans in default. Defendant asked for, and plaintiff provided, covenant violation waiver letters during both the 1985 and 1986 audits.

The loan on which the jury found defendant liable was a $3.5 million dollar loan from plaintiff to SRC in 1986. The purpose of this loan was to enable SRC to purchase assets of a competitor, Jo-Ann's Nuthouse (Jo-Ann's). This loan was more than three times the size of any other loan made to SRC by plaintiff.

SRC first approached plaintiff about the Jo-Ann's loan in May 1986, just before the 31 May end of SRC's fiscal year, as the 1986 audit was being planned by defendant. The seller, Jo-Ann's, had requested assurance that SRC would be able financially to purchase the assets. Although SRC initially contemplated and discussed a public stock offering, the company only approached plaintiff about financing.

In May 1986, SRC asked plaintiff for a commitment letter regarding the loan. At this point, plaintiff had received only interim, unaudited 1986 financial information from SRC, which showed substantially increased profits. Plaintiff reviewed and relied on this information, but SRC understood that funding the loan was contingent on independent verification by defendant, through an audit of SRC's 1986 financial performance. Plaintiff's loan officer, plaintiff's city executive, and SRC's president all testified to this.

Plaintiff proposed a commitment letter. A draft of the letter provided expressly that the loan would not be funded until plaintiff received SRC's audited 1986 financial statements. SRC believed that Jo-Ann's would not be satisfied with that contingency and asked plaintiff to delete it. In its place, plaintiff inserted the following language: "Funding of the term loan is subject to our negotiation of a satisfactory Loan Agreement covering all borrowings. We expect such a Loan Agreement to closely follow covenants already in the existing Loan Agreement." Both SRC's president and plaintiff's bankers testified that all parties understood that this contingency meant, among other things, that the loan would not be finalized until the 1986 audit report was available.

Plaintiff's bankers also testified at length that the loan approval process they undertook in May concerned the commitment letter only, not approval for the funding of a loan. Thus, before the loan was funded, the approval process had to be repeated in August and

September, based on additional information including assurances from defendant about SRC's 1986 financial position.

On 14 August 1986, Mr. Robert Moore, defendant's audit partner, telephoned Mr. Pike to discuss violations by SRC of its existing loan agreements with plaintiff. Mr. Moore asked Mr. Pike if plaintiff was willing to waive the violations so that the loans would not be in default. Mr. Pike would not agree to waive the violations without assurances that SRC's financial position was sound.

As a result of this conversation, Mr. Pike was provided a draft of defendant's 1986 audit report. All the financial information was included in the draft, including the footnotes to the financial statements and defendant's audit opinion (with defendant's name typed but not signed). The draft was compiled from defendant's audit work and it had been reviewed by defendant; editorial changes to the typed draft were handwritten by one of defendant's auditors. The financial information in the draft was identical to that in the final audit report.

During the 14 August 1986 telephone conversation, Mr. Moore told Mr. Pike that the financial information included on this draft was final, and that only nonsubstantive editorial changes would be made. A written notation in defendant's work papers confirmed that a conversation between Mr. Moore and Mr. Pike took place. Mr. Moore and Mr. Pike did not specifically discuss the Jo-Ann's loan during their conversation.

Although the chief financial officer of SRC testified that he had no recollection of speaking with defendant about how the Jo-Ann's acquisition would be funded, evidence was presented to show that defendant had notice of the Jo-Ann's acquisition: (1) defendant specifically identified acquisition financing as a special audit risk for purposes of defendant's conduct of SRC's 1986 audit; (2) in July 1986, defendant was in possession of a publication by a stockbroker, Davenport & Co., which announced, "[t]he new upside potential [of the Jo-Ann's transaction] is not without peril as we expect [SRC] will use borrowed money for the acquisition thus significantly raising debt levels." This publication was initialed by employees of defendant, and filed in defendant's workpapers; and (3) in August 1986, before the audit was finalized, defendant received information from SRC that SRC "has entered into an agreement to acquire the confectionery division of [Jo-Ann's]. This transaction will be financed out of proceeds from operations as well as bank borrowings." This information was found in SRC's 1986 Form 10-K which was circulated to

defendant as early as 20 August 1986 and which was reviewed by defendant in connection with its audit work.

The Jo-Ann's loan was funded by plaintiff 15 September 1986. Defendant's final audit opinion was issued 14 October 1986. In late 1986, SRC began to experience internal strife which led to the financial demise of the company. Defendant withdrew as SRC's auditors in July 1987; on 31 July 1987, defendant also withdrew its opinion on SRC's 1986 financial statements.

In September 1987, SRC retained Coopers & Lybrand (Coopers) to audit its 1987 statements. In order to determine reliable ending 1986 numbers, Coopers reviewed defendant's 1986 work, including defendant's internal papers. Coopers determined that "[t]he conclusions that resulted from [defendant's] audit work were incorrect." As a result, SRC restated its 1986 financial statements.

SRC had reported profits exceeding $842,000.00 in its 1986 financial statements audited by defendant; its restated 1986 financial statements reported profits of about $133,000.00. For fiscal year 1987, SRC's financial statements (audited by Coopers) reported that SRC lost more than $7 million. In April 1988, SRC filed for bankruptcy.

ARGUMENTS

Defendant first argues on appeal that the trial court committed reversible error in denying defendant's motions for a directed verdict and judgment notwithstanding the verdict on the grounds that there was insufficient evidence to support the jury verdict on the issue of negligent misrepresentation.

"To survive a motion for a directed verdict, the non-moving party . . . must present 'sufficient evidence to sustain a jury verdict in [its] favor, . . . or to present a question for the jury.' " *Best v. Duke University*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994) (*quoting Davis v. Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991)). A motion for judgment notwithstanding the verdict uses this same standard because this motion is essentially "a renewal of the movant's prerequisite motion for a directed verdict." *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993).

Our Supreme Court addressed negligent misrepresentation as to accountants in *Raritan River Steel Co. v. Cherry, Bekaert and Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988) (*Raritan I*), stating:

> [t]he tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care. We conclude that a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information. (Citations omitted.)

Id. at 206, 367 S.E.2d at 612. Regarding this reliance, the Court adopted the standard set forth in the *Restatement (Second) of Torts* § 552 (1977), which states:

> *Information Negligently Supplied for the Guidance of Others.*
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Our Court noted that "liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom he knows his client intends will so rely." *Id.* at 214, 367 S.E.2d at 617. The Court commented that courts have not been uniform in their approach to application of the Restatement approach, but went on to state that

> [t]he Restatement's text does not demand that the accountant be informed by the client himself of the audit report's intended use. The text requires only that the auditor *know* that his client intends to supply information to another person or limited group of persons. Whether the auditor acquires this information from

> his client or elsewhere should make no difference. If he knows at the time he prepares his report that specific persons, or a limited group of persons, will rely on his work, and intends or knows that his client intends such reliance, his duty of care should extend to them.

Id. at 215, 367 S.E.2d at 618.

Defendant argues that plaintiff failed to prove that it actually relied upon the audit opinion and financial statements in the instant case. Further, defendant argues that plaintiff did not prove that defendant knew that plaintiff would rely on its audit opinion in a particular transaction.

[1] We disagree. We believe that there was sufficient evidence presented to show that the tort of negligent misrepresentation occurred in the instant case, and that plaintiff relied upon financial statements prepared by defendant to its detriment. We also believe there was sufficient evidence that, although defendant was not specifically informed by SRC itself of the audit report's intended use, defendant *knew* that SRC intended to supply information to plaintiff, their primary bank. Again, as the Restatement makes clear, whether defendant acquired this information from SRC or elsewhere makes no difference. If defendant knew at the time it prepared its report that plaintiff would rely on its work, and knew that SRC intended such reliance, defendant's duty of care extended to plaintiff.

The evidence supporting our reasoning includes extensive testimony from plaintiff's bankers explaining the loan approval process from the commitment letter to the subsequent final loan; the testimony from plaintiff as well as SRC that it was understood that financing the loan was contingent on defendant's 1986 audit; defendant's specific identification of acquisition financing as a special audit risk for purposes of defendant's conduct of SRC's 1986 audit; the publication by Davenport & Co., initialed by employees of defendant and filed in defendant's workpapers, announcing the Jo-Ann's transaction and referring to borrowed money; and SRC's 1986 Form 10-K which was circulated to defendant and reviewed by defendant in connection with its audit work, stating that SRC "has entered into an agreement to acquire the confectionery division of [Jo-Ann's]. This transaction will be financed out of proceeds from operations as well as bank borrowings."

As such, we find that the trial court properly denied defendant's motions for a directed verdict and judgment notwithstanding the verdict on the grounds that there was insufficient evidence to support the jury verdict on the issue of negligent misrepresentation.

[2] Defendant next argues that the trial court committed reversible error in denying defendant's motions for a directed verdict and a judgment notwithstanding the verdict on the grounds that the claims of plaintiff were barred by the applicable statute of limitations and statute of repose. Defendant specifically argues that pursuant to North Carolina General Statutes § 1-15(c) (1983), which governs malpractice claims against professionals, this claim must have been brought within three years of the "last act" giving rise to the claim of negligence. Defendant asserts that because the date of the conversation between Mr. Pike and Mr. Moore and the date that the audit opinion was delivered to SRC were both more than three years before the instant action was filed, this action was barred.

Plaintiff argues that the applicable statute of limitations is found in North Carolina General Statutes § 1-52(5) (Cum. Supp. 1994), "[f]or any . . . injury to the person or rights of another, not arising on contract and not hereafter enumerated." Plaintiff claims that the reliance tort of negligent misrepresentation "does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation and second, the claimant discovers the misrepresentation." *Jefferson-Pilot Ins. Co. v. Spencer*, 336 N.C. 49, 57, 442 S.E.2d 316, 320 (1994). Plaintiff argues that both of these events occurred within three years of plaintiff's filing of the suit on 14 September 1989: plaintiff was injured on 15 September 1986, when it disbursed loan funds to SRC in reliance on defendant's representations, and plaintiff only discovered defendant's misrepresentations in 1987, when defendant withdrew its 1986 audit. Plaintiff states that defendant "argues erroneously that the statute of limitations for malpractice actions, N.C. Gen. Stat. § 1-15(c), governs accrual of [plaintiff's] negligence claims. This is not a malpractice action."

We agree with plaintiff. The instant case is not a malpractice case with privity between plaintiff and defendant; it is a negligent misrepresentation case. (*See Insurance Co. v. Holt*, 36 N.C. App. 284, 288, 244 S.E.2d 177, 180 (1978), where our Court held "that claims for relief for attorney malpractice are actions sounding in contract and may properly be brought only by those who are in privity of contract with such attorneys by virtue of a contract providing for their employ-

ment." *See also Jefferson-Pilot Ins. Co. v. Spencer*, 336 N.C. at 56, 442 S.E.2d at 319, where our Supreme Court stated that because the claim was one for negligent misrepresentation, "it [was] governed by the statute of limitations set out in N.C.G.S. § 1-52(5)[.]")

Therefore, we find the trial court properly denied defendant's motions for a directed verdict and a judgment notwithstanding the verdict on the grounds that the claims of plaintiff were barred by the applicable statute of limitations and statute of repose.

Finally, defendant argues that the trial court committed reversible error by failing to present defendant's jury instruction to the jury on the contributory negligence of plaintiff. We have reviewed the record and the evidence in this case and we find that the trial court properly declined to present a separate jury instruction relating to contributory negligence.

PLAINTIFF'S CROSS-APPEAL

Because of our disposition of defendant's arguments, we need not reach plaintiff's cross-appeal.

* * *

No error.

Judges COZORT and McGEE concur.

JOAN P. STACY AND SUSAN P. HUFFAKER, EXECUTRIXES OF THE ESTATE OF JOHN R. PURSER, JR., PLAINTIFF v. JEDCO CONSTRUCTION, INC., DEFENDANT

No. 9416SC344

Filed 6 June 1995

1. Negligence § 29 (NCI4th)— diminished ability due to senility—capacity for contributory negligence

One whose mental faculties are diminished, not amounting to total insanity, is capable of contributory negligence, but is not held to the objective reasonable person standard; rather, such a person should be held only to the exercise of such care as he was capable of exercising, i.e., the standard of care of a person of like mental capacity under similar circumstances. Therefore, the issue of the contributory negligence of plaintiffs' father, who suf-

fered mental incompetence due to senility, in going onto defendant's construction site was properly submitted to the jury.

Am Jur 2d, Negligence §§ 954-957.

Comment Note.—Contributory negligence of mentally incompetent or mentally or emotionally disturbed person. 91 ALR2d 392.

2. Negligence § 38 (NCI4th)— personal injury—negligence of injured party's caretaker—insufficiency of evidence of imputed contributory negligence

In an action to recover for personal injury to plaintiffs' father sustained when he wandered from the care of his "sitter" onto defendant's construction site, the evidence was insufficient to support a finding of negligence, imputable to the father, on the part of the "sitter," and it was error for the court to submit the issue of imputed contributory negligence to the jury.

Am Jur 2d, Negligence § 1752.

3. Negligence § 165 (NCI4th)— *contributory negligence*—instructions erroneous

Where the issue of contributory negligence as framed to the jury presented the separate questions of whether plaintiffs' father contributed to his injury by his own negligence or whether he was contributorily negligent through the imputed negligence of his "employee," the jury was given questions to which it might give separate answers, allowing them to answer the issue without reaching a unanimous verdict as to either proposition and thereby rendering an uncertain verdict.

Am Jur 2d, Negligence § 29.

4. Negligence § 106 (NCI4th)— fall at construction site—negligence of contractor—sufficiency of evidence

The evidence was sufficient to support a finding that plaintiffs' father fell and was injured as a proximate result of negligence on the part of defendant contractor where it tended to show that the father wandered from a nursing home facility onto defendant's construction site, and defendant's superintendent saw the father on the site and directed him across the site to a doorway which had been designated a hazardous area, rather

than escorting him away from the site in the direction from which he had entered.

Am Jur 2d, Premises Liability § 29.

Appeal by plaintiff from judgment entered 30 September 1993 and order entered 3 November 1993 by Judge D. Jack Hooks, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 16 November 1994.

This action was commenced by Joan P. Stacy as guardian *ad litem* for John R. Purser, Jr. to recover compensatory and punitive damages for personal injuries sustained by Mr. Purser due to alleged negligence of defendants Jedco Construction, Inc., (Jedco) and Methodist Retirement Homes, Inc., d/b/a/ Wesley Pines Retirement Home (Wesley Pines). Both defendants asserted, *inter alia*, the contributory negligence of Mr. Purser as a defense to the action. A recitation of the procedural history of the case is unnecessary to an understanding of the issues presented by this appeal except to note that Mr. Purser died on 31 July 1992, during the pendency of the action, and the executrixes of his estate were substituted as plaintiffs. During the trial, plaintiffs reached a settlement with, and voluntarily dismissed their claim against, defendant Wesley Pines. Plaintiffs proceeded, however, with their claim against Jedco.

At trial, plaintiffs' evidence tended to show that in February 1984, Mr. Purser and his wife relocated from Charlotte to Lumberton to be closer to their daughter, Joan Stacy, and her family. Due to Mr. Purser's age and Mrs. Purser's declining health, the couple moved into Wesley Pines, a retirement community and nursing home. Mrs. Purser died in August 1984.

Prior to his retirement, Mr. Purser had been a professional engineer. At the time he entered Wesley Pines, he was approximately eighty years of age and was in good physical health for his age. He did, however, suffer from senile dementia, with progressively worse short term memory loss, and had had cataract surgery and wore thick eyeglasses. Upon first entering Wesley Pines in 1984, Mr. Purser's mental faculties were sufficient to allow him to live by himself in an apartment. By December 1987, however, his senility had progressed to the point that it was necessary that he be moved from his individual apartment to the center's main nursing home facility.

Mr. Purser had been an athlete while in college, had briefly played semi-professional basketball, and he had continued to play golf until shortly before the injury which is the subject of this suit. To maintain his physical fitness, Mr. Purser regularly walked throughout the Wesley Pines campus, and he continued to do so even after his move to the main facility and despite his almost total loss of short term memory ability.

In March 1989, Jedco began work on a construction project to expand the main facility at Wesley Pines. Although the original construction site diagrams indicated perimeter fencing would be used to prevent residents of Wesley Pines from entering the site, no barriers were erected. Mr. Purser showed a keen interest in the construction, and he repeatedly visited and entered into the construction area during his walks around the Wesley Pines grounds. Jedco's project superintendent, Richard Woosley, informed management at Wesley Pines of Mr. Purser's repeated entries onto the site, and Mr. Purser was warned to stay out. Unfortunately, his memory difficulties made these warnings ineffective. In response, a yellow ribbon or tape was used to cordon off the area, but Mr. Purser continued to enter onto the construction site.

After discussion with Rev. Paul Bunn, the administrator of Wesley Pines, Joan Stacy hired "sitters" to keep an eye on her father from 9:00 in the morning until 5:00 in the afternoon, the approximate hours during which construction took place. This arrangement was successful in preventing further intrusions by Mr. Purser into the construction area from 25 April 1989 until the afternoon of 18 May 1989. At approximately 5:00 that afternoon, Mr. Purser again entered the construction area. He was met by Richard Woosley, who began escorting him away from the site in the direction from which he had come. However, employees of Wesley Pines who had also noticed Mr. Purser's presence on the construction site called to him to come towards them, at a rear entrance to the main facility which opened onto the construction site. This entranceway had been designated by Jedco as a hazardous area and a hard hat zone. Woosley then allowed Mr. Purser to change direction and walk alone across the construction area to this entrance. Plaintiffs offered evidence that a wooden ramp which led up to the entrance had a gap between the ramp and the door, and that there was a difference of several inches from the top of the ramp to the floor of the hallway, requiring one to step up into the building. Upon reaching the building and attempting to enter, Mr. Purser fell and fractured his hip. Plaintiffs contended that Mr.

Purser had tripped over the uneven portion while crossing the ramp and entering the door.

At the close of plaintiffs' evidence, Jedco's motion for a directed verdict was denied. Jedco did not offer evidence, and plaintiffs' motion for a directed verdict as to Jedco's affirmative defense of contributory negligence was also denied. The trial court granted defendant's motion for directed verdict as to plaintiffs' claim for punitive damages.

Three issues were submitted to the jury and answered as follows:

ISSUE NUMBER ONE:

1. Was the plaintiff, John R. Purser, Jr., injured or damaged by the negligence of the defendant, Jedco Construction, Inc.?

ANSWER: YES

ISSUE NUMBER TWO:

2. Did the plaintiff, John R. Purser, Jr., or his employees, by their own negligence, contribute to his injury or damage?

ANSWER: YES

ISSUE NUMBER THREE:

3. What amount is the plaintiff, John R. Purser, Jr., entitled to recover for personal injuries?

ANSWER: N/A

Judgment was entered on the jury's verdict and plaintiffs' motions for judgment notwithstanding the verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b), and alternatively, for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, were denied. Plaintiffs appeal.

Anderson, Broadfoot, Johnson, Pittman, Lawrence & Butler, by Steven C. Lawrence, for plaintiff-appellants.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins and Rodney B. Davis, for defendant-appellee.

MARTIN, JOHN C., Judge.

Plaintiffs' assignments of error and contentions focus on the second issue submitted to the jury; i.e., the issue of contributory negligence. By cross-assignments of error, defendant Jedco contends its

motion for directed verdict should have been granted and the issue of its negligence should not have been submitted to the jury. For the reasons stated herein, we hold plaintiffs are entitled to a new trial on the issue of Mr. Purser's contributory negligence.

I.

A.

[1] Plaintiffs initially argue they were entitled to a directed verdict as to Jedco's affirmative defense alleging that Mr. Purser was contributorily negligent. The basis for their argument is that Mr. Purser's mental incompetence due to senility rendered him incapable of contributory negligence. We have not found a case in North Carolina dealing with the issue of whether an adult whose mental capacity has been impaired or diminished due to advanced age, disease, or senility is capable of contributory negligence. Our Supreme Court has held "one who has *capacity to understand* and avoid a known danger" is contributorily negligent if he fails to take advantage of the opportunity to avoid the danger and is injured, *Presnell v. Payne*, 272 N.C. 11, 13, 157 S.E.2d 601, 602 (1967) (emphasis added); and one cannot be guilty of contributory negligence "unless he acts or fails to act *with knowledge and appreciation*, either actual or constructive, of the danger of injury which his conduct involves." *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E.2d 276, 279 (1951). It is generally held that one "who is so insane or devoid of intelligence as to be totally unable to apprehend danger and avoid exposure to it is not a responsible human agency and cannot be guilty of contributory negligence." 57A Am. Jur. 2d *Negligence* § 954 (1989). However, where an injured plaintiff suffers from diminished mental capacity not amounting to insanity or total incompetence, it is a question for the trier of fact as to whether he exercised the required degree of care for his own safety, and the effect of his diminished mental faculties and capabilities may be taken into account in determining his ability to perceive and avoid a particular risk of harm. *Id.* at § 956. Thus, we hold that one whose mental faculties are diminished, not amounting to total insanity, is capable of contributory negligence, but is not held to the objective reasonable person standard. Rather, such a person should be held only to the exercise of such care as he was capable of exercising, i.e., the standard of care of a person of like mental capacity under similar circumstances. *Fields v. Senior Citizens Center, Inc.*, 528 So. 2d 573 (La. App., 2 Cir. 1988) (person who suffers from impaired senses due to old age held to a relaxed standard of care); *Cowan v. Doering*, 545

A.2d 159 (N.J. 1988) (mentally disturbed plaintiff's conduct measured in light of plaintiff's mental condition); *Young v. New York Dept. of Social Services*, 401 N.Y.S.2d 955, 92 Misc. 2d 795 (N.Y. 1978) (plaintiff held to no greater degree of care for own safety than he is capable of exercising); *Feldman v. Howard*, 214 N.E.2d 235 (Ohio App. 1966), *rev'd on other grounds*, 226 N.E.2d 564 (Ohio 1966) (mentally deficient plaintiff held only to exercise of faculties and capacities with which she was endowed); *Snider v. Callahan*, 250 F. Supp. 1022 (W.D. Mo. 1966); *see* Annot., *Contributory Negligence of Mentally Incompetent or Mentally or Emotionally Disturbed Person*, 91 A.L.R.2d 392 (1963).

We have reviewed the other arguments urged by plaintiffs in support of their contention that the trial court erred by denying their motions for directed verdict and judgment notwithstanding the verdict as to the issue of Mr. Purser's contributory negligence, and conclude they are without merit. We hold that the issue of Mr. Purser's contributory negligence was properly for the jury.

B.

[2] In its answer, Jedco also alleged that Mr. Purser's "sitter" had neglected her duties and that her negligence was imputed to Mr. Purser. Plaintiffs contend the trial court erred by denying their motion for directed verdict as to the defense of imputed contributory negligence. We agree.

Jedco had the burden of proving the "sitter" was negligent in order to impute such negligence to Mr. Purser and bar plaintiffs' recovery. N.C. Gen. Stat. § 1-139. (Party asserting contributory negligence has burden of proving such defense). The "sitter", who was not identified at trial, was employed by Joan Stacy, who was acting for her father pursuant to a power of attorney. Thus, the sitter was acting as Mr. Purser's subagent. The traditional view has been that a principal is liable for the torts of his authorized subagent to the same extent as he is liable for the torts of his primary agent, 3 C.J.S. *Agency* § 431 (1973), and the general rule is that "if the principal or master is injured by the negligence of a third party and by the concurring contributory negligence of his own servant or agent, the negligence of the servant acting within the scope of his employment or the agent acting within the scope of his power to bind the principal may be imputed to the master or principal." Annot., *Imputation of Servant's or Agent's Contributory Negligence to Master or Principal*, 53 A.L.R.3d 664, 666

(1973); *see Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363 S.E.2d 367 (1988).

However, one relying on the defense of contributory negligence must prove facts from which such negligence may reasonably be inferred, and evidence which raises only a bare conjecture is insufficient to warrant submission of the issue to the jury. *Bruce v. Flying Service*, 234 N.C. 79, 66 S.E.2d 312 (1951); *Tharpe v. Brewer*, 7 N.C. App. 432, 172 S.E.2d 919 (1970). The evidence disclosed that Joan Stacy had employed "sitters" from 9:00 A.M. until 5:00 P.M. as suggested by Rev. Bunn, the administrator. Mr. Purser's injury occurred in the vicinity of 5:00 P.M. The only evidence with respect to the actions of the unidentified "sitter" came through the testimony of Rev. Bunn, who testified that after the "sitter" was employed, Mr. Purser had not gone back out to the construction site "until he fell, and that's when the sitter had gone to the bathroom. He (Mr. Purser) was on the telephone. He immediately hung up the telephone, **we think**, as soon as she—**must have** as soon as she went to the bathroom, and out the door he went . . .". (emphasis added).

The evidence leaves for mere conjecture the questions of how Mr. Purser left the building, whether the "sitter" had completed her shift, and even if she had not, whether her conduct in going to the bathroom while Mr. Purser was engaged in a telephone conversation was a breach of her duty. Just as negligence cannot be inferred from the mere fact of injury, the negligence of one's caretaker cannot be inferred from the mere fact that the person in her care suffers an accidental injury. *See Jeffreys v. Burlington*, 256 N.C. 222, 123 S.E.2d 500 (1962). We hold the evidence was insufficient to support a finding of negligence, imputable to Mr. Purser, on the part of the "sitter", and it was error for the court to submit the issue to the jury.

C.

[3] We also conclude that the trial court committed error by the manner in which it phrased the issue of contributory negligence. The form and number of issues submitted is within the court's discretion. *Wilson v. Pearce*, 105 N.C. App. 107, 412 S.E.2d 148, *disc. review denied*, 331 N.C. 291, 417 S.E.2d 72 (1992). Nevertheless, the issues should be formulated so as to present separately the determinative issues of fact arising on the pleadings and evidence. *Trucking Co. v. Dowless*, 249 N.C. 346, 106 S.E.2d 510 (1959). "[I]t is misleading to embody in one issue two propositions as to which the jury might give different responses." *Foy v. Spinks*, 105 N.C. App. 534, 538, 414 S.E.2d

87, 88 (1992), quoting *Edge v. North State Feldspar Corp.*, 212 N.C. 246, 247, 193 S.E. 2 (1937).

The issue as framed to the jury in the instant case presented the separate questions of whether Mr. Purser contributed to his injury by his own negligence or whether he was contributorily negligent through the imputed negligence of his "employees". These questions were propositions to which the jury might give separate answers, allowing the jury to answer the issue without reaching a unanimous verdict as to either proposition. Therefore, the jury's verdict is uncertain. *See Edge, supra.* Plaintiffs were obviously prejudiced by the error, especially in view of our holding that the issue of imputed contributory negligence was improperly submitted.

D.

By reason of errors as set forth above, we conclude plaintiffs are entitled to a new trial on the issue of contributory negligence.

II.

[4] By cross-assignments of error pursuant to N.C.R. App. P. 10(d), Jedco contends the trial court should have granted its motion for directed verdict as to plaintiff's claim against it. Jedco argues there was insufficient evidence of actionable negligence on its part to take the case to the jury. We find no merit in its arguments.

When ruling upon a defendant's motion for a directed verdict, the evidence must be considered in the light most favorable to the plaintiff, and the plaintiff must be given the benefit of every reasonable inference which may be drawn therefrom. *Manganello v. Permastone*, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977). The motion should not be granted unless the plaintiff would not be entitled to recover under any set of facts reasonably established by the evidence. *Id.* The grounds for the motion must be specifically stated, N.C. Gen. Stat. § 1A-1, Rule 50(a), and an appellate court will not consider grounds other than those stated to the trial court in reviewing the trial court's ruling on the motion. *La Grenade v. Gordon*, 60 N.C. App. 650, 299 S.E.2d 809 (1983); *see Feibus & Co. v. Construction Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980).

Jedco first argues that its motion for a directed verdict should have been granted because Mr. Purser was a mere licensee upon the construction site, and Jedco owed him only a duty not to wilfully injure him and not to wantonly and recklessly expose him to danger.

However, at trial, Jedco did not offer Mr. Purser's status as a ground for its motion for directed verdict and is, therefore, precluded from making the argument for the first time on appeal. *La Grenade, supra.*

Jedco's remaining contention is that the evidence was insufficient to support plaintiffs' claim that Jedco's negligence was a proximate cause of Mr. Purser's fall and resulting injuries. However, the evidence tended to show that when Jedco's superintendent, Richard Woosley, saw Mr. Purser on the construction site, he directed him across the site to a doorway which had been designated a hazardous area, rather than escorting Mr. Purser away from the site in the direction from which he had entered. David Royal, an employee of an electrical subcontractor on the project, testified that Mr. Purser's foot got caught on the threshold to the door as he attempted to enter; there was testimony from Mr. Purser's grandson that minutes after the fall, he observed a gap between the door and the ramp leading up to it, as well as a difference between the height of the ramp and the doorsill. When he later attempted to bring the ramp flush with the door, the ramp was higher than the doorsill and prevented the door from opening. Though Richard Woosley denied the ramp was in the position testified to by other witnesses at the time of Mr. Purser's fall, he admitted that if a gap or difference in elevation had existed, it would not have been safe. We hold that the evidence, considered in the light most favorable to the plaintiffs, and giving them the benefit of the reasonable inferences which may be drawn therefrom, is sufficient to support a finding that Mr. Purser fell and was injured as a proximate result of negligence on the part of Jedco. The trial court did not err by denying Defendant Jedco's motion for directed verdict.

III.

In summary, we find no error in the denial of defendant Jedco's motion for directed verdict nor in the denial of plaintiffs' motion for directed verdict on the issue of Mr. Purser's own contributory negligence. However, for the reasons stated above, we hold that the trial court erred by permitting the jury to consider whether plaintiffs are barred from recovery by reason of the contributory negligence of Mr. Purser's "sitter", and that such error necessitates a new trial on the issue of contributory negligence.

No error in part, reversed in part, and remanded for a new trial on the issue of contributory negligence.

Chief Judge ARNOLD and Judge JOHNSON concur.

MARLOWE v. PINER

[119 N.C. App. 125 (1995)]

DARLENE H. MARLOWE AND SHUBBIN LETHA LANDEN, JR., PLAINTIFFS V. DEPUTY SHERIFF J.B. PINER, (INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY), DEFENDANT

No. 945SC691

(Filed 6 June 1995)

1. Municipal Corporations § 444 (NCI4th)— claim against sheriff in official capacity—no showing of waiver of immunity by purchase of insurance—summary judgment improper

Because defendant deputy sheriff as the moving party with the burden of proof failed to show that there was no genuine issue of material fact regarding insurance coverage and that he was entitled to judgment as a matter of law, he was not entitled to summary judgment in plaintiffs' false arrest action based on immunity as to the claims against him in his official capacity.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 37 et seq.

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit. 43 ALR4th 19.

2. Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th)— claim against deputy sheriff in individual capacity—no showing of intentional injury—summary judgment proper

In plaintiffs' action for false imprisonment against defendant deputy sheriff in his individual capacity, the trial court properly entered summary judgment for defendant where plaintiffs' evidence at most tended to show that defendant negligently believed he had probable cause to arrest plaintiffs, and plaintiffs made no forecast of evidence which would tend to show that defendant intended his actions to be prejudicial or injurious to them.

Am Jur 2d, Sheriffs, Police, and Constables § 155.

3. Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th)— claim against deputy sheriff in official capacity—issue as to existence of probable cause—summary judgment improper

The trial court in an action for false imprisonment erred in entering summary judgment for defendant in his official capacity

where there was a genuine issue of fact as to whether probable cause existed for the arrests.

Am Jur 2d, Sheriffs, Police, and Constables § 155.

Judge GREENE dissenting in part and concurring in part.

Appeal by plaintiffs from order signed 31 January 1994 and filed 2 February 1994 by Judge Napoleon B. Barefoot in New Hanover County Superior Court. Heard in the Court of Appeals 22 March 1995.

Jackson & Rivenbark, by Bruce H. Jackson, Jr. and M. Troy Slaughter, for plaintiffs-appellants.

Van Camp, West, Hayes & Meacham, P.A., by Thomas M. Van Camp, for defendant-appellee.

LEWIS, Judge.

Plaintiffs commenced this action to recover damages alleged to have resulted from their false arrest and imprisonment by defendant. The trial court granted defendant's motion for summary judgment, and plaintiffs appeal.

On 18 March 1992 at approximately 7:30 p.m., defendant, a deputy with the New Hanover County Sheriff's Department, responded to a call regarding a "mental subject." Defendant met with Doanie Walston, the husband of the "mental subject," at a gas station and followed Mr. Walston to his home. Mrs. Walston was intoxicated and had driven her car through the family's garage door in a fit of anger. After defendant and Mr. Walston arrived at the Walston residence, Mr. Walston took his young son next door, to the home of plaintiff Shubbin Landen, Jr. Mrs. Walston then ran to Mr. Landen's home, and defendant followed her inside. At this time, Mr. and Mrs. Landen and their neighbor, plaintiff Darlene Marlowe, were also in the home.

In the Landen home, the Walstons began to push and shove each other. Mr. Landen began yelling at defendant demanding he remove the Walstons from his home. The parties' accounts differ hereafter. Mr. Landen contends that he had raised his hand to point toward the door and was lowering it when defendant walked toward him, causing the back of Mr. Landen's fingers to make contact with defendant's chest. Defendant then informed Mr. Landen that he was under arrest for assaulting an officer. Defendant contends that as he was trying to

calm the Walstons, Mr. Landen shoved him lightly on his right arm with the palm of his hand.

Mrs. Marlowe contends that upon hearing defendant place Mr. Landen under arrest, she lightly touched her hand to defendant's forearm to get his attention and asked defendant why he was arresting Mr. Landen. Defendant contends that Mrs. Marlowe screamed at him and shoved him lightly, with the "heel of her hand" contacting his right forearm. Thereafter, defendant placed Mrs. Marlowe under arrest for assaulting an officer. Plaintiffs were tried for these offenses and were found not guilty. Later, they instituted this action against defendant.

On appeal, plaintiffs contend that the trial court erred in granting summary judgment for defendant. Defendant contends that he is immune from suit and that summary judgment was therefore properly granted.

[1] Plaintiffs commenced this suit against defendant in both his official and individual capacities. We first address the claim against defendant in his official capacity. Plaintiffs contend that defendant is not immune in his official capacity because New Hanover County has purchased liability insurance, thereby waiving governmental immunity.

A county may waive its immunity by purchasing liability insurance to the extent of the insurance coverage. N.C.G.S. § 153A-435(a) (1991). Plaintiffs alleged in their complaint that New Hanover County had a policy of insurance which covered suits for false arrest and imprisonment and that to the extent of that coverage, the county had waived governmental immunity. In his answer, defendant admitted that the county had an insurance policy at the time in question, but denied the allegations regarding the coverage of the policy. Neither side offered the insurance policy as evidence at the hearing on summary judgment. Defendant contends that his denial of the allegations as to coverage in his answer was sufficient to shift the burden at summary judgment to plaintiffs to produce the policy. We disagree.

Regardless of who has the burden of proof at trial, upon a motion for summary judgment the burden is on the moving party to establish that there is no genuine issue of fact remaining for trial and that he is entitled to judgment as a matter of law. *First Federal Sav. & Loan Ass'n v. Branch Banking & Trust Co*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972). Thus, a defendant moving for summary judgment assumes

the burden of producing evidence of the necessary certitude which negatives the plaintiff's claim. *Clodfelter v. Bates*, 44 N.C. App. 107, 111, 260 S.E.2d 672, 675 (1979), *disc. review denied*, 299 N.C. 329, 265 S.E.2d 394 (1980). Until the moving party makes a conclusive showing, the non-moving party has no burden to produce evidence. *Virginia Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). Here, defendant had the burden as the moving party to produce evidence showing the lack of insurance coverage, and defendant came forth with no such evidence even though the county had the policy and could easily have produced it. Because defendant failed to show that there was no genuine issue of material fact regarding insurance coverage and that he was entitled to judgment as a matter of law, defendant was not entitled to summary judgment based on immunity as to the claims against him in his official capacity.

[2] We next address the claims against defendant in his individual capacity. The general rule is that a public official is immune from personal liability for mere negligence in the performance of his duties, but is not immune if his actions were corrupt or malicious or if he acted outside and beyond the scope of his duties. *Slade v. Vernon*, 110 N.C. App. 422, 428, 429 S.E.2d 744, 747 (1993). A deputy Sheriff in the performance of his investigative and arrest duties is a "public official." *See Messick v. Catawba County*, 110 N.C. App. 707, 718, 431 S.E.2d 489, 496, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993).

In the instant case, plaintiffs contend that defendant's actions were malicious. "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). An act is wanton when it is done of wicked purpose, or when it is done needlessly, manifesting a reckless indifference to the rights of others. *Id.* at 313, 321 S.E.2d at 891. Plaintiffs have made no forecast of evidence which would tend to show that defendant intended his actions to be prejudicial or injurious to them. At most, plaintiffs' evidence tends to show that defendant *negligently* believed he had probable cause to arrest plaintiffs. Accordingly, summary judgment was properly granted for defendant as to the claims against him in his individual capacity.

[3] Despite our conclusion that a genuine issue of material fact exists as to the county's waiver of immunity, summary judgment for defendant in both capacities would still have been proper if defendant showed there was no genuine issue of material fact as to plaintiffs' claims of false arrest and imprisonment and that defendant was entitled to judgment as a matter of law.

False imprisonment is the illegal restraint of a person against his will. *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). A restraint is illegal if not lawful or consented to. *Id.* A false arrest is an arrest without legal authority and is one means of committing a false imprisonment. *Myrick v. Cooley*, 91 N.C. App. 209, 212, 371 S.E.2d 492, 494, *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988). The existence of legal justification for a deprivation of liberty is determined in accordance with the law of arrest, which is set forth in Chapter 15A of the General Statutes. *Id.*

N.C.G.S. § 15A-401(b)(1) (Cum. Supp. 1994) provides that an officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed a criminal offense in the officer's presence. A warrantless arrest without probable cause is unlawful. *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984). Thus, the dispositive issue is whether defendant had probable cause to believe that plaintiffs had committed assaults upon him.

The existence or nonexistence of probable cause is a mixed question of law and fact. *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 319, 317 S.E.2d 17, 20 (1984), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985). If the facts are admitted or established, it is a question of law for the court. *Id.* However, if the facts are in dispute, the question of probable cause is one of fact for the jury. *Id.* In this case, the material facts surrounding the incident are in dispute, and therefore the existence or nonexistence of probable cause is for the jury to determine. Accordingly, defendant was not entitled to summary judgment on this ground.

For the reasons stated, the trial court's order of summary judgment is affirmed as to defendant in his individual capacity and reversed as to defendant in his official capacity, and the case is remanded to the trial court for further discovery or trial.

Affirmed in part, reversed in part, and remanded.

Judge MARTIN, Mark D. concurs.

Judge GREENE dissents in part and concurs in part.

Judge GREENE dissenting in part and concurring in part:

I agree with the majority that the plaintiffs' claims against the defendant in his individual capacity were properly dismissed by the trial court. I do not agree that the trial court improperly dismissed the plaintiffs' asserted claims against the defendant in his official capacity. For the reasons that follow, I would affirm the trial court in every respect.

In this case, the plaintiffs have been specific in their complaint in asserting claims for false arrest, false imprisonment and emotional distress against the defendant in both his official and individual capacities. Because the plaintiffs' designation in the complaint is not determinative of whether defendant is actually being sued in his individual or official capacity, it must first be determined in what capacity he has been sued. *See Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993), *disc. rev. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994).

In determining whether a plaintiff has brought an action against a defendant in his official or individual capacity, it is important to consider both "the nature of the conduct giving rise to the action" and "the nature of the relief sought." 1 *Civil Actions Against State and Local Government, Its Divisions, Agencies, and Officers* § 1.16 (Shephard's Editorial Staff 1992) [hereinafter *Civil Actions*]; *see Oyler v. Wyoming*, 618 P.2d 1042, 1046 (Wyo. 1980) (whether suit is really against state "is to be determined . . . by the essential nature and effect of the proceeding, as it appears from the entire record) (*quoting In re State of New York*, 256 U.S. 490, 500, 65 L.Ed. 1057, 1062 (1920)). The nature of the conduct involved in the action determines in what capacity one *can be sued.* If the allegations in the complaint involve acts of a governmental employee or official performed within the bounds of their official duties and pursuant to their lawful authority, the defendant can only be sued in his official capacity which is treated as an action against the governmental entity employing the official or employee. *Smith v. State*, 289 N.C. 303, 332, 222 S.E.2d 412, 431 (1976); *Microfilm Corp. v. Turner*, 7 N.C. App. 258, 264, 172 S.E.2d 259, 263 (1970); *Electric Co. v. Turner*, 275 N.C. 493, 498, 168 S.E.2d 385, 388 (1969) (action is really against State where "record discloses that every act charged against any defendant was performed in his capacity as representative of the State"); *Texas Dep't*

of Human Serv. v. Trinity Coalition, Inc., 759 S.W.2d 762, 763 (Tex. Ct. App. 1988) ("officer who acts within the State's laws, stays within that pavilion of immunity"), *cert. denied*, 493 U.S. 1020, 107 L. Ed. 2d 739 (1990); *Civil Actions* § 1.19. Therefore, in a suit brought against a governmental officer or employee in his official capacity, the same immunities available to the entity are available to him. *Dickens v. Thorne*, 110 N.C. App. 39, 45, 429 S.E.2d 176, 180 (1993).

If a plaintiff alleges in the complaint that the conduct of a governmental employee or official is illegal, wrongful, or in excess of the employee's or official's duties, the defendant can only be sued in his individual capacity. *Corum v. University of North Carolina*, 330 N.C. 761, 772, 413 S.E.2d 276, 283, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, —— U.S. —-, 121 L. Ed. 2d 431 (1992); *Taylor*, 112 N.C. App. at 607-08, 436 S.E.2d at 279; *Robinette v. Barriger*, 116 N.C. App. 197, 203, 447 S.E.2d 498, 502 (1994), *disc. rev. denied in part*, 339 N.C. 615, 454 S.E.2d 257 (1995); *Civil Actions* § 1.19; *Robb v. Sutton*, 498 N.E.2d 267, 270 (Ill. App. 1986) (legal official acts of State agents performed within bounds of official authority or duties are normally considered acts of State; illegal acts or acts in excess of delegated authority are against agent individually); *Texas Dep't of Human Serv.*, 759 S.E.2d at 763 ("officer who ventures into an ultra vires act steps beyond the State's inviolable mantle, and becomes individually subject to corrective measures").

The nature of the relief sought by a plaintiff shows how a particular defendant *has been sued.* If a judgment in favor of the plaintiff could operate to control the actions of the governmental entity or subject it to liability or directly and adversely affect its funds or property, the action is really one against the entity and not the individual defendant. *Civil Actions* §§ 1.17-.18; *see Robb*, 498 N.E.2d at 267; *Dugan v. Rank*, 372 U.S. 609, 620, 10 L. Ed. 2d 15, 23 (1963). If money damages are sought from the individual defendant, and not from the entity, the action is against the individual defendant and not the entity.

In this case, plaintiffs' only allegations in their complaint are that defendant engaged in illegal and wrongful conduct in that he "did not have probable cause, or any cause or reason whatsoever to arrest either [plaintiff]," and his actions were "totally unreasonable" and constituted "false arrest and false imprisonment." Defendant, therefore, can only be sued in his individual capacity. Furthermore, plaintiffs' prayer for relief shows that they are only seeking money dam-

ages from the pocket of the defendant, and there is nothing to indicate the county will somehow be adversely affected by a judgment in favor of plaintiffs. This action is therefore against defendant in his individual capacity. Accordingly, I would affirm the trial court's grant of summary judgment as to plaintiffs' alleged action against defendant "in his official capacity."

Having determined that plaintiffs' action is against defendant in his individual capacity, and because the defendant is a public official performing a discretionary act, the question then is whether plaintiffs have produced a forecast of evidence that defendant's actions went beyond mere negligence. *Smith*, 289 N.C. at 331, 222 S.E.2d at 430 (public official is immune from personal liability for mere negligence in performance of his duties, but is not immune if his actions were corrupt or malicious or if he acted outside of and beyond the scope of his duties); *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787-88 (1951) (qualified immunity for public officer sued in individual capacity does not extend to mere employee of governmental entity). Although plaintiffs allege in their complaint that defendant falsely arrested and imprisoned them and argue in their brief that defendant's conduct was somehow malicious, I agree with the majority that all of plaintiffs' allegations and evidence tend to show that, if anything, defendant's conduct on 18 March 1992 was akin to mere negligence. Plaintiffs therefore have failed to present a forecast of evidence that defendant engaged in any action that would rise to the level of malice, entitling defendant to summary judgment in these claims against him in his individual capacity.

KIMBERLY (HICKS) YOUNG v. CHRISTOPHER ALLEN WOODALL IN HIS INDIVIDUAL CAPACITY AND AS AN OFFICER OF THE WINSTON-SALEM POLICE DEPARTMENT; AND WINSTON-SALEM POLICE DEPARTMENT AND THE CITY OF WINSTON-SALEM

No. 9421SC623

(Filed 6 June 1995)

1. Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th); Municipal Corporations § 445 (NCI4th)— officer pursuing vehicle—governmental immunity

Defendant city and defendant police officer, in his official capacity, were entitled to partial summary judgment based on governmental immunity for any damages up to and including two

million dollars in an action arising from a collision while the officer was chasing another vehicle, except as to the contentions of negligence arising under N.C.G.S. § 20-145, where the city has no liability insurance for damages of two million dollars or less and is not a member of a local government risk pool.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 40; Sheriffs, Police, and Constables §§ 90-180.

2. Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th)— police officer pursuing vehicle—governmental function—immunity in individual capacity

Defendant police officer who collided with plaintiff at an intersection while pursuing another vehicle was entitled to summary judgment in his individual capacity, since he was engaged in a governmental function at the time of the accident, and public officers are absolutely immune from liability for discretionary acts when taken without a showing of malice or corruption.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

3. Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th)— officer pursuing vehicle—statutory standard of care observed—jury question

Defendant city and defendant police officer were not entitled to summary judgment under N.C.G.S. § 20-145 where the evidence that defendant officer pursued a vehicle through an intersection with a yellow flashing light without activating his siren or blue lights created a genuine issue of material fact as to whether the officer conducted himself as would a reasonably prudent person in the conduct of official duties of a like nature under like circumstances.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

Appeal by defendants from order entered 6 April 1994 by Judge D. Jack Hooks, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 1 March 1995.

Wright, Parrish, Newton & Rabil, by Melvin F. Wright, Jr. and Nils E. Gerber, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Gusti W. Frankel, for defendant-appellant.

MARTIN, MARK D., Judge.

The sole question upon review is whether the trial court erred in denying defendants' motion for summary judgment. We affirm in part and reverse in part.

On 30 May 1992, at approximately 2:00 a.m., plaintiff, Kimberly (Hicks) Young, was travelling north on Peters Creek Parkway. While preparing to make a left turn onto Link Road, plaintiff's automobile was struck by a police car operated by Officer Christopher Allen Woodall of the Winston-Salem Police Department. At the time of the collision, Officer Woodall was on duty as a police officer.

Officer Woodall was travelling north on Peters Creek Parkway when he observed a Camaro travelling south with only one headlight. Officer Woodall turned his vehicle around and gave chase. Officer Woodall did not notify the police dispatcher of his intention to pursue the Camaro, as required by departmental regulations, nor did he activate his sirens or flashing lights.

Officer Woodall testified that if he activates his emergency equipment when he is not close to the vehicle, the driver has an opportunity to try to outrun the officer. Apparently, Officer Woodall's intention was to turn on the blue lights when he closed in on the Camaro and, if the Camaro did not stop, to activate his siren.

It is disputed whether Officer Woodall's vehicle was travelling at an excessive speed as he approached the flashing yellow light at the intersection of Peters Creek Parkway and Link Road. During his deposition Officer Woodall testified his speed was not excessive as he approached the intersection. However, Darla Mansell, a witness, alleged in her affidavit that she "observed a police car travelling at a high rate of speed proceeding down Peters Creek Parkway." In any event, Officer Woodall conceded in his deposition that if he were in fact exceeding the posted speed limit, he would have been required by Winston-Salem Police Department policy to turn on all of his emergency equipment.

Officer Woodall testified he did not see plaintiff's vehicle until he had entered the intersection with Link Road and, at that time, saw plaintiff's vehicle was already "well into the intersection." Officer Woodall testified he did not have time to stop or take any evasive action. The two cars collided.

On 3 August 1993 plaintiff filed a negligence action against the City of Winston-Salem, the Winston-Salem Police Department, and Police Officer Christopher Woodall to recover damages sustained in the motor vehicle collision involving plaintiff and Officer Woodall. The defendants denied the material allegations of the complaint and asserted the affirmative defenses of: governmental immunity up to and including damages of two million dollars; public officers' immunity; and contributory negligence. On 3 March 1994 defendants filed a motion for summary judgment. On 6 April 1994 the trial court granted defendant Winston-Salem Police Department's motion for summary judgment; denied defendant Woodall's motion for summary judgment on the grounds of governmental immunity and public officers' immunity; and denied defendant City of Winston-Salem's motion for summary judgment, or in the alternative, partial summary judgment on the ground of governmental immunity.

We note at the outset that denial of defendants' motion for summary judgment on the issues of governmental immunity and public officers' immunity is immediately appealable. *Corum v. University of North Carolina*, 97 N.C. App. 527, 531, 389 S.E.2d 596, 598 (1990), *aff'd in part, rev'd in part on other grounds*, 330 N.C. 761, 413 S.E.2d 276 (1992).

[1] On appeal defendants contend the City of Winston-Salem is immune from suit up to and including two million dollars since the City is not indemnified by a contract of insurance for damages of two million dollars or less and is not a member of a local government risk pool. Defendants further contend Officer Woodall is immune from suit to the same extent as the City of Winston-Salem since at the time of the accident he was acting in his official capacity.

Governmental immunity protects a municipality, *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993) (citations omitted), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994), and its officers or employees sued in their official capacity from suit for torts committed while the officers or employees are performing a governmental function. *Id.* at 607, 436 S.E.2d at 279. It is well established that law enforcement is a governmental function. *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

In this case, Officer Woodall was performing his official duties as a police officer when he pursued the Camaro to enforce the motor vehicle laws of this State. Because Officer Woodall was performing a

governmental function at the time of the collision, we believe the City of Winston-Salem and Officer Woodall, in his official capacity, would generally be immune from suit under the doctrine of governmental immunity.

Defendant City of Winston-Salem may waive governmental immunity by the purchase of liability insurance or by joining a local government risk pool. N.C. Gen. Stat. § 160A-485(a) (1994); *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992) (addressing purchase of insurance). To the extent a city does not purchase liability insurance or participate in a local government risk pool pursuant to Article 23 of General Statute Chapter 58, however, a city generally retains immunity from civil liability in tort. N.C. Gen. Stat. § 160A-485.

At the time of the accident, the City of Winston-Salem was not indemnified by a contract of insurance for damages of two million dollars or less. Nor was the City a member of any local government risk pool. Because immunity has not been waived from suit for damages of two million dollars or less, the City of Winston-Salem would ordinarily be entitled to partial summary judgment for any claims in this lawsuit up to and including that amount. Furthermore, as an employee of the City of Winston-Salem, Officer Woodall would ordinarily be immune from suit in his official capacity to the same extent as the City.

[2] Defendants also contend Officer Woodall is immune from suit in his individual capacity.

> The general rule is that a public official is immune from personal liability for mere negligence in the performance of his duties, but he is not shielded from liability if his alleged actions were corrupt or malicious or if he acted outside and beyond the scope of his duties.

Slade v. Vernon, 110 N.C. App. 422, 428, 429, S.E.2d 744, 747 (1993). A police officer is a public official. *Shuping v. Barber*, 89 N.C. App. 242, 248, 365 S.E.2d 712, 716 (1988). Public officers are absolutely immune from liability for discretionary acts when taken without a showing of malice or corruption. *Pigott v. City of Wilmington*, 50 N.C. App. 401, 402-403, 273 S.E.2d 752, 753-754, *cert. denied*, 303 N.C. 181, 280 S.E.2d 453 (1981) (*quoting Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)). Discretionary acts are those requiring

personal deliberation, decision and judgment. *Hare v. Butler*, 99 N.C. App. at 700, 394 S.E.2d at 236.

Plaintiff does not allege Officer Woodall's conduct was malicious or corrupt. Rather, plaintiff apparently argues Officer Woodall failed to exercise reasonable care in the exercise of an alleged ministerial or proprietary function carried out for his own private purposes in contravention of departmental policy. Plaintiff also alleges that Officer Woodall failed to comply with the statutory standard of care codified in N.C. Gen. Stat. § 20-145.

We disagree with plaintiff's contentions that Officer Woodall was engaged in a ministerial or propriety function when he gave chase to the Camaro. Law enforcement is clearly a governmental function, *Hare v. Butler*, *supra*, and Officer Woodall was on duty as a police officer at the time of the collision. Likewise, the officer's decisions to chase the Camaro, to not activate his emergency equipment, and to allegedly employ excessive speed all constitute discretionary decisions made within the course of his duties. Accordingly, Officer Woodall would ordinarily be entitled to immunity under the general standard of care required of public officers and employees.

However, plaintiff contends the statutory standard of care codified in N.C. Gen. Stat. § 20-145 provides the proper legal standard for her negligence cause of action against Officer Woodall.

Defendants, in their reply brief, contend plaintiff did not pursue this theory of negligence in the complaint and is therefore barred from raising it on appeal. According to N.C.R. Civ. P. 8(a) (1), a pleading must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief . . . ." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (1990). Under Rule 8(a)(1), pleadings must be liberally construed to do substantial justice between the parties. *Givens v. Sellars*, 273 N.C. 44, 48, 159 S.E.2d 530, 534 (1968). We conclude that plaintiff's allegations, liberally construed, provide sufficient notice of her intention to pursue a negligence theory of recovery at trial whether premised upon common law standards of care or the standard of care provided in section 20-145.

Section 20-145 of the North Carolina Motor Vehicle Act provides:

> The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators

> of the law or of persons charged with or suspected of any such violation. . . . This exemption shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others.

N.C. Gen. Stat. § 20-145 (1993) (emphasis added).

The threshold question is whether a statutory claim under section 20-145 is appropriately directed against a law enforcement officer in his official capacity, in essence constituting a claim against the municipality or, alternatively, whether a claim under section 20-145 is properly directed against the officer in his individual capacity.

Plaintiff contends that liability under section 20-145 is appropriately directed against a police officer in his or her individual capacity. In *State v. Flaherty*, 55 N.C. App. 14, 22, 284 S.E.2d 565, 571 (1981), this Court stated that the exemption from liability provided in section 20-145 applied to "a police officer acting within the scope of his official duties." In *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993), a case arising under an analogous statutory standard of care imposed on law enforcement officers in N.C. Gen. Stat. § 153A-224(a), this Court concluded that claims arising under section 153A-224(a) were properly directed against law enforcement officials in their official capacity and, in addition, stated that "our appellate courts have traditionally recognized this statutory claim without reaching the question of sovereign immunity." *Id.* at 427, 429 S.E.2d at 746-747. We therefore assume, without deciding, that claims arising under section 20-145 are properly directed against a law enforcement officer in his official capacity.[1]

[3] Unlike the doctrine of public officers' immunity, which requires a showing of malice or corruption to overcome the bar of immunity for discretionary actions, *Pigott v. City of Wilmington*, *supra*, the specific standard of care codified in section 20-145 has been interpreted to require only allegations of mere negligence directed against a law enforcement officer on the ground of excessive speed. *See Goddard v. Williams*, 251 N.C. 128, 133-134, 110 S.E.2d 820, 824 (1959).

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1. We note the parties have not yet had the opportunity to fully brief this question. It appears from the record that the City of Winston-Salem, pursuant to N.C. Gen. Stat. § 160A-167, has passed a resolution related to claims and judgments sought or entered against city officers or employees for claims arising within the course of their duties. In the event plaintiff ultimately obtains a judgment premised upon its contentions of negligence under section 20-145, we defer in the first instance to the trial court to determine whether a statutory claim under section 20-145 is appropriately directed against a defendant in his individual or official capacity.

Section 20-145 constitutes an exception to the speed limitations codified within the North Carolina Motor Vehicle Act for police vehicles when pursuing "violators of the law or . . . persons . . . suspected of any such violation" absent conduct exhibiting "a reckless disregard of the safety of others." We do not believe Officer Woodall's conduct in the present case exhibits any "reckless disregard of the safety of others." However, under section 20-145 "[t]he officer is held to the standard of care that a reasonably prudent person would exercise in the discharge of official duties of a like nature under like circumstances." *Bullins v. Schmidt*, 322 N.C. 580, 582, 369 S.E.2d 601, 603 (1988) *(citing Goddard v. Williams*, 251 N.C. 128, 110 S.E.2d 820 (1959)); *State v. Flaherty, supra.*

Application of the *Bullins* standard of care reveals summary judgment is not appropriate under section 20-145. The evidence of record shows the officer failed to notify the police dispatcher of his intention to pursue the Camaro in contravention of departmental policy. Despite the presence of a flashing yellow light, the officer thereafter proceeded into the intersection without activating his siren or blue lights. It is disputed whether he was travelling at an excessive rate of speed. Nonetheless, at intersections having a flashing yellow light, section 20-158(b)(4) requires an approaching vehicle to "proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection." N.C. Gen. Stat. § 20-158(b)(4) (1993).

We believe the evidence of record, construed in the light most favorable to the nonmoving party, creates a genuine issue of material fact as to whether the officer conducted himself as "a reasonably prudent person would exercise in the discharge of official duties of a like nature under like circumstances." Accordingly, the City of Winston-Salem and Officer Woodall are not entitled to summary judgment under N.C. Gen. Stat. § 20-145.

In summary, we conclude that the City of Winston-Salem and Officer Woodall, in his official capacity, are entitled to partial summary judgment based on governmental immunity for any damages up to and including two million dollars, except as to the contentions of negligence arising under N.C. Gen. Stat. § 20-145. We also conclude that Officer Woodall, in his individual capacity, is entitled to summary judgment, except as to the contentions of negligence arising under N.C. Gen. Stat. § 20-145. As to the contention that Officer Woodall failed to observe the standard of care provided in section 20-145, we

affirm the trial court's denial of summary judgment on behalf of the City of Winston-Salem and Officer Woodall.

This case is remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in part and reversed in part.

Judges JOHNSON and JOHN concur.

AL PATRICK O'CARROLL, ADMINISTRATOR OF THE ESTATE OF WILLIAM C. O'CARROLL, PLAINTIFF v. ROBERTS INDUSTRIAL CONTRACTORS, INC.; ROBERTS WELDING CONTRACTORS, INC.; JOHN B. ROBERTS, INDIVIDUALLY; THE ROBERTS COMPANY; AND TEXASGULF, INC., DEFENDANTS

No. 9410SC659

(Filed 6 June 1995)

1. **Labor and Employment § 182 (NCI4th)— trenching work by independent contractor—no supervision by owner—insufficiency of evidence of negligence**

Defendant owner was not liable to an employee of a contractor for the negligence of the contractor in conducting trenching operations where the owner did not supervise, participate in, or "police" the work done by the contractor.

Am Jur 2d, Independent Contractors § 37.

2. **Labor and Employment § 192 (NCI4th)— trenching work by independent contractor—inherently dangerous trench—knowledge of owner—sufficiency of evidence**

In a wrongful death action where plaintiff contended that a trench was inherently dangerous, that defendant owner had knowledge of the circumstances creating the danger, and that defendant owner had a non-delegable duty to provide employees of an independent contractor with a safe place to work, evidence was sufficient to survive summary judgment where it tended to show that the owner's employees knew that the trench had not been properly sloped, and one of the owner's employees, after observing that the soil was not stable and some had sloughed off into the trench, told the independent contractor's employees to slope before allowing anyone into the trench.

Am Jur 2d, Independent Contractors §§ 37-39.

Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor. 34 ALR4th 914.

Appeal by plaintiff from order entered 18 April 1994 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 23 February 1995.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams and Dill, Fountain, Hoyle & Pridgen, by William S. Hoyle and Randall B. Pridgen, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, for defendant Texasgulf, Inc.

JOHNSON, Judge.

This appeal is from an order granting defendants' summary judgment motion. The facts are as follows: William C. O'Carroll was employed in January of 1991 by Roberts Welding (Roberts' corporate entities, hereinafter Roberts defendants) as a welder. He was later killed in an accident on the job. At that time, defendant Texasgulf had a contract with Roberts defendants for certain excavation and welding work at defendant Texasgulf's phosphate mine in Aurora, North Carolina. Roberts defendants held itself out to defendant Texasgulf as having expertise in excavation work when it bid on this particular contract. Roberts defendants had performed independent contract work for defendant Texasgulf prior to this contract and, as part of its construction business, Roberts defendants maintained its own earth-moving equipment. For the purposes of this contract, Mr. Bruce Coward was Roberts defendants' foreman for all excavation work. During the performance of the contract, Roberts defendants were in direct supervision and control of the excavation site.

On 14 January 1991, Roberts defendants began performance of its contract with defendant Texasgulf. The contract called for the removal and replacement of a thirty-inch pipe under a road at the Texasgulf facility. The contract required Roberts defendants to complete the project in two stages, so as not to interrupt traffic on the road. Defendant Texasgulf did not participate in, supervise, or "police" the welding and excavation work performed by Roberts defendants under the contract.

On the first day of the project, Mr. Bruce Coward used a backhoe to begin digging a trench to uncover the thirty-inch pipe on one side of the road. Subsequent to the excavations beginning on the first trench, defendant Texasgulf's Safety Specialist, Mr. Dwight Williams, arrived at the site. Mr. Williams reminded Roberts defendants that, during the excavations and before anyone went into the trench, Roberts defendants should slope the walls of the trench for safety purposes. Roberts defendants, in fact, did slope the walls of this first trench. The sloping on the first trench was adequate, and Roberts defendants completed the first half of the project without incident.

On 17 January 1991, Mr. Coward began excavations on the second trench on the other side of the road. Late that afternoon, Mr. Coward discovered additional pipes in the excavation area. Mr. Coward then stopped excavations for the day and backfilled the trench to a level of about four feet, which was just deep enough to leave the newly discovered pipes exposed. The following morning he contacted defendant Texasgulf to determine whether Roberts defendants could remove the newly discovered pipes. Employees of defendant Texasgulf reminded Roberts defendants to be sure to slope the walls of the trench as they continued their excavations.

When the employees of defendant Texasgulf saw the second trench on the morning of the day of the accident, it was only three to five feet deep. At this time, defendant Texasgulf's employees, Mr. Jackson and Mr. Fulmer, did not see any evidence that anyone actually had worked in the trench. However, Mr. Fulmer stated that as to the safety of the trench at the time he observed it on the morning of the accident, he would have put more slope on the trench before allowing anyone to work in it. He recommended that more slope be placed on the wall after observing that part of the earth had "sloughed off into the trench." He made this recommendation because this indicated to him "that the material [soil] was unconsolidated, that there was a potential for more material to fall if it wasn't sloped. . . ."

Mr. Stephen Carrow, defendant Texasgulf's Area Supervisor, had visited the excavation site earlier that morning at about 8:00 a.m., to make sure that Roberts defendants' work was on schedule. Mr. Carrow did not see anything unsafe or dangerous about the second trench.

Once defendant Texasgulf confirmed that Roberts defendants could remove the newly discovered pipes, defendant Texasgulf's employees left the excavation site and did not return until after the

accident. Neither Roberts defendants, nor its employees, sloped the walls of the second trench prior to continuing their excavation. Mr. Coward then continued digging with the backhoe. When Mr. Coward finished digging, plaintiff's decedent, Mr. O'Carroll, entered the trench to begin welding. Only minutes after entering the trench, plaintiff's decedent was fatally injured when the north wall of the trench collapsed.

The federal Mine Safety & Health Administration investigated the accident. Following the investigation, a citation was issued against Roberts defendants on 24 January 1991, for violating the regulations promulgated pursuant to the Mine Safety and Health Act. This was the first citation Roberts defendants had received from any governmental agency for any excavation activity. No citation was issued against defendant Texasgulf for the accident.

On 16 December 1992, plaintiff filed this wrongful death action on behalf of the heirs of Mr. O'Carroll. Plaintiff sued Roberts defendants, John B. Roberts, individually, and defendant Texasgulf. Plaintiff settled all claims with Roberts defendants and John B. Roberts. Plaintiff's complaint asserted five claims against defendant Texasgulf: negligence, wanton misconduct, strict liability, absolute liability and punitive damages.

On 2 February 1994, defendant Texasgulf filed a motion for summary judgment. On 11 February 1994, defendant Texasgulf filed an amended motion for summary judgment. Defendant Texasgulf's amended motion specifically incorporated the affidavits of John B. Roberts and Bruce Coward, which Roberts defendants and John B. Roberts had attached to their motions for summary judgment before settling with plaintiff. On 6 April 1994, Judge Henry V. Barnette, Jr. issued a memorandum of decision explaining the grounds for the court's decision to grant summary judgment in favor of defendant Texasgulf on all claims. On 18 April 1994, the court issued an order and judgment dismissing all claims against defendant Texasgulf.

Plaintiff, in the instant case, has failed to argue in its brief issues regarding the trial court's dismissal of its wanton misconduct, strict liability, absolute liability, and punitive damages claims; thus, they are deemed abandoned. N.C.R. App. P. 28. Plaintiff only argues its negligence claim that defendant Texasgulf is liable for the negligence of Roberts defendants under the non-delegable duty doctrine.

Where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment shall be granted. N.C.R. Civ. P. 56. A consideration of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, determine if summary judgment is appropriate. *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993), *cert denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). Summary judgment is a forecast of the evidence used to determine if a jury trial is needed. *Howard v. Parker*, 95 N.C. App. 361, 382 S.E.2d 808 (1989). The forecast of evidence in the instant case shows that Roberts defendants were independent contractors. An independent contractor "exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Cook v. Morrison*, 105 N.C. App. 509, 513, 413 S.E.2d 922, 924 (1992) (*quoting Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988)).

Our Courts recognize that a party who contracts with another to do work is not liable for injuries sustained by the contractor's employees unless the employer has retained the right to control the method and manner in which the independent contractor performs his employment. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). *See also Hooper v. Pizzagalli Construction Co.*, 112 N.C. App. 400, 436 S.E.2d 145 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994). Our Court in *Hooper* states in pertinent part:

> North Carolina law provides that a general contractor does not have a duty to furnish a subcontractor or the subcontractor's employees with a safe place in which to work. Instead, it is the duty of the subcontractor to provide himself and his employees with a safe place to work and, also, to provide proper safeguards against the dangers of the work. (Citations omitted.)

Id. at 403-04, 436 S.E.2d at 148. Exceptions to the no-liability rule include: (1) situations where the contractor retains control over the manner and method of the subcontractor's substantive work, (2) situations where the work is deemed to be inherently dangerous, and (3) situations involving negligent hiring and/or retention of the subcontractor by the general contractor. *Woodson*, 329 N.C. 330, 407 S.E.2d 222.

In the instant case, plaintiff's forecast of evidence must show that its claims fit within one of the above mentioned exceptions. Plaintiff

argues that this action falls within the first two exceptions—that defendant Texasgulf maintained control over the manner and method of Roberts defendants' work and that defendant Texasgulf had a non-delegable duty to ensure the safety of decedent because trenching is an inherently dangerous activity.

[1] Our Supreme Court in *Woodson* said that "one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work." *Woodson*, 329 N.C. at 350, 407 S.E.2d at 234. The first exception is based on the supposition that defendant Texasgulf, the contractor, retained the right to control the manner and method of Roberts defendants' work. The record indicates that employees of both Roberts defendants and defendant Texasgulf testified that defendant Texasgulf did not supervise, participate in, or "police" the work done by Roberts defendants under the contract. According to the record, on the day of the accident, defendant Texasgulf's employees were called to the site by Roberts defendants to identify pipes; they inspected the pipes and affirmed that the pipes were no longer used and that removal was not a problem. Defendant Texasgulf did not retain control of the manner and method of Roberts defendants' work. Plaintiff, in the instant case, argues that defendant Texasgulf failed to supervise, and that defendant Texasgulf "had the authority to stop the trenching operation at any time." However, this Court has stated that "merely taking steps to see that the contractor carries out his agreement, . . . does not make the employer liable, nor does reserving the right to dismiss incompetent workmen." *Hooper*, 112 N.C. App. at 405, 436 S.E.2d at 149 (*quoting Denny v. Burlington*, 155 N.C. 33, 39, 70 S.E. 1085, 1087 (1911)).

Plaintiff argues that defendant Texasgulf was vicariously liable for the negligence of Roberts defendants under the non-delegable duty doctrine. Our Supreme Court in *Woodson* noted that vicarious liability does not arise against a landowner or a general contractor based on the non-delegable duty doctrine. *Woodson*, 329 N.C. 330, 407 S.E.2d 222. Plaintiff's reliance on pre-*Woodson* cases for the proposition that a breach of a non-delegable duty gives rise to vicarious liability is misplaced in light of the Supreme Court's decision in *Woodson*.

[2] Plaintiff next argues that the subject trench was inherently dangerous and that defendant Texasgulf had knowledge of the circumstances creating the danger. Plaintiff argues that the work being per-

formed was an inherently dangerous activity; therefore, defendant Texasgulf had a non-delegable duty to provide employees of an independent contractor with a safe place to work. In *Woodson*, the Supreme Court stated that "[o]ne who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others[.]" *Woodson*, 329 N.C. at 352, 407 S.E.2d at 235. Our Court defines an inherently dangerous activity

> as work to be done from which mischievous consequences will arise unless preventative measures are adopted, and that which has "a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which later might take place on a job itself involving no inherent danger." (Citations omitted.)

Hooper, 112 N.C. App. 400, 405, 436 S.E.2d 145, 149. Additionally, the Supreme Court noted that a non-delegable duty would arise only when the trenching done by an independent contractor becomes inherently dangerous and the owner knows of "the dangerous propensities of the particular trenching in question." *Woodson*, 329 N.C. at 358, 407 S.E.2d at 238. *See also Dunleavy v. Yates Construction Co.*, 114 N.C. App. 196, 442 S.E.2d 53 (1994). The dangers involved in trenching are addressed on a case by case basis. *Woodson*, 329 N.C. 330, 407 S.E.2d 222.

In the case *sub judice*, the evidence presented is enough to survive summary judgment. Whether the trench in question was inherently dangerous at the time defendant Texasgulf's employees last saw the trench is a question of fact for the jury. *Id.*

Defendants rely upon this Court's decision in *Dunleavy* to argue that defendant Texasgulf did not know of the dangerous condition of the trench. However, the instant action is distinguishable from *Dunleavy*. In *Dunleavy*, there was no indication at the time that employees had any knowledge that the trench was inherently dangerous while looking at it. In fact, employees reported that the soil was "firm and stable," unlike the soil in the instant case which was said to be unsettled. *Dunleavy*, 114 N.C. App. at 198, 442 S.E.2d at 54.

In the instant case, depositions of defendant Texasgulf's employees reveal that defendant Texasgulf may have had knowledge of the inherent dangers of the trench involved which would give rise to a

non-delegable duty to the decedent. The evidence presented to the trial court, thus, establishes a genuine issue of material fact regarding whether defendant Texasgulf had notice of a dangerous condition in the trench.

Plaintiff's forecast of evidence shows defendant Texasgulf's employees knew that the trench had not been properly sloped, and that one of defendant Texasgulf's employees, after observing that the soil was not stable and some had sloughed off into the trench, told Roberts defendants' employees to slope before allowing anyone into the trench. This is evidence from which a jury could reasonably conclude that defendant Texasgulf's employees knew that the trench was inherently dangerous at that time.

Therefore, the trial court improperly concluded that summary judgment for defendant Texasgulf was warranted and the decision is reversed.

Reversed.

Judges JOHN and MARTIN, MARK D. concur.

DEBRA S. EAST, PLAINTIFF-APPELLEE v. BABY DIAPER SERVICES, INC., AND U.S.F. & G. COMPANY, DEFENDANTS-APPELLANTS

No. COA94-819

(Filed 6 June 1995)

1. Workers' Compensation § 427 (NCI4th)— continuous pain rendering employment impossible—change of condition—sufficiency of evidence

Evidence that the continuous pain stemming from plaintiff's injury eventually rendered her totally incapable of earning any wages was sufficient to justify the Industrial Commission's finding and conclusion that a substantial change in plaintiff's back condition had occurred since her initial award for permanent partial disability compensation for 36 weeks.

Am Jur 2d, Workers' Compensation §§ 652-658.

2. Workers' Compensation § 427 (NCI4th)— change in condition—testimony of all examining physicians admissible

Where a plaintiff is seen and examined by several physicians over the course of treatment for a compensable injury, each physician may testify as to plaintiff's condition at the time she was examined if such testimony would aid the Commission in determining whether a change of condition has occurred, and proof should not be limited to the testimony of a physician who examined plaintiff both before and after the change in condition.

Am Jur 2d, Workers' Compensation §§ 652-658.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission filed 26 April 1994. Heard in the Court of Appeals 19 April 1995.

Kenneth M. Johnson for plaintiff-appellee.

Adams Kleemeier Hagan Hannah & Fouts, by David A. Senter and Betty P. Balcomb, for defendants-appellants.

WALKER, Judge.

The parties in this action do not dispute that plaintiff was injured at work on 23 September 1987 while moving a heavy storage cart. On 30 September 1987, defendant employer filed an "Employer's Report of Injury to Employee" (I.C. Form 19) listing plaintiff's upper back as the nature and location of injury. On 28 October 1987, the parties entered an "Agreement for Compensation for Disability" (I.C. Form 21) for plaintiff's "injured upper back" with temporary total disability benefits beginning on 15 October 1987 and continuing for the prescribed number of weeks. This agreement was approved by the Industrial Commission on 22 December 1987.

In February 1988, plaintiff underwent a laminectomy which was performed by her treating physician, Dr. Deaton. Plaintiff returned to work on 31 May 1988 in a lighter duty position. In January 1989, Dr. Deaton rated plaintiff as having a 12% permanent partial disability to her back. Based upon Dr. Deaton's rating, the parties signed a "Supplemental Memorandum of Agreement as to Payment of Compensation" (I.C. Form 26) on 30 January 1989 in which defendant carrier agreed to pay plaintiff permanent partial disability compensation for 36 weeks. The Commission approved this agreement on 10

February 1989. The final payment to plaintiff under this agreement was made on 23 March 1989.

Subsequent to her rating by Dr. Deaton, plaintiff continued to complain of pain in her right hip and leg. Dr. Deaton performed further diagnostic tests, but in July 1989 he informed defendant carrier that he could not "objectively document a change of condition since the previous rating." Nonetheless, during 1989, plaintiff missed substantial time from work due to her recurring pain, and on 15 August 1989, defendant employer terminated plaintiff.

In August 1989, plaintiff began to see Drs. Paul and Dye, who were partners in an orthopedic practice. On 11 September 1989, Dr. Paul indicated in his office notes that he felt plaintiff was suffering from a worsening of her condition. On 1 June 1990, plaintiff filed a "Request that Claim Be Assigned for Hearing" (I.C. Form 33), claiming that she had undergone a substantial change in the condition of her back and seeking permanent partial disability compensation for days missed after 15 August 1989 (the date of her termination by defendant employer) and payment of medical expenses and treatment.

In March and April 1991 plaintiff was seen by Dr. Price, who had been appointed by the Commission to evaluate plaintiff with regard to a change of condition. Dr. Price noted that plaintiff was experiencing recurrent pain and had no significant relief of her pain following her February 1988 surgery. In his opinion plaintiff was suffering from scarring. In May 1991, plaintiff was diagnosed with a bulging disc in her cervical spine. On 6 May 1991, plaintiff filed another Form 33, seeking additional compensation due to a change in the condition of her back.

In an Opinion and Award filed 29 June 1992, Deputy Commissioner Edward Garner, Jr. found that "[a]s a result of [her] injury by accident, plaintiff has suffered a substantial change in her back condition and thereby requires further medical treatment." He concluded that plaintiff was entitled to a review of the prior award of compensation pursuant to N.C. Gen. Stat. § 97-47. He further concluded:

> 2. A change of condition is not only indicated from a standpoint of when a physician is able to indicate it. A change of condition can also be indicated on what one['s] employers or one['s] own opinion is as to his or her ability to engage in gainful employment.

> Plaintiff was released to return to gainful employment and did in fact return to gainful employment with defendant employer. On August 15, 1989, [Mr.] Marshall Morgan, Vice President of defendant employer, wrote to plaintiff and stated that due to recurring medical problems which made her unable to do the task of her job, the employment of plaintiff had been terminated. This documentation constitutes a change of her condition. Plaintiff was released by a treating physician to return to light duty work and in such time as she is no longer able to perform light duty work, then [sic] in and of itself constitutes a change of condition. In determining if a change of condition has occurred, entitling an employee to additional compensation under this section, the primary factor is a change in condition affecting the employee['s] physical capacity to earn wages. *Lucas v. Bunn Manufacturing Co.*, 90 N.C. App. 401, 368 S.E.2d 386 (1988).
>
> . . .
>
> 4. In view of the totality of the deposition[s] of the treating physicians, in light of the stipulated medical records that were presented at the hearing, plaintiff has undergone a substantial change in condition from a medical standpoint. This substantial change of condition is further boasted [sic] by plaintiff's work record which is not contested. That work record demonstrated that plaintiff has since been released to return to gainful employment on a light duty basis, attempted to engage in gainful employment and has made every reasonable effort to do so and has only failed to go forwarded [sic] with these efforts when the complications or increased back pain and immobility has [sic] prevented her from doing so.
>
> 5. As a result of the injury by accident giving rise to this claim, plaintiff has been temporarily totally disabled since February 10, 1989, and she is entitled to temporary total disability compensation . . . beginning February 10, 1989, and continuing thereafter until such time as plaintiff reaches maximum medical improvement or returns to work. N.C.G.S. § 97-29.

Defendants appealed to the Full Commission, which modified Conclusion of Law No. 5 to state that plaintiff was entitled to temporary total disability compensation beginning 15 August 1989 instead of 10 February 1989 but otherwise adopted and affirmed the deputy commissioner's findings of fact and conclusions of law.

In reviewing decisions from the Full Commission, the scope of our review is limited to consideration of (1) whether there is competent evidence to support the Commission's findings of fact; and (2) whether the Commission's conclusions of law are supported by its findings of fact. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). If there is any evidence which directly or by reasonable inference tends to support the Commission's findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980).

A change in condition under N.C. Gen. Stat. § 97-47 (1991) occurs when there "is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings." *Pratt v. Upholstery Co.*, 252 N.C. 716, 722, 115 S.E.2d 27, 34 (1960). "Whether there has been a change of condition is a question of fact; whether the facts found amount to a change of condition is a question of law." *Id.* at 722, 115 S.E.2d at 33-34.

[1] Defendants contend that "[p]laintiff's recurrent lumbar pain and her inability to return to work do not constitute a substantial change in condition." They cite *Pratt* for the proposition that if the employee is simply suffering from "a continued incapacity of the same kind and character and for the same injury" which existed at the time the award was made, she has not suffered from a change of condition. *Pratt*, 252 N.C. at 722, 115 S.E.2d at 33. Defendants argue that the lay and medical evidence "unequivocally establishes that plaintiff is suffering from nothing more than lumbar pain of the same kind and character for which the original award was made."

However, as the Commission correctly recognized in its Opinion and Award, this Court has held that "[i]n determining if a change of condition has occurred entitling an employee to additional compensation under G.S. 97-47 the primary factor is a change in condition *affecting the employee's physical capacity to earn wages* . . . ." *Lucas v. Bunn Manuf. Co.*, 90 N.C. App. 401, 404, 368 S.E.2d 386, 388 (1988) (emphasis added).

In *Lucas*, plaintiff sustained a compensable back injury on 30 April 1984 while working as a hemmer for the defendant. *Id.* at 401, 368 S.E.2d at 387. In December 1984, at the end of the healing period, the plaintiff was rated with a 15% permanent partial disability of the back and the parties agreed on the proper amount of compensation. *Id.* at 402, 368 S.E.2d at 387.

On 3 January 1985, the plaintiff resumed working as a hemmer for another company because defendant had no openings. The plaintiff quit working altogether on 1 February 1985 because of increasing back pain. After examining the plaintiff and prescribing some therapy which the plaintiff was unable to tolerate, the plaintiff's physician determined that he could not prescribe further treatment without performing additional tests. The defendant refused to authorize or pay for the tests, contending that its obligations to pay plaintiff terminated when the last disability payment was made on 21 February 1985. Following hearings requested by the plaintiff, the deputy commissioner found and concluded that a substantial change occurred in the condition of the plaintiff's back after the December 1984 agreement was approved and that she was then temporarily totally disabled and entitled to further benefits. The Full Commission adopted and affirmed the deputy commissioner's findings and conclusions. *Id.* at 402, 368 S.E.2d at 387.

This Court held that the Commission's finding that the plaintiff had experienced a change of condition was clearly supported by competent evidence. The Court noted that both the plaintiff and her husband testified that the plaintiff's condition was worse after she went back to work and that she was no longer able to do her housework. *Id.* at 403, 368 S.E.2d at 387. The Court also pointed to the statement of the plaintiff's treating physician that "this patient's condition has considerably changed from the November time when she was discharged from here and that she needs further treatment for this condition." *Id.* The physician testified that when he saw the plaintiff in February 1985, he felt she could not work at all. *Id.* at 404, 368 S.E.2d at 388. The Court rejected the defendant's argument that no substantial change had occurred because the plaintiff's pain and other symptoms were only "slightly worse" than before:

> [W]hile the physical and symptomatic changes that occurred here—increases in the intensity and frequency of pain and muscle spasms and a decrease in the movement of the back muscles— may not appear to be great when considered by themselves and measured in the abstract, their effect upon the plaintiff was very profound, indeed, reminiscent of the straw and the camel's back, because they 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.

Id.

In the instant case, Dr. Deaton released plaintiff to return to work in May 1988. At that time, he advised plaintiff that she would not be able to return to the same type of work she had been doing prior to her injury and that she would have to live with a certain amount of pain and physical restrictions for the rest of her life. Plaintiff returned to a lighter duty job with defendant employer, but she continued to experience pain which became more severe as time passed. Return visits to Dr. Deaton revealed that plaintiff had experienced post-operative changes in her lower back area. Plaintiff missed numerous days of work during 1988 as a result of pain directly attributable to her injury. When Dr. Deaton rated plaintiff in January 1989, he noted that she continued to experience pain in her right hip and leg. As Dr. Deaton's notes confirm, plaintiff continued to complain of severe pain throughout 1989, and she continued to miss time from work. In August 1989, plaintiff began to see Drs. Dye and Paul. On 15 August 1989, Dr. Dye took plaintiff out of work for one week because of her severe pain. As a result of this absence, plaintiff's supervisor terminated her, stating that she had "recurring medical problems which render her unable to do the tasks of her job" and that "[t]here is no 'lighter work' available as was suggested by her physician." Plaintiff testified that she tried several other jobs after her termination by defendant employer but was unable to perform them satisfactorily because of pain.

Thus, the evidence before the Commission showed that the continuous pain stemming from plaintiff's injury eventually rendered her totally incapable of earning any wages. Guided by *Lucas*, we hold that this evidence was sufficient to justify the Commission's finding and conclusion that a substantial change in plaintiff's back condition had occurred since the initial award.

Defendants rely on *Sawyer v. Ferebee & Son, Inc.*, 78 N.C. App. 212, 336 S.E.2d 643 (1985), *rev. denied*, 315 N.C. 590, 341 S.E.2d 29 (1986), to support their assertion that the testimony of Drs. Paul, Dye, and Price is incompetent to prove plaintiff's condition changed after the 1989 award since none of those physicians had examined plaintiff prior to that award. In *Sawyer*, the Court affirmed the Commission's conclusion that the plaintiff had not experienced a change of condition. The Court based its holding on the fact that the plaintiff's own doctor testified that her condition had remained "essentially unchanged." *Id.* at 214, 336 S.E.2d at 644. The Court further stated that if the plaintiff's doctor did not have first-hand knowledge of her condition at the time of the initial award, he was not competent to

testify as to whether the plaintiff had suffered a change of condition since that time. *Id.* Defendants point out that Dr. Deaton, the only testifying physician who saw plaintiff both before and after the original compensation award, testified that in July 1989 he could not objectively document a change in plaintiff's condition since her January 1989 rating. Defendants argue that this testimony is the only competent evidence on that issue.

[2] However, in *Styron v. Duke University Hospital*, decided after *Sawyer*, this Court stated:

> We see no reason to inhibit an applicant's ability to prove a change of condition by limiting proof to the testimony of a physician who had examined the plaintiff before and after the change in condition. Generally speaking, such physician may be unavailable for testifying during a later hearing for greater benefits. Further, the Commission, not the testifying physician, makes the crucial comparison of conditions. From an expert's testimony of the plaintiff's current condition, the Commission may observe that this condition is worse than the condition described at an earlier point in time by other experts.

Styron, 96 N.C. App. 356, 358, 385 S.E.2d 519, 520 (1989). Thus, where a plaintiff is seen and examined by several physicians over the course of treatment for a compensable injury, each physician may testify as to the plaintiff's condition *at the time she was examined* if such testimony would aid the Commission in determining whether a change of condition has occurred.

Dr. Paul testified that when he first saw plaintiff in September 1989, he felt her pain was "definitely a worsening of [her] original condition in terms of her symptoms over a period of time where she had been relatively quiescent but with more of a chronic nature of pain." Dr. Price, who examined plaintiff in March and April 1991, noted that plaintiff had not experienced any significant relief of her pain since her surgery and that her increased pain might be due to scarring. He stated, "It is my feeling the difficulty which is presently being evaluated for which she is being seen is related to her original accident and her original surgery." In May 1991, plaintiff was seen by Dr. Dye after hearing a loud pop and experiencing pain on the right side of her neck and shoulder area. Dr. Dye concluded from subsequent test results that she had a bulging disc at the C4-C5 area on the right side, which was her symptomatic side, and that the bulging disc could have been in existence in 1989. He further testified that his

examination of plaintiff led him to conclude that plaintiff had undergone a change of condition in regard to her cervical spine. Under *Styron*, the Commission properly considered this evidence in reaching its decision to award plaintiff additional compensation based on a change of her back condition.

We note that the Commission in its conclusion did not differentiate between plaintiff's lower back injury and her cervical spine injury, and we also decline to do so. We hold that there was competent evidence to support the Commission's finding that plaintiff suffered a substantial change in her back condition and that this finding justifies the Commission's conclusion that "plaintiff experienced a substantial change in the condition of her compensable back injury . . ." under N.C. Gen. Stat. § 97-47.

The Opinion and Award of the Full Commission is hereby

Affirmed.

Judges EAGLES and MARTIN, JOHN C. concur.

W.T. BUIE AND WIFE, MARTHA C. BUIE; ROSSIE G. GARDNER AND WIFE, RAMONA M. GARDNER; C. KENNETH WOOD AND WIFE, SYLVIA WOOD; RICHARD L. HALL, JR. AND WIFE, LOIS S. HALL; THOMAS J. WELCH AND WIFE, DIANE F. WELCH; RALPH W. HULLENDER AND WIFE, GERRY HULLENDER; FRALLEY G. MITCHELL AND WIFE, DORIS MITCHELL; HARDING McDOWELL AND WIFE, MARY W. McDOWELL; RALPH BRENNER AND WIFE, DIANE BRENNER; HAROLD R. HEDRICK AND WIFE, RUTH R. HEDRICK; MILDRED F. ISRAEL; BENNIE L. ROGERS AND WIFE, JACQUELINE D. ROGERS; DONALD M. ROSS, JR. AND WIFE, MARY LOU ROSS; JAMES B. MERRELL; CHERYL K. MOORE; LINDA L. COFFIN; BOBBY L. ROGERS AND WIFE, JUNE H. ROGERS; ABDUL J. AWAN AND WIFE, RIZWANA L. AWAN; JOHNNY J. WHITE AND WIFE, RUBY WHITE; CLAUDE O. DRAUGHN, JR. AND WIFE, PATSY K. DRAUGHN; AND THOMAS LAUDER, JR.; PLAINTIFFS V. HIGH POINT ASSOCIATES LIMITED PARTNERSHIP, DELOS SAMUEL HEDGECOCK, JR., JASPER LEE HEDGECOCK, ARLENE HEDGECOCK GUY, MARGARET HEDGECOCK DAVIS, AND ROBERT WATSON HEDGECOCK, DEFENDANTS

No. 94-315

(Filed 6 June 1995)

1. Deeds § 85 (NCI4th)— drainage system on restricted lots—nonresidential use

The trial court did not err in finding a drainage system built on defendants' lots to be a nonresidential use in violation of

restrictive covenants, and there was no merit to defendants' contention that, since the system benefited residential property by assisting with drainage and preventing flooding problems within the subdivision, it served a residential purpose, since a covenant limiting property to residential use implies the property is not to be put into service incident to a forbidden commercial enterprise, even if the enterprise is located on adjacent unrestricted property.

Am Jur 2d, Covenants, Conditions, and Restrictions § 196.

2. Deeds § 85 (NCI4th)— restricted lots used for improper purpose—order requiring restoration of lots proper

The trial court did not abuse its discretion and order a remedy disproportionately harmful to defendants compared to the harm suffered by plaintiffs where the court issued an injunction prohibiting defendants from maintaining a drainage system on their restricted lots to support a nonresidential use of adjacent unrestricted property and ordering defendants to return the restricted property to its undeveloped residential nature.

Am Jur 2d, Covenants, Conditions, and Restrictions § 196.

3. Judgments § 53 (NCI4th)— property transferred—transferee not joined—judgment in name of original owner proper

There was no merit to defendant partnership's contention that the judgment should be vacated because its interests in commercial property and the easements over restricted property were transferred to another entity prior to entry of judgment, since joinder of a transferee is not mandatory; an action continued in, and a judgment entered in, the name of the original party alone is valid; and neither party made a motion to join the transferee, nor did either object to an entry of judgment against defendant prior to entry of judgment.

Am Jur 2d, Pleading §§ 382 et seq.

Appeal by defendant High Point Associates Limited Partnership from judgment entered 20 October 1993 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 11 January 1995.

Plaintiffs own real property in a subdivision subject to restrictive covenants. These covenants state in part that the property "shall be used for residential purposes only." The individual defendants, who did not appeal, own the real property located within the subdivision that is the focus of this lawsuit and which is also subject to the same restrictive covenants as plaintiffs' property.

In November 1991, the individual defendants conveyed several undeveloped tracts of land to defendant High Point Associates Limited Partnership (HPALP). These tracts adjoin the property involved in this action, but are not part of the subdivision and are not subject to any restrictive covenants. HPALP purchased this property in order to build a commercial shopping center and parking lot on the undeveloped land.

To ease foreseeable drainage problems that could be caused by the new shopping center, the individual defendants also conveyed to HPALP certain easements appurtenant over the adjoining restricted property they own within the subdivision. These easements allowed HPALP to construct a drainage system on the restricted property consisting of a dry retention pond and various other devices designed to regulate water flow.

Plaintiffs brought suit against the individual defendants and HPALP, alleging the drainage system constituted a prohibited non-residential use of the property. After a hearing without a jury upon the evidence in the record, the trial court entered judgment for plaintiffs. The judgment enjoins defendants from maintaining a drainage system to support a non-residential property and orders that they return the restricted property to its "undeveloped state or nature . . . as existed before November 6, 1991." From this judgment, defendant HPALP appeals.

Baker & Boyan, by Walter W. Baker, Jr. and Jeffrey L. Mabe, for plaintiff-appellees.

Smith Helms Mulliss & Moore, by Bruce P. Ashley and Mary V. Cavanagh, for defendant-appellant.

McGEE, Judge.

Defendant HPALP argues three issues on appeal: (1) the court erred in finding the drainage system to be a non-residential use in violation of the restrictive covenants; (2) the court erred in requiring the defendants to return the restricted property to its undeveloped resi-

dential state, and (3) the judgment should be vacated since HPALP transferred its interest in the easements and shopping center to another partnership prior to the entry of judgment. For the reasons stated below, we affirm the trial court's entry of judgment.

I.

[1] Defendant-appellant HPALP first assigns as error the trial court's conclusion that the easements and drainage system constitute a non-residential use of the property in violation of the restrictive covenants. HPALP argues that since the system benefits residential property by assisting with drainage and preventing flooding problems within the subdivision, it serves a residential purpose. We disagree.

The trial court made a finding of fact that the construction of the drainage system constituted a non-residential use of the restricted property. If a jury trial is waived, the court's findings of fact have the same effect as a jury verdict and are conclusive on appeal if there is evidence to support them, even if the evidence might support findings to the contrary. *Blackwell v. Butts*, 278 N.C. 615, 619, 180 S.E.2d 835, 837 (1971).

In this case, the record clearly includes evidence to support the trial court's findings. The easements allowing construction of the drainage system were granted by the individual defendants to HPALP contemporaneously with the conveyance of the property on which the commercial shopping center was built. As HPALP admitted in its answer to plaintiff's complaint, the drainage system was constructed to "serve and support and as part of the commercial development." This admission is binding, and when considered in conjunction with relevant case law, is conclusive of the issue.

An admission in a pleading which admits a material fact becomes a judicial admission in the case. *Crowder v. Jenkins*, 11 N.C. App. 57, 62, 180 S.E.2d 482, 485 (1971). It has the same effect as a jury finding and is conclusive upon the parties and the trial judge. *Id* at 63, 180 S.E.2d at 486. Paragraph 5 of plaintiffs' complaint alleged in part: "Pursuant to the purported easements . . . [HPALP] began to construct various drainage devices . . . upon [the restricted property] to *serve and support and as part of the commercial development.*" (emphasis added). In its answer, HPALP stated: "The allegations of Paragraph 5 are admitted." Therefore, HPALP made a conclusive admission that the drainage system serves a non-residential purpose by supporting a commercial enterprise.

While conceding the drainage system may serve a commercial purpose, HPALP argues that since it also serves the residential community by preventing flooding, it should be considered a residential use of the property. We find this argument unconvincing when the plain language of the covenant states: "This property shall be used for residential purposes *only*." (emphasis added). The expression "shall be used for residential purposes only" is not ambiguous. As used in this covenant, the word "only" is synonymous with the word "solely" and is the same as the phrase "and nothing else."

In *Starmount Co. v. Memorial Park*, 233 N.C. 613, 65 S.E.2d 134 (1951), our Supreme Court held a covenant limiting property to residential use implies the property is not to be put into service incident to a forbidden commercial enterprise, even if the enterprise is located on adjacent unrestricted property. *Starmount* at 616, 65 S.E.2d at 137. *Accord, Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967). In *Starmount*, the Court prohibited the defendant from maintaining a driveway over restricted property connecting two commercial properties, holding that "[s]uch use would violate the restrictions in question for it would be tantamount to dedicating the . . . tract to a prohibited business or commercial purpose." *Starmount* at 616, 65 S.E.2d at 137. Here, HPALP's construction of the drainage system to benefit the commercial property virtually dedicated the restricted property for commercial purposes in violation of the restrictive covenants.

It is true that restrictive covenants are not favored in the law, and nothing can be read into a restrictive covenant to enlarge its meaning beyond the plain language of the covenant. *Julian v. Lawton*, 240 N.C. 436, 440, 82 S.E.2d 210, 212 (1954). However, such covenants must be reasonably construed to execute the intent of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of the restriction. *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967). Since HPALP admits the drainage system also serves a commercial purpose, the system violates the restrictive covenant. Therefore, we hold the trial court correctly ruled the drainage system constitutes a non-residential use in violation of the restrictive covenant.

We disagree with HPALP's argument that equity compels a finding that the drainage system serves a residential purpose and does not violate the restrictive covenant. Even if, as HPALP alleges, removal of the drainage system will result in increased flooding within the sub-

division, the plaintiffs are free to enforce their property rights. "[E]quity cannot balance the relative advantages and disadvantages of a covenant and grant relief against its restrictions merely because it has become burdensome. . . . [I]t is not the way of equity to override the law or to invalidate contracts or to destroy property rights." *Tull v. Doctors Building, Inc.*, 255 N.C. 23, 40-41, 120 S.E.2d 817, 829 (1961) (quoting *Vernon v. R.J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E.2d 710 (1946)).

II.

[2] HPALP next assigns as error the trial court's issuance of an injunction prohibiting defendants from maintaining a drainage system to support a non-residential use of the property and ordering the defendants to return the restricted property to its undeveloped residential nature. HPALP argues the defendants will suffer irreparable harm if they are required to remove the drainage system and, therefore, the trial court abused its discretion in ordering a remedy disproportionately harmful to the defendants compared to the harm suffered by the plaintiffs. Again, we disagree.

When enforcing a restrictive covenant and restoring the status quo, a mandatory injunction is the proper remedy. *Wrightsville Winds Homeowners' Assn. v. Miller*, 100 N.C. App. 531, 536, 397 S.E.2d 345, 347 (1990), *disc. review denied*, 328 N.C. 275, 400 S.E.2d 463 (1991). As stated by our Supreme Court in *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E.2d 388 (1954):

> Mandatory injunction has been frequently granted to compel the removal of a building or a part thereof which has been erected in violation of some restrictive covenant as to the use of land. . . . Unless the injury is so slight as to be within the maxim 'de minimis,' mandatory injunction will issue to compel removal of encroachments. In the case of one who deliberately violates a building restriction, a mandatory injunction to compel the modification of his building so as to comply with the restrictions cannot be avoided on the theory that the loss caused by it will be disproportionate to the good accomplished.

Ingle at 390, 82 S.E.2d at 391 (quoting 14 Am. Jur. *Covenants, Conditions, and Restrictions* 672). In *Ingle*, the Court held a mandatory injunction was appropriate to require the defendant to remove a building constructed nearer than fifty feet from the street in violation of restrictive covenants. *Ingle* at 391, 82 S.E.2d at 396.

An order requiring the removal of a drainage system is no more burdensome than an order requiring the removal of a building. Further, it is clear in this case that the individual defendants had actual notice of the restrictions and HPALP had at least record notice, if not actual notice, of the restrictions. Therefore, the defendants cannot be heard to complain that the injunction is disproportionately harmful to them.

A mandatory injunction may be an appropriate remedy to compel removal of structures erected in violation of restrictive covenants. *Crabtree v. Jones*, 112 N.C. App. 530, 534, 435 S.E.2d 823, 825 (1993), *disc. review denied*, 335 N.C. 769, 442 S.E.2d 514 (1994). The issuance of such an injunction depends upon the equities of the parties and such balancing is clearly within the province of the trial court. *Id.* "Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused." 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 313 (1965). We find no abuse under these facts. Accordingly, the trial court's issuance of a mandatory injunction ordering defendants to return the restricted property to the undeveloped residential state or nature of the property as it existed prior to 6 November 1991 is affirmed.

III.

[3] Finally, HPALP claims the judgment should be vacated because HPALP's interests in the commercial property and the easements over the restricted property were transferred to North Pointe Partners prior to entry of judgment. HPALP argues that because the court was informed of the transfer, and North Pointe was represented in court, it was error to enter judgment against HPALP. We find no merit to this argument.

After any transfer of interest other than by death, a lawsuit involving that interest continues in the name of the original party. However, the court may, upon the motion of any party, allow the transferee to be joined with the original party. N.C.R. Civ. P. 25(d). A judgment rendered in the name of the original party-transferor, without objection from the adverse party, is valid. W. Brian Howell, *Shuford North Carolina Civil Practice and Procedure* § 25-5 (4th ed. 1992). *See also, International Rediscount Corp. v. Hartford Accident & Indem. Co.*, 425 F. Supp. 669 (D. Del. 1977), holding that substitution or joinder after a transfer of interest is not mandatory under Fed.

R. Civ. P. 25, and absent a motion for substitution, the action is continued in the name of the original party, with the successor in interest bound by any judgment.

Like the federal rule, the North Carolina statute uses permissive, not mandatory language. The North Carolina rule states: "[T]he court *may* allow the person to whom the transfer is made to be joined with the original party." N.C.R. Civ. P. 25(d) (emphasis added). Since joinder of the transferee is not mandatory, an action continued in, and a judgment entered in, the name of the original party alone is valid.

We also note that, in this case, neither party made a motion to join North Pointe, nor did either party object to an entry of judgment against HPALP prior to the entry of judgment. Defendant HPALP did not object to the entry of judgment against itself until after the judgment was rendered. Therefore, the judgment entered against HPALP is valid. Further, North Pointe also appeared in this matter, stating in open court that North Pointe was the successor in interest to HPALP. Accordingly, there exists no prejudice to HPALP's or North Pointe's rights that would require us to vacate this judgment.

The judgment of the trial court declaring the drainage system to be a non-residential use in violation of the restrictive covenants, and the issuance of an injunction ordering defendants to return the property to its undeveloped residential state is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

LANDON W. SLOAN, JR. AND WIFE, PHYLLIS FAY SLOAN, PLAINTIFFS v. MILLER BUILDING CORPORATION, DEFENDANT

No. 945SC330

(Filed 6 June 1995)

Labor and Employment § 196 (NCI4th)— workplace injury—employer's misconduct willful and wanton—sufficiency of evidence

In plaintiff's action to recover for injuries sustained in a workplace fall, reasonable jurors could find that the conduct of defendant general contractor in the present case constituted will-

ful or wanton misconduct sufficient to overcome the bar of plaintiff's contributory negligence where the evidence tended to show that defendant had little regard for workplace safety; defendant knew it was in violation of an OSHA standard requiring railings around the perimeter of an open floor; and defendant's indifference to the regulations contributing to plaintiff's injuries on this and other projects constituted a pattern of noncompliance and conscious disregard of OSHA standards.

Am Jur 2d, Master and Servant §§ 121, 361 et seq., 372 et seq.

Appeal by plaintiff from order entered 10 January 1994 by Judge Napoleon B. Barefoot in New Hanover County Superior Court. Heard in the Court of Appeals 31 January 1995.

Armstrong & Armstrong, P.A., by Emery D. Ashley, for plaintiff-appellants.

Marshall, Williams & Gorham, L.L.P., by Ronald H. Woodruff, for defendant-appellee.

MARTIN, MARK D., Judge.

The sole issue presented by the parties is whether the trial court erred by finding evidence of defendant's willful or wanton negligence insufficient to overcome the bar of contributory negligence and granting defendant's motion for summary judgment. We reverse.

On 21 October 1985 plaintiff Landon W. Sloan, Jr. (Sloan) was injured when he fell three stories to the ground from the Campus Edge Phase II Condominium Project (project) in Wilmington, North Carolina. Defendant was the general contractor for the project.

Defendant hired F & F Construction Company (F & F) to perform carpentry services. F & F hired Sloan as a carpenter. Defendant hired Sloan and two other employees of F & F to complete the exterior trim carpentry work. Sloan worked in this capacity for approximately one week before the accident.

On the third floor where Sloan worked there were no standard railings or the equivalent around the perimeter of the floor as required by OSHA standard 29 CFR 1926.500(d)(1). More than one month prior to Sloan's fall defendant noted in its inspection records that standard railings or the equivalent were needed, but did not erect

them. Also, F & F asked defendant to provide standard railings or the equivalent for protection of persons on the floor. Instead, defendant tied ropes which it knew did not satisfy OSHA standard 29 CFR 1926.500(d)(1) to each post around the perimeter of the third floor.

On Saturday, 19 October 1985, the ropes in place to provide safety protection to third floor workers were removed. The ropes were not replaced and no comparable protective device was substituted.

On the morning of 21 October 1985 Sloan arrived at work and noticed the third floor ropes were missing and the posts were painted. Sloan assumed the ropes had been removed over the weekend by the painting contractor for the project and reported to work on the third floor. He made no effort to replace the ropes or ask the general contractor to replace them.

On 21 October 1985 the atmosphere on the third floor was hectic. Sloan worked as the lead carpenter toward the middle of the third floor cutting materials for co-workers. At approximately 2:00 p.m. he walked to the end of the building to discuss work with other carpenters. Other workers were in the hallway carrying material. As Sloan tried to discuss work with the other carpenters he kept moving to let others pass by. He tried to get out of the way by stepping back and down on some scaffolding. As Sloan sat on the scaffolding it gave way. He reached for the safety rope, which had been removed, and dropped three stories to the ground.

During the course of this project, defendant did not have anyone on site responsible for safety and compliance with either company policy or OSHA regulations. Defendant designated Bob Becher "supervisor" of the construction site, but instead of supervising the site, he worked a crew of men. Becher apparently never performed any type of inspections, never held any safety meetings, and never mentioned safety on the site. Defendant's failure to do these things violated internal company policy.

From 13 May 1981 until the date of Sloan's fall, defendant was cited for thirty-nine OSHA violations. (Eight serious violations and thirty-one non-serious violations). Five of the serious violations and three of the non-serious violations involved defendant's failure to provide standard railings or the equivalent on open-sided floors. On 17 May 1984 defendant was cited for OSHA violations at the Campus Edge Phase I Condominium Project, the job site involved in the pres-

ent case, including a serious violation for its failure to have standard railings or the equivalent on the open-sided second and third floors.

On 23 May 1984 defendant was cited for serious violations, including failure to provide standard railings or the equivalent on open-sided floors, at the Harbor Inn condominiums/hotel construction project at Wrightsville Beach, North Carolina. An OSHA safety officer questioned Mr. Deal, general superintendent of the Harbor Inn condominiums/hotel construction project and employee of defendant for 35 years, regarding the 23 May 1984 OSHA violations. The safety officer reported Mr. Deal stated, "if . . . (OSHA) knew anything about construction [it] would know that these conditions (cited) were not hazards," and "his employees knew better that [sic] to get to [sic] close to open sided floors, . . . the job could be completed by the time he complied with all the standards." An OSHA safety officer questioned Mr. Henry Miller, Sr., Chairman of the Board and Safety Director of Miller Building Corporation, regarding the 23 May 1984 violations. The safety officer reported Mr. Miller indicated, "Mr. Deal has worked for him for 35 years and knows the requirement [OSHA standards], but . . . is the type of superintendent that will wait until an OSHA inspection before correcting hazardous conditions."

There is evidence another employee was injured prior to Sloan during construction of phase I of the Campus Edge project in a fall from an open-sided floor without the required standard railings or the equivalent.

Sloan filed this action on 11 June 1986 seeking damages for injuries he sustained as a result of the 21 October 1985 fall. On 10 October 1988 he took a voluntary dismissal without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. On 6 October 1989 Sloan refiled his claim. His wife, Phyllis Fay Sloan, also filed a claim for loss of consortium. On 17 June 1991 plaintiffs filed an amended complaint. On 9 July 1991 defendant filed its answer and, on 8 December 1993, moved for summary judgment based on the contributory negligence of Sloan. On 10 January 1994 the trial court granted defendant's motion for summary judgment.

The United States Supreme Court explained the role of the trial court when considering a motion for summary judgment in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202 (1986):

> The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the

> plaintiff is entitled to a verdict—"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

Id. at 252, 91 L. Ed. 2d at 214 (citation omitted) (emphasis added).

Within the context of negligence claims, "[a]lthough there may be no question of fact, when the facts are such that reasonable men could differ on the issue of negligence courts have generally considered summary judgment improper." *Willis v. Power Co.*, 42 N.C. App. 582, 591, 257 S.E.2d 471, 477 (1979); *See Dettor v. BHI Property Co. No. 101*, 324 N.C. 518, 522, 379 S.E.2d 851, 853 (1989). Rather, such questions must be resolved by the jury. 324 N.C. at 523, 379 S.E.2d at 853.

On appeal plaintiffs contend the trial court erred by finding evidence of defendant's alleged willful or wanton negligence insufficient, as a matter of law, to overcome the bar of Sloan's contributory negligence and granting summary judgment to the defendant.

Pursuant to the regulatory adoption procedure in N.C. Gen. Stat. § 95-131(a), all federal occupational safety and health standards constitute the regulatory standard in North Carolina, unless alternative regulations are promulgated by the North Carolina Commissioner of Labor. "A statute or ordinance designed for the protection of the public is a 'safety' enactment and its violation constitutes negligence *per se* . . . ." *Jackson v. Housing Authority of High Point*, 73 N.C. App. 363, 368, 326 S.E.2d 295, 298 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986). The parties agree 29 CFR 1926.500(d) is the relevant safety statute at issue:

> *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides . . . . The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling material could create a hazard.

29 CFR 1926.500(d) (1994). 29 CFR 1926.500(f)(1) sets forth standard specifications for standard railings as follows:

> A standard railing shall consist of a top rail, intermediate rail, toeboard and posts, and shall have a vertical height of approximately

> 42 inches from upper surface of top rail to floor, platform, runway or ramp level.

29 CFR 1926.500(f)(1) (1994). The placement of ropes around the perimeter of an open-sided floor, as installed by the defendant, is not listed as an alternative to standard railings anywhere in section (f) of CFR 1926.500. At oral argument counsel for defendant admitted defendant knew the ropes placed around the perimeter of the open-sided third floor did not comply with 29 CFR 1926.500.

Defendant noted in its inspection records that standard railings or the equivalent were needed, and F & F specifically requested that defendant provide standard railings or the equivalent for protection of workers on the third floor. Defendant apparently elected, for whatever reason, not to comply with OSHA standard 29 CFR 1926.500. Instead, defendant tied ropes to each post around the perimeter of the third floor knowing the ropes did not meet the requirements of OSHA standard 29 CFR 1926.500(d)(1).

The question presented by this appeal is whether reasonable jurors could find, by a preponderance of the evidence, that the cumulative effect of defendant's actions constituted reckless disregard for the rights and safety of Sloan or, alternatively, constituted intentional failure to follow safety regulations necessary to ensure his safety.

It is well settled that the contributory negligence of a plaintiff does not preclude recovery when defendant's conduct amounts to willful or wanton negligence and is a proximate cause of plaintiff's injuries. *Lewis v. Brunston*, 78 N.C. App. 678, 685, 338 S.E.2d 595, 600 (1986). Wanton negligence has been defined as "an act manifesting a reckless disregard for the rights and safety of others." *Pleasant v. Johnson*, 312 N.C. 710, 714, 325 S.E.2d 244, 248 (1985) (citations omitted). Willful negligence has been defined as "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.* (citations omitted). Willful negligence requires only constructive intent. 312 N.C. at 715, 325 S.E.2d at 248. "Constructive intent to injure exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. Wanton and reckless negligence gives rise to constructive intent." *Id.* (citations omitted).

Plaintiffs contend evidence of defendant's conduct at the time of the fall *and* evidence of defendant's history of noncompliance with OSHA standards are relevant to the question of whether defendant's conduct rose to the level of willful or wanton negligence. We agree.

We conclude the cumulative effect of defendant's negligence in three different areas creates a genuine issue of material fact sufficient to foreclose the entry of summary judgment. The three areas are: (1) general safety procedures on the project; (2) defendant's failure to comply with OSHA standard 29 CFR 1926.500(d)(1) in the present case; and (3) defendant's history of non-compliance with OSHA standards, including OSHA standard 29 CFR 1926.500(d)(1).

First, plaintiffs' forecast of evidence indicates defendant had little regard for workplace safety. Defendant did not have anyone on site responsible for safety and compliance with either company policy or OSHA regulations. Although defendant designated Bob Becher "supervisor" of the construction site, he apparently worked a crew of men rather than supervise the site. Notably, Becher apparently never performed any type of inspections or held safety meetings, all in violation of company policy.

Second, evidence exists from which a jury could reasonably infer that defendant knew it was in violation of 29 CFR 1926.500. Not only had defendant noted in its inspection records more than one month prior to Sloan's fall that standard railings or their equivalent were needed, but F & F had also asked the defendant to provide standard railings or their equivalent for protection of workers on the third floor. Despite this specific request from its subcontractor, it appears defendant refused to remedy this safety violation. Instead, defendant tied ropes to each post around the perimeter of the third floor which it knew did not satisfy the requirements of OSHA standard 29 CFR 1926.500(d)(1). Plaintiffs' forecast of evidence indicates that defendant's failure to provide standard railings or their equivalent caused F & F to walk off the job.

Third, plaintiffs' forecast of evidence supports the reasonable inference that defendant's indifference to the regulations contributing to Sloan's injuries constituted a pattern of noncompliance and conscious disregard of OSHA standards, including OSHA standard 29 CFR 1926.500(d)(1). Although defendant's disregard of OSHA standards on this and other projects, standing alone, is not tantamount to a finding of wilful or wanton negligence, we believe it remains a relevant factor for the jury to consider giving due regard to the frequency

of alleged violations and the nature and scope of defendant's operations at the time of the infractions. Indeed, apart from the evidence of noncompliance with OSHA regulations and the apparent hostile attitude of company officials regarding their obligation to observe basic safety procedures, plaintiffs have presented evidence that defendant had been cited for failure to install satisfactory standard rails or their equivalent in other projects and, in addition, that another employee was injured during construction of phase I of the same project when he fell from an open-sided floor which lacked the required standard railings or their equivalent.

Based upon plaintiffs' forecast of evidence, we conclude reasonable jurors could differ on the question of whether the conduct of defendant in the present case constituted willful or wanton misconduct sufficient to overcome the bar of Sloan's contributory negligence. Accordingly, we hold summary judgment was improperly granted.

Reversed and remanded.

Judges JOHNSON and JOHN concur.

TERRY LEE TEDDER v. ROBERT F. HODGES, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. COA94-824

(Filed 6 June 1995)

1. Evidence and Witnesses § 697 (NCI4th)— refusal to take breathalyzer—revocation of driver's license—expert testimony not allowed—summary of testimony—issue preserved for appeal

A summary of excluded expert testimony was sufficient to preserve the exclusion for appeal in an action arising from the revocation of petitioner's driver's license for refusing to take a breathalyzer test where petitioner claimed that he had a history of bronchitis and could not blow into the machine long enough to provide an adequate sample.

Am Jur 2d, Trial §§ 436, 445-460.

Comment Note.—Ruling on offer of proof as error. 89 ALR2d 279.

Construction of provision of Rule 43(c) of the Federal Rules of Civil Procedure, and similar state provisions, providing for entry into record of evidence excluded by trial court. 9 ALR3d 508.

2. Evidence and Witnesses § 2148 (NCI4th)— refusal to take breathalyzer—revocation of driver's license—expert testimony excluded—not helpful to trier of fact

There was no error in an action arising from the revocation of petitioner's driver's license in the exclusion of expert testimony concerning petitioner's ability to blow into the machine for a sufficient length of time where the testimony would not have been helpful to the trier of fact.

Am Jur 2d, Expert and Opinion Evidence §§ 1-4.

3. Automobiles and Other Vehicles § 93 (NCI4th)— revocation of license—failure to give adequate breathalyzer sample—willful refusal

The trial court properly declined to enter judgement in favor of petitioner where he had petitioned for a determination that the revocation of his driver's license for willful refusal to take a breathalyzer was erroneous and there was testimony that, while petitioner appeared to be generally cooperative, he kept putting his fingers in his mouth despite warnings to the contrary, so that the observation period had to be restarted, and that petitioner would stop blowing into the machine too early despite the officer's instructions to blow until she told him to stop. Failure to follow the instructions of the breathalyzer operator is an adequate basis for concluding that petitioner willfully refused to submit to chemical analysis. Although petitioner presented evidence that he was biting his nails out of nervousness rather than intentionally putting his fingers in his mouth, and that he could not blow into the machine because he suffered from bronchitis and because his nose had been injured in a fight, there was still competent evidence to support willful refusal and the trial judge as the trier of fact has the duty to pass upon the credibility of the witnesses.

Am Jur 2d, Automobiles and Highway Traffic § 130.

Suspension or revocation of driver's license for refusal to take sobriety test. 88 ALR2d 1064.

Sufficiency of showing of physical inability to take tests for driving while intoxicated to justify refusal. 68 ALR4th 776.

4. Automobiles and Other Vehicles § 117 (NCI4th)— driver's license revocation—superior court hearing—findings

There were sufficient findings to allow the Court of Appeals to determine whether the trial court's judgment and legal conclusions were a correct application of the law in an action arising from the revocation of petitioner's driver's license for failure to take a breathalyzer.

Am Jur 2d, Automobiles and Highway Traffic § 144.

Validity and application of statute or regulation authorizing revocation or suspension of driver's license for reason unrelated to use of, or ability to operate, motor vehicle. 18 ALR5th 542.

Appeal by petitioner from judgment entered 9 June 1994 by Judge Clarence W. Carter in Forsyth County Superior Court. Heard in the Court of Appeals 19 April 1995.

On 29 May 1994, Officer R.K. Hutchins of the Winston-Salem Police Department observed Terry Lee Tedder (hereinafter petitioner) operating a motor vehicle on Country Club Road in Winston-Salem, North Carolina. After petitioner failed to dim his headlights as he approached Officer Hutchins' vehicle, Officer Hutchins stopped petitioner's vehicle. Because petitioner performed poorly on several roadside sobriety tests, Officer Hutchins arrested petitioner for driving while impaired. Officer Hutchins transported petitioner to a breathalyzer room at the Winston-Salem Police Department where petitioner was to submit to a chemical analysis. Officer B.J. Kapps, a certified breathalyzer analyst, served as the operator of the Intoxilyzer 5000 (breathalyzer machine) for petitioner.

Before a person blows into the Intoxilyzer 5000, there is an observation period during which the person must not eat, drink, or smoke. Here, Officer Kapps informed petitioner of his rights regarding the breathalyzer machine at 10:47 p.m. and began observing petitioner at that time. At 11:10 p.m., Officer Kapps reported that petitioner put his fingers in his mouth, requiring Officer Kapps to restart the observa-

tion period. At the end of the second observation period, petitioner blew into the machine five or six times, but he never blew long enough for a sufficient sample. Officer Kapps wrote petitioner up as refusing to take the breathalyzer test and, as a consequence, petitioner's driver's license was revoked pursuant to G.S. 20-16.2. Petitioner subsequently was treated at Forsyth Memorial Hospital for an injury to his nose and for chest congestion.

Petitioner petitioned Forsyth County Superior Court for a hearing to determine whether the revocation of his license was erroneous. At the hearing, respondent presented evidence that Officer Kapps and Officer Hutchins had to tell petitioner several times not to put his fingers in his mouth. Respondent also presented evidence that although petitioner appeared cooperative, and although Officer Kapps had informed petitioner of his rights regarding the breathalyzer machine, petitioner never blew into the machine long enough to render an adequate sample. At the close of respondent's evidence, petitioner's counsel argued that respondent had failed to carry its burden of proving a willful refusal. The trial court denied petitioner's motion.

Petitioner then testified that he could not blow into the machine long enough to provide an adequate sample because he had a history of bronchitis and had been in a fight earlier on the day he tried to blow into the machine. Petitioner stated that he was a truck driver and would not intentionally refuse to blow into the machine because he knew refusal would cause him to lose his license and jeopardize his job. Petitioner's counsel then attempted to introduce the deposition testimony of Dr. Peter Alford to show *inter alia* that there was no way to prove whether or not petitioner could have blown into the machine for the required amount of time on the night in question. The trial court excluded Dr. Alford's testimony on the basis that Dr. Alford had never examined petitioner. After hearing all of the evidence, the trial court entered a judgment concluding that petitioner had willfully refused to submit to a chemical analysis and affirming the revocation of petitioner's driver's license. Petitioner appeals.

Morrow Alexander Tash & Long, by C.R. "Skip" Long, Jr., for petitioner-appellant.

Attorney General Michael F. Easley, by Associate Attorney General C. Norman Young, for respondent-appellee.

EAGLES, Judge.

I.

[1] Petitioner argues that the trial court erred in its refusal to consider or admit the expert opinion testimony of Dr. Alford. Respondent responds that petitioner has failed to preserve this assignment of error for appellate review.

For a party to preserve for appellate review the exclusion of evidence, "the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). *See also River Hills Country Club v. Queen City*, 95 N.C. App. 442, 446, 382 S.E.2d 849, 851 (1989). Here, when petitioner moved to introduce Dr. Alford's deposition into evidence, respondent objected to its admission. Petitioner's counsel then told the trial court what Dr. Alford's deposition testimony would show, but the trial court ruled that it would not consider any of Dr. Alford's testimony. Respondent argues that the summary of Dr. Alford's testimony was not an offer of proof and was not sufficient to preserve petitioner's assignment of error for appellate review. After reviewing the record, we conclude that the summary of Dr. Alford's testimony given by petitioner's counsel was sufficient to clearly show us what the excluded evidence would have revealed. Accordingly, we conclude that petitioner has preserved the issue of the exclusion of Dr. Alford's testimony for appellate review and we now address the merits of this assignment of error.

[2] Petitioner argues that Dr. Alford's testimony was admissible and that the trial court erred in excluding it based solely on the fact that Dr. Alford had not personally examined petitioner. Respondent conceded at trial that Dr. Alford would qualify as an expert witness. The test for admissibility of the opinion of an expert witness is helpfulness to the trier of fact and the trial court's decision on admissibility will be reversed only for an abuse of discretion. *Jennings v. Jessen*, 103 N.C. App. 739, 745, 407 S.E.2d 264, 267-68 (1991). In appropriate situations, "an expert can base opinion testimony on other than first-hand knowledge." *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 516, 428 S.E.2d 238, 243 (1993). After reviewing the record, we conclude that Dr. Alford's testimony would not have been helpful to the trier of fact because it would not have helped to show whether or not petitioner willfully refused to breathe into the

machine on 29 May 1994. Accordingly, the trial court did not err in excluding Dr. Alford's deposition testimony.

II.

[3] Petitioner also argues that the trial court erred in refusing to enter judgment in favor of petitioner at the end of respondent's evidence. Pursuant to G.S. 20-16.2(d), a driver whose license has been revoked for committing an implied-consent offense may request a hearing to determine whether:

(1) The person was charged with an implied-consent offense;

(2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense;

(3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

(4) The person was notified of his rights as required by subsection (a); and

(5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

G.S. 20-16.2(e) provides that "[i]f the revocation is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing de novo upon the issues listed in subsection (d)."

Petitioner argues that the trial court erred in failing to enter judgment in favor of petitioner at the end of respondent's evidence because respondent's evidence failed to prove that petitioner willfully refused to submit to the chemical analysis. When a trial judge sits as the trier of fact, his findings of fact and conclusions of law are conclusive on appeal if supported by competent evidence. *General Specialities Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979). "This is true even though there may be evidence in the record to the contrary which could sustain findings to the contrary." *Id.*

Here, Officer Kapps testified that after Officer Hutchins requested petitioner to take a breathalyzer test, petitioner put his fingers in his mouth and Officer Kapps had to restart the observation. Officer Kapps admitted that she had not told petitioner not to put anything in his mouth, but after he put his fingers in his mouth, she instructed him that if he did it again, he would be written up as a

refusal. Officer Kapps further testified that after the second observation period, petitioner blew into the instrument five or six times, but that "when he got the tone to start, he would stop blowing." Officer Kapps testified that she told petitioner before he started blowing that she "needed for him to blow hard enough to bring that tone on and to blow until [she] told him to stop." Officer Kapps testified that she could not tell if petitioner physically could not blow into the machine or if he was intentionally not blowing. Although Officer Hutchins testified that petitioner appeared to be generally cooperative, Officer Hutchins also testified that petitioner "kept leaning over and putting his fingers in his mouth" and that Officer Kapps and he had to tell petitioner several times not to put his fingers in his mouth or they would write him up as a refusal.

Petitioner points to our Supreme Court's decision in *Etheridge v. Peters*, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980) where the Court stated:

> [A] willful refusal to submit to a chemical test within the meaning of G.S. 20-16.2(c) occurs where a motorist: (1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test.

Petitioner argues that respondent did not satisfy the third element of the *Peters* test because respondent's evidence showed that petitioner voluntarily elected to take the test. We disagree. After reviewing the record, we conclude that respondent's evidence showed that petitioner failed to follow the instructions of the breathalyzer operator, Officer Kapps. Failure to follow the instructions of the breathalyzer operator is an adequate basis for the trial court to conclude that petitioner willfully refused to submit to a chemical analysis. *Bell v. Powell*, 41 N.C. App. 131, 135, 254 S.E.2d 191, 194 (1979). Accordingly, the trial court properly declined to enter judgment in favor of petitioner at the end of respondent's evidence.

III.

Petitioner also argues that the trial court erred in its refusal to enter judgment in favor of petitioner at the end of all the evidence because respondent failed to establish that petitioner willfully refused to take the breathalyzer test. After respondent presented its

evidence, petitioner testified that although the officers thought he was intentionally putting his fingers in his mouth, he was actually biting his nails out of nervousness. Petitioner also testified that he suffers from bronchitis and that he could not blow into the machine on the night in question because of his bronchitis and because his nose had been injured during a fight on that date. He insisted that he tried to blow because he knew he would lose his license and would lose his job if he was written up as a refusal.

While this evidence could have led the trial court to determine that petitioner did not willfully refuse to blow into the breathalyzer machine, we conclude that there was still competent evidence to support the trial court's conclusion that petitioner willfully refused. When the trial judge is the trier of fact, "he has the duty to pass upon the credibility of the witnesses who testify. He decides what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom. The appellate court cannot substitute itself for the trial judge in this task." *Nello L. Teer Co.* at 275, 254 S.E.2d at 660. Accordingly, this assignment of error fails.

IV.

[4] Petitioner argues that the trial court erred in its failure to make any findings of fact to resolve why petitioner was unable to give a sufficient breath sample. G.S. 1A-1, Rule 52(a)(1) provides that in a non-jury trial, the trial court must "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." "However, the trial court need not recite every evidentiary fact presented at the hearing, but must only make specific findings on the ultimate facts established by the evidence that are determinative of the questions raised in the action and essential to support its conclusions." *Tolbert v. Hiatt*, 95 N.C. App. 380, 385, 382 S.E.2d 453, 456 (1989). In its judgment, the trial court found *inter alia*:

> 6. The breathalyzer operator first began observing petitioner at 10:47 p.m. Petitioner was informed of his rights regarding chemical analysis pursuant to G.S. 20-16.2 at 10:47 p.m. Petitioner indicated that he would submit to a chemical analysis of his breath.
>
> 7. Thereafter, petitioner blew into the machine five or six times but failed to give a sufficient sample for analysis each time. Petitioner was thereafter informed that he was being written up as having refused the test.

Petitioner contends that the trial court's seventh finding of fact was not an ultimate fact and was insufficient to indicate that the trial court rejected petitioner's argument that his inability to give a breath sample was not willful or was excusable under the circumstances. We disagree. Here, the trial court made findings that petitioner was informed of his rights regarding chemical analysis, petitioner indicated he would submit to the test, and petitioner blew into the machine five or six times but failed to give a sufficient sample for analysis. The purpose of requiring sufficient findings of fact is to allow "meaningful appellate review." *Hiatt* at 385, 382 S.E.2d at 456. The findings here were sufficient to allow us to determine whether the trial court's judgment and legal conclusions were a correct application of the law. Accordingly, petitioner's assignment of error fails.

V.

Petitioner also argues that the trial court's conclusion of law that petitioner willfully refused to submit to a chemical analysis is not supported by any findings of fact and is contrary to the evidence. We have already addressed this assignment of error in II. and III., *supra*, and we have concluded that the trial court's conclusion of law regarding petitioner's willful refusal is supported by adequate findings and by competent evidence in the record.

VI.

Finally, petitioner argues that the trial court erred in affirming the revocation order because it is not supported by proper findings, conclusions, and is an abuse of discretion. We have addressed the merits of this argument, *supra*, and we have concluded that this assignment of error fails.

Affirmed.

Judges MARTIN, JOHN C., and WALKER concur.

JOYCE BOWLIN, PLAINTIFF-APPELLANT v. DUKE UNIVERSITY, PRIVATE DIAGNOSTIC CLINIC, AND ROY B. JONES, DEFENDANTS-APPELLEES

No. COA94-807

(Filed 6 June 1995)

1. **Pleadings § 397 (NCI4th)— second amended complaint— relation back to original complaint**

Claims asserted in plaintiff's second amended complaint related back to her original complaint where there was no question that the original complaint gave notice of the transactions or occurrences sought to be proved pursuant to the second amended complaint, that is, that defendants were negligent in performing a bone marrow harvest and this negligence proximately caused permanent injuries; therefore, the claims were viable when plaintiff voluntarily dismissed her action, and she had an additional year in which to file the claims.

Am Jur 2d, Pleading §§ 337, 338.

Rule 15(c), Federal Rules of Civil Procedure, or state law as governing relation back of amended pleading. 100 ALR Fed. 880.

2. **Pleadings § 399 (NCI4th)— voluntary dismissal—relation back—procedure employed by plaintiff proper**

Plaintiff did not forfeit her right to prosecute this lawsuit and obtain appellate review of the previous court orders by failing to seek a ruling of relation back prior to seeking a voluntary dismissal, since the statute of limitations was not pled until after the voluntary dismissal and relation back therefore did not become an issue until after the voluntary dismissal.

Am Jur 2d, Pleading §§ 337, 338.

Rule 15(c), Federal Rules of Civil Procedure, or state law as governing relation back of amended pleading. 100 ALR Fed. 880.

Appeal by plaintiff from order entered 15 February 1994 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 19 April 1995.

Elizabeth F. Kuniholm, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, William H. Moss, and James Y. Kerr, III, for defendants-appellees Private Diagnostic Clinic and Roy B. Jones, M.D.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Kathleen M. Millikan, for defendant-appellee Duke University.

JOHNSON, Judge.

In the Spring of 1986, plaintiff was diagnosed with breast cancer. She had a mastectomy and underwent chemotherapy. Her treating oncologist then referred her to Duke University Medical Center (DUMC) for participation in the bone marrow transplant program, a program allowing cancer patients to harvest their own bone marrow to be frozen and reimplanted in the case of recurrence of the disease.

In October 1986, plaintiff entered DUMC for the harvesting of her bone marrow. The procedure was performed on 6 October 1986 under general anesthesia and involved inserting a long needle into the posterior hip bone and extracting marrow. Defendant Dr. Roy B. Jones and a fourth year medical student acting under Dr. Jones' direct supervision performed the harvest procedure. Immediately after the procedure, plaintiff noticed pain and numbness in her right buttock and posterior thigh. This pain has persisted and was diagnosed by plaintiff's experts as caused by a penetration injury to the medial portion of the sciatic nerve, the major nerve serving the leg and foot, and to the posterior femoral cutaneous nerve, the sensory nerve that serves the posterior thigh. The pain is constant and interferes with her ability to sleep, carry on daily activities or be gainfully employed.

In the original complaint filed 12 December 1988, plaintiff alleged damages occurring as a result of defendants' negligence in performing the bone marrow harvest procedure, resulting in injury to her nerves. Because plaintiff was asleep during the surgery and because none of her doctors, until that time, had been able to identify the cause or mechanism of her nerve injury, she based her allegations of negligence on the doctrine of *res ipsa loquitur*. On 19 September 1989, plaintiff amended her complaint to add additional defendants and factual allegations relating to the active participation of a medical student in plaintiff's operation.

On 11 May 1991, plaintiff dismissed several of the individual defendants in connection with identifying expert witnesses. On 20 June 1990, defendants deposed Dr. Austin Sumner, plaintiff's principal expert on negligence and causation. Dr. Sumner testified that in his opinion plaintiff had suffered a needle penetration injury to the sciatic and posterior femoral cutaneous nerves where they exit the pelvis at the sciatic notch (a point of injury distant from the operative site), that the injury occurred during the bone marrow harvest procedure and that it was below the applicable standards of practice to permit the needle to penetrate those nerves in the course of performing the bone marrow harvest.

On 15 January 1990, defendants deposed a second expert for plaintiff, Dr. Guido Tricot, who testified that it would be a deviation from applicable standards of practice to inflict a needle penetration injury to these nerves in the course of the harvest procedure.

On 22 January 1991, defendants identified a total of six expert witnesses who were expected to testify as to the standards of practice in performing bone marrow harvest procedures and the cause of plaintiff's injury. These experts later testified by deposition in opposition to Dr. Sumner's and Dr. Tricot's testimony, addressing the issues of negligence, standards of practice and causation.

Bowlin I was set for trial in July 1991. Ten days before trial, defendants moved for summary judgment on all issues. Because this Court had recently held that the doctrine of *res ipsa loquitur* was inapplicable in most medical negligence cases, in *Grigg v. Lester*, 102 N.C. App. 332, 401 S.E.2d 657, *disc. review denied*, 329 N.C. 788, 408 S.E.2d 520 (1991), and because both the original complaint and the first amended complaint had been drafted to invoke the doctrine of *res ipsa loquitur*, in response to defendants' motion for summary judgment on all issues, plaintiff filed a motion to amend the complaint to conform to the evidence on 10 July 1991 to allege a specific deviation from the standards of practice by defendants. These contentions had been the subject of discovery since June 1990, had been addressed specifically by defendants' experts months before and were the basis for plaintiff's response to the summary judgment motions.

The court heard arguments on defendants' summary judgment motions and on plaintiff's motion to amend on 15-17 July 1991. Plaintiff presented to the court all the evidence upon which she relied that defendants had deviated from applicable standards of practice

and that these deviations had caused her injury. Defendants asserted, through their respective counsel, that plaintiff's contention that the standards of practice had been violated was a "new" claim and that they were surprised and prejudiced by her attempt to assert this "new" claim at the last minute, because they had discovered and prepared the case as a *res ipsa loquitur* case and not as a standards of practice case. As a result, defendants argued, they were unprepared to defend allegations that deviations from standards of practice had caused injury to plaintiff, and they would therefore be severely prejudiced if the motion to amend were allowed.

In response to these arguments by defendants, Judge Jenkins indicated that he was inclined to allow summary judgment on *res ipsa loquitur* and to deny the motion to amend. Plaintiff then agreed that if the court would allow the motion to amend, she would immediately upon filing and service of the amended complaint take a voluntary dismissal without prejudice of the general negligence claims that remained in the second amended complaint. This would preserve her claims of ordinary negligence for hearing at a later date.

Defendants did not object to this procedure. The court entered partial summary judgment and then signed an order (drafted by defendants) allowing plaintiff's motion to amend as to general negligence claims and respondeat superior but reserving ruling on the issue of relation back of the amendment. Judge Jenkins stated in court that he assumed the statute of limitations as to the claims in the second amended complaint was not in issue. Accordingly, after the court entered partial summary judgment and allowed the motion to amend as to general negligence, plaintiff filed and served the second amended complaint, which contained claims of general negligence and respondeat superior against defendants based upon the same factual allegations as were contained in the original complaint and the first amended complaint, both filed and served before the expiration of the statute of limitations. Plaintiff then filed her notice of voluntary dismissal of the second amended complaint. Plaintiff made clear at the hearing that the only claims being voluntarily dismissed were those on which summary judgment had not been entered, as set forth in the second amended complaint. At no time before the voluntary dismissal without prejudice was filed did defendants raise the statute of limitations as a defense or issue, nor did they object to the court's failure to rule on the issue of relation back.

Plaintiff filed notice of appeal from the order of partial summary judgment. She also filed notice of appeal from the order allowing the motion to amend, solely on the issue of the court's refusal to rule on relation back. At the time plaintiff's brief was filed, she did not include an argument relating to the refusal of the court to rule on relation back.

Defendants argued in *Bowlin I*, that plaintiff's claims of ordinary negligence as contained in the second amended complaint and voluntarily dismissed were still pending and that if all rulings on partial summary judgment were affirmed, the plaintiff would be free to pursue these ordinary negligence claims and would not be without a remedy for her alleged injuries. At the time of oral argument in November 1992, plaintiff had refiled her negligence claims and they were pending in Wake County Superior Court.

On 1 December 1992, this Court affirmed Judge Jenkins' ruling on partial summary judgment in *Bowlin I. Bowlin v. Duke University*, 108 N.C. App. 145, 423 S.E.2d 320 (1992), *disc. review denied*, 333 N.C. 461, 427 S.E.2d 618 (1993). Plaintiff argues that this Court assumed what defendants had argued, that plaintiff's ordinary negligence claims were still pending. Our Court noted that "the trial court granted defendants' motions as to all of plaintiff's claims except her ordinary negligence claims . . ." and "that the summary judgment below did not resolve all claims between all parties." *Id.* at 147-48, 423 S.E.2d at 321-22.

On 10 July 1992, plaintiff refiled the second amended complaint pursuant to N.C.R. Civ. P. 41(a)(1). Defendants raised the statute of limitations as a defense under Rule 12(b)(6); defendant DUMC included it in the answer and defendants Private Diagnostic Clinic and Jones by serving a motion to dismiss. The parties engaged in minimal discovery. On 21 October 1993, the court set the case peremptorily for trial at the 14 March 1994 session. On 25 October 1993, plaintiff identified her experts. Defendants identified their experts on 31 January 1994. On the issue of negligence, defendants' experts were essentially the same as they were in *Bowlin I*, designated to testify that defendants had complied with all applicable standards of practice.

At the time defendants' motions to dismiss were heard on 10 February 1994, *Bowlin I* had been pending for nineteen months and *Bowlin II* was essentially ready for trial, which was one month away. Judge Cashwell entered his order dismissing the instant case, *Bowlin*

II, for failure to state a claim because he determined that the statute of limitations had expired on plaintiff's claims.

The dispositive issue on appeal is whether the trial court erred in allowing defendants' Rule 12(b)(6) motion, dismissing plaintiff's claim. A 12(b)(6) motion is an appropriate vehicle for dismissing a claim barred by the statute of limitations. *Long v. Fink*, 80 N.C. App. 482, 342 S.E.2d 557 (1986). North Carolina General Statutes § 1-15 (1983) requires that a medical malpractice cause of action must be filed within three years of the date of the last act giving rise to the cause of action. The statute also gives a period of repose of four years.

Defendants argue that the second amended complaint on its face is time barred because in the instant action, after the voluntary dismissal, plaintiff filed her complaint on 10 July 1993, more than four years after the date of the bone marrow harvest procedure of 6 October 1986. Defendants also contend that plaintiff, by voluntarily dismissing her action, and appealing and abandoning a ruling of the trial court which failed to provide that her second amended complaint related back, has lost any further right to prosecute the instant case.

[1] Plaintiff argues that the issue is whether the second amended complaint relates back under Rule 15(c) at the time of filing and dismissal, such that the claims asserted in it were viable at the time they were dismissed. If the claims are still alive, Rule 41(a) operates to allow an additional year in which to file.

Thus, we address whether the claims asserted in the second amended complaint relate back to the original complaint. Rule 15(c) states:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Accordingly, whether defendants had notice in the original pleadings of the events to be proved in the amended pleadings is important. *See Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 321 N.C. 435, 364 S.E.2d 380 (1988); *You v. Roe*, 97 N.C. App. 1, 387 S.E.2d 188 (1990). There is no question that the original complaint gave notice of the transactions or occurrences sought to be proved pursuant to the

second amended complaint. Defendants were on notice of the circumstances involved. "Whether an amended complaint will relate back to the original complaint does not depend upon whether it states a new cause of action but instead upon whether the original pleading gave defendants sufficient notice of the proposed amended claim." *Pyco*, 321 N.C. 435, 442, 364 S.E.2d 380, 384.

We recognize that defendants alleged prior to the July 1991 trial that they had not prepared for an ordinary negligence claim and that this led to the trial court's hesitancy concerning amending plaintiff's second complaint. Defendants were on notice, however, that plaintiff was alleging that defendants were negligent in performing the bone marrow harvest and that she alleged that this proximately caused permanent injuries. Therefore, the amended complaint relates back to the original complaint. As plaintiff has complied with the requirements of Rules 15 and 41, her claims were sufficiently preserved.

[2] The next issue is whether plaintiff forfeited her right to prosecute this lawsuit and obtain appellate review of the previous court orders by failing to seek a ruling of relation back prior to seeking a voluntary dismissal. This Court in *You v. Roe* failed to find fault with the procedure used where an amendment was initially allowed and the trial court reserved ruling as to relation back until it was later raised by defendant. This Court went on to reverse the trial court's summary judgment for defendants based on the statute of limitations stating that where "there are no contradictory allegations" and "the allegations of the amended complaint are based on the same transaction or occurrence . . . as the original complaint" that "plaintiff's amended complaint should be deemed to relate back to the filing date of the original complaint." *Id.* at 15, 387 S.E.2d at 195.

Until the statute of limitations is affirmatively pled, it is not available. Accordingly, the defense became available only when pled by defendants in *Bowlin II*, the instant action. Hence, defendants' argument that plaintiff abandoned the relation back issue by failing to argue the issue in *Bowlin I* is without merit.

In light of our holding, we find it unnecessary to reach plaintiff's remaining collateral arguments. For the foregoing reasons the decision of the trial court is reversed and remanded.

Reversed and remanded.

Judges COZORT and McGEE concur.

STATE OF NORTH CAROLINA v. CEASAR B. KIRKLAND

No. 933SC1225

(Filed 6 June 1995)

1. Evidence and Witnesses § 754 (NCI4th)— failure to rule on motion to suppress—admission of objectionable evidence—harmless error

Though the trial court erred in failing to rule on defendant's motion to suppress evidence seized during a search and then permitting testimony regarding evidence which was the subject of the motion, such error was harmless where there was evidence from a number of witnesses that defendant had committed the robbery in question. N.C.G.S. §§ 15A-977(c) and (d).

Am Jur 2d, Appeal and Error § 806.

2. Grand Jury § 30 (NCI4th)— jury challenge based on racial discrimination—timeliness

The trial court did not err by summarily denying defendant's motions to compel disclosure of jury records, to appoint expert witnesses to assist him in investigating and preparing statistics concerning jury selection procedures to support his motion to quash, and to quash the indictment, since the motion to quash was not timely made, and defendant did not make the threshold showing of specific need required for the appointment of an expert.

Am Jur 2d, Grand Jury §§ 21 et seq.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 5 February 1993 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 28 September 1994.

The evidence presented at defendant's trial tended to show the following. Around 1:00 a.m. on 2 January 1991, a car pulled up to the order stand of a Burger King restaurant in Greenville. After placing an order the driver pulled up to the window, cancelled the order, and talked with Angelique Parker, a Burger King employee. Selina Benson, assistant manager of the Burger King, identified defendant as the driver of the car.

After the restaurant closed for the night, Ms. Benson began counting the money in her office when she looked up and saw a man wearing a maroon and white-striped mask who was carrying a gun and a plastic bag. The man shoved Ms. Benson, warned the other employees not to move, and demanded money. An employee approached the robber who hit him with the gun and threatened to shoot if anyone moved again. Ms. Benson could only see the robber's eyes and mouth. She gave him approximately $2000 from the register, and the robber left. Ms. Benson ran out the back door and saw the robber jump into a car as it sped away. Ms. Benson testified that this car was the same one she had seen earlier driven by defendant. She stated that she identified a photograph of defendant as having "the eyes" of the robber.

Ms. Parker testified that both she and her husband, Jeffrey DeWitt, were employed by the Burger King. Several days before the robbery, Jeffrey, his sister Vicky DeWitt, and defendant discussed robbing the Burger King with Ms. Parker. They wanted Ms. Parker to let them in after the restaurant closed but she refused.

On the night of the robbery, Ms. Parker worked the 4:00 p.m. to midnight shift. Ms. Parker testified that between 10:30 and 11:00 p.m. a car driven by defendant pulled up to the restaurant's drive-in window. Vicky DeWitt and Lennon Smith, a friend of defendant, were in the car, and Mr. Smith asked Ms. Parker if she was ready to leave. She replied that she would not get off work until after midnight. Ms. Parker testified that the car defendant drove was owned by Pamela Harper who dated Reggie DeWitt, Ms. Parker's brother-in-law.

After the robbery, Ms. Parker went to defendant's apartment. Vicky, Jeffrey, and Reggie DeWitt, and defendant were present. Ms. Parker went into Ms. DeWitt's room and saw money scattered around. When Ms. Parker asked where the money had come from, her friends said that they "did Burger King." Defendant was laughing and passing out money.

Lennon Smith testified that he went with defendant to the Burger King and that defendant entered through the back door of the restaurant with an empty bag in his hand. Mr. Smith said defendant returned about fifteen minutes later with a toboggan over his head, carrying a full bag. Mr. Smith testified that defendant said, "Hurry up. Take off. I just robbed Burger King."

Detective D. R. Best of the Greenville Police Department investigated the robbery. Detective Best testified that Helen Yvette Spell, a Burger King employee, saw the robber without his mask and identified Reggie DeWitt from a photographic array as the robber. Ms. Spell later recanted, stating that her reason she chose DeWitt from the photographs was because she had seen him in the restaurant with his brother earlier that night. Ms. Parker and Mr. Smith both testified that they each made false statements to Detective Best before stating that defendant had committed the robbery.

Defendant proceeded *pro se.* He presented evidence that he was jailed for eight months before posting bond and then fled the state. After five months, defendant returned to face trial on the robbery charge. Defendant was convicted and sentenced to fourteen years imprisonment. Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lorinzo L. Joyner, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defenders Benjamin Sendor and Charlesena Elliott Walker, for defendant appellant.

ARNOLD, Chief Judge.

[1] Defendant assigns error to the trial court's failure to rule on defendant's motion to suppress and then permitting testimony regarding evidence which was the subject of the motion. Under N.C. Gen. Stat. § 15A-977, a motion to suppress is not subject to a summary denial where the defendant has alleged a legal basis for the motion and has provided a supporting affidavit. N.C. Gen. Stat. § 15A-977(c) (1988); *State v. Breeden*, 306 N.C. 533, 293 S.E.2d 788 (1982). "If the motion is not determined summarily the judge must make the determination after a hearing and finding of facts." N.C. Gen. Stat. § 15A-977(d) (1988).

In the instant case, defendant made a proper motion to suppress evidence seized by the police from a search of his apartment, including approximately $150 in cash. In considering defendant's motion, the trial judge rendered the motion moot upon the State's assurance that it would not introduce any evidence arising out of the search pursuant to the warrant. During the State's case, however, testimony was elicited from Detective Best as to whether any of the money from the robbery was recovered. Over defendant's objection, Best responded,

"Yes, sir. There was just over $100—$140 or $50 recovered, pursuant to that search warrant."

We agree with defendant that the trial court erred by admitting Detective Best's testimony concerning the money without first having conducted a hearing to determine the admissibility of such evidence. *Breeden*, 306 N.C. 533, 293 S.E.2d 788; N.C. Gen. Stat. §§ 15A-977(c) and (d). However, the error was harmless beyond a reasonable doubt.

A violation of the defendant's rights under the United States Constitution is presumed prejudicial unless the State proves and the appellate court finds that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (1988). The State's evidence shows that although Angelique Parker and Lennon Smith admitted having lied to the police, both Parker and Smith recanted those statements and testified before the jury that defendant had committed the robbery. Significantly, both witnesses said they had lied because they had been threatened. Furthermore, Parker and Smith had already testified prior to Detective Best's testimony that money from the robbery was in #13 Pinehurst Apartments shortly after the robbery. Moreover, Detective Best was not the only impartial witness, as suggested by the dissent. Selina Benson, the assistant manager, described in detail how she was confronted by the robber and how she carefully observed every exposed feature of his face. Thereafter, by covering the bottom half of faces shown to her in a photographic lineup, she instantly identified defendant as the robber, stating, "Without a doubt, these are the eyes." Therefore, in light of this and other evidence presented at trial, we find that the State has met its burden in demonstrating that the error was harmless.

[2] Defendant next contends that the trial court erred by summarily denying his motions to compel disclosure of jury records, to appoint expert witnesses, and to quash the indictment. Defendant argues that the indictment should have been quashed because the grand jury foreman, the grand jury, and the petit jury were unlawfully selected on the basis of race. Accordingly, he moved to inspect relevant jury records, and further motioned for appointment of an expert witness to assist him in investigating and preparing statistics concerning jury selection procedures to support his motion to quash.

N.C. Gen. Stat. § 15A-955 (1988) allows the trial court, upon defendant's motion, to dismiss an indictment when there is ground for a challenge to the grand jury array. *State v. Lynch*, 300 N.C. 534, 268 S.E.2d 161 (1980). This motion must be made at or before the

arraignment or it is waived. *Id.*; N.C. Gen. Stat. § 15A-952 (1988). Defendant was arraigned on 6 May 1991, and the motion to quash was not made until 1 February 1993; therefore, the motion was not timely made. We also find that defendant did not make the threshold showing of specific need required for the appointment of an expert to assist him in his investigation of racial discrimination in jury selection. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986). This assignment of error is overruled.

Defendant failed to preserve any of his remaining assignments of error for appellate review. N.C.R. App. P. 10(b)(1) (1995). However, we have reviewed these assignments of error and find defendant has received a fair trial free from prejudicial error.

No error.

Judge COZORT concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting.

Because I cannot say that the erroneous admission of testimony regarding the search of defendant's apartment was harmless beyond a reasonable doubt, I respectfully dissent.

Defendant was charged with one count of armed robbery with a dangerous weapon for the robbery of a Burger King restaurant in Greenville, North Carolina. Defendant made a proper motion to suppress evidence seized by the police from a search of his apartment. After the State assured the trial court that it would not introduce any evidence from the search, the court ruled that the motion to suppress was moot. During the State's examination of Detective Best, however, he testified that money from the robbery was recovered after a search of defendant's apartment. The majority finds, and I agree, that the admission of this testimony was constitutional error which requires a new trial unless the State shows that the error was harmless beyond a reasonable doubt. *State v. Swindler*, 339 N.C. 469, 450 S.E.2d 907 (1994); *State v. Bozeman*, 115 N.C. App. 658, 446 S.E.2d 140 (1994); N.C. Gen. Stat. § 15A-1443(b) (1988). Overwhelming evidence of guilt may render a constitutional error harmless. *State v. Autry*, 321 N.C. 392, 364 S.E.2d 341 (1988); *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982). I conclude

that the evidence of defendant's guilt is not overwhelming and that he should receive a new trial.

At trial, Angelique Parker, who worked for the Burger King, testified that her husband, Jeffrey DeWitt, his sister, Vicky DeWitt, and defendant discussed robbing the Burger King. Ms. Parker made two statements to the police. In her first statement, she said that defendant had robbed the Burger King. In her second statement she said that she had lied in her first statement after being threatened by Greenville Police Detective Best and that defendant was not involved in the robbery. At trial, Ms. Parker said her second statement was a lie and that she had made it because her brother-in-law, Reggie DeWitt, threatened her life and the lives of her parents.

Lennon Smith testified that he rode with defendant, Reggie DeWitt, and defendant's girlfriend to the Burger King on the night of the robbery. Mr. Smith testified that defendant left the car and committed the robbery. Mr. Smith told the police in a written statement, however, that Reggie DeWitt had planned and executed the robbery. He testified that he was "probably threatened" when he made the statement to the police.

Selina Benson, the manager of the Burger King, testified that she recognized defendant in a photographic array as the robber by his eyes. Detective Best testified that a Burger King employee, Helen Yvette Spell, saw the robber without his mask and identified him as Reggie DeWitt from a photographic array. Detective Best stated that Ms. Spell recanted her identification and she was not available at trial.

While there is evidence that defendant was involved in the robbery of the Burger King, the evidence that he was the actual robber is weak. Ms. Parker and Mr. Smith repeatedly lied to the police and their credibility is questionable. Ms. Benson's testimony that she recognized defendant as the robber by his eyes is probative but not overwhelming. Therefore, I cannot conclude that the error of admitting Detective Best's testimony that he found money from the robbery in defendant's apartment was harmless beyond a reasonable doubt. Constitutional error is not harmless beyond a reasonable doubt if " 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " *Chapman v. California*, 386 U.S. 18, 23, 17 L. Ed. 2d 705, 710, *reh'g denied*, 386 U.S. 987, 18 L. Ed. 2d 241 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 11 L. Ed. 2d 171, 173 (1963)). I vote for a new trial.

NOELL v. KOSANIN

[119 N.C. App. 191 (1995)]

LISA ANN NOELL, PLAINTIFF v. RADOSLAV KOSANIN, VERNE C. LANIER, JR., VERNE C. LANIER, JR., M.D., F.A.C.S.—PLASTIC SURGERY CENTER, P.A. (FORMERLY KNOWN AS LANIER & RIEFKOHL PLASTIC SURGERY CENTER, P.A.), DOE ONE, DOE TWO AND DOE THREE, DEFENDANTS

No. 9414SC317

(Filed 6 June 1995)

1. Physicians, Surgeons, and Other Health Care Professionals § 137 (NCI4th)— anesthesiologist—eyes not taped closed—injury to eye—summary judgment for defendant—improper

The trial court erred by granting summary judgment for an anesthesiologist where plaintiff had a rhinoplasty and replacement of a chin implant; she suffered severe pain in her right eye following the surgery; it was determined that she had suffered erosion of the surface epithelium secondary to drying of the epithelial surface during her surgery; she continued to suffer periodic episodes of recurrent erosion syndrome which became less frequent but still occurred several times a month; her forecast of evidence included the affidavit of her mother and plaintiff's deposition, both relating that Dr. Lanier (the plastic surgeon) had told them that the eye had been improperly taped during surgery; and the response to a request for admissions and the deposition of the anesthesiologist in which the anesthesiologist indicated that the standard of care required the eyes to be taped shut during this surgery to prevent drying of the eye. Viewed in the light most favorable to plaintiff, the evidence establishes issues of fact as to whether the anesthesiologist breached the applicable standard of care and thereby proximately caused plaintiff's injury.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 256-258.

2. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— eye not taped by anesthesiologist—liability of surgeon

The trial court erred in granting summary judgment for a plastic surgeon in a medical malpractice action arising from an anesthesiologist's failure to tape closed the patient's eye during surgery where this anesthesiologist had served as the primary anesthesiologist for this plastic surgeon since 1986; he had administered anesthesia to all of the plastic surgeon's patients

requiring general anesthesia beginning in 1989; the anesthesiologist would furnish the plastic surgeon with a list of times when he was available and the surgeon would schedule his surgeries accordingly; the surgeon's office would telephone the anesthesiologist with the schedule of cases for the following week; plaintiff testified that she chose the surgeon because she heard that he was the best; she first spoke to the anesthesiologist the day before the surgery when he called to explain the procedure to her; he had sent her a pamphlet explaining his background and reviewing general anesthesia procedures; the pamphlet stated that he worked jointly with the plastic surgeon; and the only bill plaintiff received was through the plastic surgeon's office, which included an anesthesia fee. These facts are sufficient to create a jury question as to whether plaintiff reasonably assumed that the plastic surgeon was in charge of her entire surgical procedure, including anesthesia care and recovery.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 286, 287.

Appeal by plaintiff from summary judgment entered 19 and 20 October 1993 by Judge J.B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 6 April 1995.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr. and Kenneth B. Oettinger, for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by E.C. Bryson, Jr. and Mark E. Anderson, for defendant-appellee Radoslav Kosanin.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and Kerry A. Shad, for defendants-appellees Verne C. Lanier, Jr. and Verne C. Lanier, Jr., M.D., F.A.C.S.—Plastic Surgery Center, P.A.

WALKER, Judge.

On 24 August 1990, plaintiff was admitted to Lanier & Riefkohl Plastic Surgery Center, P.A., now known as Verne C. Lanier, M.D., F.A.C.S.—Plastic Surgery Center, P.A. (the Plastic Surgery Center), for secondary open rhinoplasty and removal and replacement of a chin implant. Defendant Verne C. Lanier, Jr., a plastic surgeon, per-

formed the surgery. Defendant Radoslav Kosanin, an anesthesiologist, administered anesthesia services to plaintiff.

At approximately 8:30 a.m., plaintiff was marked for surgery by Dr. Lanier and placed under general anesthesia by Dr. Kosanin. Plaintiff was then prepared for surgery by Dr. Kosanin and other operating room personnel. Surgery was completed at approximately 11:00 a.m., and plaintiff was taken to the recovery room. Upon awakening from surgery, plaintiff complained of a severe pain in her right eye. At approximately 5:30 p.m., Dr. Lanier came to the recovery room to examine plaintiff's stitches, and plaintiff informed him of this pain. Plaintiff was discharged at approximately 6:00 p.m. but continued to have pain in her right eye.

The next morning, plaintiff called Dr. Lanier and informed him that she was still experiencing severe pain in her right eye. Dr. Lanier arranged for plaintiff to be examined by Dr. J. Stuart McCracken, an ophthalmologist. Dr. McCracken examined plaintiff that morning and determined that plaintiff's right cornea had "an approximate 40 percent central erosion or defect of the surface epithelium." The pain persisted, and plaintiff saw Dr. McCracken daily from 26 August to 30 August. Dr. McCracken diagnosed plaintiff's eye injury as "an epithelial erosion secondary to drying out of the epithelial surface during her surgical procedure." After that time plaintiff continued to experience periodic episodes of recurrent erosion syndrome which became less frequent but still occurred several times a month.

On 22 May 1992 plaintiff filed suit, alleging that Drs. Kosanin and Lanier were negligent in failing to properly tape her eyes shut prior to surgery, which negligence proximately caused her injuries and damages. Plaintiff also alleged that Drs. Kosanin and Lanier were negligent under the doctrine of *res ipsa loquitur*. Defendants answered denying negligence and subsequently moved for summary judgment. Summary judgment was granted in favor of all defendants.

[1] We first address plaintiff's argument that summary judgment was improvidently granted in favor of Dr. Kosanin. In order to maintain an action for medical malpractice, a plaintiff must offer evidence to establish (1) the applicable standard of care; (2) breach of that standard; (3) proximate cause; and (4) damages. *Turner v. Duke University*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989). Causation is an inference of fact to be drawn from other facts and circumstances. *Id.*

In support of his motion for summary judgment, Dr. Kosanin presented the affidavit of Dr. Lloyd F. Redick, a board certified anesthesiologist. After reviewing plaintiff's medical records and the depositions of Drs. Kosanin and McCracken, Dr. Redick expressed the opinion that Dr. Kosanin's anesthetic management of plaintiff conformed to the applicable standard of practice of physicians with Dr. Kosanin's training and experience practicing anesthesiology in Durham in 1990. Dr. Redick further opined that the corneal abrasion plaintiff experienced could occur in the absence of any medical negligence.

Dr. Kosanin contends that this evidence demonstrates the lack of essential elements of plaintiff's claim (breach and proximate cause) and that plaintiff is now required to come forward with expert medical testimony showing genuine issues for trial on these elements. In support of this argument, Dr. Kosanin cites *Mozingo v. Pitt County Memorial Hospital*, 101 N.C. App. 578, 400 S.E.2d 747 (1991), *aff'd*, 331 N.C. 182, 415 S.E.2d 341 (1992). Dr. Kosanin apparently construes the language of *Mozingo* to require expert testimony at the summary judgment stage to show breach of the standard of care and proximate cause. However, after carefully reviewing *Mozingo*, we find no such requirement therein.

Plaintiff argues that her forecast of the evidence establishes issues of fact as to whether Dr. Kosanin negligently provided anesthesia services to her and whether this negligence proximately caused her eye injury. In support of her negligence claim, plaintiff offered the affidavit of her mother, Evelyn Glover Noell, who stated:

> At [Lisa's follow-up] visit Dr. Lanier informed us that he and Dr. Kosanin had discussed the possible causes for Lisa's injury and that they had concluded the most likely cause was that Lisa's eye was improperly taped during surgery.

Plaintiff also offered her own deposition testimony, in which she made a similar statement:

> Meanwhile, in the middle of the week, Dr. Lanier called and . . . said that he had spoken with Dr. Kosanin about what had happened. And the only thing they could figure out was that my eye had not been taped properly during the surgery and because of whatever procedures were done, the eye had been cut either by the oxygen in the room or the air or something . . . contributing to the two-and-a-half hours that I was on the table.

Plaintiff testified in her deposition that Dr. Kosanin called her on Monday after the operation and told her,

> "Verne and I have talked about it." And he said, "We just feel that your eye was not taped properly." And he said, "And I believe that's what caused your eye to be cut."

She also testified that when Dr. Lanier was removing the stitches from her nose, he told her,

> ". . . I really believe that your eye was not taped properly." He said, "That's the only thing we can figure out that happened." And he said, "It's unfortunate, but once in a while these things happen in surgery, and there is nothing really that you can say except I'm sorry."

Plaintiff further offered Dr. Kosanin's response to plaintiff's request for admissions in which he stated:

> It is admitted that the standard of care for preparation of a patient prior to a secondary open rhinoplasty and removal and replacement of a chin implant procedure under general anesthesia requires that the patient's eyes be taped shut to prevent drying of the eye during surgery.

Finally, plaintiff offered the following deposition testimony of Dr. Kosanin:

> Q. And that is, again, the standard of care . . . to tape the eyes closed?
>
> A. Yes.
>
> Q. And if the eyes are not properly taped closed, would that be negligence?
>
> A. It should not—yes, that's correct.

Plaintiff contends that this evidence not only establishes the applicable standard of care but also creates jury questions on the issues of breach and proximate cause.

Summary judgment is appropriate where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *Mozingo v. Pitt County Memorial Hospital*, 331 N.C. 182, 187, 415 S.E.2d 341, 344 (1992). All evidence offered at the hearing must be viewed in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference to be drawn from the

evidence. *Beaver v. Hancock*, 72 N.C. App. 306, 310, 324 S.E.2d 294, 298 (1985). When a defendant moves for summary judgment and offers evidence demonstrating that no genuine issues of material fact exist or that plaintiff cannot make out an essential element of her claim, the plaintiff must then come forward with specific facts showing a genuine issue for trial. *Id.*

In the instant case, Dr. Kosanin's admissions established that the appropriate standard of care was to tape the eyes shut during surgery to prevent them from drying. Furthermore, according to plaintiff, Drs. Kosanin and Lanier told her they had concluded that the most likely cause of her injury was that her eye was not taped shut properly during surgery. Finally, Dr. McCracken's statement during treatment that plaintiff's injury happened "during her surgical procedure" supports the inference that there was a causal connection between the actions of Dr. Kosanin and plaintiff's injury. When viewed in the light most favorable to plaintiff, this evidence establishes issues of fact as to whether Dr. Kosanin breached the applicable standard of care and thereby proximately caused plaintiff's injury. Therefore, the trial court erred in granting summary judgment in favor of Dr. Kosanin.

[2] We next examine plaintiff's claim that summary judgment was improperly granted in favor of Dr. Lanier. Plaintiff conceded at oral argument that the only theory on which she is now proceeding against Dr. Lanier is apparent agency. The doctrine of apparent agency holds that "a principal who represents to a third party that another is his agent is liable for harm caused the third party by the apparent agent if the third party justifiably relied on the principal's representation." *Hoffman v. Moore Regional Hospital*, 114 N.C. App. 248, 252, 441 S.E.2d 567, 570, *disc. rev. denied*, 336 N.C. 605, 447 S.E.2d 391 (1994). Plaintiff argues that the evidence presented at summary judgment was sufficient to create a factual issue as to whether Dr. Lanier could be held liable for Dr. Kosanin's negligence based on apparent agency.

The evidence showed that since 1986, Dr. Kosanin served as the primary anesthesiologist for Dr. Lanier. Beginning in April 1989, Dr. Kosanin had administered anesthesia to all of Dr. Lanier's patients requiring general anesthesia. Dr. Kosanin would furnish Dr. Lanier with a list of times when he was available for administering anesthesia, and Dr. Lanier would schedule his surgeries accordingly. Dr. Lanier's office would telephone Dr. Kosanin with the schedule of cases for the following week.

Plaintiff testified that she chose Dr. Lanier to do her plastic surgery because she had heard he was "the best." Plaintiff first spoke to Dr. Kosanin the day before her surgery when he telephoned her to explain the anesthesia procedure to her. Prior to that call, Dr. Kosanin had sent plaintiff a pamphlet explaining his background and reviewing general anesthesia procedures. The pamphlet, entitled *You and Your Anesthesiologist*, stated that "[s]ince April 1989, [Dr. Kosanin] works jointly with Dr. Verne C. Lanier, Jr., a plastic surgeon." Following her surgery, the only bill plaintiff received was through Dr. Lanier's business office and included a surgical fee, an anesthesia fee, and a facility fee.

These facts are sufficient to create a jury question as to whether plaintiff reasonably assumed Dr. Lanier was in charge of her entire surgical procedure, including anesthesia care and recovery. Thus, we cannot conclude as a matter of law that plaintiff's apparent agency claim against Dr. Lanier fails. We therefore hold that the trial judge erred in granting summary judgment in favor of Dr. Lanier on this issue.

Reversed and remanded.

Judges EAGLES and MARTIN, JOHN C. concur.

STATE OF NORTH CAROLINA v. LLOYD STEPHEN LANE

No. 9416SC657

(Filed 6 June 1995)

1. Criminal Law § 107 (NCI4th)— inmate—crack—fingerprints not available from cellophane bag—testimony not disclosed

There was no error in the prosecution of an inmate for possession of a controlled substance where defendant filed a motion for discovery but the State did not disclose the testimony of a detective on fingerprints. The detective did not conduct any tests in preparation for the trial and did not testify regarding any test results or examinations specific to this case; he formulated his opinion about the cellophane bag based on an examination made for the first time at trial.

Am Jur 2d, Depositions and Discovery §§ 447-449.

Right of accused in state courts to have expert inspect, examine, or test physical evidence in possession of prosecution—modern cases. 27 ALR4th 1188.

Reports of tests, experiments, or analyses as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure. 110 ALR Fed. 313.

2. Evidence and Witnesses § 2908 (NCI4th)— fingerprint expert—DNA testimony—door opened by defendant

There was no error in the prosecution of an inmate for the possession of crack cocaine where a detective testifying as an expert on fingerprint matters was questioned about DNA testing of saliva. The witness discussed DNA analysis only upon cross-examination by defendant; since defendant opened the door, the State appropriately clarified DNA testing procedures by asking follow-up questions. Moreover, the trial court sustained defendant's objections when the State asked a question on DNA testing that was clearly outside the scope of expertise of the witness.

Am Jur 2d, Witnesses § 830.

3. Narcotics, Controlled Substances, and Paraphernalia § 180 (NCI4th)— inmate—possession of crack—instruction on constructive possession—evidence of direct possession

There was no error in the prosecution of an inmate for possession of a controlled substance in the court's instruction on constructive possession where the evidence included incriminating circumstances that would allow a jury to conclude through circumstantial evidence that defendant had actual possession of the crack cocaine. Actual possession may be shown by direct evidence or inferred from the circumstances and the court properly instructed the jury about actual possession.

Am Jur 2d, Drugs, Narcotics, and Poisons § 45.

Prosecutions based upon alleged illegal possession of instruments to be used in violation of narcotics laws. 92 ALR3d 47.

4. Criminal Law § 468 (NCI4th)— possession of controlled substance—prosecutor's closing arguments

There was no error in the prosecution of an inmate for possession of crack cocaine where the prosecutor argued that "DNA testing I submit to you is not an inexpensive type test. And I'd

submit to you that's the type of test that you use when you have rape. . . ." This statement does not constitute an injection of experience or personal belief as to the truth of the evidence, nor does it involve matters that were outside the record.

Am Jur 2d, Trial § 496.

5. Criminal Law § 468 (NCI4th)— inmate—possession of crack—closing argument—jury misled

The trial court did not err in the prosecution of an inmate for possession of crack cocaine by sustaining the prosecutor's objection to defense counsel's closing argument that defendant can't call an expert from Raleigh. Defendant misled the jury because defense counsel has the right to call experts and subpoena potential witnesses himself.

Am Jur 2d, Trial § 496.

Appeal by defendant, Lloyd Stephen Lane, from judgment entered 1 March 1994 by Judge Joe Freeman Britt in Robeson County Superior Court. Heard in the Court of Appeals 28 February 1995.

Attorney General Michael F. Easley, by Associate Attorney General Sarah A. Fischer, for the State.

William L. Davis, III for defendant appellant.

McGEE, Judge.

In November 1992, Lloyd Stephen Lane was incarcerated in the Robeson County Department of Correction. The morning of 4 November, defendant and two other inmates were scheduled to leave the prison on work detail. After defendant was seated on a transport van, one of the other inmates received permission to return to the prison to obtain cold medication from the prison nurse. The officer in charge, Sergeant Byron Walters, searched the inmate before allowing him to re-enter the prison.

Defendant also requested to return to the prison to obtain medication from the nurse. As defendant walked toward the building, he attempted to bypass Sergeant Walters. The sergeant called defendant back outside the prison gate and began to search him. The defendant pushed the sergeant's hand away when the sergeant felt around defendant's left pants pocket. Defendant then took something clear out of his pocket and put it into his mouth. Sergeant Walters ordered

the defendant to hand over the object but the defendant did not comply and began walking away from the sergeant towards the van. Sergeant Walters followed him and repeatedly ordered him to give up the object he had placed in his mouth. At the rear of the van, the defendant stopped and ran his hand back over his mouth. He brought his hand back down to his side and stepped over to his left. Sergeant Walters looked on the ground and found a "little, clear, plastic cellophane bag" containing a hard rock substance. When the sergeant picked up the bag, it felt moist to the touch. Sergeant Walters asked the defendant if the bag belonged to him and if he had anything else in his mouth. Defendant took a brown tablet from his mouth and said it was a vitamin.

The defendant asked Sergeant Walters if they could speak in private. He asked the sergeant to "give him a break" because his mother "would have a heart attack" if she found out about it. Sergeant Walters refused and turned the plastic bag over to the prison contraband officer. The bag and its contents were tested by the State Bureau of Investigation and found to contain crack cocaine.

Defendant was indicted 14 December 1992 for possession of crack cocaine in violation of N.C. Gen. Stat. § 90-95. On 1 March 1994, defendant was convicted of felonious possession of a controlled substance and sentenced to five years imprisonment. From this judgment, defendant appeals.

I. Testimony of Detective Mickey Biggs

[1] On 19 November 1992, defendant filed a motion for discovery under N.C. Gen. Stat. §§ 15A-902 and 15A-903 requesting, among other things, access to "[a]ll results or reports of physical or mental examination or of tests, measurements or experiments, made in connection with the case. . . ." The State complied with the discovery request but did not disclose the substance of the testimony to be offered by Lumberton Police Detective Mickey Biggs. Over the defendant's objection, the State called Detective Biggs as an expert witness to testify on the subject of fingerprint identification. Defendant contends the State failed to disclose during discovery "the evidence to which Detective Mickey Biggs testified to at trial" and this violated defendant's constitutional rights and G.S. 15A-903(e). We disagree.

The court accepted Detective Biggs as an expert in the field of fingerprint identification. Detective Biggs was given State's Exhibit Number 1 and asked if he had ever seen or examined it before.

Detective Biggs answered he had not seen the evidence until that day. He was asked to describe the evidence and replied that it looked like "a small cellophane bag used for packaging controlled substances." Detective Biggs then testified in general terms about packages similar to State's Exhibit Number 1 and how difficult it is to retrieve "a classifiable print" from such a package. He gave a general explanation of the overall process of collecting, analyzing and identifying "classifiable" fingerprints. During cross-examination, Detective Biggs further explained it would be difficult to obtain identifiable fingerprints from this particular cellophane bag because it had been twisted, severely crumpled and appeared to be burned on one end.

N.C. Gen. Stat. § 15A-903(e) (1988) states:

> Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. . . .

While this statute requires the State to allow defendant access to any results, reports of physical or mental examinations, tests, measurements or experiments made in connection with the case, Detective Biggs did not conduct any tests in preparation for this trial and he did not testify regarding any test results or examinations specific to this case. He formulated his opinion as to the cellophane bag based on an examination made for the first time at trial. Defendant had ample opportunity to thoroughly cross-examine Detective Biggs about his opinion at trial.

[2] Defendant also argues Detective Biggs was allowed to testify as an expert witness "concerning matters [about] which he lacked personal knowledge," those being DNA testing of saliva. Defendant contends this testimony was contrary to the North Carolina Rules of Evidence on expert witnesses, and unduly prejudiced him thereby entitling him to a new trial. We disagree.

The State's direct examination of Detective Biggs was about fingerprint identification in general. Detective Biggs was received by the court only as a latent fingerprint expert and not as a DNA specialist. It was only upon cross-examination by the defendant that Detective

Biggs discussed DNA analysis. Defense counsel asked him a series of general questions as to whether saliva tests can be conducted for identification purposes and whether an identification can be made using DNA tests. The detective testified he had received some training in the collection of DNA samples but no training in conducting DNA testing. Detective Biggs admitted he did not know if there were sufficient samples in this case for some other expert to make a DNA test. Since defendant "opened the door" during cross-examination, the State appropriately clarified DNA testing procedures by asking follow-up questions during redirect examination of Detective Biggs. *State v. Brown*, 64 N.C. App. 637, 644-45, 308 S.E.2d 346, 350-51 (1983), *aff'd*, 310 N.C. 563, 313 S.E.2d 585 (1984). Finally, we note the trial court sustained defendant's objections when the State asked a question on DNA testing that was clearly outside the scope of expertise of Detective Biggs.

II. Jury Instructions on Constructive Possession

[3] Defendant next argues the trial court erred because there was insufficient evidence to support a jury instruction on the doctrine of constructive possession. The trial court instructed the jury on both actual and constructive possession. The court's jury instruction included the following:

> Now, members of the jury, possession of a substance may be either actual or constructive.
>
> A person has actual possession of a substance if he has it on his person, is aware of it's [sic] presence and has both the power and intent to control it's [sic] disposition or use.
>
> A person has constructive possession of a substance if he does not have it on his person, but is aware of it's [sic] presence and has both the power and intent to control it's [sic] disposition or use.
>
> A person's awareness of the presence of the substance and his power and intent to control it's [sic] disposition or use may be shown by direct evidence or it may be inferred from the circumstances.

Assuming, *arguendo*, the constructive possession charge to the jury was improper, this was not prejudicial error because the court properly instructed the jury about actual possession, which may be shown by direct evidence or inferred from the circumstances. *State v. Thorpe*, 326 N.C. 451, 454, 390 S.E.2d 311, 313 (1990).

The evidence against defendant included incriminating circumstances that would allow a jury to conclude through circumstantial evidence that defendant had actual possession of the crack cocaine. Evidence that defendant took something from his pocket, placed it in his mouth while walking away from the prison guard who was attempting to conduct a search, combined with the fact that the defendant stopped, ran his hand back over his mouth and immediately thereafter the prison guard retrieved a wet, plastic bag containing crack cocaine which was in close proximity to defendant is sufficient circumstantial evidence to conclude the defendant had actual possession of the crack cocaine.

III. Closing Arguments

[4] Defendant's contention that the trial court judge made improper rulings during closing arguments is unsupported by the record. There is nothing in the trial transcript that supports defendant's claim that the prosecutor violated N.C. Gen. Stat. § 15A-1230 (1988) by injecting his experience and personal beliefs as to the truth of the evidence, or by arguing matters which were outside the record. The control of closing arguments by the prosecution and defense counsel is left to the discretion of the trial judge, and his rulings will not be disturbed in the absence of abuse of discretion. *State v. Hunter*, 297 N.C. 272, 278, 254 S.E.2d 521, 524 (1979).

In support of his contention, defendant objects to the prosecutor's statement that "DNA testing I submit to you is not an inexpensive type test. And I'd submit to you that's the type of test that you use when you have rape. . . ." This statement does not constitute an injection of experience or personal belief as to the truth of the evidence, nor does it involve matters that were outside of the record. As already discussed, the DNA issue initially arose when defendant questioned the lack of any DNA testing by law enforcement officials.

[5] Defendant's other argument that the court erred in sustaining the prosecution's objections during defense counsel's closing argument is also without merit. Defense counsel misled the jury when he said, "[defendant] can't call an expert from Raleigh" since a defendant has the right to call experts and to subpoena potential witnesses himself. The court properly exercised its discretion in sustaining the State's objections to the statement.

For the foregoing reasons, we find defendant's final argument questioning the sufficiency of the evidence to be without merit and we overrule this assignment of error.

No error.

Judge EAGLES and WALKER concur.

CAROLINA BATCHELDOR, TOM SMITH, JAMES B. SMITH, JOHN B. SMITH, ALLEN SMITH, MARION C. SMITH, AND HARRIET SMITH ANISOWICZ, PLAINTIFFS V. WILLIAM RICHARD BOYD, SR., T. MICHAEL JORDAN, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF J.R. BOYD, JR., BARBARA BURGIN, TOMMY G. BOYD, JR., HENRY CLAYTON, AND ROBERT M. CHAFIN, DEFENDANTS

No. 9430SC113

(Filed 6 June 1995)

1. **Evidence and Witnesses § 2211 (NCI4th); Illegitimate Children § 47 (NCI4th)— presumption of paternity by husband—rebuttal by DNA evidence—legitimation by marriage**

DNA test results showing a greater than 99.99% probability that defendant's putative father was his actual father were sufficient to rebut the presumption that he was the child of the man married to his mother at the time of his birth and thus showed that he was a "child born out of wedlock," and defendant was legitimized by the subsequent marriage of his mother and putative father and is entitled to be considered as the child of his putative father for intestate succession purposes.

Am Jur 2d, Bastards §§ 49, 50; Expert and Opinion Evidence §§ 278-282, 300, 310, 316.

Legitimation by marriage to natural father of child born during mother's marriage to another. 80 ALR3d 219.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

Admissibility of DNA identification evidence. 84 ALR4th 313.

2. **Costs § 28 (NCI4th)— determination of heir—allowance of costs and attorney fees against estate**

In a declaratory judgment action to determine whether defendant is the legitimized son and sole heir of an intestate decedent, the trial court did not err by allowing defendant to recover

costs and attorney fees from the estate pursuant to N.C.G.S. § 6-19 where defendant's claim had substantial merit and was successful. Furthermore, the trial court did not err by allowing plaintiffs and the aligned defendants to recover costs and attorney fees from the estate even though they were not successful on the merits where their claim had substantial merit.

Am Jur 2d, Costs §§ 72-86.

Appeal by plaintiffs and the aligned defendants from a declaratory judgment entered on 23 July 1993 by Judge Julia V. Jones in Haywood County Superior Court in favor of defendant William Richard Boyd, Sr. A post-judgment hearing was held by Judge Jones and fees were awarded to counsel for plaintiffs and counsel for the aligned defendants from which defendant William Richard Boyd, Sr. appealed. Fees were also awarded to counsel for defendant, from which plaintiffs and aligned defendants appealed. Heard in the Court of Appeals 6 April 1995.

Westall, Gray & Connolly, P.A., by Jack W. Westall, Jr., for plaintiffs-appellants.

Russell L. McLean, III for defendants-appellants.

Brown, Ward, Haynes, Griffin & Seago, P.A., by Randal Seago, for defendant-appellee William Richard Boyd, Sr.

JOHNSON, Judge.

Defendant William Richard Boyd, Sr. was born 16 September 1936 to Mary Kirkpatrick Jones, now deceased. The birth certificate did not identify the father of defendant William Richard Boyd, Sr. a/k/a William Algermon Kirkpatrick.

At the time of the birth of defendant William Richard Boyd, Sr. (hereinafter defendant), Mary Kirkpatrick was married to, but separated from Silas Armistead Jones. Mary Kirkpatrick and Silas Jones were married in August 1935 and lived as husband and wife until November 1935. The pleadings denote that Mary Kirkpatrick and Silas Jones lived continuously separate and apart for two years after the separation. In 1938, Mary Kirkpatrick was granted a divorce from Silas Jones.

On 22 December 1940, the intestate decedent James R. Boyd, Jr. married Mary Kirkpatrick in Texas. At that time, James R. Boyd, Jr.

and defendant were residents of Haywood County, North Carolina. The couple divorced in May 1948 and stated in court documents that there were no children born of the marriage.

Soon after the birth of defendant, intestate decedent claimed him as his son. Defendant William Richard Boyd, Sr. was identified as the son of James R. Boyd, Jr. in a number of documents: the Boyd family bible; the will of James R. Boyd, Sr., which makes a provision for defendant William Richard Boyd, Sr., and refers to him as "the son of my son, James R. Boyd, Jr. and Mary Kirkpatrick Boyd"; Haywood County hospital records from the 1940's; newspaper articles from the "social" section of the local paper and wedding announcements; and applications for probate and letters testamentary of two of decedent's sisters identify defendant as their "nephew." Additionally, defendant obtained DNA comparison parentage testing as to himself and James R. Boyd, Jr. from two labs. Independently, each lab produced test results showing that to a greater than 99.99% probability, James R. Boyd, Jr. was the father of defendant. Defendant also called seven witnesses from the Boyd family and from the community of Waynesville as to the issue of "reputation" of James R. Boyd, Jr. as the father of defendant.

There is evidence which indicates that during the last years of the life of the intestate decedent, defendant lived with the intestate decedent in the Boyd homeplace in Haywood County, North Carolina.

Plaintiffs assign as error the following: that the trial court erred in failing to grant plaintiffs' and aligned defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted; that the trial court erred in admitting DNA evidence from J.R. Boyd, Jr. over objection because: (a) the evidence was irrelevant, and (b) it was prejudicial under Rule 403 of the Rules of Evidence; that the trial court erred in the denial of plaintiffs' and aligned defendants' motion for directed verdict under Rule 50 of the Rules of Civil Procedure at the close of defendant's evidence and at the close of all of the evidence; that the trial court erred in admitting testamentary evidence of the reputation in the community of the relationship of decedent and defendant during the 1940's; that the trial court committed reversible error in submitting the jury charge on the first issue by directing the jury that they may be permitted to find a child born to a married woman is the child of her husband and that the jury could infer that her husband was the father of the child but was not compelled to do so; that the trial court erred in failing to submit the

proposed issues and jury instructions as proffered by plaintiffs and aligned defendants; that the trial court erred in awarding defendant attorney's fees based upon his contract of employment with his client; and finally, that the trial court erred in entering as a declaratory judgment an order that defendant is the legitimized son and sole heir of intestate decedent and entitled to inherit the entire estate.

[1] Notwithstanding plaintiffs' numerous assignments of error, the preeminent issue is whether competent evidence was presented to the court to show that defendant was entitled to inherit under the intestacy statutes.

This Court has stated that "[a]bsent a statute to the contrary, illegitimate children have no right to inherit from their putative fathers." *Helms v. Young-Woodard*, 104 N.C. App. 746, 749, 411 S.E.2d 184, 185 (1991), *disc. review denied*, 331 N.C. 117, *cert. denied*, — U.S. —, 121 L.E.2d 53 (1992). Ways in which a child may be legitimized in North Carolina include:

> 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. N.C.G.S. § 49-10 through 49-14 (1984). Illegitimate children may inherit from their putative fathers if they have been legitimated by one of the above or if paternity has been established in an action for criminal non-support. N.C.G.S. § 29-19(b)(1984).

Id. at 749-50.

Defendant William Richard Boyd, Sr. alleges that he was legitimized as the child of James R. Boyd, Jr. by the subsequent marriage of his parents—mother, Mary Kirkpatrick Jones, and the intestate decedent, James R. Boyd, Jr.; and that pursuant to North Carolina General Statutes § 49-12 (1984), he is legally legitimized as the child of James R. Boyd, Jr. and is entitled to be considered as the child of James R. Boyd, Jr. for purposes of intestate succession. We agree.

Our Court has noted that DNA testing results may be used to rebut the presumption that a child born to a married woman is her husband's child. *Batcheldor v. Boyd*, 108 N.C. App. 275, 423 S.E.2d 810 (1992), *disc. review denied*, 333 N.C. 254, 426 S.E.2d 700 (1993). *See also Wright v. Wright*, 281 N.C 159, 188 S.E.2d 317 (1972). Additionally, our Court has noted that testing results may be used to establish that the phrase "born out of wedlock" includes a child whose mother was married to a man not the father of the child.

Batcheldor, 108 N.C. App. 275, 423 S.E.2d 810. "[T]he phrase, 'born out of wedlock,' should refer 'to the status of the parents of the child in relation to each other.' 'A child born to a married woman, but begotten by one other than her husband, is a child "born out of wedlock". . . .' " *Id.* at 279, 423 S.E.2d at 813; (*quoting In re Legitimation of Locklear*, 314 N.C. 412, 418, 334 S.E.2d 46, 50 (1985)). Thus, defendant has successfully rebutted the presumption that a child of a married woman is her husband's child and shown that he was a "child born out of wedlock" as required by the statutes. Accordingly, because defendant was legitimized by the subsequent marriage of his mother to his reputed father, he is sole heir to the estate of James R. Boyd, Jr. by the intestacy statutes.

Plaintiffs' arguments that North Carolina General Statutes §§ 49-14 (Cum. Supp. 1994), 49-12 and 29-18 (1984) are applicable to defendant's claim of legitimacy is misplaced. The evidence shows that the statutory requirements in accordance with North Carolina General Statutes § 49-12 for purposes of inheriting from a putative father have been met.

[2] We now turn to whether the trial court erred in awarding attorney's fees to counsel for defendant. The trial court pursuant to North Carolina General Statutes § 6-19 (1986) allowed defendant to recover costs and attorney's fees against the estate, allowed plaintiffs to recover costs including attorney's fees against the estate, and allowed the aligned defendants to recover costs and attorney's fees against the estate.

North Carolina General Statutes § 6-20 (1986) notes that a court in its discretion may tax costs including attorney's fees if they are just and equitable. *Trust Co. v. Dodson*, 260 N.C. 22, 131 S.E.2d 875 (1963). Where questions regarding inheritance arise regarding the estate of the deceased, a court may award attorney's fees if legitimate claims exist. "The statute does not *require* the court to award attorneys' fees in such cases but clearly *authorizes* the court to do so. It is a matter in the discretion of the court, both as to whether to allow fees and the amount of such fees." *In re Ridge*, 302 N.C. 375, 380, 275 S.E.2d 424, 427 (1981).

Because this action is under intestate succession and deals with inheritance rights, North Carolina General Statutes § 6-21(2) (1986) concerning caveators is relevant. North Carolina General Statutes § 6-21(2) provides:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . . .
>
> (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.

Our Court has held that attorney's fees were properly taxed as costs so long as the claims had substantial merit and success on the merits of the claims was not a requirement. *In re Estate of Tucci*, 104 N.C. App. 142, 408 S.E.2d 859 (1991); *Dyer v. State*, 331 N.C. 374, 416 S.E.2d 1 (1992).

Having reviewed the record, defendant's claim did have substantial merit and was successful. In the instant case, the trial court found that defendant's attorney had spent a substantial amount of time on the case, and provided services of a complex nature; thus, the trial court's award of attorney's fees in this case was proper. *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).

Plaintiffs' and aligned defendants' claims had substantial merit even though they did not have success on the merits. The trial court may at its discretion award attorney's fees even to unsuccessful caveators. *Id.* And since substantial merit under the statute does not require success on the merits, the trial court did not abuse its discretion in awarding attorney's fees to plaintiffs and aligned defendants.

In light of our holding, we find it unnecessary to address plaintiffs' and aligned defendants' remaining assignments of error. For the reasons discussed herein, we find no error.

No error.

Judges COZORT and McGEE concur.

CENTURA BANK, PLAINTIFF v. PEE DEE EXPRESS, INC., JEAN M. WESTBERRY, LEON S. WESTBERRY, DOROTHY B. FREEMAN, AND CHARLES F. FREEMAN, DEFENDANTS

No. 947SC665

(Filed 6 June 1995)

1. **Courts § 15 (NCI4th)— nonresident defendants—contracts executed with North Carolina bank—sufficient minimum contacts with North Carolina**

North Carolina had jurisdiction over the male South Carolina defendants where they executed leases and guaranty agreements with plaintiff, a North Carolina bank; and defendants had sufficient minimum contacts with this state to allow the exercise of *in personam* jurisdiction where they did some business in North Carolina; some of their business was conducted by trucks travelling to and from North Carolina; some customers were located in this state or had facilities here; some of their own trucks travelled within North Carolina; and the trucks leased by defendants from plaintiff operated on North Carolina highways.

Am Jur 2d, Courts § 118.

Construction and application, as to isolated acts or transactions, of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations upon the doing of an act, or upon doing or transacting business or "any" business, within the state. 27 ALR3d 397.

2. **Courts § 15 (NCI4th)— nonresident defendants—wives' interest in husbands' company stock—no in personam jurisdiction over wives**

The trial court erred in denying the motion of defendant wives to dismiss for lack of personal jurisdiction since the marital interest defendant wives potentially had in their husbands' company stock was not a direct and substantial commercial interest sufficient to support the trial court's assertion of personal jurisdiction and did not demonstrate any purposeful availment of the benefits and protection of North Carolina laws.

Am Jur 2d, Courts § 118.

Comment note—"Minimum contacts" requirement of Fourteenth Amendment's due process clause (Rule of

***International Shoe Co. v. Washington*) for state court's assertion of jurisdiction over nonresident defendant. 62 L. Ed. 2d 853.**

Appeal by defendant from order entered 15 March 1994 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 23 February 1995.

Poyner & Spruill, L.L.P., by J. Nicholas Ellis, for plaintiff-appellee.

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by C. David Williams, Jr., for defendant-appellants Jean M. Westberry and Leon S. Westberry.

MARTIN, MARK D., Judge.

The question presented is whether the trial court erred by finding defendants had sufficient minimum contacts with North Carolina to justify the assertion of personal jurisdiction. We affirm in part and reverse in part.

In February 1991 Pee Dee Express, Inc. (Pee Dee), contacted Earl B. Mikell, Jr. (Mikell), president of M & W Truck Sales, Inc., of Florence, South Carolina, about purchasing or leasing trucks for use in Pee Dee's business. Mikell contacted Flagstone Leasing of Greensboro, North Carolina, a financial broker, about arranging financing for the sale or lease of the trucks. Upon the request of Flagstone Leasing, Centura Bank agreed to finance the transaction and acquired nine trucks from M & W Truck Sales, Inc. Centura thereafter applied for certificates of title in its name at the North Carolina Division of Motor Vehicles.

In February of 1991 Pee Dee leased nine trucks from Centura for use in its business. The leases were all dated 25 February 1991, but were not finalized until they had been accepted by Centura through its representative, C. James Books, on 27 February 1991. Along with the leases, Leon Westberry, Jean Westberry, Charles Freeman and Dorothy Freeman executed personal guaranty agreements covering the leases between Pee Dee and Centura.

At the time the leases were executed Centura was a North Carolina banking corporation with its principal place of business in Nash County, North Carolina. Pee Dee was a South Carolina corporation with its principal place of business in Florence County, South

Carolina. Leon Westberry and Charles Freeman were the officers and only two shareholders in Pee Dee. Westberry was president.

Leon Westberry admitted in his affidavit "Pee Dee is engaged in the business of brokering trucks for business across the United States and . . . it does some business in the state of North Carolina . . . ." Furthermore, Charles Freeman admitted in his affidavit "some business of Pee Dee is conducted by trucks travelling to and from North Carolina and some customers, but not a substantial number, are located in North Carolina or have facilities which are located in North Carolina. Pee Dee also owns several trucks which it uses. These trucks are authorized to travel in interstate commerce, some of which is in the state of North Carolina." The trucks leased by Pee Dee apparently operated on the highways of North Carolina.

Defendants allegedly defaulted on the leases and Centura brought the present action on 20 December 1993 to collect a deficiency and enforce the guarantees arising out of the series of truck leases. On 28 January 1994 all defendants joined in a motion to dismiss for lack of personal jurisdiction pursuant to North Carolina Rule of Civil Procedure 12(b)(2). On 15 March 1995 the trial court denied all of the defendants' motions.

On appeal defendants contend the trial court erred by finding defendants had sufficient minimum contacts with North Carolina to justify the assertion of personal jurisdiction.

In order to establish *in personam* jurisdiction over a non-resident defendant, a two-part test must be satisfied. *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 513, 251 S.E.2d 610, 613 (1979). First, we must determine whether North Carolina's "long arm" statute, N.C. Gen. Stat. § 1-75.4, allows the exercise of jurisdiction over the defendant. *Id.* Second, we must determine whether the assertion of personal jurisdiction over the nonresident defendant is consistent with constitutional due process protections. *Id.* The burden is on the plaintiff to prove the existence of jurisdiction. *DeSoto Trail, Inc. v. Covington Diesel, Inc.*, 77 N.C. App. 637, 639, 335 S.E.2d 794, 796 (1985). North Carolina courts have consistently held that the test for determining personal jurisdiction should be liberally applied, to vest our courts with the full jurisdictional powers available under federal due process. *Id.*; *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1065 (4th Cir 1982).

[1] First, it is necessary to determine whether a North Carolina statute allows the assertion of personal jurisdiction over defendants.

N.C. Gen. Stat. § 1-75.4(5)(a) confers *in personam* jurisdiction upon the courts of this state over a person served pursuant to Rule 4(j) of the Rules of Civil Procedure, in any action which "[a]rises out of a promise, made anywhere to the plaintiff . . . by the defendant . . . to pay for services to be performed in this State by the plaintiff." N.C. Gen. Stat. § 1-75.4(5)(a) (1983). The North Carolina Supreme Court has recognized that contracts relating to promises to perform services within this state or to pay for services to be performed in North Carolina come within the "long arm" statute. *Buying Group, Inc. v. Coleman*, 296 N.C. at 513-514, 251 S.E.2d at 613.

Clearly, the leases and guaranty agreements executed by Pee Dee and the guaranty agreements signed by the individual defendants satisfy the first prong of the personal jurisdiction test.

The second prong of the personal jurisdiction test, whether the defendants have sufficient minimum contacts with North Carolina, is the central issue of this appeal.

Under the Fourteenth Amendment to the United States Constitution: " '[D]ue process requires only that in order to subject a [nonresident] defendant to a judgment in personam, . . . he have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Buying Group, Inc. v. Coleman*, 296 N.C. at 515, 251 S.E.2d at 614 (*quoting International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L. ED. 95 (1945)). Application of the minimum contacts standard " 'will vary with the quality and nature of 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.' " *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974) (*quoting, Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L. Ed. 2d 1283 (1958)). Perhaps most important, the "minimum contacts" inquiry focuses on the actions of the non-resident defendant over whom jurisdiction is asserted, and not on the unilateral actions of some other entity. *See Carroll v. Carroll*, 88 N.C. App. 453, 456, 363 S.E.2d 872, 874 (1988); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985) (question is whether "the contacts proximately result from actions by the defendant *himself*

that create a 'substantial connection' with the forum State.") (emphasis in original).

At the outset we note our Supreme Court has held "where . . . defendant is a principal shareholder of the corporation and conducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him." *Buying Group, Inc. v. Coleman*, 296 N.C. at 515, 251 S.E.2d at 614 (citations omitted).

In the present case Leon Westberry and Charles Freeman were officers and the only two shareholders in Pee Dee. Westberry was president. Therefore, the corporate acts of Leon Westberry and Charles Freeman can be imputed to them for the purpose of determining if they had sufficient minimum contacts.

Because our inquiry must focus on the actions of Westberry and Freeman, the unilateral actions of Flagstone Leasing in arranging the financing with Centura and, in addition, Centura's actions in acquiring and titling the trucks in its name with the North Carolina Division of Motor Vehicles, are not relevant to the minimum contacts inquiry. *See Carroll v. Carroll*, *supra*.

As officers and the only two shareholders of Pee Dee, Westberry and Freeman both signed the lease agreement on behalf of Pee Dee and as individual guarantors. Westberry admitted in his affidavit that Pee Dee did some business in North Carolina. Likewise, Freeman admitted in his affidavit that some of Pee Dee's business is conducted by trucks travelling to and from North Carolina, some customers are located in North Carolina or have facilities which are located in North Carolina, and some of Pee Dee's own trucks travel within North Carolina. Finally, the trucks leased by Pee Dee apparently operated on the highways of North Carolina. We hold these contacts satisfy Fourteenth Amendment Due Process and support the trial court's assertion of personal jurisdiction over Leon Westberry and Charles Freeman in connection with the dispute which arose out of their lease of several trucks that were operated at least partially within North Carolina.

[2] Next, we address plaintiff's assertion that the marital interest individual defendants Jean Westberry and Dorothy Freeman potentially have in their husbands' Pee Dee stock constitutes a sufficient

commercial interest to support the trial court's assertion of personal jurisdiction.

In order to support assertion of personal jurisdiction a commercial benefit must be "direct and substantial." *Johnston v. Gilley*, 50 N.C. App. 274, 278-279, 273 S.E.2d 513, 516 (1981). *See also Harrelson Rubber Co. v. Layne*, 69 N.C. App. 577, 317 S.E.2d 737 (1984); *Brickman v. Codella*, 83 N.C. App. 377, 350 S.E.2d 164 (1986); *Church v. Carter*, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

In *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979), our Supreme Court held that our courts did not have jurisdiction over a nonresident who merely co-signed a note guaranteeing payment of his brother's indebtedness to the plaintiff. In so holding, the Court noted at the time the nonresident brother signed the note he owned no shares of stock or any interest whatsoever in Coleman's or Buying Group, and therefore held "no attending commercial benefits to himself enforceable in the courts of North Carolina." *Id.* at 517, 251 S.E.2d at 615.

Contrary to plaintiff's assertion, we hold the marital interest individual defendants Jean Westberry and Dorothy Freeman potentially have in their husband's Pee Dee stock, standing alone, like the familial guarantor in *Buying Group, Inc. v. Coleman*, is not a "direct and substantial" commercial interest sufficient to support the trial court's assertion of personal jurisdiction and, in any event, does not demonstrate any "purposeful availment" of the benefits and protection of North Carolina laws.

Accordingly, we find individual defendants Jean Westberry and Dorothy Freeman lack the requisite contacts to satisfy Fourteenth Amendment Due Process, and therefore we hold the trial court erred in denying their motion to dismiss for lack of personal jurisdiction pursuant to North Carolina Rule of Civil Procedure 12(b)(2).

Affirmed in part and reversed in part.

Judges JOHNSON and JOHN concur.

JAMES D. AVERITT, PLAINTIFF v. AL ROZIER, D/B/A, AL'S TRUCK SERVICE, AND FREDDIE JOHNSON, SR., DEFENDANTS

No. 9412SC608

(Filed 6 June 1995)

Libel and Slander § 43 (NCI4th)— defamatory statement by police officer—statements privileged—same statements by private citizen—privilege as jury question

Where the evidence established that both defendants made oral statements to third parties suggesting that plaintiff had kidnapped and murdered an investigator who had been employed by plaintiff's former wife, the trial court did not err in granting summary judgment for defendant police officer, since the officer's statements were made in the course of a privileged occasion, an investigation into allegations of criminal conduct; however, the trial court erred in entering summary judgment for the other defendant where there was a genuine issue of fact as to whether his statements were privileged as those of an individual acting in good faith and within the duty of a good citizen by reporting to a law enforcement officer information which had come to him concerning the possibility of serious criminal activity.

Am Jur 2d, Libel and Slander § 59.

Appeal by plaintiff from order entered 21 February 1994 by Judge A. Leon Stanback, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 27 February 1995.

Plaintiff brought this action seeking actual and punitive damages by reason of defendants' alleged oral publication of defamatory statements about him. In his complaint, plaintiff alleged that sometime in August 1992, defendant Rozier reported to defendant Johnson, a detective lieutenant employed by the Cumberland County Sheriff's Department, that plaintiff had kidnapped and murdered an unnamed private investigator who had been employed by plaintiff's former wife at the time of their divorce. As a result, defendant Johnson initiated a criminal investigation of Rozier's allegation and, in the course thereof, interviewed plaintiff's former wife, Charlotte Carter, to determine the identity of the alleged victim. Plaintiff alleged that defendant Johnson told Ms. Carter that he had been informed that plaintiff had kidnapped and murdered the investigator, and that Johnson's statements to Ms. Carter were overheard by others who knew plain-

tiff. Plaintiff alleged that the defendants' statements were false and were made maliciously and intentionally.

Defendants answered separately, each denying the material allegations of the complaint and asserting, *inter alia*, qualified privilege as a defense. Both defendants moved for summary judgment with supporting affidavits. Defendant Rozier maintained in his affidavit that he had been told by one of plaintiff's employees, Glenn Hair, that plaintiff had killed a private investigator and "was going off the deep end," and that he related the information to defendant Johnson, a law enforcement officer, out of a sense of duty and without representing that the information was true or accusing plaintiff of criminal conduct. Defendant Johnson stated in his affidavit that Rozier told him that he had received information concerning an unnamed private investigator in a case involving plaintiff and his first wife and that the man might be missing under unusual circumstances. Defendant Johnson went to Ms. Carter, told her that he had information that the investigator might be missing, and asked for his name. After obtaining the name, Johnson went to the investigator's office and determined that he was alive. After advising the investigator of the reason for his visit, defendant Johnson concluded that the information had no merit and concluded his investigation. Plaintiff filed affidavits in opposition to the summary judgment motions, including an affidavit by Glenn Hair, in which he denied making the statements which Rozier attributed to him.

Both defendants' motions for summary judgment were granted; plaintiff appeals.

Downing & David, by Edward J. David, for plaintiff-appellant.

Bobby G. Deaver for defendant-appellee Al Rozier.

Yarborough & Hancox, by Garris Neil Yarborough, for defendant-appellee Freddie Johnson, Sr.

MARTIN, John C., Judge.

Plaintiff contends that genuine issues of material fact exist as to his claim against both defendants, rendering summary judgment inappropriate. We agree there are genuine factual issues with respect to plaintiff's claim against defendant Rozier and we reverse summary judgment granted in his favor. However, we conclude that no genuine issues of material fact exist as to defendant Johnson and that he is entitled to judgment as a matter of law. Accordingly, we affirm sum-

mary judgment dismissing plaintiff's claim against defendant Johnson.

Summary judgment is appropriate where the pleadings and affidavits show there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56. In ruling on the motion, the court must consider the evidence in the light most favorable to the nonmovant, who is entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proffered. *New South Insurance Co. v. Kidd*, 114 N.C. App. 749, 443 S.E.2d 85, *disc. review denied*, 336 N.C. 782, 447 S.E.2d 427 (1994).

Spoken communication to a third person of false and defamatory words which "tend to prejudice another in his reputation, office, trade, business, or means of livelihood" is actionable slander. *Morrow v. Kings Department Stores*, 57 N.C. App. 13, 20, 290 S.E.2d 732, 736, *disc. review denied*, 306 N.C. 385, 294 S.E.2d 210 (1982). "Slander *per se* is an oral communication to a third person which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease." *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 277, 450 S.E.2d 753, 756 (1994). When a false statement falling within one of these categories is spoken, a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage arises; allegation and proof of special damages is not required. *Donovan v. Fiumara*, 114 N.C. App. 524, 442 S.E.2d 572 (1994).

Here, the evidence, when considered in the light most favorable to the plaintiff, establishes that both defendants made oral statements to third parties suggesting that plaintiff had kidnapped and murdered an investigator who had been employed by plaintiff's former wife. The statements were obviously false. Murder and kidnapping are, beyond any rational argument to the contrary, crimes involving moral turpitude. *See State v. Mann*, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986) ("Moral turpitude involves an act of inherent baseness in the private, social, or public duties which one owes to his fellowmen or to society, or to his country, her institutions and her government.").

Nevertheless, statements which are otherwise defamatory may be protected by a qualified privilege.

> A defamatory statement is qualifiedly privileged when made (1) in good faith, (2) on subject matter (a) in which the declarant has an interest or (b) in reference to which the declarant has a right or duty, (3) to a person having a corresponding interest, right, or duty, (4) on a privileged occasion, and (5) in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.

Shillington v. K-Mart Corp., 102 N.C. App. 187, 194-95, 402 S.E.2d 155, 159 (1991). Where the occasion is privileged, there is a presumption that the defendant acted in good faith and the plaintiff has the burden of proving that the statement was made with actual malice. *Id.* "Actual malice may be proven by a showing that the defamatory statement was made with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity." *Id.* at 195, 402 S.E.2d at 159. If the plaintiff cannot show actual malice, the qualified privilege becomes an absolute privilege, and there can be no recovery even though the statement was false. *Id.* "[A] 'privileged occasion' arises when for the public good and in the interests of society one is freed from liability that would otherwise be imposed on him by reason of the publication of defamatory matter." *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 272, 365 S.E.2d 665, 668, *disc. review denied*, 322 N.C. 838, 371 S.E.2d 284 (1988). (Citation omitted). Whether an occasion is privileged is a question of law, unless the circumstances of the publication are in dispute, in which case it is a mixed question of law and fact. *Shuping v. Barber*, 89 N.C. App. 242, 365 S.E.2d 712, (1988).

There is no genuine factual dispute as to the circumstances surrounding defendant Johnson's statements to Ms. Carter and the alleged victim with respect to the information which precipitated his investigation. The circumstances show that those statements were made by defendant Johnson in the course of a privileged occasion; certainly a police officer has an interest in undertaking an investigation into allegations of criminal conduct and in engaging in good faith communications with potential witnesses and alleged victims, who have a corresponding interest in receiving information relating thereto. Plaintiff failed to come forward with any evidence to rebut the presumption that defendant Johnson was acting in good faith in undertaking to investigate the information related to him by defendant Rozier or to show that defendant Johnson was acting with actual malice. Thus, we hold that statements made by defendant Johnson during the course of his investigation were protected by the qualified

privilege, and summary judgment was appropriately entered in his favor.

We reach a different conclusion, however, with respect to defendant Rozier. He maintains that he too was acting in good faith and within the duty of a good citizen by reporting to a law enforcement officer information which had come to him concerning the possibility of serious criminal activity. The circumstances surrounding his communication of that information to defendant Johnson, however, are in dispute. While defendant Rozier stated, in his affidavit, that he merely passed on to defendant Johnson allegations made against plaintiff by Glenn Hair, Hair denied having made the statements to defendant Rozier, permitting the inference that Rozier was not acting in good faith and was acting with malice. Therefore, there exists a genuine issue of fact as to whether the defamatory statements were made on a privileged occasion so as to be protected by the qualified privilege, and summary judgment was inappropriate.

For the reasons stated, summary judgment in favor of defendant Johnson is affirmed, summary judgment in favor of defendant Rozier is reversed, and this cause is remanded to the Superior Court of Cumberland County for trial.

Affirmed in part, reversed in part, and remanded.

Chief Judge ARNOLD and Judge WYNN concur.

MICHAEL EARL HONEYCUTT AND CATHY LYNN HONEYCUTT, PLAINTIFFS V. ROY LEE WALKER AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANTS

No. 94-645

(Filed 6 June 1995)

1. Insurance § 528 (NCI4th)— automobile insurance—named insured—UIM coverage—injury while riding motorcycle

Plaintiff, as the named insured under an automobile policy covering his Pontiac and Dodge automobiles, is a person insured of the first class under N.C.G.S. § 20-279.21(b)(3) who is entitled to benefits under the UIM coverage of the policy even though he was injured while operating his motorcycle.

Am Jur 2d, Automobile Insurance §§ 315, 322.

2. Insurance § 532 (NCI4th)— automobile insurance—invalidity of family-owned exclusion

A family-owned exclusion clause in a policy covering insured's Pontiac and Dodge automobiles did not prohibit the insured from recovering UIM benefits under this policy for injuries suffered while operating his motorcycle because this exclusion is contrary to the terms of N.C.G.S. § 20-279.21(b)(4) in that it attempts to impose a restriction not intended under the Financial Responsibility Act. The family-owned exclusion was not rendered valid by the 1991 amendments to N.C.G.S. § 20-279.21(b)(4) since the purpose of the amendments was the prohibition of intrapolicy stacking of UIM coverages, and they do not prevent an insured from being covered while operating an owned vehicle not listed in the policy.

Am Jur 2d, Automobile Insurance § 324.

Appeal by defendant North Carolina Farm Bureau Mutual Insurance Company from judgment entered 17 March 1994 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 2 March 1995.

On 9 September 1992, plaintiff Michael Honeycutt suffered serious injuries when his 1986 Honda motorcycle was struck by a car driven by defendant Roy Lee Walker. Honeycutt's motorcycle was insured by Integon General Insurance Corporation under a policy which did not provide any uninsured/underinsured motorist (UM/UIM) coverage. Honeycutt also owned two other vehicles, Pontiac and Dodge automobiles, insured under a policy issued by defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). The Farm Bureau policy provided UM/UIM limits of $100,000 per person and $300,000 per accident.

Michael Honeycutt and his wife, Cathy Honeycutt, filed suit seeking damages from Walker, as the alleged tortfeasor, and from Farm Bureau for recovery of UIM benefits under the policy covering the Dodge and Pontiac automobiles. Farm Bureau denied coverage based upon a family-owned exclusion clause contained in the policy. The exclusion clause states that UIM coverage will not be provided for property damage or personal injury sustained by any person "[w]hile occupying, or when struck by, any motor vehicle owned by you or a family member which is not insured for this coverage under this policy."

Farm Bureau moved for bifurcation of the tort and coverage issues, and the court entered a Consent Order allowing bifurcation on 25 October 1993. Plaintiffs then moved for summary judgment against Farm Bureau on the issue of coverage. The trial court entered summary judgment in favor of plaintiffs, holding the family-owned exclusion to be void as a matter of law. Farm Bureau appeals the judgment entitling plaintiffs to recover UIM benefits under the Farm Bureau policy.

Stewart & Hayes, by Vernon K. Stewart and Heather A. Hayes, for plaintiff-appellees.

Thompson, Barefoot & Smyth, by Theodore B. Smyth, for defendant-appellant.

McGEE, Judge.

Defendant-appellant Farm Bureau assigns as error the trial court's grant of summary judgment for the plaintiffs entitling them to underinsured motorist coverage under the Farm Bureau policy.

[1] Farm Bureau first argues the family-owned exclusion clause prevents plaintiffs from recovering for injuries sustained by Mr. Honeycutt while operating a motorcycle owned by him but not listed in the Farm Bureau policy. Our analysis begins with a determination of whether Michael Honeycutt is a member of an insured class entitled to UIM coverage under the Farm Bureau insurance policy. In *Bass v. N. C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992), the plaintiff was also injured while riding his motorcycle. The insurance policy covering the motorcycle did not contain UIM coverage. The plaintiff attempted to recover under a policy insuring an automobile and a truck owned by him that did include UIM coverage. Our Supreme Court held that the plaintiff, as the named insured, was a person insured of the first class under N.C. Gen. Stat. § 20-279.21(b)(3) and therefore was "entitled to UIM benefits under his automobile/truck policy regardless of whether he [was] riding in the insured vehicles or on his motorcycle, or just walking down the street." *Bass* at 112, 418 S.E.2d at 223. The Court stated UIM insurance is essentially person oriented, unlike liability insurance which is vehicle oriented. Therefore the plaintiff could recover under the automobile/truck policy issued by the defendant. *Id.*

Mr. Honeycutt, as the named insured under the Farm Bureau policy, is a first class insured as defined by statute and under the *Bass*

decision. As an insured of the first class, he is entitled to benefits under the UIM coverage contained in the Farm Bureau policy covering his Pontiac and Dodge automobiles, even though he was injured while riding his motorcycle.

[2] Next, we must determine the effect of the family-owned exclusion clause. Farm Bureau argues this case is distinguishable from *Bass* because the *Bass* insurance policy contained no such clause. However, the existence of a family-owned exclusion clause in Mr. Honeycutt's insurance policy does not affect whether plaintiffs are entitled to UIM benefits. This Court rejected the family-owned exclusion with regard to UIM coverage in *Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, 444 S.E.2d 664, *disc. review allowed*, 337 N.C. 802, 449 S.E.2d 748, 450 S.E.2d 485 (1994), *cert. dismissed*, 339 N.C. 614, 454 S.E.2d 225 (1995). *Mabe* held that a family-owned vehicle exclusion is contrary to the terms of G.S. 20-279.21(b)(4) because it attempts to impose a restriction not intended under the Financial Responsibility Act. *Mabe* at 205, 444 S.E.2d at 671. *Accord, Harper v. Allstate Ins. Co.*, 117 N.C. App. 302, 450 S.E.2d 759 (1994), *disc. review allowed*, 339 N.C. 612, 454 S.E.2d 251 (1995). Mr. Honeycutt may collect UIM benefits under the Farm Bureau policy for injuries suffered while riding his motorcycle, notwithstanding the family-owned exclusion clause.

Finally, Farm Bureau argues the 1991 amendments to G.S. 20-279.21(b)(4) moved the focus of UIM coverage from persons to vehicles, thereby making a family-owned exclusion valid. The 1991 amendments to G.S. 20-279.21(b)(4) became effective 5 November 1991 and apply to all new and renewal policies written on or after that date. 1991 N.C. Sess. Laws ch. 646 § 4. Mr. Honeycutt renewed his Farm Bureau policy on 17 March 1992.

The amended statute states, in part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's

> underinsured motorist coverages as determined by combining the highest limit available under each policy . . . . The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (1993). Based upon our reading of the statutory changes, Farm Bureau's final argument is unconvincing.

While no cases have directly addressed the impact of the 1991 amendments regarding stacking issues, several have discussed their probable intent. In *Bass*, our Supreme Court stated in a footnote that the amendment to G.S. 20-279.21(b)(4) "appears to prohibit intrapolicy stacking." *Bass* at 113, 418 S.E.2d at 223. In *State Farm Mut. Auto. Ins. Co. v. Young*, 115 N.C. App. 68, 443 S.E.2d 756, *disc. review allowed*, 338 N.C. 523, 453 S.E.2d 168 (1994), this Court held a family-owned exclusion to be void as contrary to the Financial Responsibility Act, noting the policy was issued "before G.S. § 20-279.21 was amended to preclude intrapolicy stacking of underinsured motorist coverage." *Young* at 69, 443 S.E.2d at 758. In *Maryland Casualty Co. v. Smith*, 117 N.C. App. 593, 452 S.E.2d 318, *disc. review denied*, No. 79P95 (N.C. Supreme Court April 6, 1995), this Court, in determining the validity of a rejection of UIM coverage after the 1991 amendments, noted that the amendments dealing with UIM coverage allowed only interpolicy stacking. *Maryland Casualty* at 597, 452 S.E.2d at 320. Further, the bill enacting the amendments was entitled "AN ACT TO PROHIBIT THE STACKING OF UNINSURED AND UNDERINSURED MOTORIST COVERAGE." 1991 N.C. Sess. Laws ch. 646.

Based upon our reading of the statute, discussions of the amendments in previous cases, and the title of the Act, the main purpose of the 1991 amendments to G.S. 20-279.21(b)(4) appears to be the prohibition of intrapolicy stacking of UIM coverage. We do not agree with Farm Bureau that an anti-intrapolicy stacking provision in the statute is equivalent to a family-owned exclusion. As this Court has stated, UM/UIM coverage follows the person, not the vehicle. *Mabe* at 204, 444 S.E.2d at 671. The amendments do not indicate the General Assembly intended to change the focus of UIM coverage from persons to vehicles. The anti-intrapolicy stacking provisions in the 1991 amendments to G.S. 20-279.21(b)(4) simply prevent an insured from receiving multiple UIM recoveries under a single policy. They do not prevent an insured from being covered while operating an owned vehicle not listed in the policy.

The trial court's entry of summary judgment against Farm Bureau in favor of the plaintiffs is affirmed.

Affirmed.

Judges EAGLES and WALKER concur.

STATE OF NORTH CAROLINA v. LLOYD WILLIAM ISOM, DEFENDANT/APPELLANT

No. 9426SC306

(Filed 6 June 1995)

Criminal Law § 129 (NCI4th); Jails, Prisons, and Prisoners § 55 (NCI4th)— plea agreement—sentence as committed youthful offender—rescission by State while serving sentence—right to benefit of bargain or withdrawal of guilty plea

Where a twenty-two-year-old defendant was sentenced for armed robbery as a committed youthful offender pursuant to a plea agreement, and the State in effect rescinded the agreement while defendant was serving his sentence on the ground that defendant was not eligible to be sentenced as a committed youthful offender, defendant was entitled to have the committed youthful offender status accorded to him as provided in the plea agreement or, in the alternative, to withdraw his plea. Since defendant filed a motion for appropriate relief seeking to set aside his guilty plea, he is entitled to have the plea set aside so that he may enter a new plea or go to trial. Former N.C.G.S. § 148-49.14.

Am Jur 2d, Criminal Law §§ 481 et seq.; Juvenile Courts and Delinquent and Dependant Children §§ 1, 8-12; Penal and Correctional Institutions § 7.

Appeal by defendant from order entered 28 January 1994 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 January 1995.

No brief for the State.

Goodman, Carr, Nixon, Laughrun & Levine, P.A., by George V. Laughrun, II, for defendant-appellant.

WYNN, Judge.

On 16 May 1990, defendant pled guilty pursuant to a plea agreement to one charge of robbery with a dangerous weapon. According to the terms of the plea agreement, Judge Shirley Fulton would sentence defendant as a committed youthful offender (CYO) to a fourteen-year sentence to run consecutively to a sentence defendant currently was serving. In accordance with the agreement, Judge Fulton ordered that defendant be imprisoned for a term of "14 YEARS AS CYO." Judge Fulton also checked the box on the judgment form which states: "The defendant shall serve as a committed youthful offender pursuant to G.S. Chapter 148, Article 3B." Defendant commenced service of the sentence.

On 23 November 1992, Mr. Charles L. Cromer, Chairman of the North Carolina Parole Commission, wrote a letter to then Attorney General Lacy H. Thornburg seeking an answer to the following question regarding defendant's eligibility for parole:

> When a person is sentenced as a Committed Youthful Offender (CYO) under Chapter 148, Article 3B, of the North Carolina General Statutes and the Judgment and Commitment and records indicate that the person was not eligible for CYO status because of their age at the time of sentencing may the Parole Commission consider parole based upon the CYO status or are we required to go behind the official judgment, take notice that the person was not eligible for CYO status and treat the individual as a regular youthful offender for parole purposes?

In a letter dated 11 December 1992, a special deputy attorney general advised Mr. Cromer that Judge Fulton "had no authority to sentence the defendant as a Committed Youthful Offender" since defendant did not qualify for CYO status under N.C. Gen. Stat. § 148-49.14. The special deputy attorney general concluded that "the Parole Commission lacks any jurisdiction over [defendant] until he has completed service of a term of not less than seven years in prison." On 25 March 1993, the Parole Commission mailed the decision of the attorney general to defendant.

On 17 December 1993, defendant filed a motion for appropriate relief in the Superior Court of Mecklenburg County alleging that since he did not receive what he bargained for, his guilty plea should be set aside so that he could either re-plea or go to trial on the criminal

charges. After a hearing, the trial court denied defendant's motion. From the denial of that motion, defendant appeals.

Preliminarily, we note that because defendant filed the motion for appropriate relief long after the time for taking appeal had expired, he can obtain appellate review of the court's ruling only by a petition for a writ of certiorari. N.C. Gen. Stat. § 15A-1422(c)(3) (1988). Although defendant has not expressly petitioned for a writ of certiorari, we exercise our discretion to treat the record on appeal and defendant's brief as such a petition and grant the writ. The State's motion to dismiss the appeal is denied.

N.C. Gen. Stat. § 148-49.14, the relevant sentencing provision for committed youthful offenders at the time of the offense, provides in pertinent part:

> As an alternative to a sentence of imprisonment as is otherwise provided by law, when a person under 21 years of age is convicted of an offense punishable by imprisonment . . . the court may sentence such person . . . as a committed youthful offender. When a person under twenty-five (25) years of age is convicted of a crime punishable by imprisonment but which is not a Class A, B, C, D, E, F, or G felony, or a violent crime . . . the court may sentence such a person . . . as a committed youthful offender.

N.C. Gen. Stat. § 148-49.14 (1987) (Repealed by Session Laws 1993, c. 538, s. 34). Since defendant was twenty-two years old at the time he pled guilty on 16 May 1990, he was not eligible to be sentenced as a CYO under the first clause of the statute. Defendant was indicted for robbery with a dangerous weapon which is a Class D felony and was therefore not eligible for CYO status under the second clause of the statute.

However, under the facts of the subject case, whether defendant was eligible to be sentenced as a CYO is irrelevant. The record undisputedly shows that defendant pled guilty in reliance upon the representation that he would "receive a 14 year sentence, CYO, to be served consecutive to the sentence [defendant] is now serving." The plea agreement was signed by defendant, defendant's counsel, the trial judge, and the prosecutor, representing the State. The Attorney General's letter to the Parole Commission, however, instructs the Commission that defendant's "commitment as a Committed Youthful Offender is unauthorized by statute and therefore void," and defendant is not entitled to CYO status. In effect, the State is rescinding a

plea agreement which the State agreed to and was accepted by the court. This action is untenable.

In *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427 (1971), the United States Supreme Court addressed whether the State may withdraw a plea agreement after the defendant pleads guilty. The Court held that:

> the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello, 404 U.S. at 262, 30 L. Ed. 2d at 433. Therefore, the State may withdraw a plea bargain arrangement at any time prior to, but not after the actual guilty plea by the defendant. *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980); *State v. Johnson*, 95 N.C. App. 757, 383 S.E.2d 692 (1989).

In *Collins*, the Court noted that plea agreements were analogous to unilateral contracts. *Collins*, 300 N.C. at 149, 265 S.E.2d at 176. The consideration given for the prosecutor's promise is not the defendant's corresponding promise to plead guilty, but rather the defendant's actual performance by doing so. *Id.* Therefore, the State may not withdraw or modify a plea agreement after the defendant has pled guilty or takes other action which constitutes detrimental reliance upon the agreement. *Id.*; *see State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, — U.S. —, 122 L. Ed. 2d 136, *reh'g denied*, — U.S. —, 122 L. Ed. 2d 776 (1993).

It follows from our analysis that defendant is entitled to have CYO status accorded to him as provided in the plea agreement, or in the alternative, be allowed to withdraw his plea. It is the latter relief that defendant seeks in his motion for appropriate relief. Specifically, he requests that his guilty plea be set aside and he be allowed to enter a new plea or go to trial. Thus, we need not address the question of whether this Court should direct the Parole Commission to follow the trial court's judgment and sentence.

Therefore, for the reasons stated, defendant is entitled to withdraw his guilty plea and the order of the trial court is

Reversed.

Chief Judge ARNOLD and Judge MARTIN, John C. concur.

STATE OF NORTH CAROLINA v. KENNETH EDGAR PATTON, DEFENDANT

No. 9425SC542

(Filed 6 June 1995)

Criminal Law § 1284 (NCI4th)— habitual offender—indictments required for substantive offense and habitual offender status

The trial court erred by giving defendant five life sentences where defendant was indicted for five counts of forgery, five counts of uttering forged paper, one count of conspiracy to commit forgery, and one count of conspiracy to commit uttering forged paper; the forgery and uttering counts were consolidated and the conspiracy counts were attached to the combined forgery and uttering counts; and there was only one habitual felon indictment. In order to enhance a defendant's sentence for a substantive felony on the basis of his status as an habitual felon, there must be a corresponding habitual felon indictment. Since there was only one habitual felon indictment, the trial court erred by enhancing all five convictions. N.C.G.S. § 14-7.3.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 20.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 ALR5th 263.

Appeal by defendant from judgment entered 14 March 1994 by Judge Zoro J. Guice, Jr. in Caldwell County Superior Court. Heard in the Court of Appeals 20 February 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Sue Y. Little, for the State.

C. Gary Triggs, P.A., by C. Gary Triggs, for defendant-appellant.

WYNN, Judge.

Defendant was convicted of five counts of forgery, five counts of uttering forged paper, one count of conspiracy to commit forgery, and one count of conspiracy to commit uttering forged paper. He was also found guilty of being an habitual felon. The trial court sentenced defendant to six consecutive life sentences in prison. Defendant appealed and in an unpublished opinion, *State v. Patton*, 112 N.C. App. 546, 436 S.E.2d 415 (1993), this Court remanded for a resentencing hearing. After the resentencing hearing, the trial court sentenced defendant to five consecutive life sentences. From this judgment, defendant appeals.

Initially, we note that defendant's brief exceeds the page limitation of Rule 26(j) of the Rules of Appellate Procedure which subjects his appeal to dismissal. *State v. Puckett*, 54 N.C. App. 576, 284 S.E.2d 326 (1981); *State v. Lesley*, 33 N.C. App. 237, 234 S.E.2d 476 (1977). This violation is especially egregious since defendant argues issues in his brief that were rejected by this Court in its previous opinion. Rather than dismiss this appeal for this violation, we instead assess to defendant's attorney, personally, the costs of printing defendant's entire brief. We also conclude that defendant's other arguments which address the resentencing hearing are without merit.

After reviewing the record, however, we find that there was only one habitual felon indictment which could be used to enhance a conviction for a subsequent felony. The trial court erred by enhancing all five convictions with the habitual felon status when there was not a corresponding indictment which could attach to each conviction.

N.C. Gen. Stat. § 14-7.3 provides:

> An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the

> court wherein said pleas or convictions took place. No defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within 20 days of the finding of a true bill by the grand jury; provided, the defendant may waive this 20-day period.

N.C. Gen. Stat. § 14-7.3 (1993).

"This procedure contemplates two separate indictments, one for the predicate substantive felony and one for the ancillary habitual felon charge." *State v. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 863 (1995). Being an habitual felon is not a crime but rather a status which subjects the individual subsequently convicted of a crime to increased punishment for that crime. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977); *State v. Penland*, 89 N.C. App. 350, 365 S.E.2d 721 (1988). An habitual felon who is convicted of a subsequent felony is sentenced as a Class C felon which has a presumptive term of 15 years and a maximum term of life imprisonment. N.C. Gen. Stat. § 14-1.1 (1993); N.C. Gen. Stat. § 14-7.6 (1993).

N.C. Gen. Stat. § 14-7.3 does not require the substantive felony indictment to cross-reference the habitual felon indictment, *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985); *State v. Sanders*, 95 N.C. App. 494, 383 S.E.2d 409, *disc. review denied*, 325 N.C. 712, 388 S.E.2d 470 (1989), nor does it require the habitual felon indictment to refer to the substantive felony, *Cheek*, 339 N.C. at 728, 453 S.E.2d at 864. The statute does require, however, two indictments in order to sentence an individual as an habitual felon; a substantive felony indictment and an habitual felon indictment. The habitual felon indictment attaches as an ancillary proceeding to the substantive felony. *Allen*, 292 N.C. at 434, 233 S.E.2d at 587. Therefore, in order to enhance a defendant's sentence for a substantive felony on the basis of his status as an habitual felon, there must be a corresponding habitual felon indictment. *See, e.g. State v. Netcliff*, 116 N.C. App. 396, 448 S.E.2d 311 (1994) (Defendant, an habitual felon, was indicted for four offenses and charged in four corresponding indictments as an habitual felon.).

In the instant case, defendant was indicted on twelve counts: five counts of forgery, five counts of uttering forged paper, one count of conspiracy to commit forgery, and one count of conspiracy to commit uttering forged paper. After the resentencing hearing, the trial court consolidated the forgery and uttering counts together and attached the two conspiracy counts to two combined forgery and uttering

counts. The trial court then enhanced each of the five counts to Class C felonies, found the aggravating and mitigating factors as required by N.C. Gen. Stat. § 15A-1340.4, and found that the aggravating factors outweighed the mitigating factors. The trial court sentenced defendant to life imprisonment for each of the five counts, to be served consecutively.

Since there was only one habitual felon indictment, the trial court erred by enhancing all five convictions. The statute requires a one-to-one correspondence between the substantive felony indictment and the habitual felon indictment. "An indictment which charges a person who is an habitual felon . . . with the commission of any felony . . . *must, in order to sustain a conviction of habitual felon,* also charge that said person is an habitual felon." N.C. Gen. Stat. § 14-7.3 (1993) (emphasis added). Therefore, this matter must be remanded for resentencing.

Sentence vacated and remanded for resentencing.

Chief Judge ARNOLD and Judge MARTIN, John C. concur.

DEEP RIVER CITIZENS COALITION, SCOTT LINEBERRY AND GUY SMALL, PETITIONERS-APPELLEES v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, RESPONDENT-APPELLANTS, AND PIEDMONT TRIAD REGIONAL WATER AUTHORITY, INTERVENOR-RESPONDENT-APPELLANT

No. COA94-873

(Filed 6 June 1995)

Administrative Law and Procedure § 52 (NCI4th)— judicial review prior to administrative hearing—error

The superior court is without jurisdiction to conduct a judicial review of an agency decision sought by an aggrieved party, pursuant to N.C.G.S. § 150B-43, who has not first had the administrative hearing to which he is entitled.

Am Jur 2d, Administrative Law §§ 595 et seq.

Appeal by respondents and intervenor-respondent from order entered 12 May 1994 in Wake County Superior Court by Judge Dexter Brooks. Heard in the Court of Appeals 9 May 1995.

John D. Runkle for petitioner-appellees.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Daniel C. Oakley and Special Deputy Attorney General Francis W. Crawley, for respondent-appellants.

Poyner & Spruill, L.L.P., by H. Glenn Dunn and Timothy P. Sullivan, for intervenor-respondent-appellant.

GREENE, Judge.

The North Carolina Department of Environment, Health and Natural Resources (DEHNR), The North Carolina Environmental Management Commission (EMC), and Piedmont Triad Regional Water Authority (Water Authority) (collectively respondents) appeal from an order of the Wake County Superior Court which reversed and vacated the decision of the EMC.

Water Authority filed a petition with EMC on 18 August 1988, pursuant to N.C. Gen. Stat. §§ 162A-7 and 153A-285, to obtain a certificate allowing the exercise of eminent domain powers to acquire water from the Deep River basin and divert it to the Haw and Yadkin river basins to construct the Randleman Lake, a drinking water project. Although a member of the EMC, assigned to review the case and recommend a decision, recommended that EMC deny the certificate, after a public hearing, EMC granted the certificate pursuant to N.C. Gen. Stat. § 162A-7. The Deep River Citizens Coalition, Scott Lineberry and Guy Small (collectively petitioners) petitioned the Wake County Superior Court for judicial review of EMC's decision, pursuant to N.C. Gen. Stat. §§ 150B-43, 162A-7, and 153A-285. At the same time, petitioners filed a petition for a contested case in the Office of Administrative Hearings (OAH). DEHNR and EMC moved for the dismissal of the OAH proceeding on the grounds that OAH lacked subject matter jurisdiction and OAH denied the motion. The superior court, however, granted respondents' motion for writ of certiorari and stayed any further OAH proceedings. Water Authority intervened in the superior court proceedings with the consent of all the parties.

The dispositive issue is whether the superior court has subject matter jurisdiction to review an administrative decision when the "person aggrieved" has not first exhausted his right to an administrative hearing.

Our Supreme Court has recently determined that pursuant to N.C. Gen. Stat. § 150B-23(a) of the North Carolina Administrative Procedure Act (NCAPA), any "person aggrieved" by an administrative agency decision is "entitled to an administrative hearing to determine the person's rights, duties, or privileges," unless "the organic statute [under which an agency renders an aggrieving decision], amends, repeals or makes an exception to the NCAPA so as to exclude him from those expressly entitled to appeal thereunder." *Empire Power Co. v. North Carolina Dep't of E.H.N.R.*, 337 N.C. 569, 588, 447 S.E.2d 768, 779, *reh'g denied*, 338 N.C. 314, 451 S.E.2d 634 (1994). Water Authority argues that it necessarily follows that the superior court is without jurisdiction to conduct a judicial review of an agency decision sought by an aggrieved party, pursuant to N.C. Gen. Stat. § 150B-43, who has not first had the administrative hearing to which he is entitled. We agree.

The purpose of the contested case hearing is to give a party who qualifies as a "person aggrieved," in a hearing before an administrative law judge (ALJ), an "opportunity to present arguments on issues of law and policy and an opportunity to present evidence on issues of fact." N.C.G.S. § 150B-25(c) (1991). Additionally, the "aggrieved" party, at this hearing, is permitted to "cross-examine any witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence." N.C.G.S. § 150B-25(d). Once the ALJ makes her recommended decision, N.C.G.S. § 150B-34(a) (1991), the party is given an "opportunity to file [with the agency who will make the final decision] exceptions to the [recommended] decision . . . and to present written arguments." N.C.G.S. § 150B-36(a) (1991). "If the agency does not adopt the [ALJ's] recommended decision as its final decision, the agency shall state in its decision or order the specific reasons why it did not adopt [it]." N.C.G.S. § 150B-36(b). Only after this final agency decision is an aggrieved party entitled to judicial review in the superior court. N.C.G.S. § 150B-43 (1991) (no judicial review until all administrative remedies are exhausted). This judicial review must be based on the "official record in the contested case," N.C.G.S. § 150B-47 (1991), which includes all the evidence presented before the ALJ. N.C.G.S. § 150B-37 (1991). Accordingly, the superior court's jurisdiction to review the agency decision does not arise until this official record is prepared. Indeed, the superior court cannot perform its function until that record is complete and any attempt to do so is premature. To hold otherwise would preclude the aggrieved person his right to

prepare a record before the ALJ and influence the decision of the agency.

In this case, it is not disputed that petitioners are "person[s] aggrieved" by EMC's certification, and that there is no language in N.C. Gen. Stat. § 162A-7 which excludes them from the provisions of the NCAPA. Thus, because the petitioners did not first have the contested case hearing to which they were entitled, the superior court was without jurisdiction to conduct a judicial review and the order of that court reversing and vacating the decision of EMC is vacated. The order of the trial court staying the proceedings before the administrative agency is reversed and remanded in order that OAH may provide the petitioners with a contested case hearing and that EMC may issue a decision based on the new record.

Because the issues presented in this case relate to the subject matter jurisdiction of the trial court, it is not relevant that the petitioners have not and do not object to the trial court's exercise of jurisdiction. Subject matter jurisdiction "cannot be conferred upon a court by consent, waiver, or estoppel." *State v. Earley*, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975).

Vacated in part, reversed in part and remanded.

Judges JOHNSON and MARTIN, JOHN C., concur.

JAMES KENNETH McMAHAN, PLAINTIFF v. DARRELL HENDRICKS BUMGARNER, DEFENDANT

No. COA94-769

(Filed 6 June 1995)

Automobiles and Other Vehicles § 487 (NCI4th)— intersection accident—directed verdict improper

In an action for damages arising out of an automobile accident, the trial court erred in directing verdict for defendant where the evidence tended to show that plaintiff entered an intersection after observing defendant's automobile approaching and determining that he had sufficient time to cross and that defendant, who could see the intersection as he approached, hit plaintiff's automobile just as it cleared the intersection, since this evidence was sufficient for submission to the jury on several theories of

negligence, including that plaintiff failed to keep a proper control of his automobile, operated his auto at a speed greater than reasonable and prudent under the conditions, and failed to decrease his speed when approaching and entering an intersection.

Am Jur 2d, Automobiles and Highway Traffic § 798.

Appeal by plaintiff from judgment entered 23 March 1994 by Judge Marilyn Bissell in Mecklenburg County District Court. Heard in the Court of Appeals 4 April 1995.

John P. Barringer for plaintiff-appellant.

Golding, Meekins, Holden, Cosper & Stiles, by Deborah G. Casey, for defendant-appellee.

WALKER, Judge.

Plaintiff sued defendant for negligently causing damage to his vehicle as a result of an accident on 18 April 1992 at the intersection of Fairview Road and Valencia Terrace in Charlotte. Defendant filed an answer and counterclaim which alleged that plaintiff was contributorily negligent and that plaintiff negligently caused damage to defendant's vehicle. Thereafter, plaintiff amended his counterclaim to allege that defendant had the last clear chance to avoid the accident.

The evidence at trial showed that on 18 April 1992, plaintiff, while driving south on Valencia Terrace, approached the intersection of Valencia Terrace and Fairview Road. At this intersection, Fairview Road is a multi-laned, paved public thoroughfare with two lanes of travel heading west and three lanes of travel heading east. Valencia Terrace is a two-lane, paved public thoroughfare which runs in a north/south direction and is controlled by a stop sign at its intersection with Fairview Road. Plaintiff testified that he stopped at the intersection and evaluated the traffic to his left and right before proceeding across. He saw defendant's vehicle approaching in an easterly direction approximately two-tenths of a mile away. Approximately half way across the intersection, plaintiff looked again and saw defendant's vehicle about one-tenth of a mile from the intersection. When plaintiff had crossed a distance of some 32 feet in the eastbound lanes of Fairview Road, plaintiff's vehicle was struck on the right rear quarter panel by the right front portion of defendant's vehicle.

Plaintiff further testified that he did not see defendant's vehicle hit his and that he did not hear the sound of brakes being applied. When plaintiff exited his vehicle after the collision, he observed defendant's vehicle stopped in the intersection with the front part extending beyond the curb line and into Valencia Terrace on the southside of the Fairview Road intersection. He also observed skid marks from defendant's vehicle which extended from Fairview Road beyond the curb and into Valencia Terrace on the southside of the Fairview Road intersection. Given the length of his car and the point of impact on the rear panel, plaintiff determined that he had cleared the intersection before his vehicle was struck by defendant's vehicle. Defendant's admission that he could see the intersection of Fairview Road and Valencia Terrace as he approached it was read into evidence.

At the close of plaintiff's evidence, defendant moved for a directed verdict on plaintiff's claim, asserting that plaintiff failed to produce evidence of defendant's negligence. The court granted defendant's motion. Defendant then presented evidence on his counterclaim, after which plaintiff moved for a directed verdict. Plaintiff's motion was denied and the jury rendered a verdict in defendant's favor.

The primary issue before us is whether the court erred in granting defendant's motion for a directed verdict. A motion for a directed verdict tests the sufficiency of the evidence to go to the jury and to support a verdict for the non-moving party. *Eatman v. Bunn,* 72 N.C. App. 504, 506, 325 S.E.2d 50, 51 (1985). In ruling on a motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, with conflicts, contradictions and inconsistencies being resolved in plaintiff's favor. *Hornby v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 62 N.C. App. 419, 422, 303 S.E.2d 332, 334, *cert. denied*, 309 N.C. 461, 307 S.E.2d 364 (1983).

The trial court should deny a motion for a directed verdict when it finds more than a scintilla of evidence to support each element of the non-movant's case. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986). "[A]s a general proposition, issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant 'but should be resolved by trial in the ordinary manner.' " *Phelps v. Duke Power Co.*, 76 N.C. App. 222, 229, 332

S.E.2d 715, 719 (1985). *See also Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987) (directed verdict against plaintiff in a negligence case only proper in exceptional cases). Thus, the better practice is for the trial court to deny the motion for a directed verdict, submit the case to the jury, and to enter a judgment notwithstanding the verdict if it finds, upon reconsidering the sufficiency of the evidence after the jury's verdict, that the evidence is insufficient. *Phelps*, 76 N.C. App. at 229, 332 S.E.2d at 719.

Since defendant only asserted insufficient evidence of negligence as grounds for a directed verdict, our inquiry is limited to determining whether there was sufficient evidence of defendant's negligence. *See Warren v. Canal Industries*, 61 N.C. App. 211, 213, 300 S.E.2d 557, 559 (1983) (appellate review of a directed verdict is usually limited to those grounds asserted by movant upon making his motion before the trial judge). When viewed in the light most favorable to plaintiff, the evidence shows that plaintiff entered the intersection after observing defendant's automobile approaching and determining that he had sufficient time to cross and that defendant, who could see the intersection as he approached, hit plaintiff's automobile just as it cleared the intersection. We hold that this evidence was sufficient to submit to the jury on several theories of negligence, including that defendant failed to keep a proper control of his automobile, operated his automobile at a speed greater than reasonable and prudent under the conditions, and failed to decrease his speed when approaching and entering an intersection. Thus, we reverse the granting of defendant's motion for a directed verdict.

Defendant argues that the issue of whether the court erred in granting its motion for a directed verdict is moot since the jury, by its verdict on his counterclaim, determined that plaintiff was negligent and that defendant was not contributorily negligent. However, defendant cites no authority to support his argument. Moreover, since the facts and issues surrounding defendant's counterclaim are inextricably intertwined with plaintiff's claim, a new trial should be granted on both claims so that all issues and legal theories that arise from the evidence can be presented to the jury. Judgment on defendant's counterclaim is vacated and the case is remanded for a new trial.

Reversed and remanded.

Judges EAGLES and MARTIN, JOHN C. concur.

JEFFREY SCOTT ABRAMS AND DIANNE M. ABRAMS v. OSCAR SURRETTE, JR.

No. COA94-921

(Filed 6 June 1995)

Insurance § 509 (NCI4th); Discovery and Depositions § 69 (NCI4th)— uninsured motorist—failure to answer interrogatories—answer filed by UM insurer—sanctions—striking of motorist's answer prohibited

The express prohibition against entry of a default judgment against an uninsured motorist in N.C.G.S. § 20-279.21(b)(3)(a) when plaintiff's uninsured motorist carrier has timely filed an answer prohibited the trial court from entering a sanction, pursuant to N.C.G.S. § 1A-1, Rule 37, striking an uninsured motorist's answer and establishing his liability as a matter of law for his failure to comply with court orders to supply answers to plaintiff's interrogatories where plaintiff's uninsured motorist carrier filed an answer as an unnamed defendant denying defendant's negligence and alleging plaintiff's contributory negligence. Such a sanction precluded the insurance carrier from presenting its defenses and was inconsistent with N.C.G.S. § 20-279.21(b)(3)(a).

Am Jur 2d, Automobile Insurance §§ 293 et seq.; Discovery and Depositions § 390.

Applicability of uninsured motorist statutes to self-insurers. 27 ALR4th 1266.

Appeal by unnamed defendant State Farm Mutual Automobile Insurance Company from order entered 17 May 1994 in Wake County Superior Court by Judge Orlando F. Hudson. Heard in the Court of Appeals 11 May 1995.

Gregory P. Chocklett for plaintiff-appellees.

Law Offices of Douglas F. DeBank, by Douglas F. DeBank, for unnamed defendant-appellant State Farm Mutual Automobile Insurance Company.

GREENE, Judge.

State Farm Mutual Automobile Insurance Company (State Farm), an unnamed defendant in this action, appeals from the trial court's

order striking the defenses of Oscar Surrette, Jr. (Surrette) and establishing Surrette's liability as a matter of law.

The record reveals that Jeffrey Scott Abrams (Abrams) and Dianne M. Abrams (plaintiffs) sued defendant for personal injuries sustained by Abrams during an automobile accident with defendant. Surrette answered plaintiffs' complaint and alleged contributory negligence. Because plaintiffs believed defendant to be uninsured, plaintiffs also served State Farm, plaintiffs' uninsured motorist insurance carrier, with a civil summons. State Farm also filed an answer, "in its own name, as an unnamed defendant," pursuant to N.C. Gen. Stat. § 20-279.21(b)(3)(a). In State Farm's answer it denied that Surrette was negligent and alleged in the alternative that Abrams was contributorily negligent. Plaintiffs filed a reply alleging that Surrette had the last clear chance, thus contending that any negligence by Abrams would not be a complete bar.

On 7 February 1994, after Surrette failed to provide complete answers to plaintiffs interrogatories, the trial court ordered that "Defendant shall provide full verified answers to Plaintiffs' interrogatories within fifteen days." Subsequently, on 4 April 1994, plaintiffs moved for sanctions against defendant for failure to comply with the trial court's earlier "Order to Compel and Sanctions." After a hearing on this motion, the trial court ordered "[t]hat Defendant's defenses be stricken in this case and that liability is hereby conclusively established against Defendant," as sanctions for failure to comply with his order.

The issue is whether the express prohibition against entry of a default judgment in N.C. Gen. Stat. § 20-279.21(b)(3)(a) prohibits a trial court from entering a sanction, pursuant to N.C. Gen. Stat. § 1A-1, Rule 37, establishing an uninsured motorist's liability as a matter of law.

The "North Carolina Motor Vehicle Safety and Financial Responsibility Act of 1953" (the Act) provides that "[n]o default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law." N.C.G.S. § 20-279.21(b)(3)(a) (1993). Nonetheless, the plaintiffs argue that this language does not prohibit the trial court from using Rule 37 to strike Surrette's answer and establish his liability to plaintiffs for his failure to "provide or permit discovery." N.C.G.S. § 1A-1, Rule 37(b)(2)(c) (1990). We disagree.

The purpose of that portion of Section 20-279.21(b)(3)(a) prohibiting entry of default judgments is to provide the insurer, who has filed a timely answer, an opportunity to defend the complaint without being prejudiced by the conduct of the uninsured motorist who may, and usually does, have absolutely no interest in the law suit. Otherwise, the insurer's liability being derivative, *Brown v. Lumberman's Mut. Casualty Co.*, 285 N.C. 313, 319, 204 S.E.2d 829, 834 (1974), the entry of a default or default judgment, *see* N.C.G.S. § 1A-1, Rule 55 (1990) (distinction between entry of default and default judgment), against the uninsured motorist also establishes the liability of the insurer. *See* N.C.G.S. § 20-279.21(b)(3)(a) (insurer bound by judgment against uninsured motorist). Conduct of an uninsured motorist that can prejudice the insurer, in that it precludes it from presenting any defense, is not limited, as plaintiffs argue, to failing to file a timely answer pursuant to Rule 12(a)(1). Failing to "provide or permit discovery," pursuant to Rule 37, can also result in "an order striking out pleadings" or entry of a "judgment by default." N.C.G.S. § 1A-1, Rule 37(b)(2)(c). In both instances, the liability of the uninsured motorist is established by virtue of his pretrial conduct and not by virtue of a trial in which the insurer had an opportunity to present its defenses.

In this case Surrette, the uninsured motorist, failed to comply with orders of the trial court to supply answers to the plaintiffs' interrogatories and as a consequence Surrette's answer was stricken and "liability conclusively established against" Surrette. This order conclusively establishing Surrette's liability also established State Farm's liability, even though they had filed a timely answer contesting the issue of negligence and alleging the contributory negligence of Abrams. The order thus precluded State Farm from presenting its defenses, is inconsistent with Section 20-279.21(b)(3)(a) and must be reversed.

The trial court, however, is not without other remedies to effectuate compliance with its order to supply discovery. Rule 37 for example permits the trial court to treat the conduct of Surrette as "a contempt of court," N.C.G.S. § 1A-1, Rule 37(b)(2)(d), and to "require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure." N.C.G.S. § 1A-1, Rule 37(b)(2).

Accordingly, the trial court's order is reversed and this case is remanded for entry of new sanctions.

Reversed and remanded.

Judges JOHNSON and MARTIN, JOHN C., concur.

NANCY O'BRYAN ASKEW (MARTIN), PLAINTIFF/APPELLEE v. EDDY H. ASKEW, DEFENDANT/APPELLANT

No. COA94-710

(Filed 6 June 1995)

1. Divorce and Separation § 439 (NCI4th)— child support—reduced income by father—change of circumstances

Notwithstanding that the needs of the children had not changed, a substantial change of circumstances could be found to exist based on a parent's ability to pay where defendant voluntarily left his employment with an insurance company to become an independent agent and his income was reduced.

Am Jur 2d, Divorce and Separation § 1085.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

2. Divorce and Separation § 439 (NCI4th)— child support—reduced income by father—change of circumstances—sufficiency of evidence

Defendant failed to meet his burden of proving changed circumstances in a child support action where the defendant had voluntarily left his job with an insurance company to become an independent agent and suffered reduced income. The Court of Appeals agreed with the trial court that defendant willfully and intentionally depressed his income.

Am Jur 2d, Divorce and Separation § 1085.

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 § 552 (NCI4th)— child support—reduced income by father—findings

The trial court in a child support action did not err by failing to make appropriate findings of fact that the actions which

reduced defendant's income were not taken in good faith prior to imposing the earnings capacity rule. The trial judge found that defendant had voluntarily terminated or quit his job and concluded that defendant had willfully and intentionally depressed his income. Good faith was not shown on the part of defendant.

Am Jur 2d, Divorce and Separation § 1086.

Appeal by defendant from judgment entered 21 February 1994 by Judge Earl J. Fowler, Jr. in Buncombe County District Court. Heard in the Court of Appeals 22 March 1995.

No brief filed for plaintiff-appellee.

Sutton & Edmonds, by John R. Sutton, for defendant-appellant.

JOHNSON, Judge.

Plaintiff and defendant were married on 25 February 1977, and lived together until on or about 25 December 1984 at which time they separated. During the marriage, two children were born. Plaintiff has custody of the minor children. Pursuant to a court order, defendant was ordered to pay $900.00 per month in child support. Defendant was employed by Allstate Insurance Company (Allstate) and upon leaving the company, entered into a covenant not to compete. Defendant became an independent insurance agent. When defendant left Allstate, defendant received a severance pay of $3,323.00 per month which ended on 30 November 1992.

Defendant alleges that his income for 1993 was $8,545.65, and that he did not make sufficient income to support himself and his wife; that he had borrowed money on an ongoing basis to make at least a $200.00 child support payment following November 1992; and that he owed federal and state back taxes for years 1991 and 1992 and was required to pay the back taxes. Defendant testified that he did not own any land or any automobiles. Defendant also testified that he had not done anything to depress his income and had done what he could to make money to pay his obligations.

The trial court found that defendant was an able-bodied male, trained as an insurance agent; that he was employed at Allstate for a period of eighteen years; that he voluntarily quit his job with Allstate; that he has been an independent agent for two years; that defendant's adjusted gross income for 1993 was $8,545.65; that defendant did not make sufficient amounts to pay the costs of his maintenance in 1994;

that he had to borrow money from his wife and mother-in-law to maintain himself and to pay the child support obligation and other expenses; and that defendant's mother gave title to a piece of land that she owned to defendant, who immediately transferred it to his wife in consideration of his wife's promise to assist with his mother's maintenance.

The trial court went on to conclude that defendant voluntarily quit his job with Allstate, that defendant willfully and intentionally depressed his income, and that defendant failed to meet his burden of proof in showing a substantial change of circumstances.

The trial court then entered a judgment against defendant denying his motion to reduce child support by reason of substantial change of circumstances, and also denying plaintiff's motion to find defendant in willful and intentional contempt of court by reason of defendant's failure to pay child support as previously ordered.

[1] Defendant first argues that his financial circumstances changed in that his income was reduced from $3,323.00 per month to between $700.00 and $800.00 per month, and that this constituted a substantial change of circumstances authorizing a reduction in child support even though the needs of the children remained unchanged. Defendant is correct in arguing that notwithstanding that the needs of the children had not changed that a substantial change of circumstances could be found to exist based on a parent's ability to pay. *See O'Neal v. Wynn*, 64 N.C. App. 149, 306 S.E.2d 822 (1983), *aff'd*, 310 N.C. 621, 313 S.E.2d 159 (1984).

[2] Defendant next argues that the trial court erred in concluding that defendant failed to meet his burden of proof regarding his motion to reduce child support by reason of change of circumstances.

North Carolina General Statutes § 50-13.7 (1987) provides that an order awarding child support "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances." Modification of a child support order occurs when the moving party presents evidence that a substantial change in circumstances affecting the welfare of the child exists. *Pittman v. Pittman*, 114 N.C. App. 808, 443 S.E.2d 96 (1994). A party's ability to pay child support is determined by the party's ability to pay at the time the award is made or modified. North Carolina General Statutes §§ 50-13.4 (Cum. Supp. 1994) and 50-13.7. Additionally, a party's capacity to earn income may become the basis of an award if it is

found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. *O'Neal*, 64 N.C. App. 149, 306 S.E.2d 822. Because we agree with the trial court that defendant willfully and intentionally depressed his income, we find that defendant has failed to meet his burden in proving changed circumstances.

[3] Defendant next argues that the trial court erred in failing to make appropriate findings of fact that the actions which reduced the party's income were not taken in good faith prior to imposing the earnings capacity rule. Before the earnings capacity rule is imposed, it must be shown that defendant's actions which reduced his income were not taken in good faith. *Id.*

In the instant case, the trial judge found that defendant had voluntarily terminated or quit his job, and then concluded that defendant had willfully and intentionally depressed his income. Hence, good faith was not shown on the part of defendant. Therefore, we find that the trial court properly denied defendant's motion to reduce the support payments.

Accordingly, the trial court properly decided that defendant had failed to meet his burden. The decision of the trial court is affirmed.

Affirmed.

Judges COZORT and McGEE concur.

LORRAINE H. LOCKLEAR, AS ADMINISTRATRIX OF THE ESTATE OF LISA ROBIN JACOBS, DECEASED, AND HAL H. LOCKLEAR, AS GUARDIAN AD LITEM OF ANTHONY JACOBS v. SCOTLAND MEMORIAL HOSPITAL, INC., AND KEITH M. WAYMENT, M.D.

No. 9416SC656

(Filed 6 June 1995)

Process and Service § 53 (NCI4th)— alias and pluries summons—retroactive extension of time

The trial court properly refused to set aside the order of dismissal in a medical malpractice action where plaintiff issued the summons on 4 May 1993; the summons was returned unserved on 12 May 1993; plaintiff had ninety days from 4 May 1993 (until 2 August 1993) to have this action continued through endorsement

upon the original summons or issuance of alias or pluries summons; and plaintiff failed to secure an endorsement upon the original summons or sue out an alias or pluries summons. Any subsequent issuance of a summons in the case would have resulted in the commencement of an entirely new action from the date the summons was issued, more than one year after the date on which plaintiffs took a voluntary dismissal and otherwise outside the statutory limitations period.

Am Jur 2d, Process § 119.

Conduct of defendant or defendant's attorney, other than express waiver of service of process, that induces plaintiff to forgo service of process as constituting or supporting finding of "good cause," under Rule 4(j) of Federal Rules of Civil Procedure, for plaintiff's failure to timely serve process. 108 ALR Fed. 887.

Appeal by plaintiffs from order signed 8 March 1994 by Judge D. Jack Hooks, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 21 February 1995.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr. and Kenneth B. Oettinger, for plaintiff-appellants.

Young, Moore, Henderson & Alvis, P.A., by Joseph W. Williford, for defendant-appellee Keith M. Wayment, M.D.

MARTIN, MARK D., Judge.

The issue on appeal is whether the trial court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(b), has discretion to retroactively extend the time provided in N.C. Gen. Stat. § 1A-1, Rule 4(d), for issuance of an alias and pluries summons or for an endorsement upon the original summons to effectuate service. We affirm.

On 29 January 1991 plaintiffs commenced a wrongful death and survival action against defendants Scotland Memorial Hospital, Inc. and Keith M. Wayment, M.D. Plaintiffs alleged defendants medical negligence resulted in the death of Lisa Robin Jacobs on 2 February 1989. On 4 May 1992 plaintiffs took a voluntary dismissal without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). On 4 May 1993 plaintiffs commenced the present action based on the same claims. On 4 May 1993 a summons was issued for defendant Scotland Memorial Hospital, Inc., which was served on 10 May 1993. On 4 May

1993 a summons was also issued for defendant Wayment and was returned unserved on 12 May 1993. Plaintiff did not secure an endorsement upon the original summons or sue out an alias or pluries summons on defendant Wayment. On 7 July 1993 defendant Hospital filed its answer and moved to tax the costs of the prior action to plaintiffs. On 9 August 1993 defendant Wayment moved, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2),(4), and (5), to dismiss the action for lack of jurisdiction of the person, insufficiency of process, and insufficiency of service of process. On 23 August 1993 Judge Hooks allowed defendant Wayment's motion to dismiss and defendant hospital's motion to tax the costs of the prior action to plaintiffs. On 24 August 1993 the trial court found the action against defendant Wayment had been discontinued and dismissed the action with prejudice for lack of jurisdiction.

On 18 November 1993 plaintiffs moved to set aside the order of dismissal and to extend time to effectuate service on defendant Wayment. Although the trial court found that the failure to obtain service of process upon defendant Wayment was due to excusable neglect, it denied plaintiffs' motions stating:

> The action as to Keith M. Wayment, M.D. was discontinued on August 2, 1993 and the statute of limitations as to Keith M. Wayment, M.D. for any alleged actions resulting in the death of Lisa Jacobs on February 2, 1989 has expired. Any extension of time to attempt to effectuate service of process upon Keith M. Wayment, M.D. would not prevent a discontinuance of the action as to Keith M. Wayment, M.D. and if service were effectuated at any time after August 2, 1993 the applicable statute of limitations would bar the claim as to Keith M. Wayment, M.D.

On appeal plaintiffs contend Rule 6(b) allows the trial court to exercise its discretion to retroactively extend the ninety day time period provided in Rule 4(d) for issuance of an alias and pluries summons or for an endorsement upon the original summons to effectuate service on defendant Wayment and to prevent a discontinuance of the action against him. We disagree.

Rule 6(b) gives our trial courts the discretion, upon a finding of "excusable neglect," to retroactively extend the time provided in Rule 4(c) for serving a summons after it has become *functus officio*. *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d, 655, 658 (1988). However, this Court held in *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635, *disc. review denied as improvidently*

allowed, 332 N.C. 480, 420 S.E.2d 826 (1992), that trial courts do not have discretion pursuant to Rule 6(b) to prevent a discontinuance of an action under Rule 4(e) when there is neither endorsement of the original summons nor issuance of alias or pluries summons within ninety days after issuance of the last preceding summons. *Id.* at 78, 411 S.E.2d at 638.

We are bound by *Dozier* in this case. Plaintiff issued the summons on defendant Wayment on 4 May 1993. The summons was returned unserved on 12 May 1993. Plaintiff had ninety days from 4 May 1993, or until 2 August 1993, to have this action continued through endorsement upon the original summons or issuance of alias or pluries summons. Plaintiff failed to secure an endorsement upon the original summons or sue out an alias or pluries summons on defendant Wayment. Any subsequent issuance of a summons in the case would have resulted in the commencement of an entirely new action from the date the summons was issued, more than one year after the date on which plaintiffs took a voluntary dismissal and otherwise outside of the statutory limitations period. Therefore, plaintiffs' action is barred by the statute of limitations.

Plaintiffs rely on *Lemons*, *supra*, and argue that the trial judge had discretion to allow an extension of time to serve the summons. Plaintiffs' reliance upon *Lemons* is misplaced. In *Lemons*, plaintiffs obtained an alias summons and therefore the action never lapsed. Unlike *Lemons*, plaintiffs here allowed the original summons to expire by not obtaining an alias summons or endorsement, *which resulted in a discontinuance of their action.* Therefore, the issuance of a new summons would institute a new civil action. Because discontinuance of the action against defendant Wayment is mandated under this Court's decision in *Dozier*, the trial court properly refused to set aside the order of dismissal.

Affirmed.

Judges JOHNSON and JOHN concur.

BERKELEY FEDERAL SAVINGS BANK v. TERRA DEL SOL, INC.

[119 N.C. App. 249 (1995)]

BERKELEY FEDERAL SAVINGS BANK (F/K/A BERKELEY FEDERAL SAVINGS AND LOAN ASSOCIATION), A FEDERALLY CHARTERED SAVINGS BANK, PLAINTIFF v. TERRA DEL SOL, INC., A KENTUCKY CORPORATION, STEVEN K. SMITH, A NATURAL PERSON; LINDENWOOD LAND COMPANY, LTD., A KENTUCKY LIMITED PARTNERSHIP; ILEX PROPERTY SERVICES, INC., A KENTUCKY CORPORATION; HORIZON RESORTS, INC., A NORTH CAROLINA CORPORATION; FOXFIRE RESORTS, INC., A NORTH CAROLINA CORPORATION; FIRST RESORT PROPERTIES OF N.C., INC., A NORTH CAROLINA CORPORATION; RANCH RESORTS OF N.C., INC., A NORTH CAROLINA CORPORATION; GULF COAST LAND COMPANY, AN ADMINISTRATIVELY DISSOLVED FLORIDA CORPORATION, AND PREMIER RESORTS, INC., AN INVOLUNTARILY DISSOLVED MASSACHUSETTS CORPORATION, DEFENDANTS

No. COA94-830

(Filed 6 June 1995)

Trial § 213 (NCI4th)— counterclaims—original claims—voluntary dismissal and refiling

Plaintiff, a former savings and loan, was entitled to take a voluntary dismissal of its claims and refile them within one year of the voluntary dismissal where plaintiff filed and amended its initial complaint; the trial court granted plaintiff partial summary judgment on three of its twenty-nine claims; the trial court granted summary judgment on all of defendants' seventeen counterclaims; defendants' appeal was dismissed as interlocutory; plaintiff took a voluntary dismissal on its remaining claims; defendant filed another appeal and the granting of partial summary judgment for plaintiff on three of its claims and on all of defendants' counterclaims was affirmed; plaintiff refiled its remaining claims within one year of its dismissal; and the trial court granted defendants' motion to dismiss based on *res judicata*. Although it was held in *McCarley v. McCarley*, 289 N.C. 109, that a plaintiff is barred from voluntarily dismissing his initial claim when a defendant asserts a counterclaim that arises out of the same transactions and occurrences as plaintiff's initial claim, defendants' counterclaims were completely adjudicated at the time plaintiff took its voluntary dismissal.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 9 et seq.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 ALR4th 778.

Appeal by plaintiff from order entered 12 April 1994 by Judge D. Jack Hooks, Jr. in Moore County Superior Court. Heard in the Court of Appeals 19 April 1995.

This case involves a suit to recover damages from defendants who allegedly defrauded plaintiff, a federally chartered and federally insured savings and loan institution. On 26 January 1988, plaintiff filed its initial complaint. On 9 September 1988, plaintiff filed an amended complaint alleging twenty-nine claims for relief. Defendants answered and filed a counterclaim alleging seventeen claims for relief against plaintiff. On 22 December 1988, the trial court granted plaintiff partial summary judgment on three of its twenty-nine claims for relief. The trial court also granted plaintiff summary judgment on all of defendants' seventeen counterclaims.

Defendants appealed the dismissal of their counterclaims to the North Carolina Court of Appeals. On 30 March 1990, this Court held that defendants' appeal was interlocutory and dismissed defendants' appeal. On 20 September 1991, plaintiff took a voluntary dismissal of its remaining twenty-six claims pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure. Defendants filed another appeal to this Court which affirmed the trial court's order granting plaintiff partial summary judgment on three of its claims and granting summary judgment for plaintiff on all of defendants' counterclaims.

Plaintiff refiled its remaining twenty-six claims on 18 September 1992, within one year of its voluntary dismissal. On 7 April 1994, the trial court granted defendants' motion to dismiss based on *res judicata*. Plaintiff appeals.

Brown & Bunch, by Charles Gordon Brown and John C. Schafer, for plaintiff-appellant.

Patton Boggs, L.L.P., by Eric C. Rowe and Allen Holt Gwyn, for defendant-appellees.

EAGLES, Judge.

Plaintiff contends that the trial court erred in dismissing plaintiff's unadjudicated claims. We agree.

In its order dismissing plaintiff's claims, the trial court held that all of plaintiff's claims in this action arose out of the same transactions and occurrences as defendants' counterclaims in the previous action. The trial court stated:

> As a result, the plaintiff's present claims are themselves compulsory counterclaims to the counterclaims asserted by the defendants in the first case. Because plaintiff elected not to present its claims for resolution in the first case, plaintiff is now barred from doing so. The Court concludes as a matter of law that the doctrine of res judicata precludes the further prosecution of this action . . . .

Rule 41(a)(1) of the North Carolina Rules of Civil Procedure provides that any action or any claim therein may be dismissed by the plaintiff without a court order at any time before plaintiff rests his case. G.S. 1A-1, Rule 41(a)(1). Unless otherwise stated, the dismissal is without prejudice and may be refiled within one year of the dismissal. *Id.* In *McCarley v. McCarley*, 289 N.C. 109, 221 S.E.2d 490 (1976), our Supreme Court held that when a defendant asserts a counterclaim that arises out of the same transactions and occurrences as plaintiff's initial claim, plaintiff is barred from voluntarily dismissing his initial claim without defendant's consent. Here, however, plaintiff took a voluntary dismissal of its remaining twenty-six claims after plaintiff had been granted summary judgment on defendants' counterclaims and after their initial appeal to this Court had been dismissed as interlocutory. Defendants appealed again to this Court after plaintiff took its voluntary dismissal on its remaining claims. After this Court affirmed the trial court's order in its entirety, plaintiff refiled its remaining claims within the one year period provided by the rules. Since plaintiff's claims were still pending at the time the trial court entered judgment on defendants' counterclaims and their appeal to this Court was dismissed as interlocutory, defendants' counterclaims were completely adjudicated at the time plaintiff took its voluntary dismissal. We conclude that on these facts, plaintiff was entitled to take a voluntary dismissal of their claims and refile them within one year of the voluntary dismissal. Accordingly, the trial court erred in dismissing plaintiff's action.

Reversed and remanded.

Judges MARTIN, JOHN C., and McGEE concur.

STATE OF NORTH CAROLINA v. DAVID STEVEN HARPER

No. 935SC21

(Filed 6 June 1995)

Criminal Law § 762 (NCI4th)— reasonable doubt—instructions

Under *State v. Bryant*, 337 N.C. 298, there was no error in the trial court's reasonable doubt instruction.

Am Jur 2d, Trial §§ 1077 et seq., 1104 et seq.

On remand based on order of Supreme Court filed on 15 May 1995, *State v. Harper*, 336 N.C. 776, 447 S.E.2d 434 (1994), vacating and remanding the unanimous decision of the Court of Appeals, *State v. Harper*, 112 N.C. App. 636, 436 S.E.2d 412 (1993), for reconsideration in light of the Supreme Court's opinion in *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994). Appeal by defendant from judgments entered 11 August 1992 by Judge William C. Griffin in New Hanover County Superior Court. Originally heard in the Court of Appeals 4 October 1993.

Attorney General Michael F. Easley, by Assistant Attorney General D. David Steinbock, for the State.

Nora Henry Hargrove for defendant appellant.

ARNOLD, Chief Judge.

The evidence presented at trial is summarized in this Court's prior opinion. *Harper*, 112 N.C. App. at 636-37, 436 S.E.2d at 412 (*Harper I*). In light of the Supreme Court's decision in *Bryant*, 337 N.C. 298, 446 S.E.2d 71, we find no error in the trial court's reasonable doubt instruction. As to the assignments of error raised by defendant and not addressed in *Harper I*, we have reviewed them and find no prejudicial error.

No error.

Judges WYNN and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 JUNE 1995

BERMUDA RUN COUNTRY CLUB v. BERMUDA VILLAGE, INC. No. 94-627	Davie (92CVS521)	Reversed & Remanded for Proceedings not inconsistent with this Opinion
BLACK v. FLOWERS BAKING CO. No. 94-412	Ind. Comm. (115154) (123235)	Affirmed
BYRD v. LOWE'S COMPANIES, INC. No. 94-572	Wake (93CVS1177)	Reversed & Remanded
CHRISTENSEN v. CHRISTENSEN No. 94-466	Wake (91CVD10796)	Affirmed
CORN v. NESBITT No. 94-234	Henderson (91CVD821)	No Error
DEVANE v. CITY OF WILMINGTON No. 94-865	Ind. Comm. (170174)	Reversed & Remanded
DULANEY v. THURSTON MOTOR LINES No. 94-915	Ind. Comm. (703236)	Affirmed
FLETCHER v. FLETCHER No. 94-927	Forsyth (92CVD7173)	Affirmed
FOWLER v. TAYLOR No. 94-189	Guilford (92CVS8063) (93CVS06212)	New Trial
HOLCOMB v. LEITCH No. 94-549	New Hanover (91CVS3616)	Affirmed
KEWAUNEE SCHIENTIFIC CORP. v. EASTERN SCIENTIFIC PRODUCTS No. 94-860	Iredell (93CVS00295)	Affirmed
MARSH v. COEUR LABORATORIES, INC. No. 94-692	Wake (92CVS1218)	Affirmed
MITCHELL v. LANGSTON No. 94-1021	Lee (93CVD710)	No Error
NEW HANOVER DSS ex rel. TRAVIS v. COOPER No. 94-932	New Hanover (93CVD1473)	Affirmed in Part, Vacated in Part & Remanded

PAIGE v. MAYO No. 94-1040	Wake (91CVS261)	Dismissed
S&S REALTY OF CHARLOTTE v. CRAWFORD No. 94-728	Mecklenburg (91CVD3394) (91CVD5464) (91CVD6677) (91CVD9362)	No Error
SOUTHERN CONCRETE v. SARDO CORP. No. 93-1213	Mecklenburg (91CVS11998)	Reversed
STATE v. BASS No. 94-664	Wake (92CRS52141) (92CRS52142) (92CRS52143) (92CRS80027)	Reversed & Remanded
STATE v. BROOKS No. 94-622	Robeson (92CRS19030) (92CRS19025)	No Error
STATE v. BURNS No. 93-390	Wayne (91CRS12111)	No Error in Trial; Remanded for new Sentencing Hearing
STATE v. BYNUM No. 94-1033	Guilford (93CRS70206) (93CRS70207)	No Error
STATE v. CORNATZER No. 94-984	Yadkin (91CRS705) (91CRS707) (91CRS709) (91CRS1912) (91CRS1913)	No Error
STATE v. DuBOISE No. 94-1030	Union (93CRS001077)	No Error
STATE v. GILLIARD No. 94-978	Cumberland (91CRS11338)	No Error
STATE v. McNEILL No. 93-1251	Cumberland (93CRS7622) (93CRS7623)	No Error
STATE v. MITCHELL No. 94-877	New Hanover (93CRS22925)	No Error

STATE v. SLAGLE No. 94-966	Buncombe (93CRS58458) (93CRS58459) (93CRS58460)	No Error in conviction making false report in violation of NC General Statute 14-225, Reversed & Remanded in conviction for possession of a controlled substance with intent to sell or deliver
STATE v. WILKERSON No. 94-974	Cumberland (91CRS1552) (91CRS1553) (91CRS1578) (91CRS1893) (91CRS1895) (91CRS2408)	No Error
STATE v. WILKIE No. 94-887	Rutherford (92CRS0652)	No Error
STATE v. WILLIAMS No. 94-950	Robeson (93CRS3584)	No Error
STATE v. WITHROW No. 94-988	Cleveland (93CRS7372)	No Error
VANCE v. NORMAN No. 94-629	McDowell (93CVD544)	Affirmed in Part Reversed in Part & Remanded
WATFORD v. POLLARD No. 94-605	Edgecombe (92CVS719)	No Error
WILLIAMS v. WILLIAMS No. 94-574	Wake (93CVD5202)	Vacated & Remanded
WRIGHT v. WRIGHT No. 94-1097	Moore (93CVD482)	Affirmed

STATE OF NORTH CAROLINA v. TIMOTHY ALEXANDER ALKANO

No. 9426SC576

(Filed 20 June 1995)

1. Constitutional Law § 359 (NCI4th); Evidence and Witnesses § 1087 (NCI4th)— defendant's failure to offer explanation of events—no violation of right against self-incrimination

In a prosecution of defendant for second-degree sexual offense, the prosecutor's questions to the arresting officers concerning defendant's pre-*Miranda* post-arrest lack of explanation of the events in question did not violate defendant's right against self-incrimination, since defendant did not choose to remain silent but instead, without any interrogation whatever by the officers, spontaneously made several inculpatory statements after being arrested, and the prosecutor's line of questioning served only to show the extent of defendant's spontaneous utterances.

Am Jur 2d, Criminal Law § 938.

2. Evidence and Witnesses § 764 (NCI4th)— drug use by defendant—improper questions stricken—defendant not prejudiced

Defendant in a sex offense case was not prejudiced by the prosecutor's questions about use of drugs since defendant's objections were sustained, the court gave curative instructions to the jury, and no evidence of drug use was admitted or presented.

Am Jur 2d, Appellate Review §§ 705-708, 710.

3. Evidence and Witnesses § 2949 (NCI4th)— alcohol use—impeachment by showing impairment of witness—cross-examination proper

In a prosecution of defendant for second-degree sexual offense, cross-examination of defendant concerning whether he had consumed alcohol on the day of the incident was not improper character evidence, since a witness may be impeached under N.C.G.S. § 8C-1, Rule 611(b) by evidence showing mental or physical impairment affecting his ability to observe and remember the events in question, and impeachment of a witness con-

cerning alcohol use near the time of the observed incident is permissible to show such impairment.

Am Jur 2d, Witnesses §§ 872, 873.

Impeachment of witness with respect to intoxication. 8 ALR3d 749.

Judge GREENE concurring in the result.

Appeal by defendant from judgment and commitment entered 24 January 1994 by Judge Loto G. Caviness in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 March 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Elisha H. Bunting, Jr. and Assistant Attorney General D. Sigsbee Miller, for the State.

John G. Plumides and T. Russell Peterman, Jr. for defendant-appellant.

LEWIS, Judge.

Defendant was convicted 24 January 1994 of second degree sexual offense and was sentenced to twenty-five years in the North Carolina Department of Correction.

The evidence for the State tended to show: The prosecutrix and friends went to the Pterodactyl Club in Charlotte on 23 May 1993. During their evening there, a man touched her, and, through the thin pants she was wearing, his fingers penetrated her vagina. Defendant was identified as the man who had grabbed her. She, her friends, and a bouncer found defendant and took him to the lobby. One of the friends slugged defendant.

Police officers Franklin and Helms arrived and arrested defendant. Neither officer gave defendant Miranda warnings. Defendant asked what he had done, and Officer Franklin told him what the prosecutrix had said. Defendant then said, "[D]id she scream?—did she say she screamed? She didn't scream." Neither Officer responded. On the way to jail, defendant continued to talk, but neither officer responded.

The prosecutor elicited the following testimony from Officer Franklin:

Q. Okay. Now, during that time period [while he was in Officer Franklin's presence], what if anything did the Defendant tell you with regard to his asking [the prosecutrix] to dance?

A. He never made that statement at any time . . . .

Q. What explanation if any did the Defendant state while he was in your presence?

MR. PLUMIDES: Objection.

Q. About what had happened?

THE COURT: I am going to overrule it and permit him to respond if he can.

A. He gave no explanation.

On re-direct:

Q. Officer, . . . the defense attorney asked you or stated you just talked to the prosecuting witness, you didn't take a statement from Mr. Alkano. And you answered you did not.

A. No, sir, I did not take a statement from Mr. Alkano regarding the crime which [sic] he was charged.

Q. . . . Did he ever offer to give you a statement?

MR. PLUMIDES: Objection.

THE COURT: I'm going to overrule it and let him respond.

A. No, sir, he did not.

On direct Officer Helms testified:

A. . . . And when the suspect found out that the man that assaulted him was not going to jail, he stated, so the man that hit me is not going to jail, but I am by sticking my finger into her vagina.

Q. Okay. Did you make any response—

A. No, sir, I did not

Q. —to those statements?

A. No, sir.

Q. At any time during the period when this defendant was in your presence, did he ever offer to give you a statement about what had happened?

A. No, sir.

MR. PLUMIDES: Objection.

THE COURT: Overruled. Permit him to respond if he knows.

Q. Your answer?

A. No, sir.

Defendant's evidence tended to show: Defendant asked the prosecutrix to dance when he was at the Pterodactyl Club that evening, but she declined. The prosecutrix's boyfriend, who was walking with her, told defendant she was nervous because someone had grabbed her. When the prosecutrix identified defendant as the man who had grabbed her, defendant denied the accusation.

Defendant testified at trial. During cross-examination, the prosecutor questioned defendant concerning the use of alcohol and drugs. The Court sustained objections to questions about drugs but allowed questions concerning use of alcohol. The prosecutor again questioned defendant about use of drugs and again the court sustained the objection and instructed the jury to disregard the question. The prosecutor then asked defendant if he ingested anything that altered his mental faculties. Defendant did not object to this question.

Defendant raises the following issues on appeal: Did the trial court commit reversible error (1) by allowing testimony of the arresting officers that defendant, when placed in custody, failed to give a statement or explanation about the crime for which he had been arrested and (2) by allowing the prosecutor to cross-examine defendant regarding use of alcohol and drugs.

I. Testimony Concerning Lack of Statement or Explanation

[1] In his first assignment of error, defendant challenges the officers' testimony on the lack of statement or explanation from defendant on several grounds. However, in his brief, defendant presents argument only on the ground that admission of this testimony violated defendant's right against self-incrimination under the Fifth and Fourteenth Amendments of the United States Constitution and under Article I, Section 23 of the North Carolina Constitution. His other arguments and assignments of error are deemed abandoned. N.C.R. App. P. 28(a) (1995).

The Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, *Malloy v.*

Hogan, 378 U.S. 1, 12 L. Ed. 2d 653 (1964), provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Similarly, our North Carolina Constitution provides: "In all criminal prosecutions, every person charged with a crime has the right to . . . not be compelled to give self-incriminating evidence . . . ." N.C. Const. art. I, § 23. The admission of freely volunteered statements is barred neither by the Fifth Amendment of the United States Constitution, *Miranda v. Arizona*, 384 U.S. 436, 478, 16 L. Ed. 2d 694, 726 (1966), nor by the North Carolina Constitution. *State v. Levan*, 326 N.C. 155, 172, 388 S.E.2d 429, 438 (1990).

Defendant does not contend that the officers conducted in-custody interrogation as would require *Miranda* warnings. Rather, defendant contends that the in-court testimony of the officers concerning defendant's pre-Miranda, post-arrest lack of explanation or statement violated his constitutional right to remain silent. The problem with defendant's argument, here, is that defendant did not choose to remain silent. Without any interrogation whatever by the officers, defendant spontaneously made several inculpatory statements after being arrested.

The questions and the officers' responses concerning defendant's lack of explanation immediately followed their testimony concerning the unsolicited statements defendant did make during the fifteen minutes that it took to arrest defendant and transport him to the station. This line of questioning in-court by the prosecutor served only to show the extent of defendant's spontaneous utterances. We do not see how in-court questioning of the officers on the extent of defendant's statements violated either his federal or state constitutional right against compelled self-incrimination.

Neither party has presented any cases directly on point, nor have we found any. Defendant cites *State v. Castor*, 285 N.C. 286, 204 S.E.2d 848 (1974), in which our Supreme Court held it reversible error to admit an investigator's testimony concerning a defendant's pre-Miranda, in-custody silence in the face of accusatory statements of a co-defendant. *Id.* at 293, 204 S.E.2d at 853. *Castor* is distinguishable, however, because the defendant in *Castor* did exercise his right to remain silent, in contrast to defendant Alkano who spoke freely while in custody. In fact, our Supreme Court emphasized this fact in reaching its holding:

> Defendant was in custody, charged with . . . [murder] . . . when Elaine [co-defendant] was brought into his presence and ques-

> tioned concerning what she had previously related . . . . Defendant was not then represented by counsel and had not been advised of his constitutional rights. However, decision is not based on either of these circumstances. *The crucial fact is that he exercised his constitutional right to remain silent.*

Castor, 285 N.C. at 291, 204 S.E.2d at 852. *State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975), is similarly distinguishable in that defendant *Williams* did remain silent as to the events for which he was charged. *See Williams*, 288 N.C. at 692-93, 220 S.E.2d at 567-68.

A defendant's lack of silence was similarly critical in *United States v. Agee*, 597 F.2d 350 (3rd Cir.), *cert. denied*, 442 U.S. 944, 61 L. Ed. 2d 315 (1979), in which the United States Court of Appeals for the Third Circuit affirmed the conviction of a defendant who was cross-examined by the prosecution and by a co-defendant's attorney about statements he did not make at the time of his arrest. *See Agee*, 597 F.2d at 353. The *Agee* court, distinguishing *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976), stated:

> *"Silence" at the time of arrest is the critical element of the Fifth Amendment right on which Agee relies* . . . . The Supreme Court has described that right as "the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' " The rationale which the Supreme Court adopted for its decision in *Doyle* was that it is fundamentally unfair for the prosecution to impose a penalty at trial on a defendant who has exercised that right by choosing to remain silent. . . . *Doyle* can have no application to a case in which the defendant did *not* exercise his right to remain silent . . . . *Agee did not exercise his right to remain silent regarding the facts of the incident.*

Agee, 597 F.2d at 354-56 (citations omitted) (emphasis added). *Doyle* is similarly distinguishable here. The defendant in *Doyle* asked one question, "[W]hat's this all about?" at his arrest, but remained silent as to the facts of the incident. *Doyle*, 426 U.S. at 614 n.5, 49 L. Ed. 2d at 96 n.5. Defendant Alkano, like defendant Agee, was not silent regarding the facts of the incident at the time of his arrest.

Defendant also argues that the prosecution's use of the officers' testimony during its case-in-chief differs from the impeachment use of a defendant's silence because it puts the defendant in the position of having to take the stand to clear up the ambiguity raised by the officers' testimony. Under these facts, we find this argument without

merit. We cannot see how the officers' testimony about defendant's failure to give further explanatory statements made it any more necessary for him to testify than was already necessary to refute the officers' testimony on his inculpatory statements. The fact remains that defendant did not remain silent. Rather, he made several inculpatory statements which he then chose to explain by testifying at trial.

The prosecutor's questions to the officers concerning defendant's lack of explanation did not violate defendant's rights against self-incrimination under either the United States or North Carolina Constitutions.

II. Cross-examination Regarding Use of Alcohol and Drugs

a. Questions About Use of Drugs

[2] During the trial, the prosecutor asked defendant questions about use of drugs. Defendant's objections were sustained, thus eliminating any prejudice caused by the questions. *See State v. Barrow*, 276 N.C. 381, 387-88, 172 S.E.2d 512, 516 (1970) (no prejudice when objection sustained; merely asking the question is not prejudicial). When the prosecutor again asked a question concerning defendant's use of drugs, defendant's objections were sustained and the court gave curative instructions to the jury, thus further correcting any prejudice caused by the questions. *See State v. Perry*, 276 N.C. 339, 345, 172 S.E.2d 541, 545-46 (1970) (harmful effect of an officer's testimony concerning a second warrant corrected by instruction not to consider the testimony).

State v. Wheeler, 261 N.C. 651, 135 S.E.2d 669 (1964), is distinguishable. In *Wheeler*, after an objection to the question was sustained, the prosecutor questioned the defendant three times concerning his response to a suggestion to take a lie detector test. This problem was compounded in *Wheeler* by the prosecutor's continued questioning concerning the defendant's domestic problems. There is no indication in *Wheeler* that the improper questions were stricken or that the jury was instructed to disregard the questions. Our Supreme Court noted in *Wheeler* that the judge generally failed to be firm with the attorneys and allowed the trial "to get out of hand." *Id.* at 652, 135 S.E.2d at 670.

Defendant Alkano's trial did not "get out of hand." Objections were sustained, curative instructions were given, and no evidence of drug use was admitted or presented. Defendant was not prejudiced by

the questioning about use of drugs. The trial judge retained control of the proceedings throughout.

Defendant also argues that the court erred in allowing the prosecutor to question him about substances ingested that would alter his mental faculties. Since defendant did not object to this question at trial, has not argued plain error or asserted how this issue is otherwise preserved for appellate review, we decline to address it further. N.C.R. App. P. 10; *State v. Oliver*, 309 N.C. 326, 335, 307 S.E.2d 304, 312 (1983).

b. Questions About Use of Alcohol

[3] Defendant claims that cross-examination concerning whether he had consumed alcohol on the day of the incident was improper character evidence under N.C.G.S. § 8C-1, Rule 608(b) and Rule 404(b) or otherwise should have been excluded under N.C.G.S. § 8C-1, Rule 403.

"[E]vidence of drug use alone is not admissible under Rule 608(b)." *State v. Williams*, 330 N.C. 711, 718, 412 S.E.2d 359, 364 (1992). However, a witness may be impeached under N.C.G.S. § 8C-1, Rule 611(b), by evidence showing mental or physical impairment affecting his ability to observe and remember the events in question. *Williams*, 330 N.C. at 719, 412 S.E.2d at 364; 1 Brandis & Broun, *Brandis and Broun on North Carolina Evidence* § 156, at 511 (4th ed. 1993). Impeachment of a witness concerning alcohol use near the time of the observed incident is permissible to show such impairment. *State v. Rollins*, 113 N.C. 722, 732, 18 S.E. 394, 398 (1893); Brandis & Broun, *supra*, at 512. Here, the prosecutor limited its questions on alcohol use to substances used on the day and evening of the incident and did not ask questions about addiction or habitual use. This was permissible impeachment. *See Williams*, 330 N.C. at 719, 412 S.E.2d at 364.

Defendant also contends that the State did not have a good faith basis for its questions concerning alcohol use. Questions asked on cross-examination must be asked in good faith. *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971). Defendant testified that he had visited other bars that evening, and Officer Helms testified that defendant had an odor of alcohol about his person. Thus, the State had a good faith basis for its attempts to impeach defendant's testimony by seeking to establish whether alcohol use affected his ability to observe and remember the events of that evening.

Defendant also contends that these questions on alcohol use were so prejudicial as to be improper under Rule 403. Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1988). Whether to exclude evidence under Rule 403 "is a matter within the sound discretion of the trial judge." *State v. Schultz*, 88 N.C. App. 197, 203, 362 S.E.2d 853, 857 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988). A new trial will be ordered for abuse of discretion in not excluding evidence under Rule 403 "only upon a showing that the 'ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *State v. Cotton*, 329 N.C. 764, 768, 407 S.E.2d 514, 518 (1991) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

Given the discrepancy in testimony as to what actually happened, the jury was faced with the task of judging the ability of each witness to recall the events of that evening with precision. The incident in question took place in a club in which alcohol was served. The prosecutrix and another witness present that evening, as well as defendant, were questioned on cross-examination as to whether they were drinking that night. Defendant was not singled out by this questioning; he was subjected to the same type of limited questioning on alcohol use as were the other witnesses. We conclude that the probative value of this evidence showing defendant's ability to recall and relate was not substantially outweighed by any unfair prejudice, and the trial judge's decision to allow the questioning was not manifestly unsupported by reason.

The court did not err in permitting the prosecutor to question defendant on alcohol use in this manner.

For the reasons stated, we hold there was no error.

No error.

Judge COZORT concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result:

Contrary to the majority, I believe that the prosecutor's questions to the officers concerning defendant's lack of explanation did violate the defendant's rights against self-incrimination.

Our Supreme Court has been unequivocal in holding that a defendant's in-custody silence cannot be offered into evidence either for the purpose of proving his guilt or for the purpose of impeachment. *State v. Castor*, 285 N.C. 286, 292, 204 S.E.2d 848, 853 (1974); *State v. Williams*, 288 N.C. 680, 692-93, 220 S.E.2d 558, 568 (1975). The United States Supreme Court is in accord. *United States v. Hale*, 422 U.S. 171, 176, 45 L. Ed. 2d 99, 104-05 (1975); *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976).

In this case there can be no dispute that the defendant chose to remain silent on several occasions while he was in the presence of the police officers. There can also be no dispute that when the State presented evidence that defendant never gave an explanation, never made any response and never offered to give a statement, it offered evidence on defendant's silence. It therefore follows that the admission of this evidence was error.

I disagree with the majority that the defendant lost his right to remain silent once he spoke with the officers about the incident. There is no language in any of the cases relied on by the majority, or any that I have found, suggesting that once a defendant has some communication with the police "regarding the facts of the incident" that he is no longer entitled to exercise his right to remain silent. Indeed in the context of in-custody interrogation the courts have been unambiguous in holding that a defendant has the right to "cut off questioning" and stand silent, *Miranda v. Arizona*, 384 U.S. 436, 474, 16 L. Ed. 2d 694, 723 (1966), and there is no reason to provide otherwise where the silence is asserted in a non-interrogation in-custody situation. Furthermore, I do not believe that *United States v. Agee*, 597 F.2d 350 (3d Cir. 1979), *cert. denied*, *Agee v. United States*, 422 U.S. 944, 61 L. Ed. 2d 315 (1979), relied on by the majority, suggests a different result. The *Agee* Court simply held that the holding of *Doyle* had not been violated because the question asked by the prosecutor "was not a reference to Agee's purported silence." *Agee*, 597 F.2d at 354. The Court did not hold that the prosecutor examined the defendant about "statements he did not make."

Although the evidence relating to the defendant's silence should not have been admitted, the error does not require a new trial because the other evidence in this record demonstrates beyond a reasonable doubt that the error was harmless. N.C.G.S. § 15A-1443(b) (1988) (burden on the State where error is constitutional in nature). The prosecutrix was unequivocal in her testimony that the defendant assaulted her and the statements the defendant did make to the officers were particularly incriminating.

Because I join with the majority in its resolution of the other issues raised by the defendant, I concur with the ultimate disposition of "No error."

STATE OF NORTH CAROLINA v. ELBERT RANDOLPH POE AND DAVID LADELL BEASLEY

No. COA94-867

(Filed 20 June 1995)

1. Assault and Battery § 25 (NCI4th)— brick throwing incident—aiding and abetting assault—sufficiency of evidence

Defendant Poe was properly found guilty of aiding and abetting the commission of the offense of assault with a deadly weapon inflicting serious injury and damage to personal property not only because he was present when the crimes were committed but because his actions in driving the car from which several items were thrown by his passengers at other cars and in throwing items at other cars himself showed his consent to the criminal purpose and contribution to its execution.

Am Jur 2d, Criminal Law § 81.5.

2. Evidence and Witnesses § 364 (NCI4th)— prior bad act committed by defendant—evidence admissible

In a prosecution of defendant for assault which occurred when defendants allegedly threw a brick from their car into the victims' car, the trial court did not err in admitting the testimony of one of defendant's passengers that defendant had allegedly committed a prior bad act by throwing a bottle into another vehicle earlier in the evening, since the incident was similar in means

and execution and occurred the same evening as the brick throwing incident.

Am Jur 2d, Evidence §§ 404, 428.

3. Trial § 444 (NCI4th)— witness's statement taken into jury room—defendant not prejudiced

Although the trial court erred in allowing the jury to take the statement of a witness into the jury room over one defendant's objection, the other defendant was not prejudiced, since that defendant had not objected to the jury's request and the witness's statement made no reference to that defendant.

Am Jur 2d, Trial §§ 1665, 1671.

4. Trial § 444 (NCI4th)— witness's statement taken into jury room—defendant prejudiced

The trial court's submission of a witness's statement to the jury to take to the jury room over one defendant's objection rose to a level of error sufficiently prejudicial to entitle that defendant to a new trial, since the State's entire case rested on the testimony of that witness who himself had pending charges of assault and damage to personal property arising out of this same incident.

Am Jur 2d, Trial §§ 1665, 1671.

Appeal by defendants from judgments entered 9 February 1994 by Judge Chase B. Saunders in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 April 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Margaret A. Force, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant Elbert Randolph Poe.

Grant Smithson for defendant-appellant David Ladell Beasley.

JOHNSON, Judge.

Defendants Elbert Randolph Poe and David Ladell Beasley were indicted for charges of assault with a deadly weapon in violation of North Carolina General Statutes § 14-32(b) (1993) and injury to personal property in violation of North Carolina General Statutes § 14-160 (1993). The cases were joined for trial.

Evidence presented at trial showed the following: Shortly after 9:00 p.m. on 18 April 1993, Brenda Sexton and her sister, Rachel Carter, were traveling north on Eastway Drive toward Central Avenue in Charlotte, North Carolina, in a blue Ford Escort. Ms. Sexton was driving and Ms. Carter was in the passenger seat. As they neared a Starvin' Marvin convenience store, a brick was thrown through the window of the car, shattering the windshield and damaging the hood and interior dash of the car. Ms. Carter heard a loud explosion and felt glass spray across her face. Ms. Sexton had been knocked unconscious. Ms. Carter, who was not injured, brought the car under control after it crossed three lanes of traffic.

Ms. Sexton regained consciousness at the scene. She did not know what had caused her injury, but her eye had been hit and the side of her face smashed and she could not see because of glass and blood. Ms. Sexton was taken to the hospital where she remained for two weeks; the right side of her head and face were surgically reconstructed. By the time of trial she had undergone three operations and more were necessary.

Ms. Carter testified that just before the brick was thrown into the car, she saw two cars, a small red car and a small gray car. She could not see who was inside either vehicle. Immediately after the accident, Ms. Carter saw a brick lying in the back seat; the brick was old, had mortar edges, and was covered with mud. Ms. Carter threw the brick away the following day.

Benjamin Tyrone Carter was one of the people indicted in connection with the assault; Mr. Carter testified for the State pursuant to an arrangement with the State which would result in all charges being dismissed in exchange for his testimony. Mr. Carter testified that he knew defendants from attending Myers Park High School. According to Mr. Carter, he, defendant Poe, defendant Beasley, and Tito Truesdale spent the afternoon of 18 April 1993 together; defendant Poe had his mother's car, a gray four-door Nissan Sentra, and he drove the others; they drove to Freedom Park around 5:00 p.m.; Mr. Carter, who suffers from vertigo, became dizzy and asked to be taken home; and when they left the park, Mr. Truesdale was in the front seat with defendant Poe, the driver, defendant Beasley was in the back seat behind defendant Poe, and Mr. Carter was in the right rear passenger seat. The men stopped at a convenience store and all of them except Mr. Carter went in and got something to eat; they then began to travel on I-77 going toward I-85.

Mr. Carter testified further that as the four men traveled on I-77, defendant Poe threw a bottle at a blue Nissan 300 ZX which had pulled up beside them; that the driver of the 300 ZX chased the men through downtown Charlotte for approximately ten minutes before defendant Poe was able to lose the 300 ZX; that at defendant Beasley's request, defendant Poe stopped in the parking lot of a Bojangle's beside a Jiffy Lube near Eastland Mall; that defendants got out of the car to use the bathroom; and that when they returned, defendant Beasley was carrying two rocks which had been picked up from the dumpster area. Mr. Carter continued, that defendants got back into the car and headed down Central Avenue; that defendant Beasley threw a rock at an approaching car and asked defendant Poe to pull over again; that defendant Poe stopped at a dry cleaners on Eastway Drive near a Starvin' Marvin store; that defendants got out of the car again and this time defendant Poe picked up a bottle and defendant Beasley picked up some bricks from a nearby wall; and that defendants got back into the car and as they were driving down Eastway Drive, defendant Poe threw the bottle at a Ford Escort and defendant Beasley threw a rock at the car.

Mr. Carter further testified that he looked back and saw the car cross the center lane and enter the wrong lane of traffic; that defendant Poe turned the car around and after defendant Beasley got rid of the second rock, defendant Poe drove past the car Ms. Sexton had been driving and saw that she had been badly injured; and that he asked defendant Poe to take him home and his companions told him "not to fag out" and "go home and call the police." Mr. Carter stated that defendant Poe did not drive Mr. Carter home but he did drive Mr. Truesdale home because Mr. Truesdale "didn't want no part of it"; that defendant Beasley then got in the front seat with defendant Poe and the three men returned to the Starvin' Marvin store and waited as emergency aid was rendered to the victim, Ms. Sexton; and that Mr. Carter and defendants were apprehended as they sat in the car.

Regis L. Morrison was at the scene when the incident occurred and told police that he saw the car from which the brick had come. As a result of this information, Officer George D. Dawkins, the first police officer to arrive at the scene, got into his car and drove about 200 feet to the Starvin' Marvin store where defendants and Mr. Carter were parked. Officer Dawkins and Officer M. D. Burney, who had joined the investigation, approached the car in which defendants and Mr. Carter were seated. Officer Burney put Mr. Carter into his car and Officer Dawkins placed defendants into his car. According to Officer

Burney, Mr. Carter was scared and almost in tears. Before any questioning commenced, Mr. Carter said he wanted to make a statement. He told Officer Burney that defendant Beasley threw the brick through the window of the car Ms. Sexton was driving and that they were involved in another similar incident on Central Avenue where he threw a brick at another car. Mr. Carter was taken to the Law Enforcement Center where he gave a written statement regarding the incident. There was no indication in Mr. Carter's written statement that defendant Poe had thrown a bottle at any car that night.

Pieces of brick and broken rock were found by police in both the Ford Escort driven by Ms. Sexton and on the floorboard in the left rear behind the driver's seat in the gray Nissan Sentra which defendant Poe was driving.

Officer Larry F. Mackins testified that he was dispatched at 9:47 p.m. to investigate a report of damage to a vehicle near Eastway Drive and Central Avenue, less than a mile away from the scene of the incident involving the car Ms. Sexton was driving. A car driven by Robert Dale Johnson had damage to its windshield and the interior dash. Pieces of concrete rock were found inside the car. Officer Mackins, as well as Officer Burney, heard the calls to police regarding the two incidents.

Both defendants presented evidence which tended to exonerate themselves and implicate Mr. Carter. According to defendants' evidence, Mr. Carter had been drinking and was "hyper" and was talking "junk" to people in passing cars. Both defendants testified that during one of their stops, Mr. Carter used a telephone and slammed it down. After slamming down the phone, according to defendant Beasley, Mr. Carter said, "I'm going to hit that bitch in the head"; defendant Poe testified that Mr. Carter said that he was going "to bust the bitch" with a rock because she was with another man. Defendant Beasley denied having any rocks or bricks in the car. His testimony was that while he did not know what had happened, Mr. Carter had to have been the one to throw the brick into the car Ms. Sexton was driving. Defendant Poe testified that Mr. Carter had the brick and that defendant Poe heard "glass breaking" immediately after he saw Mr. Carter roll down a window and put his hand out.

Defendants were found guilty as charged. Each defendant was sentenced to a term of three years imprisonment for the assault conviction and six months for damage to personal property. Defendants have each appealed to our Court.

I. Defendant Poe's Appeal

[1] Defendant Poe first argues that the trial court erred in denying defendant Poe's motion to dismiss the charges where the evidence was insufficient to show each and every element of the crime beyond a reasonable doubt. Defendant Poe was convicted of aiding and abetting the commission of the offense of assault with a deadly weapon inflicting serious injury and also convicted of damage to personal property.

The offense of assault with a deadly weapon is found in North Carolina General Statutes § 14-32(b), i.e., the offense is committed by "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury[.]" The offense of injury to personal property is found in North Carolina General Statutes § 14-160, that "[i]f any person shall wantonly and willfully injure the personal property of another [,]" he shall be guilty of this offense.

As to aiding or abetting, "[it is] . . . the law that one may not be found to be an aider or abettor, and thus guilty as a principal, solely because he is present when a crime is committed. It will still be necessary, in order to have that effect, that it be shown that the defendant said or did something showing his consent to the criminal purpose and contribution to its execution." *State v. Ainsworth*, 109 N.C. App. 136, 144, 426 S.E.2d 410, 415 (1993). "Intent to aid may be inferred from defendant's actions or from his relation to the perpetrator." *State v. Capps*, 77 N.C. App. 400, 403, 335 S.E.2d 189, 191 (1985).

The evidence shows that defendant Poe spent the afternoon and evening of 18 April 1993 with defendant Beasley; that defendant Poe drove his mother's car, a gray four-door Nissan Sentra, throughout this time period; that during the evening, while traveling on I-77 going toward I-85, defendant Poe threw a bottle at a blue Nissan 300 ZX which had pulled up beside them; that, after stopping at defendant Beasley's request, upon their return to the car, defendant Beasley was carrying two rocks which had been picked up from the dumpster area; that, while driving down Central Avenue, defendant Beasley threw a rock at an approaching car; that after stopping again, defendant Poe picked up a bottle and defendant Beasley picked up some bricks from a nearby wall; and that after defendants got back into the car, driving down Eastway Drive, defendant Poe threw the bottle at a Ford Escort and defendant Beasley threw a rock at the car. Based on this evidence, we believe defendant Poe was properly found guilty of

aiding and abetting the commission of the offense of assault with a deadly weapon inflicting serious injury not only "because he [was] present when [the crime was] committed" but because, by his actions, he clearly "show[ed] his consent to the criminal purpose and contribution to its execution." Based on the evidence, we also find defendant Poe was properly found guilty of damage to personal property. This assignment of error is overruled.

[2] Defendant Poe next argues that the trial court committed plain error in admitting the testimony of Mr. Carter under N. C. R. Evid. 404 regarding a prior bad act allegedly committed by defendant Poe where the evidence was admitted solely to show defendant Poe's propensity for the type of conduct for which he was being tried and where the unduly prejudicial nature of the testimony far outweighed its probative value. Specifically, defendant Poe argues that the admission of Mr. Carter's testimony regarding the bottle-throwing at the Nissan 300 ZX was improper, pursuant to N. C. R. Evid. 404(a), because it attempted to prove the character of a person to show "that he acted in conformity therewith." The State, however, argues that admission of Mr. Carter's testimony was proper, pursuant to N. C. R. Evid. 404(b), as it was "admissible for other purposes[.]"

Evidence of a defendant's prior bad acts under what is known as the "same transaction" rule is generally admissible if it "forms part of the history of the event or serves to enhance the natural development of the facts." *State v. Agee*, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990) (citation omitted). Our Supreme Court has observed that the use of evidence of prior bad acts is guided by two constraints, those being similarity and temporal proximity. *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *death sentence vacated and remanded for new sentencing hearing*, 494 U.S. 1023, 108 L.Ed.2d 604 (1990), 329 N.C. 679, 406 S.E.2d 827 (1991). We believe the trial court properly admitted Mr. Carter's testimony regarding the bottle-throwing at the Nissan 300 ZX because that incident was similar in means and execution and occurred the same evening as the brick-throwing incident involving the car Ms. Sexton was driving. As such, we overrule this assignment of error.

Defendant Poe next argues that defendant was denied the effective assistance of counsel under the sixth and fourteenth amendments to the United States Constitution and under Article I, §§ 19 and 23 of the North Carolina Constitution where defense counsel failed to object and move for a mistrial after Mr. Carter was allowed to testify

regarding a prior bad act allegedly committed by defendant Poe. Because of our resolution of defendant Poe's previous assignment of error, we dismiss this argument.

[3] Finally, defendant Poe argues that the trial court committed plain error in allowing the jury to take the statement of Mr. Carter into the jury room over defendant Beasley's objection in violation of North Carolina General Statutes § 15A-1233 (1988). North Carolina General Statutes § 15A-1233 states that "[u]pon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence."

The record indicates that during its deliberations, the jury requested to hear the testimony of defendant Beasley, defendant Poe, and Mr. Carter, and statements written by defendant Poe and Mr. Carter. As to the testimony of defendant Beasley, defendant Poe, and Mr. Carter, the court instructed the jury it would have to rely on what their testimony was in open court. As to the request for defendant Poe's statement, the court denied it because that statement had not been received in evidence. However, the court allowed the request for Mr. Carter's statement, as it had been received in evidence. Defendant Poe did not object to the request for Mr. Carter's statement; defendant Beasley did, however, object.

Plain error is a fundamental error, one which is so prejudicial and so lacking in its elements that it denies a defendant a fair trial. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). The statutory violation committed by a trial judge in allowing a witness' statement to go to the jury over objection is corrected by our Court only when it prejudices the defendant. *State v. Taylor*, 56 N.C. App. 113, 287 S.E.2d 129 (1982). "Such prejudice obtains only when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises; the burden of showing such prejudice is upon the defendant." *Id.* at 115, 287 S.E.2d at 130-31.

Although the trial court did not obtain the consent of all of the parties in allowing Mr. Carter's statement to go to the jury to take to the jury room, we do not find that defendant Poe was prejudiced by this error. Not only did defendant Poe not object to the jury's request at trial, but Mr. Carter's statement made no reference whatsoever to defendant Poe. Therefore, we find this error did not rise to the level of prejudicial error as to defendant Poe.

II. Defendant Beasley's Appeal

[4] Defendant Beasley's assignments of error have all been addressed earlier in this opinion. For reasons outlined above, we reject all of these assignments of error except the final one: defendant Beasley argues that the trial court committed plain error in allowing the jury to take the statement of Mr. Carter into the jury room over defendant Beasley's objection in violation of North Carolina General Statutes § 15A-1233.

Defendant Beasley argues that

> the jury was improperly allowed over Beasley's counsel's objection to give ultimate importance and weight to a written statement of the State's major witness, Benjamin Carter. The statement additionally served to corroborate his trial testimony, whereas defendant's testimony and that of his co-defendant [Poe] could only be highlighted by the jurors [sic] own individual and collective recollections.

We find defendant Beasley's argument persuasive. We note that the State's entire case rested on the testimony of Mr. Carter, who himself had pending charges of assault and damage to personal property arising out of this same incident. The jury was obviously weighing the testimony of each person who testified in order to arrive at a verdict. By denying the jury's request to hear the testimony of defendant Beasley, defendant Poe, and Mr. Carter, and by allowing the jury to take Mr. Carter's written statement, which directly implicated defendant Beasley, into the jury room over defendant Beasley's objection, we believe there exists a reasonable possibility and a reasonable assumption that the jury may have inadvertently given more weight to Mr. Carter's statement. *See Doby v. Fowler*, 49 N.C. App. 162, 270 S.E.2d 532 (1980) (where our Court found prejudicial error where the trial court allowed an exhibit, a bill for payment, to go to the jury; plaintiff had testified about this bill, and defendant had expressed his unwillingness for the bill to go to the jury). *Compare State v. Platt*, 85 N.C. App. 220, 354 S.E.2d 332, *disc. review denied*, 320 N.C. 516, 358 S.E.2d 529 (1987) (where our Court found prejudicial error in allowing a witness' statement to go into the jury room over objection by the defendant, where the statement represented the only direct evidence against the defendant); and *State v. Flowe*, 107 N.C. App. 468, 420 S.E.2d 475, *disc. review denied*, 332 N.C. 669, 424 S.E.2d 412 (1992) (where our Court found it was *not* prejudicial error where the trial court allowed the defendant's statement to go to the jury, where the

statement had been previously read in its entirety and in portions to the jury, the victim had positively identified the defendant, the officer who had taken the defendant's statement testified, and the defendant himself testified to pointing a gun at the victim).

Therefore, we find that the trial court's submission of Mr. Carter's statement to the jury to take to the jury room over defendant Beasley's objection rose to a level of error sufficiently prejudicial to entitle defendant Beasley to a new trial.

* * *

In case nos. 93CRS25592 and 93CRS25594 (defendant Poe), no prejudicial error.

In case nos. 93CRS25597 and 93CRS25598 (defendant Beasley), new trial.

Judges COZORT and McGEE concur.

CATHERINE LEE DALTON, EMPLOYEE, PLAINTIFF v. ANVIL KNITWEAR, EMPLOYER AND NATIONAL UNION FIRE INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA94-726

(Filed 20 June 1995)

Workers' Compensation § 341 (NCI4th)— agreement for compensation entered into by parties—termination of benefits—error

The Industrial Commission erred in concluding that plaintiff's compensable injury did not cause her current disability and that plaintiff was not entitled to receive further disability benefits, since the parties had previously entered into an Agreement for Compensation for Disability which had been approved by the Commission, and the sole issue before the Commission therefore was whether plaintiff's disability compensation should continue, not whether her alleged disability was the result of her accident.

Am Jur 2d, Workers' Compensation §§ 513-316.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 4 April 1994. Heard in the Court of Appeals 23 March 1995.

On 5 February 1990, plaintiff, a knitting machine operator, suffered a back injury while "doffing a roll of cloth weighing fifty pounds from a knitting machine." Dr. Donald Mullis examined plaintiff on 21 February 1990 and diagnosed her as having an acute lumbar strain. The parties subsequently entered into an "Agreement for Compensation for Disability" (Industrial Commission Form 21) for plaintiff's back strain which was approved by the Industrial Commission (hereinafter Commission) on 4 April 1990. Defendant carrier paid plaintiff compensation for temporary total disability until 18 October 1991.

On 23 April 1991, defendant applied to the Commission on Industrial Commission Form 24 to stop the payments of temporary total disability. Plaintiff filed a request for hearing on 26 April 1991. Although defendant's application to stop payments was denied on 10 May 1991, plaintiff's claim was assigned for hearing on 18 October 1991. At the hearing, the parties stipulated that plaintiff "sustained an injury by accident arising out of and in the course of her employment on February 5, 1990. The accident resulted in back strain."

On 14 October 1992, Deputy Commissioner Markham issued the following Opinion and Award:

STIPULATIONS

3. Plaintiff sustained an injury by accident arising out of and in the course of her employment on February 5, 1990.

4. The accident resulted in back strain.

5. Plaintiff's average weekly wage was $404.08, yielding a compensation rate of $269.40.

. . . .

FINDINGS OF FACT

1. Plaintiff's compensable injury of February 5, 1990 occurred when in the course of her duties as a knitting machine operator for defendant, she was doffing a 50 pound roll of fabric. She flipped the roll over and felt something pull in her back. Pursuant to the Form 21 agreement between the parties, she was thereafter paid compensation for temporary total disability intermittently and was continuing to be paid such compensation at the time of the hearing. On April 23, 1991 defendant had applied to the Industrial Commission on Form 24 to stop payment of compen-

sation on grounds that "claimant has reached maximum medical improvement, has been rated, and will not be returning to gainful employment due to non-work related problems." The application was denied May 10, 1991. Among other grounds cited by the Commission for the denial as stated June 6, 1991 by the Chief Claims Examiner, was that the evidence was not clear whether the employer was unemployable because of her accident, other factors or a combination of both, matters which would have to be addressed at a hearing because the case by then had been placed on the hearing docket.

2. Plaintiff now 48 years old, completed the eighth grade in school and in 1985 obtained a General Equivalency Diploma. Her employment history includes approximately 20 years in the textile industry in the knitting and spinning departments of various mills. At the time of her injury she had been employed for a second time by defendant about a year and a half. She is married and has four living children in their 20's, the youngest of whom lived at home.

3. Plaintiff is visually impaired and has never had a driver's license. She has a past history of peptic ulcer disease. About 1982 or 1983, plaintiff was treated for a seizure disorder which was then treated with Dilantin. She first experienced seizures when she was a child. She had no further such disorders for about eight years after 1982-1983 and did not require her medication. Between July 1984 and June 1987 plaintiff was treated conservatively by Dr. Donald Mullis for chronic lumbar strain with pain radiating into her right foot, occasioned by incidents in her then employment in 1984 and 1985 at Tandy Manufacturing Company (for which no workers' compensation apparently was ever sought or paid). Dr. Mullis concluded by November 1986 that plaintiff had a chronic recurrent fibromyositis problem. On June 30, 1987, Dr. Mullis rated plaintiff as having a ten percent permanent partial disability of the lumbar spine; released her from his care; and referred her to the back program at Thoms Rehabilitation Hospital. Fibromyositis is a chronic inflammation in the muscles (soft tissue) that is not related to a slipped disc or pinched nerves and is very difficult to treat. As of June 30, 1987 Dr. Mullis expected plaintiff to have continued, recurrent back pain. Patients with a fibromyositis problem may experience periods when they feel fine and then the back begins to hurt again when they become active, even with insignificant activity.

4. Plaintiff was evaluated at Thoms July 28, 1987 but did not at that time enter the program. Dr. Shields and his colleague, Dr. Craig Waggoner, reported their conclusions to Dr. Mullis as follows: "Catherine Dalton is suffering from Chronic pain syndrome secondary to a probably myofascial dysfunction with possibility of a right posterior sacroiliac joint dysfunction. Psychological/behavioral factors appear to be greatly perpetuating and amplifying her complaints of pain and overall symptomatology. Considerable amount of marital dysfunction and current stress is present and contributing to her pain problems." When plaintiff applied to defendant for a job in August 1987, she reported no prior back problems when asked about this in an interview. On her job application form she did not refer to any employment at Tandy or to her visual impairment. On the basis of this application and interview, she was hired by defendant and worked for a short time. She again began working for defendant in late 1988, and was re-hired on the basis of her acceptable performance during the earlier brief period.

5. From March 8 or 9, 1989 through April 17, 1990 plaintiff was intermittently under the care of Dr. F. Alan Thompson, a gastroenterologist. . . . Dr. Thompson diagnosed plaintiff's condition as irritable bowel syndrome, a condition of spasm in the muscles of the intestinal tract that represents a lot of stress in one's life. Plaintiff also had a gastroesophageal reflux (also associated with stress), where acid produced in the stomach washes up into and burns the lower esophagus, causing heartburn and difficulty swallowing. Stooping, bending and lifting are possible irritants to one in such a condition. At one point she had out-patient surgery for this condition. The tailbone pain of which plaintiff had complained was in fact caused by spasms in the intestinal muscles and was related to the irritable bowel syndrome. During the course of his treatment, Dr. Thompson noted on August 28, 1989 that plaintiff appeared to be in a total state of despair; was very disturbed and upset and needed time off from work.

6. After her compensable injury of February 5, 1990, plaintiff was treated conservatively by Dr. Christina McQuiston of St. Joseph's Hospital Urgent Care, and was again seen by Dr. Mullis between February 21, 1990 and March 13, 1990. About April 2, 1990 plaintiff sustained a seizure disorder, the first since 1982 or 1983. On April 9, 1990 plaintiff was first seen on referral from Dr. McQuiston by Dr. Ralph C. Loomis, reporting to him that she had

severe back and right leg pain going into the right foot and great toe. Dr. Loomis' impression was reflex and sensory right S1 and right L5 radiculopathy. Later Dr. Loomis obtained a myelogram, CT scan, and EMG and nerve conduction studies of plaintiff's back, all of which were normal. No neurosurgical intervention was thought to be appropriate. Plaintiff returned to work July 12, 1990 for a few days, but had difficulty doing the work because her pain had returned, and she was released from work by Dr. McQuiston.

7. On referral from Dr. McQuiston, plaintiff was evaluated at Thoms Rehabilitation Hospital September 4, 1990 and remained under the care of Dr. Charles R. Shields there through June 28, 1991. During the course of her treatment at Thoms, plaintiff made two attempts at suicide, one in late September 1990, as a result of which she was treated at Appalachian Hall until October 17; and another in March 1991 as a result of which she was confined to the psychiatric ward of St. Joseph's Hospital for a weekend. Between January 23, 1991 and March 27, 1991 plaintiff was seen several times by Dr. Ed Entmacher, a psychiatrist at Blue Ridge Mental Health Center. Although Dr. Entmacher believed that plaintiff's injury and inability to work were the primary causes of her depression, he was not made aware of the depressed condition that had been observed the previous year by Dr. Thompson. He was aware, however, of the relationship between plaintiff's domestic problems and her emotional state.

8. The initial evaluation of plaintiff at Thoms yielded a diagnosis of low back and right lower extremity pain since February 1990, secondary to myofascial dysfunction, mild degenerative joint and disc disease without neurologic deficit, and significant anxiety and possibly somatiform pain disorder associated with her low back problem, but also with her significant gastrointestinal problems. Significant anxiety and other significant psychosocial factors, hypochondriacal tendencies and histrionic tendencies were noted.

9. In a report to Dr. McQuiston September 4, 1990 Dr. Shields and the Thoms staff psychologist noted that a causal relationship between plaintiff's injury at work and her present symptomatology was "structurally reasonable"; however, plaintiff's symptoms had been maintained past the expected recovery period (of that injury) by perpetuating factors such as generalized decondition-

ing, pain amplification, significant focusing on gastrointestinal problems, sleep deprivation, anxiety and dependent personality characteristics. It was stated that behavioral factors which are perpetuating plaintiff's symptomatology and complicating her recovery and rapid return to work include cognitive and behavioral patterns reinforcing impairment, family enmeshment, history of abuse, moderate to severe anxiety, mild to moderate depression, sleep disturbance, weight gain, somatization and poor awareness thereof and modeling of disability and illness behavior.

10. Plaintiff participated in both inpatient and outpatient programs at Thoms. By December 5, 1990 she was doing very well. On January 9, 1991 Dr. Shields' final diagnosis was consistent with her admitting diagnosis. He believed plaintiff had reached maximum medical improvement from a pain management and return to work standpoint. She was given a rating of seven percent permanent partial disability of the back.

11. On January 30, 1991 plaintiff had a significant flare-up of low back and bilateral lower extremity pain without any obvious new clinical findings and with strong behavioral components and psychosocial components. Plaintiff requested a second opinion of her back and returned to Dr. Loomis, who, on February 18, 1991 concluded that her back and leg problems did not warrant any further pursuit and noted she would have to put up with her back and lower extremity pain at the current time. Her flare-ups and seizures continued in March and April.

12. Dr. Shields released plaintiff from care June 28, 1991. He noted on that date: "Because of the combination of her visual impairment which is more than just an acuity problem, her persistent back pain, and her fragile behavioral status, I believe she is not gainfully employable at any level and should be considered a reasonable candidate for Social Security disability." On the same date Dr. Shields wrote to plaintiff's primary care physician, Dr. John Kelly, as follows: "(Ms. Dalton) is now at a stable state and has a better control over her pain, though it does not appear that it is going to resolve to a point that she can return to any gainful employment. The combination of the pain, her visual perceptual deficits, and her fragile behavioral condition is significant enough to preclude any ability to maintain long-term gainful employment."

13. The seven percent disability rating given plaintiff by Dr. Shields is less that [sic] the degree of impairment of ten percent which plaintiff was assigned in 1987 after her injuries while in the employ of another employer in 1984 and 1985. No additional permanent impairment was occasioned by her compensable injury February 5, 1990.

14. While plaintiff has established through her own accounts of her present condition and through the observations of Dr. Shields that she is currently incapable of earning wages in any employment, including her former employment for defendant (taking into account her age, limited education and training, physical limitations, and work experience involving only physical labor in the textile industry), the compensable accident of February 5, 1990 must be considered in light of a number of her preexisting nonwork related disabling conditions (including emotional difficulties), and did not substantially or significantly and proximately contribute to her present disability.

Based upon the findings of fact, The Full Commission concludes as follows:

CONCLUSIONS OF LAW

In order to support a conclusion of disability, the Industrial Commission must find: (1) that plaintiff was incapable after her injury of earning the same wages she had earned before her injury in the same employment, (2) that plaintiff was incapable after her injury of earning the same wages she had earned before her injury in any other employment, and (3) that this incapacity to earn was caused by plaintiff's injury. Hilliard v. Apex Cabinet Co., 305 N.C. 593 (1982); Hendrix v. Linn-Corriher Corp., 78 N.C. App. 373 (1985), aff'd in part and rev'd in part, 317 N.C. 179 (1986). The rule of causation is the very sheet anchor of the Workers' Compensation Act. Duncan v. City of Charlotte, 234 N.C. 86 (1951); Perry v. American Bakeries, 262 N.C. 272 (1964). Here, plaintiff has not shown that her compensable accident of February 5, 1990 caused in a significant way her current disability.

Based on the foregoing findings of fact and conclusions of law, the Full Commission affirms the holding of the Deputy Commissioner and enters the following:

AWARD

1. Plaintiff is not entitled to any further benefits under the Workers' Compensation Act.

2. Defendants' application on Form 24 to terminate payment of compensation is APPROVED.

On 4 April 1994, the Full Commission adopted as its own the Deputy Commissioner's Opinion and Award and affirmed the Deputy Commissioner's holding. Plaintiff appeals.

Eleanor MacCorkle for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Marla Tugwell Adams, for defendant-appellee.

EAGLES, Judge.

Plaintiff brings forward three assignments of error. After careful review of the record and briefs, we reverse and remand.

Plaintiff first contends that the Commission erred in terminating her disability benefits by finding her accident was not a significant cause of her continuing disability. We agree.

We note initially that the parties entered into an Agreement for Compensation for Disability (Industrial Commission Form 21), which was approved by the Commission on 9 April 1990. Plaintiff was paid compensation for temporary total disability beginning 1 March 1990 and continuing until the date of the hearing on 18 October 1991. G.S. 97-82 provides that an agreement for the payment of compensation approved by the Commission is enforceable by a court decree. "An agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from." *Brookover v. Borden*, 100 N.C. App. 754, 756, 398 S.E.2d 604, 606 (1990). Once an agreement for compensation has been approved by the Commission, "no party . . . shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear . . . that there has been error due to fraud, misrepresentation, undue influence or mutual mistake . . . ." G.S. 97-19.

On 23 April 1991, defendant applied to the Commission on Industrial Commission Form 24 to stop payment of compensation on the grounds that "claimant has reached maximum medical improve-

ment, has been rated, and will not be returning to gainful employment due to non-work related problems." In its Conclusions of Law, the Commission held that plaintiff "ha[d] not shown that her compensable accident of February 5, 1990 caused in a significant way her current disability." The sole issue before the Commission, however, was whether plaintiff's disability compensation should continue, not whether her alleged disability was the result of her accident. *Radica v. Carolina Mills*, 113 N.C. App. 440, 448, 439 S.E.2d 185, 190 (1994); *Lucas v. Thomas Built Buses*, 88 N.C. App. 587, 591, 364 S.E.2d 147, 150 (1988). Here, defendant has admitted liability under the Workers' Compensation Act by signing the Industrial Commission Form 21 agreement for disability compensation. Defendant cannot now deny that plaintiff's compensable back injury is not a significant cause of her current disability, G.S. 97-17; *Radica*, 113 N.C. App. at 448, 439 S.E.2d at 190; *Lucas*, 88 N.C. App. at 591, 364 S.E.2d at 150, in the absence of an independent intervening cause attributable to claimant's own intentional conduct. *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379-80, 323 S.E.2d 29, 30 (1984).

G.S. 97-2(9) defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." In order to find that a worker is disabled under the Act, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
>
> (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
>
> (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Initially, claimants must prove the extent and degree of their disability, but once the disability is proven, there is a presumption that the disability continues until "the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 475-76, 374 S.E.2d 483, 485 (1988) (quoting *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971)).

Plaintiff contends that the Commission failed to apply this presumption. We agree. Plaintiff has met her initial burden of proving

disability. Defendant admitted liability pursuant to the approved Industrial Commission Form 21 settlement agreement. Plaintiff began receiving temporary total disability payments pursuant to the settlement agreement on 1 March 1990 and was continuing to receive payments until the date of the hearing. After plaintiff has met her initial burden, the burden shifts to defendant to show that plaintiff is employable. *Radica*, 113 N.C. App. at 447, 439 S.E.2d at 190. The Commission's findings of fact and conclusions of law do not indicate that plaintiff was capable of earning the same wages that she had earned prior to the injury. Defendant has failed to overcome the presumption of disability.

Although the issue of causation was not properly before the trial court, we note that the aggravation of an injury or a distinct new injury is compensable "[w]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct." *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379-80 (1984) (quoting *Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E.2d 485, 488 (1983)). An "intervening cause" in the context of the Workers' Compensation Act is an occurrence "entirely independent of a prior cause." *Petty v. Transport, Inc.*, 276 N.C. 417, 426, 173 S.E.2d 321, 328 (1970). We find no evidence in the record that plaintiff's pre-existing symptomatology acted as an independent, intervening cause of her current disability that was not in some way triggered by her compensable injury.

Accordingly, we hold that the Commission erred in concluding that plaintiff's compensable injury did not cause her current disability and that plaintiff was not entitled to receive further disability benefits. We reverse the Commission's Opinion and Award and remand to the Commission to determine whether plaintiff is employable and capable of earning wages equal to those she was receiving prior to her injury.

Reversed and remanded.

Judges MARTIN, JOHN C., and WALKER concur.

STATE OF NORTH CAROLINA v. ROBERT HAM JACKSON, DEFENDANT

No. COA94-1014

(Filed 20 June 1995)

1. **Assault and Battery § 81 (NCI4th)— discharging firearm into occupied property**

Evidence was sufficient to be submitted to the jury in a prosecution for discharging a firearm into occupied property where it tended to show that a gun was fired at a car and that defendant did it; defendant had threatened to kill the victim six or seven times the same day; a black man was seen running from nearby bushes shortly before the shooting; shots were fired into the occupied vehicle; defendant was standing in nearby bushes immediately after the shooting; and defendant fled from his own home when the police tried to arrest him.

Am Jur 2d, Assault and Battery § 53.

2. **Criminal Law § 1060 (NCI4th)— sentencing hearing— statement by person not a witness—error not prejudicial**

Though the trial court erred in allowing defendant's wife's attorney, who was not called as a witness at the sentencing hearing, to address the court at the hearing, such error was not prejudicial to defendant, since defendant's record had already been detailed to the court by the prosecutor, and the attorney's comment that defendant "deserved a jail sentence" did not contribute to his sentence, given defendant's history of threats and violence toward his wife.

Am Jur 2d, Criminal Law § 598.

3. **Criminal Law § 1182 (NCI4th)— prior conviction—admission by defense counsel—finding of aggravating factor proper**

The trial court did not err in finding as an aggravating factor that defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement where the prosecutor merely recited defendant's prior convictions at the sentencing hearing, but defense counsel's statements at a preliminary sentencing hearing with regard to prior offenses amounted to admissions of those convictions.

Am Jur 2d, Criminal Law §§ 598, 599.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

4. Criminal Law § 1053 (NCI4th)— sentencing—factors not announced in open court—failure to find mitigating factor—different judge at sentencing hearing—no error

Defendant was not prejudiced by the trial court's failure to announce its findings in open court with regard to aggravating and mitigating factors; by the court's failure to find as a mitigating factor, based on defendant's psychiatric evaluation at Dorothea Dix Hospital, that he suffered from a mental condition which reduced his culpability; and by having a different judge at this sentencing hearing from the judge who presided over his trial.

Am Jur 2d, Criminal Law §§ 525-530.

Substitution of judge in criminal case. 83 ALR2d 1032.

Accused's right to sentencing by same judge who accepted guilty plea entered pursuant to plea bargain. 3 ALR4th 1181.

On writ of certiorari to review judgment and commitment entered 23 March 1993 by Judge Robert E. Gaines in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 April 1995.

Attorney General Michael F. Easley, by Associate Attorney General Jill A. Bryan, for the State.

John L. Wolfe for defendant-petitioner.

LEWIS, Judge.

Defendant was convicted of discharging a firearm into occupied property and was sentenced to ten years imprisonment. The State's evidence tended to show that on the evening of 28 December 1991, defendant's wife, Clara Jackson, and her friend, Kim Morris, left the home of another friend to go to Jackson's apartment so that Jackson could change clothes. While they were in Jackson's apartment, defendant telephoned Jackson twice, both times threatening to kill her. Defendant had called Jackson four or five times earlier in the day threatening to kill her. About forty minutes after the second call that evening, Jackson and Morris left the apartment and got in Jackson's car.

As they approached the exit to the parking lot, Morris, who was sitting in the front passenger's seat, saw a black man run out of the bushes and stop at a sidewalk across the street from the car. Morris had never seen defendant before that day and did not testify that the man she saw running was, or was not, defendant. Jackson looked to the left to see if the traffic was clear. At that moment, she heard a loud "boom boom" sound. Jackson looked to the right and saw the passenger windows shattering. She then noticed defendant, a black man, standing in the bushes about ten to twelve feet away on Morris' side of the car. Jackson could see defendant from a little above his waist to the top of his head. Jackson then sped away, believing that defendant was coming after them. As a result of the shooting, Morris' face was cut by broken glass from the windows.

Jackson drove to a friend's house, and the friend called the police. The police recovered one bullet slug from Jackson's car and another from the collar of the jacket Morris was wearing at the time of the shooting. The police then obtained a warrant for defendant's arrest and went to defendant's house. They knocked and announced their presence but defendant did not respond. They then had their dispatcher call defendant's home. Defendant did not answer. The officers then removed their marked cars from sight and staked out the house. About five minutes later, defendant came outside and hid in his backyard. When he saw the police, he ran. After a chase, defendant was apprehended and arrested.

Defendant presented no evidence.

[1] Defendant's first contention is that there was insufficient evidence to convict him and that the trial court therefore erred in not granting his motion to dismiss. In a motion to dismiss, the question is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, so as to warrant submission of the charge to the jury. *State v. Thomas,* 65 N.C. App. 539, 541, 309 S.E.2d 564, 566 (1983). We must view the evidence in the light most favorable to the State and afford the State every reasonable inference that may arise from the evidence. *Id.* at 542, 309 S.E.2d at 566. There must be substantial evidence to support a finding that an offense has been committed and that the defendant committed it. *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

Defendant contends that the facts of this case raise only conjecture and suspicion. We disagree. The evidence is substantial that a gun was fired at a car and that defendant did it. Defendant had threatened to kill Jackson six or seven times that same day, a black man was seen running from nearby bushes shortly before the shooting, shots were fired into the occupied vehicle, defendant was standing in nearby bushes immediately after the shooting, and he fled from his own home when the police tried to arrest him. A reasonable mind could accept this evidence as adequate to support the conclusion that defendant discharged a firearm into occupied property. Accordingly, the trial court properly denied defendant's motion to dismiss.

[2] Defendant's remaining arguments concern his sentencing hearing. First, defendant contends that the trial court erred in allowing Mrs. Jackson's attorney to address the court during the sentencing hearing. Defendant did not object at the hearing, and he therefore argues that the alleged error amounted to plain error. Plain error has been described as error sufficiently fundamental and prejudicial to amount to a miscarriage of justice or the denial of a fair trial. *See State v. Harris*, 315 N.C. 556, 564, 340 S.E.2d 383, 388 (1986). Alternatively, defendant requests that we review the alleged error under Rule 2 of the Rules of Appellate Procedure to prevent manifest injustice.

N.C.G.S. § 15A-1334(b) (1988) sets forth the procedure to be followed at the sentencing hearing:

> The defendant at the hearing may make a statement in his own behalf. The defendant and prosecutor may present witnesses and arguments on facts relevant to the sentencing decision and may cross-examine the other party's witnesses. No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court. Formal rules of evidence do not apply at the hearing.

We agree that it was error to allow Mrs. Jackson's attorney, who was not called as a witness at the hearing, to address the court. However, a judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play. *State v. Stone*, 104 N.C. App. 448, 453, 409 S.E.2d 719, 722 (1991), *disc. review denied*, 330 N.C. 617, 412 S.E.2d 94

(1992). Here, defendant argues that he was prejudiced by the attorney's summary of defendant's criminal record and the attorney's statement that he thought defendant deserved a jail sentence. We find no prejudice, however. First, defendant's record had already been detailed to the court by the prosecutor. Second, in light of defendant's history of threats and violence toward his wife and the serious nature of the current charge, we do not believe the attorney's comment that defendant "deserve[d] a jail sentence" contributed to defendant's receiving the sentence he did. In sum, the court's error did not amount to plain error and did not result in manifest injustice.

[3] Defendant's next contention is that the court erred in finding as an aggravating factor that defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days' confinement. *See* N.C.G.S. § 15A-1340.4(a)(1)(o) (1988). Defendant argues that the prosecutor's mere recitation of defendant's prior convictions at the sentencing hearing was insufficient to prove the prior convictions. Defendant is correct that the trial court may not, absent a stipulation of the parties, find as an aggravating factor a defendant's prior conviction where the only evidence to support it is the prosecutor's mere assertion that the factor exists. *See State v. Cunningham*, 108 N.C. App. 185, 197, 423 S.E.2d 802, 809 (1992). However, in some cases a defense counsel's response to the prosecutor's assertion of prior convictions may be held to constitute a stipulation or an admission that the defendant indeed has the convictions represented by the State. *Id.* at 197, 423 S.E.2d at 810; *see, e.g.*, *Cunningham*, 108 N.C. App. at 198, 423 S.E.2d at 810 (when prosecutor stated at sentencing hearing that defendant had prior convictions of loitering and resisting a public officer, defense counsel's statement that the defense would object to the loitering as not carrying a sixty-day sentence amounted to an admission or stipulation that defendant had the prior convictions asserted by the prosecutor); *State v. Brewer*, 89 N.C. App. 431, 436, 366 S.E.2d 580, 583 (when prosecutor stated that defendant had 1974 and 1977 convictions, defense counsel's response that defendant's record indicated no convictions for almost ten years constituted an admission that defendant did have the two older convictions), *cert. denied*, 322 N.C. 482, 370 S.E.2d 229 (1988). Further, in *State v. Duffy*, 109 N.C. App. 595, 428 S.E.2d 695 (1993), the prosecutor sought to prove a prior conviction at the sentencing hearing by introducing a motion *in limine* which had been filed by the defense. In the motion, the defense had sought to prevent the State from introducing evidence during the trial regarding a cer-

tain prior conviction on the ground that the probative value was substantially outweighed by the possibility of unfair prejudice or of misleading the jury. This Court held that the motion's language regarding the conviction amounted to an admission by the defendant which was sufficient to prove the prior conviction. *Id.* at 598, 428 S.E.2d at 697.

In the present case, the State sought a pretrial ruling that it could introduce evidence concerning prior threats defendant had made to Jackson. Defense counsel objected on the ground that the probative value was outweighed by the possibility of unfair prejudice. He stated, "These allegations, or these other threats, that the State seeks to introduce as far as the prior convictions happened in June of '92, one in May of 1990, one in August of '91, and in October of '91." Counsel further stated that the May 1990 charge was for assault on a female, but that the other three were for communicating threats. At a preliminary sentencing hearing before Judge Julia Jones, after the prosecutor introduced records showing multiple prior convictions, Judge Jones asked defense counsel if he agreed that the prior convictions shown by the prosecutor would be aggravating factors. Defense counsel responded, "I would object to any charges subsequent to this act [discharging a firearm into occupied property] being considered as aggravating factors. There was one that the State related to you that occurred after December of 1991 and so we would object to that one being used. I think there were three prior to that." These statements by defense counsel amounted to admissions of prior convictions. We do not believe it is significant that the admissions were not made in response to the prosecutor's recitation of defendant's prior convictions at the final sentencing hearing, as were the admissions in *Cunningham* and *Brewer*. *Cf. State v. Wooten* 104 N.C. App. 125, 131, 408 S.E.2d 202, 206 (1991) (holding defendant's admission of prior conviction *on cross-exam* to be sufficient proof of prior conviction). Accordingly, the trial court properly found as an aggravating factor that defendant had a prior conviction or convictions punishable by more than sixty days' confinement.

[4] Defendant next contends that the trial court erred in not making its findings as to aggravating and mitigating factors in open court. Defendant failed to object to this alleged error, and therefore seeks review under the plain error standard or under Rule 2.

N.C.G.S. § 15A-1340.4(b) provides in pertinent part: "If the judge imposes a prison term for a felony that differs from the presumptive term . . ., the judge must specifically list in the record each matter in

aggravation or mitigation that he finds proved by a preponderance of the evidence." Our cases have read this requirement to mean that the judge must make *written* findings. *See, e.g., State v. Green*, 101 N.C. App. 317, 322, 399 S.E.2d 376, 379 ("If the trial court imposes a sentence greater than the presumptive term for any conviction, it must consider each of the aggravating and mitigating factors under the Fair Sentencing Act for each of defendant's convictions, and make written findings of fact concerning the factors and whether one set of factors outweighs the other"), *supersedeas and temporary stay denied*, 328 N.C. 335, 400 S.E.2d 449 (1991). Defendant cites no case for his proposition that the trial court must also verbally announce its findings in open court, chambers, or any other place, and we have found none. At the hearing, the prosecutor summarized the case for the court and listed defendant's prior convictions. Defense counsel then made his argument and in no way attempted to counter the validity or applicability of the prior convictions. The trial court found only one aggravating factor, that being prior convictions. We fail to see how defendant was prejudiced by the trial court's failure to announce its findings in open court. Accordingly, we find no plain error or manifest injustice here, and we decline to judicially mandate a proclamation rule.

Defendant's next contention is that the trial court erred in not finding the statutory mitigating factor that "[t]he defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense." *See* N.C.G.S. § 15A-1340.4(a)(2)(d).

Where the evidence in support of a mitigating factor is substantial, uncontradicted, and inherently credible, it is error for the trial court to fail to find that mitigating factor. *State v. Grier*, 70 N.C. App. 40, 48, 318 S.E.2d 889, 894-95 (1984), *cert. denied*, 318 N.C. 698, 350 S.E.2d 860 (1986). The defendant has the burden of establishing a mitigating factor by a preponderance of the evidence. *Id.* at 48, 318 S.E.2d at 895. He must convince the trial court that not only is the evidence uncontradicted, but also that no reasonable inference to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law. *Id.*

In this case, the trial court had before it defendant's psychiatric evaluation from Dorothea Dix Hospital. While a mental condition may be capable of reducing a defendant's culpability for an offense, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor. *State v. Salters*, 65 N.C. App. 31, 36,

308 S.E.2d 512, 516 (1983), *disc. review denied*, 310 N.C. 479, 312 S.E.2d 889 (1984). The burden of proving that the condition reduced his culpability is on the defendant. *State v. Barranco*, 73 N.C. App. 502, 511, 326 S.E.2d 903, 910, *cert. denied and appeal dismissed*, 314 N.C. 118, 332 S.E.2d 484 (1985). Here, defendant did not allege or prove that any condition from which he suffers actually reduced his culpability, and such a conclusion is not manifest from his psychiatric records. Accordingly, the trial court correctly found no mitigating factor in defendant's mental condition.

Defendant's final contention is that Judge Jones, who presided over the trial, should have presided over the sentencing hearing. After receiving the jury verdict, Judge Jones held a sentencing hearing and preliminarily entered a sentence, but, according to defendant, "withdrew" the sentence. She then ordered the psychiatric evaluation at Dorothea Dix. Judge Jones also ordered that defendant be brought back before her for sentencing. Defendant contends it was error for Judge Gaines to preside over the subsequent sentencing hearing and to sentence defendant. Defendant made neither motion to continue nor objection at the sentencing hearing before Judge Gaines and therefore argues plain error. Alternatively, he seeks review under Rule 2 to prevent manifest injustice.

N.C.G.S. § 1334(c) provides that a judge who orders a presentence report may direct that the sentencing hearing be held before her in another county, district, or set of districts. Judge Jones's order stated that defendant "be brought back before the Honorable Julia V. Jones." The record does not reveal whether Judge Jones was in Mecklenburg County at the time of the sentencing hearing, which was four months after the trial. In any event, even if it was error for Judge Gaines to sentence defendant under these circumstances, we do not believe that the error was so fundamental and prejudicial as to amount to a miscarriage of justice. Thus, we find no plain error and no manifest injustice.

For the reasons stated, defendant received a fair trial free from prejudicial error.

No error.

Judges GREENE and MARTIN, Mark D. concur.

JOHN N. BUNCH, JR., PETITIONER v. NORTH CAROLINA CODE OFFICIALS QUALIFICATIONS BOARD, RESPONDENT

No. COA94-749

(Filed 20 June 1995)

Building Codes and Regulations § 24 (NCI4th)— building inspector—revocations of certificates—sufficiency of evidence

Pursuant to N.C.G.S. § 143-151.17(a)(6) respondent board properly revoked petitioner's building and electrical certificates based on evidence of plainly visible violations of the North Carolina Uniform Residential Building Code but improperly revoked petitioner's mechanical and plumbing certificates.

Am Jur 2d, Buildings § 10.

Appeal by respondent from order entered 4 April 1994 by Judge Thomas S. Watts in Chowan County Superior Court. Heard in the Court of Appeals 4 April 1995.

W. T. Culpepper, III for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General W. Wallace Finlator, Jr., for respondent-appellant.

JOHNSON, Judge.

On 22 July 1991, respondent North Carolina Code Officials Qualification Board (respondent Board) received a verified written complaint from Mr. Gordon L. Stagaard, owner and occupant of a home located at 400 Oakridge Drive in Edenton, North Carolina. In the complaint, Mr. Stagaard alleged *inter alia* that petitioner John N. Bunch, Jr. had been guilty of gross negligence or gross incompetence in the inspection of his home. On 12 August 1992, respondent Board issued petitioner a Notice of Administrative Hearing. The purpose of the hearing was to hear testimony concerning the allegations brought against petitioner by Mr. Stagaard and to determine whether petitioner should be permitted to continue to hold inspection certificates pursuant to North Carolina General Statutes § 143-151.17 (1993).

On 20 October 1992, the charges against petitioner came on for hearing before respondent Board. On 16 November 1992, respondent Board issued an order which included the following findings of fact:

. . .

5. Pursuant to a complaint by Stagaard to the Board, an on-site investigation was performed by a certified Code Enforcement Official of the Engineering Division of the North Carolina Department of Insurance. This investigation confirmed the following violations of the NC Uniform Residential Building Code (hereinafter "Code") in the house:

a. Wood framing was too close to chimney masonry.

b. Firestopping was omitted above the wood storage area.

c. Insulation was omitted above the wood storage area.

d. The skylight shaft was not insulated.

e. An attic area had no access.

f. Two hearth extensions were too small.

g. Load bearing wall of porch was improperly supported.

h. Omission of hangers or ledgers from deck joists.

i. Inadequate wall support at foundation wall vent.

j. Girder joint was not supported by pier.

k. Girder not supported fully by pier.

l. Improper footing beneath exterior wall.

m. No cover on some electrical junction boxes.

n. No connector at junction boxes at ceiling lights.

o. No electrical receptacle in bathroom.

p. Improper support for electrical wiring.

q. Bathroom exhaust fans not ducted to outside.

r. Improper support for flex duct.

s. No water line shut off valve.

6. Of the foregoing items c, d, e, f, h, j, k, m, n, o, p, r, and s were obvious violations of the Code which were plainly visible and should have been discovered by an inspection if ordinary care and prudence had been exercised.

7. The remainder of the foregoing items a, b, g, i, l, and q were less obvious or more technical violations of the Code and could have

been discovered by an inspection if ordinary care and prudence had been exercised.

8. [Petitioner], in his capacity as Code Enforcement Official, made the field inspections as required by law on the Stagaard house.

9. The detection of Code violations in the construction of a house is the responsibility of the field inspector.

10. The failure to detect Code violations while conducting a field inspection amounts to a negligent act.

11. A Code Enforcement Official, pursuant to NCGS 153A-352, has the duty and responsibility to enforce the State and local laws relating to the construction of buildings and other structures.

12. A Code Enforcement Official, pursuant to NCGS 153A-360, shall make as many inspections as necessary to satisfy himself that the work is being done in accordance with State and local laws and the terms of the permit.

13. The Board has the power, pursuant to NCGS 143-151.17, to suspend or revoke any certificate of any person who has been guilty of willful misconduct, gross negligence, or gross incompetence.

Respondent Board then concluded that "[t]he failure of [petitioner] to detect the Code violations . . . in the construction of the Stagaard house violated NCGS 153A-352 and 153A-360 and constitutes gross negligence and gross incompetence. . . . Gross negligence or gross incompetence is grounds to revoke the certificates of a Code Enforcement Official. NCGS 143-151.17(a)(6)[.]" Respondent Board ordered the revocation of all inspection certificates issued to petitioner; these included building, electrical, mechanical and plumbing certificates.

Petitioner filed a petition requesting judicial review of respondent Board's order. The parties entered into a consent order for stay, staying the revocation order pending judicial review.

On 11 October 1993, petitioner's petition for judicial review came on for hearing. On 4 April 1994, Judge Thomas S. Watts entered his decision reversing the revocation order of respondent Board. Among Judge Watts' findings were the following:

. . .

> The possession and maintenance by the Petitioner of all Building, Electrical, Mechanical and Plumbing Inspection Certificates previously issued to the Petitioner by [respondent Board] is a substantial right.
>
> This Court has applied the "whole record" test in making its determination under N. C. Gen. Stat. § 150B-51(b)(5). . . . Having applied the "whole record" test to these proceedings . . . this Court concludes as a matter of law that [respondent Board's] findings, inferences, conclusions and decision as contained in its November 16, 1992 order . . . are unsupported by substantial evidence in view of the entire record as submitted.
>
> By further application of the "whole record" test this Court has also concluded that [respondent Board's] decision must be reversed because [respondent Board's] findings, inferences, conclusions and decision are arbitrary and capricious [N.C. Gen. Stat. § 150B-51(b)(6)]. In this regard this Court finds the following to be particularly arbitrary and capricious:
>
> (1) [Respondent Board's] imperical [sic] finding that a failure to detect any code violation, no matter how "minor", "technical" or "easily missed" constitutes a negligent act;
>
> (2) [Respondent Board's] decision to **revoke** Petitioner's Mechanical Inspection Certificate based on only two code violations, one of which was, at worst, a minor technical code violation and the other of which involved the Petitioner's good faith belief that the use of insulated copper wiring to support flex duct constituted a suitable alternative to the code requirement of a one inch metal strip; and
>
> (3) [Respondent Board's] decision to **revoke** Petitioner's Plumbing Inspection Certificate based on Petitioner's failure to detect one violation of the plumbing code.

Respondent Board gave timely notice of appeal to our Court.

Respondent Board argues on appeal that the trial court erred in concluding that respondent Board's decision was unsupported by substantial evidence in view of the entire record as submitted. Further, respondent Board argues that the trial court erred in concluding that respondent Board's decision was arbitrary and capricious.

North Carolina General Statutes § 150B-51(b) states the standard of review for this Court when reviewing a decision of respondent Board:

> [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(b) (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 Air-A-Plane v. N.C. Dept. of E.H.N.R.*, 118 N.C. App. 118, 454 S.E.2d 295 (1995) and cases cited therein. This requires our Court to examine all of the competent evidence in determining whether there is substantial evidence to support respondent Board's findings and conclusions. *Id.* "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).

We have conducted a review of all of the evidence and we find there is substantial evidence in the record to support respondent Board's findings and conclusions as to the revocation of petitioner's building and electrical certificates. We so find based on respondent Board's findings of several different violations of the N.C. Uniform Residential Building Code; that many of these violations were plainly visible and should have been discovered by an inspection performed with ordinary care and prudence; and that many of the remaining vio-

lations were less obvious or more technical violations which could have been discovered by an inspection performed with ordinary care and prudence. We are further persuaded to so find based on the evidence presented in the form of inspection reports prepared by both Mr. Michael O'Connor, a private inspector, and Mr. Robert Worley and Mr. Mike Page, staff with the N.C. Department of Insurance, Engineering Division. We also find persuasive the testimony at trial by petitioner himself, admitting many of the violations.

However, we do not believe that there is substantial evidence in the record to support respondent Board's findings and conclusions as to the revocation of petitioner's mechanical and plumbing certificates. A review of the evidence indicates minimal mechanical and plumbing violations; of these violations, a majority were considered "minor" or "technical" by the staff investigating the violations, or were not considered violations by the staff. In at least one additional instance, opinions varied as to the violation.

Therefore, we find that the trial court erred in concluding that respondent Board's decision was unsupported by substantial evidence in view of the entire record as submitted, and erred in concluding that respondent Board's decision was arbitrary and capricious, as to petitioner's building and electrical certificates. We find, pursuant to North Carolina General Statutes § 143-151.17(a)(6), that respondent Board properly revoked petitioner's certificates as to petitioner's building and electrical certificates. However, we find the trial court properly concluded that respondent Board's decision was unsupported by substantial evidence in view of the entire record as submitted, and that respondent Board's decision was arbitrary and capricious, as to the revocation of petitioner's mechanical and plumbing certificates.

Reversed in part, affirmed in part.

Judges COZORT and McGEE concur.

RED SPRINGS PRESBYTERIAN CHURCH v. TERMINIX CO.

[119 N.C. App. 299 (1995)]

RED SPRINGS PRESBYTERIAN CHURCH, PLAINTIFF v. TERMINIX COMPANY OF NORTH CAROLINA, INC., AND FRANKLIN D. KELLETT, DEFENDANTS

No. COA94-810

(Filed 20 June 1995)

1. Arbitration and Award § 3 (NCI4th)— arbitration provision—validity

There was no merit to plaintiff's contention that an arbitration provision was void because it was not independently negotiated since the parties, as evidenced by their signatures on a termite contract, agreed to submit any disputes for arbitration and thus had a valid agreement to arbitrate.

Am Jur 2d, Alternative Dispute Resolution § 70-73.

2. Arbitration and Award § 47 (NCI4th)— termite contract—fraud—unfair and deceptive trade practice—failure to order arbitration—error

The parties' agreement to arbitrate was valid and enforceable for all claims of relief alleged in plaintiff's complaint, and the trial court erred in failing to order arbitration of plaintiff's claims for fraud and unfair and deceptive trade practices arising out of its termite treatment agreement with defendant.

Am Jur 2d, Alternative Dispute Resolution § 52.

Appeals by defendant and plaintiff from order entered 15 June 1994 by Judge Joe Freeman Britt in Robeson County Superior Court. Heard in the Court of Appeals 19 April 1995.

J. Gates Harris, and Lee and Lee, by W. Osborne Lee, Jr., for plaintiff-appellant/appellee.

Russ, Worth, Cheatwood & Guthrie, by Walker Y. Worth, Jr., for defendants-appellants/appellees.

JOHNSON, Judge.

The facts are as follows: Plaintiff is a church. Defendant Company is in the termite and pest control business. Defendant Franklin D. Kellett was an employee of defendant company.

In March 1984, the sanctuary and educational buildings of plaintiff church were severely damaged by tornados. During the next two

years, the buildings were restored and renovated. When the restoration and renovation was substantially completed, defendants, acting under the license of defendant Kellett, treated the sanctuary for termite infestation. At the time of this treatment, the parties signed a contract entitled "Termite Protection Plan." Plaintiff paid for the termite treatment and for the annual fees set out in the termite contract.

In the Spring of 1993, plaintiff discovered termite damage to the flooring of the vestibule, the flooring of the library, and to the stained glass windows on the south side of the sanctuary. Defendants have not made any repairs to these areas alleged to be damaged.

In April 1994, plaintiff filed this action. Plaintiff alleged in its complaint: (1) inadequate and unworkmanlike termite treatment; (2) inadequate and unworkmanlike annual inspections occurring after the original treatment; (3) failure to repair plaintiff's building as required by the contract; (4) fraud for contractually waiving "minimum" termite treatment requirements; (5) unfair and deceptive trade practices; and (6) failure "to seek in good faith a resolution" of plaintiff's claim which is alleged to constitute an unfair and deceptive trade practice. The fraud and unfair and deceptive trade practice claims concern, in part, the waivers contained in the Termite Contract. In the Termite Contract prepared by defendants, plaintiff had waived ten of the minimum requirements for treatment required by the North Carolina Structural Pest Control Committee. Plaintiff contends that by waiving these minimum standards, it was substantially certain that termites would later actively infest the sanctuary; that defendants knew this; that plaintiff did not know the importance of these waivers; that defendants knew that plaintiff did not know the importance of these waivers; that defendants had a duty to disclose this information to plaintiff; and that this failure to disclose was done fraudulently.

Plaintiff also contends that defendants have fraudulently attempted to avoid their legal responsibility for the termite damage.

The Termite Contract also provided that:

> It is agreed between Purchaser and Terminix that any controversy or dispute arising between them relating to: (1) any treatment or service rendered by or allegedly required to be rendered by Terminix, or (2) any damage or injury to person or to property, whether direct, incidental, or consequential, allegedly caused by Terminix, or (3) the enforcement of or any claim under the "GUARANTY AND EXCLUSIONS" provisions hereof, shall be settled and resolved exclusively by arbitration. It is further agreed the said

> arbitration shall be controlled by and conducted under the provisions of the North Carolina Uniform Arbitration Act, North Carolina General Statutes 1-567.1 through 1-567.20, as said statutes may be amended or replaced from time to time, and said North Carolina statutes are hereby incorporated into this Contract by reference as if fully set forth herein. It is further agreed that there shall be a total of three (3) arbitrators, one to be chosen by Purchaser, one by Terminix, and a third by the first two arbitrators. It is also agreed that the arbitrators shall render their written award or decision within thirty days after the conclusion of the arbitration hearing.

Defendants filed a motion to dismiss based upon this contractual provision requiring arbitration of disputes or claims arising between the parties. At the hearing on this motion, with the consent of plaintiffs, defendants amended their motion to seek the enforcement of the arbitration provision of the Termite Contract.

On 15 June 1994, the trial court partially allowed defendants' motion and ordered arbitration and a stay of litigation as to plaintiff's first, second, and third claims for relief, but denied the motion as to plaintiff's fourth, fifth and sixth claims for relief.

On 29 June 1994, defendants filed and served notice of appeal from that portion of the trial court's order denying arbitration in part, and on 5 July 1994, plaintiff appealed from that portion of the order allowing arbitration in part.

Because the parties are appealing from an order which denies in part and stays in part arbitration of plaintiff's claims against defendants, the appeal is interlocutory. The portion of the order denying arbitration is immediately appealable because a substantial right is involved. *See Miller v. Two State Const. Co., Inc.*, 118 N.C. App. 412, 455 S.E.2d 678 (1995). However, an order compelling arbitration does not affect a substantial right; consequently, it is not immediately appealable. *See N.C. Electric Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 381 S.E.2d 896, *disc. review denied*, 325 N.C. 709, 388 S.E.2d 461 (1989); *The Bluffs v. Wysocki*, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

[1] Plaintiff contends that the arbitration provision is void because it was not independently negotiated. Plaintiff cites *Blow v. Shaughnessy*, 68 N.C. App. 1, 313 S.E.2d 868, *disc. review denied*, 311 N.C. 751, 321 S.E.2d 127 (1984) and *Routh v. Snap-On Tools Corp.*,

108 N.C. App. 268, 423 S.E.2d 791 (1992) in support of this proposition. The language used in these cases is not controlling in the instant case. The cases relied upon by plaintiff are distinguishable. In both cases there was a question as to whether a valid agreement existed since proper signatures were not available. In *Routh*, the party objecting to arbitration had failed to sign the contract where his signature was required. It was on that basis that this Court noted that the plaintiff had not agreed to the arbitration clause in the agreement. In *Blow v. Shaughnessy*, plaintiffs did not sign the Limited Partnership Agreement, nor the customer agreements that existed between the defendants; thus, this Court ruled that no valid agreement existed. Prior to a contract being valid, a mutual agreement must exist between the parties as to the contract. *Id.* In the instant case, unlike *Blow v. Shaughnessy* and *Routh*, an agreement existed. Therefore, plaintiff's argument is without merit.

North Carolina General Statutes § 1-567.2 (1983) 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.

Where the contract's language is clear and unambiguous, the court is required to interpret the contract as written. *Routh*, 108 N.C. App. 268, 423 S.E.2d 791. In the instant case, the language is clear and unambiguous. The parties in the instant case as evidenced by their signatures on the Termite Contract agreed to submit any disputes for arbitration. Thus, a valid agreement to arbitrate exists.

Plaintiff also argues that it was fraudulently induced to execute the Termite Contract with defendant Company. Plaintiff's allegations, however, fail to sufficiently allege the elements of fraud. There is no allegation of misrepresentation or concealment of any "subsisting or ascertainable fact." *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 500 (1974). Further, plaintiff does not argue that the alleged misrepresentation induced its execution of the contract, nor does it allege that the arbitration clause was invalid.

[2] Defendants cross-appeal arguing that the trial court erred by failing to grant defendants' motion to compel arbitration of plaintiff's fourth, fifth, and sixth claims for relief and for a stay of litigation with respect to the pending award.

Defendants contend that the agreement to arbitrate is valid and enforceable for all claims of relief alleged in plaintiff's complaint. Our Court in *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) stated that claims seeking punitive damages, claims for fraud in the inducement, unfair and deceptive trade practices, and negligent misrepresentation were subject to arbitration under the provisions of a written contract between the parties so long as they arise out of or relate to a contract which provides for breach. Thus, the claims that the trial court declined to stay for arbitration would come under the auspices of arbitrable claims.

North Carolina has a strong public policy favoring arbitration. *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). Additionally, no public policy exists which would preclude arbitration of termite treatment disputes. Therefore, the trial court erred in failing to order arbitration of all claims. For the foregoing reasons, the decision of the trial court is affirmed regarding that portion of the order allowing arbitration, and reversed regarding that portion of the trial court's order denying arbitration.

Affirmed in part and reversed in part and remanded in order for the trial court to order the remaining claims to arbitration.

Judges COZORT and McGEE concur.

NED W. GODWIN, PLAINTIFF-APPELLANT v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT-APPELLEE

No. 9411SC699

(Filed 20 June 1995)

Insurance § 690 (NCI4th)— UM coverage—prejudgment interest—award up to policy limits

Because a judgment for personal injury exceeded the UM limit of liability in the policy issued by defendant, plaintiff was

not entitled to prejudgment interest on the personal injury portion of the judgment; however, plaintiff was entitled to prejudgment interest on the property damage verdict up to the policy limit because the verdict did not exceed this amount.

Am Jur 2d, Automobile Insurance § 428.

Appeal by plaintiff from judgment entered 29 March 1994 by Judge Wiley F. Bowen in Johnston County Superior Court. Heard in the Court of Appeals 22 March 1995.

Plaintiff was injured in an automobile collision with Melissa Maud Leroy on 18 August 1987. At the time of the collision, Leroy had no insurance coverage. Plaintiff was the husband of and resided with Bettie W. Godwin, who was insured by defendant Nationwide Mutual Insurance Company (hereinafter "Nationwide"). Plaintiff was a covered person under Nationwide's policy (hereinafter "the policy").

Pursuant to plaintiff's insurance policy, Nationwide represented Leroy in the underlying tort action filed by plaintiff pursuant to the uninsured motorist coverage provision of the policy. The policy provided that the limits of liability for uninsured motorist (hereinafter "UM") coverage for personal injury would be $25,000 per person and $50,000 per accident.

On 18 March 1988 Nationwide made a $3,842.04 payment to plaintiff on account of the property damage claim. Nationwide made no further payment at any time prior to judgment for plaintiff's personal injuries.

On 6 June 1990 a jury rendered a verdict in the tort action in favor of plaintiff in the amount of $64,000 for personal injuries and $6,000 for property damage.

On 12 February 1991 Nationwide paid $26,380.96 to plaintiff on account of the jury verdict in the underlying tort action, representing the $25,000 limit of liability contained in the UM coverage, plus postjudgment interest on that amount.

On 31 May 1991 Nationwide paid $2,329.51 to plaintiff, representing the difference between the $6,000 property damage verdict and the 18 March 1988 payment under the collision coverage of the Nationwide policy, as well as postjudgment interest.

On 23 May 1991 plaintiff brought a declaratory action against Nationwide, seeking a ruling that, *inter alia*, plaintiff was entitled to

prejudgment interest on the judgment rendered in the underlying tort action. The trial court denied plaintiff's request for declaratory relief. Plaintiff appeals.

Mast, Morris, Schulz & Mast, P.A., by George B. Mast and Bradley N. Schulz, for plaintiff appellant.

Ragsdale, Liggett & Foley, by Stephanie Hutchins Autry, for defendant appellee.

ARNOLD, Chief Judge.

Plaintiff assigns error to the trial court's conclusions of law that plaintiff is not entitled to recover prejudgment interest on (1) his property damage verdict, and (2) his personal injury verdict. We note initially that the trial court found that plaintiff failed to include in his complaint for declaratory relief a claim that he was entitled to prejudgment interest on the property damage portion of the verdict, and thus, summarily concluded that plaintiff was not entitled to recover any additional amount on the property damage verdict. We disagree with the court's finding. Although he specifically stated in his complaint that defendant refused to pay "the $6,000.00 for the property damage and interest thereon from June 6, 1990 [the date of the judgment] through February 12, 1991 [the date Nationwide paid the difference between the earlier collision payment and the property damage verdict]," plaintiff nevertheless demanded in the same paragraph prejudgment interest on the entire $70,000 judgment. Therefore, as defense counsel conceded at oral argument, the question presented for appellate review is whether plaintiff was entitled to prejudgment interest on the personal injury and property damage judgments.

Our Supreme Court has held that an underinsured motorist (UIM) carrier is obligated to pay prejudgment interest on a judgment rendered in the underlying tort action up to, but not in excess of its UIM policy limits. *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993). In the present case, however, plaintiff seeks prejudgment interest on the personal injury verdict in addition to its UM policy limit, $25,000, which has already been exhausted. The issue of whether a claimant is entitled to prejudgment interest in an amount *exceeding* the insurer's limit of liability has been addressed by this Court most recently in *Watlington v. N.C. Farm Bureau Mut. Ins. Co.*, 116 N.C. App. 110, 446 S.E.2d 614 (1994). In *Watlington* we held that "courts must look to the actual language in each insurance policy at issue to determine whether the insurance company is obligated

to pay prejudgment interest in excess of its contractual limit of liability." *Id.* at 112, 446 S.E.2d at 616.

The Nationwide policy contained the following relevant UM provision:

> **PART D - Uninsured Motorists Coverage**
>
> We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:
>
> 1. Bodily injury sustained by a covered person and caused by an accident; and
>
> 2. Property damage caused by an accident.
>
> . . . .
>
> **LIMIT OF LIABILITY**
>
> The limit of bodily injury liability shown in the Declarations for "each person" for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. . . .

Our appellate courts have continuously interpreted the term "damages" in similar provisions to include prejudgment interest as an element only "up to, but not in excess of, its . . . policy limits." *Baxley*, 334 N.C. at 11, 430 S.E.2d at 901; *see Watlington*, 116 N.C. App. 110, 446 S.E.2d 614; *Baxley v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 718, 446 S.E.2d 597 (1994) (*Baxley* II); *Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, 444 S.E.2d 664, *review allowed*, 337 N.C. 802, 449 S.E.2d 748 (1994); *United Services Automobile Assn. v. Gambino*, 114 N.C. App. 701, 443 S.E.2d 368, *disc. review denied*, 337 N.C. 698, 448 S.E.2d 539 (1994); *Wiggins v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 26, 434 S.E.2d 642 (1993). We see no reason to distinguish this UM case from any UIM or liability case which has refused to order prejudgment interest once the policy limits have been exhausted. *See Cochran v. N.C. Farm Bureau Mutual Ins. Co.*, 113 N.C. App. 260, 437 S.E.2d 910, *disc. review denied*, 335 N.C. 768, 442 S.E.2d 513 (1994).

Both parties made commendable arguments but, we are bound by former holdings. Plaintiff articulates sound policy arguments to support his position, but "policy alone is not sufficient to overcome the plain and unambiguous language of the policy." *Mabe*, 115 N.C. App.

at 202, 444 S.E.2d at 669. Therefore, we hold that Nationwide is obligated to pay prejudgment interest as part of the damages up to its UM coverage limit of $25,000. In this case, because the judgment exceeds the policy's limit of liability, $25,000 (plus the postjudgment interest) is the extent of Nationwide's liability, and plaintiff is not entitled to any prejudgment interest on the personal injury portion of the judgment. However, plaintiff is entitled to prejudgment interest on the property damage verdict (less the 18 March 1988 payment) up to the policy limit because the policy limit on property damages was $10,000, and plaintiff's claim did not exceed this amount.

For the foregoing reasons, we affirm the judgment as to prejudgment interest on the personal injury verdict, but we reverse that portion of the judgment denying plaintiff prejudgment interest on the property damage verdict and remand for the entry of judgment consistent with this opinion.

Affirmed in part, reversed in part.

Judges WYNN and JOHN concur.

JAMES R. PITCOCK AND WIFE, PAMELA P. PITCOCK, PLAINTIFFS v. GLENN M. FOX AND WIFE, DEBORAH SUSAN FOX; WADE T. SIMS AND WIFE, ROSEMARY NORKUS SIMS; AND JACKIE L. MURRAY AND WIFE, SHIRLEY L. MURRAY, DEFENDANTS

No. 9429SC263

(Filed 20 June 1995)

1. Adverse Possession § 2 (NCI4th)— adverse or hostile claim—insufficiency of evidence

The trial court in an action to establish an easement erred in denying defendants' motion for directed verdict at the close of plaintiffs' evidence because there was no evidence to show that plaintiffs' use of a drive over defendants' property was adverse, hostile, or under claim of right for the required twenty-year period.

Am Jur 2d, Adverse Possession § 48.

2. Trial § 471 (NCI4th)— no trespass found—damages awarded—inconsistent verdict

The trial court erred by entering judgment upon an inconsistent verdict where the jury found that plaintiffs did not trespass upon defendants' property, yet the jury found that plaintiffs owed defendants $430 for damages.

Am Jur 2d, Trial § 1805.

Appeal by defendants Wade T. and Rosemary Norkus Sims from judgment entered 11 October 1993 by Judge Marvin Gray in Henderson County Superior Court. Heard in the Court of Appeals 6 April 1995.

Defendants own three contiguous tracts of real property located in Blue Ridge Estates, Henderson County, North Carolina. Plaintiffs James and Pamela Pitcock own a tract of undeveloped real property which is adjacent to defendants' property, but which is not adjacent to any public road. The defendants share a common drive which leads from the public road across defendants' property to their houses. Plaintiffs bought their property in 1990 and used this drive because it was the only way to reach their land. When Mr. Pitcock drove a bulldozer up the drive to do some work on his property, defendants had Mr. Pitcock arrested for trespassing. Defendants said that the bulldozer created cracks in the drive and scuffed the drive's surface. Defendants then blocked the drive with a gate and prevented plaintiffs from accessing their property.

Plaintiffs filed a complaint in March 1991, alleging that they had the right to use the drive because they had established an easement by dedication and prescription. Defendants denied the existence of an easement and counterclaimed for damages, alleging that plaintiffs had trespassed on defendants' property. On 31 March 1992, defendants moved for partial summary judgment as to plaintiffs' claim of an easement by dedication. On 6 May 1992, the trial court granted defendants' motion for partial summary judgment. The remaining issues went to trial on 27 September 1993 where the trial court denied defendants' motions for directed verdict at the close of plaintiffs' evidence and at the close of all evidence. The jury found that plaintiffs had acquired an easement by prescription over defendants' land, that plaintiffs had not trespassed over defendants' land, and awarded defendants $430.00 for damages caused by plaintiffs to defendants' property. Defendants Wade T. Sims and his wife, Rosemary Norkus Sims, appeal.

Whitmire & Fritschner, by Samuel H. Fritschner, for plaintiff-appellees.

Prince, Youngblood & Massagee, by Sharon B. Alexander, for defendant-appellants.

EAGLES, Judge.

I.

[1] Defendants argue that the trial court erred by denying defendants' motion for directed verdict because the evidence was insufficient to show that plaintiffs acquired an easement by prescription. 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, 465, 400 S.E.2d 91, 93 (1991). On appeal, "[our] scope of review is limited to those grounds asserted by the moving party at the trial level." *Freese* at 34, 428 S.E.2d at 845-46.

To establish a prescriptive easement, a party must prove by a preponderance of the evidence:

> (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Potts v. Burnette, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981). In establishing the prescriptive easement, the party must overcome the presumption that the party is on the true owner's land with the owner's permission. *Johnson v. Stanley*, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579 (1989), *citing Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900 (1974).

Defendants first argue that plaintiffs failed to prove that their use of the drive was adverse, hostile, or under claim of right. The meanings of the terms "adverse," "hostile," and "under claim of right" are

intertwined. "Adverse" means "[h]aving opposing interests." *Blacks Law Dictionary* 53 (6th ed. 1990). "A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Dickinson v. Pake*, 284 N.C. at 581, 201 S.E.2d at 900. A "claim of right" is an intention to claim and use land as one's own. *Black's Law Dictionary* 248 (6th ed. 1990). "Notice to the true owner of the existence of the alleged easement is 'crucial to the concept of holding under a claim of right.' " *Johnson* at 75, 384 S.E.2d at 579, *quoting Taylor v. Brigman*, 52 N.C. App. 536, 541, 279 S.E.2d 82, 85-86 (1981). A party can give notice to the true owner by "open and visible acts such as repairing or maintaining the way over [the true owner's] land." *Johnson* at 75, 384 S.E.2d at 579.

At trial, Mr. Pitcock testified that the drive was the only way to reach his property and that he never asked or received permission to use the drive. Mr. Pitcock testified that he first was on the drive in July 1973 with a real estate broker when he was looking for property in the area to purchase. Although he did not purchase the particular tract until 1990, Mr. Pitcock testified, "I was up there in '73 and I was up there in '79 and '84 and numerous times since then up until they had me arrested for trespassing." He testified that he had received "a series of harrassing [sic] and threatening phone calls" from defendants for approximately one month before he was arrested, telling him he did not have the right to use the drive.

To satisfy the adversity requirement, plaintiffs had to show that defendants had notice of plaintiffs' adverse use for the required twenty year period. Mr. Pitcock testified that he never made any effort to improve or change the drive over which he travelled. While performing maintenance or repair work to a road is not the sole way to give the true landowner notice of adverse use, the only evidence plaintiffs offered to show that defendants had notice of plaintiffs' alleged adverse use of the drive was Mr. Pitcock's testimony that defendants harassed him for one month in the fall of 1990 and then had him arrested for trespassing. This evidence fails to show that plaintiffs and their predecessors made any *adverse* use of the drive for the required twenty year period. The remainder of plaintiffs' evidence showed that plaintiffs and their predecessors only used the drive as a means of ingress and egress. "[M]ere use alone is insufficient to establish a prescriptive easement." *Johnson* at 76, 384 S.E.2d at 580. Accordingly, we conclude that the trial court erred in denying defendants' motion for directed verdict at the close of plaintiffs' evi-

dence because there was no evidence to show that plaintiffs' use of the drive was adverse, hostile, or under claim of right for the required twenty year period. *See Godfrey v. Van Harris Realty, Inc.*, 72 N.C. App. 466, 471, 325 S.E.2d 27, 30 (1985) (holding that a landowner is entitled to a directed verdict when there is insufficient evidence to support an essential element of a prescriptive easement claim).

II.

[2] Defendants also contend the trial court erred by entering judgment upon an inconsistent verdict. In its verdict, the jury found that plaintiffs did not trespass upon defendants' property, yet the jury also found that plaintiffs owed defendants $430.00 for damages. Defendants argue that the jury's verdict is inconsistent because the trial court instructed the jury that defendants were entitled to recover damages only if they proved that plaintiffs trespassed upon their property and the jury's verdict was that there was no trespass. Although defendants have technically waived this argument by failing to move for a new trial in the trial court, N.C. R. App. P. 10(b)(1), we will exercise the discretion granted us by N.C. R. App. P. 2. It is error to enter judgment upon an inconsistent verdict. *Matter Of Will Of Leonard*, 71 N.C. App. 714, 718, 323 S.E.2d 377, 380 (1984). The jury having answered the issue of trespass in favor of plaintiffs, it follows that defendants were not entitled to recover damages, and the jury's answer to Issue 3 awarding damages must be stricken. *See Summey v. Cauthen*, 283 N.C. 640, 649, 197 S.E.2d 549, 555 (1973).

Reversed in part, vacated in part, and remanded for entry of judgment in accordance with the opinion.

Judges MARTIN, JOHN C., and WALKER concur.

STATE OF NORTH CAROLINA v. PHILLIP MANNING CANNADA

No. 9314SC781

(Filed 20 June 1995)

1. Evidence and Witnesses § 1789 (NCI4th)— defendant's refusal to take polygraph exam—evidence admissible

Based on defendant's attorney's extensive questions pertaining to defendant's willingness to cooperate with authorities and

the reference to the "Voluntary Consent to Identification Procedures" form which indicated defendant was willing to take a polygraph test, it was not error for the trial court to allow the prosecution to subsequently elicit testimony from the investigator that, although defendant initially agreed to submit to a polygraph test, he refused some days later.

Am Jur 2d, Evidence § 742.

Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test. 95 ALR2d 819.

2. Evidence and Witnesses § 294 (NCI4th)— prior unrelated drug use—no inadmissible evidence

The trial court did not erroneously admit evidence of prior unrelated drug use by defendant where the investigator properly testified that he believed defendant was under the influence of "something" the evening of the murder; he was attempting to find out what that something might be; defendant stated that he had abused a prescription drug in the past; but defendant's response to the investigator's question did not indicate that he had been charged with any type of drug use or drug dealing by his use of the prescription drug.

Am Jur 2d, Evidence § 408.

3. Evidence and Witnesses § 763 (NCI4th)— inadmissible hearsay—no prejudicial error

Even though the trial court erred in allowing inadmissible hearsay concerning what the murder victim said about her will, defendant was not prejudiced where other similar evidence was properly admitted.

Am Jur 2d, Evidence §§ 658-660.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection. 79 ALR2d 890.

Appeal by defendant from judgment entered 29 January 1993 by Judge Robert L. Farmer in Durham County Superior Court. Heard in the Court of Appeals 9 March 1994. Opinion filed by the Court of Appeals 3 May 1994. Heard in the Supreme Court 13 March 1995. Opinion filed by the Supreme Court 7 April 1995 reversing the opin-

ion of the Court of Appeals. Remanded to the Court of Appeals for further consideration.

Attorney General Michael F. Easley, by Special Deputy Attorney General Francis W. Crawley, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

JOHNSON, Judge.

The facts of this case are reported at *State v. Cannada*, 114 N.C. App. 552, 442 S.E.2d 344 (1994), *rev'd*, 340 N.C. 101, 455 S.E.2d 158 (1995). In *Cannada*, defendant Phillip Manning Cannada was found guilty of the second-degree murder of Teresa Gilmore. Ms. Gilmore's body was found in the two-story home which she shared with defendant, her boyfriend, in Durham, North Carolina.

Our Court held that the State failed to prove by substantial evidence that the trial court erred by failing to dismiss the case at the close of the evidence because the evidence was insufficient as a matter of law to support defendant's conviction. The Supreme Court, in reversing our decision, remanded this case to our Court for consideration of any other issues properly raised in defendant's appeal. We now address those additional assignments of error and discuss only those facts necessary for the consideration of these issues on remand.

[1] Defendant argues that he was denied a fair trial by the trial court's admission of evidence that defendant refused to take a polygraph test. Arguing that "a defendant's willingness or unwillingness to submit to polygraph testing is not relevant to any question to be resolved by the jury[,]" *e.g.*, *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E.2d 704, *cert. denied*, 464 U.S. 908, 78 L.Ed.2d 247 (1983), defendant states that "the introduction of this evidence had much the same prejudicial effect as offering evidence that defendant took a polygraph but failed it." We disagree.

A review of the testimony at trial indicates that during direct examination by the State, Investigator Alvin Carter testified that while being questioned at the station, defendant stated he would be willing to take a polygraph test. On cross-examination, defendant's attorney asked Investigator Carter extensive questions pertaining to defendant's willingness to cooperate with authorities. In particular,

defendant's attorney elicited testimony from Investigator Carter that defendant signed a form entitled "Voluntary Consent to Identification Procedures" which indicated defendant was willing to take a polygraph test. We note that "[w]here one party introduces evidence as to a particular fact . . . the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Rose*, 335 N.C. 301, 337, 439 S.E.2d 518, 538, *cert. denied*, — U.S. —, 129 L.Ed.2d 883 (1994) (*quoting State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)). Therefore, based on defendant's attorney's extensive questions pertaining to defendant's willingness to cooperate with authorities and the reference to the "Voluntary Consent to Identification Procedures" form, it was not error for the trial court to allow the prosecutor to subsequently elicit testimony from Investigator Carter that although defendant initially agreed to submit to a polygraph test, days later, he refused. This assignment of error is overruled.

Defendant next argues that the prosecutor's closing argument impermissibly lessened the State's burden of proving defendant's guilt beyond a reasonable doubt, exceeding the limits of fair comment upon the law and the evidence, and thus depriving defendant of a fair trial. We have reviewed the referenced remarks that the prosecutor made to the jury during his closing argument and find that these remarks make no reference to the burden of proof required in this criminal case. We reject this assignment of error.

[2] Next, defendant argues the trial court committed reversible error by admitting evidence of prior unrelated drug use by defendant. Prior to trial, defendant had filed a motion *in limine* to exclude any evidence relating to drug use or drug dealing by defendant on the grounds that such evidence was not relevant. The trial court granted the motion but stated that if the issue became relevant, the ruling would be changed. A review of the transcript indicates that on direct examination, the following colloquy occurred between the prosecutor and Investigator Carter:

> Q. Based on your observations of the defendant and your experience of some thirteen years as a police officer, did the defendant appear to be under the influence of something to you?
>
> A. Yes, he did, and I asked him if he was under the . . . if he had ever taken drugs and he . . .

[DEFENDANT'S ATTORNEY]: Well, I object.

COURT: Well, as to whatever his answer was, overruled.

A. [Defendant] stated that he had abused Dilaudid in the past.

Q. Did he indicate whether he had taken any drugs on this occasion?

A. He did not tell me that he was under the influence of Dilaudid at that time.

We do not believe the trial court erred by overruling defendant's objection and admitting this evidence. Investigator Carter believed that defendant was under the influence of "something" the evening of the murder, and he was attempting to find out what that "something" might be. Moreover, Dilaudid is a prescription drug which may be legally obtained and defendant's response did not indicate that he had been charged with any type of drug use or drug dealing by his use of Dilaudid. As such, we reject this assignment of error.

[3] Finally, defendant argues the trial court erred to defendant's prejudice by allowing the introduction of inadmissible hearsay concerning what Ms. Gilmore said about her will. Officer Carter testified that "[i]n talking to a Mr. Freeman, he advised that [Ms.] Gilmore did come down and talk with him in reference to her will and what he told me was that she decided to leave the will as it was and that she was going to tell [defendant] that she did change the will."

We find in this double hearsay instance that Mr. Freeman's statement to Officer Carter was hearsay and that therefore, the statement should not have been admitted at trial. We note that Ms. Gilmore's statement to Mr. Freeman may have been admissible under N.C.R. Evid. 803(3), the "state of mind" exception to the hearsay rule, had Mr. Freeman testified to the conversation. Nonetheless, although the trial court erred in admitting Officer Carter's testimony regarding this statement, we do not believe defendant has shown he was prejudiced to such an extent as to require a new trial. Other evidence was presented at trial regarding Ms. Gilmore's intention to leave her vehicles to defendant, and her intention to allow defendant to remain in her house if anything happened to her. Defendant, therefore, has not shown that a reasonable possibility exists that if the error had not been committed, a different result would have occurred at trial. *See State v. Harper*, 96 N.C. App. 36, 384 S.E.2d 297 (1989); *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984). We reject this argument.

We find that defendant received a fair trial, free of prejudicial error.

Judges GREENE and JOHN concur.

LAWRENCE G. GORDON, PLAINTIFF v. PEGGY S. GORDON, DEFENDANT

No. COA94-981

(Filed 20 June 1995)

Judgments § 95 (NCI4th)— alimony award—duration—clerical error—correction properly allowed

Where the decretal portion and the conclusions of law in an alimony order clearly stated that defendant was entitled to alimony until she reached age 62, neither part of the judgment stated a date, it was only in the findings of fact that a date was stated, and the date was incorrect by one year, the date was clearly a typographical error so that correction thereof did not alter the effect of the original order and was proper under Rule 60(a); furthermore, defendant was not barred from seeking the correction by the doctrine of laches, even if the doctrine of laches applies to Rule 60(a), where defendant sought to have the clerical error in the original order corrected as soon as plaintiff informed her that he was terminating his payments. N.C.G.S. § 1A-1, Rule 60(a).

Am Jur 2d, Judgments § 165.

Appeal by plaintiff from order signed 1 June 1994 and filed 3 June 1994 by Judge Roland H. Hayes in Forsyth County District Court. Heard in the Court of Appeals 22 May 1995.

Gordon & Nesbit, P.L.L.C., by L.G. Gordon, Jr. and Thomas L. Nesbit, for plaintiff-appellant.

Frye & Booth, by C. Michael Day, for defendant-appellee.

LEWIS, Judge.

By order dated 15 April 1991, plaintiff, Lawrence G. Gordon, was ordered to pay alimony in the amount of $500.00 per month to defendant, Peggy S. Gordon. Payment was to cease upon defendant's reach-

ing the age of sixty-two, defendant's remarriage, defendant's death, or plaintiff's death, whichever occurred first.

In the order, Judge Hayes made various findings of fact and conclusions of law. The court found that, at the time of entry of the order, 15 April 1991, defendant was fifty-eight years old and would reach the age of sixty-two on 17 March 1994. At age 62, defendant would become eligible for Social Security retirement benefits. The court further found that defendant was entitled to, and plaintiff had the means and ability to contribute to, support in the amount of $500.00 per month, through and including the 17th day of March, 1994, at which time defendant would turn sixty-two. In fact, defendant would not turn sixty-two until 17 March 1995.

The court made the following relevant conclusion of law: "That the Defendant is entitled to permanent alimony until she reaches 62 years of age, dies, remarries, or Plaintiff dies, whichever event shall first occur." There was no conclusion of law regarding the date on which defendant would turn sixty-two. In the decretal portion of the order, the court directed:

> That on or before the 1st day of each month the Plaintiff shall pay $500.00 into the Office of the Clerk of Superior Court of Forsyth County, North Carolina, such payments to be disbursed to the Defendant . . . and to continue until Defendant reaches 62 years of age, dies, remarries, or Plaintiff dies, whichever event shall first occur.

Again, no specific date was stated.

Upon making the payment due 17 March 1994, plaintiff wrote defendant that such payment was the final payment. At that time, however, defendant was only sixty-one years old. Defendant then filed a motion in the cause seeking an order correcting the clerical error as to the date of defendant's sixty-second birthday and an order directing plaintiff to continue making alimony payments until 17 March 1995, the date defendant would turn sixty-two, and to make back payments.

After holding a hearing on the matter, Judge Hayes found that defendant was actually sixty-one years old on 17 March 1994 and would not turn sixty-two until 17 March 1995. He then stated that the clear intent of the order was that plaintiff pay alimony until defendant reached age sixty-two and not to stop making payments on 17 March 1994, regardless of the erroneous calculations. Judge Hayes

then ordered that defendant continue to make alimony payments to defendant until defendant reached the age of sixty-two on 17 March 1995 and that plaintiff make back alimony payments for the months after he ceased payment. The effect of Judge Hayes' second order was the correction of what would appear to be a "clerical mistake" in the first. We therefore must determine whether this was proper under Rule 60(a) of the Rules of Civil Procedure.

Rule 60(a) provides in pertinent part: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders." N.C.G.S. § 1A-1, Rule 60(a) (1990). This rule allows the correction of clerical errors, but it does not permit the correction of "serious or substantial" errors. *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784, *disc. review denied*, 335 N.C. 236, 439 S.E.2d 143 (1993). Our appellate courts have consistently rejected attempts to make substantive changes to judgments or orders under the guise of making clerical changes. *Id.* A change is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order. *Id.*

In the present case, the decretal portion of the original order clearly stated that plaintiff was to continue making payments to defendant until defendant reached the age of sixty-two. No date was stated. Similarly, in the conclusions of law, the court stated that defendant was entitled to alimony until she reached age sixty-two, and no date was stated. The clear intent of the order was for defendant to receive payments until she was entitled to Social Security benefits at age sixty-two. It is only in the findings of fact that a date is stated. And there, the findings are clearly erroneous on their face. The court found that defendant was presently (15 April 1991) fifty-eight years old and that she would turn sixty-two on 17 March 1994. It is obvious that defendant would not turn sixty-two until 1995. In light of a clearly typographical error and plaintiff's unqualified duty under the conclusions of law and the decretal portion of the order to continue making payments to defendant until defendant reached the age of sixty-two, we do not believe that the clerical correction altered the effect of the original order. Thus, the correction was proper under Rule 60(a).

Plaintiff contends, however, that defendant was barred from seeking the correction by the doctrine of laches. Rule 60(a) provides no time limit for the correction of clerical errors. In fact, the rule states that such errors may be corrected "at any time." Plaintiff cites no authority for his proposition that the doctrine of laches applies to limit "any time" to "a reasonable time." We note that Rule 60(b), in contrast, does require that motions be made within "a reasonable time." Furthermore, even if the doctrine of laches does apply to Rule 60(a), we find nothing inequitable or unjust in allowing defendant to seek a correction of the original order. *See Rape v. Lyerly*, 287 N.C. 601, 620, 215 S.E.2d 737, 749 (1975) (doctrine of laches applies only when circumstances have so changed during the lapse of time that it would be inequitable and unjust to permit the prosecution of the action). As soon as plaintiff informed defendant that he was terminating his payments, defendant sought to have the clerical error in the original order corrected.

For the reasons stated, the order of the trial court is affirmed.

Affirmed.

Chief Judge ARNOLD and Judge McGEE concur.

GAIL G. LENNON, WIDOW, AND ABRIL LENNON, ALLEGED DEPENDENT OF ALLEN B. LENNON, DECEASED EMPLOYEE, PLAINTIFFS v. CUMBERLAND COUNTY, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA94-985

(Filed 20 June 1995)

Workers' Compensation § 273 (NCI4th)— adoption proceeding not finalized—child not entitled to benefits

Where adoption proceedings had begun but were not finalized, the minor plaintiff was not a child legally adopted prior to the injury of the employee and thus was not a "dependent child" entitled to benefits under the Workers' Compensation Act until she reached the age of eighteen. N.C.G.S. § 97-2(12); N.C.G.S. § 97-38.

Am Jur 2d, Workers' Compensation § 214.

Appeal by plaintiffs from Opinion and Award entered 20 May 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 May 1995.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Mark A. Sternlicht, for plaintiffs-appellants.

Teague, Campbell, Dennis & Gorham, by George W. Dennis III and Karen K. Prather, for defendant-appellee.

JOHNSON, Judge.

This case was submitted upon written stipulated facts and affidavits without an evidentiary hearing by the agreement of the parties before the Industrial Commission. The issue to be resolved was whether Abril Lennon (the minor plaintiff) was entitled to receive benefits until she was eighteen years old, or entitled to receive benefits for 400 weeks, as a result of the death of Allen Lennon (the deceased employee). The deceased employee was a Cumberland County Sheriff's Deputy who was killed in a work-related motor vehicle accident on 11 August 1992. At the time of his death, the deceased employee and his wife were in the process of adopting the minor plaintiff, a one year old child who had been living with them since she was ten days old.

The deputy commissioner concluded that the minor plaintiff was not a "dependent child" for purposes of North Carolina General Statutes § 97-38 (1991). Based on this, but finding that the minor plaintiff was a person wholly dependent upon the earnings of the deceased employee, the deputy commissioner found that the minor plaintiff was entitled to benefits for 400 weeks from the deceased employee's death. The Full Commission affirmed the deputy commissioner's ruling that the minor plaintiff was not a "dependent child," noting that the intention to adopt in the future is not "the equivalent of a Final Order of Adoption." From that ruling, plaintiffs appeal to our Court.

Plaintiffs argue on appeal that the Full Commission erred when it determined the minor plaintiff was not a "dependent child." Plaintiffs argue that the minor plaintiff was entitled to receive wage benefits as a result of the deceased employee's death until she reaches age eighteen because she is a dependent child within the meaning of North Carolina General Statutes § 97-38.

North Carolina General Statutes § 97-38 states in pertinent part:

> . . .
>
> Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18.

As plaintiff notes, the Commission relied upon North Carolina General Statutes § 97-2(12) (Cum. Supp. 1994) for the definition of "child," which states:

> When used in this Article, unless the context otherwise requires—
>
> . . .
>
> (12) Child, Grandchild, Brother, Sister.—The term "child" shall include a posthumous child, *a child legally adopted prior to the injury of the employee*, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. . . . "Child[]" . . . include[s] only persons who at the time of the death of the deceased employee are under 18 years of age. (Emphasis added.)

Notwithstanding the definition found in North Carolina General Statutes § 97-2(12), plaintiffs note that the deputy commissioner found that the minor plaintiff was wholly dependent on the deceased employee's earnings for support. Plaintiffs argue that North Carolina General Statutes § 97-2(12) does not act as an absolute limit on the persons who may be considered "dependent child[ren]." Plaintiffs assert that because North Carolina General Statutes § 97-2(12) provides "[t]he term 'child' *shall* include . . ." (emphasis added), the word "shall" permits other persons to be included within the meaning of "child" under appropriate circumstances, and that the provision is not an exclusive definition. Plaintiffs argue that "the lack of adoption is not a bar to a *factual finding* of dependency."

Plaintiffs cite *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E.2d 281 (1972) in support of their position that North Carolina General Statutes § 97-2(12) does not act as an absolute limit on the persons who may become "dependent child[ren]" under North Carolina General Statutes § 97-38. Plaintiffs argue that the language of North Carolina General Statutes § 97-38 establishes an intent to provide benefits to someone in the minor plaintiff's position until they reach the age of eighteen, and, quoting *Stevenson*, note that "[t]he primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id.* at 303, 188 S.E.2d at 283. In *Stevenson*, our Supreme Court reconciled an interpretation of the term "next of kin" with two statutes *in pari materia.* However, we find *Stevenson* distinguishable from the instant matter in that the statute in question in that case contained its own definition of "next of kin."

Based on a plain reading of North Carolina General Statutes § 97-2(12), we disagree with plaintiffs. We believe the Commission properly looked to North Carolina General Statutes § 97-2(12) for the definition of "child." In the instant case, where the adoption proceedings had begun but were not finalized, the minor plaintiff was not "a child legally adopted prior to the injury of the employee[.]" *Compare Winstead v. Derreberry*, 73 N.C. App. 35, 326 S.E.2d 66 (1985) (where our Court held that the deceased's stepchildren, a class identified in North Carolina General Statutes § 97-2(12) but having no legal right of support from their stepparent, must have been factually dependent upon the deceased employee to be entitled to a share of death benefits).

As the Full Commission acknowledged below, "this is a situation which engenders sympathy"; however, for reasons outlined above, we find that the Full Commission did not err when it determined the minor plaintiff was not a "dependent child."

Affirmed.

Judges GREENE and MARTIN, JOHN C. concur.

DEBORAH STEPHENS, PLAINTIFF-APPELLEE v. JOHN KOENIG, INC., DEFENDANT-APPELLANT

No. COA94-1055

(Filed 20 June 1995)

Appeal and Error § 56 (NCI4th)— relief from magistrate's order—no jurisdiction of district court—no jurisdiction of court on appeal

The district court had no jurisdiction to hear and decide defendant's Rule 60(b) motion for relief from a magistrate's order entered in small claims court, since an aggrieved party in small claims court may seek relief by filing a Rule 60(b) motion with a magistrate or by appealing for trial *de novo* before the district court. Since the district court did not have jurisdiction to hear and decide defendant's motion, the Court of Appeals had no jurisdiction to decide defendant's appeal. N.C.G.S. § 7A-228.

Am Jur 2d, Appellate Review § 77.

Small claims: jury trial rights in, and on appeal from, small claims court proceeding. 70 ALR4th 1119.

Appeal by defendant from order entered 13 June 1994 by Judge Sol G. Cherry in Cumberland County District Court. Heard in the Court of Appeals 8 May 1995.

On 25 January 1994, plaintiff filed a complaint in small claims court seeking $1,800.00 in damages from defendant for breach of warranty and misrepresentation. On 17 March 1994, a magistrate entered judgment for plaintiff. On 20 April 1994, defendant filed in the district court a motion for relief from judgment pursuant to G.S. 1A-1, Rule 60(b)(4) and (6) on the grounds that the judgment was void and that justice required that relief from the judgment be granted. On 13 June 1994, Chief District Court Judge Sol G. Cherry entered an order denying the motion. Defendant appeals.

Benjamin E. LeFever for plaintiff-appellee.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins and Rodney B. Davis, for defendant-appellant.

EAGLES, Judge.

Defendant contends that the district court erred in denying defendant's motion for relief from judgment pursuant to Rule 60(b) of

the North Carolina Rules of Civil Procedure. We dismiss defendant's appeal for lack of jurisdiction.

"Jurisdiction cannot be conferred by consent where it does not otherwise exist, and the jurisdiction of the Court of Appeals is derivative; therefore, if the court from which the appeal is taken had no jurisdiction, the Court of Appeals cannot acquire jurisdiction by appeal." *Wiggins v. Insurance Co.*, 3 N.C. App. 476, 478, 165 S.E.2d 54, 56 (1969) (citation omitted). Because the district court did not have jurisdiction to hear and decide defendant's motion made pursuant to G.S. 1A-1, Rule 60(b), this Court has no jurisdiction to decide defendant's appeal.

G.S. 7A-228 addresses the procedures for seeking relief from a magistrate's judgment as follows:

> (a) With the consent of the chief district court judge, a magistrate may set aside an order or judgment for mistake or excusable neglect pursuant to G.S. 1A-1, Rule 60(b)(1) and order a new trial before a magistrate. After final disposition before the magistrate, the sole remedy for an aggrieved party is appeal for trial de novo before a district court judge or a jury.

In *Menache v. Management Corp.*, 43 N.C. App. 733, 260 S.E.2d 100 (1979), *disc. review denied*, 299 N.C. 331, 265 S.E.2d 396 (1980), this Court addressed the district court's role in reviewing judgments of magistrates:

> The district court is the proper forum to hear and decide a motion made pursuant to G.S. 1A-1, Rule 60(b), of the Rules of Civil Procedure for relief from judgment or order entered in the magistrate's court. A new trial is not permitted before the magistrate.

Id. at 735, 260 S.E.2d at 102. At the time of our decision in *Menache*, G.S. 7A-228 did not provide for Rule 60(b) motions before a magistrate. G.S. 7A-228 at that time provided: "No new trial is allowed before the magistrate. The sole remedy for a party aggrieved is by appeal for trial de novo before a district judge."

It is presumed that by amending a statute the General Assembly either intended to change the substance of the original act or clarify the meaning of it. *Desk Co. v. Clayton, Comr. of Revenue*, 8 N.C. App.

452, 458, 174 S.E.2d 619, 623 (1970). Furthermore, "[w]here the legislature has specifically designated certain statutory procedures, it has by implication excluded other procedures." *Laurel Park Villas Homeowners Assoc. v. Hodges*, 82 N.C. App. 141, 143, 345 S.E.2d 464, 465 (1986); *see also Campbell v. Church*, 298 N.C. 476, 259 S.E.2d 558 (1979).

Since our decision in *Menache*, the General Assembly has amended the statute in question to provide that an aggrieved party in small claims court may seek relief by filing a motion pursuant to G.S. 1A-1, Rule 60(b)(1) with a magistrate. The magistrate may then set aside its order or judgment with the consent of the chief district court judge. The statute did not previously address Rule 60(b) motions, and it does not now provide for the filing of Rule 60(b) motions before the district court. In *Menache*, we stated that the district court was the proper forum to hear and decide Rule 60(b) motions for relief from judgment in magistrate's court. *Menache*, 43 N.C. App. 733, 735, 260 S.E.2d 100, 102 (1979). The General Assembly, however, by amending the statute, has designated a specific procedure for setting aside a magistrate's judgment pursuant to Rule 60(b) motions. These motions must now be filed in magistrate's court. An aggrieved party's only other option for relief is an appeal for trial de novo before the district court. G.S. 7A-228. Because the General Assembly has designated specific procedures for an aggrieved party to seek relief from a magistrate's judgment, it has by implication excluded other procedures including the filing of Rule 60(b) motions before the district court. Therefore, the district court had no jurisdiction to hear and decide defendant's Rule 60(b) motion. Accordingly, this Court also has no jurisdiction to decide the merits of defendant's appeal. Defendant's appeal must be dismissed.

Dismissed.

Judges JOHN and McGEE concur.

GEORGE C. KORNEGAY AND WIFE, RETHA B. KORNEGAY, PLAINTIFFS v. GARY L. BROADRICK AND WIFE, PATRICIA E. BROADRICK, WARLICK, MILSTED, DOTSON & CARTER, A GENERAL PARTNERSHIP CONDUCTING THE PRACTICE OF LAW, ALEX WARLICK, JR., CARL STEPHEN MILSTED, MARSHALL F. DOTSON, JR., AND JOHN T. CARTER, JR., INDIVIDUALLY, MARK PADGETT, AND INVESTORS TITLE INSURANCE COMPANY, DEFENDANTS

No. 944SC676

(Filed 20 June 1995)

Attorneys at Law § 64 (NCI4th)— attorneys' fees to clear encumbrance from land—fees not recoverable

The trial court in its order for judgment on the pleadings did not err in denying plaintiffs' prayer for attorneys' fees paid in clearing an encumbrance on land sold to plaintiffs by defendants, since, absent express statutory or contractual authority or pursuant to certain equitable powers of the court, attorneys' fees are not recoverable.

Am Jur 2d, Attorneys at Law §§ 237-244.

Appeal by plaintiffs from judgment entered 4 April 1994 by Judge Ernest B. Fullwood in Onslow County Superior Court. Heard in the Court of Appeals 2 March 1995.

David M. Rouse for plaintiffs-appellants.

E. C. Thompson, III for defendants-appellees.

LEWIS, Judge.

This appeal arises out of an action brought by plaintiffs to recover damages for breach of a warranty deed executed by defendants Gary and Patricia Broadrick.

The facts are not in dispute. The Broadricks conveyed certain real property to plaintiffs by warranty deed. Plaintiffs subsequently discovered that the property was within the right of way of the Intracoastal Waterway owned by the United States Government, a condition recognized as something of an encumbrance. Plaintiffs brought suit in state court against the Broadricks, the closing attorneys, the title company, and the surveyor of the property. The Broadricks counterclaimed for the amount due under the note. The claims against the attorneys and the surveyor were dismissed.

Another action was brought in federal court against the United States Government by property owners whose property was affected by the right of way for the Intracoastal Waterway. The present action, still pending in state court, was then "closed" pending resolution of the federal action. Pursuant to a settlement agreement, the Broadricks paid $5000 to the United States Government, and plaintiffs' land was cleared of the encumbrance. The settlement was without prejudice to any state court claims the Broadricks and Kornegays had against each other. This action was then "reactivated" in state court for resolution of remaining issues. Defendants filed a motion for judgment on the pleadings on its counterclaim. The court granted defendants' motion and denied plaintiffs' prayer for attorney's fees.

The sole issue on appeal is whether the trial court, in its order for judgment on the pleadings, erred in denying plaintiffs' prayer for attorney's fees paid in clearing the encumbrance. Since plaintiffs have not argued their other assignments of error, these are deemed abandoned. N.C.R. App. P. 28(a) (1995).

Absent express statutory or contractual authority or pursuant to certain equitable powers of the court, attorney's fees are not recoverable. *Parker v. Lippard*, 87 N.C. App. 43, 45, 359 S.E.2d 492, 494 (citing *Bowman v. Comfort Chair Co.*, 271 N.C. 702, 704, 157 S.E.2d 378, 379 (1967)), *modified and aff'd*, 87 N.C. App. 487, 361 S.E.2d 395 (1987). This rule includes attorney's fees sought either as damages or as costs. *Powers v. Powers*, 103 N.C.App. 697, 706, 407 S.E.2d 269, 275 (1991). Plaintiffs do not contend that the court has equitable power to award attorney's fees here. Furthermore, plaintiffs point to no contractual or express statutory authority permitting them to recover the attorney's fees they incurred to clear their title.

Hinkle v. Bowers, 88 N.C. App. 387, 363 S.E.2d 206 (1988), cited by plaintiffs, is not controlling. "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). There is language in *Hinkle* suggesting that $150 paid to a plaintiff's attorney for obtaining a release was recoverable as damages for breach of contract. *Hinkle*, 88 N.C. App. at 390, 363 S.E.2d at 208. However, in *Hinkle*, this Court's holding on the attorney's fees issue rests on a determination that the defendant's arguments were not supported by its assignments of error. All other commentary by this Court in *Hinkle* on the attorney's fees issue is non-binding dicta.

We are bound by the rule set forth in *Bowman*, *Powers*, and *Parker*. Plaintiffs may not recover attorney's fees as damages or as costs.

For the reasons stated, the order for judgment on the pleadings is affirmed.

Affirmed.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. MICHAEL ALAN PARKER, SR.

No. COA94-1045

(Filed 5 July 1995)

1. Criminal Law § 557 (NCI4th)— first-degree sexual offense and indecent liberties—defendant's threats to blow up women's shelter—suspicious package at courthouse—no mistrial

There was no abuse of discretion in not granting a mistrial in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant's children testified that their family had left a battered women's shelter because their father had threatened to blow up the shelter, but defendant's objection was sustained, the answer stricken, and the jury instructed to disregard that statement. There was also no abuse of discretion in not granting a mistrial where a suspicious package was found in an entrance to the courthouse after that testimony; the courthouse was cordoned off and searched and extra security measures were taken; the trial court told the jury that the package was in the possession of the SBI and that the court could not discuss the contents of the package because officials were conducting an investigation; the court also informed the jury that the courthouse had been searched and that law enforcement officials had allowed the courthouse to be occupied again; the court asked each juror individually whether anything that had occurred would affect their verdict and whether each juror would still be able to render a fair and impartial verdict; and the jurors each assured the court of their ability to serve.

Am Jur 2d, Criminal Law § 646.

2. Indictment, Information, and Criminal Pleadings § 42 (NCI4th)— first-degree sexual offense and taking indecent liberties with minor—bill of particulars—variance with indictment

The trial court did not err in a prosection for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant was indicted in case number 93 CRS 1014 for first-degree sexual offense and the State's response to defendant's request for a bill of particulars listed the charge as "93-CRS-1014—Indecent Lib." and included a statement that the victim had been anally penetrated. The State's evidence at trial was consistent with the information provided in the bill of particulars, defendant was in no way misled, the clerical error in listing the charge as "Indecent Lib." did not amend the original indictment charging first degree sexual offense, and defendant was not prejudiced.

Am Jur 2d, Indictments and Informations §§ 159 et seq.

3. Grand Jury § 2 (NCI4th)— grand jury—reconvened—oral application

The trial court did not err by denying defendant's motion to dismiss a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where a grand jury was selected and discharged, the district attorney made an oral application to the trial judge to have the grand jury reconvened, the court ordered that the grand jury be reconvened, and defendant was indicted. Assuming that N.C.G.S. § 15A-622(g) requires a written application to the trial court or a written order from the trial judge, certain technical violations concerning the grand jury proceedings do not render an otherwise valid indictment fatally defective.

Am Jur 2d, Grand Jury §§ 10, 11.

4. Evidence and Witnesses § 2593 (NCI4th)— attorney—motion to be released from representation—denied—testimony at evidence tampering hearing

The trial court did not err in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child by denying defense counsel's motion to be released from representation where defense counsel was called as a witness during a *voir dire* hearing to determine whether evidence had

been tampered with or altered. Defendant's attorney did not testify on behalf of defendant, but on a collateral matter regarding the attorney's handling of certain evidence; Rule 5.2(c) of the North Carolina Rules of Professional Conduct provides that a lawyer may continue the representation until it is apparent that the lawyer's testimony is or may be prejudicial to the client. Defense counsel's testimony was taken during a voir dire hearing outside the presence of the jury and defendant has shown no prejudice.

Am Jur 2d, Witnesses §§ 97-99.

Defense attorney as witness for his client in state criminal case. 52 ALR3d 887.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel. 88 ALR2d 796.

5. Criminal Law § 441 (NCI4th)— prosecutor's closing argument—State's witnesses—not paid to testify—fees already approved—no objection—no prejudice

There was no gross impropriety amounting to prejudicial error in a prosecution for first-degree sexual offense and taking indecent liberties with a child where the prosecutor argued to the jury that the State's witnesses were not paid to testify but the court had already signed orders for expert witness fees for three of the State's witnesses. However, the court had informed counsel that it would be absent during certain portions of the closing arguments and defendant did not object to the trial judge being absent or to the State's argument.

Am Jur 2d, Trial §§ 692, 694.

6. Criminal Law § 754 (NCI4th)— indictments—multiple counts—instructions

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant contended that the court erred in refusing to charge the jury as to each count of the indictments separately, but the court's instructions, taken in their entirety, make it clear that the jury was to consider each charge separately in its deliberations.

Am Jur. 2d, Trial §§ 1242, 1243, 1247.

7. Evidence and Witnesses § 3130 (NCI4th)— child sexual abuse—medical examinations of children other than victims—offered to support defendant—not admissible

The trial court did not err in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child by refusing to allow defendant to introduce the results of medical examinations of other minor children who did not testify at trial but who had allegedly participated in and witnessed the abuse of the victims who did testify and defendant testified that he did not abuse any of his children. N.C.G.S. § 8C-1, Rule 608(b).

Am Jur 2d, Witnesses §§ 632 et seq.

8. Evidence and Witnesses § 2333 (NCI4th)— child sexual abuse—pediatrician—qualified as expert

The trial court did not err in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant contended that a State's witness was allowed to testify concerning matters in which he was not competent to testify, but the witness was allowed to testify without objection as an expert in pediatrics and he testified concerning his examination of the youngest victim that there was vaginal trauma statistically consistent with previous penetration.

Am Jur 2d, Witnesses §§ 53-56.

9. Evidence and Witnesses § 364 (NCI4th)— child sexual abuse—use of marijuana—context of crime—admissible

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child in allowing one victim to testify concerning defendant's use of marijuana just before the abuse. When evidence leading up to a crime is part of the scenario which helps explain the setting, there is no error in permitting the jury to view the criminal episode in the context in which it happened. Furthermore, defendant did not object to another witness testifying that defendant smoked marijuana on several occasions.

Am Jur 2d, Evidence § 450.

10. Evidence and Witnesses § 762 (NCI4th)— interview with social worker—testimony by detective—tape of interview admitted by defendant—no prejudice from detective's testimony

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant contended that the court erred in allowing a detective to testify regarding statements made by a victim in an interview with a social worker but defendant introduced the entire videotape.

Am Jur 2d, Evidence § 687.

Admissibility of videotape film in evidence in criminal trial. 60 ALR3d 333.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 ALR4th 120.

11. Evidence and Witnesses § 747 (NCI4th)— inadmissible evidence—objection sustained, motion to strike allowed, jury instructed—no error

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant contended that the court erred in allowing certain testimony, but the trial court sustained defendant's objection to the testimony, allowed defendant's motion to strike, and instructed the jury to disregard the information.

Am Jur 2d, Appellate Review § 222.

12. Evidence and Witnesses § 762 (NCI4th)— evidence of same import admitted without objection—no error

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant contended that the trial court erred by admitting the testimony of the program director for a battered women's clinic regarding several calls made by defendant to the clinic because the caller identified himself as defendant but the program director did not previously know his voice. Defendant in his testimony acknowledged making calls to the clinic to inquire about his children.

Am Jur 2d, Appellate Review § 753.

13. Evidence and Witnesses § 3130 (NCI4th)— testimony of doctor supporting testimony of codefendant—excluded—no error

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant contends that the trial court erred in excluding the testimony of a doctor which was offered in support of the testimony of a codefendant who was cross-examined about a statement she had made to the doctor. N.C.G.S. § 8C-1, Rule 608(b) prohibits the use of extrinsic evidence to prove or disprove specific instances of conduct.

Am Jur 2d, Witnesses §§ 992, 1001.

14. Evidence and Witnesses § 2929 (NCI4th)— State's witness—examination by State—contradiction with prior statement—no extrinsic evidence

There was no error in a prosecution for multiple counts of first-degree sexual abuse and taking indecent liberties with a child where one of the State's witnesses testified that he had seen defendant and several of the codefendants walking around the trailer park but did not remember what they were wearing and the prosecutor asked if the witness remembered what he had told him in the presence of a detective and the witness testified as to what he had said that people in the crowd were wearing. The State did not attempt to offer extrinsic evidence to challenge the truthfulness of its own witness's memory.

Am Jur 2d, Witnesses §§ 992-996.

Appeal by defendant from judgment entered 4 February 1994 by Judge Zoro J. Guice, Jr., in Henderson County Superior Court. Heard in the Court of Appeals 6 June 1995.

Defendant was convicted of eight counts of first degree sexual offense, G.S. 14-27.4(a)(2), and four counts of taking indecent liberties with a child, G.S. 14-202.1. Defendant was sentenced to eight consecutive life sentences for the eight first degree sexual offense convictions and four consecutive ten year terms of imprisonment for the taking indecent liberties with a child convictions. At trial the State's evidence tended to show the following: Defendant's three children, M, S and G Parker, all testified to several specific instances of sexual abuse. M, nine years old, testified to three specific instances of abuse.

On one occasion, defendant took M to his grandmother's house, where she removed their clothes and got on top of him on the bed and jumped up and down on his private parts. Defendant watched and did nothing. On another occasion, defendant took M out to the woods where his grandmother and four other people were present. Defendant took M's clothes off and inserted something "hard" into his rectum. One of the spectators, Travis Gordon, put his penis in M's mouth. Defendant also placed his penis in M's mouth. M testified to another similar incident with the same four people.

S, defendant's eleven year old daughter, also testified that defendant abused her. On one occasion, when her mother was absent, defendant called her into the bedroom where he and two other men were smoking "pot." Defendant pulled down S's pants and threw her on the floor and inserted a spoon into her vagina and moved it around. Defendant took blood that was on the spoon, put it in a cup and drank it while the others were standing around singing with lit candles.

G, defendant's seven year old daughter, testified that defendant committed similar acts of sexual abuse to her. G testified that on one occasion, defendant placed a brush handle into her vagina. Medical examinations of the three victims corroborated each of the victims' testimony and indicated a diagnosis of sexual abuse. Dr. John Carter, an expert in adolescent psychiatry, evaluated the three victims and found that each victim experienced emotional and behavioral characteristics consistent with sexual abuse.

Defendant testified and denied any abuse. From judgment entered upon the jury's guilty verdicts, defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General Gail E. Weis, for the State.

J. Michael Edney for defendant-appellant.

EAGLES, Judge.

Defendant brings forward numerous assignments of error. After careful review of the record and briefs, we find no prejudicial error.

I.

[1] Defendant first contends that the trial court erred in denying both his motions for mistrial. We disagree. Defendant's first motion for mistrial came during M's testimony. Prior to trial, defendant filed a

Motion *in Limine* to exclude testimony about defendant's alleged threat to blow up the battered women's shelter where the victims were staying. During M's testimony, in response to the State's question asking why M and his family left the shelter, nine year old M answered, "The reason that we left is because my daddy forced [sic] to bomb the place." Defendant immediately moved for mistrial. The trial court instructed the jury to disregard M's statement and that it was not a proper statement for their consideration. S also testified that when the family left the battered women's shelter, their mother went to the hospital "and then my dad threatened to bomb the place." Defendant's objection was sustained, the answer was stricken from the record and the jury was instructed to disregard that statement. Defendant did not make a motion for mistrial during S's testimony.

Defendant's second motion for mistrial concerned a suspicious package that was found in one of the entrances to the courthouse. The package was found after M and S testified. After the package was found, the courthouse was cordoned off and searched and extra security measures were taken. The trial court informed the jury that the package was in the possession of the State Bureau of Investigation and that the court could not discuss the contents of the package because law enforcement officials were conducting an ongoing investigation. The trial court also informed the jury that the courthouse had been searched and that law enforcement officials had allowed the courthouse to be occupied again. The trial court asked each juror individually whether anything that had occurred would affect their verdict and whether each juror would still be able to render a fair and impartial verdict. The jurors each assured the court of their ability to serve.

A motion for mistrial is within the trial court's discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991).

> "Not every disruptive event occurring during the course of trial requires the court automatically to declare a mistrial," and if in the sound discretion of the trial judge it is possible despite the untoward event, to preserve defendant's basic right to receive a fair trial before an unbiased jury, then the motion for mistrial should be denied. On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect just how far the jury may have been influenced by the events occurring during the trial and

> whether it has been possible to erase the prejudicial effect of some emotional outburst. Therefore, unless his ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

State v. Moore, 335 N.C. 567, 598, 440 S.E.2d 797, 815 (1994) (quoting *State v. Blackstock*, 314 N.C. 232, 244, 333 S.E.2d 245, 253 (1985)). We conclude that the trial court did not abuse its discretion in denying defendant's motions for mistrial.

II.

[2] Defendant next contends that the trial court erred in holding that the State was not bound by the charge as differently stated in its bill of particulars. Defendant was indicted in case number 93 CRS 1014 of first degree sexual offense. In response to defendant's request for a bill of particulars pursuant to G.S. 15A-925, the State responded:

> 93-CRS-1014—Indecent Lib.—this occurred in summer of 1992 sometime after the above events and occurred in a garage at their home in Saluda. Defendant stripped the victim and put his penis in the victim's butt.

The function of a bill of particulars is to inform the defendant of the nature of the evidence the State intends to offer against him and to limit the evidence to the items and transactions stated in the bill of particulars. *State v. Wadford*, 194 N.C. 336, 338, 139 S.E. 608, 609 (1927). Defendant contends that since the charge of indecent liberties is not a lesser included offense of first degree sexual offense, the trial court should have dismissed the first degree sexual offense charge. A bill of particulars is not a part of the indictment, nor is it a substitute for or amendment to the indictment. *Id.* The State's evidence at trial was consistent with the information provided in the bill of particulars. Defendant was in no way misled. The clerical error in the bill of particulars listing the charge as "Indecent Lib." did not amend the original indictment charging first degree sexual offense. Defendant was not prejudiced by this clerical mistake. This assignment of error fails.

[3] Defendant also contends that the grand jury was improperly convened and that the trial court erred in denying defendant's motion to dismiss the indictments. G.S. 15A-622(g) provides that, "At any time when a grand jury is in recess, a superior court judge may, upon application of the prosecutor or upon his own motion, order the grand jury reconvened for the purpose of dealing with a matter requiring grand

jury action." In denying defendant's motion to dismiss the indictment, the trial court made findings of fact to the effect that: On 4 January 1993 a grand jury was duly selected and sworn and discharged after completing its work. Sometime after 29 January 1993, the Henderson County District Attorney, Alan C. Leonard, made an oral application to the trial court judge to have the grand jury reconvened. As a result of the oral application to the trial court, the trial court ordered and authorized the District Attorney to institute the necessary proceedings for reconvening the grand jury. On 8 February 1993, the grand jury was reconvened and issued the true Bills of Indictments against defendant. The trial court concluded that the oral application made by the District Attorney to the trial court constituted substantial compliance with G.S. 15A-622(g) and denied defendant's motion to dismiss.

Assuming, without deciding, that the provisions of G.S. 15A-622(g) require a written application to the trial court or a written order from the trial judge, we have held in other contexts that certain technical violations concerning the grand jury proceedings do not render an otherwise valid indictment fatally defective. In *State v. Reep*, 12 N.C. App. 125, 182 S.E.2d 623 (1971), this Court held that failure to return bills of indictment strictly according to statute was not prejudicial error. *See also State v. Avant*, 202 N.C. 680, 163 S.E. 806 (1932) (no error in failure of grand jury foreman to endorse a bill of indictment or to include in the indictment the names of the State's witnesses who were examined before the grand jury); *State v. Midyette*, 45 N.C. App. 87, 262 S.E.2d 353 (1980) (signature of grand jury foreman pursuant to statute is merely directory and does not invalidate an indictment). Defendant has shown no prejudice from the lack of a written application or order of the trial court. Accordingly, we conclude that the trial court did not err in denying defendant's motion to dismiss.

III.

[4] Defendant further contends the trial court erred in denying defendant's counsel's motion to be released as defendant's attorney. During the course of the trial, the State called defendant's counsel to testify during a *voir dire* hearing to determine whether evidence had been tampered with or altered. After hearing the testimony of defense counsel, J. Michael Edney, and two other witnesses, the trial court concluded that defense counsel did not unlawfully alter, destroy or

conceal any evidence in the case. Rule 5.2(b) of the North Carolina Rules of Professional Conduct states:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial and his or her firm, if any, shall not continue representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in his or her firm may testify under the circumstances enumerated in (a) above.

Here, defendant's attorney did not testify on behalf of defendant, but on a collateral matter regarding the attorney's handling of certain evidence. Rule 5.2(c) provides that if a lawyer learns that he "may be called as a witness other than on behalf of his client, the lawyer may continue the representation until it is apparent that the lawyer's testimony is or may be prejudicial to the client." N.C.R. Professional Conduct, Rule 5.2(c). Furthermore, defendant's counsel's testimony was taken during a *voir dire* hearing outside the presence of the jury. Defendant has shown no prejudice from defense counsel's testimony. This assignment of error is overruled.

IV.

[5] Defendant next contends that the trial court erred in failing to intervene during the State's closing argument. Defendant contends that the State argued in its closing argument that the State's witnesses were not paid to testify. The trial court, however, had already signed orders for expert witness fees to be paid to the State's three expert witnesses. The trial court had informed counsel for both sides that he would be absent during certain portions of the closing arguments. Defendant did not object to the trial judge being absent from the courtroom during portions of closing argument, nor did defendant raise any objections at trial to the State's argument that its expert witnesses had not been paid to testify. Upon failure to object to statements made during closing argument, the standard of review is whether the statements amounted to such gross impropriety as to require the trial court to act on its own motion. *State v. Oliver*, 309 N.C. 326, 356, 307 S.E.2d 304, 324 (1983). Counsel should refrain from representations in oral argument that are incorrect or untrue. Even so, we conclude that on these facts, the statements did not amount to such gross impropriety as to amount to prejudicial error.

[6] Defendant also contends that the trial court erred in refusing to charge the jury as to each count of the indictments separately. The trial court in its charge to the jury stated:

> Now, ladies and gentlemen of the jury, there are 12 cases involved, and the court is going to submit to you a separate verdict sheet for each case. You will note that the verdict sheet, at the top, will have the heading of the case with the word verdict, and that will be followed by this language.

The trial court then proceeded to inform the jury that they could either vote guilty or not guilty on each charge in the indictment which was represented by each of the separate verdict sheets. When reviewing a trial court's charge to the jury, the instructions must be considered in their entirety. *State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987). The trial court's instructions, taken in their entirety, make it clear that the jury was to consider each charge separately in its deliberations. *See State v. Schultz*, 294 N.C. 281, 284, 240 S.E.2d 451, 454 (1978). This assignment of error also fails.

V.

[7] Defendant's next several assignments of error concern the testimony of various witnesses and the allegedly erroneous admission of evidence. We conclude that all of these assignments of error are without merit. Defendant contends that the trial court erred in refusing to allow defendant to introduce the results of medical examinations of other minor children who did not testify at trial. Defendant offered the medical examinations of several other minor children who were children of the codefendants who allegedly participated and witnessed the abuse of the victims who testified at trial. The trial court held that defendant's evidence was inadmissible extrinsic evidence prohibited by Rule 608(b) of the North Carolina Rules of Evidence and irrelevant evidence pursuant to Rule 402. We agree.

Rule 608(b) provides that, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609 may not be proved by extrinsic evidence." Defendant testified that he did not abuse any of his children. Defendant also offered the medical examination of A Robinson, a child of one of the codefendants. S testified that when defendant took her to the woods behind her grandmother's house and abused her in front of several people holding lit candles, another young girl, A Robinson, "started screaming at first and then

she jumped up and she had no clothes on and she started running and her dad jumped up and started chasing after her through the woods." Defendant offered the medical examination of A Robinson to show that she showed no signs of sexual abuse in an effort to support his credibility. The results of A Robinson's medical examination is the type of extrinsic evidence which is prohibited by the rule when it is offered to support the credibility of a witness. Furthermore, defendant was not charged with sexually abusing A Robinson; S did not testify that she saw A Robinson being abused. Whether A Robinson was abused by a codefendant is irrelevant to the charges against defendant and was properly excluded pursuant to Rule 402.

[8] Defendant contends that the State's expert witness, Dr. Charles Marston, was allowed to testify concerning matters in which he was not competent to testify. Dr. Marston was allowed to testify as an expert in the field of pediatrics without objection. Dr. Marston testified about the results of his examination of the youngest victim, G Parker. He testified that an examination of G revealed vaginal trauma "statistically [] consistent with previous penetration." Dr. Marston's testimony in this regard is well within the knowledge of experts in pediatrics.

[9] Defendant next contends that the trial court erred in allowing M Parker to testify concerning defendant's use of marijuana just before the episodes of abuse. When evidence leading up to a crime is part of the scenario which helps explain the setting, there is no error in permitting the jury to view the criminal episode in the context in which it happened. *State v. Agee*, 326 N.C. 542, 548-49, 391 S.E.2d 171, 175 (1990). Furthermore, defendant did not object to S testifying that defendant smoked marijuana on several occasions. "Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Townsend*, 99 N.C. App. 534, 537, 393 S.E.2d 551, 553 (1990) (quoting *State v. Brooks*, 83 N.C. App. 179, 191, 349 S.E.2d 630, 637 (1986)).

Defendant's wife, Sandra Parker, also testified that she and defendant were involved in cashing an altered check. Defendant's objection was sustained and the objectionable testimony stricken from the record. Defendant's assignments of error in this regard are without merit.

[10] Defendant further contends that the trial court erred in allowing Detective Walter Harper to testify regarding statements made by S in

an interview with a Department of Social Services social worker. Defendant, however, introduced into the evidence the entire videotape of Detective Harper's interview with S which further corroborated S's testimony. "Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Townsend*, 99 N.C. App. 534, 537, 393 S.E.2d 551, 553 (1990) (quoting *State v. Brooks*, 83 N.C. App. 179, 191, 349 S.E.2d 630, 637 (1986)).

[11] In a related assignment of error, defendant contends the trial court erred in allowing Detective Harper to testify concerning S's statement about Michael McAbee. McAbee had been previously tried and convicted in Henderson County for second degree murder. S told Detective Harper in the interview that McAbee was "[t]he Mike that burned his baby." The trial court sustained defendant's objection to Detective Harper's testimony regarding his knowledge of McAbee, allowed defendant's motion to strike and instructed the jury to disregard the information. This assignment of error is without merit.

[12] Defendant further contends that the trial court erred in allowing Pam Perkins, program director for the battered women's shelter known as Mainstay, to testify regarding several calls made by defendant to Mainstay inquiring about the whereabouts of his wife and children. Ms. Perkins testified that the caller identified himself as defendant but that she did not previously know his voice so as to be able to personally identify defendant as the caller. Defendant, however, testified acknowledging that he made several calls to Mainstay to inquire about his children and that eventually he was informed that if he continued to call they would inform the sheriff's department. "Where evidence is admitted over objection, and the same evidence has been previously admited or is later admitted without objection, the benefit of the objection is lost." *State v. Townsend*, 99 N.C. App. 534, 537, 393 S.E.2d 551, 553 (1990) (quoting *State v. Brooks*, 83 N.C. App. 179, 191, 349 S.E.2d 630, 637 (1986)).

[13] Defendant next contends that the trial court erred in excluding the testimony of Dr. John Reinhardt. Defendant offered Dr. Reinhardt to support the testimony of codefendant Tabitha Taylor who was cross-examined by the State about a statement she made to Dr. Reinhardt during an interview. Defendant offered Dr. Reinhardt's testimony to discuss the entire interview so that the statement used to impeach Ms. Taylor by the State could be considered in its proper context. Rule 608(b) of the North Carolina Rules of Evidence specifi-

cally prohibits the use of extrinsic evidence to prove or disprove specific instances of conduct.

[14] Finally, defendant contends that the trial court erred in allowing the State to impeach one of its own witnesses. John Rogers testified he saw defendant and several of his codefendants walking around the trailer park at approximately 2:00 a.m. When Rogers testified that he did not remember what the people were wearing, the prosecutor asked Rogers if Rogers remembered what he told him in the presence of Detective Harper at 1:00 p.m. that afternoon in the prosecutor's office. Defendant answered, "I said the girls were wearing white shirts and nothing on underneath them, and that's all that I remember." When the prosecutor asked what the other people in the crowd were wearing, Rogers answered, "the girls were wearing white shirts and men were wearing dark clothes." Defendant contends that the State was allowed to improperly impeach its witness with a prior inconsistent statement.

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

State v. Williams, 322 N.C. 452, 455, 368 S.E.2d 624, 626 (1988) (quoting *State v. Green*, 296 N.C. 183, 192, 250 S.E.2d 197, 203 (1978)). The State did not attempt to offer extrinsic evidence, such as Detective Harper's additional testimony, to challenge the truthfulness of Rogers's memory.

We need not address defendant's remaining assignments of error as they are clearly without merit. In sum, defendant received a fair trial free from prejudicial error.

No error.

Judges WYNN and MARTIN, MARK D., concur.

PORTER v. LENEAVE

[119 N.C. App. 343 (1995)]

BARBARA PORTER, ADMINISTRATRIX OF THE ESTATE OF MARCIA L. ATKINSON, DECEASED, PLAINTIFF/APPELLANT v. CHARLES E. LENEAVE, III, DEFENDANT/APPELLEE

No. 938SC725

(Filed 5 July 1995)

Damages § 1 (NCI4th)— plaintiff damaged by defendant's negligence—award of nominal damages required

Where the jury found that plaintiff had been damaged by the negligence of the defendant and the plaintiff's intestate did not contribute to her own injuries, plaintiff established her cause of action for wrongful death, and the trial court erred in refusing to enter an award of nominal damages; furthermore, the language of N.C.G.S. § 28A-18-2(b)(6), which states that nominal damages are recoverable "when the jury so finds," does not require a different result.

Am Jur 2d, Damages §§ 8 et seq.

Judge JOHNSON concurring.

Judge JOHN dissenting.

Appeal by plaintiff from judgment entered 13 January 1993 by Judge William C. Griffin, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 23 March 1994.

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

Wallace, Morris, Barwick & Rochelle, P.A., by Paul A. Rodgman and Martha B. Beam, for defendant-appellee.

GREENE, Judge.

Barbara Porter (plaintiff) appeals the trial court's judgment awarding her neither damages nor attorney fees.

On 5 November 1990, Marcia Atkinson, plaintiff's fifteen year old daughter, was riding her bicycle in an easterly direction on RPR 1541 near La Grange, North Carolina, when she was struck and killed by a truck operated by Charles Leneave (defendant). Plaintiff, as administrator of her daughter's estate, brought the instant wrongful death action alleging defendant negligently drove his vehicle into the rear of

the child's bicycle. Plaintiff sought to recover damages for medical and funeral expenses, pain and suffering of the deceased, net income of the deceased, "services, protection, care and assistance of the deceased, whether voluntary or nonvoluntary, . . . [and] society, companionship, comfort, guidance, kindly offices and advice of the deceased to the persons entitled to the damages recovered."

On 25 February 1991, defendant answered disavowing any negligence and affirmatively defending on the grounds of contributory negligence and sudden emergency. Plaintiff replied 4 March 1991 denying her daughter was contributorily negligent and further alleging last clear chance.

Trial was held at the 11 January 1993 session of Lenoir County Superior Court before a jury. Defendant's evidence tended to show *inter alia* that Ms. Mattie Taylor had cared for plaintiff's intestate since the child was two years old and that the last time plaintiff had visited the child was six years before the accident in question. The jury initially answered the issues submitted as follows:

> 1. Was the plaintiff, Barbara Porter, Administratrix of the Estate of Marsha Atkinson, damaged by the negligence of the defendant, Charles E. Leneave, III?
>
> ANSWER: Yes.
>
> 2. Did the plaintiff's intestate by her own negligence contribute to plaintiff's damages?
>
> ANSWER: No.
>
> 3. What amount, if any, is plaintiff, Barbara Porter, Administratrix of the Estate of Marsha Atkinson, entitled to recover for damages?
>
> ANSWER: $0.00 to Barbara Porter, only funeral and ambulance to be paid in the amount of $2550.00

The presiding judge then instructed the jury to resume deliberations for purposes of clarifying their response to the third issue. When the jury returned, the portion of the answer to issue III on the verdict form reading "$0.00 to Barbara Porter" had been circled. In response to the court's inquiry, the jury indicated (through its foreperson with the other members assenting) that the circled portion was the jury's "verdict in answer to that issue" and that the remaining language "was not part of [their] answer to the issue as such," but rather

was reflective of the jury's concern about payment of the funeral and ambulance bills to the providers.

The trial court thereafter signed the judgment complained of which provided that "plaintiff [was to] take nothing" and "that each party [was to] bear its own costs." Plaintiff gave notice of appeal to this Court 1 February 1993.

The dispositive issue presented is whether the plaintiff is entitled to an award of nominal damages.

Our Supreme Court recently held that "[o]nce a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages." *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992). Pecuniary loss is not an element in North Carolina of a cause of action for wrongful death, *see* N.C.G.S. § 28A-18-2(b) (permitting recovery of nominal damages); thus, this cause of action is established upon a showing that the decedent was killed as a proximate cause of the negligence of the defendant. *See* 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 3.3(2) (2d ed. 1993) (noting that some causes of action require proof of actual damages) (hereinafter *Dobbs*). In this case, the jury found that plaintiff had been "damaged by the negligence of the defendant" and that the plaintiff's intestate did not contribute to her own injuries. Thus, plaintiff established her cause of action for wrongful death, and the trial court erred in refusing to enter an award of nominal damages.

The language of N.C. Gen. Stat. § 28A-18-2(b)(6), which states that nominal damages are recoverable "when the jury so finds," does not require a different result. The statute simply means that "when the evidence adduced does not establish . . . facts which will reasonably support an assessment" of damages and "when the jury so finds," there shall be an award of nominal damages. *Brown v. Moore*, 286 N.C. 664, 673, 213 S.E.2d 342, 349 (1975); *see Armentrout v. Hughes*, 247 N.C. 631, 633-34, 101 S.E.2d 793, 795 (1958) (construing an earlier version of the wrongful death statute, which did not include the nominal damage language, as prohibiting an award of nominal damages when a jury determined there was no pecuniary loss). The phrase "when the jury so finds" does not therefore mean when the jury finds nominal damages but means when "the jury finds that the decedent's death was caused by the defendant's wrongful act but fails to find that such death caused pecuniary loss." *Bowen v. Rental Co.*, 283 N.C. 395, 418, 196 S.E.2d 789, 804 (1973). Thus, the jury does not have the

option, after it has determined that there are no pecuniary losses, of choosing whether to award or not to award nominal damages. If the jury so determines, the party is entitled to an award of nominal damages and cost.

In this case the jury, when it set the plaintiff's damages at "$0.00," found that the evidence did not support an assessment of damages. At that point, the plaintiff was entitled to an award of nominal damages, and the order of the trial court must be reversed and the case is remanded for an award of nominal damages. In so holding, we reject the argument of the plaintiff that the award must also be amended to include the funeral and ambulance bills in the amount of $2550.00. The jury, after instructions from the trial judge, indicated that the language regarding the $2550.00 was not part of their answer to issue III; therefore, the trial court correctly refused to enter judgment for the plaintiff in this amount. See *Kim v. Professional Brokers*, 74 N.C. App. 48, 52, 328 S.E.2d 296, 299 (1985) (similar notation by jury treated as surplusage and properly disregarded by trial judge).

Reversed and remanded.

Judge JOHNSON concurs with separate opinion.

Judge JOHN dissents.

Judge JOHNSON concurring.

I concur but write separately to express the following.

In this wrongful death action, the jury determined that plaintiff decedent, Marcia L. Atkinson, was killed as a result of the negligence of defendant; yet, the jury only awarded special damages to cover funeral and ambulance expenses. By failing to award compensatory damages, the jury in essence has said that the life of this vibrant and promising fifteen year old ninth grader was of no value. I find this unconscionable. With our wrongful death statute, North Carolina General Statutes § 28A-18-2 (Cum. Supp. 1994), which allows for such a harsh result, should be revisited by our legislature and rectified.

I agree that the case should be remanded to the trial division for consideration of the issue of nominal damages. Nominal damages are defined as "a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the

defendant's duty . . . ." Black's Law Dictionary 712 (6th ed. 1990). Nominal damages are "a peg on which to hang the costs." *Potts v. Howser*, 274 N.C. 49, 61, 161 S.E.2d 737, 747 (1968) (*quoting Hutton v. Cook*, 173 N.C. 496, 499, 92 S.E. 355, 356 (1917)). However, on remand, I believe the issue of nominal damages is an issue for the jury unless the parties stipulate and consent to an amount of nominal damages or to allow the trial judge to set such an amount.

When the jury found that decedent's death was caused by defendant's wrongful act but failed to find that such death caused pecuniary loss, the *jury* did not have the option of choosing whether to award or not to award nominal damages. The *jury*, as a matter of law, was required to make an award of nominal damages. *See Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973).

My research reveals that the customary practice has been for the trial court to enter an amount of $1.00 as nominal damages when a jury, after proper jury instructions, failed to award an amount of nominal damages. I believe this constitutes an invasion of the province of the jury and the entry of an award of $1.00 by a trial judge is arbitrary unless the parties have stipulated and consented to the trial judge entering an amount for nominal damages. A jury could choose to award nominal damages in an amount greater than $1.00. In *Paving Co. v. Highway Commission*, 258 N.C. 691, 129 S.E.2d 245 (1963), the Court held that an award of $900.00 could not be denominated nominal damages. The Court further stated that "[i]nflation has not reached the stage where $900.00 can be called trivial." *Id.* at 695, 129 S.E.2d at 248. Therefore, in 1963, nominal damages would have been an amount from $1.00 to $899.00. Considering the factor of inflation since 1963, certainly $900.00 today and some amount even above that amount can be denominated as a trivial amount. Therefore, on remand, plaintiff is entitled to have an award of nominal damages, and costs can also be assessed.

Judge JOHN dissenting.

I respectfully dissent. While I agree the amounts indicated on the jury verdict sheet for funeral and ambulance bills constitute surplusage, I believe the majority misapprehends the purport of N.C. Gen. Stat. § 28A-18-2(b)(6) (1984 & Cum. Supp. 1994) as well as the *Brown* and *Bowen* decisions upon which it relies.

No right of action for wrongful death existed at common law, and the claim is entirely statutory, *Armentrout v. Hughes*, 247 N.C. 631,

632, 101 S.E.2d 793, 794 (1958), the statute defining the bases upon which damages may be recovered. *Stetson v. Easterling*, 274 N.C. 152, 155, 161 S.E.2d 531, 533 (1968) (citation omitted). Prior to amendment in 1969, our wrongful death statute contained no provision for nominal damages. *Armentrout*, 247 N.C. at 633-34, 101 S.E.2d at 795. However, an amendment enacted that year, retained in the version of the statute in effect at trial of the matter *sub judice*, G.S. § 28A-18-2(b)(6) (1984), allows recovery of nominal damages "when the jury so finds." G.S. § 28-174(a)(6) (1969).

G.S. § 28A-18-2(b) reads as follows:

> Damages recoverable for death by wrongful act include:
>
> (1) Expenses for care, treatment and hospitalization . . . ;
>
> (2) Compensation for pain and suffering . . . ;
>
> (3) The reasonable funeral expenses . . . ;
>
> (4) The present monetary value of the decedent . . . ;
>
> (5) [P]unitive damages . . . ;
>
> (6) Nominal damages *when the jury so finds.*

(emphasis added).

"[W]here a statute is intelligible without any additional words, no additional words may be supplied." *State v. Camp*, 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974) (citation omitted). Further, when "the section dealing with a specific matter is clear and understandable on its face, it requires no construction," *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citations omitted), "and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Camp*, 286 N.C. at 152, 209 S.E.2d at 756 (citation omitted). Lastly, it is the duty of this Court to apply a valid statute as written. *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973) (citation omitted).

It would "grossly underestimate[] the powers of comprehension possessed by '[persons] of common intelligence,' " *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967), *cert. denied*, 390 U.S. 1028, 20 L. Ed. 2d 285 (1968), to assert the presence of ambiguity or lack of clarity in the statutory phrase "when the jury so finds." The words thus must be accorded their plain meaning without judicial interpola-

tion of explanatory phraseology not contained within the statute. *Camp*, 286 N.C. at 152, 209 S.E.2d at 756.

Additionally, the "doctrine of the last antecedent [requires that] relative and qualifying words, phrases, and clauses ordinarily . . . be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote." *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 469 (1990) (citations omitted). Under this doctrine, and indeed under any fair reading of the statute, there is absolutely no provision in the section cited above to which the phrase "when the jury so finds" can be said to refer other than to the words "nominal damages" which immediately precede it.

Application of the foregoing statutory construction principles to the 1969 amendment of G.S. § 28A-18-2(b) leads, I respectfully suggest, indisputably to the conclusion that the award of nominal damages in actions for wrongful death has been limited by our General Assembly to those circumstances *when the jury in its discretion elects* to make such an award. In other words, as a result of the legislative inclusion of subsection (6) to the statute, nominal damages in a wrongful death action "*may* . . . be recovered if the jury finds that the decedent's death was caused by the defendant's wrongful act but fails to find that such death caused pecuniary loss." *Bowen v. Rental Co.*, 283 N.C. 395, 418, 196 S.E.2d 789, 804 (1973) (emphasis added).

Despite use of the permissive "*may*" in the *Bowen* decision, *see In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (use of "may" in statute ordinarily means provisions are to be construed as permissive and not mandatory) (citations omitted), the majority holds recovery of nominal damages is mandatory upon determination of fault in the absence of a finding of pecuniary loss. *Brown v. Moore*, 286 N.C. 664, 213 S.E.2d 342 (1975), is cited as support for the holding. In that decision, our Supreme Court wrote as follows:

> [A] jury will not be required to award damages when the evidence adduced does not establish to its satisfaction facts which will reasonably support an assessment. In such a situation, by Subsection (6) the Legislature *authorized* "[n]ominal damages *when the jury so finds.*" *Permission is granted; no command is given.* . . . We hold, therefore, that in awarding damages for wrongful death the jury is not ordinarily required *as a matter of law* to award damages for all *or any* of the items specified in [the statute].

Id. at 673-74, 213 S.E.2d at 349 (emphasis added).

Contrary to the majority holding, therefore, both the specific language of the statute (the "wisdom[] or expediency" of which are not our concern but that of the legislative branch of government, *Camp*, 286 N.C. at 153, 209 S.E.2d at 757) and the interpretive holding of our Supreme Court (by which we are bound, *see 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)) grant "permission" to the jury to award nominal damages following its determination of no pecuniary loss, but do *not* "command" such an award as a matter of law. *Hawkins*, cited by the majority, involved a common law assault and battery claim not established by statute, and is thus inapposite.

Moreover, had the General Assembly intended for the general principle enunciated in *Hawkins* to prevail, the phrase "when the jury so finds" simply would not have been included. *See 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) ("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.") (citation omitted).

I note the trial court, following the N.C. Pattern Jury Instructions, instructed the jury that if it answered the first two issues in favor of plaintiff, "then plaintiff would be entitled under the law . . . to at least nominal damages without proof of actual damages." N.C.P.I., Civ. 106.75. In view of the statutory provision noted above and the holding of our Supreme Court in *Brown*, I would hold the pattern instruction is erroneous as applied to wrongful death actions generally. However, the error is harmless in the case *sub judice* given the jury's obvious disregard of the instruction and subsequent award to plaintiff of "$0.00." *See State v. Bryant*, 283 N.C. 227, 234, 195 S.E.2d 509, 513 (1973) (conceding "*arguendo* that the charge was technically erroneous, . . . it was harmless error . . . .").

Finally, the jury's refusal to grant nominal damages in any event would not constitute reversible error. *See Marisco v. Adams*, 47 N.C. App. 196, 198, 266 S.E.2d 696, 698 (1980) (failure to award nominal damages not reversible error because nominal damages are a trivial sum "awarded in recognition of a technical injury") (citations omitted).

In view of all the above, I vote no error.

CAPITOL FUNDS, INC.; AND CAPITOL FUNDS OF SOUTH CAROLINA, INC., PLAINTIFFS v. ROYAL INDEMNITY COMPANY; AND CUMMINGS LEGRAND INSURANCE AGENCY, INC., DEFENDANTS

No. COA94-1043

(Filed 5 July 1995)

Insurance § 930 (NCI4th)— actual and apparent authority of agent—sufficiency of evidence

In an action to recover on a property and casualty insurance policy, the trial court did not err in submitting to the jury issues of actual and apparent authority where the evidence tended to show that defendant insurance company created a communication structure whereby (1) defendant insurer dealt with retail agents and insured through the Quaker Agency, (2) defendant Cummings LeGrand Agency dealt with defendant insurer only through Quaker, and (3) plaintiff consumer communicated only with defendant Cummings LeGrand Agency; defendant insurer considered Cummings LeGrand Agency to be its agent in connection with the general serving of its relationship with the insured and in all communications with the insured; defendant agency received an acceptable quote for coverage from defendant insurer and sent out binders for this coverage to plaintiff; these binders reflected that defendant agency had authority to act for defendant insurer; neither defendant insurer nor the Quaker Agency told defendant agency that it was not authorized to take such action; and there was no evidence that, prior to sending the binders, defendant agency was instructed that it could not act as an agent of defendant insurer.

Am Jur 2d, Insurance §§ 119-121.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions. 35 ALR3d 907.

Appeal by defendants from judgment entered 24 March 1994 by Judge Robert P. Johnston in Cleveland County Superior Court. Heard in the Court of Appeals 25 May 1995.

Caudle & Spears, P.A., by Harold C. Spears and Lloyd C. Caudle, for plaintiffs-appellees.

Dean & Gibson, by Rodney Dean and J. Bruce McDonald, for defendant-appellant Royal Indemnity Company.

Kennedy Covington Lobdell & Hickman, L.L.P., by Wayne Huckel and Amy L. Pritchard, for defendant-appellee Cummings LeGrand Insurance Agency, Inc.

JOHNSON, Judge.

Cummings LeGrand is a general insurance agency located in Shelby, North Carolina. The owner and president of Cummings LeGrand, Stuart LeGrand, has been an insurance agent since 1971 and has operated Cummings LeGrand since 1986.

Capitol Funds, Inc. and Capitol Funds of South Carolina, Inc. (Capitol Funds) insures the majority of its property through a single insurance policy. Beginning on 1 February 1990 and continuing through the date at issue in this case, 7 July 1992, Capitol Funds insured approximately thirty pieces of improved real property under a property and casualty policy with Royal Insurance (Royal Policy). The Royal Policy procured in 1990 replaced a similar policy held with National Union. The Royal Policy was procured through Cummings LeGrand.

The building at issue in this case was a thirty thousand square foot structure, used primarily for warehousing, located on a twenty acre parcel of land near Woodruff, South Carolina. This building was destroyed in a fire. A caretaker lived on the property in a mobile home near the building. At the time of the fire, the building contained machinery and building supplies.

On 6 July 1992, the caretaker of the property came to see Mr. Royster, who runs Capitol Funds, to discuss purchasing the mobile home unit in which she and her husband lived. The discussion of the property prompted Mr. Royster to check on the status of the insurance coverage of the property. Mr. Royster was informed by Cummings LeGrand that the property was not covered under the Royal Policy. Mr. Royster realized that the building was inadvertently left off of the list of properties to be insured. As soon as he learned of the lack of coverage, Mr. Royster called Stuart LeGrand to obtain coverage for the property, but did not reach him until the next morning.

Both Mr. Royster and Mr. LeGrand acknowledged conversing on the morning of 7 July 1992. Mr. Royster spoke with Mr. LeGrand and requested coverage in the amount of $330,000.00. Mr. LeGrand verbally told Mr. Royster that the property was covered with Royal. Mr. Royster understood that the property would be added to the existing policy, which already covered substantially all of Capitol Funds' properties. Mr. LeGrand's view was that the insurance was effective when he told Mr. Royster that the building was covered and that the coverage would be through the Royal Policy.

Following his conversation with Mr. Royster, Mr. LeGrand gave the information he obtained about the property to another insurance agent in his office, Ms. Valerie McCoy, and instructed her to complete a change request form. Ms. McCoy understood that coverage with Royal was bound pursuant to an oral binder. Ms. McCoy completed a document entitled Endorsement Request-Commercial Lines, mailed the endorsement to Quaker Agency, and sent a copy by hand delivery to Capitol Funds. Ms. McCoy testified that the endorsement request form was one of several forms used to memorialize agreements binding coverage.

Mr. Royster testified that he received all communications regarding the Royal Policy from Mr. LeGrand. For example, Capitol Funds received all invoices from Cummings LeGrand and paid all premiums to Cummings LeGrand.

Mr. Royster further testified that when he needed a change to the Royal Policy, such as an addition or deletion of a property or a change in a lender beneficiary, he would obtain such changes from Cummings LeGrand. Whenever Mr. Royster requested a change from Cummings LeGrand, Capitol Funds received confirmation of the change from Cummings LeGrand within a day or so. A formal endorsement from Royal reflecting the change would arrive later, but the endorsements always showed the changes effective as of the date first specified by Cummings LeGrand.

Mr. Royster testified that requesting coverage on the Woodruff property on 7 July 1992 was handled in the same manner as all previous changes to the Royal Policy. Mr. LeGrand testified that the procedure used—submitting an endorsement request to Royal via Quaker and a copy to Capitol Funds—was the same procedure always used to obtain changes in the Royal Policy.

Mr. LeGrand stated that Cummings LeGrand always dealt with Royal through the Quaker Agency. Mr. LeGrand further testified that he thought Quaker was an authorized agent of Royal through the Quaker Agency. Mr. LeGrand further testified that he thought Quaker was an authorized agent of Royal based on past relations between the parties. No evidence was produced to show that Cummings LeGrand should have known that Quaker was not an authorized agent of Royal, and testimony revealed that the manner in which decisions regarding coverage issues were communicated and the relationship between Capitol Funds, Cummings LeGrand, Quaker and Royal was set up by Royal.

A great deal of testimony came before the court and the jury regarding the basis of Cummings LeGrand's authority to bind Royal to coverage. Although there was no written agreement that set out whether Cummings LeGrand had binding authority with Royal, Mr. LeGrand testified as follows:

> Q. (by Mr. Spears): Based on your course of conduct and dealings that you had with the parties, did you believe that you were authorized by Royal to bind coverage on property such as the Woodruff, South Carolina property?
>
> Mr. Dean: Objection.
>
> Court: Overruled.
>
> A. (by Mr. LeGrand): Yes, I did.

On cross-examination, Mr. LeGrand was questioned as to whether binding authority existed despite the absence of a written agreement as follows:

> Q. (by Mr. Dean): So you assumed this only because you had never—you had never heard anything from them one way or the other, is that what you're saying?
>
> A. (by Mr. LeGrand): I'm saying that's the normal course of doing business with the Quaker Agency. Issuing binders, asking for change requests, and they were all done, prior to this, the way we'd asked them to be done.

Later in his testimony, Mr. LeGrand reiterated that "[e]very change that we made in the policy was in the form of a change request which was indicating that the change had been made as of the date and every endorsement that we got from every change that we made with Quaker came back as we requested, as of the day we requested it, and the way we requested it." Mr. LeGrand also testified that the change

requests submitted to Quaker were instructions to change the policy as opposed to requests that the policy be changed.

Mr. LeGrand testified that Cummings LeGrand sent out the original binders for coverage beginning in February 1990 as the authorized representative for Royal. Although Royal had already committed to issuing a policy at that point, the binders nevertheless reflected on their face that Cummings LeGrand had authority to act for Royal. A copy of the original binder was sent to Quaker (through which all dealings with Royal took place) and neither Royal nor Quaker ever told Cummings LeGrand that the agency was not authorized to take such actions. Mr. LeGrand concluded that "[i]f I didn't have the authority to issue these binders, they [Royal or Quaker] would have told me not to do it."

Mr. LeGrand explained that in any binding situation the insurance company always can come back and decline to continue the coverage, but that until such time the coverage is good. In this case, Mr. LeGrand knew that he could not override Royal's decision going forward but that, until Royal notified Cummings LeGrand differently, coverage existed on the property based upon his verbal binder.

Mr. LeGrand testified that on 7 July 1992 he asked Mr. Royster questions regarding the use of building, its construction, age, size and location. Mr. LeGrand had been down to the building several times and was familiar with the property. The building was constructed between 1976 and 1978, and was a pre-engineered metal building with a concrete floor. The building was insulated, heated and equipped with electricity and telephone. Mr. Royster testified that someone from Capitol Funds was in the building on a regular basis—sometimes as often as twice a week but no less often than once a month. In addition, the caretaker checked on the building daily.

The Royal Policy contained a provision permitting vacant buildings to be covered. Other properties under Royal Policy at the time of the fire were vacant as well. In addition, Royal had previously insured personal property located in the building in the amount of $304,000.00, and Mr. LeGrand was aware of this when he was asked to bind coverage on the building. The personal property insurance was discontinued after Capitol Funds sold most of the contents of the building in 1990. Further, Mr. LeGrand was familiar with the other thirty pieces of property under the Royal Policy and concluded that the property near Woodruff was comparable to the other properties already insured by Royal.

The issue of Royal's liability was submitted to the jury. The jury decided that Cummings LeGrand had actual authority and apparent authority. They did not answer whether Royal was entitled to be indemnified by Cummings LeGrand. In accordance with the jury's verdict, the trial court ordered that plaintiffs recover judgment in the amount of $328,800.00. The trial court also denied Royal's motions for a directed verdict and J.N.O.V. From this judgment, Royal appeals.

Defendant Royal contends that the trial court erred in submitting the issues of actual authority, apparent authority, and indemnity to the jury. We disagree.

In determining whether a trial court properly submitted an issue to the jury, the inquiry is "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). If there is more than a scintilla of evidence to support the elements of a particular claim, then the evidence is sufficient to go to the jury. *Guilford County v. Kane*, 114 N.C. App. 243, 441 S.E.2d 556 (1994). Furthermore, the non-moving party is allowed all reasonable inferences. *Id.*

The Supreme Court of North Carolina has held that actual authority

> may be shown by conduct, by the relations and situations of the parties, by acts and declarations, by matters of omission as well as commission, and, generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy[.]

Smith v. Kappas, 218 N.C. 758, 765, 12 S.E.2d 693, 698, *modified*, 219 N.C. 850, 15 S.E.2d 375 (1941) (*quoting Realty Co. v. Rumbough*, 172 N.C. 741, 748, 90 S.E. 931, 934 (1916)). Thus, contrary to defendant Royal's contentions, a written instrument is not necessary to create actual authority. *Id.*

The evidence shows that defendant Royal's underwriter, Michael Adamson, testified that Cummings LeGrand was defendant Royal's agent for purposes of servicing the policy, including changing provisions in the policy; that when Cummings LeGrand received an acceptable quote for coverage from Royal in 1990, it sent out binders for this coverage to Capitol Funds and to certain mortgagees, as authorized representative for Royal; that the binders reflect that Cummings LeGrand had authority to act for Royal; that a copy of the

original binder was sent to Quaker and neither Royal nor Quaker told Cummings LeGrand that the agency was not authorized to take such actions; that no evidence was produced to show that prior to 7 July 1992 Cummings LeGrand was instructed that it could not act as an agent of defendant Royal; that defendant Royal created a communication structure whereby (1) Royal dealt with retail agents and insured through the Quaker Agency, (2) Cummings LeGrand dealt with Royal only through Quaker and (3) the consumer, Capitol Funds, communicated only with Cummings LeGrand; and that Royal considered Cummings LeGrand to be its agent in connection with the general serving of its relationship with the insured and in all communications with the insured.

Thus, the evidence viewed in the light most favorable to Cummings LeGrand and Capitol Funds shows that there was more than a scintilla of evidence to support the trial court's submission of an issue of actual authority to the jury.

Defendant Royal next argues that the trial court erred in submitting the issue of apparent authority to the jury. We disagree.

Apparent authority is "that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses." *Investors Title Ins. Co. v. Herzig*, 320 N.C. 770, 774, 360 S.E.2d 786, 788 (1987) (*citing Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974)). *See also Bell Atlantic Tricon Leasing Corp. v. DRR, Inc.*, 114 N.C. App. 771, 443 S.E.2d 374 (1994). It must be shown that a party was reasonable in believing that another had conferred authority to that party to act on its behalf. *Zimmerman*, 286 N.C. 24, 209 S.E.2d 795. There was ample evidence of apparent authority in the instant case which supported the trial court's submission of actual authority to the jury. Evidence presented shows that defendant Royal had knowledge that Cummings LeGrand was the retail agent; that defendant Royal used Cummings LeGrand to do its bidding; and that it never informed Capitol Funds that Cummings LeGrand's authority was limited.

Defendant Royal argues that Capitol Funds acted unreasonably in that the policy provision provided that "the policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy." Defendant Royal relies on *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9 (1985), *aff'd in part, rev'd in part*, 316 N.C. 461, 343 S.E.2d 174 (1986) to support its argument. The policy language in *Pearce*, however, is distinguishable. In *Pearce*, the policy language was as follows: "No alteration of this

Policy and no waiver of any of its provisions shall be valid unless made in writing by us and signed by our President, Vice President or Secretary." *Pearce*, 74 N.C. App. at 627, 330 S.E.2d at 13. The *Pearce* policy provision requires that changes be made in writing, but the language in the instant case provides that changes may be made by endorsement. It does not require the endorsement to be in writing or preceded by a verbal binder. Additionally, the instant policy does not require that a specific officer or representative issue the endorsement.

Defendant Royal also argues that the trial court erred in its instructions on indemnity by Cummings LeGrand to Royal. In the instant action, the issue of whether Mr. LeGrand had authority was submitted to the jury and answered in the affirmative; thus, the issue of indemnity need not be addressed.

Defendant Royal's final argument is that the trial court erred in allowing certain testimony and disallowing other testimony. Defendant Royal argues that the court abused its discretion in refusing to admit testimony about "errors and omissions" insurance coverage. It is within the trial judge's sound discretion as to whether to exclude evidence under Rule 403. *State v. Mason*, 315 N.C 724, 340 S.E.2d 430 (1986). Under N.C.R. Evid. 403, a trial court may exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. . . ." As defendant Royal has failed to show that the trial judge's ruling was arbitrary and could not have been the result of a reasoned decision, its argument must fail. Further, defendant Royal has not shown that the exclusion of the testimony prejudiced defendant Royal and affected the result in this action. *Dept. of Transportation v. Craine*, 89 N.C. App. 223, 365 S.E.2d 694, *disc. review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988).

Accordingly, the trial court properly denied defendant Royal's motions for a directed verdict and J.N.O.V.; therefore, the decision of the trial court is without error.

No error.

Judges GREENE and MARTIN, JOHN C. concur.

NKEIRU CAROLINA ANUFORO, PLAINTIFF v. JAMES ALLEN DENNIE, DEFENDANT

No. COA94-840

(Filed 5 July 1995)

1. Appeal and Error § 331 (NCI4th)— production of transcript—Rule 7 requirements met

A contract for the production of the transcript, as envisioned by Rule 7 of the Rules of Appellate Procedure, was formed on the day plaintiff affirmatively requested by letter within the ten-day deadline of the rule that the court reporter provide the transcript.

Am Jur 2d, Appellate Review §§ 493, 502.

2. Appeal and Error § 331 (NCI4th)— compliance with Rules of Appellate Procedure—excusable neglect

The court reporter's notation that plaintiff "ordered" a transcript on 6 November 1993, coupled with her certification the transcript was "mailed" on 3 January 1994, indicating, however erroneously, that the transcript was prepared and delivered within 60 days, constituted excusable neglect justifying relief from the trial court's order dismissing plaintiff's appeal for the failure of counsel to seek an extension of time for production of the transcript under Rule 7(b)(1); moreover, plaintiff sufficiently alleged that she may prevail on her claim so that it was error for the trial court to deny plaintiff's motion, pursuant to N.C.G.S. 1A-1, Rule 60(b), to vacate and set aside an order dismissing her appeal.

Am Jur 2d, Appellate Review §§ 492-505.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 7 June 1994 by Judge William A. Creech in Wake County District Court. Heard in the Court of Appeals 20 April 1995.

E. Gregory Stott for plaintiff-appellant.

Law offices of Douglas F. DeBank, by Marcelina K. Crisco, for defendant-appellee.

MARTIN, MARK D., Judge.

Plaintiff appeals from the trial court's denial of her motion, pursuant to N.C.R. Civ. P. 59 and 60, to vacate and set aside the order

entered 4 February 1994 dismissing plaintiff's appeal. We reverse and remand.

On 8 January 1992 plaintiff filed a complaint seeking damages for personal injuries sustained as a result of an automobile accident. On 16 March 1992 defendant filed an answer denying negligence and alleging contributory negligence. At trial the issues of negligence, contributory negligence, and damages were submitted to the jury. The jury answered both the negligence and contributory negligence issues in the affirmative and denied any recovery to plaintiff. On 16 July 1993 the trial court entered judgment on the aforesaid verdict.

On 21 July 1993 plaintiff filed a motion requesting the trial court set aside the verdict and grant a new trial. On 20 October 1993 the trial court denied plaintiff's motion. On 20 October 1993 plaintiff appealed to this Court.

On 26 October 1993 plaintiff mailed a letter to the court reporter stating plaintiff had given notice of appeal to the North Carolina Court of Appeals, requesting production of the transcript, and advising the transcript must be prepared and delivered within 60 days of such request. On 9 November 1993 the court reporter executed AOC Form A 129, indicating the transcript was "ordered" on 6 November 1993. On 3 January 1994 the court reporter executed a certificate indicating the transcript was "requested" on 2 November 1993 and "mailed" to the attorneys on 3 January 1994.

On 3 January 1994 defendant filed a motion to dismiss plaintiff's appeal for failure to timely produce the transcript pursuant to Rule 7 of the North Carolina Rules of Appellate Procedure. On 4 February 1994 the trial court granted defendant's motion to dismiss.

On 8 February 1994 plaintiff filed a motion, pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure, requesting the court vacate and set aside the order entered 4 February 1994 dismissing plaintiff's appeal. On 7 June 1994 the trial court denied plaintiff's motion requesting the court vacate and set aside the order entered 4 February 1994 dismissing plaintiff's appeal. In its order denying plaintiff's motion, pursuant to N.C.R. Civ. P. 59 and 60, the trial court concluded as a matter of law that "plaintiff-appellant [] failed to comply with Rule 7 of the North Carolina Rules of Appellate Procedure and therefore her appeal should be dismissed."

The only issue presently before the Court is whether the trial court erred by denying plaintiff's motion, pursuant to N.C.R. Civ. P. 59

and 60, to vacate and set aside the order entered 4 February 1994 dismissing her appeal.

The motion for relief from a judgment or order made pursuant to Rule 60(b) is within the sound discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of that discretion. *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983). Where no abuse of discretion appears, an error in law arising from the misapprehension of the appropriate legal standard by the trial court is nonetheless reviewable on appeal. *See Selph v. Selph*, 267 N.C. 635, 638-639, 148 S.E.2d 574, 577 (1966).

At the outset we note the trial court did not apply the correct legal standard to plaintiff's 8 February 1994 motion, pursuant to Rules 59 and 60, to vacate and set aside the 4 February 1994 order of dismissal.

According to Rule 60 of the North Carolina Rules of Civil Procedure, relief from an order may be granted "[o]n motion and upon such terms as are just" when there has been a: "(1) Mistake, inadvertence, surprise, or excusable neglect; . . . (6) Any other reason justifying relief from the operation of the judgment." N.C.R. Civ. P. 60(b). The movant must also demonstrate she has pled a meritorious defense or otherwise properly demonstrate that she may prevail on the merits. *See* 2 G. Gray Wilson, *North Carolina Civil Procedure*, § 60-3, at 372 (1989) ("It is not necessary that a meritorious defense be proved, but only that one be properly pled."). In determining whether Rule 60 relief is justified, the trial court should apply the following standard:

> When relief is sought under Rule 60(b)(1), the trial court first determines if there has been a mistake, inadvertence, surprise, or excusable neglect. . . . If the motion does not allege factual allegations corresponding to the specific situations contemplated in clauses (1) through (5), subsection (6) serves as a "grand reservoir of equitable power" by which a court may grant relief from an order or judgment. The expansive test by which relief can be given under subsection (6) is whether "(1) extraordinary circumstances exist and (2) there is a showing that justice demands it."

In the Matter of Oxford Plastics v. Goodson, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985) (citations omitted).[1]

1. We do not believe, as suggested by the dissent, that a motion made pursuant to Rule 60 should automatically be subject to dismissal where the motion does not pre-

The trial court's 7 June 1994 order is devoid of any mention of Rule 60(b) considerations such as mistake, inadvertence, surprise or excusable neglect. Rather, the 7 June 1994 order reveals the trial court re-applied the same legal standard, *i.e.*, whether plaintiff complied with N.C.R. App. P. 7, used in evaluating the defendant's 3 January 1994 motion to dismiss the appeal. To the extent the trial court rendered its 7 June 1994 order denying plaintiff's motion, pursuant to Rules 59 and 60, without regard to the applicable legal framework under Rule 60(b), we hold it acted under a misapprehension of the appropriate legal standard. *See Oxford Plastics v. Goodson*, *supra*. Accordingly, we will proceed to address the question of whether excusable neglect existed for counsel's failure to move for an extension of time in which to produce and deliver the transcript.

Rule 7 of the North Carolina Rules of Appellate Procedure provides in pertinent part:

> Preparation of the Transcript; Court Reporter's Duties
>
> (a) Ordering the Transcript.
>
> (1) Civil Cases. Within 10 days after filing the notice of appeal the appellant shall contract, in writing, with the court reporter for production of a transcript of such parts of the proceedings not already on file as he deems necessary. The appellant shall file a copy of the contract with the clerk of the trial tribunal. . . .
>
> . . . .
>
> (b) Production and Delivery of Transcript.
>
> (1) From the date of the reporter's receipt of a contract for production of a transcript, the reporter shall have 60 days to produce and deliver the transcript in civil cases . . . .

N.C.R. App. P. 7.

[1] We believe plaintiff's letter to the court reporter *within the 10-day deadline* set forth in N.C.R. App. P. 7 constitutes "substantial compliance" with the requirement of a contract between the litigant and the court reporter. *Cf. Ferguson v. Williams*, 101 N.C. App. 265,

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cisely specify upon which subsection or ground it is premised. Rather, it is the long-standing rule in North Carolina that where the "movant is uncertain whether to proceed under clause (1) or (6) of Rule 60(b) he need not specify if his 'motion is timely and the reason justifies relief.' " *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971) (*citing* 7 Moore's Federal Practice § 60.27(2) (2d ed. 1970)). *See* 2 G. Gray Wilson, *North Carolina Civil Procedure*, § 60-12, at 392.

275, 399 S.E.2d 389, 395 (affirming lower court finding of "substantial compliance" with Rule 7), *disc. review denied*, 328 N.C. 571, 403 S.E.2d 510 (1991). We hold the contract, as envisioned under Rule 7, was formed on 26 October 1993, the day the plaintiff affirmatively requested production of the transcript by the court reporter. Therefore, the issue is whether the facts demonstrate plaintiff was entitled to relief pursuant to Rule 60 from the trial court's dismissal of her appeal for noncompliance with the 60-day deadline under Rule 7.

[2] We believe noncompliance with the 60-day deadline under Rule 7 may appropriately provide the basis for dismissal of an appeal. Nonetheless, we hold that the court reporter's notation here that plaintiff "ordered" the transcript on 6 November 1993, coupled with her certification the transcript was "mailed" on 3 January 1994, indicating, however erroneously, that the transcript was prepared and delivered within 60 days, constitute excusable neglect justifying relief from the trial court's order dismissing plaintiff's appeal for the failure of counsel to seek an extension of time for production of the transcript under Rule 7(b)(1).

This court has previously declined to allow the court reporter, "whether with or without good excuse, to determine the rights of litigants to appellate review." *Lockert v. Lockert*, 116 N.C. App. 73, 81, 446 S.E.2d 606, 610, (literal meaning of rule of appellate procedure should not be followed where delay by court reporter would deprive litigant of appellate review), *disc. review allowed*, 338 N.C. 311, 450 S.E.2d 487, *supersedeas allowed*, 338 N.C. 311, 450 S.E.2d 490 (1994).

We now consider the second prong of the Rule 60(b) inquiry, that is, whether plaintiff has sufficiently alleged she may prevail on the merits of her claim.

In her first assignment of error, plaintiff maintains the jury verdict below should be set aside on the ground it is ambiguous and conflicting. Although we express no opinion as to the merits of this contention, we believe, for purposes of our disposition of plaintiff's Rule 60(b) motion, that plaintiff's first assignment of error sufficiently alleges she may prevail on the merits of her appeal such that it would not be "a waste of judicial economy to vacate" the order of the trial court denying relief under Rule 60(b). *Oxford Plastics v. Goodson*, *supra*.

Because we find the facts in the present case support a finding of excusable neglect, we reverse the order of the trial court denying plaintiff's 8 February 1994 motion requesting, pursuant to Rule 60, the court vacate and set aside the order entered 4 February 1994 dismissing plaintiff's appeal. Appeal from judgment and order is to be deemed taken as of the date that mandate of this opinion is issued to the Clerk of Superior Court. At this time the plaintiff may perfect her appeal pursuant to the North Carolina Rules of Appellate Procedure.

Reversed and remanded.

Judge LEWIS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I believe the order of the trial court denying plaintiff's Rule 60 motion to set aside the order dismissing her appeal should be affirmed. Accordingly, I dissent.

Rule 7 requires that the appellant, within ten days after filing the notice of appeal, enter into a written contract with the court reporter for production of the transcript. Although the requirement that there be a written contract suggests that there must be more than a simple request from the appellant to the court reporter to satisfy Rule 7, because the court reporter has an affirmative obligation to prepare the transcript upon request, the contract arises upon a written request. I therefore agree with the majority that the letter from plaintiff to the court reporter is a contract within the meaning of Rule 7. Thus, because the contract was entered into on 26 October 1993, plaintiff, as the appellant, had the obligation to have the transcript produced by the court reporter within sixty days after 26 October 1993 or obtain an extension of time in which to do so from the trial court or the appellate court. N.C. R. App. P. 7(b)(1).

In this case, the transcript was produced more than sixty days after plaintiff's request for the transcript, and neither the court reporter nor plaintiff nor her attorney requested an extension of time in which to produce and deliver the transcript under Rule 7(b)(1). Therefore, the appeal was subject to dismissal, N.C. R. App. P. 25(a), and the record does not reveal that the trial court abused its discretion in denying plaintiff's Rule 60 motion to set aside the earlier dis-

missal. *See Sink v. Easter*, 288 N.C. 183, 200, 217 S.E.2d 532, 543 (1975) (motion for relief under 60(b) is addressed to sound discretion of trial court, and appellate review is limited to determining whether court abused its discretion).

Whether plaintiff's noncompliance with the sixty-day requirement amounts to "excusable neglect" is not an issue before this Court because it was not asserted before the trial court as a ground for the motion. N.C.G.S. § 1A-1, Rule 7(b)(1) (1990) (motion "shall state the grounds therefor"). The only ground asserted for the Rule 60 motion was that the plaintiff did not receive notice of the hearing of the defendant's motion to dismiss the appeal. The trial court did not address this issue in its order denying the Rule 60 motion and the plaintiff does not argue this issue on appeal. In any event, a finding of "excusable neglect" is not alone sufficient to support an order striking the order of dismissal, as plaintiff must also show that her appeal from the underlying jury verdict has merit. *See In the Matter of Oxford Plastics v. Goodson*, 74 N.C. App. 256, 258, 328 S.E.2d 7, 9 (1985). This she has failed to do.

Finally, I do not accept that affirming the order of the trial court in this case would permit a court reporter to "determine the rights of [the] litigants to appellate review." Rule 7(b)(1) is specific in granting the plaintiff the right to request an extension of time for production of the transcript. In this case, plaintiff neither requested an extension nor argued that her failure to so request was excusable. Thus, the plaintiff's rights to appellate review were not determined or controlled by the reporter's failure to timely submit the transcript.

UNITED STATES FIDELITY AND GUARANTY COMPANY v. THE COUNTRY CLUB OF JOHNSTON COUNTY, INCORPORATED

No. COA94-1044

(Filed 5 July 1995)

1. Insurance § 895 (NCI4th)— defendant in business of selling alcoholic beverages—no coverage under policy

Defendant, a private, nonprofit corporation which owned and operated a golf course, was in the business of selling alcoholic beverages, since defendant's facilities included a small snack bar and grill where members could obtain bottled or canned beer at

any time by charging it to a membership account; therefore, the commercial general liability coverage of the policy written by plaintiff did not apply where a member consumed alcohol at defendant's premises, had a blood alcohol level of greater than .10%, and subsequently caused an automobile collision which resulted in death and serious injury to occupants of the vehicle which he hit.

Am Jur 2d, Insurance §§ 703 et seq.

2. Insurance §§ 150, 153 (NCI4th)— insured in business of selling alcoholic beverages—exclusionary clause as forfeiture provision—applicability of waiver and estoppel

In the general liability insurance policy written by plaintiff the clause excluding coverage if defendant were "in the business of selling alcoholic beverages" was a forfeiture provision and therefore subject to the doctrines of waiver and estoppel. Whether waiver or estoppel applied so as to preclude plaintiff from asserting the policy exclusion depended upon whether the independent insurance agent who procured the policy, who was also a member of defendant, was an agent of the insured or the insurer, as his knowledge could be imputed to the party for which he was an agent, and there was a genuine issue of fact as to whether he was the agent of plaintiff, defendant, or both.

Am Jur 2d, Insurance §§ 1571 et seq.

Comment Note.—Doctrine of estoppel or waiver as available to bring within coverage of insurance policy risks not covered by its terms or expressly excluded therefrom. 1 ALR3d 1139.

Appeal by defendant from order entered 17 May 1994 in Wake County Superior Court by Judge E. Lynn Johnson. Heard in the Court of Appeals 25 May 1995.

Wilson & Iseman, L.L.P., G. Gray Wilson and Elizabeth Horton, for plaintiff-appellee.

W. Brian Howell, P.A., by W. Brian Howell, and Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for defendant-appellant.

GREENE, Judge.

The Country Club of Johnston County, Incorporated (defendant) appeals from an order entered 17 May 1994, sustaining United States Fidelity and Guaranty Company's (plaintiff) objection to the affidavit of defendant's expert witness and allowing plaintiff's motion for summary judgment in its action for declaratory judgment concerning whether it has any obligation under an insurance policy to afford defendant coverage in a pending lawsuit.

Defendant is a private club open to members and guests only. It is a nonprofit corporation that owns and operates a golf course, and its facilities include a pro shop, a swimming pool, tennis courts, a dining room and supporting kitchen facilities. On 18 October 1991, Stephen Richard Upton, III (Mr. Upton), a member of defendant, consumed several mixed drinks while attending a Friday night dinner preceding a member-member golf tournament held at defendant's facilities. After the dinner, Mr. Upton left the facilities and was operating his vehicle in Smithfield, North Carolina, when he struck another vehicle, killing the driver and seriously injuring her younger brother. Mr. Upton, whose blood alcohol level at the time of the accident was greater than 0.10%, was subsequently indicted, tried and convicted of involuntary manslaughter for which he received an active prison term.

In July 1993, the family of the driver killed in the accident initiated a lawsuit against Mr. Upton and defendant for wrongful death and personal injuries, *Sanders, et al. v. Upton*, 93 CVS 4415 (the *Sanders* lawsuit). On the date of the accident, plaintiff insured defendant under a master insurance policy including commercial general liability coverage which provided in pertinent part:

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . .

2. Exclusions.

   This insurance does not apply to: . . .

   c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

Plaintiff defended the *Sanders* lawsuit on behalf of defendant under a reservation of rights pending a determination regarding coverage.

On 9 July 1993, plaintiff filed a complaint for a declaratory judgment "relieving plaintiff of any obligation to defend or afford coverage to defendant under the policy at issue in the pending" *Sanders* lawsuit. On 14 September 1993, defendant filed an answer admitting it "contends that it is entitled to a defense and coverage" to the *Sanders* lawsuit. Defendant also asserted estoppel as a defense alleging that although plaintiff was informed of defendant's practices with respect to acquisition and consumption of alcohol on defendant's premises, plaintiff continued coverage "without change, without requested change, and without informing the Defendant of any contended applicability of exclusions from coverage based upon the acquisition and consumption of alcohol on the Defendant's premises," and defendant "with justification, reason and in good faith, acted in reliance upon the continued coverage . . . and did not request, nor receive any request for, changes in coverage, nor receive any notification of the Plaintiff's intended exclusion of coverage." Defendant also asserted that plaintiff waived any exception of risk or exclusion involving the consumption of alcohol on 18 October 1991 because "[s]ubsequent to August, 1991, in further consideration of the continuation of the Policy," plaintiff did not cancel or change the coverage of the Policy.

On 15 December 1993, plaintiff made a motion for summary judgment. At the summary judgment hearing, plaintiff asserted that defendant's claims of waiver and estoppel were "gone"; however, plaintiff argued waiver and estoppel would not apply anyway because "no one ever asked, no one ever requested, no one ever represented, no one ever promised anything with regard to coverage for liquor liability, not the insured, not the agent, and not [defendant]." Furthermore, plaintiff, relying on cases from other jurisdictions,

argued the language in the Policy was unambiguous and "if liquor or alcohol is being served or furnished on the premises that that as a matter of law places the insured, quote, 'in the business.' "

At the summary judgment hearing, defendant, in opposition to the summary judgment motion, submitted the affidavits of Sammy G. Jackson (Mr. Jackson), Jeffrey Pope (Mr. Pope), and Peter M. Foley (Mr. Foley) and the depositions of Cathy Davis (Ms. Davis) and David Grady (Mr. Grady) along with several documents, including correspondence between Ms. Davis and Mr. Grady. Defendant filed an objection to the use of Mr. Foley's affidavit.

Mr. Jackson, President of defendant's Board of Directors in 1990 and 1991, stated in his affidavit that there has never been a full-time bartender employed at the Club although the dining room and kitchen are used by private organizations as well as for Club functions. There is a small bar and snack area, but neither liquor by the drink nor alcoholic beverages on tap are served. The Club does have valid brown-bagging permits, and the physical facilities include members' liquor cabinets adjoining the bar area. Bottled or canned beer can be obtained by members in the snack bar by charging it to a membership account.

Ms. Davis, a commercial underwriter for plaintiff, stated in her deposition that she was involved in renewing defendant's insurance policy in 1989 and for 1990-91. She stated that in 1989, she "understood that [defendant] had a brown bagging license, and that they had parties six times a year and there was no sales . . . and understood [defendant was] building a bar." She reviewed an inspection report of defendant's premises dated 9 September 1989 and performed by Stephen Kaasa, plaintiff's loss representative. The report stated "[a]lcohol is allowed as the club does have a brown bagging license, however, no liquor stocks are kept on the premises. . . . The building contains . . . an area that is currently being renovated into a bar and lounge." Ms. Davis identified a 29 August 1991 recommendation letter she sent to Max Creech Insurance Agency which handled defendant's insurance. The letter provided:

> [W]e will be attaching CG 21 50, Amendment Of Liquor Liability Exclusion, onto the renewal. According to an inspection on file, the insured has a brown bagging license, as alcohol is allowed at the club occasionally. We feel it is not the intent of Host Liquor Liability to pick up this exposure. Therefore, if liquor liability is requested, then this needs to be added onto the policy.

On Ms. Davis' file copy of this letter, she handwrote the following:

> I spoke to [Mr.] Grady re: liquor. Insured has a brown bagging license. Guests/members brown bagging approximately 6 times/yr. There is a hired bartender who only serves those w/the bottles they bring in. No Sales - [Mr. Grady] is a member of the club. Doesn't appear to be a large exposure. I am going to delete CG2150.

Ms. Davis stated the handwritten notation was her documentation of a telephone conference with Mr. Grady on 25 September 1991. Mr. Grady is an independent insurance agent with Max Creech Insurance Agency. Ms. Davis called Mr. Grady and "basically what [she] found out was that they only had brown bagging approximately six times a year. They had a hired bartender who serves only those who bring the bottles in. That there were no sales." She told Mr. Grady "to delete the CG-2150, which is an enhancement endorsement to the liquor liability exclusion." Before she talked to Mr. Grady, Ms. Davis thought CG-2150 "needed to be on the policy." She "understood later on that [Mr. Grady] didn't tell [her] the entire truth . . . . [W]e later found out that you can go into the club at any day of the week and get a beer. That was not mentioned to me in my conversation with [Mr. Grady] on September 25, 1991."

Mr. Grady, a member of defendant, stated in his deposition that he is an independent insurance agent with Max Creech Insurance Agency and represents a number of carriers, including plaintiff. He became involved with coverage issues concerning defendant in the fall of 1990. He stated that in his telephone conversation with Ms. Davis concerning liquor liability, she asked him about liquor by the drink, bartenders, and liquor cabinets. He informed her that after the Club had tournaments, alcohol would be served at dinners and other social events after the tournament, "but nothing else was discussed." Although as a member of the Club he was aware that beer could be charged to a member's account at any time, he did not inform Ms. Davis because she did not ask him about beer in their telephone conversation concerning liquor liability. She indicated in their conversation that she was going to delete CG-2150. Mr. Grady "was under the assumption that social host exposure would be covered." Mr. Grady stated he never requested coverage for liquor liability prior to 18 October 1991, and no one from plaintiff ever told him that defendant had liquor liability coverage prior to the accident.

Although defendant appealed from the trial court's sustaining of plaintiff's objection to the affidavit of Mr. Foley, defendant's expert witness, defendant has failed to make any argument in its brief on this issue; therefore, this assignment of error is deemed abandoned, and we need not address it. N.C. R. App. P. 28(b)(5).

The issues presented are whether (I) defendant, whose members can charge bottled and canned beer to their accounts, is "in the business of . . . selling, serving or furnishing alcoholic beverages"; and (II) the evidence reveals a genuine issue of material fact on the issues of estoppel and waiver.

I

[1] The meaning of language used in an insurance contract is a question of law for the court, *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993), as is the "construction and application of the policy provisions to the undisputed facts." *Walsh v. National Indem. Co.*, 80 N.C. App. 643, 647, 343 S.E.2d 430, 432 (1986). If the language in an exclusionary clause contained in a policy is ambiguous, the clause is "to be strictly construed in favor of coverage." *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 202, 415 S.E.2d 764, 765, *disc. rev. denied*, 331 N.C. 557, 417 S.E.2d 803 (1992). If such an exclusion is plainly expressed, it is to be construed and enforced as expressed. *Id.*, 415 S.E.2d at 765-66. We agree with the plaintiff that the language in the exclusion at issue in this case is plain and unambiguous. *See Fraternal Order of Eagles v. General Accident Ins. Co.*, 792 P.2d 178, 182-83 (Wash. App.), *disc. rev. denied*, 802 P.2d 127 (1990); *McGriff v. United States Fire Ins. Co.*, 436 N.W.2d 859, 862 (S.D. 1989); *Cormier v. Travelers Ins. Co.*, 618 So. 2d 1185, 1187 (La. Ct. App.), *cert & rev. denied*, 625 So. 2d 174 (1993); *Grain Dealers Mut. Ins. Co. v. Lower*, 979 F.2d 1411, 1415 (10th Cir. 1992); *but see American Legion Post # 49 v. Jefferson Ins. Co. of New York*, 485 A.2d 293, 294 (N.H. 1984); *Newell-Blaise Post No. 443 v. Shelby Mut. Ins. Co.*, 487 N.E.2d 1371, 1373 (Mass. 1986).

Applying the plain language of the exclusion, the question is whether the defendant was, on 18 October 1991, "in the business of . . . selling, serving or furnishing alcoholic beverages." The defendant argues that it was not because it is a nonprofit organization whose primary focus is the operation of a golf course and that the serving of alcoholic beverages is a service to its members which does not generate substantial revenue. We disagree. The "obvious purpose of the phrase 'in the business of' is to describe the nature of the activity

engaged in," *Cormier*, 618 So. 2d at 1187, with the focus being on the actual conduct of the insured with respect to the "selling, serving or furnishing" of the alcoholic beverages. *Fraternal Order*, 792 P.2d at 183. Therefore, if the conduct of "selling, serving or furnishing" alcoholic beverages is a permanent, ongoing operation, the insured is "in the business of . . . selling, serving or furnishing alcoholic beverages." If such conduct is infrequent or occasional, the insured is not "in the business of." Accordingly, it is irrelevant whether the insured is a nonprofit organization or in the business of making a profit. Likewise, it is immaterial whether the income from the sale of alcoholic beverages constitutes a major portion of the insured's revenue or whether the primary purpose of the organization is something other than the sale of alcoholic beverages. *Id.*

In this case, the facts are undisputed as to the operations of defendant, and the question of whether the exclusion applies to defendant is a proper subject for summary judgment. *See Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690-91, 340 S.E.2d 374, 377, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). The facts show that defendant is a private, nonprofit corporation which owns and operates a golf course. The facilities include a small bar area with a snack bar and grill where members can obtain bottled or canned beer at any time by charging such beer to a membership account. This selling of beer is an ongoing operation rather than an occasional or infrequent event. Defendant, therefore, is "in the business of . . . selling" alcoholic beverages and the policy excludes coverage in this case. Because of our holding, it is unnecessary to decide whether the other events sanctioned by the defendant during the course of the year, i.e., member-member golf party, are alone sufficient to support a conclusion that the defendant was "in the business . . . of selling, serving or furnishing alcoholic beverages." *See Sprangers v. Greatway Ins. Co.*, 514 N.W.2d 1, 9 (Wis. 1994) ("club serving alcoholic beverages only at its annual holiday party would not likely be excluded from coverage").

II

[2] Defendant argues that even if this Court determines that the policy provides it no coverage, summary judgment was nonetheless improper because it has established the defenses of waiver and estoppel as a matter of law.

It is well-settled in North Carolina that the doctrines of waiver and estoppel may be applied to obviate forfeiture provisions in insur-

ance contracts; however, waiver and estoppel "are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom." *Hunter v. Insurance Co.*, 241 N.C. 593, 595, 86 S.E.2d 78, 80 (1955); *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 466, 343 S.E.2d 174, 177 (1986); *Durham v. Cox*, 65 N.C. App. 739, 744, 310 S.E.2d 371, 375 (1984). The question is whether the exclusionary clause in this case is a forfeiture provision and therefore subject to the doctrines of waiver an estoppel or not.

This Court, quoting a South Carolina case, explained the difference between a forfeiture provision which is an "accepted" risk and an "excepted" risk to which estoppel and waiver do not apply:

> The distinction between an accepted risk to be defeated by conditions set forth in the policy and an excepted risk is clear, and it is logical to hold that it takes a new contract to cover an excepted risk. By way of illustration: A. has a plantation on which there are 10 buildings. All are covered by a policy of insurance, but the policy provides that, in case A. shall store certain inflammable materials in any of the houses, then the insurance on that building shall instantly cease. That is an assumed risk, which will be void upon a condition subsequent. B. has a plantation upon which there are 10 buildings; 9 of them are covered by a policy of insurance. Building No. 10 is excluded from the policy. It is entirely logical to hold that it takes a new contract to include insurance on B.'s No. 10, but not on A.'s No. 10.

Durham, 65 N.C. App. at 747, 310 S.E.2d at 376 (*quoting Keistler Co. v. Aetna Ins. Co.*, 124 S.C. 32, 117 S.E. 70 (1923)). Relying on this explanation of the difference between an "accepted" risk and an "excepted" risk, this Court determined that a provision of a homeowner's policy under coverage on appurtenant structures which stated "[t]his coverage excludes structures used in whole or part for business purposes," "is analogous to the provision against storage of inflammable materials in the foregoing illustration in that both may be said to enhance a risk already assumed by the insurer." *Id.* "[A] 'business use' of the covered property may properly be considered as a condition subsequent, the occurrence of which renders the assumed risk voidable" so that the doctrines of waiver and estoppel may be applied to deny the insurer's right to avoid liability. *Id.*

In *Pearce*, relied on by plaintiff, the insured purchased a $20,000 life insurance policy and also purchased an accidental death rider

which paid an additional $40,000 if the insured were to be injured or die by accident. The rider excepted from coverage death or injuries resulting under certain circumstances, including "travel or flight in or descent from any species of aircraft if (i) you are a pilot, officer, or other member of the crew of such aircraft while in flight, or (ii) the aircraft is maintained or operated for military or naval purposes." *Pearce*, 316 N.C. at 463, 343 S.E.2d at 176. The Court determined that the doctrines of waiver and estoppel were not available to extend coverage to the insured, an Air Force member, who was accidentally killed in a flight training mission. *Id.* at 466, 343 S.E.2d at 178.

The policy provision in this case is similar to the one in *Durham* rather than the one in *Pearce*. By the terms of the Policy, insurance coverage is provided for bodily injury or property damage "for which any insured may be held liable by reason of" (1) contributing to the intoxication of any person, (2) furnishing alcoholic beverages to an underage person or under the influence of alcohol or (3) any regulation pertaining to the sale, gift or distribution of alcoholic beverages unless the insured is "in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages." Being "in the business of" is properly considered a condition subsequent, "the occurrence of which renders the assumed risk voidable." *Durham*, 65 N.C. App. at 747, 310 S.E.2d at 376. The doctrines of waiver and estoppel may therefore apply to disallow plaintiff from denying coverage.

> A party is estopped when he
>
> by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Webber v. Webber, 32 N.C. App. 572, 576, 232 S.E.2d 865, 867 (1977) (*quoting In re Bank v. Winder*, 198 N.C. 18, 20, 150 S.E. 489, 491 (1929)). Under waiver, "an insurer waives a policy provision (which would have allowed avoidance of the policy) if at the time the policy is issued, the insurer has knowledge of existing conditions which would otherwise void the policy under the provision's terms." *In re Appeal by McCrary*, 112 N.C. App. 161, 171, 435 S.E.2d 359, 366 (1993). Whether waiver or estoppel may apply so as to preclude the plaintiff from asserting the policy exclusion depends on whether Mr. Grady was an agent of the insured or the insurer as Mr. Grady's

knowledge can be imputed to the party for which he was an agent. *See City of Greensboro v. Reserve Ins. Co.*, 70 N.C. App. 651, 321 S.E.2d 232 (1984). If Mr. Grady was an agent of the insured, the doctrine of estoppel may apply to disallow plaintiff from denying coverage if Ms. Davis, through her actions or silence when she ought to have spoken, intentionally or through culpable negligence, induced Mr. Grady to believe liquor liability coverage existed, and Mr. Grady rightfully relied on such belief to his, i.e., the defendant's, prejudice. The elements of waiver do not arise if Mr. Grady was an agent for the insured. If Mr. Grady was an agent of the insurer, however, the doctrine of waiver, but not estoppel, may apply because he knew that defendant allowed its members to charge beer to their accounts and that knowledge may be imputed to the plaintiff. If Mr. Grady were an agent of both the insured and the insurer, both estoppel and waiver may apply. *See McCartha v. Ice Co.*, 220 N.C. 367, 17 S.E.2d 479 (1941). In any event, estoppel and waiver do not apply unless the defendant meets its burden of proof on each of the elements of estoppel and waiver.

The evidence before the trial court, however, creates an issue of fact as to whether Mr. Grady was the agent of plaintiff, the insurer, or of defendant, the insured, or both. 16 *John Alan Appleman & Jean Appleman, Insurance Law and Practice* §§ 8721, 8722 (1981). Therefore, there is a genuine issue of material fact with regard to the issues of estoppel and waiver, and summary judgment for plaintiff was improper. For these reasons, the decision of the trial court is

Reversed and remanded.

Judges JOHNSON and MARTIN, JOHN C., concur.

STATE OF NORTH CAROLINA v. JIMMY KELLY SOLES

No. 9327SC1273

(Filed 5 July 1995)

1. Conspiracy § 45 (NCI4th)— acquittal of coconspirators in separate trial—conviction of defendant upheld

The conviction of one defendant in a conspiracy prosecution will be upheld where all alleged coconspirators are acquitted in a separate subsequent trial.

Am Jur 2d, Conspiracy §§ 24-26.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 ALR4th 192.

2. Evidence and Witnesses § 1222 (NCI4th)— statement resulting from polygraph examination—voluntariness of statement

There was no merit to defendant's contention that the trial court committed reversible error in denying his motion to suppress a statement given by him as a result of a polygraph examination because the statement was obtained in a coercive and oppressive manner, since defendant's first statement was made when defendant was not under arrest but was free to leave, and it was made voluntarily; because defendant was not under arrest, he was not entitled to *Miranda* warnings before making the statement; his second statement was therefore not the fruit of an earlier illegally obtained statement; the second statement was voluntary in that defendant voluntarily came to the police station, voluntarily submitted to the polygraph, and was free to leave at any time; and neither the polygraph operator's asking questions off the polygraph nor questioning by officers vitiated defendant's waiver of his *Miranda* warnings with respect to the second statement.

Am Jur 2d, Evidence § 749.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination. 89 ALR3d 230.

Admissibility of polygraph evidence at trial on issue of voluntariness of confession made by accused. 92 ALR3d 1317.

3. Evidence and Witnesses § 1470 (NCI4th)— coconspirator's possession of weapon—admissibility of evidence

In a prosecution of defendant for conspiracy to commit murder, the trial court did not err in admitting testimony related to defendant's coconspirator's possession of a pistol of the same caliber and type which killed the victim.

Am Jur 2d, Conspiracy § 40.

STATE v. SOLES

[119 N.C. App. 375 (1995)]

Appeal by defendant from judgment entered 30 June 1993 by Judge Robert D. Lewis in Gaston County Superior Court. Heard in the Court of Appeals 17 October 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General James P. Erwin, Jr., for the State.

Childers, Fowler & Childers, P.A., by David C. Childers, for defendant appellant.

COZORT, Judge.

Defendant was indicted for second degree murder, armed robbery and conspiracy to commit murder. On 11 February 1993, defendant was convicted of conspiracy to commit murder and was sentenced to eight years in prison. On appeal, defendant contends the trial court erred by (1) denying defendant's motion to suppress a statement given by him as a result of a polygraph examination because this statement was obtained in a coercive and oppressive manner, (2) overruling defendant's objection and denying his motion to strike irrelevant testimony concerning the purchase of a firearm because this firearm was never connected to the murder which defendant was alleged to have conspired to commit, and (3) denying defendant's request for a special instruction which would have allowed the jury to consider evidence which might have tended to show that the crime was committed by someone else. Defendant also filed a motion for appropriate relief seeking to have his conviction reversed due to dismissal of charges against his coconspirator, Donal Wright. We deny the motion for appropriate relief and find no error in the trial.

On 23 January 1990, the badly decomposed body of a black male with gunshot wounds was found in the Mountain Island Dam area north of Mt. Holly, North Carolina. This body was identified as Shawn Ford. Shawn Ford was a drug dealer who sold to Jimmy Soles, defendant herein, and Donal Wright. During early December 1989, Wright approached defendant Soles with a scheme to rob and murder Ford. The plan was for defendant to lure Ford to a remote location on the pretense of making a cocaine buy. At that point, Wright was to kill Ford and share the stolen cocaine with defendant.

On 9 February 1990, officers with the Gaston County Police Department questioned defendant about his involvement in Ford's death. On 15 February 1990, defendant submitted to a polygraph

examination at the request of the Gaston County Police Department. Joseph A. Kenny, a Forensics Polygraph Examiner, administered the polygraph. Defendant was given Miranda warnings before and after the polygraph examination. During this examination, Kenny confronted defendant about observed patterns of deception. Defendant then made a statement which served as the basis for indictments for murder, conspiracy to commit murder, and armed robbery. On 23 January 1992, defense counsel made a motion to suppress defendant's statement. This motion was denied by Judge Robert E. Gaines on 13 March 1992, and at trial by Judge Robert E. Lewis.

Defendant was tried during the 8 February 1993 Criminal Session of Gaston County Superior Court. The State presented evidence, including Wright's recent possession of a Taurus .357 caliber pistol, which linked defendant and Wright to Ford's death. This same type of pistol was mentioned in defendant's statement. Furthermore, a .38/.357 caliber bullet was found near the location of Ford's body. A firearms expert, after examining the bullet, concluded from the bullet markings that the bullet could have been fired from a Taurus-manufactured pistol.

At trial, defendant contended that this Taurus pistol was never linked in any way to the murder. Defendant requested a special instruction that persons other than defendant committed the murder; the trial court denied the request. On 11 February 1993, the jury acquitted defendant of murder and armed robbery and convicted defendant of conspiracy to commit murder. Defendant agreed to testify against Donal Wright, and on 30 June 1993, Judge Lewis sentenced defendant to eight years in prison. Defendant gave notice of appeal from his conviction and sentence on 30 June 1993.

On 1 September 1993, after a jury had been impaneled in the Wright case, defendant refused to testify against Wright, asserting his privilege against self-incrimination because his case was before the Court of Appeals. The State took a voluntary dismissal as to the charge of conspiracy to commit murder against Wright. Wright made a motion to dismiss the remaining charges of second degree murder and armed robbery which the trial court granted.

On 23 February 1994, defendant filed a motion for appropriate relief seeking to have his conviction reversed due to the dismissal of charges against Donal Wright. Judge John Gardner granted defendant's motion. On 4 March 1994, the State made a Motion to File Addendum to the Record on Appeal with a copy of Judge Gardner's

Order granting defendant's motion for appropriate relief. This Court treated the State's motion as a petition for writ of certiorari. This Court held that, since the case was in the appellate division, the trial court was without jurisdiction to rule upon the motion for appropriate relief; therefore, the order was vacated. Defendant filed a motion for appropriate relief in this Court on 25 March 1994. We now address this motion.

[1] Where all participants charged in a conspiracy have been legally acquitted, except the defendant, the conviction against the sole remaining defendant must be set aside. *State v. Raper*, 204 N.C. 503, 504, 168 S.E. 831, 832 (1933). The policy behind this rule is that there is no one left with whom the remaining party could have agreed; therefore, there is no conspiracy without an unlawful agreement. *State v. Littlejohn*, 264 N.C. 571, 574, 142 S.E.2d 132, 134 (1965).

Defendant contends that the dismissal of the conspiracy to commit murder charge against Donal Wright after the jury was impaneled constituted an acquittal under *State v. Raper*, 204 N.C. 503, 168 S.E. 831. In *Raper*, defendant was tried with two alleged coconspirators. Five people were part of the conspiracy, but two were acquitted at a previous trial. The evidence presented at trial pointed to defendant's codefendants as coconspirators. The defendant was convicted while his codefendants were acquitted. The Supreme Court held that one person may not be convicted of conspiracy where all the other defendants charged with conspiracy are acquitted. *Id.* at 504, 168 S.E. at 831-32.

In the present case, we have two conspirators tried at separate trials. The codefendant was tried at a separate subsequent trial from the defendant in the present case. Thus, *Raper* is distinguishable. There is no case law in North Carolina that speaks directly to the facts at hand. Some courts have refused to extend the general rule, that the conviction of only one defendant in a conspiracy prosecution will not be upheld where all alleged coconspirators are acquitted, where the alleged coconspirators are acquitted in a separate subsequent trial. Michelle Migdal Gee, Annotation, *Prosecution or Conviction of One Conspirator As Affected By Disposition of Case Against Coconspirators*, 19 A.L.R.4th 192 § 3[b] (1983). Persuasive authority, which sheds light on this question, is found in the following:

> We think that the verdict of a jury on a separate trial, finding one of two persons charged with conspiracy to be guilty, concludes

> also the guilt of the other for purposes of that trial, otherwise no conviction could have been had. . . . This element of the crime having been established as against the convicted defendant, the crime was complete and the conviction final as to him, irrespective of what some other jury on different evidence might decide. . . . The subsequent acquittal of the other necessarily amounts to no more than that there was a failure of proof as to him. . . . It seems to us that reason and sound logic do not support the rule where one of two conspirators is convicted in a separate trial, that he shall be discharged because the second may be acquitted for a multitude of reasons having nothing to do with his guilt.

Gardner v. Maryland, 286 Md. 520, 527, 408 A.2d 1317, 1321 (1979) (quoting *Platt v. State*, 8 N.W.2d 849, 855 (Neb. 1943)). We now adopt this view holding that the conviction of one defendant in a conspiracy prosecution will be upheld where all alleged coconspirators are acquitted in a separate subsequent trial. Defendant's motion for appropriate relief is denied.

[2] In his first assignment of error, defendant argues that the trial court committed reversible error in denying defendant's motion to suppress a statement given by him as a result of a polygraph examination because the statement was obtained in a coercive and oppressive manner. We disagree.

Miranda warnings are required where a defendant undergoes custodial interrogation. *State v. Phipps*, 331 N.C. 427, 441, 418 S.E.2d 178, 185 (1992). Custodial interrogation " 'mean[s] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L.Ed.2d 694, 706 (1966)). In order to determine whether a person is in custody, the test is whether a reasonable person in the suspect's position would feel free to leave. *State v. Rose*, 335 N.C. 301, 334, 439 S.E.2d 518, 536 (1994).

In this case, Gaston County police officers interviewed defendant on 9 February 1990. Defendant argues the environment was coercive and oppressive because he was interviewed for four hours, where one of the interviewing officers was "hot-headed" and used abusive language. Defendant also contends that the second interview would not have occurred if he had been advised of his *Miranda* warnings at the first interview. "The Fifth Amendment requires suppression of a con-

fession that is the fruit of an earlier statement obtained in violation of *Miranda* only when the earlier inadmissible statement is 'coerced or given under circumstances calculated to undermine the suspect's ability to exercise his or her free will.' " *State v. Morrell*, 108 N.C. App. 465, 474, 424 S.E.2d 147, 153 (quoting *Oregon v. Elstad*, 470 U.S. 298, 309, 84 L.Ed.2d 222, 232 (1985)), *disc. review denied, cert. denied, and appeal dismissed*, 333 N.C. 465, 427 S.E.2d 626 (1993). In the instant case, the officers took defendant to Gastonia to be questioned with his consent. Defendant concedes that he was free to leave and voluntarily gave a statement to police officers. Defendant was not handcuffed during the interview, was left alone, and allowed to go to the vending machines. Thus, defendant's statement was neither coerced nor made under circumstances calculated to undermine his free will. Furthermore, defendant was not in custody and not entitled to *Miranda* warnings before making any statements. Therefore, the second statement is not the fruit of an earlier illegally obtained statement.

At this second interview, defendant asserts that his constitutional rights against self-incrimination and due process were violated when the polygraph examiner confronted defendant about patterns of deception and questioned him off the polygraph. Officers informed defendant of his *Miranda* warnings prior to the administration of the polygraph and prior to defendant's written statement. He signed a waiver form and polygraph consent form prior to the polygraph. We first recognize that defendant was not in custody during this questioning because he voluntarily came to the police station for the polygraph and was free to leave at any time. Hence, no *Miranda* warnings were required. However, even assuming that defendant was in custody, defendant was given his *Miranda* warnings, which he waived. The voluntariness of a confession is examined in light of the totality of the circumstances. *State v. Barlow*, 330 N.C. 133, 140-41, 409 S.E.2d 906, 911 (1991). Looking at the totality of the circumstances, this confession was voluntary in that defendant voluntarily came to the police station, voluntarily submitted to the polygraph, and was free to leave at any time. Therefore, we hold that neither the polygraph operator asking questions off the polygraph nor questioning by officers vitiated defendant's waiver of his *Miranda* warnings with respect to this second statement.

[3] Defendant next contends that the trial court committed reversible error by overruling defendant's objection and denying his motion to strike irrelevant testimony concerning the purchase of a

firearm because the firearm was never connected to the murder which defendant was alleged to have conspired to commit and such evidence carried a great risk of undue prejudice. We disagree.

Relevant evidence is that which has the tendency to prove or disprove a material fact. N.C. Gen. Stat. § 8C-1, Rule 401 (1992). Relevant evidence is admissible, N.C. Gen. Stat. § 8C-1, Rule 402 (1992); however, relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (1992).

In the instant case, Donal Wright's possession of a Taurus .357 pistol on 19 October 1989 is relevant where the victim died from gunshot wounds, a spent .38/.357 bullet was found in close proximity to the victim's body, and this bullet had markings consistent with those of a Taurus pistol. The facts at hand are similar to those in *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). In *Bullard*, the victim died of multiple knife and gunshot wounds, and a .22 caliber bullet was found in the victim's body. The court held that the admission of evidence of defendant's possession of a .22 caliber pistol approximately three months prior to the murder was proper. *Id.* at 156-57, 322 S.E.2d at 386. Likewise, in the present case, the testimony indicates that defendant's coconspirator was in possession of a Taurus .357 caliber pistol approximately two months before the victim was murdered. The acts of a coconspirator in furtherance of that conspiracy are admissible against all conspirators. *State v. Gibbs*, 335 N.C. 1, 47-48, 436 S.E.2d 321, 347-48 (1993), *cert. denied*, —— U.S. ——, 129 L.Ed.2d 881 (1994). Therefore, the testimony related to defendant's coconspirator possessing a .357 caliber pistol is admissible against defendant.

In his last assignment of error, defendant contends that the trial court erred in denying defendant's request for a special instruction which would have allowed the jury to consider evidence which might have tended to show that the crime with which defendant was charged was committed by someone else. We disagree.

The trial court must give a requested instruction when supported by the evidence in the case. *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988); *State v. Lane*, 115 N.C. App. 25, 31, 444 S.E.2d 233, 237, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 753 (1994). Here, even if failure to give this instruction was error, the error would at most be harmless in light of the overwhelming evidence of defend-

ant's guilt, including his confession and coconspirator Wright's possession of the same caliber and type of weapon which killed the victim.

No error.

Chief Judge ARNOLD and Judge LEWIS concur.

WILLIAM FRANKLIN PAYNE, JR., PLAINTIFF v. PARKS CHEVROLET, INC., DEFENDANT

No. COA94-919

(Filed 5 July 1995)

Automobiles and Other Vehicles § 228 (NCI4th)— sale of damaged vehicle—failure to inform buyer—knowledge of seller —sufficiency of evidence

In an action where plaintiff alleged that defendant dealer sold him a used truck without disclosing that the truck had been involved in a collision requiring repairs costing in excess of 25% of the vehicle's fair market value in violation of N.C.G.S. §§ 20-71.4(a) and 20-348(a), the evidence was sufficient for the jury where it tended to show that the previous owner told defendant he had wrecked the truck and had purchased it from a seller of wrecked vehicles; an experienced mechanic would have seen significant damage to the truck upon inspection; defendant knew or reasonably should have known of damage to the vehicle which exceeded 25% of the its fair market value; and defendant made no written disclosure of this fact to plaintiff.

Am Jur 2d, Automobiles and Highway Traffic §§ 731, 732, 734.

Appeal by defendant from judgment entered 14 April 1994 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 11 May 1995.

Ronald B. Black for plaintiff-appellee.

Craige, Brawley, Liipfert, Walker & Searcy, L.L.P., by William W. Walker, for defendant-appellant.

JOHNSON, Judge.

Plaintiff commenced the following action on 27 May 1992 alleging that in December 1990, defendant sold him a used truck without disclosing that the truck "had been involved in a collision to the extent that the cost of repair exceeded twenty-five percent (25%) of its fair market value," in violation of North Carolina General Statutes §§ 20-71.4(a) (1993) and 20-348(a) (1993). Defendant filed an answer on 27 October 1992, denying plaintiff's principal allegations.

The action was tried before Judge Chester C. Davis and a jury from 22 January to 24 January 1994. The jury answered the issues as follows:

1. Was the 1986 Ford F150 pickup sold by Parks Chevrolet, Inc. to William Franklin Payne, Jr. damaged prior to such sale to the extent that the cost of repairing such vehicle exceeded twenty-five (25) percent of its fair market retail value?

Yes Yes

No _____

2. If so, did the defendant Parks Chevrolet know or should it reasonably have known that the vehicle had been damaged to such extent?

Yes Yes

No _____

3. If so, did the defendant Parks Chevrolet act with such gross negligence or recklessness in its dealings with plaintiff as to indicate an intent to defraud him?

Yes Yes

No _____

4. If so, what amount of damage, if any, has the plaintiff William Franklin Payne, Jr. sustained as a result of the defendant's failure to disclose the damage to the vehicle to him?

$7,000.00 + court cost

Defendant filed motions for judgment notwithstanding the verdict, a new trial, and remittitur on 3 March 1994. The trial court denied the motions.

Defendant sold to plaintiff a 1986 Ford F150 with four-wheel drive. The truck's DMV title history shows that the truck's first owner was Green Ford, Inc., in Greensboro. Green Ford sold the truck new to William and Doris Nelson of Greensboro in October 1985. The Nelsons sold the truck back to Green Ford in March 1987 with mileage of 4,554; and Green Ford immediately resold the truck to Fred H. Grubb of High Point. Mr. Grubb sold the truck, with mileage of 18,504, to Hodge Motor Co. in Archdale, North Carolina in December 1987; and Hodge immediately resold the truck to D.D.S. & M. Auto Sales in Sophia, North Carolina.

D.D.S. & M. sold the truck, mileage 19,872, to Matthew S. Cain of Trinity in June 1988 for $6,630.00. Cain used the truck for everyday driving and to pull a trailer and a race car on trips that averaged 30 to 60 miles one way. He had no major difficulties with the truck, but he did replace the front springs and the clutch, reline the brakes, align the wheels, and chain the transfer to the frame because the shift lever moved when he pulled a heavy load. Eventually, Cain sold the truck because it did not have enough power for pulling his trailer.

Mr. Cain sold the truck to defendant, with mileage of 55,862, in November 1990. Mr. Cain told defendant's salesman he had one minor accident with the truck that damaged a headlight and the left front fender and cost $250.00-300.00 to repair. Mr. Cain also told the salesman he had bought the truck from a man (D.D.S. & M. Motors) who bought wrecked vehicles and resold them. The salesman asked Mr. Cain if he knew whether, before he bought the truck, it had been in a collision that had caused over 25% damage; Mr. Cain said he had no idea. Mr. Cain then signed a form Damage Disclosure Statement that to the best of his knowledge, the truck had not "been damaged by collision or other occurrence to the extent that damages exceed 25% of its value at the time of the collision or other occurrence." Defendant's salesman testified that he saw nothing about the truck that led him to believe it had been substantially damaged before November 1990.

Defendant presented evidence that it routinely inspected all vehicles, like this truck, that it intended to resell at retail; and that defendant's body shop had no record of making any repairs on Mr. Cain's truck.

Defendant sold the truck to plaintiff, without a warranty, in December 1990 for about $7,000.00. Defendant's salesman told plaintiff that defendant's mechanics had checked out the truck and it worked fine. Defendant did not give plaintiff a Damage Disclosure

Statement and did not say anything to plaintiff about the truck being in a prior accident.

Plaintiff drove the truck for about a year, to about 71,000 miles. The U-joint fell out and the transfer case began leaking in the first week. The truck always pulled to the right. In May 1992, a body shop inspected the truck and found multiple serious problems with the frame and related parts. The shop manager opined at trial that the truck's condition was caused by an accident and that an experienced mechanic would have seen the damage on inspection. The manager testified that it would have cost $2,711.60, in May 1992, to make the frame like new and that other repairs were necessary.

Plaintiff and his father testified that, at the time of the trial, the truck was unsafe to drive (and had not been driven since March 1992), but had parts with a value of $2,000.00.

Defendant argues that the trial court erred in denying its motions for directed verdict and for judgment notwithstanding the verdict because plaintiff failed to present a prima facie case that defendant had violated North Carolina General Statutes §§ 20-71.4(a) and 20-348(a). We disagree.

In accordance with Rule 50, if the evidence considered in the light most favorable to plaintiff is sufficient, it is a matter for the jury. *Meacham v. Board of Education*, 59 N.C. App. 381, 297 S.E.2d 192 (1982), *disc. review denied*, 307 N.C. 577, 299 S.E.2d 651 (1983). North Carolina General Statutes § 20-71.4 provides that:

> (a) It shall be unlawful and constitute a misdemeanor for any transferor who knows *or reasonably should know* that a motor vehicle has been involved in a collision or other occurrence to the extent that the cost of repairing that vehicle exceeds twenty-five percent (25%) of its fair market retail value, or that the motor vehicle is, or was, a flood vehicle, a reconstructed vehicle, or a salvage motor vehicle, to fail to disclose that fact in writing to the transferee prior to transfer of any vehicle up to five model years old. Failure to disclose any of the above information will also result in civil liability under G.S. 20-348. The Commissioner may prepare forms to carry out the provisions of this section. (Emphasis added.)

This statute was amended effective 1 January 1995 with minor changes. The instant action is the first case to construe this statute.

North Carolina General Statutes § 20-348(a) provides:

> (a) Any person who, with intent to defraud, violates any requirement imposed under this Article shall be liable in an amount equal to the sum of:
>
> (1) Three times the amount of actual damages sustained or one thousand five hundred dollars ($1,500), whichever is the greater; and
>
> (2) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.
>
> (b) An action to enforce any liability created under subsection (a) of this section may be brought in any court of the trial division of the General Court of Justice of the State of North Carolina within four years from the date on which the liability arises.

Plaintiff was required to show that: (1) defendant was a transferor, (2) who knew or reasonably should have known that the 1986 Ford F150 motor vehicle had been involved in a collision or other occurrence to the extent that the cost of repair exceeded 25% of its fair market value, and (3) who failed to disclose that fact in writing to plaintiff prior to the transfer, and that the vehicle at the time of transfer (4) was not a vehicle more than five model years old. The evidence reveals that plaintiff has met these requirements. Defendant acknowledged that it was a transferor, that it made no written disclosure to plaintiff, and that the 1986 Ford truck was under five model years old. Defendant argues, however, that plaintiff failed to sufficiently prove that defendant knew or reasonably should have known that the truck had been involved in a collision or other occurrence so that the cost of repair exceeded 25% of the fair market value. This argument is without merit.

Appellate review of a decision of the trial court is to determine whether the evidence, taken in the light most favorable to the nonmoving party, is sufficient as a matter of law to be submitted to the jury. *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 411 S.E.2d 133 (1991). Evidence of defendant's knowledge, taken in the light most favorable to plaintiff shows that: Matthew Cain, the owner before plaintiff, testified that he had a wreck in the truck and that he had bought it from a seller of wrecked vehicles; that he informed Robert Pegg, defendant's employee of these facts when he transferred the truck to defendant; that he did not know whether the cost of repair to the truck

exceeded twenty-five percent of its retail value, and that he told Mr. Pegg he did not know when Mr. Pegg presented him with a Damage Disclosure Statement; and that Mr. Pegg told him if he did not know for sure to sign the statement.

Other evidence offered by defendant's body shop manager, Eugene Smith, was that all vehicles which defendant took in trade with the intent to resell were inspected for damage. Plaintiff's witness, Michael Livengood, testified that an experienced mechanic would have seen the damage on inspection. Plaintiff also presented evidence that the cost of repair was $2,711.60. Defendant presented no evidence as to cost of repair. Evidence presented at trial showed the retail value of the truck varied from $3,500.00 (the estimate placed on the value of the vehicle by defendant at the time defendant acquired it) to $7,000.00, the price paid by plaintiff. The repair costs of $2,711.60 exceeded twenty-five percent of the truck's retail value of $1,750.00, if the truck were valued at $7,000.00.

Defendant's argument that it had no duty to investigate and inform the buyer of the vehicle's history under *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 374 S.E.2d 135 (1988) does not excuse defendant because it reasonably should have known of the extent of damages to the vehicle.

This Court in an analogous case, *Levine v. Parks Chevrolet, Inc.*, 76 N.C. App. 44, 50, 331 S.E.2d 747, 750, *disc. review denied*, 315 N.C. 184, 337 S.E.2d 858 (1985) (*quoting Nieto v. Pence*, 578 F.2d 640, 642 (5th Cir. 1978)), stated:

> We hold that a transferor who lacked actual knowledge may still be found to have intended to defraud and thus may be civilly liable for a failure to disclose that a vehicle's actual mileage is unknown. A transferor may not close his eyes to the truth. If a transferor reasonably should have known that a vehicle's odometer reading was incorrect, although he did not know to a certainty the transferee would be defrauded, a court may infer that he understood that risk of such an occurrence.

This Court in *Levine* found that defendant's mechanics had ignored several signs of wear on the vehicle which indicated the correct mileage of the car. Likewise, defendant in the case *sub judice* may not ignore statements made by the previous owner, the signs of damage to the truck, and its failure to provide a Damage Disclosure Statement

to plaintiff. Thus, defendant was either grossly negligent or recklessly disregarded indications made by the previous owner.

For the foregoing reasons, the evidence presented was sufficient to allow a jury to find that defendant knew or *reasonably should have known* of damage to the vehicle which exceeded twenty-five percent (25%) of the vehicle's fair market value.

Defendant's final argument is that the trial court erred in denying defendant's motion for a new trial because the jury's award of damages was so excessive as to manifest a disregard of the court's instructions and was insufficient to justify the verdict. North Carolina General Statutes § 20-348(a) references actual damages and the jury awarded actual damages, the price plaintiff paid for the truck, and the trial court in its discretion allowed the award to stand. As defendant has failed to show a manifest abuse of discretion on the part of the trial court, his argument fails; therefore, the trial court's judgment and order is affirmed.

Affirmed.

Judges GREENE and MARTIN, JOHN C. concur.

STATE OF NORTH CAROLINA EX. REL. LEA ANNA LEFEAVERS TUCKER, PLAINTIFF v. CARL FRINZI, DEFENDANT

No. COA94-1093

(Filed 5 July 1995)

Judgments § 237 (NCI4th)— reimbursement for public assistance funds—State and county in privity—res judicata applicable

The State's action to establish paternity and to recover public assistance funds expended for the prior maintenance of the minor child in question was barred by res judicata where Forsyth County had previously brought an action seeking the same reimbursement, and the County and the State were therefore in privity.

Am Jur 2d, Judgments §§ 524 et seq.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 30 July 1994 *nunc pro tunc* 14 June 1994 by Judge C. W. Bragg in Union County District Court. Heard in the Court of Appeals 7 June 1995.

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

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellee.

JOHNSON, Judge.

This appeal is from an order dismissing an action brought by the State of North Carolina to establish paternity and award support for the minor child of Lea Anna Lefeavers Tucker, including reimbursement of public assistance funds expended for the prior maintenance of the child.

The minor child who is the subject of this action was born 19 July 1976 to Lea Anna Lefeavers (now, Tucker). At that time, Ms. Tucker was sixteen years old and not married. In order to provide for the minor child's needs, Ms. Tucker applied for and received public assistance. In December of 1978, the Forsyth County Department of Social Services (DSS) filed an action against defendant Carl Frinzi to establish paternity, support and reimbursement of public assistance. On 17 February 1981, the Forsyth County DSS voluntarily dismissed the action pursuant to N.C.R. Civ. P. 41(a).

In 1993, Ms. Tucker sought the services of the Union County Child Support Enforcement (CSE) agency. The CSE program in Union County is operated and administered by the State of North Carolina through the Department of Human Resources, Division of Social Services, CSE Section. On 7 October 1993, the State brought the present action against defendant, seeking to establish paternity of and support for the minor child. At a hearing held on 14 June 1994, the trial court concluded that *res judicata* applied and the court dismissed the action. Plaintiff filed notice of appeal to our Court.

Plaintiff first argues on appeal that the trial court erred in granting defendant's motion to dismiss the civil paternity action brought by the State because neither the principle of *res judicata* nor collateral estoppel barred the action. Specifically, in discussing the two different actions brought in the name of Ms. Tucker, plaintiff argues that while the legal claims involved in both actions are the same, the parties are not the same and are not in privity. We note that in the action

filed in December of 1978, the plaintiff was Forsyth County (ex. rel. Ms. Tucker); in the action filed 7 October 1993, the plaintiff was the State of North Carolina (ex. rel. Ms. Tucker).

"*Res judicata*, or claim preclusion, prevents a party, or one in privity with that party, from suing twice on the same claim or cause of action when a final judgment on the merits was entered in the first suit." *State v. Lewis*, 63 N.C. App. 98, 102, 303 S.E.2d 627, 630 (1983), *aff'd*, 311 N.C. 727, 319 S.E.2d 145 (1984). On the other hand, collateral estoppel, also known as issue preclusion, "prevents the relitigation of specific issues actually determined in a prior action between the same parties or their privies. The key question always concerns the issue(s) *actually litigated and decided* in the original action. Consequently, collateral estoppel may be raised in a subsequent action even though that action involved a claim for relief or cause of action different from the first." *Id.*

Plaintiff cites *County of Rutherford ex. rel. Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990) in support of its position that the parties are not the same or in privity. In *Rutherford*, Rutherford County sought to establish the defendant as the natural father of the minor child of Ms. Pamela Hedrick, who had been receiving public assistance on behalf of the child from Rutherford County. The trial court found that the defendant had been prosecuted in an earlier proceeding by the State of North Carolina and found not to be the father of the minor child. The trial court further found that Rutherford County was in privity with the State of North Carolina, and that therefore, the doctrine of *res judicata* applied. On appeal, our Court first noted that "since a civil action filed by the County against the defendant is not an attempt to relitigate the same claim litigated in the previous action, this appeal presents a question of collateral estoppel, not *res judicata*." *Id.* at 74-75, 394 S.E.2d at 265. Our Court went on to state that the question in *Rutherford* was "whether the State of North Carolina, who prosecuted [a] criminal nonsupport action, and the County, who now seeks reimbursement in a civil action for public assistance paid, [were] in privity." *Id.* at 76, 394 S.E.2d at 266. Our Court held that although "the State and County were interested in proving the same state of facts[,] that the defendant was the child's father[,] . . . the County had no control over the previous criminal litigation, and nothing in the record indicates that the interest of the County was legally represented in the criminal trial." *Id.* Therefore, our Court reversed the trial court, holding that the trial court erred in concluding that the County was in privity with the State of North Carolina.

Our Court in *Rutherford* based its holding in part on *Settle v. Beasley*, 309 N.C. 616, 308 S.E.2d 288 (1983). In *Settle*, a paternity action was brought against the defendant by the minor child, through his guardian ad litem, seeking support from the defendant. It was disclosed at the summary judgment hearing that a prior action had been brought against the defendant in Johnston County in the name of the plaintiff's mother by the Child Support Enforcement Agency of Johnston County to establish paternity; in that prior action, the court concluded that the defendant was not the father of the minor child. At trial in *Settle*, the trial court granted defendant's motion for summary judgment, that the minor child in *Settle* was in privity with his mother, the plaintiff in the prior action. Our Court affirmed the trial court but the Supreme Court reversed the decision. The Supreme Court reasoned that "the issue [is] whether [the minor child] is in privity with the real party in interest in the prior action, Johnston County." *Id.* at 619, 308 S.E.2d at 290. The Court ultimately held that the minor child's interests, which were of a personal nature, were not represented in the prior action, the interests of the real party in interest, Johnston County, being solely economic.

Rutherford also cites *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976), where the Court held there was no privity between the State, who instituted a criminal action for nonsupport against the defendant, and the mother of the minor child, who instituted a civil action for nonsupport later. The Court in *Tidwell* noted that "the plaintiff mother swore out the warrant which initiated the criminal prosecution against the defendant and, presumably, was a witness for the State at the trial of that action. She was not, however, in control of the prosecution. The State was represented by its prosecuting attorney, not an attorney employed by the mother." *Id.* at 114, 225 S.E.2d at 826.

We do not believe *Rutherford* is applicable on the facts of the instant case. As in *Rutherford*, *Settle*, and *Tidwell*, the instant case turns on the question of whether the State is in privity with the real party in interest in the prior action, Forsyth County DSS. If so, the State is precluded from bringing this action based on *res judicata*. Our Supreme Court has said that "[t]he meaning of 'privity' for res judicata purposes may be elusive[.]" *Settle*, 309 N.C. at 620, 308 S.E.2d at 290. However, as to "privity," the Court has often stated that "[i]t denotes a mutual or successive relationship to the same rights of property[.]" *Id.* We observe that North Carolina General Statutes § 110-137 (1991) states in pertinent part that "[b]y accepting public

assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children up to the amount of child support paid." *See also Jackson Co. ex. rel. Smoker v. Smoker*, 115 N.C. App. 400, 445 S.E.2d 408, *disc. review allowed*, 338 N.C. 517, 456 S.E.2d 811 (1994) (noting the IV-D child support enforcement program is administered by state agencies in some counties, and by county agencies in other counties) and *Carrington v. Townes*, 53 N.C. App. 649, 655, 281 S.E.2d 765, 769 (1981), *modified*, 306 N.C. 333, 293 S.E.2d 95 (1982) (where our Court noted, "[i]n the case before us, the State, through its subdivision (County), is the real party in interest in the civil paternity proceeding").

Accordingly, we believe on the facts of this case, the State and Forsyth County DSS share "a mutual or successive relationship to the same rights of property[,]" that being the reimbursement of public assistance funds expended for the prior maintenance of the minor child; therefore, we find the State *is* in privity with the party in interest in the prior action, Forsyth County DSS. *Compare State v. Lewis*, 311 N.C. 727, 319 S.E.2d 145) (where the parties to the prior criminal action were the same or were in privity with the parties to the civil action, collateral estoppel applied). Therefore, the State is precluded from bringing this action based on *res judicata*.

Plaintiff further argues that *res judicata* cannot be applied in the instant case because there has never been a final adjudication on the merits of the claims raised in the action by Forsyth County DSS, because a civil action to establish paternity can be brought at any time prior to a child's eighteenth birthday. We disagree. Even if we consider the dismissal by Forsyth County DSS in 1981 a voluntary dismissal, we find that it became a final adjudication when Forsyth County DSS failed to refile within one year. *See Robinson v. General Mills Restaurants*, 110 N.C. App. 633, 430 S.E.2d 696 (1993).

Affirmed.

Judge MARTIN, JOHN C. concurs.

Judge GREENE dissents.

Judge GREENE dissenting:

Because I do not agree that the State and Forsyth County DSS are in privity, the principles of res judicata and collateral estoppel do not preclude the State from bringing this action. I would reverse the order of the trial court and remand for trial.

The first action to establish paternity and support was filed by the Forsyth County DSS. The second action to establish paternity and support was filed by the State of North Carolina. At the time the first action was filed, the mother lived in Forsyth County and that county's Child Support Enforcement Program was administered by the Forsyth County Board of Commissioners. At the time of the second action, the mother lived in Union County and that county's Child Support Enforcement Program was administered by the North Carolina Department of Human Resources. *See* N.C.G.S. § 110-141 (1991) (permitting operation by either the State or the County). Although the State and the County were interested in proving that the defendant was the child's father, the State had no control over the first action filed by the County, and nothing in this record indicates that the interest of the State was represented in the first action. *See County of Rutherford v. Whitener*, 100 N.C. App. 70, 76, 394 S.E.2d 263, 266 (1990) (no privity where County administered the Child Support Enforcement Program); *State v. Lewis*, 311 N.C. 727, 733-34, 319 S.E.2d 145, 149-50 (1984) (privity where State administered the Child Support Enforcement Program). Accordingly, the State was not in privity with the County, and the doctrines of res judicata and collateral estoppel do not bar the State's action. This is especially so in this case where the issues of paternity and support were never litigated in the first claim, and it cannot be argued that the State was adequately represented in the prior action. In this instance, to hold otherwise would violate the State's rights of fundamental fairness and due process.

I am aware that permitting two different Child Support Enforcement agencies, one administered by the State and one administered by a County, to file separate claims to establish paternity could lead to abuses. The mother could be encouraged to move from one jurisdiction to another for the sole purpose of vesting another agency with the right to file a new claim against the same defendant. The solution to that possibility is not, however, to deny parties the right to file good faith claims to establish paternity, which may 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, 703, 36 S.E.2d. 276, 278 (1945).

STATE OF NORTH CAROLINA v. CLARENCE JUNIOR WATSON

No. COA94-955

(Filed 5 July 1995)

Searches and Seizures § 80 (NCI4th)— cocaine seized from defendant—no arrest without probable cause

Officers had a reasonable suspicion of criminal activity to justify an investigatory stop of defendant, and officers' actions during the stop were reasonable, since officers approached defendant at a place which was known for drug activity; the officers had made numerous drug arrests in the same place; one of the officers had previously arrested defendant for a drug offense; defendant took evasive action by placing drugs in his mouth; officers were familiar with this practice of drug dealers to hide drugs in their mouths to elude detection; one officer told defendant to spit out the drugs or the drugs would kill him; and an officer placed pressure on defendant's throat in order to make him spit out the drugs.

Am Jur 2d, Searches and Seizures §§ 50, 71.

Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force. 66 ALR Fed. 119.

Appeal by defendant from judgment entered 9 May 1994 by Judge Loto G. Caviness in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 June 1995.

Attorney General Michael F. Easley, by Associate Attorney General Wm. Dennis Worley, for the State.

Public Defender Isabel Scott Day, Assistant Public Defender Kevin P. Tully, for defendant-appellant.

JOHNSON, Judge.

The evidence at the hearing showed the following: On 27 December 1993 at approximately 7:40 p.m., Officer A. N. Robinson of the Charlotte Police Department saw defendant standing in front of Josh's Convenience Store. Officer Robinson had made nearly fifty arrests at or near Josh's Convenience Store. As a unmarked police car pulled up, he saw defendant put something in his mouth. Officer Robinson believed the items to be crack cocaine. Officer Robinson

knew defendant had previously been arrested on drug charges. When the officer approached defendant, defendant tried to go into the store. Officer Robinson grabbed him. At that time, defendant acted very nervous and tried to take a drink of Coca-Cola, as if he was trying to swallow something. It is a common practice of drug dealers when they see the police to drop the items or put the items in their mouth and try to conceal it from the officers or attempt to swallow the items to avoid detection. Officer Robinson grabbed defendant by the back of his jacket and told him to spit out the drugs. He then told defendant not to swallow or the drugs would kill defendant. Defendant spit out the drugs. Officer Malone recovered three bags of substance believed to be crack cocaine that defendant had spit out onto the ground.

Officer M. N. Baltimore of the Charlotte Police Department testified that Officer Robinson had said to him that he had seen defendant put something in his mouth. Officer Baltimore had been on the police force for two years and seven months and had made ten drug arrests at this location.

Officer Daniel Malone had been with the City of Charlotte Police Department for four and one-half years. Officer Malone testified that he had made between twenty-five and thirty arrests for cocaine in the last year and a half at the same location. Officer Malone testified that he had known defendant for some time and knew that defendant sold drugs in the north Charlotte area. This was the third time he had arrested defendant.

From the evidence presented, Judge Caviness made findings of fact and conclusions of law which included the following: that Officer Robinson saw defendant in front of Josh's Convenience Store; that Officer Robinson testified that he has made approximately fifty cocaine arrests in the near vicinity of Josh's Convenience Store; that other officers testified that they too had made cocaine arrests in this area; that Officer Malone testified to twenty-five to thirty arrests near the store over a period of a year and a half; that Officer Baltimore testified that something in the nature of ten drug arrests had been made in the area; that evidence shows defendant looked up and saw the officers, and then put items in his mouth, and proceeded to return to the store; that Officer Robinson grabbed defendant at his jacket back to prevent him from going into the store; that defendant then attempted to drink a Coca-Cola that he was carrying with him; that the officer relieved defendant of his drink; that defendant was ordered to spit

out the objects in his mouth; that Officer Malone applied pressure to defendant at a known pressure point; that defendant eventually spat out the items in his mouth; that the items were three baggies containing crack cocaine; that defendant was frequenting an area known as having several drug arrests; that defendant was behaving in a manner upon apparent view of the officer placing items in his mouth and attempting to swallow those items while trying to go back into the store; that it created suspicious behavior in the placing of the items in his mouth and subsequent behavior; and that this evidence established probable cause for the officer to stop this individual as to his initially placing the items in his mouth in that area and under those circumstances, and also probable cause for their subsequent action and then arrest.

On 14 February 1994, defendant was indicted on charges of Resisting a Public Officer and Possession With Intent to Sell or Deliver a Controlled Substance by the grand jury. At the hearing before Judge Caviness, the court denied defendant's motions to suppress evidence. Defendant entered notice of appeal.

Defendant then pled guilty and was sentenced to six months on the misdemeanor and five years on the felony.

Defendant argues that the trial court erred in denying his motion to suppress evidence based on the fact that the evidence was seized in violation of defendant's rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution. Defendant argues that the officers' actions constituted an arrest which was not based upon probable cause.

The Fourth Amendment to the United States Constitution guarantees the right of citizens to be secure from unreasonable searches and seizures. In the instant case, there was adequate suspicion for the officers to stop and detain defendant for investigatory purposes. However, an officer may make an investigatory stop if he has a reasonable articulable suspicion based on objective facts that the person was engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357 (1979); *State v. Thompson*, 296 N.C. 703, 252 S.E.2d 776, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143 (1979). *See also Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968). Our Supreme Court has stated:

> A court must consider "the totality of the circumstances—the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. *U.S. v. Cortez*, 449 U.S. 411,

> 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981). The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. *Terry*, 392 U.S. at 21-22, 885 S.Ct. at 1880, 20 L.Ed.2d at 906; *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143 (1979). The only requirement is a minimum level of objective justification, something more than an "unparticularized suspicion or hunch." *U.S. v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1, 10 (1989).

State v. Watkins, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994). *See also State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988).

Thus, an officer's experience and training can create reasonable suspicion. Defendant's actions must be viewed through the officer's eyes. *State v. McDaniels*, 103 N.C. App. 175, 405 S.E.2d 358 (1991), *aff'd*, 331 N.C. 112, 413 S.E.2d 799 (1992). *See also State v. Thompson*, 296 N.C. 703, 252 S.E.2d 776, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143. Our Supreme Court has also noted that the presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant are sufficient to form reasonable suspicion to stop an individual. *State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992).

The officers had reasonable suspicion to suspect criminal activity when they approached defendant. The evidence shows that it was dark when the officer saw defendant standing in front of the convenience store; that upon approach of the police cars, defendant immediately attempted to enter the convenience store to avoid detention; that defendant made evasive maneuvers to avoid detection, i.e., putting the drugs in his mouth, attempting to swallow the drugs by drinking Coca-Cola and attempting to go into the store; that this area was an area of high drug transactions; and that Officer Malone had arrested defendant on two other occasions. *See State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (Court found that the fact that defendant immediately left the corner and walked away from the officers after making eye contact was an additional circumstance to be considered). A careful review of the record shows that in light of the totality of the circumstances, Officer Robinson was justified in detaining defendant for an investigatory stop.

Our inquiry now must explore whether the degree of intrusion is reasonably related to the events that took place. This Court recently stated:

> 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." 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. (Citation omitted.)

State v. Smith, 118 N.C. App. 106, 114, 454 S.E.2d 680, 685, *cert. denied and supercedeas allowed*, No. 125A95 (N.C. Supreme Court June 1, 1995). This Court in *Smith* also noted that "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." *Id.* at 115, 454 S.E.2d at 686. The evidence in the instant case reveals that the officer applied pressure to defendant's throat so that defendant would spit out the items in his mouth. Officer Robinson testified that he told defendant to spit out the drugs or the drugs would kill him. In light of the officers' experience and training including their familiarity with the area, defendant and the practice of drug dealers to hide drugs in their mouth to elude detection, we cannot state that the officer's action reached a sufficient level of unreasonableness.

The final issue to be addressed is whether there was probable cause to arrest defendant. The North Carolina Supreme Court, having discussed probable cause for arrest, stated that a reviewing court's role "is to determine whether the officer has acted as a man of reasonable caution who, in good faith and based upon practical consideration of everyday life, believed the suspect committed the crime for which he was later charged." *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 147 (1984). Factors which a court may consider in determining whether probable cause to arrest exists include: (1) the time of day, *see State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981); (2) the defendant's suspicious behavior, *see Peters v. New York*, 392 U.S. 40, 20 L.Ed.2d 917 (1968) and *State v. Bridges*, 35 N.C. App. 81, 239 S.E.2d 856 (1978); (3) flight from the officer or the area, *see Zuniga*, 312 N.C. 251, 322 S.E.2d 140; and (4) the officer's knowledge of defendant's past criminal conduct, *see State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980). Additionally, one's reputation for relevant criminal conduct may contribute to probable cause. *United States v. Harris*, 403 U.S. 573, 29 L.Ed.2d 723 (1971).

The evidence presented in the instant case reveals that Officer Robinson testified that he had personal knowledge that defendant had been arrested on several occasions for possession of drugs; that the area was a known drug activity area; that upon spotting the officers, defendant attempted to swallow the drugs and flee the area; and that defendant acted nervously upon the officer's approach. These factors considered in their totality gave the officers the requisite probable cause to arrest defendant.

Accordingly, in light of the totality of the circumstances, the officers' actions were justified. Therefore, the trial court properly denied defendant's motion to suppress the evidence.

Affirmed.

Judges GREENE and MARTIN, JOHN C. concur.

IN THE MATTER OF: ESTATE OF RALPH E. PATE, DECEASED

No. COA94-724

(Filed 5 July 1995)

Husband and Wife § 30 (NCI4th)— premarital agreement—wedding plans cancelled—wedding seven months later—agreement in full force and effect—dissent from will not permitted

The evidence was sufficient to support the clerk's findings with respect to the intentions of the parties as to a premarital agreement and to support the clerk's conclusion that the premarital agreement was in full force and effect at the time of the parties' marriage where the evidence tended to show that the parties executed a premarital agreement on 29 April 1992 by which each waived and released any right to inherit from the other or to dissent from the other's will; they subsequently called off their wedding and ended their relationship; they reconciled in late November 1992 and were married 2 December 1992; after the agreement was signed, neither ever mentioned it again; at deceased husband's request after the marriage, appellant wife placed the agreement, along with other personal papers belonging to her, in a safe deposit box where it was found when the box was inventoried under the supervision of the clerk following hus-

band's death; and there was never a written revocation of the agreement. Though the agreement did not state a specific date for the wedding, it could properly be concluded that the parties considered their wedding to have occurred within a reasonable time of the signing of the agreement, and their cancelling of the wedding did not automatically terminate the premarital agreement.

Am Jur 2d, Husband and Wife §§ 277, 294.

Appeal by Margaret Clark Pate from order entered 30 March 1994 by Judge Frank R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 23 March 1995.

Rose, Rand, Orcutt, Cauley & Blake, P.A., by William R. Rand and Susan K. Ellis, for appellant.

Connor, Bunn, Rogerson & Woodard, P.A., by David M. Connor and C. Timothy Williford, for appellees.

MARTIN, John C., Judge.

Margaret Clark Pate appeals from an order of the Superior Court affirming a determination by the Clerk of Superior Court that she has no right to dissent to the will of Ralph E. Pate or to inherit from his estate. We affirm.

The events leading to this appeal are: Ralph E. Pate, a resident of Wilson County, died testate on 26 April 1993, survived by his wife, Margaret Clark Pate, and three daughters by a previous marriage. His will was admitted to probate and letters testamentary were issued by the Clerk of Superior Court to Connie P. Holloman and Frankie P. Letchworth, who are Ralph Pate's daughters. The will made no provision for Margaret Clark Pate, and she filed a dissent from the will. In response, the co-executrixes asserted the provisions of a premarital agreement between Ralph Pate and Margaret Clark Pate as a bar to her right to dissent.

The issue of Margaret Clark Pate's right to dissent was heard by the Clerk of Superior Court. It was stipulated that Ralph E. Pate and Margaret Clark Pate executed a premarital agreement on 29 April 1992, were married 2 December 1992, and had no children of the marriage. Pursuant to the premarital agreement, each party waived and released any right to inherit from the other or to dissent from the other's will. It was further stipulated that there has been no written revocation of the premarital agreement.

In addition to the stipulated facts, the Clerk heard evidence tending to show that the premarital agreement recited that the parties "contemplate that they will become married sometime in the near future," but did not specify any particular date. At the time they executed the agreement, Ralph Pate and Margaret Clark Pate planned to be married on 17 May 1992. However, on or about 4 May 1992, Ralph Pate called off the wedding. The parties terminated their relationship for a time, but reconciled in late November 1992, and were married 2 December 1992. After the premarital agreement was signed on 29 April 1992, neither of the parties ever mentioned it to the other again. However, at Ralph Pate's request after their marriage, Margaret Clark Pate placed the premarital agreement, along with other personal papers belonging to her, in a safe deposit box, where it was found when the box was inventoried under the supervision of the Clerk of Superior Court following Ralph Pate's death.

The Clerk found facts essentially as stated above and that the couple had entered into the premarital agreement voluntarily in contemplation of their prospective marriage whenever that might occur. The Clerk found that the parties intended to be bound by the premarital agreement at the time of their marriage on 2 December 1992, and concluded, therefore, that the premarital agreement was in full force and effect at the time of the parties' marriage and Ralph Pate's death and that Margaret Clark Pate had "waived, relinquished and released all of her right, title and interest accruing to or vesting in her as the widow of Ralph E. Pate to inherit from the said Ralph E. Pate or to dissent from his Will or to receive any property from his estate."

The substance of appellant's argument in this Court is that the evidence before the Clerk of Superior Court did not support the Clerk's findings with respect to the intentions of the parties or the Clerk's legal conclusion that the 29 April 1992 premarital agreement was in full force and effect at the time of the parties' marriage on 2 December 1992. Thus, appellant contends the Superior Court judge erred when he affirmed the Clerk's order denying her right to dissent from Ralph Pate's will.

In her appeal of the Clerk's order to the Superior Court, appellant set forth specific exceptions to the Clerk's findings of fact. On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate court. *In re Estate of Swinson*, 62 N.C. App. 412, 303 S.E.2d 361 (1983). "When the order or judgment appealed from does contain specific findings of fact or con-

clusions to which an appropriate exception has been taken, the role of the trial judge on appeal is to apply the whole record test." *Id.* at 415, 303 S.E.2d at 363. In doing so, the trial judge reviews the Clerk's findings and may either affirm, reverse, or modify them. *In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967). "If there is evidence to support the findings of the Clerk, the judge must affirm." *Swinson* at 415, 303 S.E.2d at 363. Moreover, even though the Clerk may have made an erroneous finding which is not supported by the evidence, the Clerk's order will not be disturbed if the legal conclusions upon which it is based are supported by other proper findings. *See Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987), *cert denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). (In a non-jury trial, "[w]here there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions.") The standard of review in this Court is the same as in the Superior Court. *In re Estate of Outen*, 77 N.C. App. 818, 336 S.E.2d 436 (1985), *disc. review denied*, 316 N.C. 377, 342 S.E.2d 896 (1986).

The Clerk found specifically that there was no evidence tending to show that either party intended that the premarital agreement not apply to their 2 December 1992 marriage. On appeal to the Superior Court, appellant excepted to the foregoing findings, requiring the judge to review the record to determine if there was evidence to support them. Appellant argues to this Court that the finding is incorrect to the extent the Clerk determined *there was no evidence* to show that appellant did not intend the premarital agreement to apply, because she testified that she had considered the parties' reconciliation as a whole new relationship and had considered the premarital agreement null and void after the anticipated May wedding did not occur. In view of this testimony, we must agree with appellant that the Clerk erred in making the negative finding that there was *no evidence* the parties intended not to be bound by the agreement.

However, appellant's testimony was simply some evidence of her intent and did not compel a finding by the Clerk that she intended not to be bound by the agreement when she married Ralph Pate in December. Testimony that neither of the parties spoke of the agreement after its execution, that appellant put it in her safe deposit box after the marriage, and that there was never a written revocation was also relevant and properly considered by the Clerk on the issue of intent. Our review of the record before the Clerk discloses sufficient

evidence to support the Clerk's affirmative findings that when the parties signed the premarital agreement on 29 April 1992, they intended "to be bound thereby in the event that they got married," and that it was their intent "to be bound by the terms and conditions of said Prenuptial Agreement when they married on 2 December 1992." Thus, the negative finding may be disregarded as surplusage.

Appellant next contends there was insufficient evidence to support the Clerk's finding that the premarital agreement was executed by the parties in contemplation of their prospective marriage "whenever it occurred," and that the marriage occurred "in the near future" and "within a reasonable time after 29 April 1992." We disagree.

The premarital agreement recites that the parties "contemplate that they will become married sometime in the near future." While the words "the near future" are admittedly susceptible of varying interpretations, the words would seem to encompass a marriage six months or even a year later, so long as the marriage occurred within a reasonable time of the parties entering into the premarital agreement.

In addition to evidence that the parties never again spoke of the agreement after its execution, and that the premarital agreement was found in appellant's safe deposit box, where she had placed it at the request of her husband, as noted above, there was no evidence of any change in the couple's circumstances in the six months between the originally scheduled marriage date in May, and the actual wedding in December, to suggest that the protection of their respective interests, as provided by the agreement, was no longer necessary, desirable, or of concern to them. These circumstances suggest that the parties considered the marriage to have occurred within a reasonable time of the premarital agreement. We agree with the Clerk and with the Superior Court that the parties' 2 December 1992 marriage occurred within a reasonable time, as contemplated by the parties, after the execution of their premarital agreement, and appellant's contentions to the contrary are overruled.

Appellant's final argument is that the Clerk erred in concluding the premarital agreement was in full force and effect at the time the parties married on 2 December 1992, and that as a result, appellant was not entitled to dissent from her deceased husband's will. She contends the contract was terminated by operation of law when the parties did not marry on 17 May 1992, as they had planned when they signed the agreement.

"A premarital agreement becomes effective upon marriage," N.C. Gen. Stat. § 52B-5, and after marriage, may be amended or revoked only by written agreement. N.C. Gen. Stat. § 52B-6. However, we have not found any instance where the Court has decided the issue before us in this case, i.e., whether, before parties marry, a cancellation of their wedding plans automatically nullifies the provisions of a prenuptial agreement in the event the parties subsequently reconcile and marry. We note that prenuptial agreements "are to be construed liberally so as to secure the protection of those interests which from the very nature of the instrument it must be presumed were thereby intended to be secured." *Stewart v. Stewart*, 222 N.C. 387, 392, 23 S.E.2d 306, 309 (1942).

We are inclined to believe, and so hold, that the answer to the issue must be decided based on the intent of the parties as determined from the language of the agreement in question and the facts of each case. In the present case, the premarital agreement did not specify any date upon which the parties were to be married. Thus, the condition precedent to effectiveness of the agreement, the parties' marriage, must only have occurred within a reasonable time. *See Rodin v. Merritt*, 48 N.C. App. 64, 71-2, 268 S.E.2d 539, 544, *disc. review denied*, 301 N.C. 402, 274 S.E.2d 226 (1980). ("[W]here a contract does not specify the time of performance or the time of termination, the law will prescribe that performance must be within a reasonable time and that the contract will continue for a reasonable time, 'taking into account the purposes the parties intended to accomplish.' " *Citing Scarborough v. Adams*, 264 N.C. 631, 142 S.E.2d 608 (1965).)

The Clerk found that appellant and Ralph Pate entered into a premarital agreement which contemplated their future marriage, that the marriage occurred within a reasonable time thereafter, and that the parties intended to be bound by the terms of the agreement. We have determined those findings to be supported by the evidence before the Clerk, and we hold them sufficient to support the conclusion that the premarital agreement at issue in this case is fully enforceable, preventing appellant from dissenting from Ralph Pate's will. Accordingly, the judgment of the Superior Court sustaining the decision of the Clerk must be affirmed.

Affirmed.

Judges EAGLES and WALKER concur.

CAROLYN DALE TREXLER, PLAINTIFF v. K-MART CORPORATION, DEFENDANT

No. 9419SC123

(Filed 5 July 1995)

Negligence § 140 (NCI4th)— slip and fall—failure of defendant to show premises inspected—summary judgment inappropriate

In slip and fall cases where defendant moves for summary judgment, it is appropriate to place upon defendant the initial burden of gathering information about whether, when, and by whom the premises were last inspected prior to plaintiff's injury since defendant is in the superior position to acquire such information. Because defendant failed to come forward with such information in this case, the trial court erred in entering summary judgment for defendant.

Am Jur 2d, Premises Liability §§ 29, 63.

Appeal by plaintiff from order entered 16 November 1993 by Judge James M. Webb in Rowan County Superior Court. Heard in the Court of Appeals 4 October 1994; reconsidered per order dated 20 December 1994.

Wallace & Whitley, by Michael S. Adkins, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson and Allen C. Smith, for defendant-appellee.

WALKER, Judge.

Plaintiff instituted this civil action seeking damages for personal injuries she sustained when she slipped and fell in defendant's store on 18 August 1992. The trial court granted summary judgment for defendant.

The record before the trial court, which included the answers to interrogatories of both parties, a transcript of a recorded interview with plaintiff, and plaintiff's deposition, shows the following: On the afternoon of 18 August 1992, plaintiff was shopping in defendant's store and decided to try to locate the restroom. As she walked down the aisle where children's car seats were located, she slipped and fell. A customer standing about five feet away from plaintiff said that plaintiff had slipped in some water and sent for assistance. Plaintiff

stated that she did not know what she slipped on but that she would not have slipped unless there was something on the floor.

Defendant stated in its answers to interrogatories that it first became aware of the clear substance on the floor, which appeared to be water, after plaintiff fell. When asked to "[s]tate the date upon which the last inspection . . . of the premises where plaintiff fell was conducted by the defendant prior to August 18, 1992 and identify the person who performed the inspection," defendant responded:

> The exact time is unknown; however, a representative of management walks the aisles several times a day. Additionally, sales people are continually monitoring the aisles in their normal course of business.

North Carolina adheres to the principle that a store owner does not insure its patrons against slipping and falling. *See, e.g., Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 343 (1992); *Hinson v. Cato's, Inc.*, 271 N.C. 738, 738, 157 S.E.2d 537, 538 (1967).

> In a premises liability case involving injury to an invitee, the owner of the premises has a duty to exercise "ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963).

Roumillat, 331 N.C. at 64, 414 S.E.2d at 342. To hold the defendant proprietor liable, the plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence. *Roumillat*, 331 N.C. at 57, 414 S.E.2d at 342-43; *Hinson*, 271 N.C. at 739, 157 S.E.2d at 538. "When the unsafe condition is attributable to third parties or an independent agency, *plaintiff* must show that the condition 'existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or [to have] given proper warning of its presence.' " *Roumillat*, 331 N.C. at 64, 414 S.E.2d at 343(emphasis in original) (*quoting Powell v. Deifells, Inc.*, 251 N.C. 596, 600, 112 S.E.2d 56, 58 (1960)).

Defendant contends that plaintiff "failed to meet her burden of proof" as she "could only speculate as to the alleged existence of any dangerous conditions and the length of time such alleged dangerous conditions may have existed" and therefore was unable to forecast evidence of an essential element of her claim, namely, that defendant knew or should have known of a dangerous condition. Defendant therefore contends that summary judgment was properly granted in its favor.

Summary judgment is proper "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). All inferences of fact at the summary judgment hearing must be drawn against the moving party and in favor of the party opposing the motion. *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342 (*citing Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). Summary judgment is rarely appropriate in negligence cases because "the rule of the prudent [person], or other applicable standard of care, must be applied, and ordinarily the jury should apply it under appropriate instructions from the court." *Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E.2d 137, 140 (1980); *see also Roumillat*, 331 N.C. at 69-70, 414 S.E.2d at 346 (J. Frye, dissenting) (*quoting Vassey, supra*).

In negligence cases such as the instant one, defendants moving for summary judgment

> must carry the burden of establishing the lack of a genuine issue as to any material fact and their entitlement to judgment as a matter of law. . . . Defendants may meet their burden by (1) proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party (2) cannot produce evidence to support an essential element of his or her claim, or (3) cannot surmount an affirmative defense which would bar the claim. . . . "If the moving party fails in his showing, summary judgment is not proper regardless of whether the opponent responds."

Bernick v. Jurden, 306 N.C. 435, 440-41, 293 S.E.2d 405, 409 (1982) (citations omitted). *See also Roumillat*, 331 N.C. at 70, 414 S.E.2d at 346 (J. Frye, dissenting) (a plaintiff need not respond with a more detailed forecast of her evidence until the defendant meets its initial burden); *Emerson v. Tea Co.*, 41 N.C. App. 715, 721, 255 S.E.2d 768,

773 ("Consideration of whether plaintiff offered evidence to support her claim in her deposition is improper when defendant has not produced sufficient evidence to defeat plaintiff's claim in its entirety and to show that defendant is entitled to judgment as a matter of law."), *rev. denied*, 298 N.C. 202 (1979) (not reported in S.E.2d); *Keith v. Kresge Co.*, 29 N.C. App. 579, 582, 225 S.E.2d 135, 137 (1976) (plaintiff had no burden to offer evidence in support of her claim "until defendant produced evidence of the necessary certitude to negate plaintiff's claim in its entirety and show they were entitled to judgment as a matter of law"); *Tolbert v. Tea Co.*, 22 N.C. App. 491, 494, 206 S.E.2d 816, 818 (1974) ("Where . . . the movant for summary judgment does not offer evidence to establish the absence of a genuine issue as to any material fact, summary judgment should be denied even though no opposing evidence is presented."), *disapproved on other grounds by Roumillat*, 331 N.C. 57, 414 S.E.2d 339 (1992).

In *Maddox v. Friday's, Inc.*, 82 N.C. App. 145, 345 S.E.2d 690 (1986), plaintiff was injured when she stepped on a glass bottle on the dance floor of defendant's establishment. The trial court granted summary judgment for defendant on plaintiff's negligence claim. *Id.* at 145, 345 S.E.2d at 690. Plaintiff's deposition and affidavit established that she did not see the bottle until her foot hit it; before then she had not seen any other bottle or debris on the floor. She did not know how the bottle came to be on the floor or who placed it there. Defendant's deposition showed that the establishment had no rule against patrons dancing with beer bottles or glasses in their hands and many usually did so. It was not unusual for a glass or beer bottle to drop or fall to the dance floor and break, and when this happened, defendant's employees promptly cleaned the floor. *Id.* at 146, 345 S.E.2d at 691.

The Court of Appeals reversed summary judgment for the defendant, stating:

> The mere filing of a summary judgment motion requires nothing whatever of the opponent; for the movant has the burden of clearly establishing the lack of any triable issue and that it is entitled to judgment as a matter of law. . . . A defendant who contends that the plaintiff is unable to prove an essential element of his case has the burden of establishing that inability; and until he does so the plaintiff is not required to show otherwise.

Id. at 145-46, 345 S.E.2d at 690-91 (citations omitted). In addressing the negligence issue, the Court found that

> defendant presented no evidence whatever that it was not negligent and, for all intents and purposes, plaintiff presented none that it was. Apparently, the motion for summary judgment was made and granted because plaintiff failed to present evidence that defendant either put the offending beer bottle on the dance floor or that it was there long enough for defendant to discover and remove it in the exercise of reasonable care. While that is precisely what plaintiff must prove in order to establish defendant's negligence at *trial*, . . . she was not required to present such evidence in the hearing below because she was not confronted with any evidence to the contrary. Nor did plaintiff's testimony exonerate defendant of fault, as it argues. Plaintiff testified only that *she* does not know when or how the bottle got on the dance floor; she did not testify, and was not asked to testify, that no one else knows when or how the bottle got on the floor. Thus, it is entirely possible that one or more of the many persons that were in the dance hall when plaintiff was injured can testify as to defendant's fault and it cannot be surmised that such evidence does not exist.

Id. at 147, 345 S.E.2d at 691-92 (emphasis in original) (citations omitted).

Guided now by *Maddox* and the other cited authority, we hold that defendant, as the party moving for summary judgment, did not meet its initial burden of showing that plaintiff was unable to prove an essential element of her claim. Defendant did not testify that the time of the last inspection of the aisle where plaintiff fell was *unavailable* but only that such information was "*unknown.*" Furthermore, defendant's statements that under its policy "a representative of management walks the aisles several times a day" and "sales people are continually monitoring the aisles in their normal course of business" are not sufficient to show at this stage that defendant was not negligent at the time of plaintiff's injury. Because defendant did not meet its burden of showing that plaintiff was unable to prove an essential element of her claim, plaintiff had no duty to come forward with a forecast of evidence to support her claim, and summary judgment in favor of defendant was improperly granted.

In cases like the instant one, where the defendant moves for summary judgment, it is appropriate to place upon the defendant the initial burden of gathering information about whether, when, and by

whom the premises was last inspected prior to the plaintiff's injury, since the defendant is in the superior position to acquire such information. Had defendant here met this initial burden, plaintiff would have had to come forward with a more detailed showing of evidence to support her claim.

Reversed.

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

VANESSA THOMPSON, EMPLOYEE-PLAINTIFF v. TYSON FOODS, INC., SELF-INSURED, EMPLOYER-DEFENDANT

No. COA94-959

(Filed 5 July 1995)

1. **Workers' Compensation § 206 (NCI4th)— back-related occupational disease—no causal connection to employment**

Evidence was sufficient to support the Industrial Commission's finding that plaintiff did not develop a back-related occupational disease as a result of repetitive motion while working for defendant where the evidence tended to show that any back problem which plaintiff had resulted from her prior employment and was not the result of or aggravated by her employment with defendant.

Am Jur 2d, Workers Compensation §§ 326, 328

Pleading aggravation of pre-existing physical condition. 32 ALR2d 1447.

2. **Workers' Compensation § 164 (NCI4th)— injury by accident or specific traumatic incident—insufficieny of evidence**

The Industrial Commission did not err in its findings and conclusion that plaintiff did not sustain an injury by accident or by specific traumatic incident while employed by defendant where the evidence showed that plaintiff injured her back during her previous employment; she was treated for back pain over a period of time; she could not remember exactly when she began to experience back pain during her employment with defendant,

nor was she sure exactly when she reported the pain to her supervisor; and the pain which she experienced during her employment with defendant was in the same area of her back that had been injured during her prior employment.

Am Jur 2d, Automobiles and Highway Traffic §§ 323, 328.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 16 May 1994. Heard in the Court of Appeals 12 May 1995.

Harry B. Crow, Jr. for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Robert H. Stevens, for defendant-appellee.

WALKER, Judge.

Plaintiff began working for defendant on 14 October 1991 cutting chicken wings at defendant's Monroe, North Carolina plant. Plaintiff was terminated on 17 December 1991 for poor job performance. On 14 October 1992, plaintiff filed a Notice of Accident (I.C. Form 18) alleging that she had suffered an injury to her lower back as a result of "repetitive motion as [she] was performing [her] job of cutting chicken wings." The Form 18 alleged that plaintiff's disability began on 15 October 1991, the day after she began working for defendant. Defendant denied liability, and on 10 November 1992, plaintiff filed a Request that Claim Be Assigned For Hearing (I.C. Form 33). The matter was heard before a deputy commissioner on 10 March 1993. Deposition testimony was taken subsequent to the hearing, and the record was closed on 15 July 1993. On 30 August 1993, the deputy commissioner filed an Opinion and Award denying plaintiff's claim. On appeal, the Full Commission modified some of the deputy commissioner's findings and conclusions but affirmed the denial of plaintiff's claim. The Commission found the following:

10. Plaintiff performed no duties outside of her normal work routine. Therefore, plaintiff's back condition was not caused by, nor was it aggravated by an injury by accident.

11. Plaintiff was unable to identify any traumatic incident occurring at a cognizable time. Therefore, plaintiff's back condition was not caused by, nor was it aggravated by a specific traumatic incident.

12. Plaintiff did not develop a back related occupational disease as a result of her repetitive duties while working for defendant. Therefore, any reduction in plaintiff's wage earning incapacity [sic] is not related to her period of employment with defendant.

The Commission then concluded:

1. As a result of her employment with defendant, plaintiff did not sustain an injury by accident. . . .

2. As a result of her employment with defendant, plaintiff did not sustain a back related occupational disease. . . .

[1] We first address plaintiff's argument that the Commission erred in its finding and conclusion that plaintiff did not sustain a back-related occupational disease as a result of her repetitive duties while working for defendant. To prove the existence of a compensable occupational disease under N.C. Gen. Stat. § 97-53(13), a plaintiff must prove that: (1) the disease is characteristic of the trade or occupation; (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there is a causal connection between the disease and the employment. *Hansel v. Sherman Textiles*, 49 N.C. App. 1, 6, 270 S.E.2d 585, 588 (1980), *rev'd on other grounds*, 304 N.C. 44, 283 S.E.2d 101 (1981). We need not discuss the first two elements, because we find that plaintiff did not meet her burden of showing a causal connection between her back injury and her employment with defendant.

Plaintiff's medical evidence included the office notes of Dr. Lehman, who treated plaintiff from November 1991 until April 1992. On 15 November 1991, Dr. Lehman examined plaintiff and noted that she "apparently strained the lower thoracic area at work about four weeks ago related to pulling chicken wings at Tyson's." He found she had "a localized area of tenderness at the upper thoracic area and a paraspinal muscle or trapezius area." He diagnosed plaintiff's condition as "myofascial thoracic pain, job related; possible early carpal tunnel syndrome."

Defendant's expert, Dr. Wheeler, testified that he examined plaintiff in March 1993 and that, in his opinion, plaintiff's back condition was not caused by her employment with defendant but originated in April 1990 while plaintiff worked as a battery filler for another employer. He testified that plaintiff's employment with defendant "didn't cause the initial injury. She had a condition when she went there. . . ." Dr. Wheeler further testified that the five percent perma-

nent partial disability rating he gave plaintiff was "based on whatever happened when she was filling batteries" and was attributable to her prior employment. Dr. Wheeler stated that to the extent plaintiff's condition may have been aggravated by her employment with defendant, that aggravation did not result in additional permanency over the pre-existing five percent. When asked how much of the five percent rating was caused by aggravation, Dr. Wheeler responded, "None."

After weighing the evidence of both parties, the Commission concluded that plaintiff did not sustain a back-related occupational disease as a result of her employment with defendant. The Commission is the sole judge of the weight and credibility of testimony, and its findings may be set aside on appeal only if there is a complete lack of evidence to support them. *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981). We hold there was competent evidence supporting the Commission's finding and conclusion that plaintiff did not develop a back-related occupational disease as a result of repetitive motion while working for defendant.

[2] We next address plaintiff's argument that the Commission erred in its findings and conclusion that plaintiff did not sustain an injury by accident or by specific traumatic incident. We note that plaintiff's initial claim for compensation was not based on injury by accident or by specific traumatic incident; rather, on Form 18, plaintiff stated she suffered from an occupational disease caused by the repetitive motion of cutting chicken wings. In addition, as to the nature of plaintiff's claim, plaintiff's attorney contended at the hearing that plaintiff experienced an injury due to repetitive shifting and twisting and therefore suffered from an occupational disease. However, the Commission, in considering the evidence, did not limit its findings and conclusions to the issue of whether plaintiff suffered an occupational disease, but also considered whether plaintiff had suffered an injury by accident or by specific traumatic incident. The Commission found that the evidence did not support these claims, and its findings of fact are binding on appeal if they are supported by any competent evidence. *Thompson v. Burlington Industries*, 59 N.C. App. 539, 542, 297 S.E.2d 122, 124 (1982), *cert. denied*, 307 N.C. 582, 299 S.E.2d 650 (1983).

To succeed on a claim of injury by accident, plaintiff had to show that her injury resulted from some new circumstance not a part of her usual work routine. *Swindell v. Davis Boat Works*, 78 N.C. App. 393, 397, 337 S.E.2d 592, 594 (1985), *cert. denied and appeal dismissed*,

316 N.C. 385, 342 S.E.2d 908 (1986). Injury by accident "shall not include a disease in any form, except where it results naturally and unavoidably from the accident." N.C. Gen. Stat. § 97-2(6) (1991 & Cum. Supp. 1994). However,

> [w]ith respect to back injuries, . . . where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

Id.

The evidence showed that plaintiff injured her back in April 1990 during her previous employment. She was treated for back pain over a period of time. When plaintiff was hired by defendant, she underwent a one-week orientation program, after which she began cutting chicken wings. Plaintiff could not remember exactly when she began to experience back pain, nor was she sure exactly when she reported the pain to her supervisor. The pain which plaintiff experienced during her employment with defendant was in the same area of her back that had been injured during plaintiff's prior employment. We hold there was competent evidence to support the Commission's findings and conclusion that plaintiff's back condition was neither caused by nor aggravated by an injury by accident or by specific traumatic incident.

Affirmed.

Judges COZORT and JOHN concur.

JANICE L. GREENE, EXECUTRIX OF THE ESTATE OF KENNETH R. GREENE, AND JANICE GREENE, INDIVIDUALLY v. CARPENTER, WILSON, CANNON AND BLAIR, P.A., A PROFESSIONAL CORPORATION, AND BRUCE L. CANNON, INDIVIDUALLY

No. COA94-879

(Filed 5 July 1995)

Attorneys at Law § 49 (NCI4th)— malpractice—damages—sufficiency of evidence

A motor speedway's purchase price ($1 million) was competent evidence of its fair market value in plaintiff sellers' legal mal-

practice action against defendant attorney based on his failure to explain the legal effect of a $500,000 purchase money note and deed of trust which plaintiffs accepted as part of the purchase price and which they agreed to subordinate to a bank's deed of trust, so that plaintiffs recovered only $4,120 on their note when the bank foreclosed its deed of trust. Therefore, the trial court erred by directing a verdict for defendant attorney and his law firm on the ground that plaintiff failed to produce evidence of damages.

Am Jur 2d, Attorneys at Law § 226.

Measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation—Twentieth Century cases. 90 ALR4th 1033.

Appeal by plaintiffs from judgment signed 18 April 1994 by Judge Charles C. Lamm, Jr., in Caldwell County Superior Court. Heard in the Court of Appeals 9 May 1995.

This case involves a claim of legal malpractice against defendant, Bruce Cannon, and his law firm. Plaintiff, Janice L. Greene, has filed suit individually and as the executrix of her late husband's estate, Kenneth R. Greene.

Plaintiff and her late husband, Kenneth R. Greene, (hereinafter referred to collectively as plaintiffs) were married on 3 April 1982. In 1985, plaintiffs purchased a 32.82 acre tract of land. They developed and operated a speedway known as the Tri-County Speedway from 1985 to 1988. In 1988, plaintiffs started negotiations with Mike Lackey regarding the sale of the speedway. Plaintiffs retained defendant, attorney Bruce Cannon, to prepare a "Contract to Purchase and Sell" the speedway to Lackey and the Lackey Grading Co. On 18 November 1988, a contract to sell at a price of $1,205,000 was executed. After allowing certain cash payments, trades and the assumption of existing debt, Lackey owed plaintiffs-sellers $500,000 which was to be secured by "a second mortgage on the property . . ., payable within ten years at ten percent interest."

Sometime later, Lackey informed plaintiffs that he was having financial difficulty. He suggested that Dean and Greg Wilkie could be possible investors. Plaintiffs discussed this possibility with defendant Cannon who advised plaintiffs that adding the Wilkies as additional investors would increase their chances of being fully paid on the

Note. In March 1989, plaintiffs and Lackey executed a modification to the original agreement which allowed other investors (the Wilkies) into the deal. The Modification changed the original agreement so that plaintiffs' $500,000 deed of trust would be subordinated to any financial institution that would hold a first mortgage up to $400,000. Defendant advised plaintiffs that if they took back a $500,000 Note on the sale and subordinated their debt to the $400,000 mortgage and note, the Wilkies, who had formed a partnership, would be personally liable on the $500,000 Note.

On 11 April 1989, plaintiffs sold the Speedway to the Wilkies' partnership, Raceway Partners, for $1,000,000. On that day, Raceway Partners executed to plaintiffs a Promissory Note for $500,000 with interest at 10% per annum at an annual installment of $50,000 until paid. Recited at the bottom of the Note was the language, "This Note is given as purchase money and is secured by a Deed of Trust of even date recorded in Caldwell County Registry." Plaintiffs were concerned that only Lackey signed the note, but defendant assured them that all the partners of Raceway Partners were "jointly and wholly liable" on the Note. On 20 July 1990, Wachovia Bank loaned $400,000 to Raceway Partners; plaintiffs as agreed, subordinated their Deed of Trust to Wachovia. On 28 December 1990, Wachovia assigned its Deed of Trust to Francis Motor Speedway. Francis Motor Speedway foreclosed on Wachovia's $400,000 Deed of Trust. After the foreclosure sale and after the balance on the $400,000 Note had been paid, only $4,120.08 remained to cover plaintiffs' $500,000 Deed of Trust. Plaintiffs did not bid at the foreclosure sale since they had no money to bid on the property.

When the first installment on the Note became due on 11 April 1990, plaintiffs attempted to contact defendant, but defendant never returned plaintiffs' calls. When plaintiff Janice Greene contacted Gregg Wilkie, he informed her that "he didn't owe her a dime." When plaintiffs filed suit against Raceway Partners, their action was dismissed. Plaintiffs contend that defendant never used the words "purchase money note" in discussing their options for selling the property, nor did he explain the legal effect of a "Purchase Money Deed of Trust." Defendant also never informed plaintiffs about their rights and remedies against the buyer upon default of the Note. The individual partners of Raceway Partners were all financially solvent at the time of the transaction.

Plaintiffs filed suit against defendants for negligence in failing to explain to plaintiffs the legal effect of a "Purchase Money Note and Deed of Trust." At trial, after plaintiffs' evidence, the trial court granted defendants' motion for directed verdict because it concluded that plaintiffs had failed to properly prove their damages.

Plaintiffs appeal.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for plaintiff-appellants.

Paul I. Klein for defendant-appellees.

EAGLES, Judge.

Plaintiffs contend that the trial court erred in granting defendants' motion for directed verdict. After careful review of the record and briefs, we reverse.

I.

At the close of plaintiffs' evidence, defendants filed a motion for directed verdict pursuant to G.S. 1A-1, Rule 50. On a defendant's motion for directed verdict, the trial court must determine whether the evidence, when considered in the light most favorable to the plaintiff, is sufficient to take the case to the jury. *Southern Bell Tel. & Tel. Co. v. West*, 100 N.C. App. 668, 670, 397 S.E.2d 765, 766 (1990); G.S. 1A-1, Rule 50 (a). On appeal, the scope of review is limited to those grounds asserted by the moving party before the trial court. *Id.*

Defendants moved for directed verdict on the grounds that plaintiff had failed to produce competent evidence of proximate cause and damages. The trial court granted defendants' motion on the grounds that "plaintiffs have failed to present evidence from which a jury can reasonably determine without speculating the amount of the damages, if negligence or proximate cause were found to exist."

The proper measure of damages in a legal malpractice action is the difference between the plaintiff's actual pecuniary position and what plaintiff's pecuniary position should have been if the attorney's malpractice had not occurred. *Smith v. Childs*, 112 N.C. App. 672, 685, 437 S.E.2d 500 (1993). Plaintiffs contend that they sold the Tri-County Speedway to Raceway partners for one million dollars and that as part of the purchase price they took a $500,000 Promissory Note and Deed of Trust which they agreed to subordinate to Wachovia's $400,000 Deed of Trust. When Francis Motor Speedway

foreclosed on Wachovia's $400,000 Deed of Trust, plaintiffs only recovered $4,120.08 on their $500,000 Note and Deed of Trust. In granting defendants' motion to dismiss, the trial court held that plaintiffs had presented no evidence of the fair market value of the Speedway on the date of the sale.

> The market value of property is the yardstick by which compensation for the taking of land or any interest therein is to be measured and market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner.

Nantahala Power & Light Co. v. Moss, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941). Although *Moss* involved the determination of the fair market value of land in an eminent domain proceeding, the same factors are to be considered in the sale of property in the open market where both the buyer and seller bargain at arm's length. *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 98-99, 310 S.E.2d 338, 341 (1984).

Here, plaintiffs sold the Speedway to Raceway Partners for one million dollars ($1,000,000). As part of the agreement, Raceway Partners executed a $500,000 Promissory Note to plaintiffs for the remainder of the purchase price. The purchase price of property is competent evidence of its fair market value if the sale was voluntary and not too remote in time. *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 99, 310 S.E.2d 338, 342 (1984). Plaintiffs have presented sufficient evidence of the purchase price of the Speedway by Raceway Partners. Accordingly, the trial court erred in granting defendants' motion to dismiss. The cause is reversed and remanded for trial.

Reversed and remanded

Judges WYNN and MARTIN, MARK D., concur.

SHONEY'S OF ENKA, INC., A NORTH CAROLINA CORPORATION, A SUBSIDIARY OF B&G ENTERPRISES, D/B/A "SHONEY'S OF ASHEVILLE" v. THE BOARD OF ADJUSTMENT FOR THE CITY OF ASHEVILLE AND THE CITY OF ASHEVILLE

No. COA94-837

(Filed 5 July 1995)

Zoning § 123 (NCI4th)— sign ordinance—variance denied—insufficient findings to permit review

Denial of plaintiff's request for a variance from the city's sign ordinance was not supported by sufficient findings of fact for the court to determine whether the Board of Adjustment's decision was arbitrary or based on errors of law.

Am Jur 2d, Zoning § 1064.

Appeal by plaintiff from order entered 3 December 1992 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 20 April 1995.

T. Karlton Knight for plaintiff-appellant.

Nesbitt & Slawter, by William F. Slawter and Martha Walker-McGlohon, for defendant-appellees.

MARTIN, MARK D., Judge.

Plaintiff appeals from judgment affirming the decision of the City of Asheville Board of Adjustment (the Board of Adjustment) denying plaintiff's request for a zoning variance. We reverse and remand.

On 5 March 1992 plaintiff applied for a variance from the requirements set forth in § 30-9-5(B-4) of the City of Asheville Code of Ordinances to erect a new sign on property located near the intersection of U.S. Highway 19/23 and Interstate 40. On 20 April 1992 the Board of Adjustment held a hearing on the requested variance and voted three to two in favor of plaintiff's request. However, because N.C. Gen. Stat. § 160A-388(e) requires a four-fifths vote of the Board of Adjustment to grant a variance, plaintiff's variance request was ultimately denied. Plaintiff appealed to superior court.

On 7 December 1992 the superior court entered an order affirming the Board of Adjustment's decision denying plaintiff's requested variance. On 31 December 1992 plaintiff appealed to this Court. On 19 April 1994, in an unpublished opinion, this Court held it was unable to

determine from the record whether the superior court had subject matter jurisdiction to hear plaintiff's petition for review and remanded this matter to the superior court. *Shoney's of Enka v. Bd. of Adjustment for City of Asheville*, 114 N.C. App 505, 444 S.E.2d 494 (1994). On 31 May 1994 the trial court entered an order finding that pursuant to N.C. Gen. Stat. § 160A-388 plaintiff had appealed within the thirty days provided and therefore concluded it had subject matter jurisdiction when it entered its 7 December 1992 order. From this order, plaintiff appeals.

Plaintiff contends the superior court erred by affirming the Board of Adjustment's denial of plaintiff's variance.

Judicial review of the decision of the Board of Adjustment is limited to: (1) reviewing the record for errors in law; (2) insuring procedures specified in both statute and ordinance are followed; (3) insuring appropriate due process rights of a petitioner are protected, including the right to offer evidence, to cross-examine witnesses, and to inspect documents; (4) insuring decisions of the town board are supported by competent, material and substantial evidence in the whole record; and (5) insuring the decisions are not arbitrary and capricious. *Concrete Co. v. Board of Commissioner's*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). "It is not the function of the reviewing court . . . to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board and whether the Board made sufficient findings of fact." *Rentals Inc. v. City of Burlington*, 27 N.C. App. 361, 364, 219 S.E.2d 223, 226 (1975) (*citing In re Campsites*, 287 N.C. 493, 215 S.E.2d 73 (1975)).

Plaintiff contends the decision of the Board of Adjustment was not supported by sufficient findings of fact to permit adequate judicial review. We agree.

Findings of fact provide a safeguard against arbitrary action by the board of adjustment by providing a sufficient record upon which this Court can review the board's decision. *Id.* at 365, 219 S.E.2d at 227. "[A]ction[s] by zoning boards in allowing or denying the application of use permits require the board to state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision." *Id.* at 365, 219 S.E.2d at 226-227 (*citing Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974)). As a corollary to this principle, we do not believe the Board may rely on findings of fact which are merely conclusory in

form. *See, e.g., Wolff v. Dade County*, 370 So.2d 839, 842 (Fla. App.) (simple determination by County that development of applicant's property is not needed is not a proper basis for a determination of the reasonableness of such an application), *cert. denied*, 379 So.2d 211 (Fla. 1979); *Redden v. Montgomery County*, 313 A.2d 481, 490 (Md. 1974) (findings of county board of appeals in granting special exception which merely repeat the exact language of the county code with respect to mandatory requirement are insufficient).

In the instant case the Board of Adjustment made the following findings of fact:

> 1. It is the Board's conclusion that, if the applicant complies strictly with the provisions of this article, the applicant (can/cannot) make reasonable use of the sign allowed. This conclusion is based on the following findings of fact:
>
> Petitioner did not satisfy requirements set forth in opening statement.
>
> and
>
> 2. It is the Board's conclusion that the hardship of which the applicant complains is (unique/not unique) or nearly so, and is (is/not) suffered by the applicant rather than by owners of surrounding properties or the general public. This conclusion is based on the following findings of fact:
>
> ---
>
> and
>
> 3. It is the Board's conclusion that the hardship (relates/does not relate) to the applicant's land (rather than/but) to personal circumstance. This conclusion is based on the following findings of fact:
>
> ---
>
> and
>
> 4. It is the Board's conclusion that the hardship (is/not) the result of the applicant's own actions. This conclusion is based on the following findings of fact:
>
> ---
>
> and
>
> 5. It is the Board's conclusion that the variance (will/will not) result in the extension of a non-conforming use (and/nor) authorize the initiation of a non-conforming use. This conclusion is based on the following findings of fact:
>
> ---

and

> 6. It is the Board's conclusion that the variance (is/[is]not) in harmony with the general purpose and intent of this article and (preserves/does not preserve) and (secures/does not secure) the public safety and welfare and (does/does not do) substantial justice. This conclusion is based on the following findings of fact:
>
> ---

The findings of the Board of Adjustment are conclusory at best. Indeed, these findings merely constitute a preprinted form couched in the language of the relevant section of the City's zoning ordinance. Although the form provides space to insert findings, the Board elected for whatever reason to rely solely on the language of the preprinted form. The only written finding was the conclusion that "petitioner did not satisfy requirements set forth in opening statement." Although § 30-9-11 of the ordinance only requires the Board to make written findings when granting a variance, "[t]he requirement that a board of adjustment make findings may be imposed by statute, by ordinance, or by judicial decision." 4 R.M. Anderson, *American Law of Zoning* § 22.41, at 109-110 (1986). We believe the conclusory findings of the Board do not satisfy the standard articulated in *Rentals Inc., supra*, where we concluded that findings of fact by a Board of Adjustment must be sufficient "to enable the reviewing court to determine whether the Board ha[s] acted arbitrarily or ha[s] committed errors of law." *Id.* at 365, 219 S.E.2d at 227.

As noted by Professor Anderson in his American Zoning Law treatise:

> the requirement that a board of adjustment make appropriate findings is not met by a mere restatement of the terms of the applicable statute or ordinance.
>
> . . . .
>
> Disapproval of findings in the language of the statute or ordinance has been explained on the ground that delegations of power to boards of adjustment are broad, and the scope of judicial review is narrow. If the court's power to correct clear abuses of discretion is to be effectively exercised, the findings must disclose the facts upon which the board's determination rests.

4 R.M. Anderson, *American Law of Zoning* § 22.44, at 124-125.

We conclude the present findings are insufficient to adequately determine whether the Board of Adjustment's decision is based upon facts which are supported by evidence in the record. The Board's failure to make such findings, makes it impossible to determine whether the Board rested its decision on considerations other than those set forth in § 30-9-11 of the ordinance and further complicates this Court's ability to review whether the Board acted arbitrarily or committed errors of law. Therefore, the order of the superior court affirming the defendant Board's decision is reversed, and the cause remanded to the superior court for further remand to the City of Asheville Board of Adjustment for further proceedings consistent with this opinion.

Reversed and remanded.

Judges GREENE and LEWIS concur.

ROBERTA SIMMONS, EXECUTRIX OF THE ESTATE OF ELIJAH CULBERT SIMMONS, PLAINTIFF v. JON PARKINSON, M.D., Defendant

No. COA94-1109

(Filed 5 July 1995)

1. Jury § 103 (NCI4th)— individual voir dire denied—no error

The trial court did not err in denying counsel for plaintiff the opportunity to question a juror individually where the juror indicated that he wished to tell plaintiff's counsel "something"; the trial court advised counsel that he would have to exercise his own best judgment as to how to handle the situation; and, though counsel knew the juror had "something" he wanted to say, counsel chose not to question the juror further.

Am Jur 2d, Jury §§ 193 et seq.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. 73 ALR2d 1187.

2. Jury § 158 (NCI4th)— juror accepted by both parties—juror acquainted with defendant—court's refusal to reopen voir dire to allow peremptory challenge—error

The trial court abused its discretion by not reopening voir dire and allowing counsel for plaintiff the opportunity to exercise a peremptory challenge to a juror who initially indicated that he did not know the parties in a medical malpractice action, but subsequently revealed that his wife had been treated by defendant and he was satisfied with defendant's services.

Am Jur 2d, Jury § 243.

Peremptory challenge after acceptance of juror. 3 ALR2d 499.

Appeal by plaintiff from judgment entered 18 December 1993 by Judge L. Bradford Tillery in New Hanover County Superior Court. Heard in the Court of Appeals 7 June 1995.

Berry & Byrd, by Wade E. Byrd, for plaintiff-appellant.

Anderson, Broadfoot, Johnson, Pittman, Lawrence & Butler, by Lee B. Johnson, for defendant-appellee.

JOHNSON, Judge.

This is a medical malpractice action in which defendant John Parkinson, M.D., a psychiatrist, was charged with negligently failing to treat Elijah Culbert Simmons. Mr. Simmons committed suicide on 10 February 1989. The case was tried before a jury.

During the *voir dire* of prospective jurors, counsel for plaintiff advised the jury that in his opinion, the trial court, if requested, would hear answers from prospective jurors out of the presence of other jurors in the event of some possible embarrassment. Following a recess, the trial court was advised by counsel for plaintiff that a juror, Mr. Ronald Reagan, had approached him and indicated that he wished to tell him "something," but would prefer to do so outside of the presence of the jury. The trial court declined to excuse the other jurors and advised counsel for plaintiff that he would have to exercise his own best judgment as to how to handle the situation. Counsel for defendant was present during these discussions. Counsel for plaintiff told Mr. Reagan in open court that he was not going to pursue the matter any further.

Subsequently, during *voir dire* by defendant's counsel, it was learned that Mr. Reagan, although he had indicated that he knew none of the parties, was aware that his wife had been treated by defendant and that he was satisfied with the services of defendant. Counsel for plaintiff thereafter requested of the trial court that he be allowed to re-examine or peremptorily challenge Mr. Reagan; the trial court, in its discretion, ruled that Mr. Reagan had been passed by counsel for plaintiff and selected as a juror.

The jury found "the death of Elijah Culbert Simmons [was not] proximately caused by the negligence of [defendant]." A judgment was entered 18 December 1993 by the trial court dismissing the action based on the jury's verdict. On 28 December 1993, plaintiff Roberta Simmons, decedent's executrix, filed a motion for a new trial based upon error committed during the jury selection phase of the trial. This motion was denied by order entered 16 March 1994. Plaintiff filed timely notice of appeal to our Court.

[1] Plaintiff first argues on appeal that the trial court erred in denying counsel for plaintiff the opportunity to question Mr. Reagan individually. Plaintiff asserts that plaintiff's "right to a fair trial was compromised by denying individual *voir dire*."

"It is well established that while counsel is allowed wide latitude in examining jurors on *voir dire*, the form of counsel's questions is within the sound discretion of the trial court. Likewise, the manner and extent of trial counsel's inquiries rest largely in the discretion of the trial judge." *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994) (citations omitted). We find, in the instant case, that the trial court did not commit an abuse of its discretion by denying counsel for plaintiff the opportunity to *voir dire* Mr. Reagan individually. The trial court advised counsel for plaintiff that he would have to exercise his own best judgment as to how to handle the situation, this being after Mr. Reagan had told counsel for plaintiff that he wished to tell him "something." Counsel for plaintiff knew that Mr. Reagan had "something" he wanted to say, but counsel for plaintiff chose, for whatever reasons, not to question Mr. Reagan further. We reject this argument.

[2] Plaintiff next argues that the trial court erred in denying counsel for plaintiff the opportunity to exercise a peremptory challenge to Mr. Reagan. Plaintiff asserts:

> [i]n the case at bar, Mr. Reagan did not respond to the questions posed by [plaintiff's] counsel whether any of the jurors knew

> either of the parties or whether they had family members who had received psychiatric treatment. Not until the jury had been passed to counsel for [defendant] did the facts come to light. Counsel for [plaintiff] was thus caught by surprise and sought to have juror Reagan excused by reopening voir dire.
>
> We note that in response to an earlier argument, defendant states:
>
> [d]uring the voir dire examination by counsel for Defendant, it was learned that although Juror Reagan did not personally know the Defendant, his wife had been satisfactorily treated by him in the past. This was not the revelation of a fact explicitly denied during voir dire by counsel for Plaintiff as is claimed. Rather, it was an attempt by the juror to be completely honest with the court and to clarify his knowledge of the Defendant.

The decision whether to reopen the examination of a juror previously passed by counsel for both parties is one to be made by the trial court. *State v. Lamb*, 313 N.C. 572, 330 S.E.2d 476 (1985). We will not disturb the trial court's decision, absent an abuse of discretion. In the instant case, however, we find that the trial court abused its discretion by not reopening *voir dire* and allowing counsel for plaintiff the opportunity to exercise a peremptory challenge to Mr. Reagan. "[T]he primary purpose of the *voir dire* of prospective jurors is to select an impartial jury." *State v. Lee*, 292 N.C. 617, 621, 234 S.E.2d 574, 577 (1977). It is difficult to imagine a situation more appropriate than the instant one for reopening the examination of a juror previously passed by counsel for both parties; where, in this medical malpractice action, while defense counsel questioned the potential jurors, it was revealed that the wife of a potential juror had been defendant's patient and that the juror had been satisfied with defendant's services. Therefore, we find the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *Lamb*, 313 N.C. at 576, 330 S.E.2d at 479.

In light of our resolution of plaintiff's second argument, we need not address plaintiff's remaining argument.

New trial.

Judges GREENE and MARTIN, JOHN C. concur.

LAURA LEIGH BOONE (STOTT) BROMHAL v. E. GREGORY STOTT

No. COA94-1110

(Filed 5 July 1995)

Execution and Enforcement of Judgments § 34 (NCI4th)—transfer from clerk to district court judge—exemptions—jurisdiction of district court

When a matter relating to a judgment debtor's exemptions is transferred, pursuant to N.C.G.S. § 1C-1603(e)(7), from the clerk to the district court, the district court must be given the same general authority granted to a superior court pursuant to N.C.G.S. § 1-276 to hear and determine all matters in controversy in such action, including the authority to order the sale of a judgment debtor's exempt property having excess value.

Am Jur 2d, Judgments §§ 582, 595, 1015.

Appeal by defendant from orders entered 3 March 1994 and 5 May 1994 in Wake County District Court by Judge William A. Christian. Heard in the Court of Appeals 7 June 1995.

Brady, Schilawski, Earls and Ingram, by Michael F. Schilawski, for plaintiff-appellee.

Jack P. Gulley for defendant-appellant.

GREENE, Judge.

E. Gregory Stott (defendant) appeals from several orders of the trial court which (1) directed the sale of defendant's real property; (2) denied defendant's Rule 59 and Rule 60 motions; (3) restrained defendant and third parties from making certain property transfers; and (4) required defendant and third parties to "identify and describe any and all properties owned by Defendant which are held by third parties for his benefit."

The record shows that the parties were married, separated, whereupon they entered a separation agreement, and subsequently divorced. Laura Leigh Boone (Stott) Bromhal (plaintiff) sued defendant, alleging his failure to comply with certain terms of the separation agreement and obtained a judgment in the amount of $62,550.49 for child support deficiencies and attorney fees. On 14 April 1993, defendant filed a motion to claim exempt property pursuant to N.C.

Gen. Stat. § 1C-1603, requesting that his real property, and certain personal property, be designated as exempt property. The clerk of superior court allowed defendant's motion, by order entered 15 April 1993. Plaintiff subsequently filed a motion to set aside the clerk's order. By order entered 3 November 1993, the district court denied plaintiff's motion with respect to defendant's personal property, but granted her request with respect to defendant's real property, stating that because there was a dispute as to the fair market value of defendant's real property, the final ruling concerning the exempt status of defendant's real property would be held open pending the results of an appraisal of defendant's real property.

Thereafter, by order entered 3 March 1994, the district court found as fact that defendant is entitled to a $10,000 exemption in his real property, but determined that there is excess value in defendant's exempt property. The court then ordered, pursuant to N.C. Gen. Stat. § 1C-1603(e)(10), that defendant's real property be sold and the proceeds be applied to satisfy plaintiff's judgment. On 8 March 1994, defendant requested "a new hearing and/or an amendment to the court's" 3 March order, alleging that the district court was without statutory authority to order the sale. On 5 May 1994, the district court denied defendant's motion for a new hearing or amendment to the court's order. The court also, on 5 May 1994, entered an order which enjoined certain named third parties "from transferring, disposing of or otherwise interfering with the properties of the Defendant-judgment debtor not exempt from execution," specifically referring to certain retirement funds established by and for defendant. On that same day, the trial court ordered that certain third parties appear at a hearing on 3 June 1994 "to identify and describe properties that have been or are currently held for and owned by Defendant" or that an authorized representative of those entities complete "Interrogatories and Requests for Production of Documents" attached to the order.

The issue is whether a district court judge has the authority to enter an order directing the sale of a judgment debtor's real property under N.C. Gen. Stat. § 1C-1603(e)(10).

North Carolina General Statutes Section 1C-1603 provides the procedure by which a judgment debtor may have his property exempt from a judgment creditor's execution of a judgment against the debtor. The statute permits the judgment debtor to file a motion with the clerk of the superior court to "designate his exemptions with a schedule of assets." N.C.G.S. § 1C-1603(e)(1) (1991). If the judgment

creditor objects to the schedule filed by the judgment debtor "the clerk must place the motion for hearing by the district court judge." N.C.G.S. § 1C-1603(e)(7). The district court judge is then required to "enter an order designating exempt property." N.C.G.S. § 1C-1603(e)(9). If this order "indicates excess value in exempt property, *the clerk*, in an execution, may order the sale of property having excess value and appropriate distribution of the proceeds." N.C.G.S. § 1C-1603(e)(10) (emphasis added).

The defendant argues that the specific language of Section 1603(e)(10) authorizes only the clerk of the superior court to order a sale of property and therefore the order of sale in this case entered by the district court judge is void. We disagree. When a matter is transferred from the clerk to the superior court, N.C.G.S. § 1-273 (1983) (clerk to transfer when "issues of law and of fact, or of fact only, are raised before the clerk"), the superior court has "jurisdiction . . . to proceed to hear and determine all matters in controversy in such action, unless it appears . . . that justice would be more cheaply and speedily administered by sending the action back [to the] clerk." N.C.G.S. § 1-276 (1983). Although no specific statute grants a district court similar authority, when a matter relating to exemptions is transferred, pursuant to Section 1C-1603(e)(7), from the clerk to the district court, the district court must be given the same general authority granted to a superior court pursuant to Section 1-276. To construe this statute otherwise would be extremely inefficient and thus absurd. *See Commissioner of Ins. v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) (courts should avoid construction that has absurd or bizarre consequences). Therefore, once the issue of exemptions is properly before the district court that court has jurisdiction to order the sale of exempt property having excess value, unless it would be more efficient to remand this issue to the clerk. In this case, there is nothing to suggest that it would be more efficient to return this issue to the clerk. Accordingly, the trial court had the authority to order the sale of defendant's real property. For the same reasons, the trial court correctly denied defendant's Rule 59 and Rule 60 motions.

Defendant also argues that the trial court did not have jurisdiction over the third parties which its order restrained from transferring defendant's property and required to attend a hearing. These third parties, however, are not a party to this appeal and nothing in the record indicates that these third parties have complained about the trial court's order. Defendant's appeal from the trial court's order

seeks to relieve third parties from the order of the trial court and is not adequate to do so. *See Walker v. Nicholson*, 257 N.C. 744, 747, 127 S.E.2d 564, 566 (1962) (action must be maintained by person who is injured).

Affirmed.

Judges JOHNSON and EAGLES concur.

BETTY M. HELBEIN v. SOUTHERN METALS COMPANY, INC. AND ROBERT HELBEIN

No. COA94-1101

(Filed 5 July 1995)

Injunctions § 33 (NCI4th)— no notice before order entered— order void

Where a nonparty received no notice and was not given an opportunity to be heard before entry of the trial court's order prohibiting him from harassing or contacting defendants, their employees and attorneys, communicating threats, possessing firearms, or attending any further proceedings in this action, the trial court lacked personal jurisdiction over the nonparty, and the order was therefore void.

Am Jur 2d, Injunctions §§ 249 et seq.

Appeal by plaintiff and non-party Richard Helbein from order entered 24 May 1994 in Mecklenburg County Superior Court by Judge Charles C. Lamm, Jr. Heard in the Court of Appeals 7 June 1995.

A. Marshall Basinger, II, for plaintiff-appellant and non-party Richard Helbein.

Moore & Van Allen, PLLC, by Jeffrey J. Davis, Gregory J. Murphy, and Karin M. McGinnis, for defendant-appellees.

GREENE, Judge.

Betty M. Helbein (plaintiff) and non-party Richard Helbein (movant) appeal from an order of the trial court denying their motion to set aside an earlier order which restricted the right of movant to attend "any further proceedings in this action."

The record shows that, following a court proceeding in this matter and "while in the hallway immediately outside the courtroom," movant "communicat[ed] threats regarding his intention to harm Robert Helbein and others." After that incident, the trial court, on 3 September 1992, without any notice to the movant, entered the following order:

> 1. Richard Helbein shall not:
>
> (a) Contact, go about, harass or bother his brother, Robert Helbein, or any member of Robert Helbein's family, or any employee of Southern Metals Company.
>
> (b) Possess any firearms except in his own home.
>
> (c) Contact, go about, harass or bother counsel for Southern Metals, Mr. Jeffrey Davis, or members or employees of his firm, nor is Richard Helbein to go about his residence or place of business.
>
> (d) Communicate to any person, directly or indirectly, any threat involving Robert Helbein or any member of his family, any Southern Metals employee or member of their family, Jeffrey Davis, or any member of his family, or any other person in any way connected with this action.
>
> (e) Go about the premises of Southern Metals, Moore & VanAllen, or the residence of any person described above.
>
> 2. Richard Helbein is further hereby prohibited from attending any further proceedings in this action unless he is under subpoena.

Defendant subsequently made a motion that movant be held in contempt for violating this 3 September order. After a hearing on defendant's motion, the trial court entered an order, on 24 February 1994, which included the court's conclusion that movant's actions, as alleged by defendant's motion, did not constitute a violation of the 3 September order.

On 7 March 1994, movant and plaintiff made a motion, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, which requested that the trial court set aside the 3 September order "on the grounds that the order is jurisdictionally defective and therefore void." This motion argued that movant received no notice of the proceedings which resulted in the 3 September order and that the court thus lacked personal juris-

diction rendering its order void. In an order entered 24 May 1994, the trial court denied the 7 March motion.

The issue is whether the 3 September order is void for want of personal jurisdiction.

Absent a general appearance, due process requires that a person who will be subject to a court's order be given "reasonable notice and opportunity to be heard" before any proceeding which results in such order being entered against him. *Harris v. Harris*, 104 N.C. App. 574, 577, 410 S.E.2d 527, 530 (1991); *see also First Union Nat'l Bank v. Rolfe*, 83 N.C. App. 625, 628, 351 S.E.2d 117, 119 (1986) (general statutes and North Carolina Constitution mandate that person be given "notice and an opportunity to be heard before he can be deprived of" a right). Moreover, the 3 September order is, in effect, an injunction and North Carolina law requires that persons affected by injunctions be given notice before the issue of an injunction, unless the injunction is a "temporary restraining order," limited in duration. N.C.G.S. § 1A-1, Rule 65 (1990). There is no dispute that movant received no notice and was not given an opportunity to be heard before the 3 September order was entered. There being no notice to movant, the court lacked personal jurisdiction over movant and the 3 September order is void. *See Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (judgments entered without personal jurisdiction are void), *disc rev. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987).

A party who is subject to an order by a trial court which is void, may attack that order at any time, pursuant to Rule 60(b)(4) of the Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 60(b) (1990); *Allred*, 85 N.C. App. at 141, 354 S.E.2d at 294 (void judgment is legal nullity which may be attacked at any time). Therefore, the trial court erred in failing to grant the 7 March motion for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) and the matter is remanded for entry of an order vacating the 3 September 1992 order.

Reversed and remanded.

Judges JOHNSON and MARTIN, JOHN C., concur.

LESLIE L. ROBINSON, JR. PLAINTIFF-APPELLANT v. JUNE C. HINCKLEY, DEFENDANT-APPELLEE

No. COA94-934

(Filed 5 July 1995)

Courts § 15.1 (NCI4th)— nonresident defendant—no contacts with North Carolina—exercise of personal jurisdiction error

Defendant did not have sufficient minimum contacts with North Carolina to give the trial court jurisdiction over her in this declaratory judgment action relating to a separation and property settlement agreement where defendant never came to this state for any legal actions or negotiations arising out of her marriage to plaintiff; at no time did she seek to invoke the protection of North Carolina law; she never resided, owned property, or even visited the state; and the agreement giving rise to this action did not become binding until defendant signed it in Louisiana.

Am Jur 2d, Process §§ 190, 191.

Appeal by plaintiff from an Order entered 14 June 1994 by Judge Yvonne M. Evans in Mecklenburg County District Court. Heard in the Court of Appeals 11 May 1995.

Helms, Cannon, Hamel & Henderson P.A., by Christian R. Troy, for plaintiff-appellant.

Hicks, Brown and Mann, P.A., by Fred A. Hicks and Terri L. Young, for defendant-appellee.

WYNN, Judge.

Plaintiff, Leslie L. Robinson and defendant, June C. Hinckley married on 30 June 1955 and separated on 7 January 1986. On 18 December 1986, plaintiff filed an action for absolute divorce in Louisiana. Subsequently, plaintiff moved to North Carolina and filed another action for divorce in Mecklenburg County, apparently disregarding his previous Louisiana action. The trial court entered the Divorce Judgment on 20 July 1987.

On 28 July 1987, plaintiff signed an agreement entitled "Separation, Support and Property Settlement Agreement"

("Agreement") and mailed it to defendant in Louisiana. Defendant signed the Agreement on 27 August 1987.

Apparently, after the parties executed the Agreement, a dispute arose as to the division of a retirement account titled in plaintiff's name. On 3 December 1993, plaintiff filed a declaratory action in North Carolina seeking to resolve this issue under the Agreement. In response, defendant moved to dismiss the declaratory action for want of personal jurisdiction. Following a hearing on this matter, District Court Judge Yvonne M. Evans dismissed the action. Plaintiff appealed.

On appeal, we agree with Judge Evans' determination and therefore affirm the Order dismissing the action for lack of personal jurisdiction.

In deciding whether personal jurisdiction exists, a two step analysis is employed. "First, it should be ascertained whether the statutes of this State allow our courts to entertain the action the plaintiff has brought against the defendant." *Miller v. Kite*, 313 N.C. 474, 476, 329 S.E.2d 663, 665 (1985). If so, then the court must determine whether applying the statute would violate the due process clause of the Fourteenth Amendment. *Id.* at 476-477, 329 S.E.2d at 665. Due process requires that a nonresident defendant have sufficient minimum contacts with the forum state before a suit may be maintained in that forum state. *Int'l. Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Even assuming *arguendo* that the necessary statutory prerequisites were satisfied in the subject case, we find that the record fails to show that defendant had sufficient minimum contacts with North Carolina to support a suit being maintained against her in this State.

The law of this State is very clear that the mere execution of a contract does not provide a basis for personal jurisdiction. In *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 532, 265 S.E.2d 476, 480 (1980), this Court stated:

> [I]n cases of contract disputes, "the touchstone in ascertaining the strength of the connection between the cause of action and the defendant's contacts is whether the cause arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market of the forum state."

(*quoting Fieldcrest Mills, Inc. v. Monhasco Corp.*, 442 F.Supp 424, 428 (M.D.N.C. 1977)). "The mere act of entering into a contract with a forum resident . . . will not provide the necessary minimum contacts with the forum state especially when all of the elements of defendant's performance are to take place outside of the forum." *Phoenix Am. Corp.*, 46 N.C. App. at 532, 265 S.E.2d at 480.

Although defendant negotiated the terms of the Agreement with plaintiff while he was a resident of North Carolina, defendant never came to this State for any legal actions or negotiations arising out of the marriage, nor did she at any time seek to invoke the protection of North Carolina law or its enforcement mechanisms in the negotiation. Moreover, the record indicates that defendant never resided in this State nor owned property here. In fact, there is no indication that defendant has ever been physically present in North Carolina. Finally, we note that the Agreement did not become binding until defendant signed it on 27 August 1987, therefore, the finalization of the Agreement occurred in Louisiana. *See Williams v. Institute for Computational Studies at Colorado State Univ.*, 85 N.C. App. 421, 425, 355 S.E.2d 177, 180 (1987) ("[F]or a contract to be made in this State, the last act necessary to make it a binding obligation must be performed in this State.").

We hold that defendant did not have sufficient contacts with this State to support the exercise of personal jurisdiction.

Affirmed.

Judges EAGLES and MARTIN, Mark D. concur.

WILLIAM BRYANT CHURCH, JR., PLAINTIFF v. BEA JODI REINHARDT CHURCH, DEFENDANT

No. COA94-1063

(Filed 5 July 1995)

Divorce and Separation § 339 (NCI4th)— child custody— award of joint custody supported by evidence and findings

The trial court did not err by awarding joint custody of a child to plaintiff father where the court's findings that both parents were people of excellent character and its conclusion that both were fit and proper persons to be awarded custody of their child

were supported by competent evidence in the record, and the court was not required to make any finding with regard to the willingness of caretakers who would be with the child in plaintiff's absence.

Am Jur 2d, Divorce and Separation §§ 987 et seq.

Propriety of awarding joint custody of children. 17 ALR4th 1013.

Appeal by defendant from order entered 13 June 1994 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 25 May 1995.

This is an action to determine child custody and visitation rights. The parties were married but are separated and are the parents of one minor child, William Banks Church, born on 11 February 1991. Prior to the birth of the child, plaintiff and defendant worked together in establishing a business, Appalachian Lumber, Inc. The parties agreed that defendant wife would stop working in the business when the child was born, so that she could devote her full time to caring for the child. When the child was born, defendant became his primary caretaker.

Plaintiff and defendant separated on 7 January 1994. On 31 January 1994, plaintiff husband filed a complaint seeking joint custody, or in the alternative, extensive time in which plaintiff would have physical custody of the child. Defendant answered and counterclaimed for legal custody of the child subject to reasonable visitation with plaintiff. On 13 June 1994, the trial court entered an order awarding joint custody of the minor child to plaintiff and defendant. Defendant appeals.

Vannoy, Colvard, Triplett & McLean, by Howard C. Colvard, Jr., and Jay Vannoy, for plaintiff-appellee.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellant.

EAGLES, Judge.

Defendant contends that the trial court erred in awarding plaintiff joint custody of the minor child. After careful review of the record and briefs, we affirm.

An order for the custody of a minor child should award custody to "such person . . . that will best promote the interest and welfare of the child." G.S. 50-13.2. An order awarding joint custody or any other child custody award must include findings of fact that support a determination of the child's best interest. *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990). The trial court's decision must be based on the welfare of the child. The trial court's decision will not be disturbed on appeal absent abuse of discretion. *Id.* Defendant contends that the trial court erred in awarding joint custody, because although plaintiff testified that other parties would also care for the child in plaintiff's absence, none of the third parties who would be additional caretakers testified about their willingness or ability to care for the child. We disagree.

The trial court made the following pertinent findings of fact and conclusions of law:

> 8. Both parties are people of excellent character and have no convictions of any crimes, whatsoever. Both are very active in church activities. There was absolutely no evidence that either party has any problem with substance abuse, or that either party even consumes alcohol, drugs, or similar substances.
>
> 9. The evidence presented in this matter related solely to custody issues and not to the question of fault in the breakup of the parties' marriage.
>
> . . . .
>
> BASED ON THE FOREGOING FINDINGS OF FACT, the Court concludes as a matter of law, the following:
>
> . . . .
>
> 2. Both the plaintiff and the defendant are fit and proper persons to be awarded custody of the minor child in this action.
>
> 3. That it would promote the best interest of the minor child to award his joint custody to both of his parents.

The trial court's findings of fact in this regard are supported by competent evidence in the record. The trial court is not required to make a finding as to every fact that arises from the evidence but only to those facts which are material to the resolution of the dispute. *Green v. Green*, 54 N.C. App. 571, 573, 284 S.E.2d 171, 174 (1981).

We conclude that the trial court did not abuse its discretion in awarding joint custody to both parties. *See Witherow v. Witherow*, 99 N.C. App. 61, 392 S.E.2d 627 (1990); *but see, Smith v. Burgess*, 72 N.C. App. 340, 324 S.E.2d 53 (1985) (custody award to plaintiff vacated and remanded for finding as to whether disabled husband was willing or able to care for minor child while plaintiff was working).

We have reviewed defendant's remaining assignments of error and determined that they are without merit.

Affirmed.

Judges WYNN and MARTIN, MARK D., concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 JULY 1995

ANDREWS v. BODSFORD No. 95-951	Stokes (92CVS424)	Affirmed
ATASSI v. JACKSON No. 93-1214	Cumberland (91CVS7491)	Vacated & Remanded
BAREFOOT v. SMITH No. 94-945	Durham (93CVD2608)	Affirmed
BARNES v. BLADEN COUNTY HOSPITAL No. 94-1115	Ind. Comm. (137082)	Affirmed
CHARLOTTE BLOCK, INC. v. WAL-MART STORES No. 93-582	Mecklenburg (92CVS4227)	Affirmed
CLINKSCALE v. BRADDY No. 94-1175	Forsyth (92CVS5975)	No Error
HOAG v. WILKINS No. 94-780	Alamance (93CVS2714)	Affirmed
IN RE BILLINGS No. 94-742	Mecklenburg (94J48)	No Prejudicial Error
IN RE RUBLE No. 93-917	Forsyth (89J371)	Affirmed
LEADER CONSTR. CO. v. NEW HANOVER COUNTY No. 94-1218	New Hanover (92CVS0527)	Affirmed
NEESE v. McGARITY No. 95-7	Guilford (93CVS4824)	Affirmed
PENNINGTON v. JEWELL No. 94-1020	Dare (94CVD2)	Reversed & Remanded
PRIEST v. HOWELL'S CHILD CARE CENTER No. 94-805	Ind. Comm. (939780)	Affirmed
RONAN v. BRUMMER No. 94-926	Henderson (91CVS363)	Reversed & Remanded
SHERRIFF v. SHERRIFF No. 94-998	Iredell (92CVS01904)	Affirmed
STALLINGS BROS. v. HOPKINS No. 94-1117	Nash (93CVS3)	Dismissed

STATE v. ABRAMS No. 94-1004	Forsyth (93CRS27414)	Affirmed
STATE v. BAILEY No. 94-1056	Wake (94CRS7168)	No Error
STATE v. CAMPBELL No. 94-1351	Guilford (93CRS66078) (93CRS66079) (93CRS20804)	No Error
STATE v. DEHART No. 94-1007	Forsyth (93CRS45834)	No Error
STATE v. GOODMAN No. 94-500	Robeson (93CRS58674) (93CRS58675)	No Error
STATE v. GRIMBLE No. 94-1431	Cumberland (93CRS21719)	Dismissed
STATE v. LAMBERT No. 94-862	Union (93CRS7424) (93CRS7425)	No Error
STATE v. MCCRIMMONS No. 94-940	Beaufort (92CRS5830)	No Error
STATE v. MCKENZIE No. 94-1235	Robeson (93CRS13696)	No Error
STATE v. MILLER No. 94-1121	Guilford (92CRS55818)	No Error
STATE v. NEAL No 94-1230	Alamance (93CRS19867)	No Error
STATE v PATTERSON No. 94-1018	Iredell (91CRS11473)	No Error
STATE v. PONDER No. 94-1226	Mecklenburg (93CRS83280)	No Error
STATE v. SMITH No. 94-714	Pitt (93CRS22274) (93CRS22275) (93CRS22276)	No Error
STATE v. SORRELLS No. 94-1306	Haywood (94CRS1130)	No Error
SWANN v. FIRST CITIZENS BANK & TRUST CO. No. 94-1339	Buncombe (94CVS466)	Affirmed
WILLIAMS v. CLIFF No. 94-801	Pender (91CVS485)	Dismissed

WINSTON v. DURHAM CITY SCHOOLS No. 94-869	Ind. Comm. (769724)	Affirmed

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BEAVER v. N.C. DEPT. OF E.H.N.R. No. 94-128	Ind. Comm. (TA-11981)	Vacated & Remanded with Instructions
BRYSON v. OLD MARTIN'S CREEK CHURCH No. 94-619	Cherokee (92CVS295)	No Error
DINKINS v. FEDERAL PAPER BOARD CO. No. 94-844	Ind. Comm. (112853)	Affirmed
GARCIA v. KOVOLENKO No. 94-1360	Cumberland (94CVD3914)	Dismissed in part; Affirmed in part
JOHNSON v. CENTRAL CAROLINA REALTY No. 94-996	Wake (93CVS05274)	No Error
JOHNSON v. CITY OF ROCKY MOUNT No. 94-1249	Nash (94CVS1085)	Affirmed
LAWS v. WILLIAMS No. 94-1059	Gaston (93CVS2375)	No Error
McGARITY v. McGARITY No. 94-565	Guilford (89CVD7755)	Affirmed
McGARITY v. McGARITY No. 94-853	Guilford (89CVD7755)	Affirmed
MINTON v. CALL No. 94-1013	Wilkes (92SP114)	Affirmed
MORETZ v. MILLER No. 93-323	Watauga (91CVS452)	Reversed & Remanded
POWERS v. POWERS No. 94-584	Pitt (85CVD262)	Affirmed
RICHARDSON v. BP OIL CO. No. 94-811	Wake (94CVS2637)	Dismissed
STATE v. CODY No. 94-1096	Forsyth (94CRS7552)	Affirmed
STATE v. COUNCIL No. 94-580	Orange (92CRS9299)	No Error

STATE v. EDWARDS No. 94-825	Alamance (93CRS1825) (93CRS1826)	No Error
STATE v. EDWARDS No. 94-1215	Rowan (93CRS13876)	Affirmed
STATE v. MACK No. 94-1272	Guilford (93CRS40684) (93CRS40685) (93CRS20556)	Vacated in part and Remanded for resentencing
STATE v. PARRISH No. 94-1233	Richmond (92CRS7887) (93CRS2205)	Affirmed
STATE v. THOMPSON No. 94-1284	Alamance (92CRS10016) (92CRS10031) (92CRS10032) (92CRS10033) (92CRS10034)	Affirmed
STATE v. THOMPSON No. 94-1428	Davidson (94CRS10649)	No Error
STAUFFER INFORMATION SYS. v. N.C. DEPT. OF COMM. COLLEGES No. 94-994	Wake (93CVS10046)	Affirmed
TREVISON v. CITY OF FAYETTEVILLE No. 94-1060	Ind. Comm. (153170)	Affirmed
WARD v. CHITIEA No. 94-1264	Jackson (93CVS143)	No Error

HENDRICKSON v. LEE

[119 N.C. App. 444 (1995)]

DAVID L. HENDRICKSON, PLAINTIFF v. JAMES L. LEE, NATIONWIDE MUTUAL INSURANCE COMPANY, C/S SOVRAN CREDIT CORPORATION, PENNSYLVANIA MANUFACTURERS ASSOCIATION INSURANCE COMPANY AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANTS

No. 9310SC651

(Filed 18 July 1995)

1. Insurance § 530 (NCI4th)— underinsured coverage—waiver of policy limit coverage—use of unapproved form

Summary judgment was properly granted for plaintiff in a declaratory judgment action arising from an automobile accident to determine whether a policy issued by Pennsylvania Manufacturers Association Insurance Company (PMA) provided underinsured motorist coverage where the insurance company argued that the court erred in not finding that its insured had previously rejected UIM coverage equal to the liability limits ($1,000,000) and instead selected UIM coverage in the amount of $60,000. Where liability insurance is in excess of the statutory minimum (as here), UIM coverage must be in an amount equal to the policy limits for bodily injury liability specified in the policy absent rejection thereof in accordance with the N.C.G.S. § 20-279.21(b)(4). At the time of plaintiff's accident, rejection of UIM coverage was required to be in writing on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance. Although PMA contends that the form executed by the insured adequately expressed the intention to reject liability limits UIM coverage, that document differs from the Rate Bureau directive in several respects. Moreover, the language of the executed form is ambiguous and thus must be construed against the insurer and in favor of coverage. Finally, PMA contends that uncontroverted evidence, including an affidavit and the premiums accepted, establish that UIM coverage equal to the policy limits be rejected; however, the language of the statute is mandatory and, as of the date of the accident, only a single form complied with statutory directives.

Am Jur 2d, Automobile Insurance § 322.

2. Insurance § 527 (NCI4th)— underinsured coverage—wavier of policy limit coverage—approval of form by Rate Bureau

The trial court did not err in a declaratory judgment action arising from an automobile accident by granting summary judg-

ment for plaintiff where defendant insurance company contended that the insured had rejected policy limit UIM coverage on a form other than the form promulgated by the Rate Bureau. Although defendant contended that the failure to utilize a rejection form identical to that promulgated by the Rate Bureau did not invalidate the rejection because the policy did not fall within the jurisdiction of the Rate Bureau in that this was a fleet vehicle policy and the responsibility of the Rate Bureau extends solely to private passenger motor vehicles, the version of N.C.G.S. § 20-279.21(b)(4) in effect at the time of the accident clearly and unambiguously mandated that any rejection of UIM coverage shall be accomplished by use of a form promulgated by the Rate Bureau and approved by the Commissioner of Insurance. That statute appears merely to have been concerned with avoiding confusion and ambiguity and did not effectively confer additional jurisdictional authority on the Rate Bureau. Although defendant contends that a recent amendment expresses the Legislature's intent that N.C.G.S. § 20-279.21(b)(4) does not grant jurisdiction to the Rate Bureau beyond that found in N.C.G.S. § 58-36-1, amendments to statutes are not necessarily clarifications of legislative intent absent express mandate, and the General Assembly here explicitly provided that the 1991 amendments do not affect claims arising prior to or litigation pending on the effective date of the amendments. Plaintiff's claims arose prior to the effective date.

Am Jur 2d, Automobile Insurance § 322.

3. Insurance § 530 (NCI4th)— underinsured coverage—waiver of policy limit coverage—use of unapproved form—not substantial compliance

The trial court did not err in a declaratory judgment action arising from an automobile accident by granting summary judgment for plaintiff where defendant insurance company contended that a document executed by the insured waiving policy limit UIM coverage substantially complied with the mandate of N.C.G.S. § 20-279.21(b)(4) and fully satisfied its underlying objectives. However, the primary purpose of the Financial Responsibility Act is to assure compensation for the innocent victims of uninsured or underinsured drivers, such as plaintiff here, and PMA's proffered resolution does not serve to further the purpose of the statute. Although defendant observes that a letter sent by the Rate Bureau to its member companies said that the form may not

be changed or substantively amended without prior approval, and contends that the changes here were nonsubstantive, the alterations in the insurance company document from that issued by the Rate Bureau constitute substantive amendments of the sort prohibited by the Rate Bureau's letter and it is undisputed that prior approval of the changes was never sought.

Am Jur 2d, Automobile Insurance § 322.

Appeal by defendant Pennsylvania Manufacturers Association Insurance Company from summary judgment entered 20 August 1992 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 23 March 1994.

Edwards & Kirby, by David F. Kirby and Tiana H. Irvin, for plaintiff-appellee.

Young, Moore, Henderson & Alvis, P.A., by Ralph W. Meekins and Glenn C. Raynor, for defendant-appellant Pennsylvania Manufacturers Association Insurance Company.

Cranfill, Sumner & Hartzog, by Theodore B. Smyth and Kari L. Russwurm, for defendant-appellee North Carolina Farm Bureau Mutual Insurance Company.

JOHN, Judge.

In this declaratory judgment action, defendant Pennsylvania Manufacturers Association Insurance Company (PMA) appeals the trial court's entry of summary judgment in favor of plaintiff David L. Hendrickson (plaintiff). The court's ruling was based upon its determination that PMA policy number BAP 159000 758451 9 (the PMA policy) provided plaintiff with underinsured motorist (UIM) coverage up to the limits of bodily injury liability coverage established in the policy. PMA argues, however, that the court erred in not finding that its insured, defendant C/S Sovran Credit Corporation (Sovran), had previously rejected UIM coverage equal to the liability limits and instead selected UIM coverage in the amount of $60,000.00. We disagree with PMA's contentions.

Pertinent factual and procedural information is as follows: On 23 October 1990, plaintiff was seriously injured in an automobile collision caused by the failure of defendant James L. Lee (Lee) to stop his vehicle at a stop-light. When the accident occurred, plaintiff was operating a 1985 Plymouth owned by his employer, defendant Sovran.

This automobile was covered by the PMA policy, a general commercial insurance policy issued to Sovran in January 1990. Lee was insured on the date of the collision by Nationwide Mutual Insurance Company (Nationwide) under a personal automobile liability policy.

Seeking recovery for his injuries (including amputation of one leg), plaintiff filed a negligence action against Lee in Edgecombe County Superior Court on 14 November 1991. Nationwide subsequently accepted liability on Lee's behalf and tendered its limits of $100,000.00 to plaintiff. Plaintiff thereafter notified PMA of his claim for UIM benefits under the PMA policy.

On 19 December 1991, citing PMA's denial of UIM coverage in excess of $60,000.00, plaintiff filed the instant action for declaratory relief against PMA and North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). In his complaint, plaintiff alleged his damages exceeded the $100,000.00 submitted by Nationwide and requested a declaration that the amount of UIM coverage available to him under the PMA policy was equal to the limits of bodily injury liability coverage established within that policy.

Farm Bureau's answer, filed 11 February 1992, admitted issuance of several policies in effect on the accident date which provided UIM coverage for certain members of plaintiff's family. However, Farm Bureau asked the court to declare that plaintiff was entitled to UIM coverage at limits of $1,000,000.00 under the PMA policy, and further that PMA's UIM coverage be deemed primary to whatever coverage, if any, the court found to be provided by Farm Bureau's various policies.

PMA's answer asserted that Sovran specifically "rejected underinsured motorists coverage for any amounts over $60,000" as reflected on the policy's declarations page and as evidenced by Sovran's April 1989 execution of a standard rejection form (the rejection form). PMA thereafter requested the court's declaration that the policy provided plaintiff no more than $60,000.00 UIM coverage.

On 17 March 1992, plaintiff moved for summary judgment pursuant to N.C.R. Civ. P. 56 (1990) "on the issue of the underinsured motorist coverage afforded by [PMA]." PMA likewise moved for summary judgment on 16 April 1992. After a hearing held 29 April 1992, the court granted plaintiff's motion and denied that of PMA. Included in the court's order was the following language:

IT IS THEREFORE ORDERED:

. . . .

3. That PMA motor vehicle policy no. BAP 159000 758451 9 provides underinsured motorist coverage for damages sustained by plaintiff in the motor vehicle wreck of October 23, 1990.

4. That the limits of underinsured motorist coverage in PMA motor vehicle policy no. BAP 159000 758451 9 are equal to the limits of bodily injury liability coverage in that policy.

5. That the limits of underinsured motorist coverage in PMA motor vehicle liability policy no. BAP 159000 758451 9 are One Million Dollars (1,000,000.00).

---

[1] PMA contends the trial court erred by determining that the policy provided plaintiff with UIM coverage equal to that policy's $1,000,000.00 bodily injury liability limits. Through three interrelated assignments of error, PMA argues Sovran had previously rejected liability limits UIM coverage and selected UIM coverage in the amount of $60,000.00. Limiting our holding to the circumstances of the case *sub judice*, we disagree.

Summary judgment is a procedural device designed to permit penetration of an unfounded claim or defense in advance of trial, allowing for summary disposition in either party's favor when a fatal weakness in the claim or defense is exposed. *See, e.g., Thompson v. Insurance Co.*, 44 N.C. App. 668, 672, 262 S.E.2d 397, 400 (citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979)), *disc. review denied*, 300 N.C. 202, 269 S.E.2d 620 (1980). Summary judgment is "an appropriate procedure in a declaratory judgment action," *Montgomery v. Hinton*, 45 N.C. App. 271, 273, 262 S.E.2d 697, 698 (1980) (citations omitted), but is only properly granted 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." *See* Rule 56(c). Accordingly, we must examine the evidence herein to determine whether it reveals a genuine issue of material fact regarding the amount of UIM coverage provided in the policy; if not, the trial court properly granted plaintiff judgment as a matter of law. *See, e.g., Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *disc. review denied*, 276 S.E.2d 283 (1981) (citation omitted).

PMA initially contends plaintiff was not afforded UIM coverage equal to the liability limits contained in his employer's policy because Sovran specifically rejected that amount of coverage in April 1989. PMA also maintains the validity of Sovran's rejection was not affected by use of a form differing from that promulgated in 1986 by the North Carolina Rate Bureau (the Rate Bureau). Because these contentions involve overlapping questions, we will discuss them jointly.

We note at the outset that "[w]hen examining cases to determine whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." *Smith v. Nationwide Mutual 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). In the case *sub judice*, the type of coverage at issue is UIM and the governing statute is the version of N.C. Gen. Stat. § 20-279.21(b)(4) in effect at the time of the incidents giving rise to the instant action. *See* N.C. Gen. Stat § 20-279.21(b)(4) (1988).

The Financial Responsibility Act (the Act), which includes G.S. § 20-279.21(b)(4), is a remedial statute which must be liberally construed in order to achieve the "beneficial purpose intended by its enactment." *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (citation omitted), *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). It is well-established that "[t]he purpose of [the Act] . . . is the protection of innocent victims who may be injured by financially irresponsible motorists." *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 224, 376 S.E.2d 761, 763 (1989) (citation omitted). As our Supreme Court has stated, the Act's purpose is "best served when the statute is interpreted to provide the innocent victim with the *fullest possible protection*" from the negligent acts of an underinsured motorist. *Id.* at 225, 376 S.E.2d at 764 (emphasis added). Further, the provisions of the Act "are 'written' into every automobile liability policy as a matter of law, and, when the terms of [a] policy conflict with the statute, the provisions of the statute will prevail." *Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977) (citations omitted).

G.S. §20-279.21(b)(4) provided as follows at the time of plaintiff's accident:

(b) Such owner's policy of liability insurance:

. . . .

> (4) *Shall . . . provide underinsured motorist coverage*, to be used only with policies that are written at limits that exceed those prescribed by subdivision (2) [i.e, $25,000.00] of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, *in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy.*
>
> . . . .
>
> The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage.
>
> . . . Rejection of this coverage for policies issued after October 1, 1986, *shall* be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.

(Emphasis added).

Our Supreme Court has held that where (as here) liability insurance is in excess of the statutory minimum, "the UIM coverage must be in an amount equal to the policy limits for bodily injury liability specified in the policy" absent rejection thereof in accordance with the statute. *Smith*, 328 N.C. at 147, 400 S.E.2d at 50. Thus, although an insured is not legally obligated to contract for UIM coverage in *any* amount, *see, e.g., Sutton*, 325 N.C. at 268, 382 S.E.2d at 765, UIM coverage equal to a policy's liability limits will be assumed *unless* the insured validly rejects that amount of coverage. *See Maryland Casualty Co. v. Smith*, 117 N.C. App. 593, 598, 452 S.E.2d 318, 321 ("Underinsured coverage is mandatory unless rejected by the insured in accordance with the provisions of [G.S.] § 20-279.21."), *disc. review denied*, 340 N.C. 114, 456 S.E.2d 316 (1995). Further, the burden of establishing an insured's rejection of coverage falls on *the insurer*. *See, e.g., Lichtenberger v. Insurance Co.*, 7 N.C. App. 269, 273, 172 S.E.2d 284, 287 (1970) (discussing UM coverage).

At the time of plaintiff's accident, rejection of UIM coverage was required to be "in writing . . . on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance . . . ." G.S. § 20-279.21(b)(4).

Under the foregoing principles, therefore, unless the evidence reflects an issue of material fact regarding Sovran's rejection of UIM

coverage equal to the liability limits contained within the PMA policy (by use of a form promulgated by the Rate Bureau), we must affirm the court's determination that, under the applicable version of G.S. § 20-279.21(b)(4), plaintiff (through its employer Sovran) was afforded UIM coverage in the amount of $1,000,000.00.

As of 23 October 1990, a single form had been promulgated by the Rate Bureau and approved by the Commissioner of Insurance to effectuate rejection of UIM coverage in an amount equal to a policy's bodily injury liability limits:

> SELECTION/REJECTION FORM
> UNINSURED MOTORISTS COVERAGE
> UNINSURED/UNDERINSURED MOTORISTS COVERAGE
>
> Uninsured Motorists Coverage and Uninsured/Underinsured Motorists Coverage have been explained to me. I understand that the option I select will apply to any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policies unless I notify you otherwise in writing.
>
> —— I choose to reject Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of:
>
> B.I. _____; P.D. _____
>
> —— I choose to reject both Uninsured and Uninsured/Underinsured Motorists Coverages.

PMA's arguments before this Court rely entirely upon its interpretation of the language and significance of a form executed by Sovran which PMA insists adequately expressed the latter's intention to reject liability limits UIM coverage. More specifically, Alyce R. Hurley (Hurley, Risk Insurance Manager and Vice President of Sovran) submitted the following document to PMA on Sovran's behalf on 12 April 1989:

> UNINSURED MOTORISTS COVERAGE
> UNINSURED/UNDERINSURED MOTORISTS COVERAGE
>
> Uninsured Motorists Coverage and Uninsured/Underinsured Motorists Coverage have been explained to me. I understand that the option I select will apply to any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policies with this company unless I notify you otherwise in writing.

X I Choose to reject Uninsured Motorists Coverage Limits equal to my automobile liability limits and select Uninsured Motorists Coverage at Limits of:

X Statutory per each state's requirement for the following states:

. . . North Carolina . . . .

A subsequent endorsement to the policy (dated 23 January 1990) provided:

> In consideration of the premium charges in the various states, . . . it is agreed that the limit of liability for uninsured motorists will be as indicated in the schedule listed below:
>
> | STATE | LIMIT OF LIABILITY |
> | --- | --- |
> | . . . . | |
> | NORTH CAROLINA | $60,000.00 |

PMA maintains the foregoing clearly and unambiguously expressed Sovran's "inten[tion] to reject underinsured coverage in the amount of the policy limits as offered by PMA." We disagree.

First, it is readily apparent that the document signed by Hurley on Sovran's behalf differs from the Rate Bureau directive in several noteworthy respects. For example, although the title and prefatory language of the former refer separately to the terms "uninsured" and "underinsured," only "Uninsured" coverage is specifically rejected by Sovran. Indeed, the sole option available to an insured by the rejection form utilized in the case *sub judice* is to "reject **Uninsured** Motorists Coverage Limits equal to my automobile liability limits and select **Uninsured** Motorists Coverage at Limits of: . . . Statutory per [North Carolina's] requirement . . . ." In contrast, the Rate Bureau formulation enables an insured party to "reject both Uninsured and Uninsured/Underinsured Motorists Coverages." In addition, the rejection form herein limits an insured who rejects liability limits UM coverage to selection of UM coverage *only* at limits of "[s]tatutory per each state's requirement . . . ." The Rate Bureau form, on the other hand, provides spaces to indicate selection of specified limits of UM/UIM coverage *and* to reject both coverages in their entirety.

Moreover, the language of the rejection form executed by Sovran to the effect the insured was selecting UM limits at "statutory per [North Carolina's] requirement" is ambiguous particularly in light of

the subsequent endorsement purporting to provide $60,000.00 UM coverage. Further illustrating this ambiguity is Hurley's understanding reflected in her affidavit that Sovran was "purchas[ing] the minimum required amounts of uninsured/underinsured Motorist coverage in the state of North Carolina." As previously noted, in the absence of effective rejection of liability limits UIM coverage, the minimum required by North Carolina law under the circumstances *sub judice* would be an amount equal to the $1,000.000.00 liability coverage. In the event of proper rejection of UIM coverage, the minimum amount of UIM coverage under North Carolina law which an insured must procure is none, not $60,000.00. We therefore agree with plaintiff that the rejection form executed by Sovran and accepted by PMA is ambiguous, and thus must be construed against the insurer and in favor of coverage. *See, e.g., Hamilton v. Travelers Indemnity Co.*, 77 N.C. App. 318, 320, 335 S.E.2d 228, 230 (1985), *disc. review denied*, 315 N.C. 587, 341 S.E.2d 25 (1986).

While acknowledging the rejection form does not explicitly indicate Sovran's rejection of *UIM* coverage, PMA responds that the term *uninsured* as defined in the PMA policy includes any motor vehicle "which is an underinsured motor vehicle." Further, PMA points out that the Act includes the term "underinsured highway vehicle" in its description of "uninsured motor vehicles." *See* N.C. Gen. Stat. § 20-279.21(b)(4) (1993). Thus, PMA contends "Sovran's rejection of 'uninsured motorist coverage limits,' includes by definition, a rejection of underinsured motorist coverage, and was sufficient to accomplish rejection of both." In other words, PMA argues rejection of UIM coverage may be read into Sovran's 12 April 1989 rejection of UM coverage equal to its $1,000,000.00 liability limits.

However, UM and UIM coverages are separately referred to in both the title and introductory statement of the Rate Bureau form, and UM and UIM benefits are thus handled as two distinct types of coverage within that document itself. Construing the rejection form at issue against the insurer and in favor of coverage, therefore, we decline to endorse PMA's assertion that the concept of "underinsured" motorists coverage is incorporated within the word "uninsured" for purposes of rejecting insurance coverage under G.S. § 20-279.21(b)(4).

Finally, PMA contends uncontroverted evidence establishes that both Sovran (the insured) and PMA (the insurer) intended that UIM coverage equal to the policy's liability limits be rejected. Specifically,

PMA cites the statement in Hurley's affidavit to the effect that Sovran "intended to purchase the minimum required amounts of uninsured/underinsured Motorist Coverage in the state of North Carolina and reject uninsured/underinsured motorist coverage in the amount of liability policy limits . . . ." Further, PMA alleges that upon receipt of Sovran's rejection, PMA charged and accepted premiums reflecting only $60,000.00 UIM coverage. Because a policy of insurance constitutes a contract, PMA suggests that the intent of the parties with respect to the terms of their agreement controls interpretation thereof. *See, e.g., White v. Mote*, 270 N.C. 544, 555, 155 S.E.2d 75, 82 (1967) (citation omitted).

We observe first that the version of G.S. § 20-279.21(b)(4) in effect in 1990 provided that rejection of UIM coverage "*shall*" be in writing and on "a form promulgated by the Rate Bureau and approved by the Commissioner of Insurance." The language "shall" as applied in Chapter 20 of the North Carolina Motor Vehicle Statutes, is "mandatory" and not merely "formal" and "directory language." *Pearson v. Nationwide Mutual Ins. Co.*, 325 N.C. 246, 254-55, 382 S.E.2d 745, 749 (1989) (dealing with liability policy cancellation notice contained in N.C. Gen. Stat. § 20-310(f)(2) (1983 & Cum. Supp. 1988)); *see also Insurance Co. v. Hayes*, 276 N.C. 620, 638-39, 174 S.E.2d 511, 522-23 (1970); *Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automobile, Inc.*, 87 N.C. App. 467, 472-73, 361 S.E.2d 418, 421-22 (1987) (Chapter 20 requirements governing transfer of legal title and ownership of motor vehicles are mandatory), *disc. review denied*, 321 N.C. 480, 364 S.E.2d 672 (1988). Again, as of the date of plaintiff's accident, only a single form complied with the statutory directives.

In addition, our Supreme Court has held that although an insured may reject UIM coverage in its entirety, the terms of such coverage are not controlled simply by the parties and their insurance contract. As aforementioned:

> [W]hen a statute [such as G.S. § 20-279.21(b)(4)] is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written in[to] it, and if the terms of the policy conflict with the statute, the . . . statute will prevail.

Sutton, 325 N.C. at 263, 382 S.E.2d at 762 (citations omitted).

Thus, whatever the expressed intentions of Sovran and PMA, the rejection form executed by Sovran, because it failed to comply with

the provisions of G.S. § 20-279.21(b)(4), did not constitute a proper and effective rejection of UIM coverage equal to the policy's liability limits.

[2] PMA's second primary contention is that failure to utilize a rejection form *identical* to that promulgated by the Rate Bureau did not operate to invalidate Sovran's alleged rejection of UIM liability limits coverage. More particularly, PMA claims that the policy at issue did not fall within the jurisdiction of the Rate Bureau, *see* N.C. Gen. Stat. § 58-36-1 (1994), and thus use of the precise form promulgated by the Rate Bureau was not required. In the narrow circumstances before us, we disagree.

We reiterate our observations above regarding interpretation of the mandatory "shall" in Chapter 20. However, PMA seeks to avoid application of the statute in that the contract of insurance herein was a commercial automobile liability policy providing coverage for more than five vehicles. PMA suggests it is therefore categorized as a "fleet" motor vehicle policy. *See* N.C. Gen. Stat. § 58-40-10(2) (1994). Because responsibility of the Rate Bureau in the instant context extends solely to "private passenger (nonfleet) motor vehicles," *see* G.S. § 58-36-1(3), PMA insists "there is no basis upon which to require PMA or Sovran to use the specific rejection form promulgated by the Rate Bureau . . . ."

Nonetheless, it is uncontroverted that at the time of his automobile accident, plaintiff was operating a Sovran vehicle which was principally garaged and registered in North Carolina and which bore a North Carolina license plate. Under N.C. Gen. Stat. § 20-309 (1993), financial responsibility as provided in Article 9A of Chapter 20 of our General Statutes—i.e, the Financial Responsibility Act—must be maintained upon all motor vehicles registered in this State. Again, the version of G.S. § 20-279.21(b)(4) in effect at the time of plaintiff's accident clearly and unambiguously mandated that any rejection of UIM coverage "shall" be accomplished by use of a form "promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance."

Notwithstanding, PMA claims that to interpret this portion of G.S. § 20-279.21(b)(4) as applicable to the fleet policy at issue here would be tantamount to creating a conflict between that statutory section and G.S. § 58-36-1. *See, e.g., Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981) ("statutes should be reconciled

with each other when possible . . . .) (citations omitted). We do not believe, however, that giving effect to the plain language of G.S. § 20-279.21(b)(4) indicates any pronouncement regarding the scope or extent of the Rate Bureau's jurisdiction. To the contrary, it appears that for purposes of application of the Act in the circumstances of this case, the *jurisdiction* of the Rate Bureau is largely immaterial.

By requiring rejection of UIM coverage to be accomplished by use of a specific Rate Bureau form, G.S. § 20-279.21(b)(4) was not effectively conferring additional jurisdictional authority to the Rate Bureau. Rather, the statute appears merely to have been concerned with avoiding confusion and ambiguity through the use of a single standard and approved form. Stated otherwise, we disagree with PMA's conclusion that interpreting the relevant version of G.S. § 20-279.21(b)(4) as mandating use of a Rate Bureau form for rejection of UIM coverage within a fleet policy necessarily conflicts with G.S. § 58-36-1.

PMA in any event suggests we avoid the purported statutory conflict by "limit[ing] application of the procedure for using the Rate Bureau form to companies that are otherwise subject to the Rate Bureau's jurisdiction." PMA perceives support in a more recently enacted version of G.S. § 20-279.21(b)(4). *See* N.C. Gen. Stat. § 20-279.21(b)(4) (Cum. Supp. 1992 & 1993) (rejection of UIM coverage "for policies under the jurisdiction of the North Carolina Rate Bureau" are to be in writing on an approved Rate Bureau form). PMA claims "the Legislature's amendment expresses its intent that G.S. § 20-279.21(b)(4) does not, in either its current or pre-amended form, grant jurisdiction to the Rate Bureau beyond that found in G.S. § 58-36-1."

We note that absent express mandate by the General Assembly, "amendments to statutes are not *necessarily* clarifications of legislative intent." *Proctor*, 324 N.C. at 225, 376 S.E.2d at 764. Moreover, the General Assembly explicitly provided that the 1991 amendments to G.S. § 20-279.21(b)(4) do not affect "claims arising prior to" or "litigation pending on the effective date of" the amendments, *see* 1991 N.C. Sess. Laws ch. 646, § 4, and further that they "shall only apply to new and renewal policies written on and after the effective date" of the relevant sections—5 November 1991. *Id.* As previously indicated, Sovran's PMA policy was issued in January 1990 and the accident in which plaintiff was injured occurred 23 October 1990. As plaintiff's claim thus arose prior to the applicability of the 1991 amendments,

we decline to look beyond the earlier version of G.S. § 20-279.21(b)(4).

[3] Should we determine (as we have) that the statute indeed required use of the Rate Bureau form, PMA also presents an alternative argument that the 12 April 1989 document executed by Sovran "substantially complied" with the statutory mandate and fully satisfied its underlying objectives.

More specifically, PMA alleges one of the primary purposes of the Act is to allow an insured knowingly and intentionally to reject UIM coverage. Because Hurley's affidavit establishes that UM/UIM coverage had been fully explained to her and that she had intentionally rejected PMA's offer of UM/UIM coverage equal to the policy's bodily injury liability limits, PMA contends the goal of the Act had been achieved. PMA suggests we not "elevate form over substance . . . [by] allow[ing] the procedural mechanism defined in the statute to supersede the purpose underlying that statute."

We reiterate, however, that the primary purpose of the Act is rather to assure compensation for the innocent victims of uninsured or underinsured drivers, such as plaintiff herein. *See, e.g., Proctor*, 324 N.C. at 224, 225, 376 S.E.2d at 763, 764 (citation omitted). PMA's proffered resolution (in effect denying plaintiff recovery in excess of $60,000.00) does not serve to further the "beneficial purpose" for which G.S. § 20-279.21 (1990) was enacted. *See Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (citation omitted).

As additional support for its position that "substantial compliance" with G.S. § 20-279.21(b)(4) was sufficient, PMA observes that a circular letter sent by the Rate Bureau to its member companies included the following prohibition: "the language [of the proposed form] may not be changed or substantively amended, without prior approval . . . ." PMA contends that to the extent the rejection form utilized herein modified that of the Rate Bureau, any such amendment was "nonsubstantive" and expressly permitted under the foregoing instructions.

As discussed *supra*, however, the PMA text differs from ("changes") that issued by the Rate Bureau in numerous respects. These alterations constitute substantive amendments of the sort prohibited by the Rate Bureau's instructional letter. Significantly, moreover, it is undisputed that prior approval of the changes was never sought either by PMA or by Sovran.

For the reasons discussed hereinabove, we hold the policy affords $1,000,000.00 UIM coverage to plaintiff and that summary judgment was properly granted in his favor.

Affirmed.

Judges JOHNSON and GREENE concur.

E. ALAN RUSHER AND H & R TOWING, INC., PETITIONERS v. EUGENE B. TOMLINSON, CHAIRMAN, NORTH CAROLINA COASTAL RESOURCES COMMISSION AND NORTH CAROLINA COASTAL RESOURCES COMMISSION, RESPONDENTS AND ATLANTIC DIVING AND MARINE, INC., INTERVENOR-RESPONDENT

No. COA94-1058

(Filed 18 July 1995)

1. Environmental Protection, Regulation, and Conservation § 45 (NCI4th)— berthing facilities in Cape Fear River—CAMA permit—requirement of easement—contested case hearing denied

The trial court properly dismissed petitioners' request for a contested case hearing in regard to the requirement of an easement in an action arising from granting a CAMA permit to construct berthing facilities in the Cape Fear River. N.C.G.S. § 146-12 does not require an easement prior to the issuance of a CAMA permit; an easement is not required when a riparian owner constructs piers and docks to gain access to navigable waters; the facility in this case was built to gain access to navigable waters, but did not contain piers or docks, nor does it project over navigable waters; and the original permit falls squarely within the exception set forth in the North Carolina Administrative Code Title 1, R. 6B.0605. This case is distinguishable from *Walker v. N.C. Dept. of E.H.N.R.*, 111 N.C. App. 851, because it does not have structures over navigable waters and Atlantic Diving is using the facility to gain access to navigable waters.

Am Jur 2d, Waters §§ 93, 260.

2. Environmental Protection, Regulation, and Conservation § 45 (NCI4th)— berthing facilities in Cape Fear River—CAMA permit—denial of contested case hearing—substantial likelihood of prevailing

Petitioners failed to show a substantial likelihood of prevailing in a contested case hearing arising from the granting of a CAMA permit for a berthing facility in the Cape Fear River where the evidence fails to support a finding that the permit was contrary to any statute or rule.

Am Jur 2d, Licenses and Permits § 53.

3. Environmental Protection, Regulation, and Conservation § 45 (NCI4th)— berthing facilities in Cape Fear River—CAMA permit—denial of contested case hearing—interference with navigation

There was no error in the denial of a contested case hearing in regard to the interference of the proposed project with navigation in an action arising from the granting of a CAMA permit for a berthing facility in the Cape Fear River where all of the evidence submitted in the appeal suggests that the facility will not interfere with petitioners' access to their riparian property rights. Furthermore, petitioners failed to set out the rules they contend were violated.

Am Jur 2d, Licenses and Permits § 53; Waters §§ 260, 261, 263, 297.

4. Environmental Protection, Regulation, and Conservation § 45 (NCI4th)— berthing facilities in Cape Fear River—CAMA permit—denial of contested case hearing—safety of project

There was no error in the denial of a contested case hearing where petitioner contended that the trial court erred in refusing to order a contested case hearing in regard to the safety of the proposed project but petitioners failed to identify any safety violations and relied on a letter from the Coast Guard which does not take into account the modified permit and other actions taken by Atlantic Diving, which proposed the berthing facility.

Am Jur 2d, Waters § 297.

5. Administrative Law and Procedure § 52 (NCI4th)— berthing facilities in Cape Fear River—CAMA permit—denial of contested case hearing—exhaustion of administrative remedies

In an action regarding the denial of a contested case hearing where there was no error in the trial court's order denying the hearing, assignments of error to exhaustion of remedies, inaccuracies in the record on appeal, and petitioners' failure to account for modification of the permit were not addressed.

Am Jur 2d, Administrative Law §§ 505 et seq.

6. Courts § 137 (NCI4th)— berthing facilities in Cape Fear River—federal permits—Court of Appeals jurisdiction

In an action regarding the denial of a contested case hearing arising from a CAMA permit to build berthing facilities in the Cape Fear River where a federal permit was also acquired, the Court of Appeals may not decide federal issues relating to the regulation of navigation pursuant to the Rivers and Harbors Act of 1899, federal dredge and fill requirements, or vessel mooring safety issues controlled by the United States Coast Guard as required by the modified Corps permit.

Am Jur 2d, Conflict of Laws §§ 14, 15.

Judge GREENE dissenting.

Appeal by petitioners from order entered 5 May 1994 by Judge William C. Gore in Brunswick County Superior Court. Heard in the Court of Appeals 25 May 1995.

Murchison, Taylor, Kendrick, Gibson & Davenport, L.L.P., by Alan D. McInnes and Michael Murchison, for petitioners-appellants.

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

Clark, Newton, Hinson & McLean, L.L.P., by Reid G. Hinson, for intervenor-respondent Atlantic Diving & Marine, Inc.

JOHNSON, Judge.

On 16 March 1993, Atlantic Diving & Marine Contractors, Inc. (Atlantic Diving) submitted an application for a Coastal Area

Management Act (CAMA) major development/dredge and fill permit to construct berthing facilities and engage in associated dredging at a pier facility on the west side of the Cape Fear River immediately downstream of the Cape Fear Memorial Bridge. Atlantic Diving's application was made pursuant to a proposed plan to moor, on an extended basis, two very large ocean-going vessels (700 feet long and 100 feet wide) side-by-side under a contract with the Maritime Administration (MARAD).

Petitioner H & R Towing, Inc. has a marine towing and docking facility which abuts and is immediately upstream from the location of Atlantic Diving's proposed berthing facility. Petitioner E. Alan Rusher is the owner of the land where H & R Towing, Inc.'s facility is located. Immediately north of H & R Towing's facility, the U.S. Corps of Engineers maintains a facility for docking and maintenance. At the time of the permit application, the dredge Markam was docked at the Corps' facility.

Following receipt of a copy of Atlantic Diving's permit application, petitioners timely submitted objections to the proposed permit arguing, among other things, that the berthing facility contemplated by Atlantic Diving required an easement from the North Carolina Department of Administration, that the berthing facility would eliminate petitioners' ability to dock tugs and barges at petitioners' property, and that the berthing facility would pose a significant safety hazard.

On 4 June 1993, the North Carolina Department of Environment, Health and Natural Resources and Coastal Resources Commission issued a CAMA permit for construction of berthing facilities and associated dredging to Atlantic Diving, notwithstanding petitioners' objections.

The CAMA permit was modified at Atlantic Diving's request in October of 1993. The modification deleted certain breasting dolphins and piers and modified the dredge plan allowed by the original permit. The permit was again modified on 8 May 1994 by hand delivery of the letter to the Division of Coastal Management in which Atlantic Diving withdrew any right to construct "structures" on, above or in navigable waters granted by the original permit.

Petitioners allege that they received notice of the modification in January of 1994. No action was taken by them regarding the modification of the permit except for filing a motion to amend their petition

for judicial review to allege that they had not been given notice of the modification. This motion was filed and served on all parties on 21 January 1994. The petitioners have never filed any written objection to the modified permit or a request for a contested case hearing with the Commission regarding the modified CAMA permit.

In addition to the CAMA permit issued to Atlantic Diving, Atlantic Diving was also issued a separate United States Department of the Army Permit. This permit, issued on 28 May 1993, concerns matters over which the federal government possesses jurisdiction. The Corps permit was modified on 1 July 1993 to include a further condition with regard to matters affecting public safety and the requirement that Atlantic Diving coordinate safety issues with the Captain of the Port, the United States Coast Guard, and the Marine Safety Office.

Atlantic Diving filed its motion to dismiss for lack of subject matter jurisdiction on 25 April 1994, asserting that the court lacked subject matter jurisdiction because petitioners had failed to exhaust their administrative remedies and that the court lacked subject matter jurisdiction with regard to certain federal issues. The State as respondent joined in support of the motion to dismiss.

On 23 June 1993, petitioners timely filed a request for a contested case hearing with respondent Coastal Resources Commission. This request was based on the original permit.

On 1 July 1993, David Heeter of the Attorney General's office, on behalf of the North Carolina Division of Coastal Management, submitted an analysis of the petition to the Chairman, recommending that the request for a contested case hearing be denied. Attached to this recommendation were various documents.

On 10 July 1993, Eugene B. Tomlinson, Chairman of the North Carolina Coastal Resources Commission, entered a decision denying petitioners' request for a contested case hearing.

Pursuant to North Carolina General Statutes § 113A-123 (1994), petitioners sought judicial review and a hearing was held before Judge William C. Gore. At the hearing petitioners argued that they had satisfied the burden required to obtain a contested case hearing and that the Commission's determination was affected by errors of law, arbitrary and capricious, unsupported by substantial evidence in view of the whole record or otherwise flawed. Specifically, petitioners argued that they demonstrated a substantial likelihood that the berthing facility contemplated by Atlantic Diving required an ease-

ment from the North Carolina Department of Administration, would eliminate petitioners' ability to dock tugs and barges at petitioners' property, and would pose a significant safety hazard. Petitioners further argued that despite a letter from the agency requiring the applicants merely to summarize the evidence to be presented in support of its position, the agency determination viewed the submissions of petitioners as final and arbitrary and dismissed them.

Subsequently, the superior court affirmed the decision of the Commission finding that petitioners had failed to allege a violation of a statute or rule, and that petitioners had failed to demonstrate a substantial likelihood of prevailing upon the merits at a contested case hearing. From the adverse decision of the superior court, petitioners appeal to this Court.

Intervenor-respondent Atlantic Diving cross-appealed alleging that the trial court erred by failing to grant their motion to dismiss the petition for lack of subject matter jurisdiction.

[1] The issue in the case *sub judice* is whether the trial court erred in refusing to order a contested case hearing in regard to the requirement of an easement before issuing a permit for construction of the project. Petitioners argue that an easement should have been required prior to issuing a permit.

North Carolina General Statutes § 146-12 (1991) provides:

> The Department of Administration *may grant*, to adjoining riparian owners, easements in lands covered by navigable waters or by the waters of any lake owned by the State *for such purposes and upon such conditions as it may deem proper*, with the approval of the Governor and Council of State. . . . Every such easement shall include only the front of the tract owned by the riparian owner to whom the easement is granted, shall extend no further than the deep water, and shall in no respect obstruct or impair navigation. (Emphasis added.)

Thus, this statute does not require an easement prior to the issuance of a CAMA permit. The Department of Administration has promulgated rules which set forth the requirements for issuance of permits. These rules provide:

> (a) Riparian owners *may construct piers or docks to gain access to navigable waters without an easement.* Such structures may

include a weatherproof shelter if the use of the shelter is in keeping with riparian access.

(b) Easements in lands covered by navigable waters are generally *required for any structure built over navigable waters for purposes other than gaining riparian access.* The Department of Administration may exempt from this provision structures deemed minor in their impact upon the public trust waters of the state. Examples of such exempt structures include boat ramps, duck blinds, small groins, and the like. (Emphasis added.)

North Carolina Administration Code Title 1, R. 6B.0605. Thus, an easement is not required when a riparian owner constructs piers and docks to gain access to navigable waters. The facility in the instant case was built to gain access to navigable waters; however, in accordance with the modified permit, the facility did not contain piers or docks, nor does it project over the navigable waters. Moreover, the original permit upon which petitioners base their appeal falls squarely within the exception set forth in Rule 6B.0605(a).

Petitioners rely on this Court's decision in *Walker v. N.C. Dept. of E.H.N.R.*, 111 N.C. App. 851, 433 S.E.2d 767, *disc. review denied*, 335 N.C. 243, 439 S.E.2d 164 (1993) to support its argument that an easement is required. However, *Walker* is distinguishable from the instant case. In *Walker*, our Court determined that the rule promulgated by the Department of Administration applied. This determination was based on several factors: the size of the public trust waters covered, the size of the area being dredged, the presence of large floating docks significantly affecting the public's right to navigate on public trust waters, and the impact of the biological and physical functions of the estuary. This case, unlike *Walker*, does not have structures over navigable waters and Atlantic Diving is using the facility to gain access to navigable waters. Thus, we are unpersuaded by petitioners' argument that an easement is required prior to issuing a permit for construction of the facility.

[2] Petitioners next argue that the reviewing court's conclusion that a permit was not required was either in error or improperly made. Whether a contested case hearing is appropriate is based on the following factors: (1) the decision is contrary to a statute or rule; (2) petitioner is directly affected by the decision; and (3) petitioner has a substantial likelihood of prevailing in a contested case hearing. The standard of judicial review in cases such as the instant case is pursuant to North Carolina General Statutes § 150B-51(b)(5) (1991). The

denial should be reviewed in accordance with the "whole record" test. *Pamlico Tar River Foundation v. Coastal Resources Comm.*, 103 N.C. App. 24, 28, 404 S.E.2d 167, 170 (1991). "The 'whole record' test requires the reviewing court to examine all the competent evidence and pleadings which comprise the 'whole record' to determine if there is substantial evidence in the record to support the administrative tribunal's findings and conclusions. . . . 'Substantial evidence' is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (*quoting Walls & Marshall Fuel Co. v. N.C. Dept. of Revenue*, 95 N.C. App 151, 154, 381 S.E.2d 815, 817 (1989).

The evidence shows and the reviewing court found that petitioners have failed to show a substantial likelihood of prevailing in the hearing and that the evidence fails to support a finding that the permit was contrary to any statute or rule. Thus, in light of the whole record, the evidence was sufficient to support the Commission's findings of fact which were sufficient to support the conclusions of law.

[3] Petitioners next argue that the reviewing court erred in refusing to order a contested case hearing in regard to the interference of the proposed project with navigation. They argue that the reviewing court's decision was arbitrary and capricious. This argument must fail. All of the evidence submitted suggests that the facility will not interfere with petitioners' access to their riparian property rights. The evidence also reveals that petitioners have failed to set out which rules they contend have been violated; therefore, this argument fails.

[4] Petitioners also argue that the trial court erred in refusing to order a contested case hearing in regard to the safety of the proposed project. A review of the record reveals that petitioners failed to identify any safety violations with regard to the facility. The thrust of their argument is a letter from the Coast Guard which does not take into account the modified permit and other actions taken by Atlantic Diving in accordance with their receipt of the federal permit regarding vessel mooring plans, hurricane contingency plans, and security. Thus, there is no error with regard to safety issues.

[5] We now turn to whether this Court lacks subject matter jurisdiction over this appeal. Atlantic Diving argues that petitioners have failed to exhaust their administrative remedies with regard to the modified permit which is the subject of the instant action. The original permit authorized a plan to construct piers and mooring dolphins over and in navigable waters. However, the modified permit upon

which the facility was based, was built without the piers and dolphins, and without any "structures" over navigable waters. Thus, Atlantic Diving argues that petitioners have submitted a record containing factual inaccuracies to this Court. North Carolina General Statutes § 113A-121.1(b) (1989) requires that within twenty days after a disputed permit decision is made by CAMA that petitioners submit a request for determination of the appropriateness of a contested case hearing in writing. Atlantic Diving argues that petitioners failed to submit a petition for a contested case hearing on the modified permit within the statutory time; accordingly, Atlantic Diving submits that they have failed to exhaust their administrative remedies.

Our Supreme Court has held that administrative appeals which are taken prior to exhaustion of administrative remedies are not ripe and must be dismissed for lack of subject matter jurisdiction. *Vass v. Bd. of Trustees of State Employees' Medical Plan*, 324 N.C. 402, 379 S.E.2d 26 (1989).

Atlantic Diving is correct in arguing that petitioners have not accounted for the modification in the permit, and have alleged inaccuracies in the record. Several of the facts petitioners rely upon in making their argument were made moot by the subsequent modification of the permit. However, since this Court had determined that the trial court did not err in its order, we need not address this assignment of error.

[6] Atlantic Diving further argues that this Court, the superior court and the Commission lack subject matter jurisdiction over all federal issues which petitioners attempt to assert as reversible error. Our Court may not decide federal issues relating to the regulation of navigation pursuant to the Rivers and Harbors Act of 1899, federal dredge and fill requirements, or vessel mooring safety issues controlled by the United States Coast Guard as required by the modified Corps permit. Accordingly, we do not address any federal issues petitioners' attempt to assert.

For all of the foregoing reasons, petitioners have failed to demonstrate a substantial likelihood of prevailing in a contested case hearing and they have failed to show a violation of a statute, rule or regulation. Thus, the reviewing tribunal's findings of facts and conclusions of law were without error and the trial court properly dismissed petitioners' request for a contested case hearing. Therefore, we affirm the trial court's dismissal of petitioners' request for a contested case hearing.

Affirmed.

Judge MARTIN, JOHN C. concurs.

Judge GREENE dissents in separate opinion.

Judge GREENE dissenting.

I disagree that an easement was not required before issuance of a permit to Atlantic Diving and that petitioner is not entitled to a contested case hearing.

This Court has previously determined that a proposed project which "includes a 148-slip marina covering 5.9 acres of public trust waters, requiring the hydraulic excavation of 9 acres of public trust lands" is "an undertaking of [such] magnitude" so as to require an easement from the Department of Administration before receiving a CAMA permit. *Walker*, 111 N.C. App. at 855, 433 S.E.2d at 769. In this case, Atlantic Diving, in its CAMA permit application, proposed to construct dolphins and piers and repair a bulkhead for the "extended berthing, repairing, [and] unloading" and mooring of two vessels up to 700 feet long and 100 feet wide on the west side of the Cape Fear River downstream of the Cape Fear Memorial Bridge. The proposed project also called for extensive dredging of a boat basin, 1200 feet in length and 200 to 250 feet in width. The proposed development in this case, like the proposed development at issue in *Walker*, was an undertaking of such magnitude, it required an easement from the Department of Administration pursuant to N.C. Gen. Stat. § 146-12 before a CAMA permit could be granted. Because an easement was not granted, the case should be remanded to the Department of Administration. If the Department of Administration does not grant Atlantic Diving an easement, the proposed project cannot go forward. If, however, the Department of Administration grants Atlantic Diving an easement, petitioner is entitled to a contested case hearing with regard to the issuance of a CAMA permit.

In order to receive a contested case hearing on a decision to grant a development permit, a person must show that he "[h]as alleged that the decision is contrary to a statute or rule"; that he "[i]s directly affected by the decision"; and that he "[h]as a substantial likelihood of prevailing in a contested case." N.C.G.S. § 113A-121.1(b) (1994). Because petitioner has met the second requirement, which is not in dispute, the question is whether petitioner has met its burden with

regard to the first and third requirements. In this case, the Commission's form to request a contested case hearing directed petitioner to "[s]ummarize the evidence you will present at a hearing in support of your appeal." In the letter accompanying its contested case hearing request, petitioner alleged the following:

> The proposed development will not only have a significant adverse effect on the value and enjoyment of [petitioner's] property but will prohibit his current use of the property for docking tugs and barges because it will be unsafe for these vessels to navigate into his property and docks due to the risk of collision with the now permitted "permanently" moored ships of Atlantic Diving . . . .
>
> 1. . . . properly diagram[m]ed it will become evident that risk of collision with Applicant's ships is ever present for any vessel trying to dock at Petitioner's site and as a result Petitioner's property becomes unusable. Our evidence at the hearing will consist of photographs and diagrams which will show the project as permitted and constructed and will accurately show its affects on the adjoining riparian users. These visual aids will be accompanied by the testimony of licensed vessel operators, captains and other experts as to the dangers that this project poses and its significant adverse effect on the value and use of Petitioner's property. . . .
>
> 2. . . . Our evidence will show that the project as permitted is unsafe and poses a hazard to the port, the bridge, our property and vessels, the property of those across the river. This evidence will consist of expert testimony, diagrams, photographs, weather information and other pertinent material. . . . Evidence from docking pilots as to the safety problems created by this project will be produced along with appropriate expert testimony. . . .
>
> . . . .
>
> 4. Affect on Adjoining Riparian Property. Our evidence will show that the project as permitted will effectively deny the Petitioner the use of his property. . . .

Petitioner also refuted in this letter the conclusions of the Corps of Engineers, the United States Coast Guard, and Gary Greene, consulting engineer for Atlantic Diving, concerning the safety and effects of the proposed project, and summarized the evidence to refute their conclusions.

Pursuant to N.C. Gen. Stat. § 113A-120(a)(2), the Department of Environment, Health, and Natural Resources and Coastal Resources Commission "shall deny an application for a permit upon finding . . . [i]n the case of estuarine waters, that a permit for the development would be denied pursuant to G.S. 113-229(e)." N.C.G.S. § 113A-120(a)(2) (1994). Section 113-229(e) provides that the Department "may deny an application for a dredge or fill permit upon finding":

> (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare . . . .

N.C.G.S. § 113-229(e) (1994). Furthermore, the Department "shall deny an application for a permit" if the proposed development would interfere with public rights of access to navigable waters. N.C.G.S. § 113A-120(a)(5); N.C.G.S. § 113A-113(b)(5). Regulations promulgated pursuant to CAMA provide that "[d]evelopment shall not impede navigation or create undue interference with access to, or use of, public trust areas or estuarine waters." N.C. Admin. Code tit. 15A, r. 7H.0208(a)(2)(H) (April 1993).

Although petitioner did not allege in its request for a contested case hearing the specific numbers of statutes, rules or regulations which it contends were violated in granting Atlantic Diving a CAMA permit, petitioner's allegations were specific enough to identify violations of the statutes and rules set out above and to satisfy the requirement of alleging "that the decision is contrary to a statute or rule." N.C.G.S. § 113A-121.1(b)(1) (1994); *cf. Save Our Rivers v. Town of Highlands*, 113 N.C. App. 716, 724, 440 S.E.2d 334, 339 (liberally construing requirement under G.S. § 150B-46 that third parties seeking judicial review of final agency decision specifically set out exceptions to agency decision in party's petition for judicial review), *disc. rev. allowed*, 336 N.C. 609, 447 S.E.2d 402 (1994).

Finally, petitioner, in order to be entitled to a contested case hearing, has the burden of showing that it has "a substantial likelihood of prevailing in a contested case." N.C.G.S. § 113A-121.1(b)(3); *Pamlico Tar*, 103 N.C. App. at 27, 404 S.E.2d at 169. This burden is analogous to the process used in summary judgment proceedings because the Commission, in evaluating a petition for a contested case hearing, has

before it evidence or summaries of evidence from both sides and must determine whether or not a hearing is necessary. It therefore is appropriate that the Commission, in determining whether petitioner shows a substantial likelihood of prevailing in a contested case, look at the evidence in the light most favorable to petitioner and draw all inferences of fact in favor of petitioner. *Cf. Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (in summary judgment proceeding, all inferences of fact must be drawn against movant and in favor of nonmovant). Viewed in the light most favorable to petitioner, the evidence reveals a substantial likelihood that petitioner would prevail in a contested case hearing. Therefore, there is not substantial evidence in the "whole record" to support the Commission's conclusion that "petitioner has failed to allege violations of state statutes or rules or to demonstrate a substantial likelihood of prevailing in a contested case." For these reasons, I would reverse the trial court and order resubmission to the Department of Administration and, in the event an easement and permit are granted to Atlantic Diving, a remand to the Commission for a contested case hearing, as requested by petitioner.

I have reviewed Atlantic Diving's cross-appeal and determined the trial court did have subject matter jurisdiction.

IN THE MATTER OF: THE APPEAL OF BELK-BROOME CO. FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE CATAWBA COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991

No. 9310PTC1319

(Filed 18 July 1995)

Taxation § 82 (NCI4th)— property tax evaluation—anchor department store at mall—method of valuation—effect of operating agreement

A decision of the Property Tax Commission was remanded for a new hearing where the property was an anchor department store at a mall and the Commission relied on the cost rather than the income approach in reaching its decision. The cost approach is better suited for valuing specialty property or newly developed property; the income approach should be the primary method used to reach a value for this property. The custom when an anchor department store enters a mall is for the anchor to sign an operating agreement with the mall developer which defines the

anchor's and developer's obligations. While the Commission viewed the operating agreement as an incumbrance which distorted the results of the income and sales approach valuations and concluded that the only approach which accurately reflected the property's true value was the cost approach, it is not the Commission's place to equalize property values between anchor store property and the surrounding property. The operating agreement is an integral part of the market and the property must be valued according to that market. Placing a lower value on this property solely because it is an anchor store may appear illogical, but this unequal treatment is a part of the market that must be considered. The distinguishing factor between this case and *In re Appeal of Greensboro Office Partnership*, 72 N.C. App. 635, is that the lease in *Greensboro* was a personal encumbrance unique to that property while the operating agreement here is a market standard. N.C.G.S. § 105-345.2(b)(2) and (4).

Am Jur 2d, State and Local Taxation §§ 704 et seq.

Appeal by taxpayer from final decision of the North Carolina Property Tax Commission entered 16 August 1993. Heard in the Court of Appeals 26 September 1994.

Taxpayer (Belk) is one of three anchor department stores at the Valley Hills Mall in Hickory, North Carolina. Each of the three anchor stores owns its building, land, and parking area. Belk owns a 164,387 square foot building and 14.39 acres of land. For the 1991 tax year Belk listed its property at 5.5 million dollars. The county assessed it at 10.4 million dollars.

To assist in challenging the County's assessment Belk retained an independent appraiser who used three well accepted methods of valuation to value the property. The appraiser reached a value between $5,525,000 and $6,025,000 using the sales comparison approach, a value of $5,950,000 using the income approach, and a value of $6,000,000 using the cost approach. On appeal, Belk asserts the correct property value is $6,000,000.

At the hearing before the Property Tax Commission (the Commission), Belk and the County were prepared to offer evidence on all three methods of valuation, but, due to prompting by the Commission, the parties primarily concerned themselves with evidence of the income and sales comparison approaches. In reaching its decision, however, the Commission relied exclusively on the cost approach.

The cost approach requires the appraiser to determine the cost of land and cost of improvements separately. The combined costs, minus depreciation, constitute the total value of the property. Belk's appraiser valued the land at $1,439,000 and improvements at $4,570,260, which, after rounding, resulted in a value of $6,000,000. Belk's appraiser initially reached a value of $5,888,172 for the cost of improvements, but he deducted $1,317,912 from the reproduction cost of the building for functional obsolescence. The appraiser explained in his report that this deduction was necessary due to the extraordinarily large size of the building. The deduction resulted in the $4,570,260 figure above.

The Commission added Belk's cost of improvements, without the functional obsolescence deduction, to the County's $2,600,100 appraisal of the land, which reduced the County's assessment to $8,489,012. Belk appeals from this decision.

Manning, Fulton & Skinner, P.A., by Michael T. Medford, for taxpayer-appellant.

W. Gene Sigmon and Michael K. Newby for County-appellee.

JOHNSON, Judge.

We first address Belk's argument that the Commission violated principles of due process by basing its decision exclusively on the cost approach after inducing Belk not to submit evidence on the cost approach. The record reveals that the Commission indicated it would place little reliance on the cost approach and encouraged Belk not to spend time presenting evidence on that approach. Belk accordingly limited its presentation of testimonial evidence and cross-examination on the cost approach. Belk did submit its appraiser's report which contained a cost approach analysis, but Belk contends that this report, without the related testimonial support and cross-examination of the County's appraiser regarding his cost approach analysis, does not cure the constitutional violation.

Although the Commission's action might be criticized, we do not address the constitutional issue. The Commission's decision is reversed on other grounds.

Belk argues that the Commission overvalued its property because it relied on improper valuation methodologies, and misinterpreted the applicable case law governing assessments for ad valorem taxation. The standard of review for appeals from the Commission is found in

North Carolina General Statutes § 105-345.2(b) (1992), which provides that this Court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." It further provides that we may reverse, remand, modify, or declare void the Commission's decision if the appellant is prejudiced because the Commission's decision is

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Id.

It is "a sound and a fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct[,]" but the presumption is one of fact and is therefore rebuttable. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). To rebut the presumption, Belk must produce " 'competent, material and substantial' evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property." *Id.* at 563, 215 S.E.2d at 762. The County is required to value all property for ad valorem tax purposes at its true value in money, which is its "market value." North Carolina General Statutes § 105-283 (1992). Market value is defined in the statute as

> the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Id. An important factor in determining the property's market value is its highest and best use. *Rainbow Springs Partnership v. County of*

Macon, 79 N.C. App. 335, 339 S.E.2d 681, *disc. review denied*, 316 N.C. 734, 345 S.E.2d 392 (1986). The Belk property must be valued at its highest and best use, which the parties agree is its present use as an anchor department store. Therefore, the County, and the Commission, are required to use a valuation methodology that reflects what willing buyers in the market for anchor department stores will pay for the subject property. In doing so, the County must "consider at least [the property's] . . . past income; probable future income; and any other factors that may affect its value." North Carolina General Statutes § 105-317(a)(2) (1992).

The first matter is to determine the correct approach to valuation. For reasons we will address later, the Commission determined that the cost approach was the correct approach. Belk urges the income approach. Neither party advocates using the sales comparison approach.

It is generally accepted that the income approach is the most reliable method in reaching the market value of investment property. *Coastal Eagle Point Oil Co. v. West Deptford Township*, 13 N.J. Tax 242 (1993) (and authorities cited therein). *See also G.R.F. Inc. v. Bd. of Assessors of Cty. of Nassau*, 362 N.E.2d 597, 598 (N.Y. 1977) (where the court recognized that the income approach "generally provides an acceptable and, in the absence of market data, a preferred method of valuing rental property") and *Montgomery Ward & Co. v. County of Hennepin*, 482 N.W.2d 785 (Minn. 1992). The cost approach is better suited for valuing specialty property or newly developed property; when applied to other property, the cost approach receives more criticism than praise. For example, the cost approach's primary use is to establish a ceiling on valuation, rather than actual market value. *G.R.F.*, 362 N.E.2d 597. It seems to be used most often when no other method will yield a realistic value. The modern appraisal practice is to use cost approach as a secondary approach "because cost may not effectively reflect market conditions." *Oil Co.*, 13 N.J. Tax 242, 288 (citations omitted).

We conclude that the income approach should be the primary method used to reach a value for the Belk property. We are mindful, however, that while the income approach is preferential, a combination of approaches may be used because of the inherent weaknesses in each approach. We do not foreclose using such a combination of approaches here so long as the income approach is given greatest weight.

On remand, the Commission should be aware that the figures in the County's income approach are invalid. The income approach arrives at valuation by applying a capitalization rate to the property's potential to generate income, plus or minus certain minor adjustments. Both Belk and the County agree that the correct capitalization rate is 9.5. The property's ability to generate income is represented by the market rental value of the property. Belk's appraiser determined that the Belk property rental value was $3.50 per square foot. The County's rental value figure was $6.50 per square foot.

Based on the record, it is apparent that the County used either an allocation approach, wherein the entire mall was valued and value was allocated among all of the space at the mall according to square footage, or the County calculated the cost of reproduction and backed into the rent per square foot by calculating what the rental value would have to be in order to guarantee a return on investment. The allocation approach, by the County's own admission, transfers value from the in-line stores. In other words, the owner of the anchor store is taxed for the in-line property he does not own. The return-on-investment approach gives no consideration to market rent. It arrives at a rental value based solely on a formula for calculating return on investment, with no consideration of the actual market or external influences on the particular property being valued as required by North Carolina General Statutes § 105-317. Belk unquestionably carried its burden of showing that the County's valuation, under the income approach, was reached in an improper manner. We also note that the County's appraiser seemingly agreed that $3.50 per square foot is the market rental value for anchor department stores.

The Commission, while recognizing that another department store would only pay Belk's suggested value, used the cost approach to establish a higher value for the property. The Commission determined that the cost approach was the only approach which would accurately value the property. This decision was based upon the unique relationship between anchor department stores and mall developers.

When a mall developer decides to build a mall, the developer must secure anchor department stores, like Belk, before development begins. The anchor store is necessary to draw customers to the mall, and thereby draw shops and stores that will lease space in the in-line portion of the mall. Without the anchor department stores, the mall will not survive. Therefore, developers are willing to make monetary

concessions to attract anchor stores. These concessions consist of lower rental rates or lowered purchase prices. In short, the developer subsidizes the anchor department stores.

The developer has good reason for offering these subsidies. Not only do the anchor stores attract smaller stores and shops to the in-line spaces, their presence allows the developer to drive up the rent for in-line spaces. The value of the subsidy is at least partially regained in the increased rental value of the in-line space. In effect, all or part of the value of the subsidy is taken from the anchor department store and transferred to the in-line portion of the mall, where presumably the County will capture taxes on the transferred value.

Belk and the County agree that when an anchor department store enters a mall, the custom is for the anchor to sign an operating agreement with the mall developer. These operating agreements define the anchor's and developer's rights and obligations. The most significant features of the operating agreement, for the purpose of this appeal, are the anchor store's obligation to operate only as a department store and the corresponding obligation not to sell the property to any entity other than an acceptable anchor department store.

The effect of the operating agreement on the value of the property is the main point of contention between Belk and the County. The Commission viewed the operating agreement as an encumbrance on the property which distorted the results of Belk's appraiser's income and sales approach valuations. The Commission used a "bundle of rights" analogy in reaching this conclusion. According to the Commission, the operating agreement removed some of the rights from the bundle of fee ownership rights because it limited the property's use and restricted the sale of the property to a limited group of buyers. From this standpoint, the Commission concluded that when Belk's appraiser valued the property, he valued only a partial interest in the property. The Commission further concluded that because of the effect of operating agreements on anchor store property, the only approach which accurately reflected the property's true value was the cost approach.

We find error in the Commission's decision to rely solely on the cost approach. The Commission explained its decision as follows:

> The Commission concludes as a matter of law that the estimates of value found by Mr. Lambert in Taxpayer Exhibit 1 violate the rule laid down by this Commission and affirmed by the North

> Carolina Court of Appeals in *In re Greensboro Office Partnership*, 72 N.C. App. 635, 325 S.E.2d 24, *cert. denied*, 313 N.C. 602, 330 S.E.2d 610 (1985). Mr. Lambert applied the Cost, Income and Sales approaches in a manner which is calculated to determine the value only of a partial interest in the subject land and improvements. His estimates under these three approaches arrived at the value of part of the bundle of rights in the subject property, not of the entire bundle of rights. Under North Carolina law, all appraisals of property for property tax purposes must determine the value of the entire bundle of rights. This is true whether or not the owner has bargained away some of his rights. Like the property owner in the *Greensboro* case, the Taxpayer here does not have the entire bundle of rights, and seeks to have only his partial interest appraised. North Carolina law simply does not permit this. The owner is treated as if he owns the entire bundle of rights, even though he may have bargained some of them away. This is precisely the point settled in the *Greensboro* case.
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> . . .
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> The "property" to be appraised consists of all the rights and interests in the property that are capable of private ownership. This is variously described as the unencumbered fee simple interest or the "whole bundle of rights." Property is appraised without regard to the various privately created encumbrances affecting it. While publicly created encumbrances such as zoning are considered in appraisals for property tax purposes, private encumbrances such as leases or the operating agreements considered here are not.

The Commission continued:

> Because practices in this industry are relatively standardized, the rental rates and sales prices examined by Mr. Lambert are all reflective of rentals and sales of partial interests, and do not reflect the value of the entire interest. Under these circumstances, only the cost approach, properly applied, can generate an estimate of the value of the whole bundle of rights in the property.

To the degree that the Commission's decision is based on *Greensboro*, it is based on a misinterpretation of the law. *Greensboro* stands for the proposition that the value of property must be based on

the market, not good or bad business transactions. In *Greensboro*, the taxpayer owned an office building which was encumbered by a long-term lease at below market rent. The taxpayer argued that the property should be valued based on the actual contract rents received under the existing lease. The *Greensboro* Court held that the County should value the property using the market rental value. The distinguishing factor between the present case and *Greensboro* is that the lease in *Greensboro* was a personal encumbrance unique to that property, whereas the operating agreement in this case is a market standard.

The Commission recognized that there was a market for the Belk property. The operating agreement is an integral part of that market, a point which is at least implicit in the Commission's order. The property must be valued according to that market. North Carolina General Statutes § 105-283. Placing a lower value on this property solely because it is an anchor store may appear illogical, but this unequal treatment is a part of the market that must be considered. Other courts faced with similar questions have reached the same conclusion regarding the unequal treatment given to anchor stores:

> [T]he marketplace created the field. It is not the assessor's function to change market place "playing fields." It is his duty to tax market places as he finds them. In that process the individual assessor's sense of marketplace business morality has no place. If that marketplace "playing field" needs leveling it is, solely, absent any illegality, the function of the legislature to make those changes.

Supervisor v. Berman, 569 A.2d 706, 710 n.4 (Md. App.), *cert. denied*, 573 A.2d 1337 (Md. 1990). We agree that it is up to our legislature to change the method of valuing anchor department stores if the market value standard is no longer appropriate.

We find further support in the opinions of the New York and Arizona appellate courts. In *G.R.F., Inc. v. Bd. of Assessors Cty. of Nassau*, 362 N.E.2d 597, the Court of Appeals of New York was presented with the question of how to value an anchor department store for property tax purposes. In that case, a shopping center developer donated the land on which the taxpayer agreed to operate an anchor department store. The developer also donated over one million dollars towards construction of the building and guaranteed minimum gross annual sales of $14,000,000.

The evidence in *G.R.F.* showed, as it does in our case, that the developer subsidized construction of the anchor store, and that he would have charged lower rent to an anchor store if the property had been rented because the anchor's presence drove up the rental value of the smaller stores. The New York Court determined that the cost approach would overvalue the anchor store property and allowed a combination of the cost approach and the income approach to value the property. The Court reasoned as follows:

> [T]o the extent that [an anchor] store is an attraction to the satellite tenants, part of the cost of construction may reflect not value to the [anchor] store, but value to the remainder of the typical shopping center. That value, in turn, is reflected in the increased rental value of the shopping center property other than the [anchor] store, and, presumably, in the tax assessment of the whole shopping center property. On this view, it would be inequitable to assess the . . . property on the basis of reproduction cost less depreciation.

G.R.F., 362 N.E.2d at 599.

In the Arizona case, the taxpayer and County agreed that the income approach was the correct approach for valuing an anchor department store, but the parties arrived at vastly different values based on that approach. The difference was due to the different rental rates applied by each party. The taxpayer used market rates for anchor department stores, while the County increased its rental value figure to reflect the higher rent which the property would have brought had it not been an anchor store. The Court rejected the County's argument that the rental value should be increased, stating that the fair market value was correctly measured as "suited to a major anchor tenant." *Magna Invs. & Development Corp. v. Pima Cty.*, 625 P.2d 354, 359 (Ariz. App. 1981).

The Commission attempts to justify its placement of a higher value on the Belk property by explaining that IBM or Glaxo would pay more for the property than an anchor department store. This reasoning is unpersuasive in light of the Commission's finding that the highest and best use of the property is its present use as a department store. We find irrelevant what another type of business might pay for the property when the property is currently being used at its highest and best use.

In addition, the Commission finds elsewhere in its order that mall developers will never sell anchor store space to businesses such as Glaxo or IBM. This finding further emphasizes the need to value the Belk property according to the limited market in which it exists. The reality is that anchor store property will be sold only to another anchor department store chain, and another anchor department store chain will pay only the relatively low value which the market places on these properties, whether that value be due to the operating agreement or some other market function.

The County and Commission must take the property as it finds it. It is not the Commission's place to equalize property values between anchor store property and the surrounding property. In doing so, the Commission exceeded its authority and committed an error of law. North Carolina General Statutes § 105-345.2(b)(2) and (4). Therefore, we reverse and remand for a new hearing at which the Commission will redetermine the Belk property value with emphasis on the income approach to valuation.

Reversed and remanded.

Judges COZORT and GREENE concur.

WACHOVIA BANK AND TRUST COMPANY, N.A., A NATIONAL BANKING ASSOCIATION, PLAINTIFF v. CARRINGTON DEVELOPMENT ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP; E. HAROLD KEITH; JOYCE G. KEITH; AND HENRY H. KNIGHT, DEFENDANTS

No. 9410SC203

(Filed 18 July 1995)

1. Guaranty § 17 (NCI4th); Negotiable Instruments and Other Commercial Paper § 102 (NCI4th)— failure to disburse loan funds—lender's refusal justified

There was no merit to defendant guarantors' contention that they should not be held liable for the borrower's default on a construction loan based on plaintiff lender's wrongful failure to disburse certain remaining funds prior to the maturity date of the loan, since plaintiff had no duty to disburse funds if debts to contractors and materialmen had not been paid; the record showed

that liens had already been filed against the property by contractors prior to any failure to disburse by plaintiff; plaintiff had no duty to release remaining funds for "tenant fit up"; and the guarantors' claimed defenses of breach of contract by failure to disburse, wrongful impairment of collateral, and breach of the duty of good faith were not available.

Am Jur 2d, Bills and Notes §§ 933, 962; Guaranty §§ 79, 89.

2. Unfair Competition or Trade Practices § 39 (NCI4th)—lender's refusal to disburse loan funds—no unfair or deceptive trade practice

Plaintiff lender's failure to disburse funds pursuant to a construction loan contract did not amount to an unfair or deceptive trade practice, since plaintiff was simply exercising its right under the loan agreement to withhold funds; furthermore, even if plaintiff had wrongfully failed to disburse funds, such failure would be a breach of contract issue insufficient to sustain an unfair and deceptive trade practices action under N.C.G.S. § 75-1.1.

Am Jur 2d, Consumer and Borrower Protection §§ 302 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 ALR3d 449.

3. Unfair Competition or Trade Practices § 39 (NCI4th)—sale of secured property—allocation of proceeds—no unfair and deceptive trade practice

There was no merit to defendant guarantors' contention that plaintiff lender committed an unfair or deceptive trade practice by misapplying proceeds from the sale of a portion of the secured property, since the evidence showed that defendants agreed beforehand to plaintiff's application of the sale proceeds.

Am Jur 2d, Consumer and Borrower Protection §§ 302 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 ALR3d 449.

4. Unfair Competition or Trade Practices § 39 (NCI4th)— appointment of receiver—no unfair and deceptive trade practice by lender

There was no merit to defendant guarantors' contention that plaintiff lender committed an unfair or deceptive trade practice by having a receiver appointed for shopping center property, since plaintiff was entitled to appointment of the receiver under provisions of its deed of trust and perfected security interest; there was ample evidence that the borrower had severe financial difficulties; and plaintiff had a right to protect its security interest in the property. N.C.G.S. § 1-502(1).

Am Jur 2d, Consumer and Borrower Protection §§ 302 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 ALR3d 449.

5. Trial § 59 (NCI4th)— summary judgment motion—failure to file affidavits in timely manner—motion to continue properly denied

Even though plaintiff did not file supporting affidavits with its motion for summary judgment as required under N.C.G.S. § 1A-1, Rule 6(d), they were filed in sufficient time before the hearing to prevent any prejudice to defendants and they contained only information already known to defendants; therefore, the trial court did not abuse its discretion in denying defendant's motion for continuance of the summary judgment hearing on the ground that affidavits were not timely filed.

Am Jur 2d, Summary Judgment § 16.

Appeal by defendants E. Harold Keith and Joyce G. Keith from judgment entered 7 October 1993 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 27 January 1995.

Defendant Carrington Development Associates (Carrington) executed a construction loan agreement with plaintiff Wachovia Bank and Trust Company, N.A. (Wachovia) in the principal amount of $1,700,000 on 17 October 1988. The loan was intended to finance an expansion of the Knightdale Crossing Shopping Center (Phase II). As security for the loan, Carrington granted Wachovia a first deed of

trust on Phase II. Wachovia also received a second-priority assignment of rents on Phase I. As additional security, defendants E. Harold Keith and Henry H. Knight, the partners in Carrington, and Joyce G. Keith, wife of E. Harold Keith, executed a Mortgage Loan Guaranty Agreement whereby each guaranteed payment of the construction loan.

The parties modified the loan agreement in May 1990 and Wachovia provided Carrington an additional $150,000. In return, Wachovia received deeds of trust on various real properties owned by the Keiths and Knight.

Carrington failed to pay the loan balance when it matured on 17 October 1990. Wachovia filed this action on 30 January 1991 to collect the debt. Defendant Knight filed an answer in his individual capacity and on behalf of Carrington and also filed a cross-claim against the Keiths. Joyce Keith filed answers to Wachovia's complaint and Knight's cross-claim. E. Harold Keith filed the following: (1) a motion to dismiss and answer to Wachovia's complaint in his individual capacity and on behalf of Carrington, (2) a motion to dismiss and answer to Knight's cross-claim, and (3) a counterclaim against Wachovia. The Keiths asserted as a defense Wachovia's failure to disburse remaining loan funds prior to the maturity date. E. Harold Keith's counterclaim alleged certain acts of Wachovia constituted unfair or deceptive trade practices.

Wachovia released a parcel of land owned by Henry Knight from the deed of trust at the request of Carrington after the filing of the original suit. The property was sold to Wal-Mart, with the proceeds of the sale disbursed and the remainder applied to the outstanding debt as prescribed by an agreement between the defendants and Wachovia dated 23 December 1991.

In June 1992, Wachovia foreclosed on Phase II. Knight filed a personal bankruptcy petition 30 June 1992, which stayed the actions against him. Under the direction of the bankruptcy court, real properties owned by Knight which were security for the construction loan were sold or surrendered, with the proceeds applied to the outstanding debt. These actions significantly reduced Carrington's loan balance. In fact, all reduction of the principal balance resulted from the sale of property owned by Carrington or individually owned by Knight. Wachovia did not foreclose on any of the properties securing the loan which were owned by the Keiths.

On 21 June 1993, Wachovia filed a motion for summary judgment on its claims against the Keiths and on the counterclaim filed by E. Harold Keith. A hearing on the motion was scheduled for 4 October 1993. Wachovia filed affidavits in support of the motion for summary judgment on 21 September 1993. The Keiths filed a motion to continue the summary judgment hearing on 30 September 1993, and an affidavit signed by E. Harold Keith supporting the continuance motion was filed the following day.

On 7 October 1993, the trial court granted summary judgment in favor of Wachovia and against the Keiths, finding them jointly and severally liable in the amount of $372,249.98 for principal balance, accrued interest of $9,844.00, default interest under the terms of the note in the amount of $21,573.74, plus reasonable attorney fees and costs. The court also granted summary judgment in favor of Wachovia as to E. Harold Keith's counterclaim. From this judgment, the Keiths appeal.

Womble Carlyle Sandridge & Rice, by G. Eugene Boyce, William C. Matthews, Jr., and Elizabeth L. Riley, for plaintiff-appellee.

Wood & Francis, PLLC, by Brent E. Wood, for defendant-appellants.

McGEE, Judge.

Appellants assign as error: (1) the trial court's grant of summary judgment in favor of Wachovia and against the Keiths on the issue of liability on the Carrington loan, (2) the grant of summary judgment in favor of Wachovia on the issue of Harold Keith's counterclaim against Wachovia, and (3) the trial court's denial of the Keiths' motion to continue the hearing of Wachovia's summary judgment motion. For the reasons stated below, we affirm the decision of the trial court.

I. Liability Under The Loan Guaranty

[1] The Keiths argue they should not be held liable for Carrington's default on the construction loan. We disagree.

The Keiths and Henry Knight executed a Mortgage Loan Guaranty Agreement on 17 October 1988, whereby they unconditionally guaranteed to Wachovia the payment of $1,700,000 in principal plus interest at the maturity date of the loan. The agreement states the liability is "direct and immediate and not conditional or contingent upon the pursuit of any remedies against the Borrower or any other person"

and each of the signers of the guaranty "shall be jointly and severally bound." The Keiths reaffirmed this guaranty when they and Henry Knight executed a Loan Modification Agreement on 22 May 1990. The loan balance remained unpaid after the 17 October 1990 maturity date. Therefore, absent any available defenses, the Keiths are liable for the unpaid Carrington loan balance.

The Keiths argue Wachovia's failure to disburse certain remaining funds prior to the maturity date of the loan constitutes a breach of the loan contract and provides the Keiths with a defense relieving them from liability under the guaranty agreement. The Keiths also argue Wachovia's failure to disburse funds constituted an unjust impairment of collateral in violation of N.C. Gen. Stat. § 25-3-606 (1986) and a breach of the duty of good faith owed under N.C. Gen. Stat. § 25-1-203 (1986). Although the parties disagree as to whether Wachovia first refused to disburse loan funds in late 1989 or spring of 1990, this disagreement is not material under the facts and circumstances of the case.

The Building Loan Agreement executed 17 October 1988 and signed by Harold Keith and Henry Knight on behalf of Carrington contains the following provision:

> As a condition to its obligation to make the initial and each and every other disbursement of funds hereunder the Bank [Wachovia] may require satisfactory evidence of the payment of all debts owing contractors, surveyors, engineers, architects, materialmen and the like for labor done or professional design or surveying services, or material furnished pursuant to any contract with respect to the Improvements.

Pursuant to this provision, Wachovia had no duty to disburse funds if debts to contractors, materialmen, etc. had not been paid. The record shows liens had already been filed against Phase II by contractors prior to any failure to disburse by Wachovia.

Plaintiff's Second Request For Admissions To E. Harold Keith, pursuant to N.C.R. Civ. P. 36, requested that Keith "[a]dmit that, at the time Wachovia ceased disbursements under the loan agreement to Carrington, liens had been filed against the Knightdale Crossings Shopping Center Expansion [Phase II]." Harold Keith's response was: "Admitted." N.C.R. Civ. P. 36(b) states in part: "Any matter admitted under [Rule 36] is conclusively established unless the court on

motion permits withdrawal or amendment of the admission." Keith never moved to withdraw or amend this admission, and therefore it has been conclusively established. Keith also certified under seal, in a document executed 31 May 1990, that liens had been filed against the property in 1989. A lien in the amount of $52,009.40 was filed 18 May 1989 and another for $5,077.00 was filed 22 November 1989. Both of these liens were filed well before the Keiths claim Wachovia failed to disburse funds in late December 1989.

Since liens had been filed by materialmen and suppliers against the Phase II property, Carrington could not provide Wachovia with satisfactory evidence of "the payment of all debts owing contractors, . . . materialmen and the like," which was a condition to Wachovia's obligation to disburse set forth in the loan agreement. Under the facts presented, Wachovia had no duty to make further disbursals. Because Wachovia had the right to refuse to disburse the remaining funds, we need not consider whether the failure to disburse constituted a breach of the loan agreement or unjust impairment of collateral to such an extent that it would, as the Keiths argue, relieve them from liability.

As noted above, Wachovia eventually disbursed all of the loan principal except for approximately $57,000. The Keiths claim Wachovia's failure to disburse $50,000 of this amount for "tenant fit up" expenses caused a loss in revenue that "ensur[ed] failure" for Phase II. However, Wachovia had no duty to disburse these funds. Not only had liens been filed against Phase II, but the loan agreement itself did not authorize a disbursement for "tenant fit up." The agreement states: "Each request for disbursement shall in all cases be limited to items and certifiable costs set forth in the DCA [Development Cost Analysis] . . . .". A review of the Development Cost Analysis and its attachment shows no projected costs for tenant fit up. Wachovia had no duty to release the remaining funds for this purpose.

Since liens had been filed by materialmen and suppliers against the Phase II property, and since Wachovia had no duty to disburse funds for tenant fit up, we find Wachovia did not wrongfully fail to disburse the remaining loan funds. Therefore, the Keiths' claimed defenses of breach of contract due to failure to disburse, wrongful impairment of collateral, and breach of the duty of good faith are not available. The Keiths are liable to Wachovia for the remaining balance of the Carrington loan.

II. Harold Keith's Counterclaim

Harold Keith filed a counterclaim against Wachovia listing four causes of action, each of which alleged an unfair or deceptive trade practice under N.C. Gen. Stat. § 75-1.1 (1994). We find no merit to these claims and affirm this portion of the trial court's judgment.

A.

[2] Keith's first cause of action alleges Wachovia committed an unfair or deceptive trade practice by refusing to disburse funds as required under the loan agreement. However, as discussed above, Wachovia had no duty to disburse further funds, and thus this cause of action fails. A trade practice is unfair if it offends established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). A trade practice is considered deceptive if it has the capacity or tendency to deceive. *Id.* Our review of the record shows no action by Wachovia which rises to this level. Wachovia simply exercised its right under the loan agreement to withhold funds.

Even if Wachovia had wrongfully failed to disburse funds, we note that a failure to disburse funds is a breach of contract issue. As this Court has said: "[A] mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. 75-1.1." *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 418 S.E.2d 694, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992).

B.

[3] The second cause of action alleges Wachovia committed an unfair or deceptive trade practice by misapplying proceeds from the Wal-Mart sale. Keith claims a larger portion of the proceeds should have been applied to Carrington's outstanding debt, and that he should have been paid a real estate commission for the sale. However, we need not determine if Wachovia misapplied the funds and whether such misapplication would constitute unfair or deceptive trade practices because Keith agreed to Wachovia's application of the proceeds.

In December 1991, Carrington requested that Wachovia release a portion of the property Wachovia held under a deed of trust. Carrington then sold this property to Wal-Mart. At the time Wachovia released the Wal-Mart property, Keith signed a consent agreement approving Wachovia's application of the proceeds of the sale. In his

affidavit, Henry Knight describes the signing of the consent agreement as follows:

> In connection with the release of the Wal-Mart tract, Carrington, the Keiths and I signed an Acknowledgment and Consent agreement that specifically approved the disbursements of proceeds from the sale of the Wal-Mart tract and the application of those proceeds to the debt of Carrington. . . . Also in connection with the Wal-Mart sale, the partners of Carrington, Henry H. Knight and E. Harold Keith, signed a document ("Disbursement Schedule") prepared by Carrington's counsel entitled "Wal-Mart/Henry Knight Sale," agreeing to the application of proceeds from that sale. . . . At the time we executed the Disbursement Schedule, E. Harold Keith acknowledged that his real estate commission from the Wal-Mart tract was contributed to Carrington partnership capital by E. Harold Keith.

Based upon Knight's affidavit and the terms of the acknowledgment and consent agreement, and the disbursement schedule, it is clear Keith agreed beforehand to Wachovia's application of the Wal-Mart sale proceeds. Therefore, he cannot now complain that the proceeds were misapplied. Again, nothing in the record indicates Wachovia's actions regarding the Wal-Mart sale proceeds rise to the level of an unfair or deceptive trade practice and this cause of action fails.

C.

[4] Keith's third cause of action alleges Wachovia committed an unfair or deceptive trade practice by having a receiver appointed for the shopping center property and then by "engag[ing] in conduct to embarrass, humiliate, and damage Carrington and the Keiths" through its "agent," the court-appointed receiver, North Hills, Inc. (North Hills). We find no merit to this argument.

Keith argues Wachovia "wrongfully seized" the shopping center property by having a receiver appointed by the court. However, under provisions in Wachovia's deed of trust on Phase II and the perfected security interest in the Assignment of Rents on Phase I, Wachovia was entitled to appointment of a receiver for the property.

N.C. Gen Stat. § 1-502(1) (1983) states, in part, that a receiver may be appointed:

> Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of

> the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired . . . .

The record contains ample evidence that Carrington had severe financial difficulties at the time a receiver was appointed in May 1991. Therefore, Wachovia did not "wrongfully seize" the shopping center property since it had a right to protect its security interest in the property. Also, under the terms of the deed of trust securing Phase II, Wachovia was entitled to the appointment of a receiver upon default of any of the terms of the loan agreement. The loan balance remained unpaid and Carrington was in default at the time the receiver was appointed.

Keith further argues certain actions of North Hills, acting as the "agent" of Wachovia, constituted unfair or deceptive trade practices that can be attributed to Wachovia. However, as our Supreme Court has said: "[T]he position of the receiver is that of an officer of the court. . . . He is not appointed for the benefit of either party and does not derive his authority from either one. The parties have no authority over him . . . ." *Lowder v. All Star Mills*, 309 N.C. 695, 701, 309 S.E.2d 193, 198 (1983). As a matter of law, Wachovia is not responsible for the actions of North Hills. Assuming, *arguendo*, that North Hills' actions constituted unfair or deceptive trade practices, then North Hills would be the proper party to the action, not Wachovia. Therefore, this cause of action fails.

D.

Keith's final cause of action alleges Wachovia committed unfair or deceptive trade practices by negotiating with Henry Knight to "dissipate the assets of Keith and Carrington for the benefit of Wachovia and Knight." However, appellants did not present or discuss this cause of action in their brief and it is therefore deemed abandoned pursuant to N.C.R. App. P. 28(a). All four of Keith's causes of action fail and the trial court correctly entered summary judgment for Wachovia on this counterclaim.

III. Denial of Motion To Continue Summary Judgment Hearing

[5] The Keiths argue the trial court erred in denying their motion to continue the hearing on Wachovia's summary judgment motion. The Keiths argue the continuance should have been granted because Wachovia did not file its supporting affidavits at the time it moved for summary judgment as required by N.C.R. Civ. P. 6(d). Instead,

Wachovia filed the affidavits approximately three months after the filing of the motion and thirteen days before the hearing. The Keiths also argue the continuance should have been granted until the sale of certain collateral had been approved in the Knight bankruptcy proceeding.

The Keiths did not assign as error the trial court's acceptance of Wachovia's affidavits in support of the motion for summary judgment and we need not decide whether such acceptance was improper.

It is well established that the granting or denial of continuances is addressed to the sound discretion of the trial court. *Wood v. Brown*, 25 N.C. App. 241, 243, 212 S.E.2d 690, 691, *cert. denied*, 287 N.C. 469, 215 S.E.2d 626 (1975). A trial court's ruling on a motion to continue is not reviewable on appeal absent a manifest abuse of discretion. *Id.* Under these facts, we find no such abuse.

Although Wachovia did not file the supporting affidavits with the motion for summary judgment as required under N.C.R. Civ. P. 6(d), they were filed in sufficient time before the hearing to prevent any prejudice to the Keiths. Because these affidavits only served to supplement the pleadings and papers already filed, and since they only contained information already known to the Keiths, there was no unfair surprise. The trial court did not abuse its discretion by denying the motion for continuance on these grounds.

The Keiths also argue the continuance should have been granted until property serving as collateral for the loan had been sold. This decision was within the sound discretion of the trial court and the Keiths present no evidence of abuse of that discretion. We find no abuse of discretion in the trial court's denial of the Keiths' motion for continuance of the hearing on Wachovia's summary judgment motion.

For the reasons stated above, the decision of the trial court granting summary judgment for Wachovia is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

DENNIS FLETCHER, EMPLOYEE/PLAINTIFF v. HARTFORD ACCIDENT & INDEMNITY CO., DEFENDANTS

No. 9310IC1103

(Filed 18 July 1995)

Workers' Compensation § 236 (NCI4th)— injured worker employable within limitations—inability to find employment—not precluded from compensation

An employee who suffers a work-related injury is not precluded from workers' compensation benefits when that employee, while employable within limitations in certain kinds of work, cannot after reasonable efforts obtain employment due to unavailability of jobs. Disability is defined in the Workers' Compensation Act as impairment of the injured employee's earning capacity rather than physical disablement and workers who would not be unemployed but for a work related injury should be compensated by workers' compensation.

Am Jur 2d, Workers' Compensation § 396.

Appeal by defendants from Opinion and Award filed 28 September 1993 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 August 1994.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by C. Scott Whisnant, for plaintiff-appellee

Blue, Fellerath, Cloninger & Barbour, P.A., by Frederick S. Barbour, for defendant-appellants.

Smith, Helms, Mulliss & Moore, L.L.P., by Jeri L. Whitfield, George D. Kimberly, Jr., Todd W. Cline, for the North Carolina Textile Manufacturers Association filing brief amicus curiae.

JOHN, Judge.

Defendants appeal an award to plaintiff by the North Carolina Industrial Commission (the Commission) of temporary total disability accrued during the period between 7 November 1989 and 1 April 1991. Defendants contend the Commission erred by basing its determination of disability upon plaintiff's inability to obtain employment during the period in question. We find defendants' argument unpersuasive.

Relevant background information includes the following: Plaintiff was injured 27 January 1989 in the course of his employment with defendant Dana Corporation (Dana). He was struck in the left arm by a steel chip buggy, part of a train of carts containing scrap metal moved by a tow motor. After undergoing surgery on his shoulder, plaintiff returned to work 24 July 1989. On 8 September 1989, plaintiff was assessed by Dr. Larry G. Anderson, his treating physician, as having 20% permanent partial disability of the left arm. Plaintiff received temporary total disability compensation until returning to work as well as compensation for the permanent disability rating.

On 17 October 1989, plaintiff reinjured his shoulder while attempting to move a basket containing approximately one dozen 60-pound axle tubes. He thereafter was restricted by Dr. Anderson from lifting more than 40 pounds and from lifting overhead. However, neither plaintiff's job nor any other position then available at Dana was consistent with the limitations imposed by Dr. Anderson. Plaintiff consequently was discharged 7 November 1989. Despite extensive efforts, he was unable to secure employment until 1 April 1991.

On 1 February 1991, plaintiff's claim for disability benefits was heard by Deputy Commissioner Charles Markham who ruled plaintiff was not entitled to temporary total disability benefits for the period subsequent to 7 November 1989.

Plaintiff appealed the decision to the full Commission. In an Opinion and Award filed 28 September 1993, the Commission reversed the Deputy Commissioner and ordered defendants to pay temporary total disability accrued during the period of 7 November 1989 through 1 April 1991. In pertinent part, the Commission specified the following findings and conclusions:

> 10. Dr. Anderson believed that as of October 25, 1989, when he gave plaintiff the written restriction as to the 40 pound weight limitation, plaintiff had essentially reached the maximum point of medical improvement. It was his opinion that as of October 25, 1989, Mr. Fletcher could work with the restrictions given him, that is, not lifting anything above 40 pounds. From a medical point of view, plaintiff would have been able to perform sales work or administrative work as of October 25, 1989.
>
> 11. Dana Corporation had no jobs available which met plaintiff's physical restrictions. Therefore, he was terminated on November 7, 1989. . . .

12. After his termination November 7, 1989 and until the time of the hearing [before the Deputy Commissioner], plaintiff made extensive but unsuccessful efforts to gain employment. Plaintiff did not limit himself in this search to industrial work but included supervisory positions and jobs in state government. He was involved with the Employment Security Commission. While he was initially somewhat selective in terms of the pay expected, he lowered his sights, and finally was willing to take anything he could find (except selling insurance). Plaintiff had and sought no medical treatment after November, 1989 except that he received pain medications from his family physician. He did not re-apply for a position with [Dana] as far as its personnel director was aware.

. . . .

17. Despite reasonable efforts, the plaintiff was not able to actually obtain employment from his discharge on November 7, 1989 until returning to work on April 1, 1991.

. . . .

CONCLUSION OF LAW

As a result of the compensable injury, the plaintiff was unable to obtain employment, despite reasonable efforts, until April 1, 1991, and plaintiff is entitled to temporary total disability benefits from the time of his discharge from defendants' [sic] employment on November 7, 1989 until obtaining employment on April 1, 1991, and such other and further medical compensation as may effect a cure, give relief or shorten the period of the claimant's disability.

Defendants gave notice of appeal to this Court 8 October 1993.

We note at the outset that defendants' assignments of error set out in the record on appeal do not conform to our Rules of Appellate Procedure. Appellate Rule 10(c) provides that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." As defendants merely cite to portions of the Commission's Opinion without setting forth a basis for error, their appeal is subject to dismissal. *See Marsico v. Adams*, 47 N.C. App. 196, 197, 266 S.E.2d 696, 698 (1980) (rules of appellate procedure are mandatory and failure to comport with the rules subjects an appeal to dismissal). However, pursuant to our discretionary

power in N.C.R. App. P. 2, we nonetheless elect to review the merits of defendants' appeal.

"It is well established that the Industrial Commission's findings of fact are binding on appeal when supported by competent evidence." *Lackey v. R. L. Stowe Mills*, 106 N.C. App. 658, 661, 418 S.E.2d 517, 519, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 150 (1992) (citations omitted). Moreover, an Opinion and Award of the Commission will not be disturbed on appeal unless it contains a patent error of law. *Carter v. Frank Shelton, Inc.*, 62 N.C. App. 378, 381, 303 S.E.2d 184, 187 (1983), *disc. review denied*, 310 N.C. 476, 312 S.E.2d 883 (1984). Defendants and *amicus* counsel argue the Commission committed error of law by awarding temporary total disability benefits to plaintiff under circumstances wherein he possessed the capacity to earn wages and thus was not totally disabled. Defendants assert the Commission thereby "stretched [the Workers' Compensation Act] to provide unemployment insurance for workers ready, willing and able to work, who have qualifications to obtain employment, but who are unemployed because of economic conditions." We disagree.

A claimant seeking to recover under the Workers' Compensation Act (the Act) bears the burden of proving both the existence and extent of disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citation omitted). Under the Act, an employee injured in the course of his employment is "disabled" if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (1991). Disability as defined in the Act is thus the impairment of the injured employee's earning capacity rather than physical disablement. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986).

A claimant may meet the burden of proving inability to earn the same wages earned before injury by showing "he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted).

Defendants assert the Commission misinterpreted *Russell* and "erroneously focused on whether plaintiff was able to actually obtain employment" instead of whether plaintiff was capable of earning the same wages. *Amicus* counsel maintains an injured employee in the circumstance of plaintiff must demonstrate "he is unable to work and

not merely that he unsuccessfully sought work." In addition, counsel reiterates defendants' contention that the holding of the full Commission in reliance upon *Russell* "in effect convert[ed] temporary total disability [in]to unemployment compensation."

However, the Court in *Russell* did not address the causes of plaintiff's inability to obtain employment, but rather focused upon evidence of plaintiff's reasonable efforts to obtain employment as being one means of meeting his burden of showing incapacity to earn the same wages earned prior to injury. *Id.* at 764-65, 425 S.E.2d at 456-57.

> "[T]he so-called 'work search' test is merely the evidentiary vehicle by which employability, or lack of it, is proven," *Flesche v. Interstate Warehouse*, 411 So.2d 919, 922 (Fla. 1st DCA 1982), and "there are a number of criteria by which wage-earning capacity must be measured, and 'no single factor is conclusive.' "

Anderson v. S & S Diversified, Inc., 477 So.2d 591, 594 (Fla. 1st DCA 1985), *disc. review denied*, 486 So.2d 597 (Fla. 1986) (quoting *Walker v. Electronic Products & Engineering Co.*, 248 So.2d 161, 163 (Fla. 1971)); *see also Church's Fried Chicken v. Maloney*, 599 So.2d 706, 710 (Fla. 1st DCA 1992) and *Vann v. St. Anthony's Hosp.*, 550 So.2d 533, 534 (Fla. 1st DCA 1989) (work search an "evidentiary tool" to demonstrate causal connection between injury and wage loss).

As opposed to *Russell*, the issue in the case *sub judice* is whether plaintiff, having met the *Russell* test with credible (as determined by the Commission) evidence of diligent efforts to find employment, is entitled to receive compensation benefits where his inability to earn the same wages was caused in part by unavailability of area jobs consistent with his physical limitations. Not only this Court, but a leading workers' compensation scholar and courts from other jurisdictions suggest an affirmative response.

In Bridges v. Linn-Corriher Corp., 90 N.C. App. 397, 368 S.E.2d 388, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988), this Court observed:

> [t]he Workers' Compensation Act was enacted to ameliorate the consequences of injuries and illnesses in the workplace and one of those consequences, at least on occasion, is that a recuperated worker capable of holding a job cannot get one. A capable job seeker whom no employer needing workers will hire is not employable.

Id. at 399-400; 368 S.E.2d at 390.

Additionally, in the opinion of Professor Larson:

> Inability to get work, traceable directly and substantially to a compensable injury, may be as effective in establishing disability as inability to perform work . . . . [T]he two essentials [of disability are]: wage loss, and causation of the wage loss by work-connected injury. The fact that the wage loss comes about through . . . unavailability of employment rather than through incapacity to perform the work does not change the result [of disability].

1C Arthur Larson, *Larson's Workmen's Compensation Law* § 57.61(a), 10—389-397.

Moreover, other jurisdictions support the proposition that compensation is allowable where unavailability of jobs prevents a claimant from earning the same wages received prior to injury. In *Regency Inn v. Johnson*, 422 So.2d 870 (Fla. 1st DCA 1982), *disc. review denied*, 431 So. 2d 989 (Fla. 1983), for example, the claimant was injured during the course of her occupation as a housekeeper and consequently was required to seek lighter work. *Id.* at 872-73. Although she actively pursued other employment in the area, including seeking assistance from the Florida State Employment Office, her efforts were unsuccessful and she was subsequently awarded wage loss benefits for the period of her unemployment. *Id.* at 873.

As in our jurisdiction, the Florida statute then in effect placed the burden on the employee "to establish that any wage loss claimed is the result of the compensable injury." Fla. Stat. § 440.15(3)(b)(2) (1979). The Florida Court of Appeals, in the *en banc* portion of the *Regency* opinion, pointed out that

> [w]hether the nonavailability of jobs due to economic conditions is a factor to be considered or ignored in determining the after-injury wages an employee is 'able to earn,' is not immediately apparent from a literal reading of the statute itself.

Id. at 875 (citation omitted). Relying on prior case law, the court went on to state that

> [i]n the broadest sense, 'able to earn' takes into account many factors, including the availability of jobs, and such a broad interpretation is consistent . . . with the principle which requires a liberal construction in favor of the injured employee.

Id. The full court upheld the original panel's conclusion that since the claimant would not have suffered wage loss if the injury had not occurred, the statutory requirement of causation was satisfied. *Id.* at 872.

In other words, "but for" the work-related injury she sustained, the Florida claimant, like plaintiff herein, would not have become unemployed and suffered wage loss in consequence of the unavailability of other employment. Her wage loss was thus caused by and resulted from the injury she sustained within the scope and course of her employment.

The employer in *Regency Inn* had insisted that a work search which is unsuccessful due to unavailability of employment precludes compensation because such evidence does not prove a wage loss due to a compensable disability. *Id.* The panel disagreed:

> For wage loss the statute provides simply for general causal relation by covering such loss which 'is the result of the . . . injury.' If the intent had been to require wage loss from physical incapacity for work (independent of job availability) as an absolute condition to compensation for wage loss, the alternative language would surely have been used.

Id. at 873. We note again that disability under our Act relates to impairment of the injured employee's earning capacity rather than physical infirmity. *Peoples*, 316 N.C. at 434-35, 342 S.E.2d at 804 (citations omitted).

In a similar vein, the full Florida court emphasized that

> [h]ad the legislature intended 'able to earn' to be further qualified so as to preclude consideration of non-availability of jobs because of economic conditions, it would have been a simple matter for this to have been written into the law.
>
> . . . .
>
> In fact, the unavailability of jobs has been viewed as evidence supporting recovery for a loss of wage earning capacity, rather than as defeating it.

Regency, 422 So.2d at 875-76 (citing *United States Sugar Corporation v. Hayes*, 407 So.2d 1079 (Fla. 1st DCA 1982)).

The rationale of the *en banc* opinion in *Regency Inn* also addresses the assertion of defendants and *amicus* counsel herein

that the Commission in effect converted workers' compensation benefits into unemployment benefits.

First, the court observed that the Florida workers' compensation act contained no indication its legislature "devised and enacted a system of reparations for injured workers that would fulfill its purposes in time of relative economic prosperity, but would automatically withhold or suspend such reparations in time of economic depression." *Id.* at 878. We likewise find no such legislative indication in our workers' compensation law. Whatever the health of the economy at any given time, workers' compensation statutes are to be liberally construed to give full effect to their humane purpose and remedial character. *See Hartley v. Prison Department*, 258 N.C. 287, 290-91, 128 S.E.2d 598, 600-01 (1962) (citations omitted).

Next, the court continued, employees receiving unemployment compensation "do not suffer compensable industrial accidents; only employed workers do." *Regency*, 422 So.2d at 878.

> The employed worker is an integral part of the productive machinery of society and he is entitled to be treated as still belonging to that segment of the economy after a compensable accident, rather than categorized as a member of the unfortunate group whose unemployed status is due solely to economic conditions.

Id. Thus, workers who would not be unemployed but for a work-related injury should be compensated by workers' compensation, a system "intended to relieve society of the burden of caring for injured workers and to place the responsibility on the industry served." *Id.* (citation omitted).

The court concluded by pointing out that unemployment compensation is of "more limited amount and duration than workers' compensation benefits, and these benefits are not provided as an alternative to any other form of legal redress, as is true of workers' compensation." *Id.* (citation omitted). We note this Court as well has indicated that receipt of unemployment benefits standing alone may not bar receipt of workers' compensation benefits. *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 699, 308 S.E.2d 335, 337 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984); *see also Mitchell v. Fieldcrest Mills, Inc.*, 84 N.C. App. 661, 662, 353 S.E.2d 638, 639 (1987) (provision of N.C. Gen. Stat. § 97-31 that scheduled benefits be "in lieu of all other compensation" applies to double recovery under

the Act, but does not provide an exclusive remedy). "The problems of prorating benefits or of determining which benefit controls to the exclusion of the other, are questions best left to the General Assembly." *Dolbow*, 64 N.C. App. at 699, 308 S.E.2d at 337.

In Michigan, moreover, the Supreme Court, in *Sobotka v. Chrysler Corporation*, 447 Mich. 1, 523 N.W.2d 454 (1994), considered the implications of the circumstance that, as in North Carolina, "[w]orker's compensation benefits in Michigan are payable on the basis of wage loss and not on the basis of physical impairment." *Id.* at 15, 523 N.W.2d at 459 (citation omitted). The court determined as follows:

> Where, on account of an injury, an employee is, in fact, unemployed, the employee is entitled to [workers' compensation benefits] because the employee is not "able to earn" wages postinjury.

Id. at 7-8, 523 N.W.2d at 455.

> [A] disabled worker does not bear the burden of unfavorable economic conditions that further diminish his ability to find suitable work.

Id. at 25, 523 N.W.2d at 463.

> This means that the partially disabled employee's only burden is to show he is unable to earn wages because of his injury, not that he must show that the economy or other factors are not the cause of unemployment.

Id. at 8 n.5, 523 N.W.2d at 455 n.5.

The court went on to hold that while

> it is the employee's burden to show a link between wage loss and the work-related injury. . . , once the employee shows a work-related injury and subsequent wage loss, the factfinder may infer that the employee cannot find a job because of the injury.

Id. at 25, 523 N.W.2d at 463.

Finally, the courts in Maine have adopted a similar approach:

> To be entitled to compensation for total incapacity when only partially disabled in the medical sense, the employee must show "that he has engaged in a good faith effort to obtain work within the tolerance of his physical condition, and . . . that he failed in his effort, either because employers in his community would not

hire people with such a limited capacity to do the type of work within his tolerance, or because there was no reasonably stable market in his community for that restricted work of which he was capable.

Theriault v. Walsh Const. Co., 389 A.2d 317, 320 (Me. 1978) (quoting *Bowen v. Maplewood Packing Co.*, 366 A.2d 1116, 1119 (Me. 1976)).

The rationale of the foregoing authorities is sound and consistent with our statements in *Russell* and *Bridges*. We therefore hold that an employee who suffers a work-related injury is not precluded from workers' compensation benefits when that employee, while employable within limitations in certain kinds of work, cannot after reasonable efforts obtain employment due to unavailability of jobs.

Based on the foregoing, the Commission's award to plaintiff of temporary total disability is affirmed.

Affirmed.

Judges GREENE and MARTIN, JOHN C. concur.

MAMIE FRANCES LONG, PLAINTIFF v. JAMES H. LONG, EXECUTOR OF THE ESTATE OF R. W. LONG, DECEASED, AND E. L. "TOM" ELLROD, INDIVIDUALLY, AND AS OFFICER AND DIRECTOR OF LONG TRAILER COMPANY, INC., AND LONG TRAILER COMPANY, INC., AND NORTH CAROLINA NATIONAL BANK, N/K/A, "NATIONSBANK", DEFENDANTS

No. COA94-851

(Filed 18 July 1995)

1. Partnership § 59 (NCI4th)— buy-sell agreement—stipulated price of stock—negotiated settlement—no right of partner's wife to declaratory judgment

The trial court did not err in failing to declare plaintiff's rights under a deed of separation, an escrow agreement, and a buy-sell agreement between her husband and his partner, since plaintiff had no rights under the documents at issue which would allow her to challenge the stipulated price of the stock which was to fund a trust for her benefit and later became subject to a partnership buy-sell agreement; the deed of separation required that a

trust for plaintiff's benefit be funded out of her husband's estate but did not specify any particular property that was to be used, provided that the parties could substitute in escrow other property or cash in place of the husband's partnership stock, and expressly stated that the stock may become the subject of a buy-sell agreement between the partners; plaintiff would suffer no harm whatsoever by the current valuation of the stock; and the executor, who had the sole power to settle claims in favor of or against the estate, sought and received judicial approval of his handling of the matter.

Am Jur 2d, Partnership §§ 1158 et seq.

2. Fraud, Deceit, and Misrepresentation § 25 (NCI4th)— insufficiency of allegations and proof

The trial court properly entered summary judgment for defendants on plaintiff's claims for fraud and misrepresentation because those claims were not supported by argument, plaintiff's complaint contained no mention of any fraudulent statements made by her husband's partner to her, and plaintiff made no showing that statements were made to deceive or in fact deceived her.

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

3. Appeal and Error § 510 (NCI4th)— frivolous appeal—sanctions imposed

Where a trust benefitting plaintiff was funded by partnership stock which was bought by the remaining partner when plaintiff's husband died, and plaintiff brought an action for declaratory judgment and fraud because she thought the price of the stock was set too low, the Court of Appeals imposes sanctions upon plaintiff and her attorney because the appeal is frivolous and neither well grounded in fact nor warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. N.C.R. App. P. 34.

Am Jur 2d, Appellate Review §§ 946 et seq.

Appeal by plaintiff from judgment entered 22 April 1994, judgment entered 2 May 1994, and order entered 2 May 1994 by Judge J. Richard Parker in Edgecombe County Superior Court. Heard in the Court of Appeals 8 May 1995.

Jesse Matthewson Baker for plaintiff-appellant.

Bridgers, Horton, Rountree & Boyette, by Charles S. Rountree, for defendant-appellee James H. Long.

Godwin and Spivey, by W. Michael Spivey, for defendants-appellees E.L. Ellrod and Long Trailer Company, Inc.

LEWIS, Judge.

Plaintiff commenced this action for declaratory relief, breach of fiduciary duty, fraud and misrepresentation, intentional infliction of emotional distress, intentional interference with the contractual rights of third parties, negligent interference with the contractual rights of third parties, conversion, civil conspiracy, and relief under the cy-pres doctrine. The dispute concerns the value of a stock certificate held by NationsBank as escrow agent. Summary judgment was granted for defendants James H. Long, E.L. Ellrod, and Long Trailer Company, Inc., and defendant NationsBank was dismissed from the action and ordered to deliver the stock certificate to James H. Long. From the judgments and the order, plaintiff appeals.

Plaintiff and R.W. Long (hereinafter "Long" or "R.W. Long") separated in 1984 after many years of marriage. They entered into a deed of separation on 25 May 1984. Among other things, the deed of separation provided that Long would pay plaintiff alimony in the amount of $2,000 per month for the remainder of Long's life, such amount to be reduced by any Social Security benefits plaintiff may receive. It further provided that in his will, Long would devise to a corporate fiduciary in trust for the benefit of plaintiff real and/or personal property equal in value to a one-third interest in his estate. The trust principal was to be increased, if necessary, to an amount sufficient to pay plaintiff $2,000 per month, less Social Security received by plaintiff, for the remainder of plaintiff's life. We note that Long's will clarifies that it is the income from the trust that must be sufficient to pay plaintiff each month.

One of Long's largest assets was his stock in defendant Long Trailer Company, Inc. (hereinafter "the company"). Long and defendant E.L. Ellrod were the only shareholders of the company, and each owned sixty-two and one-half shares of stock. Apparently to guarantee Long's performance under the deed of separation, Long, Ellrod, plaintiff, and the respective attorneys for Long and plaintiff, entered into an escrow agreement regarding Long's sixty-two and one-half

shares of stock. The agreement, dated 26 July 1984, provided that defendant NCNB (now known as NationsBank) would hold Long's stock in escrow until the parties jointly requested that the stock be surrendered to them, or "either" of them, or until ordered to make a disposition of the stock by the court, or until the death of Long, whichever occurred first. The agreement further stated that Ellrod was a party because he was the only other stockholder and because the stock was then, or may become, the subject of a buy-sell agreement between Long and Ellrod. In addition, the agreement provided that the parties could agree to substitute other property or cash as escrow to guarantee the faithful performance by Long of his obligations under the deed of separation. Finally, the escrow agreement provided that Long would pay the escrow agent an annual fee and, in the event of a court action or other dispute involving the agent, additional fees.

At the time the escrow agreement was signed, Long and Ellrod were parties to a buy-sell agreement, dated 12 January 1983, regarding their stock in the company. The agreement provided that upon the death of a shareholder, the personal representatives of the deceased must sell all of the shares of the deceased to the company. The agreement stipulated that the price of the shares would be $5,600 per share, for a total price of $350,000 for all sixty-two and one-half shares. It also provided that at the close of each fiscal year, Long and Ellrod had to review the stipulated price. They could then stipulate that the price had not changed, or they could stipulate to a new price. If Long and Ellrod failed to either stipulate that the price had not changed or to stipulate to a new price, the price for each share was to be the last stipulated price plus or minus the net earnings or losses per share since the date of the last stipulated price, less dividends paid or payable thereon.

On 30 January 1986, Long and Ellrod executed another buy-sell agreement, which increased the total price for a shareholder's stock to $450,000. The language regarding the adjustment of the price based on the net earnings or losses per share was removed. On 12 January 1988, Long and Ellrod executed an "amendment to modify purchase price," whereby the price was increased to $600,000.

Long died on 6 November 1989. His will established the trust for plaintiff as required by the deed of separation. At the time of his death, the stipulated purchase price for his shares was $600,000. After Long's death, the company and Ellrod sued Long's estate claiming the

company's right to purchase Long's stock for $600,000 and claiming they were owed on loans made to Long. Defendant James Long, the executor of R.W. Long's estate, eventually entered into a settlement agreement with Ellrod and the company. In exchange for $565,000, the estate would deliver the stock, and the lawsuit would be dismissed. James Long petitioned the superior court for a ruling that he had acted reasonably in settling the case. The petition was served upon all beneficiaries and creditors of the estate, including plaintiff. The superior court approved the settlement, and plaintiff appealed to this Court, which affirmed the ruling in an unpublished opinion. *See In re Long*, 117 N.C. App. 305, 451 S.E.2d 667 (1994).

Plaintiff filed the present action seeking: (1) a declaration of her rights under the deed of separation, the escrow agreement, and the 1983 buy-sell agreement; (2) damages from Ellrod and the estate; and (3) construction of the three documents at issue under the cy-pres doctrine so as to give effect to the intentions of the parties to the documents. At the heart of plaintiff's action is her contention that had the purchase price of the stock been adjusted upward based on net earnings, as the 1983 buy-sell agreement would have required, the purchase price for Long's sixty-two and one-half shares would have been $1,429,762 at the date of Long's death, thus considerably increasing the size of Long's estate. The trial court granted summary judgment for defendants James Long, E.L. Ellrod, and the company. The court ordered that NationsBank be dismissed from the action and that NationsBank deliver the stock certificate to the executor, James Long.

[1] Plaintiff's first contention on appeal is that the trial court erred in failing to address her claim for declaratory relief. In its judgments, the court grants summary judgment for James Long, E.L. Ellrod, and the company and dismisses plaintiff's actions against them. However, the court does not declare the rights of plaintiff under the deed of separation, the escrow agreement, and the 1983 buy-sell agreement. While we agree that the trial court did not declare plaintiff's rights under the documents, we presume from its grant of summary judgment for defendants that it concluded, as do we, that plaintiff had no rights under the documents at issue which would allow her to challenge the stipulated price of the stock.

Plaintiff apparently contends that because of the deed of separation and the escrow agreement, she had a "security interest" in the stock and therefore became the equivalent of a minority shareholder

in the company. She argues that because she was a minority shareholder, Ellrod had fiduciary duties to her which would prohibit his deflating the value of the stock. Plaintiff concedes that she can find no authority to support her contention, and neither can we. We find plaintiff's contention to be entirely without merit.

The deed of separation makes no mention of Long's stock. It requires that a trust be funded out of Long's estate but does not specify any particular property that is to be used. Whatever rights plaintiff may have had based on the escrow agreement, she in no way became the equivalent of a shareholder in the company. The escrow agreement was intended to ensure that the stock remained as an asset of Long until his death or until "the parties" to the agreement, presumably plaintiff, Long, and Ellrod, decided otherwise. In addition, the agreement provided that the parties could substitute in escrow other property or cash in place of the stock. Further, the agreement expressly stated that the stock may become the subject of a buy-sell agreement between Ellrod and Long. Clearly, plaintiff did not assume the mantle of shareholder in the company by virtue of this escrow agreement.

Furthermore, plaintiff will suffer no harm whatsoever by the current valuation of the stock. Plaintiff's right under Long's will was to have a trust established which could pay plaintiff from its income $2,000 per month, less Social Security benefits received by plaintiff. There is no question but that Long's estate is sufficient to fund the trust. Thus, as plaintiff concedes, it is not she who will receive less because of the stock's valuation. Rather, it is the only child of the marriage, her son, who is to receive the corpus of the trust upon plaintiff's death. Plaintiff's son is not a party to this action.

Finally, we point out that under the will, the executor, James Long, had the sole power to settle claims in favor of or against the estate. The will granted the executor all the powers found in N.C.G.S. § 32-27 (1991). Section 32-27(23) provides that the executor has the power to "compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims" as the executor shall deem advisable, and in the absence of fraud, bad faith or gross negligence by the executor, the executor's decision shall be conclusive between the beneficiaries of the estate and the executor. Thus, by this action, plaintiff seeks to usurp the powers of the executor. As noted above, the executor sought and received judicial approval of his handling of the matter. In sum, we conclude that plaintiff had no right under the

deed of separation, the escrow agreement, or the 1983 buy-sell agreement to challenge the purchase price of the stock.

Plaintiff's next contention is that the trial court erred in granting summary judgment for defendants on her claims for intentional/negligent interference with the contractual rights of third parties. Plaintiff contends that she had contractual rights under the documents at issue, which rights were interfered with by Ellrod. As we have stated, plaintiff had no right under these documents to challenge the purchase price of the stock. Thus, plaintiff's contention that her contractual rights were interfered with is without merit.

[2] Next, plaintiff argues that the court erred in granting summary judgment on her claims for fraud/misrepresentation. 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). Plaintiff's argument in her brief consists almost entirely of quotes from various authorities and contains no mention of any fraudulent statements made by Ellrod to plaintiff. The extent of her brief's application of the law of fraud to the facts of this case is as follows: "Ellrod was a corporate fiduciary who owed a duty to [plaintiff]. We think he violated that duty to [plaintiff]." Therefore, we must look to the complaint to determine on what misrepresentations plaintiff alleges she relied. The complaint alleges that several of the documents involved in the case contain false representations by Ellrod. First, plaintiff quotes most of the escrow agreement, alleging that the quoted material represents false statements by Ellrod. We note that one of the provisions in that agreement was never stated by Ellrod. Plaintiff quotes paragraph two: "R.W. Long agrees to indemnify and save harmless the said NCNB National Bank of North Carolina from all loss, cost and expense in connection with this escrow." Ellrod had no part in that provision. The only portions of the agreement which are statements of Ellrod are undeniably true. They are set out earlier in this opinion and need not be restated here.

Plaintiff further cites the 1986 buy-sell agreement and the 1988 purchase price amendment and contends that the statement in each as to the current price of the stock amounts to a false representation by Ellrod. Even if we assume that such statements were false, plaintiff has not shown that the statements were made with the intent to deceive her, that they did deceive her, or that she in any way relied on

the statements. Plaintiff also cites a letter dated 21 November 1989 from Ellrod and the company to James Long which informed the executor that the company would perform its obligation to purchase R.W. Long's stock. Again, this is a truthful statement. The trial court properly granted summary judgment for defendants on plaintiff's claims for fraud/misrepresentation.

Although plaintiff assigns error to the granting of summary judgment on all of her claims, there is no discussion in plaintiff's brief of her claims for intentional infliction of emotional distress, conversion, civil conspiracy, or relief under the cy-pres doctrine. Accordingly, plaintiff's assignments of error with respect to those portions of the judgments are deemed abandoned. *Trull v. Central Carolina Bank & Trust Co.*, 117 N.C. App. 220, 222, 450 S.E.2d 542, 544 (1994), *disc. review denied*, 339 N.C. 621, 454 S.E.2d 267 (1995); N.C.R. App. P. 28(b)(5) (1995).

[3] Finally, defendant James Long, the executor of R.W. Long's estate, has requested that this Court impose sanctions against plaintiff and award damages to the estate for plaintiff's frivolous appeal. Rule 34 of the Rules of Appellate Procedure provides in pertinent part that this Court may, on motion of a party or on its own motion, impose a sanction against a party or an attorney or both if the Court determines that an appeal is frivolous because it is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. N.C.R. App. P. 34(a)(1) (1995). We agree that this appeal is frivolous under the above definition. It is neither well grounded in fact nor warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. We therefore order that plaintiff and her attorney pay the costs and reasonable expenses, including reasonable attorney fees, (hereinafter "costs and expenses") incurred by defendants James Long, as executor of the estate of R.W. Long, E.L. Ellrod, and Long Trailer Company, Inc. because of this appeal. *See* N.C.R. App. P. 34(b)(2). Pursuant to Rule 34(c), we remand the case to the trial court for a hearing to determine defendants' costs and expenses. To be included in those amounts are the defendants' costs and expenses associated with the hearing on sanctions. We deny the executor's request for damages.

For the reasons stated, the judgments and order of the trial court are affirmed and the case is remanded for a hearing on sanctions.

Affirmed and remanded for hearing on sanctions.

Chief Judge ARNOLD and Judge McGEE concur.

MOUNTAIN FARM CREDIT SERVICE, ACA, PLAINTIFF v. PURINA MILLS, INC., DEFENDANT v. GREY DAWN FARMS, ROBERT A. HETHERINGTON, JR., WARREN G. KILLIAN AND WALNUT GROVE AUCTION SALES, INC., COUNTERCLAIM DEFENDANTS

No. COA94-972

(Filed 18 July 1995)

1. **Secured Transactions § 34 (NCI4th)— security agreement—identification of debtor and collateral—sufficiency—partnership sufficiently bound**

In an action to determine which of two secured parties was entitled to proceeds from the sale of the debtors' cattle, the security agreement of defendant Purina: (1) sufficiently identified the debtor where it listed the name of two individuals doing business as a farm, rather than identifying the farm as a partnership; (2) sufficiently identified the collateral as all dairy cattle and proceeds from milk sales and identified the location of the cattle on debtors' farm; and (3) sufficiently bound the partnership, though signed by only one partner individually, where the evidence showed that partner was authorized to act for the partnership in signing the security agreement and financing statements.

Am Jur 2d, Secured Transactions §§ 174-183.

Sufficiency of description of collateral in security agreement under UCC secs. 9-110 and 9-203. 100 ALR3d 940.

2. **Costs § 37 (NCI4th)— sale of collateral—conversion of proceeds by third party—no right to attorney fees from third party**

A creditor which perfected its security interest in the debtor's cattle was not entitled to recover attorney fees based on the security agreement from a third party creditor which had not perfected its security interest in the cattle and which converted the proceeds from the sale of the debtor's cattle, since N.C.G.S. § 6-21.2 does not authorize attorney fees against a third party not

transactionally related to the document containing the attorney fees provision.

Am Jur 2d, Costs §§ 79-82.

Appeal by plaintiff from judgments entered 8 March 1994 and 27 May 1994 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 22 May 1995.

Appeal by defendant from judgment entered 8 March 1994 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 22 May 1995.

Appeal by counterclaim defendants Grey Dawn Farms and Robert Hetherington from judgments entered 8 March 1994 and 27 May 1994 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 22 May 1995.

Two secured parties, Purina Mills (Purina) and Mountain Farm Credit Service (MFCS), claim entitlement to proceeds from the sale of the debtor's cattle. Purina maintains that it holds a first priority, perfected security interest in the proceeds, whereas MFCS alleges that Purina's security interest is flawed in many respects.

The debtor, Grey Dawn Farms (GDF), is a general partnership formed in 1988 by Robert Hetherington and Warren Killian, its sole partners, to operate a dairy farm. During its operation, GDF entered into several security agreements with MFCS, offering the cattle as collateral. MFCS concedes it did not perfect its security interest, making it subordinate to an otherwise perfected security interest. Purina, which sells feed and supplies to farmers, alleges that in 1991 it began supplying GDF with feed on credit. When it learned that GDF planned to auction its cattle, Purina obtained a security agreement and filed financing statements giving it a security interest in the cattle. All documents were purportedly signed by both Hetherington and Killian.

After the auction, MFCS and other named creditors were paid in full, but Purina's interest was ignored, largely because Hetherington did not consider Purina a creditor. Purina demanded payment from MFCS, and MFCS brought this declaratory judgment action to determine who was entitled to the proceeds from the sale of the cattle. Purina counterclaimed alleging conversion.

At trial, Hetherington denied signing any of the instruments granting Purina a security interest and denied that Killian had the authority to indebt the partnership. He added that Killian was expressly for-

bidden to buy feed on credit. Hetherington conceded, however, that Killian ran the day to day operations of the farm. Purina employees testified that they witnessed Killian's signature on the documents, but not Hetherington's since he was not at the farm at the time. Killian then retained the documents and mailed them to Purina after Hetherington purportedly signed them.

The jury found that GDF contracted to purchase feed from Elmore's Feed and Seed, a Purina dealer, that GDF failed to pay for the feed, and that Purina was entitled to recover $30,779.51 from GDF. It also found that Killian had the authority to, and did, sign the security agreement and financing statements on behalf of GDF, but that Hetherington did not sign the documents. Finally, it found that MFCS received $66,521.02 from the sale of GDF's cattle.

Based on these findings, the trial judge entered a judgment concluding that as a general partner in GDF Hetherington, jointly and severally with GDF, owed Purina $30,779.51, and that Purina was entitled to attorney's fees of $4,616.92, or fifteen percent of $30,779.51. He also concluded that the financing statements perfected Purina's security interest in GDF's cattle, and that MFCS converted Purina's property by receiving and refusing to pay over the proceeds. Accordingly, he determined that Purina was entitled to receive from MFCS any amount Purina could get from GDF, except attorney's fees, up to $66,521.02.

The trial court denied GDF and Hetherington's motions for a new trial and amended the judgment in part. With the exclusion of counterclaim defendant Walnut Grove Auctions, all parties appeal.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for plaintiff appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Stephen R. Hunting and Russell B. Killen, for defendant appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon, for counterclaim defendant appellants.

ARNOLD, Chief Judge.

I. MFCS's Appeal

A. Directed Verdict and Judgment Notwithstanding the Verdict

[1] MFCS first contends the trial court erred in denying its motion for a directed verdict and judgment notwithstanding the verdict. It argues

that Purina's evidence did not establish the existence of, nor the perfection of, a valid security agreement. MFCS believes the security agreement is facially defective because it (1) fails to name GDF as the debtor, listing the debtor as "Warren Killian and Robert Hethrington dba Grey Dawn Farm," (2) does not describe the cattle as GDF cattle, and (3) appears to be signed in an individual, rather than representative, capacity.

"In evaluating a motion for directed verdict, the non-movant's evidence must be taken as true and all inconsistencies in the evidence resolved in the non-movant's favor." *NCNB v. Gutridge*, 94 N.C. App. 344, 346, 380 S.E.2d 408, 410, *disc. review denied*, 325 N.C. 432, 384 S.E.2d 539 (1989). "The standard is whether the evidence so considered is sufficient to submit the case to the jury." *Id.* The same standard applies in considering a motion for a judgment notwithstanding the verdict. *Smith v. Pass*, 95 N.C. App. 243, 382 S.E.2d 781 (1989).

1. Identification of Debtor

The security agreement lists the debtor as "Warren Killian and Robert Hethrington dba Grey Dawn Farm." MFCS contends this is an insufficient identification of the debtor because designation of "two individuals, doing business as Grey Dawn Farm, is not synonymous with the partnership, Grey Dawn Farms."

"A security agreement must sufficiently designate the debtor. The failure of the security agreement to contain the . . . correct name of a business debtor will not necessarily render a security agreement invalid." 79 C.J.S. *Secured Transactions* § 40 (1995). Here, the security agreement identifies GDF, but does not identify it as a partnership. While a clearer designation of the true debtor is preferred and encouraged, the designation is not so lacking as to be fatal.

2. Description of Collateral

MFCS also contends the security agreement is facially invalid because it does not identify the collateral as GDF dairy cattle as opposed to dairy cattle belonging to Killian or Hetherington individually. We do not agree.

"[A]ny description of personal property . . . is sufficient whether or not it is specific if it reasonably identifies what is described." N.C. Gen. Stat. § 25-9-110 (1986); *see also* Richard A. Lord and Charles C. Lewis, *North Carolina Security Interests* § 3-3 (1985). The security agreement describes the collateral as "[a]ll dairy cattle including all

bulls, cows, heifers, calves and all progeny resulting from said cattle; also proceeds and accounts receivable resulting from milk sales." It also lists the location of the collateral as "on [the] premises of Jean Hethrington, in the City of Morganton, County of Burke, State of North Carolina," the site of the farm. This description reasonably identifies the collateral.

3. Debtor's Signature

MFCS also contends that the security agreement was not signed in the partnership name and, therefore, does not operate to create a security interest in GDF's cattle. We disagree.

A security interest attaches once, among other things, "the debtor has signed a security agreement." N.C. Gen. Stat. § 25-9-203(1)(a) (1986). "Documents signed on behalf of a partnership *should* indicate that the debtor is a partnership and that the signing individual is a partner." Richard C. Tinney, *Sufficiency of Debtor's Signature on Security Agreement or Financing Statement* under UCC §§ 9-203 and 9-402, 3 A.L.R.4th 502 (1981) (emphasis added). However, "[g]enerally, the signature of a partner will suffice, since, under principles of partnership law which continue in effect under UCC § 1-103, any partner has the power to bind the partnership as to matters within the scope of the partnership business." *Id.* In addition,

> when an authorized principal of the company has executed a security agreement, the absence of the true business name should not defeat the security interest as long as the evidence indicates that the signer did in fact intend to bind the entity by the signature. Of course, the individual's signature will not always operate to bind the business entity. The individual must have authority to encumber the business property.

James J. White and Robert S. Summers, *Uniform Commercial Code* § 22-5 (3d ed. 1988).

Under partnership law, applicable through N.C. Gen. Stat. § 25-1-103 (1986),

> [e]very partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the par-

ticular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

N.C. Gen. Stat. § 59-39(a) (1989).

We have stated that "in order for a written instrument to be binding on a partnership, the instrument must be executed in the partnership name." *In the Matter of Oxford Plastics v. Goodson*, 74 N.C. App. 256, 262, 328 S.E.2d 7, 11 (1985). Where one partner signed, in his individual name, a contract modifying a partnership contract, we determined that plaintiff had the burden of proving that the other partners either authorized or ratified the modification of the original instrument. *Id.* When a document is not signed in the partnership name "a plaintiff must show that the defendant was acting on behalf of the partnership or that the partnership ratified the individual's act." *Messer v. Laurel Hill Associates*, 93 N.C. App. 439, 445, 378 S.E.2d 220, 224 (1989).

Here, Killian did not sign the documents in the partnership name, nor did the partnership ratify his actions. However, sufficient evidence was presented that he was acting on behalf of the partnership and had the authority to do so. Indeed, the jury found that Killian was authorized to act for the partnership in signing the security agreement and financing statements. Thus, the trial court did not err in denying MFCS's motions for a directed verdict and judgment notwithstanding the verdict.

We reach a similar conclusion with regard to the financing statements. N.C. Gen. Stat. § 25-9-402(7) (1986) states that "[a] financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners." The Amended Official Comment states that "[i]n the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners and not in any other trade name." The purpose of a financing statement is to provide notice to third parties of the debtor-creditor relationship. Lord and Lewis, *supra*, § 3-1, at 18. Here, the correct debtor is listed in the debtor box accompanied by the names of the individual partners. A search request under the name GDF located Purina's financing statements. This identification comports with the statute's requirements. Moreover, for the reasons stated above, the trial court did not err in denying Purina's motion for a directed verdict and judgment notwithstanding the verdict regarding the manner of signing the financing statements.

While we find that the trial court did not err in denying plaintiff's motion for a directed verdict and judgment notwithstanding the verdict, the minimal formalities by Purina's agents in executing these documents should certainly be avoided, and in the future, Purina should exercise greater care in conforming to the simple requirements of the Uniform Commercial Code, thereby avoiding further litigation.

B. Issues Presented and Jury Instructions

MFCS also argues that the trial court committed numerous errors in its submission of the issues to the jury and in its charge to the jury. In large part, this issue is based on MFCS's position on the facial validity of the security documents and, in light of our holding on that issue, it is unnecessary to address this issue. To the extent this issue raises additional questions, we have reviewed them and conclude that the trial court did not err.

C. Interest on Award

Finally, MFCS argues that the trial court erred in entering judgment against it at eighteen percent interest per annum, rather than the legal rate of eight percent. GDF and Hetherington also raise this issue. We do not address this issue, however, because Purina, in effect, concedes the argument in its brief. There, Purina states that "in light of the amount at issue, Purina has no objection to this Court's remanding with those instructions," those instructions being a reduction to the legal rate. In doing so, Purina abandons its cross-assignment of error.

II. Purina's Appeal

[2] In its judgment, the trial court concluded that "Purina Mills is entitled to an award of attorneys['] fees against Grey Dawn Farms and Robert A. Hetherington, Jr., jointly and severally, in the amount of $4,616.92, which is 15% of $30,779.51." It did not allow Purina to recover attorneys' fees from MFCS. On appeal, Purina contends this was error. Specifically, it argues that its security agreement with GDF provides for attorneys' fees out of the proceeds of the collateral, and the fact that MFCS converted those proceeds should not work to reduce Purina's remedy.

MFCS did not respond to this argument. However, we agree with the trial court that an award of attorneys' fees against MFCS based on the security agreement would be improper. N.C. Gen. Stat. § 6-21.2

(1986), the statutory fees provision that applies to this type of instrument, does not authorize attorneys' fees against a third party who is not transactionally related to the document containing the fees provision. Rather, the statute speaks mainly of fees assessed against the debtor, and MFCS is neither bound by nor liable for any obligation between GDF and Purina for attorneys' fees.

III. GDF and Hetherington's Appeal

GDF and Hetherington argue that the trial court erred in awarding Purina attorneys' fees. It is not necessary to address this argument as Purina has agreed that the judgment may be modified to omit this award. In its appellee's brief, Purina states that it "does not object to a remand with instructions that the judgment should not include an award of attorneys' fees against Grey Dawn and Hetherington."

In conclusion, the judgment is reversed in part and remanded so that the trial court may (1) modify the judgment to reflect interest at the legal rate, and (2) omit an award of attorneys' fees against GDF and Hetherington. In all other respects, the judgment is affirmed.

Affirmed in part, reversed in part, and remanded.

Judges LEWIS and McGEE concur.

MARK A. SINNING AND WIFE, KATHY SINNING, PLAINTIFFS-APPELLANTS v. JOHN F. CLARK, CODE ADMINISTRATOR FOR THE CITY OF NEW BERN INSPECTION DEPARTMENT, IN HIS OFFICIAL CAPACITY AND AS AGENT FOR THE CITY OF NEW BERN, NORTH CAROLINA, LINWOOD E. TOLER, BUILDING INSPECTOR FOR THE CITY OF NEW BERN INSPECTION DEPARTMENT, IN HIS OFFICIAL CAPACITY AND AS AGENT FOR THE CITY OF NEW BERN, NORTH CAROLINA, AND THE CITY OF NEW BERN NORTH CAROLINA, DEFENDANTS-APPELLEES

No. COA94-1106

(Filed 18 July 1995)

Municipal Corporations § 450 (NCI4th)— negligence of building inspectors—no special duty to homeowners—insufficiency of negligence allegations—action properly dismissed

The provisions of N.C.G.S. § 160A-411 *et seq.* and the North Carolina State Building Code do not create a special duty owed by defendants, a city and its building inspectors, to plaintiff

homeowners over and above the duty owed to the general public; therefore, the allegations of plaintiffs' complaint that their home had numerous structural defects and that defendants were negligent in the inspection of the residence during construction, in failing to require correction of numerous building code violations, and in failing to advise them that the residence was structurally unsound and unfit for occupation were insufficient to state a claim for relief for negligence, and the trial court did not err in dismissing this claim.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 138 et seq.

Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances. 38 ALR4th 1194.

Appeal by plaintiffs from order entered 1 June 1994 by Judge Robert M. Burroughs in Craven County Superior Court. Heard in the Court of Appeals 7 June 1995.

Plaintiffs brought this civil action seeking compensatory and punitive damages against the City of New Bern and two of its employees in their official capacities, John F. Clark, Code Administrator for the City's Inspection Department, and Linwood E. Toler, a building inspector holding a Level III standard inspection certificate in building, electrical, mechanical and plumbing. Plaintiffs alleged that they entered into a contract in November 1989, with Bailey Custom Homes, Inc., for construction of a home located in New Bern, North Carolina. On several occasions while construction was in progress, defendant Toler inspected the residence for building code violations. On 20 December 1990, Toler issued plaintiffs a thirty day temporary certificate of occupancy, permitting plaintiffs to move into their home subject to Bailey "finish[ing] up small jobs." After moving into the residence, plaintiffs discovered several major structural defects in the construction of their home including, but not limited to, sagging and shifting floors, doors failing to close, windows out of plumb, cracked sheetrock and other wall materials, unlevel staircases, cracking brick veneer, leaking roof, and rotting front porch columns. Plaintiffs alleged that the City of New Bern has waived its sovereign immunity by the purchase of liability insurance and sought to assert claims for negligence, gross negligence, and negligent infliction of emotional distress.

Defendants filed a joint answer, which contained, *inter alia*, a motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6). Upon hearing the motion, the trial court entered the following order:

> [A]fter hearing arguments of counsel, reading the briefs and other matters submitted, studying the pleadings as well as other evidence, determines there are no genuine issues of material fact to be decided and all defendants are entitled to summary judgment as a matter of law.

From this order, plaintiffs appeal.

White & Allen, P.A., by John P. Marshall and John C. Archie, for plaintiff-appellants.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Rudolph A. Ashton, III, Cynthia L. Turco and Scott C. Hart, for defendant-appellees Clark and Toler.

Ward, Ward, Willey & Ward, by A. D. Ward, for defendant-appellee City of New Bern.

MARTIN, John C., Judge.

I.

Although the trial court's order purported to grant summary judgment in favor of defendants, the parties have stipulated that no extraneous materials were before the court; thus, defendants' Rule 12(b)(6) motion was not converted into one for summary judgment and the appropriate standard of review is that applicable to a Rule 12(b)(6) ruling. *Whitfield v. Winslow*, 48 N.C. App. 206, 268 S.E.2d 245, *disc. review denied*, 301 N.C. 405, 273 S.E.2d 451 (1980). That standard of review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory . . . ." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

Plaintiffs' primary claim against defendants is premised on the theory of ordinary common law negligence. In their complaint, plaintiffs allege that defendants were negligent in various respects in the

inspection of their residence during construction, including their failure to locate and require correction of numerous building code violations and structural defects, and their failure to advise plaintiffs that the residence was structurally unsound and unfit for occupation. Plaintiffs argue that these allegations, treated as true, are sufficient to withstand defendants' Rule 12(b)(6) motion.

The City of New Bern cannot be held liable for simple negligence unless the individual defendants or either of them, in their official capacities, were negligent. *See Pigott v. City of Wilmington*, 50 N.C. App. 401, 273 S.E.2d 752, *cert. denied*, 303 N.C. 181, 280 S.E.2d 453 (1981). "Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent man would exercise under similar conditions and which proximately causes injury or damage to another." *Martin v. Mondie*, 94 N.C. App. 750, 752, 381 S.E.2d 481, 483 (1989), *quoting Williams v. Trust Co.*, 292 N.C. 416, 233 S.E.2d 589 (1977). Negligence "presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty which either arises out of a contract or by operation of law." *Vickery v. Construction Co.*, 47 N.C. App. 98, 103, 266 S.E.2d 711, 715, *disc. review denied*, 301 N.C. 106 (1980). If there is no duty, there can be no liability. *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988). Plaintiffs argue that defendants had a duty, imposed pursuant to G.S. § 160A-411 *et seq.* and the North Carolina State Building Code, to conduct building inspections with due care, and that defendants failed to perform such duty, proximately causing damage. Citing the public duty doctrine, defendants respond, however, that because there was no legally enforceable duty owed by them specifically to plaintiffs, they cannot be held liable to plaintiffs for negligence.

The public duty doctrine is a common law rule providing for the general proposition that a municipality and its agents ordinarily act for the benefit of the general public and not for a specific individual when exercising its statutory police powers, and, therefore, cannot be held liable for a failure to carry out its statutory duties to an individual. *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992); *Lynn v. Overlook Development*, 98 N.C. App. 75, 389 S.E.2d 609 (1990), *affirmed in part, reversed in part*, 328 N.C. 689, 403 S.E.2d 469 (1991). The doctrine has been specifically adopted in North Carolina, *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902, and has been applied by our Courts to various statutory governmental duties, including the provision of

police protection, *see Braswell, supra; Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 442 S.E.2d 75, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994); *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991); *Martin v. Mondie, supra*; the provision of fire protection, *see Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902 (1995); and the provision of animal control services, *see Prevette v. Forsyth County*, 110 N.C. App. 754, 431 S.E.2d 216, *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993). In *Lynn, supra*, this Court held that the duties imposed upon a municipality and its building inspector by G.S. § 160A-411 *et seq.* and the North Carolina State Building Code fell within the municipality's statutory police powers and, consequently, were duties owed to the general public and not to the individual plaintiffs in that case.

In adopting the public duty doctrine, the Supreme Court also adopted two generally recognized exceptions to its general prohibition against liability: First, where there is a special relationship between the injured party and the municipality, and second, where the "municipality . . . creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902, *quoting Coleman*, 89 N.C. App. at 194, 366 S.E.2d at 6. The two exceptions have been narrowly applied. *Clark, supra.*

Plaintiffs argue that both exceptions apply; they contend Toler's active negligence created a special relationship with plaintiffs, and G.S. § 160A-411 *et seq.* and the North Carolina State Building Code created a special duty owed them by defendants. We reject their arguments.

No special relationship, as contemplated by *Braswell*, existed between plaintiffs and defendants. G.S. § 160A-411 *et seq.* and the North Carolina State Building Code are safety statutes, intended to promote the safety of the general public. *Lynn*, 328 N.C. at 695, 403 S.E.2d at 472. A showing that a municipality has undertaken to perform its duties to enforce such statutes is not sufficient, by itself, to show the creation of a special relationship with particular individual citizens. If such a relationship was found to exist in an instance such as this, a municipality would become a virtual guarantor of the construction of every building subject to its inspection, exposing it to

an overwhelming burden of liability for failure to detect every code violation or defect.

To bring themselves within the special duty exception to the public duty doctrine, plaintiffs must show that an actual promise was made to create the special duty, the promise was reasonably relied upon by plaintiffs, and that the plaintiffs' injury was causally related to such reliance. *Braswell, supra.* We found, in *Davis, supra,* allegations that plaintiffs called 911 to report a fire at their residence, a fire fighter for defendant municipality advised the 911 operator that the town's fire department would respond, plaintiffs relied upon the representation and did not attempt to call any other fire department, and the promised assistance was not rendered, were sufficient to make out a *prima facie* showing of the special duty exception to the public duty doctrine.

In the present case, plaintiffs have not alleged an actual promise, but contend a special duty was owed to them pursuant to the provisions of G.S. § 160A-411 *et seq.* and the North Carolina State Building Code. Our courts have recognized that a special duty may be imposed by statute. *See Coleman,* 89 N.C. App. at 195-96, 366 S.E.2d at 7, *citing Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E.2d 333 (1955) and *Restatement (Second) of Torts* § 286 (1965). In *Coleman,* we held that G.S. § 7A-517 *et seq.* was intended to protect a specific class of individuals, i.e., abused children, from harm, so that a county Department of Social Services owed a special duty of protection to them, a breach of which could support an action for negligence.

In *Lynn, supra,* however, we considered whether such a special duty was created by the very same statutes involved in the present case and held, as previously noted, that the duty imposed by those statutes was owed to the general public rather than the individual plaintiffs. *Lynn,* 98 N.C. App. at 78, 389 S.E.2d at 611. On appeal, the Supreme Court affirmed the dismissal of the plaintiffs' claim against the municipality and its building inspector because it held that the acts or omissions of the inspector were not the cause of the plaintiffs' damage; the Court declined to decide the issue of whether the above-cited statutes created a duty owed by the city building inspector to a purchaser. *Lynn,* 328 N.C. at 695, 403 S.E.2d at 472-73. Thus, we continue to follow our decision in *Lynn,* and hold that the provisions of G.S. § 160A-411 *et seq.* and the North Carolina State Building Code do not create a special duty owed by defendants to plaintiffs over and

above the duty owed to the general public. There being no such duty owed, the allegations of plaintiffs' complaint are insufficient to state a claim for relief for negligence, and the trial court did not err in dismissing this claim.

II.

Plaintiff Kathy Sinning also sought to assert a claim against defendants for negligent infliction of emotional distress. As acknowledged by her counsel at oral argument, the decisions of our Supreme Court in *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 435 S.E.2d 320 (1993) and *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993) are dispositive, and the trial court properly dismissed her claim for negligent infliction of emotional distress.

III.

Finally, plaintiffs sought to assert a claim for gross negligence, alleging defendants' conduct to have been "willful and wanton" and "in reckless disregard of [their] rights." In addition, they attached to their complaint a copy of a report issued by the North Carolina Code Officials Qualifications Board, in which the Board had concluded, as a result of an investigation undertaken at plaintiffs' request, "that there appear[ed] to be basis in fact to the charge of willful misconduct, gross negligence, or gross incompetence against Lenwood (sic) E. Toler." Plaintiffs contend that these allegations, treated as true, are sufficient to withstand defendants' Rule 12(b)(6) motion with respect to their gross negligence claim. However, in *Clark*, 114 N.C. App. at 406, 442 S.E.2d at 79, we stated:

> The public duty doctrine previously has barred claims of gross negligence . . . . Only where the conduct complained of rises to the level of an intentional tort does the public duty doctrine cease to apply. We have examined plaintiff's complaint and find no difference between the allegations used to support negligence, gross negligence, and the actions plaintiff describes as "wanton," "wilful," and "reckless." As long as the claim is negligence, even couched in terms of "gross," "wanton," or "wilful," the public duty doctrine supports the dismissal of the complaint based on the failure to state a claim. (Citations omitted.)

Consequently, plaintiffs have also failed to state a claim against defendants for gross negligence and the trial court properly dismissed it.

Affirmed.

Judges JOHNSON and GREENE concur.

CHRISTIAN W. BURSEY, EMPLOYEE, PLAINTIFF v. KEWAUNEE SCIENTIFIC EQUIPMENT CORPORATION, EMPLOYER; HARTFORD ACCIDENT AND INDEMNITY, CARRIER; DEFENDANTS

No. COA94-1138

(Filed 18 July 1995)

1. **Workers' Compensation § 127 (NCI4th)— employee's use of illegal substances—no proximate cause of injury—sufficiency of evidence**

The Industrial Commission did not err in finding that defendants did not prove that plaintiff's injury was a proximate result of his having been under the influence of controlled substances where blood tests indicted that plaintiff, a press operator, had used crack cocaine and marijuana; the only medical evidence was from plaintiff's treating physician, an orthopedic surgeon, whose testimony was insufficient to support a finding that plaintiff's drug use was a proximate cause of his injury; defendants presented no evidence to contradict plaintiff's testimony which indicated machine malfunction; and employer's human resources director testified that the machine had malfunctioned in the past, that it did not need repairs because of the instant alleged malfunction, and that he probably would not have heard about it if the machine had malfunctioned in the past but not caused an accident.

Am Jur 2d, Workers' Compensation §§ 256, 409.

Workers' compensation: effect of allegation that injury was caused by, or occurred during course of, worker's illegal conduct. 73 ALR4th 270.

2. **Workers' Compensation § 372 (NCI4th)— additional time for deposition—untimely request—denial proper**

The Industrial Commission did not err by denying defendants' untimely request for additional time to depose a toxicologist.

Am Jur 2d, Workers' Compensation §§ 604, 605.

3. Workers' Compensation § 122 (NCI4th)— failure to use safety appliance—reduction in benefits—further findings required

The case is remanded for findings as to whether plaintiff's failure to use a jack stand to prop up a press and thus avoid having his hands crushed in the machine was willful, thereby entitling defendants to the ten percent reduction in plaintiff's benefits under N.C.G.S. § 97-12.

Am Jur 2d, Workers' Compensation § 255.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission filed 14 July 1994. Heard in the Court of Appeals 8 June 1995.

Teague, Campbell, Dennis & Gorham, by Thomas M. Clare and Karen K. Prather, for plaintiff-appellee.

Haynsworth, Baldwin, Johnson and Greaves, P.A., by Charles P. Roberts, III and Brian M. Freedman, for defendants-appellants.

WALKER, Judge.

Plaintiff was hired by defendant-employer as a permanent employee in 1989. In 1990, plaintiff bid for and received a position operating the remote press or RBI. The RBI is a large machine used to stamp metal sheets to design specifications through the application of many tons of hydraulic pressure. The RBI machine is operated by a group of switches on a control panel as well as a separate foot pedal. The foot pedal is attached by a cable to the control panel.

On 24 September 1992, plaintiff reported for his usual shift from 5:00 a.m. to 3:00 p.m. Around 1:00 p.m., plaintiff started a "new run of product" and adjusted the setting on the machine to local and normal. At approximately 2:45 p.m., plaintiff changed the setting from normal to hold in preparation for his departure. At this point, the metal became stuck in the machine. Plaintiff tried unsuccessfully to pry the metal out with a pry bar or screwdriver. Plaintiff then put his hands into the press to try to free the metal. Although defendant-employer's safety policy required employees to place a jack stand in the machine before inserting their hands into it, plaintiff did not do so. The press then came down, crushing plaintiff's hands. A co-worker adjusted the setting from hold to normal, opening the press and releasing plaintiff's hands.

Plaintiff was taken to the emergency room at Davis Community Hospital, where he was treated by Dr. Byron E. Dunaway, an orthopedic surgeon. Dr. Dunaway attempted to control plaintiff's pain by administering 30 milligrams of morphine intravenously in less than an hour. Despite the large dose of morphine, plaintiff remained alert and in pain. This led Dr. Dunaway to believe that plaintiff had previously ingested another substance which significantly raised his tolerance of morphine. A drug screen was performed which tested positive for cocaine and marijuana. Dr. Dunaway asked plaintiff if he had taken any illegal drugs. Plaintiff denied ever having done so. In a follow-up visit on 9 October 1992, Dr. Dunaway again asked plaintiff if he had used drugs prior to his accident. Plaintiff again denied using drugs.

Dr. Dunaway referred plaintiff to Dr. L. Andrew Koman at North Carolina Baptist Hospital. Dr. Koman performed multiple surgeries and was able to save some of plaintiff's fingers, the body of his right hand, and half the body of his left hand. Plaintiff was later terminated from his job with defendant-employer and has been unable to return to gainful employment due to his injuries.

On 22 February 1993, plaintiff filed an I.C. Form 33 Request for Hearing which stated that defendants had stopped paying him benefits because they alleged that his accident was proximately caused by his being under the influence of controlled substances. On 3 March 1993, defendants filed an I.C. Form 33R Response to Request That Claim Be Assigned For Hearing stating that they "[did] not feel that the claimant suffered a compensable injury under the [Workers' Compensation] Act since the injuries of September 24, 1992, were a result of violation of N.C.G.S. 97-12 and said injuries were a proximate result of this violation."

At a hearing before the deputy commissioner on 20 October 1993, plaintiff admitted that he had used drugs on 23 September 1992, the day before his injury. He testified that around 5:00 p.m., he bought and consumed two rocks of crack cocaine and smoked one marijuana cigarette. Approximately two hours later, he consumed four beers. Plaintiff denied having spoken to Dr. Dunaway about his drug use.

The parties took Dr. Dunaway's deposition on 23 November 1993. On 15 December 1993, counsel for defendants moved for additional time to depose a toxicologist. This request was denied as untimely, whereupon defendants renewed the motion and asked that the deposition of Dr. Dunaway be considered in ruling on the motion. Defendants' renewed motion was denied.

On 3 March 1994, the deputy commissioner filed an Opinion and Award containing the following findings of fact:

> 2. On September 24, 1992 plaintiff was working at the end of his shift to free a piece of metal which had become caught on the die in the press. He adjusted the switches on the machine so that the press would not come down while he worked on the machine and then tried to free the metal with a wrench or pry bar. The metal would not come loose so he then reached into the machine and shifted the metal with his hands. For some unknown reason, the die came down at that time, crushing his hands. . . .
>
> . . .
>
> 6. Plaintiff was under the influence of cocaine at the time of his injury as evidenced by his lack of response to the morphine administered at the hospital. His testimony regarding his use of illegal drugs was not credible. However, defendants did not prove that the injury was a proximate result of his having been under the influence of cocaine in that the machine settings in effect at the time would not have permitted the press to come down unless the foot pedal was depressed or the machine malfunctioned. Since he was not standing near the foot pedal, his actions could not have contributed to the injury.
>
> 7. The fact that the press came down on plaintiff's hands on September 24, 1992 constituted an unusual occurrence which interrupted his regular work routine. He thereby sustained an injury by accident arising out of and in the course of his employment.

The deputy commissioner concluded that plaintiff had sustained an injury by accident under N.C. Gen. Stat. § 97-2(6) and that plaintiff's injuries "were not proven to have been the result of his having been under the influence of a controlled substance." The deputy commissioner awarded plaintiff temporary total disability from the date of the accident and medical compensation. Defendants appealed to the Full Commission, which affirmed and adopted the deputy commissioner's findings and conclusions.

[1] Defendant does not dispute that plaintiff suffered an injury by accident arising out of and in the course of his employment. Plaintiff does not dispute that he was under the influence of cocaine and marijuana when he was admitted to the hospital on 24 September 1992, as evidenced by the tests performed after plaintiff failed to respond to

the morphine administered. The chief dispute is whether plaintiff is barred from receiving compensation for his injury under N.C. Gen. Stat. § 97-12 (1991). That statute provides that "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by . . . [h]is being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act . . . where such controlled substance was not by prescription by a practitioner. . . ." Cocaine and marijuana are controlled substances under the statute. Thus, the first issue presented for our consideration is whether the Commission erred in finding that defendants did not prove that plaintiff's injury was a proximate result of his having been under the influence of controlled substances.

The scope of review of an appeal from an award of the Industrial Commission is limited to two questions of law: (1) whether there was competent evidence to support the Commission's findings of fact and (2) whether those findings justify the Commission's legal conclusions and award. *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 186, 292 S.E.2d 766, 768 (1982). The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence, even though there is evidence that would support a finding to the contrary. *Woodell v. Starr Davis Co.*, 77 N.C. App. 352, 356, 335 S.E.2d 48, 50 (1985). The Commission is the sole judge of the weight and credibility of the evidence. *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981).

The burden of proving proximate cause under N.C. Gen. Stat. § 97-12 is placed on the employer as an affirmative defense. *Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 574, 340 S.E.2d 111, 113 (1986). To satisfy this burden, the employer need not prove that the employee's being under the influence was *the sole* proximate cause of the accident, but only that it was more probably than not *a* cause in fact of the accident and resulting injury. *Rorie v. Holly Farms*, 306 N.C. 706, 711, 295 S.E.2d 458, 462 (1982); *Anderson v. Century Data Systems*, 71 N.C. App. 540, 545, 322 S.E.2d 638, 641 (1984), *rev. denied*, 313 N.C. 327, 327 S.E.2d 887 (1985). The Commission's determination on the issue of proximate cause can be set aside on appeal only if there is a complete lack of competent evidence to support it. *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993).

After reviewing the record in this case, we hold that there was competent evidence to support the Commission's finding and conclu-

sion that "[p]laintiff's injuries were not proven to have been the result of his having been under the influence of a controlled substance."

In his deposition taken after the hearing, Dr. Dunaway noted that findings of metabolites of cocaine and marijuana are unlike a blood alcohol level, in that one cannot judge the level of impairment based on the level of metabolites in the blood. Dr. Dunaway testified as follows:

> Q. [D]o you think [plaintiff] was impaired at the time of the accident, 2:45 p.m., based upon the facts as I've given them to you and the test results that were done at 3:00 to 3:30 p.m., whether he was impaired or under the influence?
>
> A. He was certainly under the influence of the medication, of the cocaine. Was he impaired and unable to perform his duty or performing his duty in an unsafe manner? I really don't—I can't testify that that occurred. . . . Was he under the effects of cocaine at the time of his injury? He was under some effect. I can't tell you that that made him an unsafe employee or a poor candidate to be using the machinery he was using.
>
> . . .
>
> Q. Just to clarify matters, it's your opinion that [plaintiff] could or might have been under the influence of cocaine or marijuana at the time of his accident at 2:45 p.m. that day, but you don't know to what extent he may have been impaired or affected, if at all, in his performance of his job?
>
> A. That's correct. And I think that's a fair assessment.

Dr. Dunaway further testified that he did not know "how long [crack] lasts" and that "you may be better off taking a deposition from a toxicologist" who "may can tell you something different about how long crack lasts." Thus, the only medical evidence in the record is insufficient to support a finding that plaintiff's drug use was a proximate cause of his injury.

Plaintiff testified that prior to the accident he had placed the RBI in the local and hold settings. The evidence was uncontroverted that when the RBI is set to local and hold, there are only two ways the press can come down: machine malfunction or use of the foot pedal. Plaintiff testified that he did not press the foot pedal prior to the RBI coming down on his hands and that he kept the pedal pushed toward the wall, away from his foot, so that he could not accidentally press

it. Defendants presented no evidence to contradict plaintiff's testimony.

James J. Rossi, Human Resources Director for defendant-employer, testified that after plaintiff's accident, he conducted an investigation which consisted of running the RBI for about an hour in various settings to establish whether the machine would malfunction. During this investigation, the machine did not malfunction. No repairs were needed after the accident to allow the machine to run properly. However, Mr. Rossi acknowledged that he had never operated the RBI and that he was aware that the machine had malfunctioned in the past. He also admitted that if the machine malfunctioned but did not cause an accident, he would "probably not" hear about it.

We hold that all of the competent evidence supports the Commission's finding that defendants did not meet their burden of showing that plaintiff's use of controlled substances was a proximate cause of his injury.

[2] Defendants also argue that the Commission erred by denying as untimely their request for additional time to depose a toxicologist. Whether to allow a deposition to be conducted after the initial hearing is a decision which rests in the sound discretion of the Commission. *See Hodge v. Robertson*, 2 N.C. App. 216, 218, 162 S.E.2d 594, 596 (1968). We hold that the deputy commissioner's refusal to allow defendants' request was not an abuse of discretion. Moreover, considering all the factors involved in this case, we fail to see how a toxicologist's opinion as to how long the controlled substances remained in plaintiff's system would be instructive on the issue of whether plaintiff's impairment was a proximate cause of his injury.

[3] Finally, defendants argue that the Commission erred by failing to award defendants a ten percent reduction in plaintiff's benefits pursuant to N.C. Gen. Stat. § 97-12 (1991). That statute provides in part:

> When the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty or by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury compensation shall be reduced ten percent. . . .

Plaintiff admitted he did not use the available jack stand on the day of his injury because it is cumbersome. He testified that none of the press operators use the jack when working on the press.

This issue was not raised at the hearing before the deputy commissioner but was raised at the subsequent hearing before the Full Commission. However, the Full Commission made no findings or conclusions on the issue. We therefore remand the case to the Commission for further findings as to whether plaintiff's failure to use the jack stand was willful, thereby entitling defendants to ten percent reduction in plaintiff's benefits under N.C. Gen. Stat. § 97-12. *See Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 158, 314 S.E.2d 833, 838 (1984) (when Commission's findings of fact are insufficient to determine rights of parties upon a claim for compensation, proper procedure on appeal is to remand).

Affirmed in part and remanded for further proceedings consistent with this opinion.

Judges COZORT and JOHN concur.

JOHN V. TELLADO, PLAINTIFF v. TI-CARO CORPORATION, A NORTH CAROLINA CORPORATION AND DIXIE YARNS, INC., A TENNESSEE CORPORATION, DEFENDANTS

No. 9325SC1248

(Filed 18 July 1995)

Workers' Compensation § 60 (NCI4th); Labor and Employment § 75 (NCI4th)— retaliatory discharge—Workers' Compensation Act inapplicable—Release and Severance agreement not barred by Act

N.C.G.S. § 97-6, which provides that no contract or agreement shall relieve an employer of any obligation created by the Workers' Compensation Act, does not apply to retaliatory discharge claims, since retaliatory discharge is not an "obligation" within the contemplation of this rule, and obligation refers only to benefits paid under the Act; therefore, N.C.G.S. § 97-6 did not bar the Release and Severance Agreement entered into by the parties which gave plaintiff three months' severance pay in exchange for his agreement to make no claim of any kind upon defendant employer.

Am Jur 2d, Workers' Compensation §§ 474 et seq.

Appeal by plaintiff from judgment entered by Judge J. Marlene Hyatt on 5 October 1993 in Catawba County Superior Court. Heard in the Court of Appeals 3 October 1994.

Catawba Valley Legal Services, Inc., by Phyllis Palmieri, for plaintiff appellant.

Constangy, Brooks & Smith, by W. R. Loftis, Jr., and Robin E. Shea, for defendant appellees.

COZORT, Judge.

Plaintiff appeals from order granting summary judgment for defendants on plaintiff's claim for retaliatory discharge. We affirm.

Plaintiff was employed by defendants in their Catawba County plant as a supervisor in the card and spinning room. On 12 January 1992, plaintiff was injured on the job while helping a co-worker unchoke a clogged waste line. The door to the line slammed on plaintiff's hand, injuring a finger on his right hand. He immediately reported the accident to his supervisors.

On 22 January 1992, plaintiff sought treatment from Dr. Donald Campbell of the Catawba Bone and Joint Clinic. Jane Shoemaker, an employee of defendants, told Dr. Campbell's office that plaintiff would not be covered by workers' compensation. On the same day, plaintiff's supervisor, Donald Arrowood, noted in plaintiff's personnel file that "John went to the doctor on his own [*sic*] was not notified until after the fact."

On 24 January 1992, Tom Arrington, plant manager, and Arrowood met with plaintiff. Plaintiff was placed on a sixty-day probation. Arrowood made another entry in plaintiff's file stating that the meeting was "about following set procedure for accident follow-up . . . John is given 60-day turn around period on behavior." The plaintiff was discharged on 31 March 1992.

On 4 April 1992, plaintiff signed a document prepared by his employer entitled "Severance and Release Agreement" in exchange for three months' severance pay. The release provides in pertinent part that plaintiff:

> 1) Hereby unconditionally release Dixie . . . from any and all claims arising out of my employment and termination from employment including, but not limited to, any claims for wrongful discharge . . . .

2) Agree not to institute any charge, claim, demand, or action based upon any federal, state, or local statutory law, regulation, or any common law theory including, but not limited to, any claims for wrongful discharge . . . against Dixie . . . concerning any aspect of my employment with Dixie or termination thereof.

IV. I represent that I have read and understand the foregoing . . . . I understand that my acceptance of the consideration stated in Section I above and my execution of this Severance and Release Agreement are intended to bar any and all disputes arising out of my employment with Dixie or termination thereof. . . . I agree that if I challenge, fail, or refuse to abide by the terms hereof, then Dixie shall be entitled to stop making any future payments and shall be entitled to the return of all monies and benefits paid on behalf of Dixie in consideration for this Severance and Release Agreement and shall be entitled to attorneys' fees and other claims that it may have against me for the breach of the terms thereof.

Plaintiff continued to be treated by Dr. Campbell. On 24 January 1992, defendants notified Dr. Campbell that the workers' compensation claim would be filed and paid plaintiff's medical expenses. On 4 August 1992, Dr. Campbell released plaintiff with 20% permanent partial disability in his middle finger.

Plaintiff filed a verified complaint on 30 March 1993, alleging retaliatory discharge by defendants. Defendants filed an answer and counterclaim alleging breach of contract. A copy of the Severance and Release Agreement was attached as Exhibit A. In his reply to defendants' counterclaim, plaintiff denied that the Severance and Release Agreement is a bar to his claims pursuant to N.C. Gen. Stat. § 97-6.1 or that he breached the agreement. On 7 June 1993, defendants filed a motion for judgment on the pleadings.

On 9 August 1993, Judge J. Marlene Hyatt heard defendants' motion. Judge Hyatt considered Exhibit A, the Severance and Release Agreement, and treated the motion as a motion for summary judgment. On 16 August 1993 the trial court ruled that there was no genuine issue of material fact and granted summary judgment for defendants on plaintiff's claim and defendants' counterclaim. On 5 October 1993, the trial court entered an order awarding defendants $2,500 on their counterclaim along with reasonable attorneys' fees and costs. Plaintiff appealed.

Plaintiff contends that the trial court erred in concluding that there was no genuine issue of material fact and that defendants were entitled to judgment as a matter of law. Specifically, plaintiff asserts (1) that the trial court erred in granting summary judgment to defendants based on an agreement which is barred by statute, and (2) the pleadings show that there are material issues of fact which preclude summary judgment. We disagree.

Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The party moving for summary judgment has the burden of showing that there is no triable issue of material fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). " 'The movant may meet this burden by proving that an essential element of the adverse party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim . . . .' " *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). Once the movant meets his burden, the burden then shifts to the non-moving party to show that a genuine issue exists by forecasting sufficient evidence of all essential elements of their claim. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). The court must look at the evidence in the light most favorable to the non-moving party and with the benefit of all reasonable inferences. *Isbey v. Cooper Companies*, 103 N.C. App. 774, 775, 407 S.E.2d 254, 256 (1991), *disc. review denied*, 330 N.C. 613, 412 S.E.2d 87 (1992).

Plaintiff argues that N.C. Gen. Stat. § 97-6 prohibits the use of releases by employers to obtain relief from the obligations created under the Workers' Compensation Act. N.C. Gen. Stat. § 97-6 (1991) provides the following:

> No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided.

Furthermore, plaintiff contends that a release does not bar a retaliatory discharge claim under N.C. Gen. Stat. § 97-6.1 (repealed 1991, effective 1 October 1992, reenacted as part of Art. 21 of Ch. 95 of the

General Statutes, effective 1 October 1992) unless it satisfies the exception under N.C. Gen. Stat. § 97-17. This exception allows "settlements . . . between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article . . . [and] approved by the Industrial Commission." N.C. Gen. Stat. § 97-17 (1991). Plaintiff's position is that the exception of N.C. Gen. Stat. § 97-17 applies to claims for lost wages and medical benefits, not retaliatory discharge. Even assuming retaliatory discharge was within this statute, plaintiff argues, the release was not approved by the Industrial Commission. Plaintiff argues the release does not fall within the exception and cannot serve as a bar to plaintiff's retaliatory discharge claim. We disagree.

The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 196, 347 S.E.2d 814, 817 (1986). To determine this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish. *Id.* The court must also consider the law that existed at the time of the statute's enactment to determine legislative intent. *News & Observer Publishing Co. v. State of North Carolina, ex. rel. Haywood Starling*, 312 N.C. 276, 282, 322 S.E.2d 133, 137 (1984).

The North Carolina Workers' Compensation Act was enacted in 1929 to provide employees swift and certain compensation for injuries suffered on the job, while limiting the liability of employers. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 709, 295 S.E.2d 458, 460 (1982). N.C. Gen. Stat. §§ 97-6 and -17 were enacted as part of the North Carolina Workers' Compensation Act in 1929 to protect employees from employers who would try to circumvent the Act through contracts to waive benefits. For this reason, settlement agreements for workers' compensation claims must be submitted to the Industrial Commission for approval. N.C. Gen. Stat. § 97-17 (1991). On the other hand, the General Assembly enacted N.C. Gen. Stat. § 97-6.1 in 1979 forbidding retaliatory discharge of employees for filing workers' compensation claims. This retaliatory discharge statute does not compensate employees for injuries on the job nor does it protect limited liability of employers; if anything, it increases the liability of employers.

Furthermore, N.C. Gen. Stat. § 97-6.1 overruled *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *disc. review*

denied, 295 N.C. 465, 246 S.E.2d 215 (1978), where this Court refused to make an exception to North Carolina's employment-at-will rule for employees who were discharged in retaliation for filing workers' compensation claims. Case law in the employment law area tends to suggest that the intent of the statute was to provide an exception to the employment-at-will doctrine, not to provide further benefits under the Workers' Compensation Act. *See, e.g., Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985); *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989). Likewise, the fact that the General Assembly repealed N.C. Gen. Stat. § 97-6.1 and recodified it in N.C. Gen. Stat. § 95-241 (1991) (effective 1 October 1992), which specifically addresses retaliatory employment discrimination, further advances this view.

We also note several differences between the retaliatory discharge statute and the remainder of the North Carolina Workers' Compensation Act. First, the Industrial Commission has jurisdiction to determine whether an employee is entitled to compensation under the Act. N.C. Gen. Stat. § 97-91 (1991). Under prior law, jurisdiction for retaliatory discharge claims rests in the General Court of Justice. N.C. Gen. Stat. § 97-6.1(d). Second, workers' compensation benefits are not fault based, have a two-year statute of limitations, and the benefits scheme is specific in terms of schedule of injuries and rate and period of compensation. Recovery under the retaliatory discharge statute depends on the employer's motive, making fault an issue. Also, the statute of limitations is one year, and the plaintiff is entitled to reasonable damages suffered. Third, Article V of the Rules of the North Carolina Industrial Commission provides that agreements to settle claims for compensation must be submitted to the Industrial Commission. I.C. Rule 501. Retaliatory discharge claims do not provide compensation; therefore, agreements settling these actions need not be submitted to the Industrial Commission.

Based on the foregoing reasons, we conclude that N.C. Gen. Stat. § 97-6 does not apply to retaliatory discharge claims. Retaliatory discharge is not an "obligation" within the contemplation of this rule. Obligation refers only to benefits paid under this Act. N.C. Gen. Stat. § 97-6 does not bar the Release and Severance Agreement. In light of this ruling, we need not reach plaintiff's contention that there is a genuine issue of material fact with respect to motivation. We hold the trial court properly granted summary judgment for defendants on

both the plaintiff's claim and defendants' counterclaim. The trial court is

Affirmed.

Chief Judge ARNOLD and Judge LEWIS concur.

DANIEL W. WILLIAMS, PETITIONER v. N.C. DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT, RESPONDENT

No. COA94-1108

(Filed 18 July 1995)

Public Officers and Employees § 59 (NCI4th)— disabled employee terminated for just cause—exhaustion of vacation allowed in lieu of long-term disability benefits

A disabled State employee who is terminated for just cause may elect, pursuant to N.C.G.S. Chapter 135, Article 6, to exhaust his accumulated vacation leave in lieu of receipt of his long-term disability benefits for the period of his accumulated vacation leave.

Am Jur 2d, Civil Service §§ 48-50.

Appeal by respondent from order entered 27 June 1994 in Wake County Superior Court by Judge Gregory A. Weeks. Heard in the Court of Appeals 5 June 1995.

M. Jackson Nichols for petitioner-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Charles J. Murray, for the State.

GREENE, Judge.

The North Carolina Department of Economic and Community Development (NCECD) appeals from an order of the trial court which reversed in part a decision of the State Personnel Commission (SPC).

NCECD dismissed Daniel W. Williams (Williams) from his position as Chief Helicopter Pilot and cited, as reason for the dismissal, failure to maintain a valid FAA license with the appropriate medical certification for operation of an airplane as a commercial

pilot. Pursuant to N.C. Gen. Stat. § 150B-23, Williams filed a petition with the Office of Administrative Hearings (OAH) for a contested case hearing, alleging that the NCECD wrongfully discharged him, in that his discharge was discriminatory because of his age, health status, political affiliation, and because he "raised questions about unsafe activities and improper operational procedures." Williams further alleged that NCECD denied his request to exhaust his "earned annual leave," an election Williams claims is available to him under Chapter 135.

An Administrative Law Judge (ALJ) was assigned to Williams' case, pursuant to N.C. Gen. Stat. § 150B-32 and made the following findings of fact, which were adopted by the SPC, and are not disputed by the parties:

> 7. [Williams] was employed as a helicopter pilot in the Executive Aircraft Operations (EAO) of [NCECD].
>
> . . . .
>
> 10. On March 2, 1988, [Williams] had a physical examination at the Division of Occupational Medicine of the Duke University Medical Center, Durham, North Carolina in accordance with the usual procedure for the pilots of EAO.
>
> 11. On March 8, 1988[,] [Williams] suffered an attack of angina
> . . . .
>
> 12. On March 9, 1988, Dr. Locklear performed coronary artery bypass surgery on [Williams].
>
> 13. [Williams] went on sick leave starting March 8, 1988 and continued on such leave until October 17, 1988 when he started using his annual leave, resulting in [Williams] having 238 hours of accrued annual leave on December 31, 1988 to carry over to 1989. As of January 1, 1989 [Williams] went back on sick leave until August 18, 1989 when he switched to annual leave until his dismissal on September 22, 1989.
>
> . . . .
>
> 16. At some time during the Spring of 1989, approximately one year after his surgery, [Williams] applied to the Federal Aviation Authority (FAA) for the issuance of a first class medical certificate.

[EAO pilots were required to hold a first class medical certificate, issued by the FAA.]

. . . .

31. On July 19, 1989, Dr. Broadwell [a Duke University Hospital doctor, who performs Duke's contract with the N.C. Department of Commerce for the examination of their pilots] wrote Roger Lowery [the Director of Flight Operations of EAO] informing him that the FAA had ruled [Williams] ineligible for either a first or second class medical certificate.

. . . .

34. On August 4, 1989, about two months prior to his dismissal, [Williams] submitted to the State Disability Office (SDO) a medical report signed by his physician, stating that [Williams] was totally and permanently disabled to perform his job as a pilot.

35. The Medical Review Board, which approves disability for state employees, accepted this determination.

36. On August 11, 1989, [Williams] executed a notarized application for long term disability.

37. That application was inadequate in that (a) it was not notarized and (b) it showed an incorrect benefit effective date of October 1, 1989.

38. The application was later resubmitted and the SDO subsequently changed the effective date of long-term disability benefits from October 1, 1989 to May 8, 1989.

. . . .

41. [Williams'] onset of disability was March 8, 1988. 60 days from March 8, 1988 was May 7, 1988. 365 days of short term disability benefits ended on May 7, 1989, and long term benefits could begin on the following day.

42. When [Williams] learned that his disability benefits date was not October 1, he decided not to go out on disability but to stay in his job.

43. After [Williams] decided to stay on the payroll, he sent a letter to [NCECD] requesting reasonable accommodation if they determined that he could not perform the duties of his position.

44. On September 22, 1989 [Williams] was called to a meeting in William Dunn's office. Mr. Dunn, who was the Deputy Directory of [NCECD], explained to [Williams] that [NCECD] needed to fill the pilot position and that if [Williams] refused to resign he would be terminated.

45. Mr. Dunn further stated that it would not be possible for him to be placed in another position and that without the proper medical certificate he could not fly for [NCECD].

46. Despite Mr. Dunn's urgings [Williams] continued to refuse to resign and Mr. Dunn issued a letter of dismissal stating that [Williams] was dismissed because he was unable to obtain the appropriate medical certification necessary for a commercial pilot's license.

47. [Williams] was given a letter of dismissal, with that dismissal effective September 22, 1989.

48. [Williams] then asked Director Dunn to keep him on the payroll through the remainder of his accrued annual leave. Since his leave would take him through October, he would earn additional sick and annual leave for the month of October.

49. Sadie Jackson, a personnel technician with [NCECD], testified, and it is found as fact, that [Williams] would have earned leave had he remained on salary continuation through the month of October.

50. [Williams] was not given salary continuation status.

51. At the time of his dismissal, [Williams] held neither a first, second, or third class medical certificate.

52. At the time of [Williams'] dismissal, he had 240 hours of annual leave accrued.

The ALJ recommended, pursuant to N.C. Gen. Stat. § 150B-34, that the NCECD's dismissal of Williams be upheld, and that:

2. . . . [NCECD] compensate [Williams] for the additional annual leave he would have accrued had he stayed on salary continuation through the end of his accrued annual leave.

The SPC adopted the ALJ's recommendation that Williams' dismissal be upheld and refused to follow the ALJ's recommendation number two. Thus, the SPC upheld the NCECD's dismissal of Williams

but denied him compensation for the additional leave he would have earned had he been allowed to remain on "salary continuation." Williams then filed a petition for judicial review, pursuant to N.C. Gen. Stat. § 150B-43. The trial court ordered that "[Williams] dismissal is upheld but [Williams shall] be compensated for the additional annual leave he would have accrued had he stayed on salary continuation through the end of his accrued annual leave." The trial court further ordered an award of attorney fees to Williams, as the prevailing party. NCECD appeals from this order.

We note that although Williams attempts to cross-assign error, only his first cross-assignment provides "an alternative basis in law for supporting the" trial court's order. We do not address this cross-assignment, however, because it is not set forth in the record on appeal. N.C.R. App. P. 9(a)(1)(k), 10(d); *see Cieszko v. Clark*, 92 N.C. App. 290, 294, 374 S.E.2d 456, 459 (1988). Because the arguments set forth in Williams' purported cross-assignments are reasons that the trial court's order upholding his dismissal should be reversed and do not provide "an alternative basis in law for supporting the" trial court's order, the proper method to raise these questions on appeal would have been a cross-appeal, *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 588, 397 S.E.2d 358, 361 (1990), and his failure to appeal "waives our consideration on appeal." *In the Matter of Appeal from Civil Penalty*, 92 N.C. App. 1, 5-6, 373 S.E.2d 572, 575 (1988), *rev'd on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989).

The issue is whether a disabled State employee who is terminated for just cause may elect, pursuant to Chapter 135, Article 6 of the North Carolina General Statutes, to exhaust his accumulated vacation leave in lieu of receipt of his long-term disability benefits for the period of his accumulated vacation leave.

The question involves an interpretation of statutes and thus, we review the SPC's decision *de novo*. *See* N.C.G.S. § 150B-51(b) (1991); *Brooks v. Ansco & Assocs.*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994) (allegation that agency decision is based upon an error of law requires *de novo* review); *Brooks, Comm'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 345 (1988) (allegation of error in interpreting statute is an allegation of an error of law).

A career State employee may be discharged for "just cause," N.C.G.S. § 126-35(a) (1993), which includes "[f]ailure to maintain"

such license, registration or certification as required by the employee's special position. N.C. Admin. Code tit. 25, r. IJ.0612(b) (December 1994). An eligible State employee who becomes disabled during his employment is entitled to receive disability benefits under Article 6, Chapter 135, known as the "Disability Income Plan of North Carolina" (DIP). The employee becomes eligible for these benefits after a waiting period of sixty days following the disability. N.C.G.S. § 135-104(a) (1994). "During this waiting period, [an employee] may be paid such continuation of salary as provided by an employer through the use of sick leave, vacation leave or any other salary continuation." *Id.* Following the waiting period, the employee may begin to receive short-term disability benefits for a period of 365 days, or "may elect to receive any salary continuation as provided in G.S. 135-104 in lieu of short-term disability benefits . . . ." N.C.G.S. § 135-105(b) (1994). Long-term disability benefits are not available until short-term benefits are concluded, N.C.G.S. § 135-106(a) (1994), and the employee "may elect to receive any salary continuation as provided in G.S. 135-104 in lieu of long-term disability benefits . . . ." N.C.G.S. § 135-106(b). Additionally, no disability payments will begin until the period covering any lump sum payout for accrued leave has expired. *Id.*

Once an eligible employee becomes disabled he is entitled to elect to receive, N.C.G.S. §§ 135-105(b), -106(b), as a form of disability payment, "salary continuation" which includes accumulated vacation leave. N.C.G.S. § 135-104(a). If the eligible employee's disability occurs before his termination, the employee is entitled to make his elections under DIP, whether that election occurs before or after his termination. *See* N.C.G.S. § 135-103(b)(1) (disabled employee may participate in DIP unless he is terminated prior to disability).

The undisputed findings of the Commission are that Williams was terminated on 22 September 1989, that he had been disabled since March of 1988 and that he had applied for long-term disability benefits on 11 August 1989. Those findings also reveal that at the same time NCECD terminated his employment, Williams requested that NCECD "keep him on the payroll through the remainder of his accrued . . . leave." Because Williams had submitted an application for long-term disability and requested that he remain on the payroll until his accrued leave was exhausted, his request is sufficient exercise of his right to take salary continuation as a form of long-term disability payments, and because Williams was disabled prior to his termination, the trial court correctly ordered that Williams be "compensated

for the additional annual leave he would have accrued had he stayed on salary continuation through the end of his accrued annual leave."

NCECD, relying on N.C. Gen. Stat. §§ 126-41, 6-19.1, also argues that because the trial court's partial reversal of the SPC's decision was in error, its award of attorney fees to Williams was also in error. Because we have determined that the trial court correctly reversed the SPC by awarding Williams additional compensation, we reject NCECD's argument.

Affirmed.

Judges JOHNSON and MARTIN, JOHN C., concur.

CHARLES B. FARRELLY, PLAINTIFF v. HAMILTON SQUARE, A NORTH CAROLINA GENERAL PARTNERSHIP, DEFENDANT

No. 9325SC1165

(Filed 18 July 1995)

Negligence § 106 (NCI4th)— stepping on tack—defendant's knowledge of dangerous condition—insufficiency of evidence

The trial court properly granted summary judgment for defendant on plaintiff's negligence claim where plaintiff failed to offer evidence that defendant knew of the existence of tacks on its floor and failed to correct the condition; furthermore, plaintiff stated that he saw a worker vacuuming tacks, and he thus had a duty to use reasonable care to avoid injury from this known danger.

Am Jur 2d, Premises Liability §§ 29 et seq.

Appeal by plaintiff from judgment entered by Judge J. Marlene Hyatt on 12 August 1993 in Catawba County Superior Court. Heard in the Court of Appeals 3 October 1994.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for plaintiff appellant.

Sigmon, Clark, Mackie & Hutton, P.A., by Jeffrey T. Mackie and J. Scott Hanvey, for defendant appellee.

COZORT, Judge.

Plaintiff appeals from order granting summary judgment to defendant on plaintiff's claim for negligence. We affirm.

Defendant owned Hamilton Square and leased part of its building to various furniture manufacturers and dealers for the purpose of displaying their products at the High Point Furniture Market. Defendant kept and maintained common areas including the hallways in the building. The tenants kept and maintained their respective showrooms, and defendant had no responsibility for the leased areas. Eddie Forward managed defendant's building and supervised two to four employees who cleaned up trash generated by the Market. Also, a cleaning service performed general maintenance work including cleaning the bathrooms and hallways.

On 13 April 1988, plaintiff was in High Point to attend the High Point Furniture Market at Hamilton Square. Plaintiff was employed as a representative of various furniture and accessory manufacturers including Virginia Clocks and Churchill Clocks, who are tenants at Hamilton Square. Plaintiff stayed with Keith and Beth Hawkes near the towns of Archdale and Thomasville the night before the Market. He left the Hawkes' residence early on the morning of 13 April 1988, drove to High Point, and parked in the parking lot at Hamilton Square between 8:00 a.m. and 8:30 a.m. He went to the Virginia Clocks showroom on the lobby level of Hamilton Square and remained until 11:30 a.m. Plaintiff then walked out of the Virginia Clocks showroom onto a brick cobblestone floor leading to a carpeted area that went to an elevator, which he took to the third floor.

On the third floor, plaintiff went to the showroom of Churchill Clocks where he remained until approximately 3:00 p.m. or 4:00 p.m. He may have gone to the men's room on the same floor during this period. While in the showroom at Churchill Clocks, plaintiff observed a man vacuuming the hallway outside the showroom. Also, he saw the operator stop the vacuum to remove tacks from the vacuum cleaner on two occasions. One of the tacks was similar to one later found in plaintiff's shoe.

Plaintiff left Hamilton Square at approximately 5:00 p.m. and drove directly to the home of John Daly. After dinner, he removed his sweater and shoes. Upon removal of his right shoe, plaintiff discovered a tack penetrating through the bottom of his shoe and found blood in the bottom of his shoe. Plaintiff described the tack as one

used for decorative purposes in upholstered furniture. Plaintiff was unable to feel the tack penetrating through his shoe into his right foot because of the neuropathy he had experienced for three years prior to this incident. The neuropathy, a result of complications of diabetes, causes plaintiff not to have feeling in his right foot. Plaintiff reported this incident to defendant approximately four to six months later. He told an employee of Hamilton Square that he did not know if the injury occurred in Hamilton Square since he was in several buildings during the day.

Plaintiff does not know where he stepped on the tack. He did not notice anything unusual about his right foot on the night of 12 April or the morning of 13 April when he dressed before going to Hamilton Square. He did not see any tacks on the floor prior to seeing the person vacuuming the tacks, does not know how long the tacks had been on the floor, and cannot describe with any certainty the tack found in his shoe. His evidence showed that Mr. Forward noticed tacks and sharp objects on the Hamilton Square floor prior to the 1988 Market.

On 2 July 1992, plaintiff commenced this civil action seeking to recover medical expenses, loss of income, and compensation for pain and suffering allegedly resulting from defendant's negligence in allowing a hazardous condition to exist in the common area without giving to the plaintiff notice or warning of the existence of the condition. On 4 September 1992, defendant answered, denying any negligence and alleging that plaintiff was contributorily negligent. After discovery, defendant filed a motion for summary judgment. Judge Marlene Hyatt heard defendant's motion on 9 August 1993 and granted summary judgment for defendant on 12 August 1993.

Plaintiff contends on appeal the trial court erred in granting defendant's motion for summary judgment. Plaintiff contends the evidence of record and the reasonable conclusions arising therefrom create a jury issue on the question of defendant's negligence and do not show that plaintiff was contributorily negligent as a matter of law. We affirm.

Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The party moving for summary judgment has the burden of showing there is no triable issue of material fact. *Pembee Manufacturing Corp. v. Cape Fear Construction Co.*, 313

N.C. 488, 491, 329 S.E.2d 350, 353 (1985). " 'The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim . . . .' " *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). Once the movant meets his burden, the burden then shifts to the non-moving party to show that a genuine issue exists by forecasting sufficient evidence of all essential elements of the claim. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). The court must look at the evidence in the light most favorable to the non-moving party and with the benefit of all reasonable inferences. *Isbey v. Cooper Companies, Inc.*, 103 N.C. App. 774, 775, 407 S.E.2d 254, 256 (1991), *disc. review denied*, 330 N.C. 613, 412 S.E.2d 87 (1992).

In a premises liability case involving injury to an invitee, the owner of the premises has a duty to exercise " 'ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.' " *Roumillat*, 331 N.C. at 64, 414 S.E.2d at 342 (quoting *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963)). To prove negligence, plaintiff must show that defendant either negligently created the condition which caused the injury or negligently failed to correct the condition after actual or constructive notice of the condition. *Roumillat*, 331 N.C. at 64, 414 S.E.2d at 342-43.

Plaintiff does not allege in his complaint that defendant negligently created the condition. The only question here is whether defendant failed to correct the condition after notice of its existence. While plaintiff does allege that defendant should have known of the condition and failed to correct it, he must show that the condition had existed long enough to give defendant notice. Plaintiff has failed to offer such evidence. *See Roumillat*, 331 N.C. at 64, 414 S.E.2d at 343. We cannot assume the condition existed long enough for defendant to have notice. *See Roumillat*, 331 N.C. at 67, 414 S.E.2d at 344. Plaintiff here can neither show that defendant negligently created the condition nor that defendant failed to correct a condition after actual or constructive notice of its existence.

Plaintiff argues that his case should go to the jury where the facts and circumstances support the more reasonable probability that the defendant was negligent. *See Sabol v. Parrish Realty of Zebulon, Inc.*, 77 N.C. App. 680, 686, 336 S.E.2d 124, 127 (1985), *affirmed*, 316 N.C. 549, 342 S.E.2d 522 (1986). He asserts that defendant's employee, Eddie Forward, observed tacks on the floor prior to the Market, which constitutes circumstantial evidence of notice. Plaintiff further contends that the facts and circumstances in the present case establish the "more reasonable probability" that plaintiff stepped on the tack in the third floor common area hallway in that he began the day without an injury to his right foot, he drove directly to Hamilton Square, he visited the Virginia Clocks showroom and Churchill Clocks showroom in defendant's building, he used the common areas between the showrooms, and he observed tacks in the common area on the third floor similar to the one later found in his shoe. We disagree.

"Plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, nonsuit is proper." *Roumillat*, 331 N.C. at 68, 414 S.E.2d at 345. In this case, plaintiff failed to establish that the condition existed long enough for defendant to know of its existence in time to have removed the danger or to give a proper warning. Also, plaintiff may have stepped on the tack any number of places in addition to the common areas in Hamilton Square, including one of the residences or showrooms he visited on the day of his injury. We hold that plaintiff's evidence is mere speculation.

Plaintiff also argues that *Ricks v. R.R.*, 173 N.C. 696, 91 S.E. 363 (1917) is dispositive on this question. In *Ricks*, plaintiff drove his horse-drawn wagon onto defendant's property to unload fertilizer. *Id.* at 697, 91 S.E. at 364. His horse stepped on a nail in a plank covered by mud and water, resulting in the horse's death from lockjaw. *Id.* The Supreme Court held that the injury on defendant's property alone was not sufficient to hold defendant liable for negligence; however, considering "the general condition of the yard was bad," the question of negligence was properly submitted to the jury. *Id.*

Plaintiff's reliance on *Ricks* is misplaced. First, the plaintiff in *Ricks* could prove when and where the injury occurred, unlike plaintiff in the present case who cannot show sufficient evidence of when and where he stepped on the tack. Furthermore, the *Ricks* court appears to emphasize "the general condition of the yard" in order to

reach its decision. Here, we have no evidence that the general condition of defendant's premises was bad. *Ricks* is distinguishable from the instant case.

Furthermore, a premises owner does not have to warn an invitee of apparent hazards or circumstances of which the invitee has equal or superior knowledge. *Roumillat*, 331 N.C. at 67, 414 S.E.2d at 344. A reasonable person should be observant to avoid injury from a known and obvious danger. *Id.* In the case below, plaintiff stated he saw a worker vacuuming tacks. He should have used reasonable care at this point to avoid injury from this known danger, especially considering the neuropathy which prevented his feeling a tack penetrating his foot. Moreover, assuming defendant was found to be negligent, plaintiff's failure to use reasonable care in avoiding obvious dangers would constitute contributory negligence and would serve as a bar to recovery.

Plaintiff has failed to forecast sufficient evidence of the essential elements of his claim. The trial court properly granted summary judgment for defendant.

Affirmed.

Chief Judge ARNOLD and Judge LEWIS concur.

MARIE C. POORE AND FRED HUNTER POORE, JR., CO-ADMINISTRATORS OF THE ESTATE OF FRED POORE, AND MARIE C. POORE, INDIVIDUALLY, PLAINTIFFS V. SWAN QUARTER FARMS, INC., SETH EDWARDS, ADMINISTRATOR OF THE ESTATE OF A. H. VAN DORP, AND MARY H. VAN DORP, DEFENDANTS

No. COA94-970

(Filed 18 July 1995)

1. Clerks of Court § 14 (NCI4th) Judgments § 467 (NCI4th)—disbursement of farm rental income—check to plaintiffs and attorney—attorney not accountable for funds received by plaintiffs

In an action to quiet title in which the trial court ordered the clerk to distribute to plaintiffs farm rental proceeds that had been deposited with the clerk, there was nothing improper in the clerk's disbursement of these funds to plaintiffs with their attorney also named as a payee on the check where the check was

endorsed by plaintiffs and deposited in the attorney's trust account, and when it was thereafter determined on appeal that these proceeds belonged to the corporate defendant, the trial court had no authority to require the attorney to account for the funds plaintiffs received since he is not a party to this action.

Am Jur 2d, Clerks of Court § 26.

2. Corporations § 143 (NCI4th)— rental of corporate property—no individual claims by shareholders

Plaintiff shareholders had no independent claims to the proceeds from the rental of a farm owned by the corporation but could claim only through the corporation as shareholders.

Am Jur 2d, Corporations §§ 2243 et seq.

3. Corporations § 213 (NCI4th)— judicial dissolution—hearing ordered

In the interest of judicial economy, the case is remanded for a hearing on the necessity of judicial dissolution of defendant corporation based on plaintiffs' allegations that the corporation has no assets or business purpose, and that all of the original shareholders are deceased.

Am Jur 2d, Corporations §§ 2758 et seq.

Appeal by plaintiffs from orders entered 4 May 1994 by Judge James E. Ragan, III in Hyde County Superior Court. Heard in the Court of Appeals 12 May 1995.

Wayland J. Sermons, Jr., P.A., by Wayland J. Sermons, Jr., for plaintiffs-appellants.

Lee E. Knott, Jr. for defendant-appellee Swan Quarter Farms, Inc.

David C. Francisco for defendant-appellee Seth Edwards, Administrator of the Estate of A. H. Van Dorp.

WALKER, Judge.

Plaintiffs originally instituted this action on 30 March 1983, seeking to quiet title to certain real property located in Hyde County, North Carolina, to which they claimed a one-half undivided interest in fee simple. After summary judgment in favor of defendants was reversed by this Court, a jury trial was held in May 1988, and judg-

ment was entered in accordance with the verdict stating that plaintiffs were the owners of a one-half undivided interest in fee simple in the real property.

While defendants' appeal was pending, the trial court, upon plaintiffs' motion, entered an order enjoining defendants from disposing of the one-half interest in the property at issue and further ordering defendants to pay to the Office of the Clerk of Superior Court one-half of all the farm rental proceeds received from the property from the date of the judgment. Pursuant to this order defendants paid the sum of $14,004.46 to the Clerk.

Subsequently, this Court vacated the verdict in favor of plaintiffs and remanded the case for entry of judgment that defendant Swan Quarter Farms, Inc. was the owner of the property in dispute. *Poore v. Swan Quarter Farms, Inc.*, 94 N.C. App. 530, 380 S.E.2d 577, *modified*, 95 N.C. App. 449, 382 S.E.2d 835 (1989), *disc. rev. denied*, 326 N.C. 50, 389 S.E.2d 93 (1990). Thereafter plaintiffs moved for summary judgment for the judicial dissolution of defendant Swan Quarter Farms, Inc., which motion was denied.

On 28 April 1992, plaintiffs filed a Motion in the Cause asking the trial court to order the Clerk to release to them the farm rental proceeds being held pending appeal. Following a hearing, the trial court granted the motion and ordered the Clerk to disburse the funds to plaintiffs and their attorney.

Defendant Swan Quarter Farms, Inc. appealed from the trial court's order releasing the funds to plaintiffs and their attorney. In an unpublished opinion, this Court vacated the trial court's order as contrary to the prior mandates and remanded the case to the trial court for entry of "such orders as may be appropriate and necessary to recover the funds released to plaintiffs and to direct their disbursement to defendant Swan Quarter Farms, Inc." *Poore v. Swan Quarter Farms, Inc.*, 111 N.C. App. 456, 434 S.E.2d 251 (1993) (unpublished).

On 1 September 1993, defendant Swan Quarter Farms, Inc. requested the trial judge to enter an order to recover the funds from plaintiffs and their attorney and to direct their disbursement to Swan Quarter Farms, Inc. as ordered by this Court. In response, plaintiffs filed a motion for the judicial dissolution of Swan Quarter Farms, Inc. and the distribution of its assets to the shareholders, and further moved for judgment against the estate of A. H. Van Dorp for the other one-half of the farm rental proceeds.

On 4 May 1994, the trial court entered judgment against plaintiffs for $16,174.11 and ordered plaintiffs (but not their attorney) to pay that sum to the Clerk of Superior Court or to Swan Quarter Farms, Inc. within thirty days. Plaintiffs appeal from this judgment and from orders denying both of plaintiffs' previous motions.

Plaintiffs first argue that the trial court erred in entering judgment on behalf of Swan Quarter Farms, Inc. because the corporation "is a sham, does not exist and is incapable of receiving any assets, or conducting any business." This argument was rejected in the prior appeal of this case, when this Court held that plaintiffs failed to offer any evidence that Swan Quarter Farms, Inc. had not complied with the procedures required by statute for operating a corporation. *Poore*, 94 N.C. App. at 535, 380 S.E.2d at 579. We find no basis for concluding that the trial court erred in entering judgment against plaintiffs and requiring them to return the funds released to them.

[1] Defendants assert that "the order of Judge Ragan to the plaintiffs to repay the funds to the Clerk or to pay the funds to Swan Quarter Farms, Inc. is not appropriate because it is insufficient to recover the funds which were in fact released to the plaintiffs' attorney. . . ." However, plaintiffs' attorney is not a party to this action, and the trial court therefore had no authority to require him to account for the funds plaintiffs received. *See Altman v. Sanders*, 267 N.C. 158, 164, 148 S.E.2d 21, 25-26 (1966) (ordinarily, judgment binds only parties and those in privity with them). Nevertheless, defendants urge us to use our "inherent power to discipline, disbar, and regulate attorneys before it" to require plaintiffs' attorney to account for the funds and to return them. *See Gardner v. N.C. State Bar*, 316 N.C. 285, 287, 341 S.E.2d 517, 519 (1986) (in proper cases, court has inherent power to deal with its attorneys).

The record shows that the Clerk paid the sum of $16,174.11 to plaintiffs and their attorney by check dated 29 May 1992. We find nothing improper in the Clerk's disbursement of these funds to plaintiffs with their attorney also named as payee on the check. In this situation, the North Carolina Rules of Professional Conduct require an attorney to place the check in his or her trust account, to be maintained separate and apart from any of his or her own funds. Rules of Professional Conduct of the N.C. State Bar, Rules 10.1, 10.2 (1994). This procedure facilitates payment of litigation costs, costs to third parties, and attorneys' fees. The record here reflects that the check from the Clerk of Superior Court was endorsed by plaintiffs and

deposited in the trust account of plaintiffs' attorney. Thus, all proper procedures were followed.

[2] Plaintiffs next argue that the trial court erred in failing to enter judgment against the estate of A. H. Van Dorp for the other one-half of the farm rental proceeds. Plaintiffs claim that the Van Dorps kept $14,004.46 of the farm rents and that "[i]f the money released to the Plaintiffs belonged to the Corporation, then so did the money retained by the individual Defendants Van Dorp. . . ." We are unable to conclude from the record that the estate of A. H. Van Dorp or defendant Mary H. Van Dorp received any part of the farm rents. Moreover, plaintiffs would have no claim to the proceeds independently, but only through the corporation as shareholders. In the prior appeal of this case, this Court stated:

> This Court's previous opinions clearly establish that defendant Swan Quarter Farms, Inc., is the owner in fee simple of the property in dispute and that plaintiffs have no claim of ownership to that property. Accordingly, they have no claim to its rents and profits.

Poore v. Swan Quarter Farms, Inc., 111 N.C. App. 456, 434 S.E.2d 251 (1993) (unpublished). Therefore, the trial court did not err in denying plaintiffs' motion for entry of judgment against the estate of A. H. Van Dorp.

[3] Finally, plaintiffs argue that the trial court erred in failing to conduct an evidentiary hearing regarding the necessity of dissolving Swan Quarter Farms, Inc. Plaintiffs first sought judicial dissolution of Swan Quarter Farms, Inc. in their initial complaint in this action, filed on 30 March 1983. However, this issue was not addressed by the court at the subsequent trial. On 2 March 1990, plaintiffs moved for summary judgment on the issue of the dissolution of the corporation. In support of their motion plaintiffs submitted the affidavit of Fred H. Poore which stated that the corporation had failed in numerous ways to comply with the statutory requirements for conducting corporate affairs and that dissolution of the corporation was the only way to fully protect his rights as a shareholder. The trial court denied plaintiffs' motion. On 2 September 1993, plaintiffs filed a Motion in the Cause requesting the trial court to dissolve Swan Quarter Farms, Inc. and to conduct a hearing to determine the proper assets of the corporation and the proper method of distributing those assets. Plaintiffs also contend that the corporation has no assets and no business purpose and that all of the original shareholders are deceased. The trial

court denied "plaintiffs' motion to conduct a hearing to determine the necessity of dissolution of . . . Swan Quarter Farms, Inc. . . ."

Thus, plaintiffs throughout the course of this litigation have sought the dissolution of Swan Quarter Farms, Inc. Nonetheless, defendants claim that "if the plaintiffs in good faith believe that there are grounds for judicial dissolution of Swan Quarter Farms, Inc. which have arisen since the trial of this action they should file a new action setting forth the new grounds and their substantial reasonable expectations, known or assumed by the other participants, which have been frustrated without the fault of the plaintiffs, so that the Court can determine whether or not it is 'reasonably necessary' to dissolve the corporation for the protection of the rights or interest of the complaining shareholders. *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983)." We disagree. We believe that requiring plaintiffs to file a new action for judicial dissolution would not promote the interest of judicial economy. In every case, there comes a time when litigation must end. Both the trial court and this Court have already spent a considerable amount of time and resources dealing with the issues in this case. We find that this case may be resolved most expeditiously by reversing the trial court's denial of plaintiffs' motion and remanding the case for a hearing on the necessity of judicial dissolution. At this hearing, plaintiffs should be allowed to bring forward, if they can, evidence in support of the grounds for judicial dissolution set forth in their motion of 2 September 1993. The trial court should also receive evidence on the issues of whether the estate of A. H. Van Dorp and/or Mary H. Van Dorp received any farm proceeds from the property belonging to the corporation and, if so, whether these proceeds are an asset of the corporation to be distributed to shareholders.

Affirmed in part, reversed in part, and remanded.

Judges COZORT and JOHN concur.

ANTOINETTE DENISE TORRANCE, PLAINTIFF-APPELLEE v. AS & L MOTORS, LTD., DEFENDANT-APPELLANT

No. COA94-1069

(Filed 18 July 1995)

1. **Evidence and Witnesses § 2008 (NCI4th)— sale of car—parol evidence—admissibility to show unfair and deceptive practices**

Although defendant's oral statements concerning the condition of the automobile sold to plaintiff were parol evidence and inadmissible to contradict the terms of a written contract, the evidence here was not offered to contradict the contract, but rather to prove an unfair or deceptive practice, and the parol evidence rule does not bar the evidence in these situations.

Am Jur 2d, Evidence §§ 1108-1110.

2. **Unfair Competition or Trade Practices § 39 (NCI4th)— statement that vehicle was not wrecked—unfair and deceptive practice**

The trial court did not err in holding that defendant's statements that an automobile sold to plaintiff had not been wrecked amounted to an unfair and deceptive practice.

Am Jur 2d, Consumer and Borrower Protection §§ 302 et seq.

Liability for representations and express warranties in connection with sale of used motor vehicle. 36 ALR3d 125.

3. **Unfair Competition or Trade Practices § 54 (NCI4th)— unfair and deceptive practices—award of attorney fees—failure to make required findings**

The trial court erred in awarding attorney fees in an unfair and deceptive practices case where the trial court failed to make required findings as to whether defendant willfully engaged in the deceptive act at issue here and whether defendant made an unwarranted refusal to fully resolve this issue. N.C.G.S. § 75-16.1.

Am Jur 2d, Consumer and Borrower Protection § 302.

Appeal by defendant from judgment entered 25 April 1994 by Judge Chester C. Davis in Forsyth County Superior Court. Heard in the Court of Appeals 25 May 1995.

This case is based on the sale of a used BMW automobile. Plaintiff alleges claims based on fraud and unfair and deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes. On 15 June 1992, plaintiff purchased a 1989 BMW automobile from defendant. Several days prior to purchasing it, plaintiff made a visual inspection and drove the vehicle on a road test. Plaintiff testified that she asked defendant's sales manager, Mike Edwards, whether the car had ever been involved in a car accident and his response was that the car had never been involved in an auto accident. Defendant also advised plaintiff that she could have the car inspected by any mechanic or automotive specialist of her choice, but it appeared to him that the right rear quarterpanel of the car had been painted.

Plaintiff purchased the vehicle on 15 June 1992 for the sum of $13,181.00. Defendant agreed to finance $1,100 of the purchase price at a rate of $50 per month. The remainder of the purchase price was financed by plaintiff's credit union. As part of the purchasing agreement, plaintiff executed a statement acknowledging that the vehicle was being sold "as is," without a warranty.

Three weeks after purchasing the vehicle, plaintiff discovered red paint on the windshield of the car and suspected that the vehicle had been involved in an accident. Plaintiff took the car to Ron Lewendowski, an auto body repairman, who advised plaintiff that the vehicle had been substantially damaged on its right side and that it would cost approximately $2,500 to satisfactorily repair the vehicle. Plaintiff returned the vehicle to defendant's premises and demanded a refund of her purchase price or another comparable vehicle that had not been involved in an accident. When defendant refused, plaintiff filed suit against defendant alleging claims of fraudulent misrepresentation and unfair and deceptive trade practices.

The trial court, sitting without a jury, found that although defendant did not commit fraud upon plaintiff, defendant's misleading statements constituted an unfair and deceptive trade practice under G.S. 75-1.1. The trial court awarded plaintiff $2,500 in damages which the trial court trebled to $7,500 pursuant to G.S. 75-16. Defendant appeals.

Craige, Brawley, Liipfert, Walker & Searcy, L.L.P., by Ronald J. Short, for plaintiff-appellee.

Larry L. Eubanks and Robin R. Setzer for defendant-appellant.

EAGLES, Judge.

Defendant brings forward three assignments of error. After careful review of the record and briefs, we affirm in part, reverse in part and remand.

I.

[1] Defendant first contends that the trial court erred in admitting parol evidence concerning oral statements made to plaintiff by defendant's sales manager prior to plaintiff's execution of the "AS IS-NO WARRANTY" Statement. We disagree. Terms set forth in a writing intended to be the final expression of an agreement between two parties may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. G.S. 25-2-202. The general rule of contracts is that parol evidence cannot be admitted to vary, add to, or contradict the express terms of a written contract. *Love v. Keith*, 95 N.C. App. 549, 553, 383 S.E.2d 674, 677 (1989). In the course of purchasing the vehicle, plaintiff signed the following "AS IS- NO WARRANTY" statement:

> YOU WILL PAY ALL COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle.

Plaintiff testified that defendant's sales manager, Mike Edwards, told her that the vehicle had not been "wrecked," and that the vehicle was in "good condition." Defendant contends that these statements should have been excluded. G.S. 25-2-316(3) provides:

> (a) [U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

Although defendant's oral statements concerning the condition of the automobile were parol evidence and inadmissible to contradict the terms of a written contract, the evidence here was not offered to contradict the contract, but rather to prove an unfair or deceptive prac-

tice. *Love v. Keith*, 95 N.C. App. 549, 553, 383 S.E.2d 674, 677 (1989). The parol evidence rule does not bar the evidence in these situations. *Id.*

[2] Defendant further contends that even if the statements made by defendant's sales manager are admissible, the trial court erred in holding that those statements amounted to an unfair and deceptive practice. We disagree. In *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), our Supreme Court addressed the question of what acts constituted an unfair and deceptive practice pursuant to G.S. 75-1.1.

> Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. . . . [A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required.

Id. at 548, 276 S.E.2d at 403 (citations omitted). A purchaser does not have to prove fraud, bad faith or intentional deception to sustain unfair and deceptive practice claim. *Myers v. Liberty Lincoln-Mercury*, 89 N.C. App. 335, 337, 365 S.E.2d 663, 664 (1988). Plaintiff must only show that defendant's statements had the capacity or tendency to deceive and that plaintiff suffered injury as a proximate result of defendant's statements. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470-71, 343 S.E.2d 174, 180 (1986).

The trial court, sitting without a jury, found that, "[D]efendant, by its employee, made statements to the plaintiff that lead [sic] the plaintiff to believe the 1989 BMW had not been wrecked. Said statements were material to the parties' transaction and could have mislead the plaintiff and did mislead the plaintiff into purchasing the 1989 BMW." Based on this finding, the trial court concluded as a matter of law that defendant's misleading statements to the plaintiff were an unfair trade practice and that plaintiff was damaged in the amount of $2,500. The trial court's findings of fact in a bench trial have the weight of a jury verdict and are conclusive on appeal if supported by competent evidence. *Foster v. Foster Farms, Inc.*, 112 N.C. App. 700, 707, 436 S.E.2d 843, 847 (1993). This is true even though the evidence might also sustain findings to the contrary. *Id.* We conclude that the trial court's finding in this regard is supported by competent evidence in the record.

[3] Finally, defendant contends that the trial court erred in awarding plaintiff $4,750 in attorneys' fees. G.S. 75-16.1 allows the trial court to assess a reasonable attorneys' fee against the losing party. The trial court may award attorneys' fees in its discretion upon a finding that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

G.S. 75-16.1.

Defendant contends that there is no finding by the trial court that defendant willfully engaged in the practice of making misleading statements or that defendant made an unwarranted refusal to fully resolve plaintiff's complaint. We agree. To award attorney's fees under G.S. 75-16.1, the trial court must find that: (1) plaintiff is the prevailing party; (2) defendant willfully engaged in a deceptive act or practice; and (3) defendant made an unwarranted refusal to fully resolve the matter. *Evans v. Full Circle Prods., Inc.*, 114 N.C. App. 777, 781, 443 S.E.2d 108, 110 (1994). Even if all three requirements are met, an award of attorneys' fees is within the trial court's discretion. *Id.* Since the trial court failed to make these required findings, we remand to the trial court for additional findings as to whether defendant willfully engaged in the deceptive act at issue here and whether defendant made an unwarranted refusal to fully resolve this issue.

Accordingly, we affirm the trial court's judgment that defendant committed an unfair and deceptive practice in violation of G.S. 75-1.1 and awarding plaintiff treble damages of $7,500. We reverse the award of attorneys' fees and remand to the trial court for additional findings pursuant to G.S. 75-16.1.

Affirmed in part, reversed in part and remanded.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. MICHAEL DAVID SERZAN

No. COA94-1095

(Filed 18 July 1995)

1. Evidence and Witnesses § 403 (NCI4th)— defendant's earlier presence at crime scene—evidence admissible to show identity

In a prosecution of defendant for robbery with a dangerous weapon where the evidence tended to show that defendant robbed a motel clerk at gunpoint, the trial court did not err in admitting testimony by another motel employee that defendant was on the motel premises less than twenty-four hours before the robbery was committed, that he asked about room rates, asked to use the phone, asked for a cup of coffee, asked for a safety pin, and walked away when she denied all his requests.

Am Jur 2d, Evidence § 404.

2. Robbery § 66 (NCI4th)— armed robbery of motel clerk—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery, though the victim may have expressed uncertainty about identifying defendant in a photographic lineup, where she testified that she got a good look at defendant's face during the robbery; another motel employee testified that she got a good look at defendant on the night before the robbery; and both witnesses identified defendant from a lineup of five pictures presented to them by a police investigator.

Am Jur 2d, Robbery § 64.

3. Criminal Law § 113 (NCI4th)— failure to provide tape prior to trial—defendant not entitled to relief

Defendant in a prosecution for armed robbery of a motel clerk was not entitled to relief under N.C.G.S. § 15A-1411 because of the State's failure to provide him with a surveillance tape taken from the crime scene since the State was not aware of the existence of the tape until trial had already begun; the State notified defendant before the trial was over; the State never attempted to introduce the tape into evidence; and defendant was afforded an

opportunity to view the tape before the trial was concluded and to determine whether it would assist in his case.

Am Jur 2d, Depositions and Discovery §§ 426, 427.

Appeal by defendant from judgment entered 25 April 1994 by Judge Marvin K. Gray in Mecklenburg County Criminal Superior Court. Heard in the Court of Appeals 6 June 1995.

Attorney General Michael F. Easley, by Assistant Attorney General L. Darlene Graham, for the State.

Office of the Public Defender, by Assistant Public Defender Maria G. B. Long, for defendant-appellant.

WALKER, Judge.

Defendant Michael David Serzan was indicted for robbery with a dangerous weapon. The State's evidence tended to show that on the night of 12 November 1992 an individual later identified as defendant entered the La Quinta Motor Inn at I-85 and Woodlawn Road in Mecklenburg County and approached the check-in counter. The clerk, Carol Skinner, testified that defendant demanded she give him the money from the drawer. Defendant then repeated his demand for money, this time showing her a .25 caliber automatic weapon. Ms. Skinner handed the money drawer to defendant who took out fifty-four dollars. He then asked Ms. Skinner if she was able to open the money machine located at the counter, or if she had any additional money. When she told him that she could not open the money machine without a second key, and that she was not carrying any money on her person, he ordered her to lie on the floor and threatened to shoot her if she tried to look out the window. After defendant left the premises, Ms. Skinner notified the authorities. When the police arrived, Ms. Skinner gave them a description of the suspect as well as a surveillance tape on which the incident had been recorded. On 17 December 1992 Ms. Skinner met with an investigator from the Charlotte Police Department. Out of a group of five photographs of possible suspects, Ms. Skinner identified defendant as the person who robbed her, but stated that "with black and white pictures, I cannot be real sure." At trial she testified that she had gotten a very good look at defendant's face during the robbery, and she again identified defendant in open court.

Ms. Skinner's sister, Mary Smith, was working at the motel from 11:00 p.m. on 11 November 1992 until 7:00 a.m. the next morning.

Over defendant's objection, she testified that on the night before the robbery, a person she identified as defendant attempted to enter the motel sometime after 3:00 a.m. by inquiring about room rates, asking to use the phone, asking for a cup of coffee, and finally asking for a safety pin. When Ms. Smith refused all of his requests, defendant walked away. Ms. Smith testified that she looked very carefully at defendant because she thought he was an employee of the motel. Furthermore, she identified defendant in a photographic line-up, as well as in open court, as the person she observed at the motel on the night before the robbery.

Before the trial concluded, the State was made aware of the surveillance tape taken from the crime scene on the night of the robbery. The State informed defendant's counsel of the tape during the trial, but the State did not attempt to introduce the tape into evidence. At the close of the State's evidence defendant's motion to dismiss was denied. Defendant offered no evidence and renewed his motion to dismiss, which was again denied. Defendant was found guilty; however, before sentencing he made a motion for appropriate relief, specifically requesting that the verdict be set aside and a new trial be ordered. This motion was denied, and defendant was sentenced to fourteen years in prison.

[1] We first address defendant's contention that the trial court erred in overruling defendant's objection to testimony of Mary Smith on the grounds that such testimony was irrelevant and prejudicial and thus should have been excluded under N.C.R. Evid. 401 and 403. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N.C. Gen. Stat. § 8C-1, Rule 401 (1992). Since defendant was on the premises of the motel less than twenty-four hours before the robbery was committed, the testimony of Ms. Smith was relevant in establishing the identity of defendant because it tended to corroborate the testimony of Ms. Skinner and made it more probable than not that defendant was the perpetrator of the crime. Therefore, such testimony was admissible under Rule 401.

Defendant further contends that the evidence is inadmissible under Rule 403, which states that "[a]lthough 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). Generally, evidence which falls under this rule calls for balancing the

probative value of and need for the evidence against the harm likely to result from its admission. Evidence favorable to the State " 'will be, by definition, prejudicial to defendants. The test under Rule 403 is whether that prejudice to defendants is unfair.' " *Screaming Eagle Air, Ltd. v. Airport Comm. of Forsyth Co.*, 97 N.C. App. 30, 39, 387 S.E.2d 197, 203 (1990) (citation omitted). The exclusion of evidence under this balancing test is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Robinson*, 327 N.C. 346, 357, 395 S.E.2d 402, 408 (1990). We find that the probative value of the evidence substantially outweighs the danger of unfair prejudice to defendant's case and thus overrule defendant's assignment of error.

[2] We next address defendant's contention that the trial court erred in denying defendant's motion to dismiss the charge at the close of all the evidence. In considering such a motion, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of such offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The trial court's function is to decide whether the evidence will permit a *reasonable inference* that the defendant is guilty of the crime charged. *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652. The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying defendant's motion to dismiss. *State v. Powell*, 299 N.C. 95, 101, 261 S.E.2d 114, 118 (1980).

Defendant does not dispute the fact that a robbery with a dangerous weapon occurred on 12 November 1992. He only contends that there was insufficient evidence to prove that he was the perpetrator of that crime. Defendant contends that Ms. Skinner's testimony that defendant is the perpetrator of the crime is insufficient to establish that defendant committed this crime. In support of this argument, defendant notes Ms. Skinner's uncertainty in identifying defendant in the photographic line-up. Ms. Skinner testified that during the robbery she got a good look at defendant's face. Moreover, Ms. Smith testified that she got a good look at defendant on the night before the robbery. Further, both witnesses identified defendant from a line-up of five pictures presented to them by a police investigator. This was substantial evidence which was sufficient to carry the case to the

jury. Therefore, we find no error in the trial court's denial of defendant's motion to dismiss.

Defendant's final two assignments of error challenge the trial court's denial of defendant's motion for appropriate relief under N.C. Gen. Stat. § 15A-1411 (1988).

[3] Defendant's first ground in support of his motion for appropriate relief is that the State violated established discovery procedures by failing to provide defendant with the surveillance tape taken from the crime scene. The District Attorney's Office had established a voluntary discovery procedure of providing discovery without a request and agrees that had it known of the tape before trial, it would have been made available to defendant. However, the State submits that it did not become aware of the existence of the surveillance tape until the trial was in progress. Once the State became aware of the surveillance tape, it notified defendant of such before the trial was concluded, and it never attempted to introduce the tape into evidence.

A defendant moving for appropriate relief must show the existence of the asserted grounds for relief, and relief must be denied unless prejudice appears. N.C. Gen. Stat. § 15A-1420(c)(6) (1988). Such prejudice exists where there is a reasonable possibility that a different result would have been reached at trial had the error not occurred. N.C. Gen. Stat. § 15A-1443(a) (1988). Defendant contends that the tape was exculpatory in that it would have contradicted Ms. Skinner's testimony that she had observed defendant's face the entire time of the robbery because the tape shows that she was looking away for much of the time to retrieve the money drawer. However, given the fact that both Ms. Skinner and Ms. Smith identified defendant from a photographic line-up as well as in open court, we find that there is no reasonable possibility that a different result would have occurred had the tape been presented to defendant at an earlier time, and therefore there is no prejudice. Furthermore, defendant was afforded an opportunity to view the tape before the trial was concluded and to determine whether it would assist in his case. Defendant's assignment of error is overruled.

Defendant's second ground in support of his motion for appropriate relief is that the verdict was against the greater weight of the evidence. Defendant argues that the evidence at trial did not warrant the jury's verdict because it was insufficient to establish that he was the perpetrator. The decision to grant or deny a motion to set aside the

verdict is within the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion. *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). When the evidence at trial is sufficient to support the jury's verdict, there is no abuse of discretion in the trial court's denial of defendant's motion to set aside the verdict. *State v. Maness*, 321 N.C. 454, 462, 364 S.E.2d 349, 353 (1988). Since we have held that the evidence was sufficient to support the jury's verdict, there is no abuse of discretion and defendant's assignment of error is overruled.

No error.

Judges COZORT and JOHN concur.

STATE OF NORTH CAROLINA v. RONALD ALVIN WEST, DEFENDANT

No. COA94-897

(Filed 18 July 1995)

Searches and Seizures § 7 (NCI4th)— officer's questions and request to frisk—no unreasonable search and seizure

A police officer's questioning and request to frisk defendant who had just flown into Raleigh from New York did not constitute a seizure within the purview of the Fourth Amendment right against unreasonable searches and seizures, and the Court therefore need not decide whether the officer had reasonable suspicion to believe defendant was armed and involved in criminal activity when he initiated the pat frisk.

Am Jur 2d, Searches and Seizures §§ 10 et seq.

Appeal by defendant from judgment entered 2 May 1994 by Judge Dexter Brooks in Wake County Superior Court. Heard in the Court of Appeals 17 April 1995.

Attorney General Michael F. Easley, by Associate Attorney General Thomas B. Murphy and Assistant Attorney General Lori Fuller, for the State.

Philip O. Redwine; and Kunstler & Kuby, by Ronald L. Kuby and William M. Kunstler, for defendant appellant.

COZORT, Judge.

Ronald West (defendant) was indicted for trafficking by possession of more than 200 grams but less than 400 grams of cocaine. The trial court denied defendant's motion to suppress evidence. Defendant pled guilty to both counts and received a twenty-year prison sentence and a $100,000 fine. Defendant appeals from the denial of the motion to suppress, and the sole question on appeal is whether the drug agent had reasonable suspicion to believe defendant was armed and involved in criminal activity when he initiated a pat frisk. We hold the agent's questioning and request to frisk defendant did not constitute a seizure, eliminating the question of reasonable suspicion.

On 8 December 1993, Special Agent Bruce Black of the State Bureau of Investigation and Detective E. W. Woodlief of the Wake County Sheriff's Department were assigned to the Drug Interdiction Unit at the Raleigh Durham International Airport (RDU). Agent Black has been assigned to this unit for five years and has over one hundred drug arrests, 95% involving cocaine.

At 7:30 p.m. on this evening, Special Agent Black and Detective Woodlief checked the passenger list for USAir Flight 1687 arriving at RDU from New York City, a "source city" for drug trafficking. The officers examined three different reservations, and one contained the names of defendant and Jason Holness. Black determined that defendant was traveling on a student fare ticket. Defendant's ticket had been paid in cash on or near the date of the flight, and the call back number on the reservation had been disconnected. Black considered these characteristics—travel from a source city, cash paid for tickets, reservations made on or near the day of travel, use of student fare ticket, and a disconnected call back number—in identifying potential drug couriers.

Upon the arrival of Flight 1687, Black and Woodlief witnessed two males, who were carrying a small amount of luggage, walking out of the jetway. Black also observed defendant reach into his pocket and pull out some keys. After all passengers had disembarked, the officers went to the baggage claim area but did not see defendant and Holness. Black stepped outside and saw defendant and Holness walking across the parking lot towards another terminal. The officers followed defendant into a parking deck. The officers, dressed in civilian clothes, approached defendant and Holness as they stood on each

side of a parked car. Black presented his credentials, identified himself as a police officer, and requested to speak to defendant.

Defendant stopped putting items in the car and stood to face Black. Black asked to see defendant's airline ticket and identification, which defendant produced to Black's satisfaction. Both the ticket and identification were in the name of Ron West. Black observed that defendant was extremely nervous, and his hands were shaking. Black told defendant he was conducting an investigation into narcotics coming from New York and asked defendant for consent to search his baggage. Defendant agreed and handed his luggage to Black. As defendant gave his baggage to Black, Black observed defendant's hands trembling and defendant's hands jerked back briefly. This jerking motion startled Black. Concerned for his safety, Black asked defendant for permission to frisk him before checking his baggage. Without responding to Black, defendant ran.

Black chased defendant. During the pursuit, defendant reached into his coat and threw down a plastic bag containing a white substance. Black retrieved this bag and determined the bag contained crack cocaine. Defendant continued to run down the street and attempted to throw a plastic bag into a storm drain. Black called for assistance and was aided by an RDU police officer. After a quarter-mile chase, Black caught up with defendant, ordered defendant to get on the ground, and placed defendant under arrest.

The actual quantity of cocaine was 203 grams. Black charged defendant with trafficking in cocaine by possession of more than 200 grams but less than 400 grams and trafficking in cocaine by transportation of more than 200 grams but less than 400 grams. Defendant was indicted for these offenses on 22 February 1994. Defendant filed a motion to suppress evidence on 10 March 1994. Judge Dexter Brooks heard this matter on 21 March 1994 and denied defendant's motion on 22 March 1994. Defendant pled guilty to both counts of the indictment, and on 2 May 1994 Judge Brooks imposed a sentence of twenty years in prison and a fine of $100,000. On 9 May 1994, defendant gave notice of appeal from the Order denying the motion to suppress. The parties stipulated this issue had been properly preserved for appeal.

Defendant contends Agent Black's attempt to frisk defendant constituted a seizure under the Fourth Amendment of the United States Constitution and Article I, § 20 of the North Carolina Constitution. With respect to state constitutional grounds, defendant

argues that we should reject *California v. Hodari D.*, 499 U.S. 621, 113 L.Ed.2d 690 (1991) and afford greater protection against unreasonable searches and seizures under Article I, § 20 of the North Carolina Constitution than current federal case law provides. Defendant cites to other states which have rejected *Hodari D.* under their state constitutions. *See, e.g., Matter of Welfare of E.D.J.*, 502 N.W.2d 779 (Minn. 1993); *State v. Holmes*, 813 P.2d 28 (Or. 1991); *State v. Oquendo*, 613 A.2d 1300 (Conn. 1992); *State v. Quino*, 840 P.2d 358, *reconsideration denied*, 843 P.2d 144 (Haw. 1992), *cert. denied*, — U.S. —, 123 L.Ed.2d 472 (1993); *State v. Tucker*, 626 So.2d 707 (La. 1993), *aff'd on reh'g*, 626 So.2d 720 (La. 1993); *People v. Bora*, 634 N.E.2d 168 (N.Y. 1994).

We first note that a trial court's findings of fact in a suppression hearing are binding on the appellate courts when supported by competent evidence. *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994). This Court must determine whether these findings of fact support the trial court's conclusions of law, and if so, the trial court's conclusions of law are binding on appeal. *Id.* at 141, 446 S.E.2d at 585.

Defendant argues that the evidence and the trial court's findings fail to support the trial court's conclusions of law that Agent Black had "reasonable articulable suspicion of illegal activity warranting their [*sic*] to ask certain questions of the defendant in order to investigate this particular activity," and "reasonably believed that he and his fellow officer were in a position of vulnerability and needed to determine whether or not the defendant did indeed possess any weapon." In light of our holding on the seizure issue, we need not decide the issue of whether Special Agent Black had reasonable suspicion.

The Constitution does not protect an individual from the mere approach of a police officer in a public place. *State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973). Hence, communications between the police and citizens not involving coercion or detention do not fall within the purview of the Fourth Amendment. *State v. Perkerol*, 77 N.C. App. 292, 298, 335 S.E.2d 60, 64 (1985), *disc. review denied*, 315 N.C. 595, 341 S.E.2d 36 (1986). No reasonable suspicion is needed in order for a police officer to ask questions of an individual, ask for an individual's identification, or ask for consent to search his luggage as long as a reasonable person would understand he could refuse to cooperate. *Florida v. Bostick*, 501 U.S. 429, 434-35, 115 L.Ed.2d 389, 398-99 (1991). This questioning does not constitute a

seizure, *see California v. Hodari D.*, 499 U.S. at 626, 113 L.Ed.2d at 697 (1991), and "the encounter is consensual and no reasonable suspicion is required." *Bostick*, 501 U.S. at 434, 115 L.Ed.2d at 398. A seizure does not occur until there is a physical application of force or submission to a show of authority. *Hodari D.*, 499 U.S. at 626, 113 L.Ed.2d at 697. In order to determine whether there has been a seizure, the test is whether under the totality of the circumstances a reasonable person would not feel free to decline the officer's request or otherwise terminate the encounter. *Bostick*, 501 U.S. at 439, 115 L.Ed.2d at 401-02; *Brooks*, 337 N.C. at 142, 446 S.E.2d at 586.

In the present case, Special Agent Black approached defendant in a public place, an airport parking deck. Black asked for defendant's airline ticket and identification. After he produced these items to Black's satisfaction, Black then asked for consent to search defendant's luggage which defendant gave. As defendant handed his luggage to Black, defendant trembled and jerked back briefly causing Black to have concern for his safety. Black asked for permission to frisk defendant, and defendant ran. While there is testimony that Black may have reached for defendant, there is no evidence indicating Black made a physical application of force or that defendant submitted to any show of force. At the point where Black asked permission to frisk and defendant ran, the encounter was still consensual and did not require reasonable suspicion. Looking at the totality of the circumstances in the present case, there is no evidence to show that a reasonable person in the position of defendant would have believed he was not free to leave or otherwise terminate the encounter at the point where Black asked permission to frisk. This questioning and request to frisk do not constitute a seizure, and Black did not need reasonable suspicion.

Accordingly, we hold Black's questioning and request to frisk defendant did not violate defendant's Fourth Amendment right against unreasonable searches and seizures. We decline to reject the United States Supreme Court's *Hodari D.* standard. The trial court's denial of defendant's motion to suppress is:

Affirmed.

Judges JOHNSON and McGEE concur.

MICHAEL TAYLOR NOWELL, JR., PETITIONER v. ALEXANDER KILLENS, COMMISSIONER OF THE N.C. DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA94-1193

(Filed 18 July 1995)

Automobiles and Other Vehicles § 93 (NCI4th)— willful refusal to take breathalyzer test—sufficiency of evidence—possibility of losing limited driving privilege—instruction not required

Evidence was sufficient to support a finding that petitioner was informed of his statutory rights with regard to a breathalyzer test, and the trial court did not err in concluding that petitioner had willfully refused to submit to the chemical analysis of his breath. The court declines to impose the additional requirement that persons being requested to submit to chemical analysis should be informed that a refusal can result in the denial of their right to seek a limited driving privilege.

Am Jur 2d, Automobiles and Highway Traffic § 130.

Suspension or revocation of driver's license for refusal to take sobriety test. 88 ALR2d 1064.

Appeal by petitioner from judgment entered 29 July 1994 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 5 June 1995.

On 27 August 1993 at approximately 10:35 p.m., Trooper R. K. Rawlings of the North Carolina Highway Patrol arrested petitioner for driving while impaired. Trooper Rawlings transported petitioner to the Wake County Public Safety Center for a chemical analysis of petitioner's breath to determine the alcohol concentration in his body. Upon petitioner's arrival at the Public Safety Center, Philip F. Nicholas, a qualified chemical analyst, handed petitioner a form entitled "RIGHTS OF PERSON REQUESTED TO SUBMIT TO A CHEMICAL ANALYSIS TO DETERMINE ALCOHOL CONCENTRATION UNDER G.S. 20-16.2(a)." Mr. Nicholas read the form's contents to petitioner verbatim. Afterwards, Mr. Nicholas signed the form at 11:04 p.m., but petitioner refused to sign it.

At 11:22 p.m., Trooper Rawlings requested that petitioner submit to a chemical analysis of his breath. Petitioner refused and stated that he wanted a blood test. Mr. Nicholas informed petitioner that it was

Trooper Rawlings' right, not petitioner's, to choose which test was to be administered. Despite being advised numerous times by Mr. Nicholas of the consequences of refusing the breathalyzer test, petitioner continued to request a blood test. At 11:23 p.m., Mr. Nicholas reported petitioner as having refused the breathalyzer test.

As a result of petitioner's refusal to submit to the test, respondent revoked petitioner's motor vehicle operator's license effective 28 November 1993. Petitioner appealed the revocation to superior court pursuant to N.C. Gen. Stat. § 20-25 (1993). When the matter was heard on 13 July 1994, petitioner stipulated that there was probable cause for his arrest on an implied-consent offense. After making findings of fact consistent with the foregoing evidence presented at the hearing, the trial court concluded that:

> 1. Petitioner was arrested for an implied consent offense based upon reasonable grounds.
>
> 2. The petitioner was notified of his rights by a qualified chemical analyst pursuant to G.S. 20-16.2(a).
>
> 3. Petitioner willfully refused to submit to a chemical analysis upon the request of the charging officer.

The trial court then entered its judgment affirming respondent's revocation of petitioner's motor vehicle operator's license on 29 July 1994. From the trial court's judgment, petitioner appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Bryan E. Beatty, for the State.

John T. Hall for petitioner.

McGEE, Judge.

Petitioner contends that the trial court erred in denying his petition to reverse the revocation of his motor vehicle operator's license by the North Carolina Division of Motor Vehicles. The revocation resulted from his refusal to submit to a chemical analysis of his breath. He asserts that his refusal to submit to the test was not "willful" because he was not informed that he would be denied a limited driving privilege for failure to submit to the test. We are not persuaded, and accordingly affirm the trial court's judgment.

Upon revocation of a petitioner's driving privileges and an appeal *de novo* to superior court, the trial court's review is limited to a determination of whether:

(1) The person was charged with an implied-consent offense;

(2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense;

(3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

(4) The person was notified of his rights as required by subsection (a); and

(5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

N.C. Gen. Stat. § 20-16.2(d) (1993). If the trial court's findings of fact are supported by the evidence, they are conclusive on appeal. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E.2d 160 (1979).

In the present case, the first two conditions are satisfied by petitioner's stipulation that there was probable cause for his arrest on an implied-consent offense. The third condition is not relevant to this case, so the only issues to be determined by the trial court were whether petitioner was notified of his rights as required by N.C. Gen. Stat. § 20-16.2(a) (1993), and whether he willfully refused to take the test. Under N.C. Gen. Stat. § 20-16.2(a), a person must be given written and oral notification that:

(1) He has a right to refuse to be tested.

(2) Refusal to take any required test or tests will result in an immediate revocation of his driving privilege for at least 10 days and an additional 12-month revocation by the Division of Motor Vehicles.

(3) The test results, or the fact of his refusal, will be admissible in evidence at trial on the offense charged.

(4) His driving privilege will be revoked immediately for at least 10 days if:

a. The test reveals an alcohol concentration of 0.08 or more; or

b. He was driving a commercial motor vehicle and the test reveals an alcohol concentration of 0.04 or more.

(5) He may have a qualified person of his own choosing administer a chemical test or tests in addition to any test administered at the direction of the charging officer.

(6) He has the right to call an attorney and select a witness to view for him the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time he is notified of his rights.

The evidence in the record tends to show that petitioner was notified of his rights at 11:04 p.m., and that he did not ask to contact an attorney or to have a witness present to view the testing procedure. When petitioner was asked at 11:22 p.m. to submit to the chemical analysis of his breath, he stated he would not submit to a breathalyzer test. Petitioner did not attempt to submit to the chemical analysis of his breath. Mr. Nicholas determined that petitioner had willfully refused to take the test and reported the refusal occurred at 11:23 p.m. The evidence clearly supports the trial court's finding that petitioner received proper notification of his rights under N.C. Gen. Stat. § 20-16.2(a).

As for the final condition, this Court has held that a:

willful refusal occurs when a petitioner is aware that he must make a choice of whether or not to take the test, aware of the 30-minute time limit to make a decision, voluntarily decides not to take the test, and knowingly allows the time limit to expire before he elects to take the test.

Rock v. Hiatt, 103 N.C. App. 578, 581, 406 S.E.2d 638, 640 (1991). The trial court found that petitioner had been notified of his rights under N.C. Gen. Stat. § 20-16.2(a) that he had a right to refuse the test and could delay the test up to thirty minutes after calling an attorney or selecting a witness to view the testing procedure. Petitioner did not contact an attorney nor a witness. He refused to submit to the chemical analysis of his breath to determine the alcohol concentration, but continued to state that he wanted a blood test. When it is obvious that a petitioner does not intend to exercise his right to contact an attorney or witness, the examiners may find a "willful refusal" prior to the expiration of the 30-minute time period. *Id.* at 583, 406 S.E.2d at 642.

Petitioner seeks to have this Court impose by judicial decision the additional requirement that persons being requested to submit to chemical analysis should be informed that a refusal can result in the denial of their right to seek a limited driving privilege. We decline to impose this additional requirement in excess of the statutory provisions of N.C. Gen. Stat. § 20-16.2(a). Petitioner was informed of his statutory rights, and the trial court did not err in concluding that peti-

tioner had willfully refused to submit to the chemical analysis of his breath. We therefore affirm the trial court's judgment.

Affirmed.

Judges EAGLES and JOHN concur.

STATE OF NORTH CAROLINA v. WILLIE ANTHONY NIXON

No. COA94-992

(Filed 18 July 1995)

Criminal Law § 1687 (NCI4th)— sentence increased at resentencing hearing—violation of Fair Sentencing Act

Where the trial court, without finding aggravating or mitigating factors, originally sentenced defendant to 12 years imprisonment upon his first-degree kidnapping conviction, it was error for the court at the resentencing hearing to sentence defendant to 24 years on this charge based on the finding of an aggravating factor even though the aggregate sentence imposed upon defendant at the resentening remained the same.

Am Jur 2d, Criminal Law §§ 581, 598, 599.

Appeal by defendant from judgment entered 16 November 1993 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 18 April 1995.

Attorney General Michael F. Easley, by Associate Attorney General C. Norman Young, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

MARTIN, MARK D., Judge.

Defendant appeals from judgment and commitment imposed on resentencing. We reverse.

Defendant was tried and convicted of one count of first degree kidnapping, one count of second degree rape, and one count of second degree sexual offense. Each charge carried a presumptive sen-

tence of twelve years. All charges were consolidated, the court made no findings of aggravating or mitigating factors, and the defendant was sentenced to a term of 36 years in prison. Defendant appealed.

On appeal this Court held the trial court erred in entering judgment on the first degree kidnapping charge and the second degree rape and sexual offense charges. In its remand for resentencing, this Court applied *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986) and instructed: "The trial court may arrest judgment on the first-degree kidnapping conviction, enter a verdict of guilty of second-degree kidnapping, and resentence accordingly; or arrest judgment in either the rape or sexual offense, and resentence accordingly." *State v. Nixon*, 111 N.C. App. 268, 434 S.E.2d 249 (1993).

At the 19 November 1993 resentencing hearing, the State introduced evidence which tended to show that defendant had previously been convicted of the felony of forgery and uttering. This was in the form of the original Clerk's file in Case No. 89 CRS 12623. The court entered judgment on the charge of first degree kidnapping. The court found as an aggravating factor defendant had a prior conviction punishable by more than 60 days confinement. The court found no mitigating factors. The trial court further found that the aggravating factors outweighed those in mitigation and sentenced defendant to twenty-four years for the offense of first degree kidnapping. The trial court also imposed a consecutive sentence of twelve years on the conviction of second degree rape. Since the sentences were to run consecutively, the total sentence remained thirty-six years, and defendant's aggregate term of imprisonment remained the same as it had been before appeal. Finally, the trial court arrested judgment on the second degree sex offense charge. Defendant was given credit for time served during the appeal and trial.

On appeal we only address defendant's contention the trial court erred at the resentencing hearing by doubling defendant's sentence for first degree kidnapping.

Although defendant did not object to the sentence imposed by the trial court for his kidnapping conviction, we choose to exercise our authority to suspend the rules and address defendant's contention that the trial court erred at his resentencing hearing by doubling his sentence for first degree kidnapping. N.C.R. App. P. 2.

N.C. Gen. Stat. § 15A-1335 (1988) prohibits the court from imposing a "new sentence for the same offense, or for a different offense

based on the same conduct, which is more severe than the prior sentence" when the prior sentence "has been set aside on direct review or on collateral attack." Absent findings of aggravating or mitigating factors or a plea agreement, N.C. Gen. Stat. § 15A-1340.4(a) (1988) commands the imposition of presumptive terms.

Based on the command in N.C. Gen. Stat. § 15A-1340.4(a) (1988), the North Carolina Supreme Court has concluded that "when indictments or convictions with equal presumptive terms are consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms are totaled to arrive at the sentence, nothing else appearing in the record, the sentence . . . will be deemed to be equally attributable to each indictment or conviction." *State v. Hemby*, 333 N.C. 331, 336, 426 S.E.2d 77, 79-80 (1993). In applying this rule, the *Hemby* decision implicitly held that the prohibition against imposing more severe sentences after appeal, N.C. Gen. Stat. § 15A-1335 (1988), applies to offenses charged and convictions thereon, not to an aggregate term of years. *State v. Hemby*, 333 N.C. at 337, 426 S.E.2d at 80.

The State contends the rule set forth in *Hemby* does not apply. The State contends that in *Hemby*, each of the offenses involved conduct which occurred at different times, while in the present case all charges for which defendant was convicted were based on the same conduct. The State further contends N.C. Gen. Stat. § 15A-1335 permits the imposition of the same sentence for "a different offense based on the same conduct," and focuses on the aggregate sentence imposed on resentencing rather than offenses charged and convictions thereon. Since all charges for which defendant was convicted were based on the same conduct, and the overall aggregate sentence imposed by the trial court on remand was not increased, the State concludes the sentence imposed was within the guidelines of N.C. Gen. Stat. § 15A-1335. We disagree.

We hold *State v. Hemby* is dispositive of this issue. In *Hemby*, the defendant was convicted on eight counts of violating N.C. Gen. Stat. § 14-190.1(a) and (e) (1993). At the original sentencing, as in the present case, no aggravating or mitigating factors were found. The convictions were consolidated for sentencing as follows: Indictments A, B, and C were consolidated, and the defendant was sentenced to three years; indictments D, E, and F were consolidated, and the defendant was sentenced to a consecutive sentence of three years; finally, indictments G and H were consolidated, and the defendant

was sentenced to a consecutive sentence of two years. The defendant's aggregate term was eight years. On appeal, sentences on indictments G and H were upheld, while the others were vacated and remanded for resentencing. At resentencing, the trial court arrested judgment on indictments C, E, and F. In its resentencing as to the remaining indictments, A, B, and D, aggravating factors were found. The court imposed a three year sentence for the conviction on indictment D, and, after consolidating the convictions on indictments A and B, imposed another three year sentence. Having been upheld on appeal, the two year sentence on indictments G and H was left undisturbed. Since both three year sentences were to run consecutively, the total sentence remained eight years. Thus, just as in this case, the defendant's aggregate term of imprisonment remained the same as it had been before appeal. On review of the resentencing, the North Carolina Supreme Court held:

> Because, as to each indictment involved, the trial court resentenced defendant to a term of years greater than the term of years attributable to the indictment at the original sentence, the trial court violated the Fair Sentencing Act by imposing a more severe sentence at resentencing than was imposed originally.

State v. Hemby, 333 N.C. at 337, 426 S.E.2d at 80.

The violation in this case is even more straightforward than *Hemby*. This case involved convictions with equal presumptive terms of twelve years each. The charges were consolidated for sentencing without any finding of aggravating or mitigating circumstances. The presumptive terms were totaled to arrive at the sentence of thirty-six years. Nothing else appears in the record. Therefore, the original thirty-six year sentence is "deemed to be equally attributable to each indictment or conviction." *State v. Hemby*, 333 N.C.at 336, 426 S.E.2d at 80.

Application of *Hemby* reveals defendant was originally sentenced to 12 years on the charge of first degree kidnapping. At the resentencing hearing the court sentenced defendant to twenty-four years on this charge. Therefore, contrary to the State's assertion that N.C. Gen. Stat. § 15A-1335 permits the imposition of the same sentence for "a different offense based on the same conduct," and focuses on the aggregate sentence imposed on resentencing, we hold, just as in *Hemby*, "[b]ecause, as to each indictment involved, the trial court resentenced defendant to a term of years greater than the term of years attributable to the indictment at the original sentence, the trial

court violated the Fair Sentencing Act by imposing a more severe sentence at resentencing than was imposed originally." *State v. Hemby*, 333 N.C. at 337, 426 S.E.2d at 80.

Reversed and remanded.

Judges GREENE and LEWIS concur.

FCR GREENSBORO, INC., PLAINTIFF v. C & M INVESTMENTS OF HIGH POINT, INC. AND C. WAYNE McDONALD, DEFENDANTS

No. COA94-979

(Filed 18 July 1995)

Arbitration and Award § 26 (NCI4th)— liquidated damages—money for changes in sprinkler system—matters not within scope of agreement to arbitrate—award error

The trial court erred in confirming an arbitration award and entering judgment thereon because the arbitrator exceeded his authority by awarding liquidated damages and awarding monies for changes in a sprinkler system, neither of which was within the scope of the parties' agreement to arbitrate.

Am Jur 2d, Alternative Dispute Resolution §§ 234-249.

Appeal by defendant C & M Investments of High Point, Inc. from judgment entered 20 May 1994 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 22 May 1995.

On 10 August 1992, plaintiff and defendant entered into a lease in which defendant C & M Investments of High Point, Inc. agreed to construct and lease to plaintiff FCR Greensboro, Inc. a building to be used as a center for plaintiff's recycling operations pursuant to a contract plaintiff had with the City of Greensboro. The lease obligated defendant to complete the facility by 1 March 1993. The lease provided a late penalty of $750 per day for every day beyond 10 March 1993 where the premises were "not ready for occupancy by Tenant due to events within the Landlord's control."

On 1 February 1993, one month before the scheduled completion date, plaintiff and defendant entered into a lease amendment that extended the completion date to 15 June 1993, which would automatically extend for "adverse weather conditions not reasonably anticipable [sic]." Further, the amendment required that the determination of whether such weather conditions were reasonably anticipated be made by an independent party agreeable to both parties. Defendant also agreed to pay plaintiff $750 per day as liquidated damages for "any delay past the completion date."

The lease amendment stated that defendant was to begin construction immediately, but actual construction did not start until 12 May 1993. Plaintiff moved some of its equipment into the facility in August 1993, but did not begin operations until 13 September 1993 despite the construction being incomplete. A Certificate of Occupancy was finally issued to plaintiff on 3 February 1994.

After unsuccessfully demanding payment of liquidated damages from defendant and alleging damages to the facility, plaintiff filed a complaint for declaratory relief, breach of contract, and a preliminary injunction on 3 December 1993. Thereafter, on 30 December 1993, plaintiff and defendant entered into a written arbitration agreement to "arbitrate the differences which have arisen between the parties with respect to claimed liquidated damages, claimed weather delays and claimed Tenant change orders under the Lease," subject to specified conditions set forth in the agreement.

An arbitration hearing was held from 5 April to 8 April 1994. The arbitrator issued an Arbitration Award ordering defendant to pay to plaintiff as liquidated damages $121,500 and an additional $8645 as reimbursement to plaintiff for additions made to the facility's sprinkler system.

Defendant filed a Motion to Vacate Arbitration Award, and plaintiff subsequently filed a Motion for Confirmation of Arbitration Award and Judgment on Award. The trial court heard the motions and issued an order denying defendant's motion and granting plaintiff's motion. The court entered judgment in favor of plaintiff in the amount of $130,145. Defendant appeals.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips and James C. Adams, II, for plaintiff appellee.

Elrod Lawing & Sharpless, P.A., by Frederick K. Sharpless, for defendant appellant.

ARNOLD, Chief Judge.

Defendant contends that the trial court erred in denying defendant's motion to vacate or modify the arbitration award, and in confirming the award and entering judgment thereon because the arbitrator exceeded his authority by: (1) awarding liquidated damages not within the scope of the parties' agreement to arbitrate, and (2) awarding monies for changes in the sprinkler system, a controversy not within the scope of the parties' agreement to arbitrate. We agree.

The parties' arbitration agreement is governed by the Uniform Arbitration Act, N.C. Gen. Stat. § 1-567.1, *et seq.* (1983). Generally, parties who have agreed to abide by an arbitrator's decision will not be heard to attack the regularity or fairness of an award, *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981), and the trial court must confirm the award unless grounds exist to either vacate or modify the award. N.C. Gen. Stat. § 1-567.12. Judicial review of an arbitration award is limited to determining whether there exists one of the specific grounds for vacating the award under N.C. Gen. Stat. § 1-567.13, or modifying the award under N.C. Gen. Stat. § 1-567.14. *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984); *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 255 S.E.2d 414 (1979). "[O]nly awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts." *Gunter*, 41 N.C. App. at 414, 255 S.E.2d at 419. An award is presumed to be valid, and the party seeking to set it aside must demonstrate an objective basis in the record for concluding that the arbitrator in fact exceeded his authority. *Wilson Building Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987).

Defendant first contends that the parties never agreed to submit to arbitration disputes regarding liquidated damages due for a delay in *starting* construction, nor did their agreements ever contemplate such liquidated damages. In calculating his award, however, the arbitrator assessed ninety-one days at $750 per day ($68,250) between 1 February 1993 (the date of the parties' lease amendment) to 12 May 1993 (the date defendants actually began construction), labelling this as "liquidated damages due to delay of beginning construction for [February] 1 amendment."

The duty to arbitrate is contractual, therefore, only disputes which the parties agreed to submit to arbitration may be resolved.

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). "To determine whether the parties agreed to submit a particular dispute or claim to arbitration, we must look at the language in the agreement, *viz.*, the arbitration clause, and ascertain whether the claims fall within its scope." *Id.* at 23-24, 331 S.E.2d at 731. Upon review of the record, it is apparent that the arbitration agreement, as well as the lease and lease amendment, did not contemplate liquidated damages in the form of delay in starting construction of the facility. In fact, the record is replete with language that "claimed liquidated damages" were to be calculated only for any delay in the construction of the facility *beyond* the agreed upon completion date. Furthermore, the record demonstrates plaintiff never even made a request for damages caused by a delay in beginning construction. Therefore, we find defendant has demonstrated an objective basis in the record for concluding that the arbitrator in fact exceeded his authority by awarding upon a matter not submitted to him, and the award should be modified accordingly. *See* N.C. Gen. Stat. § 1-567.14(a)(2).

Furthermore, we agree with defendant's contention that the trial court also erred by confirming the arbitrator's award of $8645 "as reimbursement to FCR for additions made to the sprinkler system." Although public policy favors confirmation of arbitration awards, such awards are not infallible. *J.M. Owen Bldg. Contractors v. College Walk, Ltd.*, 101 N.C. App. 483, 400 S.E.2d 468 (1991). Under N.C. Gen. Stat. § 1-567.14(a)(2), as demonstrated by the objective evidence provided in the record, the arbitrator awarded on a matter not submitted to him. *See Rodgers*, 76 N.C. App. 16, 331 S.E.2d 726. No evidence exists to show that reimbursement for sprinkler system additions was ever a part of plaintiff's "claimed liquidated damages" or "claimed Tenant change orders" pursuant to the arbitration agreement. Therefore, the arbitrator exceeded his authority, and the trial court improperly confirmed that portion of the award.

We therefore remand to the Superior Court of Guilford County to enter judgment vacating the portions of the arbitrator's award regarding liquidated damages due to delay in beginning construction and reimbursement for additions made to the sprinkler system.

Reversed in part and remanded.

Judges LEWIS and McGEE concur.

KIMETHA RENA McNEIL, PLAINTIFF v. KIMBERLY RAE HICKS, ALLSTATE INSURANCE COMPANY, DEFENDANTS

No. COA94-1024

(Filed 18 July 1995)

1. Insurance § 511 (NCI4th)— unidentified vehicle causing accident—no contact with plaintiff's vehicle—no uninsured motorist coverage

The trial court properly granted defendant insurer's motion for relief and dismissed the action against it based on the North Carolina Supreme Court's holding in *Andersen v. Baccus*, 335 N.C. 526, that there must be physical contact with the unidentified vehicle for uninsured motorist coverage to be provided under N.C.G.S. § 20-279.1(b), since the evidence was undisputed in this case that there was no contact between plaintiff's vehicle and the unidentified vehicle which allegedly caused the accident.

Am Jur 2d, Automobile Insurance §§ 330 et seq.

2. Evidence and Witnesses § 2103 (NCI4th)— speed of vehicle—evidence properly excluded

In an action arising out of an automobile accident, the trial court did not err in refusing to allow plaintiff to testify as to her opinion of defendant's speed before the collision, since plaintiff's testimony clearly established that she had no reasonable opportunity to observe defendant's vehicle and judge its speed.

Am Jur 2d, Expert and Opinion Evidence § 119.

Admissibility and probative effect of testimony that motor vehicle was going "fast" or the like. 92 ALR2d 1391.

Plaintiff appeals from an order entered 7 March 1994 by Judge Howard R. Greeson, Jr. and from a judgment on the jury's verdict entered 27 April 1994 by Judge Russell G. Walker, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 24 May 1995.

David R. Tanis for plaintiff-appellant.

Pinto, Coates & Kyre, L.L.P., by Richard L. Pinto and Matthew L. Mason, for defendant-appellee Kimberly Rae Hicks.

Henson, Henson, Bayliss & Sue, L.L.P., by Perry C. Henson, for defendant-appellee Allstate Insurance Company.

WALKER, Judge.

On 20 February 1991 the plaintiff's vehicle was stopped on Utah Drive at the intersection with Cole Drive in Forsyth County. Defendant Hicks (Hicks) was traveling south on Cole Drive. As Hicks approached the intersection at which plaintiff was stopped, she swerved into the right shoulder of Cole Drive to avoid an oncoming car and struck plaintiff's car on the driver's side, causing plaintiff to suffer physical injury and lost wages. The driver of the car which Hicks attempted to avoid was never identified. Plaintiff subsequently brought suit against Hicks for her alleged negligence in causing the collision, and alternatively against defendant Allstate Insurance Company (Allstate), plaintiff's liability insurance carrier. Plaintiff contended that her policy with Allstate contained an uninsured motorist clause which was in force at the time of the collision, and therefore Allstate was liable for injuries she suffered as a result of the negligence of the unidentified vehicle.

Plaintiff moved for partial summary judgment against Allstate, and this motion was granted by the trial court on 29 May 1992. Allstate appealed and this Court dismissed the appeal as interlocutory. Thereafter, on 25 February 1994, Allstate moved for relief from the order of partial summary judgment pursuant to N.C. Gen. Stat. § 1A-1 Rule 60(b)(6) (1990), and for an order dismissing all claims against Allstate without prejudice. Allstate argued that, in light of the North Carolina Supreme Court's recent holding in *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994), there must be physical contact with the unidentified vehicle for uninsured motorist coverage to be provided under N.C. Gen. Stat. § 20-279.21 (b) (1993), the uninsured motorist statute (UM Statute). By an order dated 7 March 1994, the trial court granted Allstate's motion and dismissed the action against Allstate.

At trial the jury found no negligence on the part of Hicks. Plaintiff gave notice of appeal from both judgments on 6 May 1994.

[1] Plaintiff's first assignment of error is that the trial court erred in granting Allstate's motion seeking relief from a prior judgment granting plaintiff partial summary judgment on the issue of liability. Relief afforded under Rule 60(b) "is within the discretion of the trial court, and such a decision will be disturbed only for an abuse of discretion." *Harrington v. Harrington*, 38 N.C. App. 610, 612, 248 S.E.2d 460, 461 (1978). Plaintiff seeks to distinguish *Andersen*, where the Court denied the plaintiff's claim against an uninsured motorist carrier for

injuries arising out of a collision allegedly caused by an unidentified vehicle because there was no physical contact between the unidentified vehicle and either the plaintiff's or the defendant's vehicle. *Andersen v. Baccus*, 109 N.C. App. 16, 19, 426 S.E.2d 105, 107 (1993), *affirmed in part and reversed in part*, 335 N.C. 526, 439 S.E.2d 136 (1994). In this case, plaintiff contends that she is entitled to recovery from Allstate under the UM Statute based upon the jury verdict that Hicks was not negligent in causing the plaintiff's injuries. We note that plaintiff's complaint only alleged the negligence of the unidentified vehicle as a basis for UM coverage. In any event, we believe that this case comes within the purview of *Andersen*. Thus, we find that the trial court did not abuse its discretion when it granted Allstate's motion for relief in accordance with Rule 60(b)(6).

[2] Plaintiff's second assignment of error is that the trial court erred in refusing to allow her to testify as to her opinion of Hicks' speed before the collision. In order for a lay opinion regarding speed to be admissible, "the trial court must determine from the facts and circumstances as they appear in the evidence whether the witness has had a reasonable opportunity to observe the vehicle and judge its speed." *Beaman v. Sheppard*, 35 N.C. App. 73, 76, 239 S.E.2d 864, 866, *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978). A reasonable opportunity exists where the witness observes the vehicle "for such a distance and over such a period of time as to enable [him or her] to do more than merely hazard a guess as to speed." *Smith v. Stocks*, 54 N.C. App. 393, 398, 283 S.E.2d 819, 822 (1981). Plaintiff testified that she did not have time to form an opinion of the speed at which Hicks was traveling when she first saw her in the ditch, and that it was about three seconds from the time she saw Hicks' car in the ditch until the time it hit her. Since plaintiff's testimony clearly established that she had no reasonable opportunity to observe Hicks' vehicle and judge its speed, we hold that the trial court correctly excluded plaintiff's testimony.

Plaintiff's third assignment of error is that there was insufficient evidence to support a jury instruction as to the doctrine of sudden emergency. Since the record does not reflect whether the plaintiff made a timely objection to a jury instruction on the doctrine of sudden emergency, we overrule this assignment of error. *See* N.C.R. App. P. 10(b)(2) and 10(c)(1)-(2) (1995).

Plaintiff's final assignment of error is that she was entitled to a directed verdict in her favor on the issue of the negligence of Hicks.

We overrule this assignment of error since plaintiff did not preserve this error for appeal by making the appropriate motions during the trial. Assuming *arguendo* that plaintiff had made such a motion and having carefully reviewed the record, we find that the trial court would not have abused its discretion in denying the motion.

No error.

Judges COZORT and JOHN concur.

HERBERT A. WALLACE, PLAINTIFF-APPELLEE v. SCOTT E. JARVIS, D/B/A SCOTT E. JARVIS & ASSOCIATES, DEFENDANT-APPELLANT

No. COA94-1099

(Filed 18 July 1995)

Appeal and Error § 89 (NCI4th)— statutory immunity claimed by defendant—right not jeopardized absent immediate appeal—appeal dismissed

The trial court's denial of defendant's motion for summary judgment on plaintiff's slander and malicious prosecution claims did not deprive defendant of a substantial right, the right to claim immunity under N.C.G.S. § 84-28.2, which would be jeopardized absent an immediate appeal, and defendant's interlocutory appeal is therefore dismissed.

Am Jur 2d, Appellate Review § 120.

Appeal by defendant from order entered 18 July 1994 by Judge Claude S. Sitton in Buncombe County Superior Court. Heard in the Court of Appeals 26 May 1995.

Baley, Baley & Clontz, P.A., by Stanford K. Clontz, for plaintiff-appellee.

Root & Root, P.L.L.C., by Allan P. Root, for defendant-appellant.

WALKER, Judge.

Both parties are attorneys licensed to practice law in North Carolina. From July 1991 until February 1993, plaintiff was an associate in defendant's law office. A dispute arose as to whether plaintiff

was entitled to a portion of certain fees collected by defendant's law office. Shortly before plaintiff left defendant's employ, defendant contacted the North Carolina State Bar to report possible problems with plaintiff's physical and mental condition. By letter dated 15 February 1993, the Chairman of the State Bar's Grievance Committee informed plaintiff that a grievance had been filed by the State Bar concerning plaintiff. The letter was accompanied by a document entitled "Substance of Grievance" stating that "[t]he State Bar has received information suggesting that the respondent attorney may be disabled owing to a mental or physical condition. The respondent apparently has periods during which he is extremely forgetful and may be suffering from Alzheimer's." After receiving plaintiff's response to the letter, the State Bar informed plaintiff on 22 July 1993 that the Grievance Committee had dismissed the grievance with no finding of probable cause.

Plaintiff filed suit against defendant alleging causes of action for breach of contract, quantum meruit, slander, unfair trade practices, and malicious prosecution. Defendant denied liability and asserted that "[a]ny statement made by Defendant to the State Bar concerning Plaintiff is both conditionally and absolutely privileged and cannot be the basis for the finding of any liability of Defendant to Plaintiff." Defendant also counterclaimed for slander and intentional infliction of emotional distress. Both parties moved for partial summary judgment. On 18 July 1994, the trial court granted summary judgment in favor of plaintiff on defendant's counterclaim for intentional infliction of emotional distress and in favor of defendant on plaintiff's claims for quantum meruit and unfair trade practices. The court denied defendant's motion for summary judgment on plaintiff's claims for malicious prosecution and slander. Defendant appeals the denial of summary judgment on these claims.

The trial court's order does not completely dispose of the case and is thus interlocutory. *See Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). Ordinarily, there is no right to appeal an interlocutory order. *Id.* The purpose of this rule is " 'to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.' " *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quoting *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. rev. denied*, 315 N.C. 183, 337 S.E.2d 856 (1985)).

However, there are two means by which a party may appeal an interlocutory order. "First, if there has been a final disposition of at least one but fewer than all claims, the final disposition of those claims may be appealed if the trial judge in addition certifies that there is no just reason to delay the appeal." *Myers v. Barringer*, 101 N.C. App. 168, 172, 398 S.E.2d 615, 617 (1990). Second, if an interlocutory order " 'deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits,' " the order is immediately appealable. *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253 (citation omitted).

"The denial of a motion for summary judgment is not a final judgment and is generally not immediately appealable, even if the trial court has attempted to certify it for appeal under Rule 54(b)." *Henderson v. LeBauer*, 101 N.C. App. 255, 264, 399 S.E.2d 142, 147, *disc. rev. denied*, 328 N.C. 731, 404 S.E.2d 868 (1991). Therefore, in order to immediately appeal, defendant here has the burden of showing that the trial court's order deprives him of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

In a footnote to his brief, defendant argues that he has a right to appeal based on this Court's holding in *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993). In *Slade*, the defendants moved for summary judgment based on a claim of sovereign immunity, and the trial court denied the motion. *Id.* at 424-25, 429 S.E.2d at 745. This Court held that the defendants were entitled to an immediate appeal, reasoning that "[a] valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit." *Id.* at 425, 429 S.E.2d at 746. Thus, the Court stated, "[w]ere the case to be erroneously permitted to proceed to trial, immunity would be effectively lost." *Id.* Defendant here argues that his communication to the State Bar was absolutely privileged and he is therefore immune from suit on plaintiff's slander and malicious prosecution claims. He bases his claim of immunity on N.C. Gen. Stat. § 84-28.2 (1985), which provides in part:

> Persons shall be immune from suit for all statements made without malice, and intended for transmittal to the North Carolina State Bar or any committee, officer, agent or employee thereof, or given in any investigation or proceedings, pertaining to alleged misconduct, incapacity or disability or to reinstatement of an attorney.

Defendant argues that he is entitled to an immediate appeal under *Slade* and cases from other jurisdictions because if plaintiff's slander and malicious prosecution claims are allowed to proceed to trial, defendant will in effect lose his immunity.

Slade is distinguishable from the instant case. *Slade* involves sovereign immunity, which is a " 'common law theory or defense established by [the] Court' to protect the sovereign or the State and its agents *from suit.*" *Slade*, 110 N.C. App. at 426, 429 S.E.2d at 746 (citation omitted) (emphasis added). In contrast, the immunity claimed by defendant here is statutory in nature and is available to him if he satisfies all of the requirements of N.C. Gen. Stat. § 84-28.2. Thus, defendant would be immune from suit only if his communications to the State Bar were made without malice.

The trial court, in denying defendant's motion for summary judgment on plaintiff's slander and malicious prosecution claims, determined that plaintiff had presented sufficient evidence to go to the jury on the issue of whether defendant's statements to the State Bar were made with malice. Thus, on the record before us, we cannot conclude that defendant is entitled as a matter of law to immunity from suit under N.C. Gen. Stat. § 84-28.2. We therefore find that the trial court's denial of defendant's motion for summary judgment on plaintiff's slander and malicious prosecution claims did not deprive defendant of a substantial right which would be jeopardized absent an immediate appeal, and defendant's appeal must be dismissed.

Dismissed.

Judges COZORT and JOHN concur.

RIVERVIEW MOBILE HOME PARK, PLAINTIFF/APPELLANT v. ANNIE RUTH BRADSHAW AND OCCUPANTS, DEFENDANTS/APPELLEES

No. COA94-1313

(Filed 18 July 1995)

1. Appeal and Error § 14 (NCI4th)— extension of time to pay filing fees—no authority of magistrate

The magistrate did not have authority under N.C.G.S. § 1A-1, Rule 6(b) to extend the time for plaintiff to pay filing fees for an appeal from a small claims court to the district court since the

time limitation at issue was found in N.C.G.S. § 7A-228 rather than in the Rules of Civil Procedure.

Am Jur 2d, Appellate Review §§ 347, 348.

2. Appeal and Error § 230 (NCI4th)— filing fee for appeal—failure of clerk to collect—appellant not excused

Failure of the clerk of district court to collect those fees required by N.C.G.S. § 7A-228 for filing an appeal from small claims court does not operate to excuse appellant for failing to ascertain the requirement and fulfilling it.

Am Jur 2d, Justices of the Peace §§ 2,3.

Appeal by plaintiff from order entered 9 August 1994 by Judge L. W. Payne in Wake County District Court. Heard in the Court of Appeals 12 June 1995.

Hunter Law Firm, by R. Christopher Hunter and Elizabeth K. Blake, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, a Professional Limited Liability Company, by Mark A. Davis, for defendant-appellees.

McGEE, Judge.

On 2 February 1994 plaintiff filed a complaint in summary ejectment seeking the eviction of defendants based on the allegation that they had failed to pay rent. Defendants filed an answer and counterclaims in which they contended the eviction was retaliatory and plaintiff practiced unfair and deceptive trade practices. A hearing on the matter was held on 14 February 1994 in Wake County Small Claims Court. Following the hearing, the magistrate issued a judgment dismissing plaintiff's summary ejectment action as being a retaliatory eviction, and awarded defendants $3,000.00 in actual damages and $1,530.00 in attorney's fees.

On 24 February 1994 plaintiff gave notice of appeal to the District Court of Wake County. In so doing, plaintiff failed to pay the appeals fee as required by N.C. Gen. Stat. § 7A-228 (b) (1989). Accordingly, the appeal was automatically dismissed for failure to perfect the appeal. On or about 30 March 1994 plaintiff filed a motion in Wake County Small Claims Court seeking an order setting aside the entry of judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (1990), on the grounds of surprise. In the alternative, plaintiff sought an order allow-

ing an extension of time within which to perfect the appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(b) (1990). In support of this motion, plaintiff cited *Porter v. Cahill*, 1 N.C. App. 579, 162 S.E.2d 128 (1968) wherein this Court held that notice of appeal from a small claims court was sufficient to perfect the appeal, and the appeal could not be dismissed for failure of the Clerk to perform his duty to collect fees. The magistrate denied plaintiff's motion pursuant to Rule 60(b), but granted plaintiff's motion for an extension of time within which to perfect the appeal, apparently relying on this Court's holding in *Cahill.*

Defendants filed a motion in Wake County District Court seeking to dismiss the appeal for failure to perfect within the time permitted by statute. By order dated 9 August 1994, the trial court dismissed the appeal, finding that the magistrate was without the authority to grant an extension of time to pay the appeals fee, therefore the appeal was not timely perfected. Plaintiff appeals the order dismissing the appeal.

The two issues raised on appeal are (1) whether the trial court erred in determining that the magistrate lacked the authority to extend the time in which to perfect the appeal; and (2) if so, whether plaintiff demonstrated excusable neglect sufficient to warrant the extension of time.

G.S. § 1A-1, Rule 6(b) provides the following:

> (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect.

[1] The trial court's discretionary authority to extend the time specified for doing any act contained in Rule 6(b) has been held to address "the computation of any time period prescribed by the Rules of Civil Procedure." *Lemons v. Old Hickory Council*, 322 N.C. 271, 275, 367 S.E.2d 655, 657, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). *See also, Osborne v. Walton*, 110 N.C. App. 850, 431 S.E.2d 496 (1993). However, in the instant case the time limitation is not contained in the

Rules of Civil Procedure, but is found in G.S. § 7A-228. Accordingly, the magistrate did not have the authority under Rule 6(b) to extend the time for plaintiff to pay the filing fees, and the trial court did not err in so ruling.

[2] Even had the authority for enlargement in Rule 6(b) been properly applied, an extension of time allowed subsequent to the expiration of the specified period for action requires a showing of excusable neglect. G.S. § 1A-1, Rule 6(b). Plaintiff contends that its failure to pay the filing fees should be excused because counsel relied upon the statement of an anonymous Assistant Clerk of Court that no fee was required, and when the notice of appeal was filed with the Wake County Clerk's Office, no fee was assessed. This argument was recently addressed by this Court in *Principal Mut. Life Ins. Co. v. Burnup & Sims, Inc.*, 114 N.C. App. 494, 442 S.E.2d 85 (1994). In *Principal*, the defendant attempting to appeal the decision of a magistrate to the district court failed to pay the filing fees required under G.S. § 7A-228. On appeal, the defendant argued that the failure should be excused because the clerk of superior court failed to collect the court costs. This Court held that it is the responsibility of the appellant to perfect his appeal, including ascertaining and paying the costs of the appeal. The clerk of superior court has no duty to perfect an appellant's appeal. *Principal*, 114 at 496-97, 442 S.E.2d at 86.

The argument raised in the current appeal must fail for the same reason. The statute is clear and unambiguous in requiring the fees to be paid within twenty days of giving notice of appeal. The failure of the clerk of superior court to collect those fees does not operate to excuse the appellant for failing to ascertain the requirement and fulfilling it. Because there is no basis for finding excusable neglect for the failure to perfect the appeal, an extension of time granted on that ground must be overruled. Accordingly, we find no error by the trial court in its ruling.

For these reasons, we affirm the order of the trial court dismissing the appeal.

Affirmed.

Judges EAGLES and JOHN concur.

FRED GAMMONS, GUARDIAN AD LITEM FOR TRAVIS GAMMONS, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DEFENDANT

No. 9410IC695

(Filed 18 July 1995)

State § 33 (NCI4th)— county DSS as agent of State—action under Tort Claims Act—jurisdiction of Industrial Commission

In an action under the Tort Claims Act for injuries sustained by the minor plaintiff at the hands of his stepfather, allegedly even after the county department of social services was notified that plaintiff was being abused, the Industrial Commission properly denied defendant DHR's motion to dismiss for lack of subject matter jurisdiction which was based on defendant's contention that the county DSS was not its agent with regard to providing protective services.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 184 et seq.

Appeal by defendant from order entered 30 March 1994 by the Full Commission. Heard in the Court of Appeals 22 March 1995.

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General T. Lane Mallonee and Assistant Attorney General D. Sigsbee Miller, for defendant-appellant.

WYNN, Judge.

Plaintiff brought this action against defendant, Department of Human Resources ("DHR"), under the Tort Claims Act for injuries Travis Gammons received as a result of being physically abused by his stepfather. In his affidavit, plaintiff alleges that the Cleveland County Department of Social Services ("DSS") was notified that Travis was being abused by his stepfather and did not properly investigate the matter or take any action to protect Travis from further abuse. Plaintiff contends that DSS was negligent by failing to properly investigate the reports of abuse and as a result, Travis was severely injured by his stepfather. Plaintiff argues that defendant is vicariously liable for the negligence of the Cleveland County DSS.

Defendant moved to dismiss for lack of subject matter jurisdiction and argued that the Cleveland County DSS does not act as defendant's agent with regard to providing child protective services. The deputy commissioner denied defendant's motion and defendant appealed to the Full Commission. The Full Commission also denied defendant's motion and held that this case was controlled by *Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577, *disc. review denied*, 329 N.C. 786, 408 S.E.2d 517 (1991). From this order, defendant appeals.

Defendant argues that the Industrial Commission erred by denying its motion to dismiss for lack of subject matter jurisdiction because the Cleveland County DSS is not its agent with regard to providing protective services. We disagree.

The Tort Claims Act provides the following in pertinent part:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose 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 if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291(a) (1993). Under the Act, negligence, contributory negligence, proximate cause, and the doctrine of respondeat superior are determined under the same rules applicable to private litigants. *Barney v. Highway Commission*, 282 N.C. 278, 192 S.E.2d 273 (1972).

A principal is liable for the wrongful acts of its agent under the doctrine of respondeat superior when the agent's act is (1) expressly authorized by the principal; (2) committed within the scope of the agent's employment and in furtherance of the principal's business; or (3) ratified by the principal. *B. B. Walker Co. v. Burns International Security Services*, 108 N.C. App. 562, 424 S.E.2d 172, *disc. review denied*, 333 N.C. 536, 429 S.E.2d 552 (1993). A principal is not vicariously liable for the wrongful acts of the agent who is not subject to the direction and control of the principal with respect to the details of the work and is subordinate only in accomplishing a result desired

by the principal. *Vaughn v. Department of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979). "[A] principal's vicarious liability for the torts of his agent depends on the degree of control retained by the principal over the details of the work as it is being performed." *Vaughn*, 296 N.C. at 686, 252 S.E.2d at 795.

In *Vaughn*, the claimant brought an action under the Tort Claims Act against the DHR for negligence by the Director of Durham County DSS and his staff. The claimant asserted that the director and his staff were negligent by placing a foster child in her home who was a carrier of the cytomeglo virus when they knew the claimant was trying to become pregnant. The claimant became pregnant and was infected with the cytomegalo virus which forced her to have an abortion. *Vaughn*, 296 N.C. at 684, 252 S.E.2d at 794.

The Court found that the Social Services Commission of the DHR had established comprehensive standards for the placement of children in foster care. *Vaughn*, 296 N.C. at 687, 252 S.E.2d at 795. The Court also found that the DHR licensed foster homes and that the amount of funding the DHR would provide the county departments was determined, in part, by the quality of foster care the county provided. *Vaughn*, 296 N.C. at 688, 252 S.E.2d at 796. The Court concluded that the DHR was liable for the negligent acts of the DSS based upon the amount of control the DHR exercised over the DSS. *Vaughn*, 296 N.C. at 692, 252 S.E.2d at 798. The Court specifically limited its holding, however, to the obligation of the DSS to place children in foster homes. *Vaughn*, 296 N.C. at 692, 252 S.E.2d at 798.

In *Coleman v. Cooper*, this Court held that the Wake County DSS was an agent of DHR with respect to providing child protective services. *Coleman*, 102 N.C. App. at 658, 403 S.E.2d at 581-82. In *Coleman*, the plaintiff brought a wrongful death action in superior court against a DSS worker and the department. The trial court dismissed plaintiff's action against the DSS on the grounds that it lacked subject matter jurisdiction. *Coleman*, 102 N.C. App. at 653, 403 S.E.2d at 578. In affirming this determination, this Court held that:

> [the] Wake County [Department of Social Services] was acting as an agent of the Social Services Commission and the Department of Human Resources in its delivery of protective services to the decedents. A cause of action originating under the Tort Claims Act against Wake County [Department of Social Services] as a subordinate division of the State, *must be brought before the Industrial Commission.*

Coleman, 102 N.C. App. at 658, 403 S.E.2d at 581-82. (emphasis added).

In the instant case, plaintiff brought an action against the DHR for negligence allegedly committed by the director and staff of the Cleveland County DSS. Defendant argues that this Court is not bound by the *Coleman* decision because the present case is factually distinguishable and because the DHR was not a party in *Coleman*. We find, however, that *Coleman* is controlling. *See In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989); *see also Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992), *overruled on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993) (The doctrine of *stare decisis* provides that the " 'determination of a point of law by a court will generally be followed by a court of the same or lower rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case.' " (citation omitted)). To hold otherwise would deny plaintiff a remedy since *Coleman* bars an action against the DSS in superior court regarding the delivery of protective services.

Accordingly, the order of the Industrial Commission is

Affirmed.

Chief Judge ARNOLD and Judge JOHN concur.

STATE OF NORTH CAROLINA v. LARRY WORRELL

No. 946SC654

(Filed 18 July 1995)

Conspiracy § 31 (NCI4th)— conspiracy to murder witness— sufficiency of evidence

The evidence was sufficient to be submitted to the jury in a prosecution for conspiracy to commit murder of a witness. N.C.G.S. § 14-8.1(b).

Am Jur 2d, Conspiracy § 40.

Appeal by defendant from judgment entered 9 January 1992 by Judge Cy Grant in Hertford County Superior Court. Heard in the Court of Appeals 20 March 1995.

This appeal arises from defendant's conviction for conspiracy to commit murder of a witness, Willie Vincent. Vincent, an informant, was expected to testify in a trial in which defendant was charged with selling controlled substances in Virginia. Nick Stohlman, an undercover narcotics agent made several narcotic purchases from Larry Stephenson, a friend of defendant. On one occasion, Stephenson asked Agent Stohlman if he wanted to earn $2500 by killing someone. Stephenson said that a friend wanted a man killed who was a witness against him in a Virginia case. The following day Agent Stohlman reported this conversation to Agent Frank Timberlake.

Agents Timberlake and Stohlman decided that Agent Stohlman would carry a hidden tape recorder and record his conversation with Stephenson about killing a witness. After picking up Stephenson, Agent Stohlman told Stephenson that he "need[ed] to make that $2500." Stephenson replied that defendant wanted someone "to knock off a guy that was a drug witness for him." They discussed in detail how and when they would kill the witness.

Stephenson was subsequently arrested. He agreed to cooperate with the police by secretly recording defendant. Stephenson and an agent posing as a hit man, Agent K. W. Thompson, went to defendant's place of business to discuss with him his plan to have the witness murdered. When they arrived Stephenson got out of the car and spoke with defendant for approximately one minute before motioning to Agent Thompson to get out of the car and join their conversation. Stephenson introduced Agent Thompson as "Tee" to defendant and told defendant that "Tee's talking about what we been talking about. We can do it right now, today." A conversation ensued between the three men, which was tape recorded by Agent Thompson. Defendant, Stephenson and Agent Thompson discussed killing "the guy" in North Carolina for $1700 so that defendant could avoid going to prison.

Defendant was charged with solicitation to commit murder of a witness and conspiracy to commit murder of a witness. Defendant was found not guilty of the solicitation charge and guilty of the conspiracy charge. He was sentenced to twenty-five years in prison. Defendant appeals his conspiracy conviction.

Attorney General Michael F. Easley, by Special Deputy Attorney General James Peeler Smith and Associate Attorney General Wm. Dennis Worley, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender J. Michael Smith, for defendant appellant.

ARNOLD, Chief Judge.

Defendant's first assignment of error is that he is entitled to a new trial because the State was unable to provide him with the tape recordings introduced into evidence at trial and published to the jury, thereby depriving him of constitutional and statutory rights. Defendant's assignment of error is not properly before this Court for appellate review. Under North Carolina Rule of Appellate Procedure Rule 10(c)(1) "[a] listing of the assignments of error upon which an appeal is predicated *shall* be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered." N.C.R. App. P. Rule 10(c)(1) (1995) (emphasis added). The scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal. N.C.R. App. P. 10(a) (1995); *Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991). "[T]he lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect." *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980).

In the instant case, none of defendant's four assignments of error listed in the record corresponds to the issue which he now raises. Defendant attempted to add an assignment of error corresponding to this issue by a motion to this Court made pursuant to Rule 9(b)(5) of the Rules of Appellate Procedure. The Court denied defendant's motion. Therefore, because no assignment of error was made, this issue is not properly before this Court for our review.

Defendant's remaining assignment of error is that the trial court erred in denying his motion to dismiss the charge of conspiracy to commit murder of a witness. To withstand defendant's motion to dismiss, the State had to show substantial evidence as to each of the essential elements of the crime. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983). The trial court must consider all the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

The elements of conspiracy to commit murder of a witness are: (1) defendant entered into an agreement with at least one other person; (2) the agreement was to commit murder; (3) defendant and at least one other person intended that the agreement be carried out at the time it was made; (4) the intended murder victim was a witness against defendant; and (5) the intended murder victim was the

intended victim because of the exercise of his official duties. N.C. Gen. Stat. § 14-18.1(b) (1993); *see* N.C.P.I., Crim. 206.19 (1990); *see also State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982).

After reviewing the transcript in the present case, we hold that the evidence was sufficient to withstand defendant's motion. Through the testimony presented on behalf of the State, the evidence was sufficient to show that Larry Stephenson entered into an agreement with defendant to murder witness, Willie Vincent, before defendant's trial in October of 1991. Stephenson described to Agent Stohlman how and when defendant wanted to "knock off" the witness, thereby suggesting that he and defendant had previously agreed to commit a murder. Stephenson told defendant that he and "Tee" had been talking about "what we been talking about. We can do it right now, today." Stephenson further said, "We'll go on and take care of the job. You can just get the money and pay us Monday," to which defendant responded, "Alright." This evidence is sufficient to show a continuing agreement between defendant and Stephenson to have Vincent murdered. Furthermore, the evidence shows that defendant and Stephenson wanted the agreement to be carried out at the time it was made. They made plans to pay "Tee" the following Monday morning and have the witness killed later that day so that "Tee" could disappear by Monday night. Finally, although Willie Vincent was not mentioned by name, several references regarding the witness were made in the taped recordings as evidenced in the transcript. For example, Stephenson told Agent Stohlman, "[T]his guy [defendant] wants us to knock off is going to testify against him."

Therefore, all elements of conspiracy to commit murder of a witness were substantially supported by the evidence, and the trial court did not err in denying defendant's motions to dismiss.

No error.

Judges WYNN and JOHN concur.

IN THE MATTER OF: THE APPEAL OF THE MAY DEPARTMENT STORES COMPANY FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991

No. 9410PTC58

(Filed 18 July 1995)

Taxation § 82 (NCI4th)— valuation of department store property—use of cost approach error

It was error for the Property Tax Commission to use the cost approach in valuing petitioner's department store property, and the case is remanded for a new hearing so the Commission can redetermine the value of the subject property with emphasis on the income approach to valuation.

Am Jur 2d, State and Local Taxation §§ 759-762.

Income or rental value as a factor in evaluation of real property for purposes of taxation. 96 ALR2d 666.

Appeal by May Department Stores Company from Final Decision entered 16 August 1993 by the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 29 September 1994.

The May Department Stores Company (Taxpayer) appeals from a decision of the North Carolina Property Tax Commission concerning the ad valorem tax value that Forsyth County (County) placed upon the Hecht's Department Store (Hecht's) located at Hane's Mall, a super regional mall, in Winston-Salem, North Carolina, for the year 1991. Hecht's is located on approximately 9.667 acres of land and consists of a three-story department store having approximately 152,000 square feet of gross building area plus paving, lighting, and other usual accessories normally associated with a department store located in a mall location. The parties stipulated and agreed that the highest and best use of the subject property is "its present use as a department store." The parties further stipulated "that the reproduction cost new of the subject improvements as of 1 January 1988 was approximately $7,591,600."

Construction of Hecht's was completed in late 1990 and it first opened as a department store in October 1990. While the parties dispute whether Taxpayer purchased the subject property from

Thalhimer's Inc. before, during or after construction of the subject improvement, it is clear that Taxpayer owned the property as of 1 January 1991.

Less than three months after Hecht's opened its doors in October 1990 to customers, Forsyth County, during its 1991 revaluation, assessed the subject property at $10,019,600.00. Taxpayer contested the County's assessment before the Forsyth County Board of Equalization and Review, which reduced the assessment to $8,497,800.00. Taxpayer had the subject property appraised by an independent appraiser, Mr. Bruce Tomlin, who, using the cost approach method of valuation, set its value at $8,200,000.00. On 22 January 1992, Taxpayer appealed the County's assessment to the North Carolina Property Tax Commission (Commission) by filing an Application for Hearing. The Commission affirmed the Board's assessment of $8,497,800.00 and on 16 August 1993, entered its Final Decision. From this Final Decision, Taxpayer appeals.

Doody & Lafakis, Ltd., by Gregory J. Lafakis; and Manning Fulton & Skinner, P.A., by Michael T. Medford, for petitioner-appellant.

Forsyth County Attorney's Office, by P. Eugene Price, Jr., Davida W. Martin, and Paul A. Sinal, for respondent-appellee.

JOHNSON, Judge.

The Commission, in making findings of fact based on the evidence, concluded that the County's appraisal of the subject property at a value of $8,497,800.00 did not exceed the true value in money of the subject property as of 1 January 1991. Taxpayer brings forward numerous assignments of error; however, this case turns on the question of whether the Commission's use of the cost approach was unlawful because it does not approximate market value as required by North Carolina General Statutes § 105-283 (1992). In a similar case filed today, *In re Appeal of Belk-Broome Co.*, No. 9310PTC1319 (N.C. App. July 18, 1995), we held that it was error for the Commission to exclusively use the cost approach in valuing the Belk property therein, and that the *income* approach should have been the primary method used to reach a value for the Belk property. However, we noted "that while the income approach is preferential a combination of approaches may be used because of the inherent weakness in each approach." *Belk*, slip op. at 6. In *Belk*, we did not "foreclose using such a combination of approaches . . . so long as the income approach [was] given greatest weight." *Id.*

Therefore, based on *Belk*, we reverse and remand this action for a new hearing so that the Commission can redetermine the value of the subject property with emphasis on the income approach to valuation. We note that in *Belk*, we commented that "[t]he cost approach is better suited for valuing specialty property or newly developed property[.]" *Id.* Given that the subject property in the instant case was newly developed property, we direct the Commission's attention to the language cited above that "a combination of approaches may be used because of the inherent weakness in each approach . . . [as] long as the income approach is given greatest weight."

Reversed and remanded.

Judges COZORT and GREENE concur.

STERLING JULIUS ROYSTER, PLAINTIFF-APPELLANT v. CULP, INC., DEFENDANT-APPELLEE

No. COA94-1073

(Filed 18 July 1995)

Workers' Compensation § 154 (NCI4th)— employee injured on public highway—highway between parking lot and place of employment—compensable injury

The Industrial Commission erred by holding that plaintiff did not sustain an injury by accident arising out of and in the course of his employment where plaintiff was injured by a passing car when he attempted to walk across a public highway that separated his place of employment from a parking lot which was owned and operated by defendant employer.

Am Jur 2d, Workers' Compensation § 310.

Workers' compensation: coverage of injury occurring between workplace and parking lot provided by employer, while employee is going to or coming from work. 4 ALR5th 585.

Appeal by plaintiff from an award of the Industrial Commission entered 10 May 1994. Heard in the Court of Appeals 25 May 1995.

J. Rufus Farrior, P.A., by J. Rufus Farrior for plaintiff-appellant.

Smith, Helms, Mulliss & Moore, L.L.P., by Caroline H. Lock, for defendant-appellee.

WYNN, Judge.

On 23 October 1991, plaintiff-employee, Sterling Julius Royster, was injured by a passing car when he attempted to walk across a public highway that separated his place of employment from a parking lot which was owned and operated by defendant-employer, Culp, Inc.

Deputy Commissioner Jan N. Pittman issued an Opinion and Award concluding that plaintiff did not sustain an injury by accident arising out of and in the course of his employment with defendant. The Full Commission affirmed the Deputy Commissioner's Opinion and Award on 10 May 1994. From this Order, plaintiff appeals.

Plaintiff contends that the Full Commission erred by holding that he did not sustain an injury by accident arising out of and in the course of his employment. We agree.

In order to be compensable under the Workers' Compensation Act, an injury must arise out of and in the course of employment. N.C. Gen. Stat. § 97-2(6) (1991). The determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and the finding of the Commission is conclusive if supported by competent evidence. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977).

In *Hunt v. State*, 201 N.C. 707, 161 S.E. 203 (1931), our Supreme Court held that injuries sustained while an employee is traveling to his place of employment on the employer's premises are covered by the Workers' Compensation Act. "[T]he moment when [the employee] begins his work is not necessarily the moment he gets into the employment, because a reasonable margin must be allowed him to get to the place of work if he is on the premises of the employer or on some access to the premises which the employer has provided." *Id.* at 710-11, 161 S.E. at 205. Parking lots which are owned and maintained by the employer, as was the parking lot in the subject case, are considered to be on the employer's premises for purposes of workers' compensation. *Mauer v. Salem Co.*, 266 N.C. 381, 146 S.E.2d 432 (1966).

In *Hardy v. Small*, 246 N.C. 581, 99 S.E.2d 862 (1957), our Supreme Court extended the holding of *Hunt* to apply to non-employer owned property that an employee has to cross in order to get to the place of employment. In *Hardy*, our Supreme Court held that a farm employee's death arose out of and in the course of his employment even though the accident occurred while crossing a public highway. The Court stated that:

> It is noteworthy that the public highway was neither necessary nor used as a means of access to the barn, i.e., in the sense of travel *along* the highway. The fact that he has to *cross* the highway on his way to and from the barn constituted an additional hazard of his employment; for if the house and barn had not been separated by the public highway, means of access between the area of the house and the barn would have been equally available and safer.

Id. at 586, 99 S.E.2d at 867. Furthermore, "[m]ost courts . . . hold that an injury in a public street or other off-premises place between the plant and the parking lot is in the course of employment, being on a necessary route between the two portions of the premises." 1 Larson, Workmen's Compensation § 15.14(b).

Two previous cases cited by the appellee are distinguishable from the facts at hand. In *Glassco v. Belk-Tyler Co.*, 69 N.C. App. 237, 316 S.E.2d 334 (1984), our Court found that an employee's injury did not arise out of and in the course of employment because the accident occurred in a public parking lot rather than in an employer-owned lot. There, we stated: "Nothing in the present case indicates defendant owned or leased the parking area." *Id.* at 239, 316 S.E.2d at 335-36. The lot in the subject case *is* owned and controlled by the employer. In *Horn v. Sandhill Furniture Co.*, 245 N.C. 173, 95 S.E.2d 521 (1956), a case decided before the *Hardy* case, the Supreme Court found that an employee's injury did not arise out of and in the course of his employment where the accident occurred while the employee crossed a public highway on the way to a place of his own choice for lunch. The Supreme Court stated: "At the exact time of his injury he was on a personal errand . . . ." *Id.* at 179, 95 S.E.2d at 525. In both *Horn* and *Glassco*, the Courts found that the employees were not exposed to a greater risk than the general public.

In the subject case, in order to reach defendant's plant and begin his work day, plaintiff was required to cross the highway after parking in a lot owned and maintained by defendant. In fact, this was the

only route from the parking lot to the plant. As in *Hardy*, the fact that plaintiff had to cross the public highway on his way to the plant from a parking lot owned and maintained by his employer constituted an additional hazard of his employment. We, therefore, find that the injury he suffered from the accident on the public highway was compensable under the Workers' Compensation Act.

Reversed.

Judges EAGLES and MARTIN, Mark D. concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. ROY STEVEN WILLIAMS, DEFENDANT

No. COA92-134

(Filed 18 July 1995)

Criminal Law § 762 (NCI4th)— moral certainty—honest substantial misgiving—instructions not violative of Due Process Clause

The trial court's instruction on reasonable doubt did not violate the Due Process Clause where the court in instructing on the burden of proof made two references to "moral certainty," *i.e.*, "satisfied to a moral certainty in the truth of the charge" and "abiding faith to a moral certainty in the defendant's guilt," and one reference to "honest substantial misgiving," *i.e.*, "honest substantial misgiving generated by the insufficiency of the proof."

Am Jur 2d, Trial § 1385.

Appeal by defendant from judgment entered 1 July 1991 by Judge William C. Griffin, Jr. in Halifax County Superior Court. This case was originally heard in the Court of Appeals 3 March 1993. An opinion was issued 18 May 1993. *State v. Williams*, 110 N.C. App. 306, 429 S.E.2d 413 (1993). Upon discretionary review granted by the Supreme Court and by order dated 29 July 1993, the Supreme Court remanded the case to the Court of Appeals for reconsideration in light of the United States Supreme Court's 1 June 1993 opinion in *Sullivan v. Louisiana*, 508 U.S. ——, 124 L. Ed. 2d 182 (1993). *State v. Williams*, 334 N.C. 438, 433 S.E.2d 184 (1993).

Upon reconsideration by the Court of Appeals, this Court issued an opinion filed 7 September 1993 superseding its previous opinion. *State v. Williams*, 111 N.C. App. 861, 434 S.E.2d 238 (1993). Again, the

Supreme Court granted discretionary review and by order dated 29 July 1994, vacated this Court's opinion and again remanded the case to the Court of Appeals for reconsideration. However, it was remanded in light of the Supreme Court's opinion in *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994). *State v. Williams*, 336 N.C. 777, 447 S.E.2d 435 (1994).

This opinion supersedes our previous opinion in this case.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen, for the State.

Hux, Livermon & Armstrong, by James S. Livermon, Jr., for defendant-appellant.

JOHNSON, Judge.

The instant case has been remanded to our Court for reconsideration in light of our Supreme Court's opinion in *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994) (*Bryant II*). Initially, this opinion was reported at 111 N.C. App. 861, 434 S.E.2d 238 (1993). A brief review of the facts reveals the following:

Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury, in violation of North Carolina General Statutes § 14-32(a) (1986). The first trial resulted in a mistrial when the jury was unable to reach an unanimous verdict. Evidence at the second trial revealed that defendant had marital problems which led to his wife threatening to leave defendant. Defendant, while drinking, told his wife that he would kill her if she left with the children. On the evening of 10 September 1990, defendant pointed the gun at his wife's face and pulled the trigger. Although defendant offered no evidence, he asserted through cross-examination of the investigating detective that it was an accident because he thought the gun's safety was on. The jury found defendant guilty of the lesser included offense of assault with a deadly weapon inflicting serious injury in violation of North Carolina General Statutes § 14-32(b). Defendant appealed.

On appeal, this Court found that the trial court's instruction on reasonable doubt violated the Due Process Clause, and thus, was reversible error. We now reconsider this matter in light of *Bryant II*.

Our Supreme Court in *Bryant II* stated:

> the [U.S. Supreme] Court in *Victor* [*Victor v. Nebraska*, 511 U.S. —, 127 L.Ed.2d 583 (1994)] acknowledged the distinction drawn in *Cage* [*Cage v. Louisiana*, 498 U.S. 29, 112 L.Ed.2d 339 (1990)] between "moral certainty" and "evidentiary certainty." *Victor*, 511 U.S. at —, 114 S.Ct. at 1248, 127 L.Ed.2d at 596. The Court stated,

however, that in *Cage*, "the jurors were simply told that they had to be morally certain of the defendant's guilt; there was nothing else in the instruction to lend meaning to the phrase." *Id.* In *Victor*, the jury was explicitly told to base its conclusion on the evidence in the case, and there were other instructions which reinforced this message.

Likewise, in the present case, the jury was instructed that a reasonable doubt existed "if, *after considering, comparing and weighing all the evidence*, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt." The jury was also instructed that a reasonable doubt is "a sane, rational doubt *arising out of the evidence or lack of evidence* or from its deficiency" and that it is "an honest substantial misgiving generated by the *insufficiency of the proof*." We therefore conclude that, under *Victor*, "there is no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case." *Victor*, 511 U.S. at —, 114 S.Ct. at 1248, 127 L.Ed.2d at 597. Thus, on remand, we hold, contrary to our previous decision in this case, that there is no *Cage* error entitling defendant to a new trial. *Id.*

Bryant II, 337 N.C. at 306-07, 446 S.E.2d at 76.

The trial court in *Bryant* gave the following instructions, "if, *after considering, comparing and weighing all the evidence*, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt[,]" and "a sane, rational doubt *arising out of the evidence or lack of evidence* or from its deficiency" and that it is "an honest substantial misgiving generated by the *insufficiency of the proof*." Likewise, in the case *sub judice*, the trial court made two references to "moral certainty." These references were "satisfied to a moral certainty in the truth of the charge" and "abiding faith to a moral certainty in the defendant's guilt." The court made one reference to "honest substantial misgiving," i.e., "honest substantial misgiving generated by the insuffiency of the proof." As the language used in the instant case is similar to that used by the Supreme Court in *Bryant II*, there is no *Cage* or *Montgomery* error which would entitle defendant to a new trial.

Accordingly, the trial court's instructions were without error.

No error.

Chief Judge ARNOLD and Judge GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 JULY 1995

BAIRD v. DELTA AIR LINES No. 93-1203	Forsyth (91CVS5085)	No Error
BLANCHARD v. BUFFALOE No. 94-885	Cumberland (93CVD2604)	Affirmed
BROWN v. BROWN No. 94-1257	Guilford (91CVD10775)	Affirmed
COLE v. ELK HILL HOMEOWNERS ASSN. No. 94-437	Watauga (93CVS263)	Affirmed
COX v. CLEANCO, INC. No. 94-912	Ind. Comm. (983046)	Affirmed
CRUMP v. BD. OF EDUCATION No. 94-1036	Catawba (84CVS1154)	Affirm
DAVISON v. CUMBERLAND COUNTY BD. OF EDUC. No. 94-782	Cumberland (92CVS2230)	Reversed
DURHAM COUNTY DSS v. TILLEY No. 94-889	Durham (94CVD117)	Reversed and Remanded
EDGEFIELD CORP. v. WATERS MORTGAGE CORP. No. 93-694	Buncombe (92CVS3622)	Reversed in Part; Affirmed in Part
HAYWOOD v. HAYWOOD No. 94-989	Durham (85CVD1681)	Reversed and Remanded
JOHNSON v. N.C. FARM BUREAU MUTUAL INS. CO. No. 94-1031	Yadkin (93CVS481)	Reversed and Remanded
JONES v. MORRIS No. 94-440	Buncombe (90CVS4070)	No Error
LAWING v. McDOWELL COUNTY SCHOOL BD. No. 94-46	McDowell (91CVS502)	Affirmed in Part; Reversed in Part and Remanded
MANFORD DEVELOPERS v. GAR, INC. No. 94-903	Durham (93CVS3299)	Affirmed
MIRANDA v. JOHNSON CONTROLS, INC. No. 94-741	Ind. Comm. (965273)	Affirmed

MOORE v. METELKO No. 94-929	Moore (90VD374)	Vacated & Remanded
MULLINEAUX v. FAISON & ASSOC. No. 94-1185	Ind. Comm. (171362)	Affirmed
NANCE v. KILLENS No. 94-1266	Forsyth (94CVS2343)	Affirmed
OLLIS v. RICHMOND HILL, INC. No. 94-923	Avery (93CVS301)	Affirmed
PARDUE INS. AGENCY v. CHILTON No. 94-1037	Forsyth (93CVS7593)	Reversed and Remanded
PAYNE v. KELLY SPRINGFIELD TIRE CO. No. 94-904	Ind. Comm. (234471)	Affirmed
POWERS v. PARISHER No. 94-847	Mecklenburg (89CVD15875)	Vacated in Part and Remanded
PUCKETT v. HOME QUARTERS WAREHOUSE No. 94-1229	Forsyth (93CVS2286)	Dismissed
SMYTHE v. FIRST CITIZENS BANK & TRUST CO. No. 93-263	Forsyth (92CVS2510)	Affirmed
STATE v. ADAMS No. 94-1314	Gaston (93CRS028092)	No Error
STATE v. ALSTON No. 94-1192	Halifax (93CRS3423)	No Error
STATE v. BEST No. 94-1194	Wayne (93CRS6706)	No Error
STATE v. BLOCKEN No. 94-1268	Guilford (94CRS34544) (94CRS20399)	No Error
STATE v. BROOKS No. 94-946	Gaston (93CRS19889)	No Error
STATE v. BURGESS No. 94-1232	Alamance (94CRS2757)	No Error
STATE v. CANNADY No. 94-1263	Buncombe (93CRS63905) (94CRS00017)	No Error

STATE v. EMERY No. 94-1048	Wake (85CRS16729) (88CRS79820)	No Error
STATE v. FINN No. 94-1091	Currituck (93CRS1144)	No Error
STATE v. GILLEY No. 94-1209	Brunswick (93CRS1305)	No Error
STATE v. GLADDEN No. 94-1224	Rowan (91CRS13584)	No Error
STATE v. HANCOCK No. 94-125	Forsyth (92CRS29497) (92CRS29498)	No Error
STATE v. HARDISON No. 94-1323	Forsyth (93CRS42224)	No Error
STATE v. KING No. 94-1280	Guilford (93CRS33736)	No Error
STATE v. McMAHAN No. 94-1273	Buncombe (93CRS8374) (93CRS62158)	No Error
STATE v. McNEIL No. 95-3	Mecklenburg (93CRS71365)	No Error
STATE v. MORRIS No. 94-1206	Mecklenburg (93CRS23331)	No Error
STATE v. PARKER No. 94-722	Wake (93CRS34703) (93CRS34704) (93CRS34705)	Attempted Robbery with a Firearm: No Error, Remand for resentencing since all offenses were considered for judgment and sentencing. First Degree Burglary: New Trial. Second Degree Kidnapping: Reversed, Charge Dismissed With Prejudice
STATE v. SANDERS No. 94-1064	Mecklenburg (93CRS50274) (93CRS50275)	No Error

STATE v. STAMPS No. 94-1216	Mecklenburg (93CRS79675) (94CRS11289) (94CRS11290) (94CRS11291)	Appeal Dismissed; Petition for Certiorari is denied
STATE v. STREET No. 94-1251	Mecklenburg (93CRS70820) (93CRS70821) (93CRS70822) (93CRS79500) (93CRS79501) (93CRS79502)	No Error
STATE v. YOUNG No. 94-1237	Tyrrell (92CRS890) (92CRS892) (92CRS893)	No Error
WALSTON v. WALSTON No. 94-943	Wayne (93CVD320)	Remanded
WHITE v. WHITE No. 94-1187	Chatham (92CVD523)	Dismissed
WHITLEY v. SOLOVIEFF No. 93-569	Wake (92CVS07261)	Affirmed
WILLIAMS v. DICKERSON CAROLINA, INC. No. 94-823	Brunswick (93CVS0665)	Affirmed

TITLE INSURANCE COMPANY OF MINNESOTA, PLAINTIFF v. SMITH, DEBNAM, HIBBERT AND PAHL, A NORTH CAROLINA GENERAL PARTNERSHIP, AND W. THURSTON DEBNAM, JR., FRED J. SMITH, JR., CARL W. HIBBERT, JR., J. LARKIN PAHL, JOHN W. NARRON AND BETTIE KELLEY SOUSA, GENERAL PARTNERS, DEFENDANTS

No. COA94-777

(Filed 1 August 1995)

1. Attorneys at Law § 49 (NCI4th); Damages § 1 (NCI4th)— attorney malpractice—plaintiff entitled to nominal damages when suit filed—claim actionable—judgment n.o.v. error

Although plaintiff title insurer had no actual damages at the time it filed a malpractice suit against the borrower's attorneys for negligent certification of title because it had received an assignment of rights under a superior deed of trust and that deed of trust had not yet been cancelled, the trial court properly denied defendant attorneys' motion for a directed verdict since the technical injury to plaintiff's rights by defendants' erroneous certification that all requirements in plaintiff's commitment for title insurance had been met entitled plaintiff to nominal damages. However, the court did err in entering judgment n.o.v. for plaintiff where plaintiff had not yet cancelled the deed of trust and had not proved that it suffered actual damages when it moved for directed verdict but cancelled the deed of trust during the jury's deliberations.

Am Jur 2d, Attorneys at Law §§ 217, 226.

Measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation—Twentieth Century cases. 90 ALR4th 1033.

2. Attorneys at Law § 46 (NCI4th)— title certified by defendant attorney—duty to non-client

Where there was substantial evidence that defendant attorneys furnished the title certificate to plaintiff title insurer, a non-client, for the purpose of inducing plaintiff to issue a title policy for the benefit of their client and that it was foreseeable that plaintiff would be harmed by any failure to accurately certify the title, defendant attorneys had a duty to plaintiff, though there was no privity, and it would have been error to grant defendants' motion for directed verdict on this ground.

Am Jur 2d, Attorneys at Law § 223.

3. Banks and Other Financial Institutions § 192 (NCI4th)—insured lender's side agreement—applicability of 12 U.S.C. § 1823(e)—agreement not in writing—exclusions in title insurance policy inapplicable against RTC

The fact that an insured lender allegedly agreed, in a side agreement, that it would leave superior liens on property necessitated the application of the statute codifying the *D'Oench, Duhme* doctrine, 12 U.S.C. § 1823(e), requiring, among other things, that such agreement be in writing. Because there was no evidence of such a written agreement, and the Resolution Trust Corporation, which took over the lender, would be unable to discover the agreement upon examining the lender's books, the Corporation would have no indication that the exclusion for liens agreed to by the insured lender in a title insurance policy applied. The trial court therefore properly applied § 1823(e) and correctly ruled that the exclusions in the policy could not be used against the Corporation.

Am Jur 2d, Building and Loan Associations § 100.

Judge MARTIN (Mark D.) concurring.

Judge GREENE dissenting.

Appeal by defendants from judgment entered 25 February 1994 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 April 1995.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr. and John H. Carmichael, for plaintiff-appellee.

Crews & Klein, P.C., by Paul I. Klein, for defendants-appellants.

LEWIS, Judge.

This appeal arises out of plaintiff's action for legal malpractice. The jury returned a verdict of $60,000 for plaintiff. The trial court then entered judgment notwithstanding the verdict in the amount of $171,860.35 for plaintiff. From the judgment, defendants appeal.

On 5 October 1988 plaintiff issued a title insurance policy, effective as of 17 August 1988, to First Federal Savings and Loan

Association of Raleigh (hereinafter "First Federal"). The policy insured that a First Federal deed of trust, dated 17 August 1988 and securing a loan to Regency Residential, Inc. (hereinafter "Regency"), was a first lien on four tracts of land on Millbrook Road in Raleigh. Plaintiff issued the title insurance policy based on defendant Debnam's certifying that all of the requirements in plaintiff's commitment for title insurance had been met. The requirements included the cancellation of all superior deeds of trust on the property. In fact, two superior deeds of trust, one to Fred and Carolyn Deer (hereinafter "the Deers") and one to First Wachovia Mortgage Company (hereinafter "Wachovia"), were not cancelled. Thus, as to the portion of the property covered by the Deer and Wachovia deeds of trust, First Federal's lien was not superior.

The property described in the Deer and Wachovia deeds of trust was previously owned by the Deers and was sold by them to Regency. At the time of the sale, there was a deed of trust on the property to Wachovia. The Deers agreed to finance the sale and take as security for the debt a deed of trust on the property. The note to the Deers was referred to at trial as a "wraparound loan." That is, it included within its total the balance owed on the Wachovia note.

In December 1990, First Federal was taken over by the Resolution Trust Corporation (hereinafter "RTC") pursuant to a purchase and assumption agreement. In response to a claim on the title insurance policy by First Federal, plaintiff paid, in April 1991, $164,109.96 to the Deers and $7,341.79 to Wachovia. The Wachovia deed of trust was then cancelled. The Deers assigned their rights under their deed of trust to plaintiff, and the Deer deed of trust was not cancelled. Plaintiff instituted this action against defendants for Debnam's negligent certification of title and sought as part of this action a judicial determination that it was, in fact, liable to its insured under the policy. After the close of evidence, the court so ruled, and while the jury was in deliberation, plaintiff cancelled the Deer deed of trust. The jury returned a verdict for plaintiff in the amount of $60,000. The trial court then granted judgment notwithstanding the verdict for plaintiff in the amount of $171,860.35.

I.

[1] Defendants' first contention on appeal is that plaintiff had no damages at the time it filed suit, and therefore its claim was not actionable. Defendants point to the fact that plaintiff received an assignment of rights under the Deer deed of trust in exchange for the

payment made to the Deers. Thus, until the Deer deed of trust was cancelled, plaintiff had suffered no damages. Defendants moved for a directed verdict based on this argument, and the court denied the motion. We agree that plaintiff suffered no actual damages until it cancelled the deed of trust, which it did while the jury deliberated. However, we do not agree that defendants were entitled to a directed verdict.

In North Carolina, a plaintiff may recover nominal damages in a negligence action. *The Asheville School v. D.V. Ward Constr., Inc.*, 78 N.C. App. 594, 599, 337 S.E.2d 659, 662 (1985), *disc. review denied*, 316 N.C. 385, 342 S.E.2d 890 (1986). Nominal damages are recoverable where some legal right has been invaded but no actual loss or substantial injury has been sustained. *Potts v. Howser*, 274 N.C. 49, 61, 161 S.E.2d 737, 747 (1968). Nominal damages are awarded in recognition of the right and of the technical injury resulting from its violation. *Id.* The idea of the redress of grievances in court by an orderly process has been favored in our law from the beginning. Especially in a case involving the negligence of a professional person, the redress of the wrong may be no more than the showing, in court, that the attorney did not do his job. Even where the plaintiff has no evidence of actual damages, if he is entitled to nominal damages, it is error to grant a directed verdict for the defendant on the basis of the plaintiff's lack of damages. *See Robbins v. C.W. Myers Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E.2d 884, 886-87 (1960) (holding denial of nonsuit proper even though plaintiff in breach of contract action had produced no competent evidence of damages, since plaintiff was entitled to nominal damages for breach of contract). Further, proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. *Jewell v. Price*, 264 N.C. 459, 461-62, 142 S.E.2d 1, 3 (1965).

In this case, we believe that the evidence before the court at the time of defendants' motion for directed verdict entitled plaintiff to nominal damages. Plaintiff's legal right to a correct certification of title (see section II.) was denied by Debnam's negligence. The resulting technical injury to plaintiff's rights entitled plaintiff to nominal damages. Thus, the trial court properly denied defendants' motion for directed verdict.

The trial court did subsequently err, however, in entering judgment notwithstanding the verdict for plaintiff. After the jury rendered its verdict, the court concluded that plaintiff was entitled to judgment

as a matter of law in accordance with plaintiff's earlier motion for directed verdict. Because plaintiff had not yet cancelled the deed of trust when it moved for directed verdict, plaintiff had not proved that it had suffered actual damages. A directed verdict for plaintiff awarding it actual damages at that point would have been improper. Accordingly, judgment notwithstanding the verdict would likewise be improper, as a motion for JNOV is essentially a renewal of the motion for directed verdict. *See Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 306, 319 S.E.2d 290, 292, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984). However, the trial court also granted a conditional new trial on the issue of damages alone, in the event that this Court reversed or vacated its JNOV. Because we conclude that JNOV was error, we reverse the judgment as to damages and remand for a new trial on the issue of damages in accordance with the trial court's conditional grant of a new trial. Further, because proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict, *Jewell*, 264 N.C. at 461-62, 142 S.E.2d at 3, in the case at hand, even though the jury had begun its deliberations, the case could have been resumed and evidence of plaintiff's actual damage could have been presented to the jury. Likewise, such evidence may be presented at retrial.

The dissent concludes the trial court should have granted a directed verdict for defendants at the close of the evidence because plaintiff had not yet suffered actual damages. We would but point out the harsh result which such a ruling would have in this case. Judgment entered on a directed verdict is a final judgment on the merits and operates with full *res judicata* effect. *Taylor v. Tri-County Elec. Membership Corp.*, 17 N.C. App. 143, 145, 193 S.E.2d 402, 404 (1972). Thus, if directed verdict had been granted for defendants, plaintiff would be forever barred from bringing an action notwithstanding it has now suffered substantial actual damages.

II.

[2] Defendants' next contention is that they cannot be held liable to plaintiff because Debnam, who was Regency's attorney, had no duty to plaintiff regarding the certification of title. Defendants argue that the trial court therefore erred in not granting their motion for directed verdict on this ground. Defendants cite *Chicago Title Insurance Co. v. Holt*, 36 N.C. App. 284, 244 S.E.2d 177 (1978), in support of their position. That case held that claims for attorney malpractice "may properly be brought only by those who are in privity of

contract with such attorneys by virtue of a contract providing for their employment." *Id.* at 288, 244 S.E.2d at 180. In *Chicago Title*, a non-client general contractor sued an attorney for the attorney's alleged negligent certification of title. This Court upheld the dismissal of the plaintiff's complaint on the ground that the plaintiff was not in privity of contract with the attorney. *Id.*

However, in *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 406, 263 S.E.2d 313, 317, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980), this Court stated:

> In the line of cases since our decision in [*Chicago Title*], we have re-examined the rule prohibiting recovery in tort by a third person not in privity of contract with a professional person for negligence in the performance of his employment contract with his client, even though such negligence was the proximate cause of a foreseeable injury to the third person.

In *Miller*, this Court held that a non-client could sue an attorney for negligently certifying title to property. *Id.* at 407, 263 S.E.2d at 318. In the case at hand, there is substantial evidence in the record that Debnam furnished the title certificate to plaintiff, a non-client, for the purpose of inducing plaintiff to issue a title policy for the benefit of his client and that it was foreseeable that plaintiff would be harmed by any failure to accurately certify the title. *See id.* at 406-08, 263 S.E.2d at 318 (discussing the factors to be considered in determining whether there is a duty to a non-client). We therefore conclude that Debnam had a duty to plaintiff and that denial of directed verdict for defendants on this basis was correct.

III.

[3] Defendants' next contention is that the trial court erred in applying 12 U.S.C. § 1823(e) to the facts of this case. The court concluded that this statute would prohibit plaintiff from raising any defenses against the RTC arising out of the exclusions in the policy. Because of the ruling, plaintiff was liable to the RTC under the policy, and plaintiff therefore cancelled the Deer deed of trust.

The statute at issue provides in pertinent part:

> (1) In general. No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 11 [12 U.S.C. § 1821], either as security for a loan or by purchase or as receiver of any insured depository

> institution, shall be valid against the Corporation unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e) (Cum. Supp. 1995). While the "Corporation" referred to in the statute is the Federal Deposit Insurance Corporation, the statute is expressly made applicable to the RTC under 12 U.S.C. § 1441a(b)(4)(A) (Cum. Supp. 1995).

Section 1823(e) was enacted in 1950 as a codification, although more encompassing and more precise, *see FDIC v. O'Neil*, 809 F.2d 350, 353 (7th Cir. 1987), of the rule announced in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 86 L. Ed. 956 (1942). The purpose served by the common law *D'Oench, Duhme* doctrine and section 1823(e) is the same, and the case law interpreting the two are generally considered in tandem. *Outer Banks Contractors, Inc. v. Daniels & Daniels Constr., Inc.*, 111 N.C. App. 725, 731, 433 S.E.2d 759, 763 (1993). Therefore, our analysis consists of cases interpreting both the *D'Oench, Duhme* case and section 1823(e).

> The rule which has developed has been stated as follows:
>
> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

Outer Banks, 111 N.C. App. at 732, 433 S.E.2d at 763 (quoting *Baumann v. Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir. 1991), *cert. denied*, 504 U.S. 908, 118 L. Ed. 2d 543 (1992)). The purpose of this rule is to ensure that federal banking regulators are able to rely on a failed financial institution's written records and

its assets. *Id.*; *see also North Arkansas Medical Ctr. v. Barrett*, 962 F.2d 780, 788-89 (8th Cir. 1992) (stating the policy as being "to facilitate regulation and protect the FDIC from financial loss by assuring that the bank's financial condition can be assessed instantaneously; to assure that senior bank officials are aware of unusual transactions before the bank agrees to them; and to prevent collusion between bank employees and customers on the eve of a bank's failure").

We agree with plaintiff's contention that the title insurance policy in this case constitutes an "asset" under section 1823(e). *See National Credit Union Admin. v. Ticor Title Ins. Co.*, 873 F. Supp. 718, 725 (D. Mass. 1995). Thus, the issue is whether there was an "agreement" which would tend to defeat the RTC's interest in the policy. Defendants alleged in their answer that First Federal had agreed not to pay off the Deer and Wachovia deeds of trust and to leave those liens on the property, and that exclusion 3(a) in the title insurance policy thus prevented First Federal from recovering under the policy. That provision provides that the following matters are expressly excluded from coverage: "3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant." We believe that any such agreement by First Federal would tend to diminish or defeat the RTC's interest in the policy and that, therefore, the agreement must comply with the four requirements of section 1823(e).

Defendants argue, however, that the *D'Oench, Duhme* doctrine has been held not to apply to a defense in a case in which the document sought to be enforced is one which contains on its face bilateral obligations which serve as the basis for the defense. Defendants state that the driving principle in such cases is that none of the policies that favor the invocation of the doctrine are present where the terms of the agreement that tend to diminish the rights of the federal agency appear in writing on the face of the agreement that the federal agency seeks to enforce.

Defendants cite one of the leading cases on this point, *Howell v. Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981). In that case, the FDIC's predecessor in interest had entered into a lease with Howell. The provision of the lease at issue required the FDIC's predecessor, the lessor, to take certain actions. Howell claimed that such actions were not taken and that the lease was not binding on her. The FDIC claimed that the lease was enforceable and that *D'Oench, Duhme* applied, thereby estopping Howell from claiming that her

obligations under the lease were contingent upon the FDIC's predecessor's taking the actions required of it under the lease. The Seventh Circuit held that *D'Oench, Duhme* did not apply, as Howell's defense arose directly and explicitly from the provisions of the lease, which was in the bank's files and which the FDIC was seeking to enforce. *Id.* at 747. The court stated that this was not a case such as *D'Oench, Duhme* and its progeny, where the promissor's defense depended solely upon a secret or unrecorded agreement, usually oral, of which the FDIC could have had no notice. *Id.* The court further stated that none of the policies that favor the invocation of the doctrine were present in a case such as the one before it. *Id.*

In a later case, however, the Seventh Circuit stated that while some of the broad and general language in its opinion in *Howell* may be helpful to one of the parties presently before the court, "Lesson Number One in the study of law is that general language in an opinion must not be ripped from its context to make a rule far broader than the factual circumstances which called forth the language." *FDIC v. O'Neil*, 809 F.2d 350, 354 (7th Cir. 1987). The court recalled the following general statement it had made in *Howell*: "[Section 1823(e)] is inapplicable 'where the document the FDIC seeks to enforce is one, such as the leases here, which facially manifests *bilateral* obligations and serves as the basis of the lessee's defense.' " *Id.* (quoting *Howell*, 655 F.2d at 746).

In the present case, too, defendants rely on this statement from *Howell*. However, as did the Seventh Circuit in *O'Neil*, we find *Howell* distinguishable even though some of its broad language is helpful to defendants. As the court noted in *O'Neil*, not only was the lease in *Howell* explicit about the lessor's obligation, there was no side agreement at all. *Id.* Because there was no side agreement to which the policy behind the *D'Oench, Duhme* doctrine would apply, the court in *Howell* properly held that the doctrine did not apply. In the case at hand, however, the mere fact that the insurance policy contains the exclusion provision on its face is not dispositive. It is the fact that First Federal allegedly agreed, in a side agreement, that it would leave the superior liens on the property that necessitates the application of section 1823(e). Such an agreement, unless it complied with the requirements of the statute, would not be discoverable by the RTC upon an examination of First Federal's records. Thus, the RTC would have no indication that the exclusion in the insurance policy applied. Because the purpose behind *D'Oench, Duhme* and section 1823(e) is served by applying the doctrine in this case, we believe the "*Howell*

exception" is inapplicable here. Accordingly, we hold that the trial court correctly concluded that section 1823(e) applied in this case. For a case holding contra, see *National Credit Union Administration v. Ticor Title Insurance Co.*, 873 F. Supp. 718 (D. Mass. 1995) (holding that "*Howell* exception" applies to exclusion in title insurance policy).

Plaintiff's evidence showed that the RTC had located no agreement (i.e., the alleged agreement to leave the senior liens in place) in First Federal's records which would satisfy the four requirements of section 1823(e). Defendants put on no witnesses, and they produced no evidence to show that there existed such an agreement. Defendants did elicit testimony on cross-examination which tended to show that the RTC had not produced all documents which related to the loan transaction. However, defendants did not show that there existed an agreement to leave the senior liens in place which complied with the requirements of section 1823(e). We conclude that the trial court correctly ruled that, based on the absence of evidence of such an agreement, the exclusions in the policy could not be used against the RTC.

For the reasons stated, the judgment is reversed as to the award of damages and the case is remanded for a new trial on the issue of damages alone. In light of our holding, we will not address defendants' remaining argument concerning damages, as the alleged error may not recur at retrial.

Affirmed in part, reversed in part, and remanded for new trial on damages.

Judge MARTIN, Mark D. concurs with separate opinion.

Judge GREENE dissents.

Judge MARTIN, Mark D., concurring with separate opinion.

The majority opinion presents the question of whether there is sufficient evidence to support the jury's liability determination where the plaintiff sustained actual damages prior to the return of the verdict. A brief review of our jurisprudence is necessary for proper resolution of this question.

Section 1-15 of our General Statutes provides in pertinent part:

> Except where otherwise provided by statute, a cause of action for malpractice . . . 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 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. Gen. Stat. § 1-15(c) (1983) (emphasis added).

According to the language of section 1-15, a professional malpractice cause of action ordinarily accrues "at the time of the occurrence of the last act of the defendant giving rise to the cause of action." Because the statute links accrual to the "last act of the defendant" which gives rise to the "cause of action," section 1-15 is ambiguous as to whether the limitations period accrues from the date of the last act of negligence by the defendant or, alternatively, from the date plaintiff incurs actual damages.

Our courts have resolved this ambiguity in favor of accrual of a malpractice cause of action from the date of the last act of negligence by the defendant. In *Southeastern Hospital Supply Corp. v. Clifton & Singer*, 110 N.C. App. 652, 430 S.E.2d 470 (1993), *aff'd*, 335 N.C. 764, 440 S.E.2d 275 (1994), this Court concluded that "[a] cause of action for legal malpractice accrues at the time of the occurrence of the last wrongful act of the defendant and an action must be commenced within three years of that accrual." *Id.* at 653-654, 430 S.E.2d at 471 (emphasis added). Likewise, in *Nationwide Mutual Ins. Co. v. Winslow*, 95 N.C. App. 413, 416, 382 S.E.2d 872, 874 (1989), notwithstanding plaintiff's argument that actual damages were not incurred until the default judgment became final on 3 July 1985, plaintiff's cause of action for legal malpractice was held to accrue from the date the defendant allegedly failed to file an answer, 8 March 1983.[1]

The operation of the statute of repose in section 1-15 was recently interpreted in *Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784, *petition for reh'g denied*, 338 N.C. 672, 453 S.E.2d 177 (1994). In *Hargett* plaintiffs alleged in their complaint that defendant prepared a will for the testator on or before "September 1, 1978" which "fail[ed] to use

1. The dissent relies upon *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657, *review denied and appeal dismissed by*, 312 N.C. 85, 321 S.E.2d 899 (1984), for the proposition that a malpractice cause of action in tax matters does not accrue until actual injury. However, in *Nationwide Mutual Ins. Co. v. Winslow*, 95 N.C. App. 413, 382 S.E.2d 872 (1989), this Court held *Snipes* was not controlling in the context of "professional negligence suits against doctors or attorneys in general." *Id.* at 416, 382 S.E.2d at 874.

the appropriate verbiage so as to effectuate the intent of the testator." *Id.* at 653, 447 S.E.2d at 787. After the death of the testator, plaintiff filed suit on 6 November 1991 and sought damages to the extent they did not receive all of the remainder interest in the family farm. *Id.* at 654, 447 S.E.2d at 787.

The Supreme Court concluded the "defendant's last act giving rise to the claim occurred when he supervised the execution of the will on 1 September 1978; therefore plaintiffs' claim, being brought more than four years after that date, is barred by the four-year statute of repose provision contained in the professional malpractice statute of limitations." *Id.* In support of its holding, the Court stated:

> Regardless of when plaintiffs' claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim.

Id. at 655, 447 S.E.2d at 788.

In the present case the defendant attorney executed and submitted to plaintiff the "Attorney's Preliminary Report on Title," dated 11 August 1988, in which the Deer and Wachovia deeds of trust were identified as liens on the subject property. In September 1988 the defendant attorney executed and delivered to plaintiff the "Attorney's Final Certificate for Owners and/or Loan Policy," in which the defendant attorney expressly represented to the plaintiff in writing, among other things, that the Deer and Wachovia deeds of trust had been cancelled of record or released and that First Federal of Raleigh had a first lien position on the subject property. Plaintiff filed suit on 19 August 1991, within three years from the date of the attorney's completion of the final title opinion.

The lesson of our jurisprudence under section 1-15 is perfectly clear: If plaintiffs await the occurrence of actual damages within the context of legal malpractice, their right to sue for redress of the harm may be barred by section 1-15's three-year statute of limitations or, alternatively, the four-year statute of repose. Because our courts have held that a malpractice cause of action accrues from the date of the defendant's negligence, section 1-15 provides little comfort in cases where, as here, the consequences of the negligence do not manifest until years after the last act of the defendant. This dilemma has been

recognized by Mallen and Smith in their leading treatise on Legal Malpractice:

> Particularly in legal malpractice contexts . . . [the negligent act] may not be discoverable by the client or even the lawyer, and the injury may not be foreseeable or occur for years.

2 Ronald E. Mallen and Jeffrey M. Smith, LEGAL MALPRACTICE, § 18.10 (3d ed. 1989) (hereinafter "LEGAL MALPRACTICE").

Having its roots in ordinary negligence claims, the "occurrence" rule governing the accrual of malpractice causes of action, as applied in North Carolina, had its genesis in the United States Supreme Court opinion of *Wilcox v. Plummer's Executors*, 29 U.S. (4 Pet.) 172, 7 L. Ed. 821 (1830). Rejecting the argument the statute of limitations did not accrue until the client suffered actual damages due to the attorney's negligence, the Court stated:

> When the attorney was chargeable with negligence or unskillfulness his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict.

29 U.S. (4 Pet.) at 182, 7 L. Ed. at 824 (emphasis added).

The occurrence rule has been superseded in most jurisdictions by one or more alternate theories governing the accrual of the limitations period in legal malpractice claims including, among other possibilities, the damage rule and the discovery rule. *See* LEGAL MALPRACTICE, *supra*, §§ 18.10-18.11, 18.14.[2] In a legal malpractice

2. Section 1-15 provides for a partial discovery rule:

> [W]henever 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 . . . .

Because the statute of repose within section 1-15 prohibits institution of suit "more than four years from the last act of the defendant," *Hargett v. Holland*, *supra*, plaintiff's suit would have been barred had it awaited the occurrence of actual damages despite the existence of the partial discovery rule in section 1-15.

cause of action the aggrieved party ordinarily does not incur actual damages at or near the date of the defendant's negligent act or omission. Therefore, the occurrence rule inescapably relies upon the concept of nominal damages to support institution of suit prior to accrual of the limitations period:

> The concept of nominal damages . . . serve[s] a necessary function in those jurisdictions which purport to follow the rule that a statute of limitations commences to run when the negligence occurs. Where suit must be brought based upon the time of the wrongful act or omission, and usually before any actual damages occur, nominal damages are indispensable to a cause of action.

1 LEGAL MALPRACTICE, *supra*, § 16.2, at 893 (emphasis added).

In the present case it can be reasonably inferred that plaintiff filed suit within three years from the completion of the final title opinion to avoid the bar of the three-year statute of limitations in section 1-15. One year later, when the four-year statute of repose would have run, plaintiff still had not incurred actual damages. Had plaintiff waited to file its suit until the occurrence of actual damages, suit would have been barred under the four-year statute of repose. *Hargett v. Holland*, *supra*.

Examination of our jurisprudence under section 1-15 reveals the wisdom of plaintiff's election to file suit within three years of the last negligent act of the defendant. Indeed, assuming actual damages do not occur coincidental to the actual breach of duty by the defendant attorney, it is nonetheless clear suit must be instituted within the four-year statute of repose regardless of whether the plaintiff has incurred actual damages. *See Hargett v. Holland*, *supra*.

The dissent acknowledges that the occurrence rule, as applied in North Carolina, leads to "injustices and frequently illogical results." The dissent correctly notes that Mallen and Smith indicate the occurrence rule may "promote unnecessary, expensive, and lengthy litigation"; however, the treatise nonetheless concludes, in occurrence rule jurisdictions such as North Carolina, *Southeastern Hospital Supply Corp v. Clifton & Singer*, *supra*, *Nationwide Mutual Ins. Co. v. Winslow*, *supra*, that nominal damages remain indispensable to a cause of action. 1 LEGAL MALPRACTICE, *supra*, § 16.2, at 893.

In any event, I believe the occurrence of actual damages during the jury deliberations, thereby occurring before the return of the verdict, *Wilcox v. Plummer's Executors*, *supra*, is sufficient to uphold

the jury verdict below on the question of liability. The reasoning of the decision of the United States Supreme Court in *Wilcox* was essentially followed by our Supreme Court in *Jewell v. Price*, 264 N.C. 459, 461-62, 142 S.E.2d 1, 3 (1965) (proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict).

I do not quarrel with, but wholly endorse, the concept that claims should be barred after the proper accrual of the appropriate limitations period. Nonetheless, our jurisprudence dictates that the statute of limitations in a professional malpractice action accrues from the date of the defendant's negligent act. Accordingly, the aggrieved party should be afforded the opportunity to seek redress for allegations of professional malpractice before the occurrence of actual damages, seeking nominal damages for the technical breach of duty in the hope actual damages accrue before the return of the verdict, *Jewell v. Price*, *supra*, or, alternatively, our jurisprudence should be revised to allow the appropriate limitations period to be tolled until the occurrence of actual damages.[3]

Accordingly, I concur in the majority opinion and believe on remand plaintiff should be afforded the opportunity to prove the amount of its alleged actual damages.

Judge GREENE dissenting.

I do not agree that the plaintiff was entitled to nominal damages in this negligence action.

"[O]nce a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages . . . ." *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992). The question in this case is whether the plaintiff, at the close of the evidence, established the cause of action on which its complaint was based. The answer depends on whether actual loss is an essential element of a cause of action for negligent breach of duty by an attorney to a title insurance company.

3. Several jurisdictions have adopted the "damage" rule of accrual within the context of malpractice litigation. *See, e.g.*, *Banton v. Marks*, 623 S.W.2d 113 (Tenn. App. 1981); *Haghayegh v. Clark*, 520 So.2d 58 (Fla. App. 1988); *Cofield v. Smith*, 495 So.2d 61 (Ala. 1986); *Zidell v. Bird*, 692 S.W.2d 550 (Tex. Ct. App. 1985); *Cantu v. St. Paul Companies*, 401 Mass. 53 (1987). "An initial and still common application of the damage rule is an error in preparation of a will, since the injury cannot occur until after the death of the attorney's client." LEGAL MALPRACTICE, *supra*, § 18.11, at 100. In *Hargett v. Holland*, *supra*, our Supreme Court declined to adopt the "damage" rule and instead applied the four-year statute of repose in section 1-15.

Negligence actions are in that category of cases where "the plaintiff has no cause of action at all unless and until damages can be shown." 1 Dan B. Dobbs, *Law of Remedies* § 3.3(2) (2d ed. 1993) (hereinafter *Dobbs*); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 30, at 164-65 (5th ed. 1984) (hereinafter *Prosser*) (actual loss or damage is element of cause of action based on negligence); *The Asheville School v. Ward Constr., Inc.*, 78 N.C. App. 594, 598, 337 S.E.2d 659, 662 (1985) (injury and damage listed as elements of cause of action based on negligence), *disc. rev. denied*, 316 N.C. 385, 342 S.E.2d 890 (1986). In other words, a cause of action based on negligence is established only if "a legally recognized loss is demonstrated." *Dobbs* § 3.3(2). Thus "[n]ominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred." *Prosser* § 30, at 165. To hold otherwise, especially in the context of legal malpractice, would "promote unnecessary, expensive and lengthy litigation." 1 Ronald E. Mallen and Jeffery M. Smith, *Legal Malpractice* § 16.2 (3d ed. 1989) (hereinafter *Mallen*). "The cost of a lawsuit to establish a principle is often an unwarranted expense to impose upon adverse parties, the courts and society." *Id.*

Our North Carolina courts have, on several occasions, made the general statement that "[n]ominal damages may be recovered in actions based on negligence." *E.g., Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (1965); *The Asheville School*, 78 N.C. App. at 599, 337 S.E.2d at 662. These cases do not hold, however, that nominal damages are recoverable in a negligence action in the absence of proof of some actual loss. In each case the facts reveal that the plaintiff had in fact sustained some actual loss. In any event, actual loss or harm is without question an essential element of an action by a third person against a professional person who is alleged to have been negligent in the performance of his contract with his client. 2 *Dobbs* § 6.11 (cause of action based on lawyer malpractice requires proof of actual damages); *see United Leasing Corp. v. Miller*, 45 N.C. App. 400, 406, 263 S.E.2d 313, 318, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980); *see also Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 209, 214, 367 S.E.2d 609, 614, 617 (1988).

In this case, the plaintiff claims that Debnam, an attorney, was negligent in certifying the title and that as a proximate cause it "has suffered a loss." Thus, plaintiff is entitled to nominal damages only upon proof of an actual loss and in the absence of such proof a directed verdict for the defendant should have been entered. The evidence, in the light most favorable to the plaintiff and viewed at the

close of all the evidence, is that plaintiff had not suffered a loss. Indeed, the majority acknowledges that the "plaintiff suffered no damages" until the Deer deed of trust was cancelled, which did not occur until the jury was in deliberation. At the time the evidence was closed, plaintiff had not paid any monies to its insured nor had it removed the lien which was in violation of the policy of insurance. There is evidence that it did pay monies to purchase the notes and deeds of trust that were superior to First Federal's lien. In exchange, however, for the purchase of these notes and deeds of trust it received an assignment of the Deer note and deed of trust which remained a valid lien on the property for the full amount of both the Deer lien and the Wachovia lien. There is no evidence that the Deer note and deed of trust had value less than that paid by the plaintiff. Indeed, the plaintiff makes no argument to the contrary in its brief to this Court. Thus, because there is no evidence in this record that plaintiff sustained any loss, the evidence was insufficient to support a verdict for the plaintiff, even for nominal damages, and directed verdict for the defendant should have been granted on this basis.

The fact that at some point after the close of the evidence the plaintiff did cancel the Deer deed of trust cannot affect the ruling on this motion for directed verdict, which must be judged on the basis of the evidence submitted to the trial court before the close of the evidence. *See Citrini v. Goodwin*, 68 N.C. App. 391, 399, 315 S.E.2d 354, 360 (1984). Furthermore, any obligation, which may have matured after the close of the evidence, that the plaintiff had to cancel the deed of trust is likewise immaterial.

Accordingly, I would reverse the trial court's denial of defendants' directed verdict motion and remand for dismissal of the plaintiff's claim.[1]

1. Whether plaintiff's cause of action accrued at the time of the negligent act or at the time the plaintiff sustained actual injury, an issue discussed in the concurring opinion, is not an issue in this case. I do note, however, that "injustices and frequently illogical results from application of the occurrence rule have prompted most courts to add the requirement that there be actual injury before a cause of action accrues for purposes of a statute of limitations." 2 *Mallen* § 18.11 (3d ed. Supp. 1989); see *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657 (holding that malpractice action in tax matters did not accrue until actual injury), *disc. rev. denied and appeal dismissed*, 312 N.C. 85, 321 S.E.2d 899 (1984). In this case there is no dispute that plaintiff's claim was filed within the relevant statute of limitations. Furthermore, any argument that the plaintiff was forced to file its claim prior to the occurrence of any actual injury in order to avoid the running of the statute of limitation or repose, and therefore it should be insulated from the actual injury requirement, cannot be sustained. The occurrence of actual injury in this case, the cancellation of the Deer deed of trust, was totally within the control of the plaintiff.

STATE OF NORTH CAROLINA v. MONTRICK DWAYNE BURTON AND PATRICK BURDEN

No. 944SC154

(Filed 1 August 1995)

1. Criminal Law § 319 (NCI4th)— motion to join granted—defendant not prejudiced

The trial court did not err in granting the State's motion for joinder of defendants for trial on murder charges since the State presented plenary evidence of defendant's guilt, apart from his codefendant's testimony; defendant had the opportunity to cross-examine his codefendant vigorously; the antagonistic defenses in this case did not prejudice defendant; a purported statement by the codefendant was in fact not a statement against the codefendant's penal interest but was instead a conclusion drawn by the investigating officer; and the trial court's error in failing to allow impeachment of the codefendant was harmless error. N.C.G.S. §§ 15A-926(b)(2)(a), 15A-927(c)(2).

Am Jur 2d, Criminal Law § 178.

2. Evidence and Witnesses § 308 (NCI4th)— gun fired earlier by defendant—admissibility of evidence to show identity of defendant as perpetrator

Evidence that defendant was firing the gun in question shortly before the events giving rise to this homicide prosecution was admissible to prove defendant's identity as the person who fired the stray 9 mm bullet which killed the victim. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 452, 453.

3. Homicide § 338 (NCI4th)— killing by stray bullet—sufficiency of evidence of defendant as perpetrator—sufficiency of evidence of acting in concert

The evidence was sufficient to be submitted to the jury in a prosecution for involuntary manslaughter where it tended to show that the victim, a four-year-old resident of a trailer park, was killed by a stray bullet as she sat on her father's lap; it was defendant who fired the 9 mm gun, killing the child; or it was the codefendant who fired the 9 mm gun and defendant acted in concert with him.

Am Jur 2d, Homicide §§ 425, 442.

4. Homicide § 319 (NCI4th)— voluntary manslaughter—defendant as aider and abettor—sufficiency of evidence

The evidence was sufficient to support defendant's conviction for voluntary manslaughter by aiding and abetting where defendant was present at the crime scene and had just shortly before fired a gun toward the group of which the victim was a party; defendant encouraged the codefendant, his cousin, to shoot the victim; the victim repeatedly cursed at, taunted, and persisted in provoking a response by defendants; the perpetrator shot the victim as the victim approached and was in fear for his life at that moment; and the victim was unarmed throughout the encounter.

Am Jur 2d, Homicide §§ 425, 442.

5. Homicide § 620 (NCI4th)— self-defense instruction—defendant as aggressor—sufficiency of evidence to support instruction

The evidence supported the trial court's instruction that defendant would not be entitled to the benefit of self-defense if he were the aggressor with the intent to kill or inflict serious bodily harm upon the victim where the evidence tended to show that the unarmed victim cursed and taunted defendant and his codefendant from outside their trailer; and defendant and the codefendant came outside and began shooting, with defendant telling the codefendant, "Shoot him, shoot him. I'll get you out of jail."

Am Jur 2d, Homicide § 519.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 ALR4th 983.

6. Criminal Law § 929 (NCI4th)— codefendant guilty of second-degree murder—defendant guilty of voluntary manslaughter—no reversal on ground of inconsistent verdicts

There was no merit to defendant's contention that the verdicts finding him guilty of voluntary manslaughter as an aider and abettor and his codefendant, who fired the fatal bullet, guilty of second-degree murder were inconsistent and that the judgment against him should therefore be reversed, since there was suffi-

cient evidence of defendant's guilt of voluntary manslaughter, and his conviction of a lesser charge may have been a demonstration of the jury's leniency toward him.

Am Jur 2d, Trial § 1814.

Inconsistency of criminal verdicts as between two or more defendants tried together. 22 ALR3d 717.

7. Criminal Law § 1149 (NCI4th)— use of weapon normally hazardous to more than one person—finding of aggravating factor proper

The trial court did not err in finding as an aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person where the evidence showed that the victim was killed by a bullet fired from a 9 mm semi-automatic handgun, a gun which could hold between eight and sixteen bullets and which could fire bullets as fast as the shooter could pull the trigger. N.C.G.S. § 15A-1340.4(a)(1)(g).

Am Jur 2d, Criminal Law §§ 598, 599.

8. Criminal Law § 1234 (NCI4th)— age of defendant—no mitigating factor

Evidence that defendant was seventeen years old at the time of the crime was insufficient, standing alone, to support a finding of the mitigating factor regarding immaturity, N.C.G.S. § 15A-1340.4(a)(2)(e).

Am Jur 2d, Criminal Law §§ 598, 599.

9. Homicide § 630 (NCI4th)— second-degree murder—reasonable belief in need to kill victim—self-defense instruction proper

The trial court did not err in instructing that defendant would be excused of second-degree murder if it appeared to him and he believed it to be necessary to kill the victim, not just to use deadly force, in order to save himself or others from death or great bodily harm where all of the evidence showed an intent to kill.

Am Jur 2d, Homicide § 519.

Accused's right, in homicide case, to have instructed as to both unintentional shooting and self-defense. 15 ALR4th 983.

Appeal by defendants from judgments and commitments entered 10 May 1993 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 5 April 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Charlie C. Walker, for the State.

Gaylor, Edwards, Vatcher & Bell, by Walter W. Vatcher, for defendant-appellant Montrick Dwayne Burton. Edward G. Bailey for defendant-appellant Patrick Burden.

LEWIS, Judge.

Defendants were indicted for the murders of Brittany James and Carlos Howard and were tried jointly. The jury found defendants Burton and Burden guilty of involuntary manslaughter for the death of James; Burton was also found guilty of voluntary manslaughter for the death of Howard. The jury found defendant Burden guilty of second-degree murder for the death of Howard. Burton was sentenced to ten years for involuntary manslaughter and six years for voluntary manslaughter. Burden was sentenced to ten years for involuntary manslaughter and thirty years for second-degree murder. From the judgments and commitments, defendants appeal.

The evidence tended to show that on 29 April 1992 at around 8:00 p.m., defendant Burton, then seventeen, went with his cousin, defendant Burden, then twenty-two, and their cousin, Bernard Jones, to Heath's Pawn Shop in Jacksonville, North Carolina. While the three were in Burden's car in the parking lot, a group of people, including Carlos Howard, approached the car. Howard believed that Burden, whom he did not know, had shot at him a few days earlier. Upon seeing Burden's car on 29 April, Howard had followed defendants to the pawn shop. In the parking lot of the pawn shop, Howard asked Burden why he had shot at him. Howard and a friend named Earl Roy then began punching defendants, who were still in Burden's car. Burden began to drive away, and one of the passengers fired a 9mm handgun out the window. Earl Roy testified that Burton fired the shots, but others testified that it was Bernard Jones who fired the shots.

Defendants and Jones then drove to the home of another cousin, Roland Burton, in McDowell's Mobile Home Park. The Howard group also drove to the mobile home park, where they visited friends at a

trailer at Lot 5. At the park, Howard learned that defendants were in Roland Burton's trailer at Lot 11. The Howard group approached Lot 11 and Howard and defendants exchanged unpleasantries. At some point, defendants came out of the trailer, armed with a .38-caliber revolver and a 9mm semi-automatic handgun, and began firing. No one in the Howard group was armed. According to Roy, Burton told Burden, "Shoot him, shoot him. I'll get you out of jail." Howard then responded, "Shoot me, shoot me." After defendants began shooting, two neighbors came outside. The neighbors, Ginnie Champion and Mistie Anderson, testified that Burton and Anderson "had words" and that Burton pointed his gun at Anderson. Anderson testified that Burden (not Burton) then shot at her, missing her but hitting the trailer at Lot 7.

At some point during all the gunfire, three stray bullets entered the trailer at Lot 4. One of the bullets struck four-year-old Brittany James as she sat on her father's lap. The bullet exited her body, and no bullets were found in her body. The three spent projectiles found in the James trailer were all from CCI 9mm bullets. Brittany died as a result of the gunshot wound.

The testimony of the witnesses was in conflict as to which defendant fired the 9mm gun, and each defendant testified that it was the other who fired the 9mm gun that evening. The testimony on this point will be set out below, as needed to address defendants' arguments.

After the shots were fired outside Roland Burton's trailer, defendants went back inside the trailer. At some point, Howard began banging on the door of the trailer and shouting. He also punched out a window next to the door. Burden opened the door, and, according to Roy, said to Howard, "You don't think I'll shoot you, do you?" Burden then shot Howard two times with the .38-caliber revolver, once in the neck and once in the arm. Howard was standing two or three feet from Burden at the time. Howard died as a result of the gunshot wounds.

Burden and Burton then left their cousin's trailer and went to Burden's home. Officers found defendants hiding in the attic a short time later. Neither of the guns used in the shootings was found. Throughout these machinations, the defendants and the Howard group exchanged vulgarities which are omitted.

Defendant Burton's Appeal

I.

[1] Defendant Burton's first contention is that the trial court erred in granting the State's motion for joinder of defendants for trial and in denying his motions to sever, made before and during the trial. N.C.G.S. § 15A-926(b)(2)(a) authorizes joinder of two or more defendants where the State seeks to hold each defendant accountable for the same crimes. *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987). However, N.C.G.S. § 15A-927(c)(2) requires the court to grant severance whenever it is necessary to promote or achieve a fair determination of guilt or innocence. *Id.* The question of whether the defendants should be tried jointly or separately pursuant to these provisions is within the sound discretion of the trial judge. *Id.* Without a showing that joinder has deprived a defendant of a fair trial, the trial judge's discretionary ruling on the question will not be disturbed on appeal. *Id.* Defendant contends the trial court's ruling deprived him of a fair trial for two reasons.

First, defendant contends that his defense and Burden's defense were so antagonistic that a fair trial could not be had. The existence of antagonistic defenses alone, however, does not necessarily warrant severance. *Id.* at 582, 356 S.E.2d at 332. The test under section 15A-927(c)(2) is whether the conflict in the defendants' respective positions at trial is such that, in light of all of the other evidence in the case, the defendants were denied a fair trial. *Id.* at 582-83, 356 S.E.2d at 332. Thus, the focus is on whether the defendants have suffered prejudice, not on whether they contradict each other. *Id.* at 583, 356 S.E.2d at 332. No prejudice results where the State presents plenary evidence of the defendant's guilt, apart from the co-defendant's testimony, and where the defendant has the opportunity to cross-examine the co-defendant. *Id.*

In this case, defendant's contention regarding antagonistic defenses relates only to the death of Brittany James. Each defendant contended that it was the other who fired the shot from the 9mm handgun that killed Brittany. The State presented the testimony of several eyewitnesses on this issue. Troy Scott testified that defendant was rapid-firing what must have been an automatic weapon and was firing it aimlessly. Mistie Anderson testified that she thought defendant's gun was a 9mm, that it was flat (like a 9mm), not round on each side (like a revolver), and that it had a slide on the top (like a 9mm).

Earl Roy testified that defendant was shooting toward Brittany's trailer when defendant was firing in his direction. This was strong evidence to support a jury finding that defendant shot Brittany. Furthermore, defendant subjected his co-defendant, Burden, to rigorous cross-examination. Because the State presented plenary evidence of defendant's guilt, apart from his co-defendant's testimony, and defendant had the opportunity to cross-examine his co-defendant, we conclude that the antagonistic defenses in this case did not prejudice defendant.

Second, defendant contends the court's ruling denied him a fair trial because he was not allowed to introduce a statement made by Burden to Captain Larry Johnson of the Onslow County Sheriff's Department. The trial court found that the statement was made before Burden had been advised of his Miranda rights and was inadmissible. Johnson testified that Burden made the statement either while still in the attic at his home or thereafter in the police car. After Johnson spoke with Burden, he wrote the following in his report: "Suspect number 1 [Burden] advised that he had allegedly been fired upon by victim number 1 [Carlos Howard], so he retaliated by doing the same thus possibly firing a stray round into victim number 3's [Brittany's father's] mobile home at lot 4." Defendant contends the part of the statement beginning "thus possibly firing a stray round" was a statement against Burden's penal interest and was therefore admissible as an exception to the hearsay rule. He contends that had he and Burden been tried separately, the statement would have been admissible in defendant's trial.

Captain Johnson's testimony on *voir dire*, however, shows that the purported statement by Burden beginning "thus possibly firing a stray round" was in fact not a statement, but a conclusion drawn by Johnson. Johnson testified that Burden did state that he was fired on by Howard and that he returned fire. Johnson noted that the word "allegedly" was his word and was not said by Burden. Johnson testified that the part of the report beginning with "thus possibly firing a stray round" was a conclusion he drew based on the facts he knew, and that it was not a statement made by Burden. Based on this testimony, the trial court found that Burden did not make a statement concerning a stray bullet. The trial court's findings of fact following a *voir dire* hearing are binding on the appellate court when supported by competent evidence. *State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993). Accordingly, we must conclude there was no "statement" by Burden about a stray bullet which could have been admitted at

trial. Thus, defendant's argument that such a statement would have been admissible if he had been tried separately is without merit.

Defendant next contends that Burden's statement that Howard fired at Burden and that Burden returned fire was admissible to impeach Burden, who testified that he did not make such a statement to Johnson. We note that defendant also makes this argument with respect to the stray bullet "statement." However, as stated above, there was no such statement.

We agree that the trial court erred in not allowing defendant to impeach Burden with evidence of Burden's statement to Johnson. A statement taken in violation of a defendant's Miranda rights may nonetheless be used to impeach the defendant's credibility if (1) the statement was not involuntary, and (2) the defendant (i.e., Burden) testified at trial. *State v. Purdie*, 93 N.C. App. 269, 279, 377 S.E.2d 789, 795 (1989) (citing *Harris v. New York*, 401 U.S. 222, 224, 28 L. Ed. 2d 1, 4 (1971)). However, we believe such error was harmless. Burden's credibility at trial was weak at best. His testimony that he only fired one shot while the Howard group was in the street was contradicted by several witnesses. In addition, Burden testified about his history of criminal behavior, which included numerous acts of theft. The fact that his testimony was contrary to his statement to Captain Johnson rises to no more than harmless error. As we conclude the error was harmless, we likewise conclude as to defendant's severance argument that defendant's right to a fair trial was not prejudiced by the exclusion of this impeachment evidence.

II.

[2] Defendant's next contention is that the trial court erred in allowing the prosecutor to cross-examine defendant concerning 9mm shots that were fired at an apartment complex that defendant, Burden, and Bernard Jones drove past on their way from the pawn shop to the mobile home park. Defendant argues that Rule 608(b) of the Rules of Evidence does not permit cross-examination on this instance of misconduct and the prosecutor should not have been allowed to ask defendant about that incident. Defendant is correct that the act of shooting at an apartment complex is not probative of defendant's truthfulness or untruthfulness and was therefore not a proper subject for cross-examination under Rule 608(b). *See* N.C.G.S. § 8C-1, Rule 608 (1992). However, the prosecutor was not seeking to attack the credibility of defendant. Rather, he was attempting to elicit testimony

that defendant fired the 9mm gun at the apartment complex on the way to the mobile home park.

Under Rule 404(b) such cross-examination was proper. Rule 404(b) provides that evidence of other crimes, wrongs, or acts of the defendant may be admitted if the proponent's purpose is to show, *inter alia*, proof of the defendant's identity as the perpetrator. N.C.G.S. § 8C-1, Rule 404(b) (1992). Evidence that defendant was firing the gun in question shortly before the events at the mobile home park was admissible to prove defendant's identity as the person who fired the stray 9mm bullet that killed Brittany. Accordingly, the trial court properly allowed cross-examination on this point.

III.

[3] Defendant next contends the trial court erred in denying his motion to dismiss on the ground of insufficient evidence in the case involving Brittany's death. The jury found defendant guilty of involuntary manslaughter in that case.

The guiding principles we must follow when considering a defendant's motion to dismiss are as follows:

> In ruling on a motion to dismiss for insufficiency of evidence, the evidence must be viewed in the light most favorable to the State, and the State must be afforded every reasonable inference arising from the evidence. The credibility of the witnesses and the weight to be given their testimony is for the jury to determine. The question for the court is whether there is substantial evidence of each element of the crime charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. O'Rourke, 114 N.C. App. 435, 441, 442 S.E.2d 137, 140 (1994).

Involuntary manslaughter is an unlawful killing proximately caused by either (1) an unlawful act not amounting to a felony or naturally dangerous to human life, or (2) a culpably negligent act or omission. *State v. Thomas*, 325 N.C. 583, 598, 386 S.E.2d 555, 563 (1989). Culpable negligence is defined as an act or omission which evidences a disregard for human rights and safety. *Id.* at 598, 386 S.E.2d at 564. The trial court instructed that defendant could be found guilty of involuntary manslaughter whether he acted alone or in concert with Burden.

Defendant contends the State's evidence was in conflict on the question of which defendant was firing the 9mm pistol and that the State did not show which defendant fired the shot that killed Brittany. Our Supreme Court recently addressed a similar case involving two defendants. In *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994), the defendants shot two people in a club, killing one and injuring the other. Each defendant was firing a different type gun, and the State's evidence was in conflict as to which defendant fired the shot that injured the surviving victim and as to which gun fired that shot. Defendant Reid was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury. His co-defendant, Adams, was also charged with that offense but was acquitted. The Court held that there was sufficient evidence to support a finding by the jury that it was Reid who shot the victim, and that there was also sufficient evidence to support a finding by the jury that it was Adams who shot the victim, and that Reid acted in concert with Adams. *Id.* at 655, 440 S.E.2d at 780.

Likewise, in the case at hand, there was sufficient evidence to support a finding by the jury that defendant was guilty of involuntary manslaughter either because (1) it was defendant who fired the 9mm gun, killing Brittany or (2) it was Burden who fired the 9mm gun, and defendant acted in concert with him. First, as discussed in section I. of this opinion, several witnesses testified that it was defendant who was firing the 9mm gun at the time Brittany was killed. One witness testified that defendant was firing aimlessly. Another testified that defendant fired in the direction of Brittany's trailer. There can be no doubt that such actions amount to a disregard for human rights and safety, thus constituting culpable negligence.

Second, there was sufficient evidence to support a finding that it was Burden who fired the 9mm gun and that defendant was acting in concert with Burden. Earl Roy testified that he was certain that Burden was firing an automatic pistol, and defendant testified that it was Burden who was firing the 9mm pistol. Bernard Jones, a cousin of both defendants, testified that at one point, Burden fired six or seven shots with the 9mm at Carlos Howard from the steps of the trailer.

There was also evidence that defendant was acting in concert with Burden. Under the doctrine of acting in concert, one may be found guilty of committing a crime if he is at the scene with another with whom he shares a common plan to commit the crime, although

the other person does all the acts necessary to effect commission of the crime. *State v. Blankenship*, 337 N.C. 543, 557-58, 447 S.E.2d 727, 736 (1994). Defendant contends, however, that there can be no common plan to commit a culpably negligent act. This argument was rejected in *State v. Robinson*, 83 N.C. App. 146, 149, 349 S.E.2d 317, 319 (1986). Here, defendant and Burden had a common plan to shoot at Howard and his group, as evidenced by the fact that the two came out of the trailer and began firing on the group. As stated above, firing repeated shots toward a group of people is a culpably negligent act, amplified since the Howard group was not armed.

In sum, we conclude there was sufficient evidence to support a finding that defendant was guilty of involuntary manslaughter. Thus, the trial court properly denied defendant's motion to dismiss.

IV.

[4] Defendant's next contention is that the trial court erred in denying his motion to dismiss on the ground of insufficient evidence in the case involving the death of Carlos Howard. The jury found defendant guilty of voluntary manslaughter. Defendant argues that there was no evidence that he was involved in any way in this offense.

The trial court instructed the jury that it could find defendant guilty of second-degree murder or voluntary manslaughter in the death of Carlos Howard if defendant aided or abetted Burden in the commission of the crime. Under the doctrine of aiding and abetting, the defendant must have been present at the scene of the crime, either actually or constructively, with the intent to aid the perpetrator in the commission of the offense should his assistance become necessary, and such intent must have been communicated to the actual perpetrator. *State v. Amerson*, 316 N.C. 161, 166-67, 340 S.E.2d 98, 101 (1986). Such communication of intent to aid does not have to be shown by express words, but may be inferred from the defendant's actions and from his relation to the actual perpetrator. *Id.* at 167, 340 S.E.2d at 101. When the bystander is a friend of the perpetrator and knows that his presence will be viewed by the perpetrator as an encouragement and protection, the defendant's presence alone may be regarded as an encouragement. *Id.*

In the present case, defendant was actually present at the scene of the crime. A short time before Burden killed Howard, defendant actively joined Burden in firing toward the Howard group outside the trailer. Earl Roy testified that while defendant and Burden were firing

toward the group, defendant told Burden, "Shoot him, shoot him. I'll get you out of jail." In addition, defendant was a cousin and friend of Burden. From defendant's statement of encouragement, his actions, and his relationship with Burden, the jury could certainly infer his intent to aid and abet Burden in shooting Howard. Accordingly, we conclude there was sufficient evidence to support defendant's guilt by aiding and abetting.

Because defendant was convicted of voluntary manslaughter, we next address the question of whether there was evidence to support a finding that the actual perpetrator, Burden, committed voluntary manslaughter. (Interestingly, Burden was convicted of second-degree murder, not voluntary manslaughter. The inconsistency of the verdicts is discussed below in section IX.) We note that defendant makes no contention that there was insufficient evidence to support a finding that Burden committed voluntary manslaughter.

The jury was instructed that it could find Burden guilty of voluntary manslaughter if it found that Burden killed in the heat of passion upon adequate provocation, or if Burden killed in self-defense, defense of others or of habitation but used excessive force under the circumstances, or if Burden was the aggressor without murderous intent in starting the fight in which the killing took place. There was substantial evidence that Howard repeatedly cursed at, taunted, and persisted in provoking a response by defendants. He succeeded to his detriment. There was also evidence that Burden shot Howard as Howard approached him and that Burden was in fear for his life at that moment. Finally, there was evidence showing that throughout the encounter, Howard was unarmed. This evidence was sufficient to support a finding that Burden committed voluntary manslaughter.

We conclude that the trial court properly denied defendant's motion to dismiss.

V.

We next address defendant's contention that the court's instruction to the jury on aiding and abetting was error. Defendant contends that a defendant's mere presence at the scene is not enough and that the court misstated the law when it instructed: "When the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as encouragement." This was a cor-

rect statement of the law. *See Amerson*, 316 N.C. at 167, 340 S.E.2d at 101. Accordingly, defendant's contention is without merit.

VI.

Defendant's next contention is that the trial court gave an erroneous instruction on self-defense in the Brittany James case. As to this offense, the jury was instructed that it could find defendant guilty of second-degree murder, or of involuntary manslaughter, or not guilty. The jury found defendant guilty of involuntary manslaughter.

Self-defense is not a defense to the charge of involuntary manslaughter. *State v. Teel*, 65 N.C. App. 423, 424, 310 S.E.2d 31, 32 (1983). Because the jury found defendant not guilty of second-degree murder, the charge to which self-defense was applicable, any error in charging thereon could not have been prejudicial. *State v. Daniels*, 87 N.C. App. 287, 290, 360 S.E.2d 470, 471 (1987).

VII.

[5] Defendant's next contention is that the trial court erred in its instructions on self-defense in the Brittany James case when it instructed that defendant would not be entitled to the benefit of self-defense if he was the aggressor with the intent to kill or inflict serious bodily harm upon Carlos Howard. Defendant contends there was no evidence to support a finding that he was the aggressor. Defendant failed to object to this instruction but has assigned plain error. For an instructional error to constitute plain error, the error must have had a probable impact on the jury's finding of guilt. *State v. Allen*, 339 N.C. 545, 555, 453 S.E.2d 150, 155-56 (1995).

In *State v. Haight*, 66 N.C. App. 104, 310 S.E.2d 795 (1984), this Court discussed the propriety of the aggressor instruction on facts similar to those of the present case. In *Haight*, the defendant, Peggy Haight, was the owner of a lounge. The victim, Winston McKenzie, while in the lounge became verbally abusive toward several other customers. Concerned that McKenzie might cause more trouble, Haight called a male friend to come and help her close the lounge early. After Haight closed up, McKenzie began to direct his invective at Haight, even though she was then holding a shotgun. McKenzie, though unarmed, referred to the gun as a "pea shooter" and told Haight, "That ain't shit. I'll take it and ram it up your ass." This pronouncement did not endear McKenzie to Haight, who started to swing the gun toward McKenzie. Unfortunately, it hit her friend on the leg. Her friend took the gun and pointed it at McKenzie, telling McKenzie

that they should all just go home. McKenzie told the man he didn't have the nerve to shoot him. The man then put the gun in the car. Haight, who was then in the car, grabbed the gun, stood with one foot on the ground, and shot McKenzie in the chest. This Court held that the evidence was sufficient to raise the issue of whether Haight was the aggressor and that the aggressor instruction was therefore proper. *Id.* at 108, 310 S.E.2d at 798.

Likewise, in the case at hand, the evidence supported the instruction. Carlos Howard exhibited the same moronic audacity as did McKenzie. Howard, unarmed, cursed and taunted defendant and Burden from outside their trailer. Defendant and Burden then came outside. The two began shooting, with defendant telling Burden, "Shoot him, shoot him. I'll get you out of jail." Far from being a plea for mercy, this evidence supports the aggressor instruction. Accordingly, we find no error, plain or otherwise.

VIII.

Next, defendant contends the trial court erred in the Carlos Howard case, in which defendant aided and abetted Burden, in its concluding instructions to the jury by failing to refer to defendant's pleas of self-defense, defense of others, and defense of habitation. Because defendant made no objection to the charge when given the opportunity to do so, he may not assign error to these omissions from the charge. N.C.R. App. P. 10(b)(2) (1995); *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994).

Rule 10(c)(4) provides:

> Assigning Plain Error. In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(c)(4) (1995). As defendant has failed to specifically and distinctly allege that the trial court's instruction amounted to plain error, defendant has waived any appellate review. *Hamilton*, 338 N.C. at 208, 449 S.E.2d at 411; N.C.R. App. 10(c)(4).

IX.

[6] Defendant's next contention is that the trial court erred in not setting aside the verdict in the Carlos Howard case. His co-defendant,

Burden, having fired the fatal bullet, was found guilty of second-degree murder. Defendant, however, was found guilty of voluntary manslaughter as an aider and abettor. Defendant contends that because the verdicts were inconsistent and "legally impossible," the judgment against him must be reversed. On this point, defendant has also filed a motion for appropriate relief.

In *State v. Reid*, discussed in section III. of this opinion, our Supreme Court recently addressed the issue of inconsistent verdicts. In that case, the evidence was in conflict as to which of the two defendants fired the shot that injured the victim. The jury was instructed that it could find defendant Reid guilty of assault with a deadly weapon with intent to kill inflicting serious injury under the concerted action principle. Under that theory of the case, the jury would have found that Reid's co-defendant, Adams, was the actual perpetrator and that Reid acted in concert with him. The jury found Reid guilty of the offense but found Adams not guilty. Reid argued on appeal that his conviction could not stand because the jury could not have found him guilty on the concerted action principle yet found his co-defendant not guilty. The Supreme Court rejected Reid's argument. *Reid*, 335 N.C. at 657, 440 S.E.2d at 781.

The Court followed the reasoning set out in several United States Supreme Court cases. For example, in *Dunn v. United States*, 284 U.S. 390, 76 L. Ed. 356 (1932), the Court held that a criminal defendant convicted on one count could not attack that conviction because it was inconsistent with the jury's acquittal of the same defendant on another count. *Id.* at 393-94, 76 L. Ed. at 358-59. The Court stated:

> Consistency in the verdict is not necessary. . . . "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the [jurors] did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

Id. at 393, 76 L. Ed. at 358-59 (quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925)).

In *United States v. Powell*, 469 U.S. 57, 83 L. Ed. 2d 461 (1984), the United States Supreme Court noted that a criminal defendant is afforded protection against jury irrationality or error by the inde-

pendent review of the sufficiency of the evidence undertaken by the trial and appellate courts. *Id.* at 67, 83 L. Ed. 2d at 470. This review should be independent of the jury's determination that evidence on another count was insufficient. *Id.* The government must convince the jury with its proof, and must then satisfy the courts that given this proof, the jury could rationally have reached a verdict of guilt beyond a reasonable doubt. *Id.*

We conclude that in light of these principles and our Supreme Court's decision in *Reid*, defendant's conviction should stand. We believe, as did the Court in *Reid*, *see* 335 N.C. at 660, 440 S.E.2d at 783, that the jury's verdict in this case may have been a demonstration of lenity for defendant. As the Court stated in *Reid*,

> A case such as this, where the evidence, even among the witnesses for each side, is contradictory and confusing, is a prime example of why we should not attempt to enter the jury's thought process to determine whether the jurors spoke their real conclusions in their [verdicts]. What we have done to protect defendant Reid from an irrational jury is determine if the evidence was sufficient to find defendant guilty . . . beyond a reasonable doubt.

Id. We have concluded above that there was sufficient evidence to support defendant's conviction of voluntary manslaughter. Defendant's conviction will not be reversed on the ground that there were inconsistent verdicts. His assignment of error on this point is overruled, and his motion for appropriate relief is denied.

X.

[7] Defendant's remaining arguments relate to his sentencing hearing. First, defendant contends the trial court erred in finding as an aggravating factor in the Brittany James case that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. *See* N.C.G.S. § 15A-1340.4(a)(1)(g) (1988). The bullet that killed Brittany was fired from a 9mm semi-automatic handgun. Defendant contends that such a weapon would not normally be hazardous to more than one person. We find this position untenable.

In *State v. Carver*, 319 N.C. 665, 356 S.E.2d 349 (1987), our Supreme Court addressed this issue with respect to a semi-automatic rifle. The Court stated:

> In this case we believe it is evident that a great risk of death is created to more than one person when a .308M-1 rifle is fired several times into a crowd of several persons. Any reasonable person should know this and we can conclude the defendant created this risk knowingly. A semi-automatic rifle may be used normally to fire several bullets, in this case eight, in rapid succession. Several bullets fired in rapid succession are hazardous to the lives of more than one person; therefore we hold that the evidence in this case supports a finding of the aggravating factor that the defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person.

Id. at 667-68, 356 S.E.2d at 351.

In the case at hand, the gun was fired several times toward the Howard entourage. A firearms expert testified that a 9mm semi-automatic handgun will hold between approximately eight and sixteen bullets, depending on the manufacturer, and will fire the bullets as fast as the shooter can pull the trigger. Based on the reasoning in *Carver*, we conclude that the trial court did not err in finding the aggravating factor here.

XI.

[8] Defendant's final contention is that the trial court erred in not finding as a mitigating factor that defendant was a minor at the time of the offense in that he was seventeen years old. Defendant apparently contends that because of his age, he should be deemed immature. Defendant cites the statutory mitigating factor dealing with immaturity, N.C.G.S. § 1340.4(a)(2)(e) (1988). That factor provides: "The defendant's immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense." However, a defendant's age alone is insufficient to support this factor. *State v. Moore*, 317 N.C. 275, 280, 345 S.E.2d 217, 221 (1986) (defendant there was also seventeen at time of offense). Defendant makes no contention, apart from the fact of his age, that he was otherwise immature at the time of the offense. The trial judge did not err.

Defendant Burden's Appeal

I.

[9] Defendant Burden's first contention is that the trial court erred in its instruction on self-defense and defense of others in the Carlos Howard case. Defendant failed to object to the instruction at trial, but has assigned plain error to that part of the charge which states that defendant would be excused of second-degree murder if it appeared to him and he believed it to be necessary to *kill* Carlos Howard in order to save himself or others from death or great bodily harm. To support his position, defendant cites *State v. Richardson*, 112 N.C. App. 252, 435 S.E.2d 84, *temporary stay allowed*, 335 N.C. 179, 436 S.E.2d 389, *disc. review and supersedeas allowed*, 335 N.C. 241, 439 S.E.2d 159 (1993).

In *Richardson*, this Court held that this instruction is improper as it relates to second-degree murder. *Id.* at 258-59, 435 S.E.2d at 87-88. The Court reasoned:

> Submitting to the jury the first element of perfect self-defense as quoted, *i.e.*, that "it appeared to the defendant and he believed it to be necessary to *kill* the deceased in order to save himself from death or great bodily harm," reads into this defense an element (intent to kill) that is not part of second degree murder. That submission also renders impermissibly easier the State's burden of disproving the first element or the second element [i.e., the reasonableness of the defendant's belief] of perfect self-defense since the circumstances that would justify the reasonableness of an intent to kill in self-defense would be graver than those justifying the reasonableness of an intentional killing, as that phrase is defined. [The Court had earlier stated that an "intentional killing" in this context refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death was intentionally committed and was an act of assault which in itself amounted to a felony or was likely to cause death or great bodily injury].

Id. at 258, 435 S.E.2d at 87. This Court concluded that the instruction on self-defense, as it relates to second-degree murder, should be phrased in terms of a defendant's belief that it was " 'necessary to shoot [or use deadly force against] the deceased in order to save himself from death or great bodily harm.' " *Id.* at 259, 435 S.E.2d at 88. The Court stated that it was significant that in the case before it, the

trial court did not instruct on first-degree murder. *Id.* at 258, 435 S.E.2d at 88. The Court noted, however, that a case was then pending before the Supreme Court concerning this issue as to a trial where first-degree murder, second-degree murder, and voluntary manslaughter were submitted. That case, *State v. Watson*, 338 N.C. 168, 449 S.E.2d 694, *temporary stay and reconsideration denied*, 338 N.C. 523, 457 S.E.2d 302 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 569 (1995), has since been decided.

In *Watson*, the Supreme Court held that instructing the jury in terms of the need to use deadly force, rather than to kill, could be appropriate if the evidence supported such an instruction. *Id.* at 182-83, 449 S.E.2d at 703. If the evidence was that the defendant intended to use deadly force to disable the victim but not to kill him, it would be appropriate to instruct in terms of the need to use deadly force, rather than the need to kill, and in terms of whether the amount of deadly force used was excessive under the circumstances. *Id.* at 183, 449 S.E.2d at 703. However, if the evidence showed an intent to kill rather than an intent to use deadly force, the trial court should instruct the jury in terms of the need to kill. *Id.*

We believe that the rule in *Watson* modifies this Court's holding in *Richardson*, even though Watson involved first and second-degree murder, and not just second-degree murder. Since second-degree murder was an option for the jury in *Watson*, we believe that *Watson* controls even in cases, such as the present case, where second-degree murder is the only murder instruction given.

In *Watson*, all the evidence showed that the defendant intended to kill the victim. *Id.* Thus, the Court held that the trial court properly charged the jury in terms of the defendant's belief in a need to kill. Likewise, in the present case, all the evidence shows an intent to kill Carlos. Howard was only two to three feet away when defendant shot him. Clearly, a shot to the neck from three feet at one who is unarmed gives rise to a compelling belief that defendant shot to kill, not disable. Accordingly, the trial court properly instructed on defendant's belief in the need to kill Howard.

II.

Defendant's next contention is that the trial court erred in denying his motion to dismiss on the ground of insufficient evidence in the Brittany James case. We disagree, as there was sufficient evidence to support defendant's conviction either on the theory that defendant

fired the 9mm gun that killed Brittany or on the theory that defendant acted in concert with Burton, who fired the 9mm gun. The evidence on these points has been set out above and need not be restated here.

III.

Defendant's final contention is that the trial court erred in not setting aside the verdict against him in the Carlos Howard case, because the two verdicts in that case were inconsistent. As stated above in section IX., this contention will not fly.

For the reasons stated, we find that defendants received a fair trial free from prejudicial error.

No error; motion for appropriate relief denied.

Judges GREENE and MARTIN, Mark D. concur.

THELMA LU MENDENHALL, PETITIONER-APPELLEE v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT-APPELLANT

No. 9410SC176

(Filed 1 August 1995)

Public Officers and Employees § 67 (NCI4th)— blind social worker—refusal to work with AIDS patient—no insubordination—dismissal improper

There were insufficient grounds to dismiss petitioner, a blind social worker, from her job on the ground of insubordination for refusing to provide hands-on training with sharp objects to a blind AIDS patient, since the request was not reasonable; petitioner's concerns were legitimate; her refusal was based on her fears for her health and employer's failure to provide her with training in the precautions and safeguards to follow when working with an AIDS patient; and her refusal was not willful.

Am Jur 2d, Civil Service § 63.

Appeal by respondent from order entered 10 November 1993 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 October 1994.

Attorney General Michael F. Easley, by Special Deputy Attorney General John R. Corne, for respondent appellant.

Patterson, Harkavy & Lawrence, by Martha A. Geer, for petitioner appellee.

COZORT, Judge.

Petitioner is a blind social worker who was terminated by the State Department of Human Resources in 1989 allegedly for insubordination. Petitioner refused a directive to provide hands-on training with sharp objects to a blind AIDS patient. The superior court ordered reinstatement of petitioner, holding there was insufficient evidence of insubordination. We affirm. The facts and procedural history follow.

In August of 1989, petitioner, who is legally blind, had been a social worker with the Division of Services for the Blind (DSB) in Guilford County for eleven years. DSB is a division of the North Carolina Department of Human Resources (DHR). Along with one other social worker, she was responsible for providing independent living services to blind and visually impaired clients of DSB for the purpose of assisting them to live independently. Clients were referred to petitioner and her coworker on an alternating basis. The skills taught by petitioner included housekeeping, cooking, grooming, and personal hygiene. Petitioner's blindness required her to use hands-on instruction with her clients.

The DSB procedure for servicing clients begins with the referral to a social worker. The next step after referral is for the social worker to conduct an initial interview within fifteen calendar days to determine the needs of the client and whether the client is eligible for the services. DSB does not require this initial interview to take place in person. It can be conducted by telephone, through the mail, or with a representative of the referral. Petitioner's usual practice, which was encouraged by her Regional Supervisor, Ms. Madge Davis, was to meet with the client in person.

Following the initial interview, the social worker can refer the client to a Resource Specialist (a state employee who provides specialized services) or an independent contract employee. Petitioner worked with two Resource Specialists, one who was a rehabilitation teacher and another who was an orientation and mobility instructor. Petitioner had access to only two contract instructors, a blind

instructor of braille and a teacher of arts and crafts. If none of these instructors accepted the referral, it was the responsibility of petitioner to provide the services requested.

On 24 July 1989, Moses Cone Hospital referred to DSB a prospective client known to be infected with Acquired Immune Deficiency Syndrome (AIDS). This individual had become blind due to the disease and wanted to learn braille, cooking, and grooming skills. The client was assigned to petitioner in the normal course of rotation. However, the client went on vacation during this period and was unavailable for the initial interview with petitioner.

Petitioner was uncomfortable with the assignment because she instructs by touch, and the services requested by the client would require the use of sharp objects. In a written memorandum to the DSB personnel manager, Mr. Gerald Hinson, dated 25 July 1989, petitioner requested a copy of the DSB AIDS policy. Having received no response by 1 August 1989, petitioner related her concerns to Ms. Davis, her supervisor, who informed petitioner that she would have to service the client the same as any other client. Ms. Davis spoke with the Chief of Independent Living Services, Ms. Sally Syria, on petitioner's behalf and was instructed to order petitioner to proceed with services.

Not satisfied with the delay in obtaining a written policy from DSB, petitioner traveled to the Regional Library for the Blind in Raleigh to educate herself on the subject of AIDS. Her research revealed that patients, such as the referral, who suffer blindness as a result of AIDS are in the most contagious, final stages of the disease. Petitioner informed the Regional Director of DSB, Mr. Stewart Vick, that she understood the client was entitled to services, but that she was concerned about the risks to her as a blind instructor. Vick said that he would inquire as to whether petitioner could be exempt. He ultimately recommended that she provide the services while avoiding any physical contact. This instruction was impossible for the blind petitioner to follow because the only way for her to instruct her clients was by touch.

On 14 August 1989 DSB finally responded to the request for an AIDS policy through a memorandum read to petitioner by Ms. Davis. Along with stating that a social worker would know the safeguards and precautions to take to avoid contracting AIDS, the memo stated:

> [Petitioner's] concerns are *understandable*, but a Social Worker does not have the right to deny services or the taking of an application for the reasons of fear of contact with an applicant who has been diagnosed as having a social disease. (Emphasis added)

The memo further informed petitioner that her refusal to serve the client, after having been given a directive to do so, was insubordination for which she could be dismissed from employment. Ms. Davis gave petitioner until 16 August 1989 to contact the client. Because the client had not designated a representative, the memo instructed petitioner to make contact directly with the client. Ms. Davis did not suggest alternative ways to obtain the information without direct contact with the client. Petitioner responded with a memo to Ms. Davis, dated 15 August 1989, in which she stated that she considered working with the client to be a health hazard.

After determining that petitioner was not going to perform the initial assessment, Ms. Davis and the Guilford County Local Liaison Supervisor, Ms. Pearline Thompson, visited the client's room at Moses Cone Hospital. Along with a hospital social worker, they obtained the necessary information for the application. The client requested assistance in learning food service skills, dishwashing, eating tool manipulation, cleaning teeth and nails, shaving, and reading and writing braille. Many of these skills required the use of sharp objects, and all of the instruction necessitated hands-on training by petitioner.

On 17 August 1989 petitioner contacted the North Carolina Department of Labor to determine whether or not an employer is required to furnish training and protection to its employees who provide services to AIDS patients. A Department of Labor representative informed petitioner that she could not be fired for refusing to serve an AIDS patient in the absence of proper training in AIDS prevention. That same day, one year and two months after the policies were promulgated and distributed by DHR, Ms. Davis delivered a copy of the DSB Universal Blood and Body Fluid Precautions to petitioner. Since the other social workers and clerks in the region did not have copies of the policy, Ms. Davis distributed it to the entire staff on 22 August 1989.

The policy dealt mainly with the precautions to take when handling blood and bodily fluids, tasks in which petitioner would not engage. The only relevance to petitioner was the directive to "take precautions to prevent injuries caused by needles and other sharp instruments." However, the policy made no mention of how a blind

social worker could prevent potentially dangerous contact. The precautions in the policy appeared to be directed at employees who have sight. The procedures were of little or no assistance to petitioner.

Mr. Vick ordered petitioner to complete the assessment, a service plan, and initiate services for the client no later than 1 September 1989. He provided gloves, a gown, and a mask for petitioner to use, but provided no instruction on their proper use. Petitioner had still not received any training in how to prevent the spread of AIDS while working with this client even though the Department of Labor had informed her that her employer was required to furnish such training. The Universal Blood and Body Fluid Precautions, an AIDS training seminar on 11 September 1987, and a communicable disease workshop on 11 October 1988 had not provided sufficient instruction for someone with petitioner's disability.

At this point, petitioner determined to file a grievance against DSB, under N.C. Gen. Stat. § 126-34, which provides that "[a]ny career State employee having a grievance arising out of . . . his employment . . . shall . . . follow the grievance procedure established by his department or agency." N.C. Gen. Stat. § 126-34 (1993). The DHR grievance procedure follows the three-step process suggested in the State Personnel Manual. Step 1 involves a review between the employee and her immediate supervisor. Step 2 is an appeal to the unit director. Grievances related to a dismissal shall be filed initially at step 2. Step 3 is an appeal to the Secretary of DHR.

On 1 September 1989 petitioner filed a step 2 grievance appeal contesting the written warning she had earlier received from Ms. Davis. In her request for relief, petitioner sought an "option of a viable workable personnel policy by DSB to protect the rights of employees as well as clients" and an "effective training program for employees who must provide services to individuals with contagious, infectious, communicable diseases." Petitioner's grievance was denied on 7 September 1989 on the ground that no formal disciplinary action had been taken against petitioner.

Mr. Vick, Ms. Davis, Ms. Thompson, and Mr. Hinson met with petitioner on 8 September 1989. Mr. Vick read to petitioner a letter immediately dismissing petitioner from employment for insubordination arising from her continued refusal to provide services to the AIDS client. Petitioner filed an Occupational Safety and Health Act complaint with the North Carolina Department of Labor on 11 September 1989, alleging that her termination was discrimination under

§ 95-130(8) of the North Carolina Occupational Safety and Health Act. The Department of Labor found that DSB policies and training were not adequate for a personal care provider; however, petitioner's claim was dismissed as being premature because she had not been forced to actually engage in hands-on service to the client. Petitioner filed another step 2 grievance appeal, this time challenging her dismissal, on 21 September 1989. The appeal was denied by Mr. Herman Gruber, Director of DSB, on 6 October 1989.

Petitioner initiated a step 3 grievance appeal with DHR on 19 October 1989. David T. Flaherty, Secretary of DHR, notified petitioner on 15 December 1989 that he was denying the grievance and upholding the dismissal. Petitioner then filed a Petition for Administrative Hearing with the Office of Administrative Hearings and the State Personnel Commission (SPC). Administrative Law Judge Beecher R. Gray conducted a hearing on 6 and 7 September 1990 and entered a decision on 21 February 1991 recommending that petitioner be reinstated. Judge Gray concluded that petitioner's termination was without just cause and that DSB violated N.C. Gen. Stat. § 168A-5(5) by failing to make a reasonable accommodation for petitioner's handicapping condition.

Contrary to the recommended decision, the full SPC issued a decision and order on 23 October 1991 upholding petitioner's dismissal as being for just cause and not discriminatory on the basis of her handicapping condition. Petitioner filed a Petition for Judicial Review on 22 November 1991. Superior Court Judge Narley L. Cashwell remanded the case to the SPC on 15 June 1992 on grounds that: (1) the SPC did not hear new evidence after receiving the ALJ's Recommended Decision; (2) the SPC's decision and order failed to state specific reasons for declining to adopt certain findings of fact made by the ALJ; and (3) the conclusions of law in the SPC's decision and order were not conclusions of law and were erroneous. After remand, the SPC again ordered on 18 February 1993 for the dismissal to be upheld.

Petitioner filed another Petition for Judicial Review on 11 March 1993, alleging: (1) that although the SPC refused to adopt the ALJ's Recommended Decision, it violated N.C. Gen. Stat. § 150B-51(a) by not providing specific reasons for its refusal to adopt the decision; (2) the SPC's decision was not supported by substantial evidence; (3) the SPC's decision was affected by error of law; (4) the SPC's decision was made upon unlawful procedure; and (5) the decision violated due

process and was arbitrary and capricious. Superior Court Judge Donald W. Stephens held a hearing on these matters on 8 October 1993. Judge Stephens signed an order on 9 November 1993 reversing the decision of the SPC. The court found that the evidence failed to show that DSB's request was reasonable and that petitioner's refusal to comply with her supervisor's request was willful. According to Judge Stephens, the evidence of record was insufficient to support a finding and conclusion of insubordination or just cause for the termination of petitioner. The order entitled petitioner to reinstatement, reimbursement for lost wages and benefits, and reimbursement for reasonable attorney fees and costs to be set by a separate order. DHR appeals from this order. Upon a review of the entire record, we affirm the order of the superior court reinstating petitioner.

The reviewing court may reverse or modify an agency's decision if the substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are unsupported by substantial evidence in view of the entire record as submitted. N.C. Gen. Stat. § 150B-51(b)(5) (1991). This standard, the "whole record" test, does not allow the reviewing court to replace the agency's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. *Crump v. Board of Education*, 79 N.C. App. 372, 374, 339 S.E.2d 483, 484, *disc. review denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). Only when there is no substantial evidence supporting administrative action should the court reverse an agency's ruling. Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

When an appellate court reviews the decision of a lower court (as opposed to reviewing an administrative agency's decision on direct appeal), the scope of review is the same as for other civil cases. *Henderson v. North Carolina Dept. of Human Resources*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988). However, this review also requires an examination of the entire record. *Id.* A review of the entire record in the present case reveals that the superior court did not err in ruling that there is not substantial evidence to support the termination of petitioner's employment on the basis of insubordination.

The State Employee's Handbook defines insubordination as the refusal to accept a reasonable and proper assignment from an authorized supervisor. *Urback v. East Carolina University*, 105 N.C. App. 605, 608, 414 S.E.2d 100, 102, *disc. review denied*, 331 N.C. 291, 417 S.E.2d 70 (1992). The reasonableness of the assignment must be determined in light of the relative circumstances existing at the time of the incident. *Employment Sec. Commission of North Carolina v. Lachman*, 305 N.C. 492, 506, 290 S.E.2d 616, 624-25 (1982). Insubordination also requires a determination that the refusal was willful. *Urback*, 105 N.C. App. at 608, 414 S.E.2d at 102.

The Supreme Court held in *Lachman* that outside considerations such as "broken equipment, ill health, unavailability of necessary materials, etc." are factors in determining whether the assignment was reasonable. *Lachman*, 305 N.C. at 506, 290 S.E.2d at 625. Likewise, in the present case, it is proper to consider factors such as the risk to petitioner in providing services to the AIDS client and petitioner's lack of training in precautions to take with an AIDS patient when determining whether the DSB assignment was reasonable.

There were numerous findings of fact in the SPC's decision and order stating possible risks that petitioner faced in servicing this particular client. Other findings revealed petitioner's lack of proper training. Among the findings of the ALJ adopted by the SPC that tend to show the assignment was not reasonable are: (1) "blindness occurs in the late, most contagious stages of AIDS;" (2) "the skills requested by the client involved the use of sharp objects, and therefore there was a risk that either petitioner or the client could be cut during the provision of services"; and (3) neither of the two DSB sessions relating to AIDS "presented information or demonstrations designed to inform sighted or blind personal care providers such as social workers of precautionary measures to be taken while working with AIDS clients." After adopting these findings of fact, the SPC cannot justify a finding that the DSB request was reasonable. Instead, the SPC should have also adopted the ALJ's conclusion that the request was not reasonable and that there were no grounds for insubordination.

Respondent argues that the request was reasonable because it only required the initial interview and no actual contact with the client. However, the manner in which the DSB officials posed the request to petitioner made it appear that her only choice was to conduct the assessment *and* begin teaching skills to the client. Mr. Vick specifically ordered petitioner not only to complete the assessment and service plan, but also to initiate services. Petitioner's reasonable

perception was that in order to satisfy this directive she would have to put her health at risk. Any reasonable person would have thought that the DSB directive included the initiation of full services, due to the language used by petitioner's superiors. Based on the risks involved to a blind social worker conducting hands-on training with sharp objects and a blind AIDS patient, the request was unreasonable.

Petitioner's refusal to service the client did not meet the second requirement for insubordination because it was not willful. The SPC should have considered petitioner's concerns and concluded that her refusal to act was not willful. In *Urback*, an air conditioning technician was terminated by East Carolina University when he refused to remove asbestos from a building. The SPC found Urback's fears to be "legitimate, genuine, and reasonable," but still upheld his termination. *Urback*, 105 N.C. App. at 608, 414 S.E.2d at 102. Even though the Department of Labor later found the assignment not to be dangerous, we ruled that the SPC erred in its view that Urback's perception of the safety of the job assignment was irrelevant. *Id.* The conduct of an employee cannot be labeled willful misconduct if it is determined that the employee's actions were reasonable and taken with good cause. *Id.* A ruling that despite the reasonableness of an employee's fears, their refusal to act nevertheless amounted to insubordination is clearly erroneous as a matter of law. *Id.*

The present case is similar to *Urback* in that conducting the initial assessment would not have been a dangerous assignment and not placed petitioner at risk. However, petitioner reasonably perceived that she was being required to provide full services to the client and that her health would be in jeopardy if she completed the request. Petitioner's fear of the risks involved in servicing a client with AIDS is documented by her oral and written communication with her superiors. Before taking any other action, petitioner requested a copy of the DSB policy for AIDS clients. After not receiving the policy, she informed Ms. Davis that she had reservations about working with an AIDS client. Petitioner relayed these same fears to Mr. Vick. Petitioner also protested her lack of training in the safeguards and precautions to follow when working with AIDS patients, but received no instruction in this area from DSB. Petitioner finally filed a grievance protesting the lack of a DSB policy and the health risk posed to her by servicing the client.

Petitioner's fears were not solely based on her personal beliefs about AIDS. She spent a considerable amount of time educating her-

self on the disease. Petitioner traveled to the Regional Library for the Blind in Raleigh, researched AIDS, and discovered that AIDS patients such as the client were in the most contagious stage of the disease. She also contacted the North Carolina Department of Labor regarding her concerns. A representative advised her that it would be hazardous for her to give hands-on training to a blind person with AIDS. Petitioner was also assured that she would not lose her job for refusing to service the client. Petitioner's efforts to educate herself on AIDS reveal that her fears were legitimate, genuine, and reasonable, much like the employee in *Urback*. Her superiors even recognized that petitioner's "concerns [were] understandable." As in *Urback*, it is erroneous as a matter of law to find that petitioner's refusal to act was willful and amounted to insubordination.

Petitioner never initiated services because she did not know how to approach the client. She could not turn to the resource specialists because one was pregnant and the other was not qualified to teach the independent living skills requested by the client. Further, the contract instructors provided only limited services and one of them, due to his own blindness, was in no better position than petitioner to work with the client. Petitioner was willing to service the client as long as she received assurance from DSB that a sighted employee would perform the hands-on training. Without this assurance, petitioner's refusal to provide services cannot be termed willful and therefore was not insubordination. Her actions were reasonable under the circumstances, taken with good cause, and satisfied the standard set forth in *Urback*.

The decision of the trial court is affirmed because the DSB request was not reasonable and petitioner's actions were not willful. Accordingly, there were not sufficient grounds to dismiss petitioner on the basis of insubordination. The case is remanded to Wake County Superior Court for the entry of further orders for reimbursement for reasonable attorney fees and costs.

Affirmed and remanded for entry of further orders.

Chief Judge ARNOLD and Judge LEWIS concur.

IN RE STRADFORD

[119 N.C. App. 654 (1995)]

IN THE MATTER OF: JOHNNY STRADFORD

No. COA94-870

(Filed 1 August 1995)

Constitutional Law § 342 (NCI4th)— sexual abuse of children—remote testimony of victims admissible

At an adjudicatory hearing on two juvenile petitions alleging first-degree rape and first-degree sex offense, defendant's federal and state rights of confrontation were not violated when the trial court authorized the remote testimony by closed circuit television of the child witnesses who, according to their clinical therapist, would be further traumatized by a face-to-face confrontation with defendant, since the witnesses testified under oath, were subject to full cross-examination, and were able to be observed by the judge and defendant as they testified.

Am Jur 2d, Criminal Law §§ 692 et seq., 901 et seq.

Condition interfering with accused's view of witness as violation of right of confrontation. 19 ALR4th 1286.

Federal constitutional right to confront witnesses—Supreme Court cases. 98 L. Ed. 2d 1115.

Judge GREENE concurring.

Appeal by defendant from order entered 29 April 1994 by Judge William G. Jones in Mecklenburg County District Court. Heard in the Court of Appeals 9 May 1995.

Attorney General Michael F. Easley, by Investigative Law Clerk Paula A. Bridges and Associate Attorney General Carol K. Barnhill, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

JOHNSON, Judge.

On 17 September 1993, two juvenile petitions were filed pursuant to North Carolina General Statutes § 7A-517(12) (Cum. Supp. 1994) alleging that defendant Johnny Stradford committed one count of

first degree rape and one count of first degree sex offense against A., a six-year-old minor child, and one count of first degree rape and one count of first degree sex offense against B., a seven-year-old minor child.

The evidence at the adjudicatory hearing showed the following: A. testified that defendant, who was her babysitter, took her into a bathroom, made her lie down on the floor, and put "his thing that he pees with" in her. B. testified that defendant took her to a bathroom, pulled down her skirt, and put his "private" in hers. B. also observed defendant doing something to A. under the bed covers.

On approximately 3 August 1993, the girls told their stepmother, Sonya Stansbury, what defendant had done to them. B. was hesitant to talk about what had happened, and cried and became withdrawn as she told her stepmother about the incident. The day after the girls told their stepmother about the abuse, Ms. Stansbury contacted Dr. Lucy Downey, a pediatrician at Haywood Pediatrics.

After being qualified as an expert witness, Dr. Downey testified that she performed vaginal and rectal examinations on both girls. Dr. Downey found B.'s vaginal examination to be abnormal. B.'s anal opening was also irregular. Based on her examination, Dr. Downey was of the opinion that B.'s vagina and anus had been penetrated. Although sexual abuse was not confirmed, the findings were consistent with sexual contact, including penetration. The findings were also consistent with the history received from Ms. Stansbury. A.'s vaginal exam was also abnormal and indicated the possibility of sexual contact. Dr. Downey was unable to perform a thorough rectal examination of A. Dr. Downey was unable to form an opinion whether penetration of A.'s vagina and anus had occurred.

A Mecklenburg County Child Protective Services worker, Joy Burris, testified that on 9 June 1993, she responded to a call to investigate unsupervised children at the Cricket Inn on Nations Ford Road. Upon arriving at the Cricket Inn, Ms. Burris discovered five children, including A. and B., in a room attended by fifteen year old Itreon Stradford. That afternoon, Ms. Burris spoke to A. and B. who told her that their babysitters were Itreon and defendant, who had been caring for them for a couple of days. The girls also told Ms. Burris that Itreon and defendant were living in the hotel room.

Officer Donna Browning, a member of the Youth Bureau Investigations unit of the Charlotte Police Department, testified that

she became involved in the case when the Department of Social Services made a referral. Officer Browning assisted Ms. Burris in a criminal investigation of the child neglect of A., B., and another child. As part of the investigation, Officer Browning interviewed defendant; Officer Browning testified that she asked defendant if he was playing around with A. and B., "and he replied the boys were playing with [A. and B.] by pulling down their panties before." He also indicated that he had babysat the children for "about a month." Defendant denied touching either girl's private parts, and denied putting his penis into either girl's private parts. Defendant also denied that anyone else had touched the girls.

Defendant was adjudicated delinquent on two counts of first degree rape. Two counts of first degree sexual assault were dismissed. Defendant has appealed to our Court.

Defendant first argues on appeal that the trial court had no authority to authorize a procedure where the complainant testified out of the presence of defendant. Prior to the hearing, the State had moved that the trial court permit A. and B. to testify via a closed circuit television due to the girls' probable inability to communicate if forced to testify in defendant's presence. Following an evidentiary hearing on the motion, the trial court granted the State's motion. Defendant argues that there is no express or implied authority for the trial court to employ the procedure used in the instant case, namely, remote testimony. Citing North Carolina General Statutes § 7A-629 (1989) (juvenile adjudications to be conducted in open court) and North Carolina General Statues § 15-166 (1983) (defendant may not be excluded from closed courtroom), defendant argues that "[t]he proper place for a debate on the advantages, disadvantages, and [guidelines] for remote testimony is in the legislative chamber. As a matter of state constitutional law, and public policy, the trial court exceeded its authority in making the determination here that such a procedure be followed in this case." Defendant also makes an argument that the remote testimony procedure denied defendant his state and federal rights to confront the witness against him.

The State argues that pursuant to North Carolina General Statutes § 8C-1, Rule 611(a) (1992), the court is authorized to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth. . . ." Noting that our courts have systematically recognized that special

exceptions to general courtroom procedures are often required to more effectively question child witnesses in sexual abuse cases, *e.g.*, *State v. Stanley*, 310 N.C. 353, 312 S.E.2d 482 (1984) and *State v. Brice*, 320 N.C. 119, 357 S.E.2d 353 (1987), the State argues that the trial court had absolute authority to authorize the remote testimony of the child witnesses. The State notes that other states have statutory law allowing this procedure. The State also argues that examination of the child witnesses out of defendant's physical presence did not abridge defendant's federal or state constitutional right to confront the witnesses against him. The State submits that *Maryland v. Craig*, 497 U.S. 836, 111 L.Ed.2d 666 (1990) addressed this precise issue.

In *Maryland v. Craig*, the Supreme Court addressed the constitutionality of a Maryland statute which allowed a child victim in a sexual abuse case to testify outside of the defendant's presence by a one-way closed circuit television. The Court reasoned that this was proper:

> [W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

Craig, 497 U.S. at 857, 111 L.Ed.2d at 686. The *Craig* Court went on to state that before this type of testimony will be allowed, the following must be met:

> The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Finally, the trial court must find that

> the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than "mere nervousness or excitement or some reluctance to testify[.]" (Citations omitted.)

Id. at 855-56, 111 L.Ed.2d at 685. Defendant, while recognizing *Craig v. Maryland*, asserts that "[o]ur state constitutional right to confront one's accusers is broader than the corresponding right under the Sixth Amendment to the U.S. Constitution." Defendant cites *State v. Moss*, 332 N.C. 65, 73-74, 418 S.E.2d 213, 218 (1992) (*quoting State v. Blackwelder*, 61 N.C. 38, 40 (1866) (our confrontation right is a right which "ought to be kept forever sacred and inviolate") and *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969) (our confrontation clause requires "that the witness must be present before the triers of fact and the accused so that they are 'put face to face' ") in making this argument.

Although this particular issue of remote testimony has not been previously addressed in our state, we find *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988) instructive. In *Jones*, an expert witness testified that the child victim in a sexual abuse case exhibited an intense fear of the defendant and could suffer emotional harm if forced to testify in his presence. The trial judge ordered the defendant excluded from the courtroom during the questioning of the child. The defendant was able to view the child and hear her responses by one-way closed circuit television, and the defense attorney, who was in the courtroom with the child, was allowed to cross-examine the child and confer with the defendant, who was in the judge's chambers. Our Court held on appeal that the defendant's exclusion from the courtroom did not violate his constitutional right to confront the witnesses against him. The Court reasoned that "the trial court's use of a closed circuit television and its act of providing defendant and his attorney adequate opportunity to communicate during the victim's testimony, were sufficient to permit defendant to hear the evidence and refute it." *Id.* at 588, 367 S.E.2d at 142.

We believe, on the facts of the instant case, the trial court properly authorized the remote testimony of the child witnesses. We believe that "despite the absence of face-to-face confrontation . . . [the remote testimony preserved] the essence of effective communication." We note, in the instant case, that the child witnesses testified under oath, were subject to full cross-examination, and were able to be observed by the judge and defend-

ant as they testified. As such, and *on these facts*, we believe the trial court properly exercised its discretion in authorizing this method of testifying, and did not deny defendant his state and federal rights to confront the witnesses against him.

Alternatively, defendant argues that the trial court's findings were insufficient under both the federal and state constitutions in that the court's finding that the children would be traumatized by defendant was without proper evidentiary support. We have reviewed the testimony presented at the adjudicatory hearing from Rita Newkirk, the girls' clinical therapist. Based on Ms. Newkirk's training and experience, and her therapy sessions with A. and B, Ms. Newkirk testified that it would be "further traumatizing" if A. and B. were subject to face-to-face confrontations with defendant. We find, after reviewing Ms. Newkirk's entire testimony, that her testimony provided adequate support for the trial court's decision to authorize the use of remote testimony.

Finally, defendant argues that the trial court erred in not disclosing to defendant material collected on the child witnesses by the Department of Social Services. The trial court conducted an *in camera* review of these records and found that there was nothing therein which defendant was entitled to use to defend himself. Defendant requests that our Court review these sealed documents. *See State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293, *cert. denied*, 501 U.S. 1208, 115 L.Ed.2d 977 (1991). We have reviewed those sealed documents and have found no documents of material benefit to defendant. This argument is overruled.

No error.

Judge MARTIN, JOHN C. concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurring

Although I join the majority opinion, I write separately because I believe there are two issues that deserve some elaboration. Those issues are: (I) whether, in the absence of a statute, a trial court has the authority to permit a child witness to testify via closed circuit television; and if so, (II) whether the use of such procedure violates the defendant's state constitutional right to confront his accusers.

I

In North Carolina, contrary to the situation that existed in Maryland at the time of *Maryland v. Craig*, 497 U.S. 836, 111 L. Ed. 2d 666 (1990), there does not exist a specific statute that authorizes the trial judge to permit the use of closed circuit television to present the testimony of a child witness. North Carolina is in the minority in this respect as at least thirty-four states have, like Maryland, adopted statutes permitting the use of closed circuit television in this instance. National Center for Prosecution of Child Abuse, *Legislation Regarding the Use of Closed Circuit Television Testimony in Criminal Child Abuse Proceedings* (1994). The defendant therefore argues that the trial court exceeded its authority in permitting the state to present the testimony of the child witness via closed circuit television. I disagree.

Although there is no specific statute on point, the legislature has provided that the trial court is to "exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment." N.C.G.S. § 8C-1, Rule 611(a) (1992). This statutory language is sufficiently broad to vest the trial court with the discretion to permit a party to utilize closed circuit television for the presentation of the testimony of a child witness. In any event, it would appear that the use of this procedure is within the inherent power of the trial court and indeed, courts in other states have so held. *See In re Mental Health Center*, 42 N.C. App. 292, 296, 256 S.E. 2d 818, 821 (court has inherent power to take action necessary to "fulfill their assigned mission of administering justice efficiently and promptly"), *disc. rev. denied*, 298 N.C. 297, 259 S.E.2d 298 (1979); *see also In Re Will of Hester*, 320 N.C. 738, 741, 360 S.E.2d 801, 804 (defining inherent power to include "board discretionary power sufficient to meet the circumstances of each case"), *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987); *Hicks-Bey v. United States*, 649 A.2d 569, 574-75 (D.C. App. 1994) (trial court had inherent authority to permit a child sex abuse victim to testify via closed circuit television).

II

The North Carolina Constitution provides that a person charged in a criminal prosecution has the right "to confront the accusers and witnesses with other testimony." N.C. Const. art. I, § 23. The defendant argues that this language grants him greater rights than the Court

in *Maryland v. Craig* granted under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. I disagree.

The Sixth Amendment provides that the accused in a criminal prosecution has the "right to be confronted with the witnesses against him." The language in both instruments is similar. Nonetheless, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). Therefore, it does not necessarily follow that Article I, § 23 must be construed to mean that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial." *Craig*, 497 U.S. at 850, 111 L. Ed. 2d at 682. That construction, however, is proper and indeed consistent with previous opinions from this Court and our Supreme Court permitting the use of hearsay testimony in criminal trials where the defendant was denied the right to a face-to-face confrontation with the person making the out-of-court statement. *E.g.*, *State v. Deanes*, 323 N.C. 508, 525, 374 S.E.2d 249, 260 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989); *State v. Rogers*, 109 N.C. App. 491, 499, 428 S.E.2d 220, 225, *disc. rev. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, — U.S. —, 128 L. Ed. 2d 54, *reh'g denied*, — U.S. —, 128 L. Ed. 2d 495 (1994). To construe Article I, § 23 otherwise would "prohibit the admission of any accusatory hearsay statement made by an absent declarant—a declarant who is undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial." *Craig*, 497 U.S. at 849, 111 L. Ed. 2d at 680-81. Accordingly, the construction placed on the Sixth Amendment Confrontation Clause in the *Craig* decision is equally applicable to the Confrontation Clause of Article I, § 23 of the North Carolina Constitution. *See State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969) (provisions are similar and grant "accused [the] same protection").

STATE OF NORTH CAROLINA v. ROBERT EARL SPENCER

No. 9426SC345

(Filed 1 August 1995)

Evidence and Witnesses § 1763 (NCI4th)— plethysmograph test—lack of reliability—psychologist's opinion based on test properly excluded

In a prosecution of defendant for first-degree sexual offense and taking indecent liberties with a minor, the trial court did not abuse its discretion in excluding the opinion testimony of a clinical psychologist who specialized in sexual dysfunction concerning the likelihood that defendant committed the offenses charged to the extent that the testimony was based on the results of a penile plethysmograph, in view of the lack of general acceptance of the test's validity and utility and therefore its reliability for forensic purposes in the scientific community.

Am Jur 2d, Expert and Opinion Evidence § 227.

Appeal by defendant from judgments entered 5 November 1993 by Judge William H. Freeman in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 January 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Ellen B. Scouten, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery for defendant-appellant.

MARTIN, John C., Judge.

Defendant was indicted for first degree sexual offense, a violation of G.S. § 14-27.4(a)(1), and taking indecent liberties with a child, a violation of G.S. § 14-202.1. He entered pleas of not guilty. A detailed recitation of the evidence is unnecessary to our determination of the issues presented by this appeal. In summary, the State presented evidence tending to show that on several occasions during the period from September 1992 until February 1993, defendant engaged in sexual activity, including fellatio, masturbation, and genital touching, with K.B., his five-year-old stepdaughter, while her mother was at work. K.B. told her older sister about these activities in February

1993 and an investigation ensued which led to the present charges against defendant.

Defendant testified that he had spanked K.B. on occasion for disciplinary reasons, that K.B. had come into his bedroom on a couple of occasions, that she had once seen him while he was showering, and that she had an active imagination. He denied, however, any sexual activity with K.B. Defendant also offered the testimony of Dr. Eugenia Gullick, a clinical psychologist specializing in sexual dysfunction, with respect to her opinions based upon a penile plethysmograph test administered to defendant. After a *voir dire*, the trial court sustained the State's objection to Dr. Gullick's opinion testimony to the extent such opinions were based on the penile plethysmograph test, but indicated that Dr. Gullick would be permitted to testify as to any opinions which were not based on the plethysmograph. Defendant declined to offer any further testimony by Dr. Gullick.

Defendant was convicted by the jury. He appeals from judgments entered on the verdicts.

In this case, the record on appeal contains fourteen assignments of error; only four of those assignments of error are presented and discussed in defendant's brief. "Questions raised by assignments of error but not presented and discussed in a party's brief are deemed abandoned." *State v. Wilson*, 289 N.C. 531, 535, 223 S.E.2d 311, 313 (1976), *citing* N.C.R. App. P. 28. Defendant's remaining assignments of error are therefore deemed abandoned. N.C.R. App. P. 28(a); *In re Appeal from Environmental Management Comm.*, 80 N.C. App. 1, 341 S.E.2d 588, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 139 (1986).

I.

The primary issue presented by this appeal involves the exclusion of Dr. Gullick's testimony regarding her opinions which were based, at least in part, upon an evaluation of defendant with an instrument known as a penile plethysmograph. Had she been permitted to do so, Dr. Gullick would have testified to her opinion, based upon a personal interview of defendant, standardized psychological testing, and the plethysmograph testing, that although defendant has significant psychological problems, there was no evidence of his being sexually aroused by prepubescent children and the plethysmograph showed an "essentially . . . normal arousal pattern." Defendant sought to establish, by this testimony, that he did not exhibit characteristics

commonly associated with persons who are likely to commit sexual crimes against children, and therefore, it was less likely that he committed the acts charged in this case. After a lengthy *voir dire*, the trial court sustained the State's objection to the testimony, insofar as it was based on the results of the plethysmograph, but indicated that Dr. Gullick would be permitted to state her opinion to the extent it was based on factors other than the plethysmograph. The trial court determined that the instrument was of questionable reliability; that the testimony was not relevant; and that even if relevant, its probative value was outweighed by its prejudicial effect.

The question of the admissibility of an expert witness' opinion testimony based on the results of penile plethysmograph testing has never been directly addressed by the appellate courts of this State. *See State v. McKinney*, 110 N.C. App. 365, 430 S.E.2d 300 (1993). In North Carolina, a qualified expert (the State does not dispute Dr. Gullick's qualifications as an expert clinical psychologist specializing in sexual dysfunction) may give opinion testimony on scientific matters if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 702 (1992). The expert may base his opinion on matters or data "perceived by or made known to him at or before the hearing", and the data itself need not be independently admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . ." N.C. Gen. Stat. § 8C-1, Rule 703 (1992).

Implicit in these rules is the precondition that the matters or data upon which the expert bases his opinion be recognized in the scientific community as sufficiently reliable and relevant. *See Daubert v. Merrell Dow*, 509 U.S. —, 125 L.Ed.2d 469 (1993); *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984); N.C. Gen. Stat. § 8C-1, Rule 703 (1992). Whether scientific opinion evidence is sufficiently reliable and relevant is a matter entrusted to the sound discretion of the trial court. *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985), *disc. review denied*, 316 N.C. 380, 344 S.E.2d 1 (1986). "Reliability of a scientific procedure is usually established by expert testimony, and the acceptance of experts within the field is one index, though not the exclusive index, of reliability." *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990). Generally, our courts have focused on the following indicia of reliability: (1) the expert's professional background in the field; (2) the use of visual aids before the jury so that the jury is not asked "to sacrifice its independence by accepting [the]

scientific hypotheses on faith"; and (3) independent research conducted by the expert. *Id.* at 98, 393 S.E.2d at 853, *quoting Bullard,* 312 N.C. at 150-51, 322 S.E.2d at 382.

At the *voir dire* hearing, Dr. Gullick testified that she utilizes penile plethysmograph testing as a part of her assessment of the sexual arousal patterns of her patients. She explained the operation of the instrument:

> The penile plethysmograph attempts to measure physiological indications of sexual arousal in response to particular stimulus materials. The individual is placed in a room and a mercury strain gauge is placed around the penis so that the circumference of the penis can be measured. And this mercury strain gauge is capable of measuring slight increases in circumference, many times before they are noticeable to the man himself.
>
> The individual is then presented with sequential stimulus materials, auditory and visual, encouraging him to think about and look at materials indicative of sexual activity with different ages of people, different genders and different sexual activities.

Dr. Gullick remarked that the plethysmograph has been extensively studied and recently shown to be ninety-five percent accurate in discriminating between individuals "who had committed sexual offenses against children and a control group that was randomly drawn from the population." Finally, she distinguished between the plethysmograph and the polygraph:

> The plethysmograph . . . directly measures the outside evidence of sexual arousal. We know, it's established throughout the literature that when a man becomes sexually aroused, there is engorgement of the penis. It's a one-to-one relationship.
>
> In a polygraph, galvanic skin responses are measured, and we have to make a leap of logic to think that galvanic skin response is related to anxiety, and therefore truthfulness. And it is that jump in logic that leads to a lack of reliability at times with that instrument . . . .
>
> We know when the penis becomes engorged, we are measuring sexual arousal. So it's much more akin to say blood pressure measurement.

The State's expert witness, Dr. Michael Tyson, was a clinical and forensic psychologist specializing in the field of sexual criminal behavior. He testified that he was familiar with the plethysmograph through his studies in behavior therapy and had read literature on the test and discussed it with other psychologists, although he did not use the instrument in his practice. Dr. Tyson testified that it was generally accepted in the mental health community by both proponents and opponents of the plethysmograph "that the plethysmograph data does not give any evidence that is useful in determining whether an individual did or did not commit a specific act." He explained that while he agreed with Dr. Gullick that the plethysmograph accurately measures the engorgement of blood to the penis, there is substantial disagreement as to the extent to which the penile response is subject to voluntary control and as to whether the penile response as measured by the plethysmograph can then be generalized to anything else pertaining to sexual behavior. Dr. Tyson testified that the fact that the plethysmograph does not show evidence of sexual arousal when a subject is shown stimulus materials involving children does not lead to a valid conclusion that the person will not engage in sexual activities with children. He stated that the vast majority of individuals who commit sexual offenses against children are not sexually aroused by stimulus material involving children; "their primary sexual orientation is to adults and they molest children by fantasizing that they are engaging in relationships with appropriate sex partners." In Dr. Tyson's opinion, the plethysmograph has "very limited forensic utility", "the forensic validity of the instrument is highly suspect", and "the utility of what it [the plethysmograph] shows is highly questionable and the possibility of misleading the trier of fact or the jury is very high, dangerously high . . . ."

We agree with the trial court that the evidence before it by no means established the reliability of the plethysmograph; there is a substantial difference of opinion within the scientific community regarding the plethysmograph's reliability to measure sexual deviancy. *See e.g.*, Barker and Howell, *The Plethysmograph: A Review of Recent Literature*, 20 Bull. Am. Acad. of Psychiatry and Law 13 (1992) (identifying several problems with the reliability of the plethysmograph, namely "lack of standards for training and interpretation of data, lack of norms and standardization and susceptibility of the data to false negatives and false positives," and concluding that "despite the sophistication of the current equipment technology, a question remains whether the information emitted is a valid and reli-

able means of assessing sexual preference"); *see also*, Myers, et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 134-35 (1989) (stating that a problem with the reliability of penile plethysmograph testing is that penile response is subject to voluntary control, and the test should not be used to determine whether or not an individual has engaged in deviant behavior). Other jurisdictions have also found the plethysmograph unreliable as a measure of sexual deviancy. *See e.g., Gentry v. State*, 213 Ga.App. 24, 443 S.E.2d 667 (1994); *In the Interest of A.V.*, 849 S.W.2d 393 (Tex.App. 1993); *Cooke v. Naylor*, 573 A.2d 376 (Me. 1990); *Nelson v. Jones*, 781 P.2d 964 (Alaska 1989), *cert. denied*, 498 U.S. 810, 112 L.Ed.2d 20 (1990); *Dutchess County Dept. of Social Services on behalf of T.G. v. Mr. G.*, 141 Misc.2d 641, 534 N.Y.S.2d 64 (1988); *People v. John W.*, 185 Cal.App.3d 801, 229 Cal.Rptr. 783 (1986).

Nevertheless, defendant contends Dr. Gullick's testimony should have been admitted because "the admission of controversial scientific evidence is especially prevalent in cases of child sexual abuse." By way of example, she cites several cases where the use of anatomical dolls by a child witness has been approved and where opinion testimony on "syndromes" or "profiles" has been permitted. Defendant's argument is without merit. In allowing children to testify using anatomically correct dolls, both this Court and the North Carolina Supreme Court have not classified the dolls as scientific evidence and thus, they do not have to satisfy the reliability standard under the North Carolina Rules of Evidence as the plethysmograph does. Indeed, the North Carolina Supreme Court in *State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988), likened the use of dolls to "the use of photographs and other items to illustrate testimony." With regard to opinion testimony on syndromes or profiles thought to be consistent with sexual abuse, our appellate courts have found such testimony to be proper subject matter for expert testimony only after much scrutiny and sufficient recognition in the scientific community, and have imposed strict limitations on its use. *See State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992).

In the present case, plethysmograph testing formed the basis for Dr. Gullick's opinion that defendant was not sexually aroused by children, thereby making it less likely that he committed the acts charged. In view of the lack of general acceptance of the plethysmograph's validity and utility and therefore, its reliability for forensic purposes in the scientific community in which it is employed, we hold

that the trial court did not abuse its discretion in finding defendant's plethysmograph testing data insufficiently reliable to provide a basis for the opinion testimony which defendant sought to elicit from Dr. Gullick.

Moreover, for evidence to be admissible, it must be relevant. N.C. Gen. Stat. § 8C-1, Rule 402 (1992). "The test of relevancy of evidence is whether it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987), *quoting* N.C. Gen. Stat. § 8C-1, Rule 401 (1986). In view of the evidence before the trial court tending to show that a lack of penile response to sexual stimuli involving children is not probative of one's guilt or innocence of child sexual abuse, we question, without deciding, the relevance of Dr. Gullick's testimony, but agree with the trial court that any probative value it may have had was substantially outweighed by the risk that the testimony could mislead the jury, confuse the issues, and suggest a decision on an improper basis, i.e., the results of the test itself. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (1992); *Hall, supra; State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985). Thus, we hold that the trial court did not abuse its discretion in excluding Dr. Gullick's opinion testimony to the extent it was based on the results of the plethysmograph. This assignment of error is overruled.

II.

Defendant subpoenaed certain records compiled by the Department of Social Services pertaining to K.B., which were reviewed *in camera* by the trial court. Portions of the DSS file had been previously provided to defendant's counsel; the trial court found that the remaining records contained no exculpatory information to which defendant was entitled. The records were sealed by order of the trial court and transmitted to this Court for our review. *See State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988). After careful review, we agree with the trial court that all of the records relevant to the case were made available to defendant, and that the remaining records contained no information material to his defense.

III.

Defendant's final two assignments of error relate to the trial court's instructions to the jury. By assignment of error number thirteen, defendant contends the trial court's instruction with respect to

the elements of the offense of taking indecent liberties with a minor deprived him of a unanimous verdict because the jury was not required to agree unanimously as to which act, of a number of acts proscribed by G.S. § 14-202.1, was committed by defendant. The question has not been preserved for review by timely objection to the instruction, N.C.R. App. P. 10(b)(2), or by an assertion of "plain error," N.C.R. App. P. 10(c)(4). In any event, the issue has been decided adversely to defendant by our Supreme Court in *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990).

We have also carefully considered, and find no merit in, the contention advanced by defendant in his assignment of error number fourteen that the trial judge impermissibly expressed his opinion as to the sufficiency of the evidence to convict when he responded to a question by the jury. The trial court's response was a correct statement of the law and cannot reasonably be construed as an expression of opinion by the court.

Defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge ARNOLD and Judge WYNN concur.

SOUTHMINSTER, INC., PLAINTIFF v. BETSY Y. JUSTUS, SECRETARY, STATE OF NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

DAVIDSON RETIREMENT COMMUNITY, INC., PLAINTIFF v. BETSY Y. JUSTUS, SECRETARY, STATE OF NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA94-763

(Filed 1 August 1995)

Taxation § 30 (NCI4th)— homes for elderly—catering to affluent population—homes as charitable institutions

The trial court erred in concluding that plaintiffs were not charitable organizations within the meaning of N.C.G.S. § 105-164.14(b) so as to qualify for refunds of sales and use taxes where plaintiffs operated homes for the elderly which required entrance fees and monthly service fees, since the natural and ordinary meaning of "charitable" is sufficiently broad to include

aid and assistance provided for the elderly or infirm without regard to individual poverty, and the concept of charity is not confined to the relief of the needy and destitute.

Am Jur 2d, State and Local Taxation § 387.

Appeal by plaintiffs and defendant from judgment entered 29 March 1994 by Judge Shirley L. Fulton in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 April 1995.

Robinson, Bradshaw & Hinson, P.A., by Russell M. Robinson, II, Louis A. Bledsoe, III, and J. Stephen Dockery, III, for plaintiffs.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Reginald L. Watkins and Special Deputy Attorney General George W. Boylan, for defendant.

MARTIN, John C., Judge.

Plaintiffs are religiously affiliated, non-profit corporations operating continuing care facilities for the elderly. Plaintiffs commenced these actions to obtain refunds, pursuant to the provisions of G.S. § 105-164.14(b), of sales and use taxes paid by them. Defendant denied plaintiffs' entitlement to the exemption on the grounds plaintiffs are not charitable or religious institutions within the meaning of the statute. The cases were consolidated and heard by the trial court in a bench trial.

The evidence at trial, most of which was stipulated by the parties, tended to show the following: Plaintiff Davidson Retirement Community, Inc., ("The Pines"), was incorporated in 1983 for the purpose of funding and operating a nonprofit home providing health care and assistance in living to the elderly and infirm. The Pines was founded by and is affiliated with the Davidson College Presbyterian Church in Davidson. Plaintiff Southminster, Inc., ("Southminster"), was organized as a nonprofit corporation in 1984 for the express purpose of providing "a residential environment in which older people may live as independently and as actively as their faculties and strength permit, secure in the knowledge that support is available when and as it may be needed." Southminster was created by the joint effort of Myers Park Baptist Church and Christ Episcopal Church in Charlotte, and Southminster has maintained its affiliation with these churches to the present.

The Internal Revenue Service ("IRS") and the North Carolina Department of Revenue have determined that both plaintiffs are non-profit, charitable organizations exempt from federal and state corporate income taxes and state franchise taxes. Plaintiffs are also both exempt from local property taxes as qualifying homes for the aged. G.S. § 105-164.14(b) provides that sales and use taxes must be refunded to "churches, orphanages and other charitable or religious institutions and organizations not operated for profit . . . ." In 1984, the Sales and Use Tax Division of the North Carolina Department of Revenue changed its interpretation of "charitable institutions" under G.S. § 105-164.14(b) to exclude institutions similar to plaintiffs from exemption. The change in policy came as a result of two decisions of this Court upholding determinations by the Property Tax Commission that non-profit homes for the elderly operated similarly to plaintiffs' did not qualify for the charitable purpose exemption from *ad valorem* taxes. *See In re Appeal of Barham*, 70 N.C. App. 236, 319 S.E.2d 657, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 921 (1984); *In re Chapel Hill Residential Retirement Center*, 60 N.C. App. 294, 299 S.E.2d 782, *disc. review denied*, 308 N.C. 386, 302 S.E.2d 249 (1983). The Pines was denied refunds for its sales and use taxes beginning in 1985, while Southminster was denied refunds beginning in 1987.

Both plaintiffs' facilities consist of independent living units, common living units, and health care centers. The Pines opened in 1988, and currently maintains 204 independent and common units with 60 beds in its health care facility. Southminster opened in 1987, and has 196 independent and common living units with 80 beds maintained in its health care center. Plaintiffs received their initial funding for construction from charitable donations and public revenue bonds issued by the North Carolina Medical Care Commission, and plaintiffs continue to receive charitable donations.

Plaintiffs also charge entrance fees and monthly service fees to their residents, with the amount of the fees determined by a resident's choice of living accommodations. The entrance fees at The Pines range from $35,800 for a small efficiency apartment to $115,500 for a large cottage, while the monthly service fees for such accommodations range from $976 to $1,524. This monthly fee is increased by approximately fifty percent if two individuals occupy a unit. Southminster has entrance fees ranging from $30,900 to $162,500 for accommodations similar to those at The Pines, with monthly service fees from $1,000 to $1,350 plus an additional $715 for an additional

occupant. These fees collected by The Pines and Southminster cover, respectively, ninety-six percent and eighty-six percent of plaintiffs' operating expenses.

The average annual income of the residents who had reserved accommodations at The Pines as of 29 August 1988 was $43,000 while their average net worth was approximately $444,000. As of 13 November 1985, over eighty-eight percent of residents reserving a living unit at Southminster reported net worths over $200,000, while sixty-three percent had net worths over $350,000. Over fifty percent of those reserving accommodations at Southminster reported annual incomes over $40,000. Plaintiffs' residents who do not have high net worths and/or annual incomes are generally able to meet the entrance fee and monthly service fees by selling their homes upon entering The Pines or Southminster.

Plaintiffs' contracts with their residents authorize the removal of residents who are unable to meet their financial obligations to plaintiffs; however, it is not the policy of either plaintiff to terminate any resident's occupancy based on an inability to pay. To that end, Southminster created a nonprofit corporation, Southminster Endowment, Inc., and The Pines created a separate deposit account, the Resident Support Fund. These funds receive charitable donations and are plaintiffs' top fundraising priorities. If circumstances require special consideration of a prospective or current resident's ability to pay the entrance or monthly fees, these funds may be used to subsidize part or all of the fees in question. To date, Southminster Endowment, Inc., has financially assisted three residents in meeting the costs of the entrance fee, and nine residents in making their monthly service payments. There has yet to be any assistance provided to a prospective or current resident from The Pines' Resident Support Fund.

There was also evidence that since 1984, defendant had denied refunds for sales and use taxes to six similar institutions, while at the same time granting refunds to five similar institutions. Defendant's enforcement policy is to thoroughly examine refund requests from new institutions, including an examination of fee schedules. However, existing institutions previously exempted from sales and use taxes were not asked for similar information and continued to receive refunds. The evidence indicated defendant lacked the resources necessary to continuously monitor the eligibility of organizations receiving refunds without some indication of an irregularity.

Other evidence indicated defendant's refund policy was not being enforced uniformly.

The trial court made extensive findings of fact and concluded, citing *In re Chapel Hill Residential Retirement Center, supra*, that plaintiffs were not charitable organizations exempt from sales and use taxes under G.S. § 105-164.14(b) and, in addition, were not exempt as religious organizations. The trial court concluded, however, that defendant's "arbitrary, inconsistent and inequitable application of the 'charitable and religious' test to allow exemptions for some but not all institutions of like kind" was discriminatory and unconstitutionally vague, thus violating plaintiffs' equal protection and due process rights. The trial court entered judgment in favor of plaintiffs, ordering defendant to refund each plaintiff all sales and use taxes paid for the claimed periods. Plaintiffs appeal from that portion of the judgment holding they are neither charitable nor religious organizations exempt from sales and use taxes; defendant appeals from that portion of the judgment holding that defendant had violated plaintiffs' constitutional rights and awarding them refunds.

Plaintiffs assert that the trial court erred by concluding that they are neither charitable organizations nor religious organizations within the meaning of G.S. § 105-164.14(b) so as to qualify for refunds of sales and use taxes. G.S. § 105-164.14(b) provides, in pertinent part:

> The Secretary of Revenue shall make refunds semiannually to . . . churches, orphanages and other charitable or religious institutions and organizations not operated for profit of sales and use taxes paid under this Article,. . ., by such institutions and organizations on direct purchases of tangible personal property for use in carrying on the work of such institutions and organizations.

We first consider plaintiffs' assertion that they are charitable organizations within the meaning of the statute. The terms "charitable institution" and "charitable organization" are not defined in the North Carolina Sales and Use Tax Act, G.S. § 105-164.1 *et seq.*; indeed, no definition for the terms is contained in the entire Revenue Act, G.S. § 105-1 *et seq.*

It is a basic rule of statutory construction that where a statute contains no definition of words used therein, the words of the statute are to be given their natural and ordinary meaning. *In re Clayton-Marcus Co.*, 286 N.C. 215, 210 S.E.2d 199 (1974). With respect to taxation statutes, provisions for exemptions are strictly construed and

ambiguities are resolved in favor of taxation. *Id.* A taxpayer who seeks the benefit of an exemption has the burden of showing that he comes within the exclusion upon which he relies. *Chemical Corp. v. Johnson, Comr. of Revenue*, 257 N.C. 666, 127 S.E.2d 262 (1962). The rule of strict construction does not, however, require that the statute be "stintingly or even narrowly construed" or that relevant language in the statute be given other than its plain and obvious meaning. *Wake County v. Ingle*, 273 N.C. 343, 347, 160 S.E.2d 62, 65 (1968).

Citing the entrance fees and monthly service fees charged by plaintiffs, as well as the financial resources of the residents, defendant argues that plaintiffs "cater only to the affluent and provide no benefits to legitimate objects of charity." The trial court agreed, concluding the "financial and health limitations required for admission prevent plaintiffs from benefitting a significant segment of humanity and an indefinite class of persons who are legitimate subjects of charity."

We do not believe the General Assembly intended, when it enacted G.S. § 105-164.14(b), that such a narrow construction be accorded the word "charitable," nor do we agree that the residents served by plaintiffs are not "legitimate subjects of charity." "Generally defined, a charitable institution is an organization or other entity engaged in the relief or aid to a certain class of persons, a corporate body established for public use, or a private institution created and maintained for the purpose of dispensing some public good or benevolence to those who require it." *Darsie v. Duke University*, 48 N.C. App. 20, 24, 268 S.E.2d 554, 556, *disc. review denied*, 301 N.C. 400, 273 S.E.2d 445 (1980).

The natural and ordinary meaning of "charitable" is sufficiently broad to include aid and assistance provided for the elderly or infirm without regard to individual poverty. "The concept of charity is not confined to the relief of the needy and destitute, for 'aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants.' " *In re Taxable Status of Property*, 45 N.C. App. 632, 638, 263 S.E.2d 838, 842, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 684 (1980), *quoting Central Board on Care of Jewish Aged, Inc. v. Henson*, 120 Ga. App. 627, 171 S.E.2d 747 (1969). We note also that the IRS has recognized that "charitable" in its generally accepted legal sense includes "[p]roviding for the special needs of the aged . . . where the requisite elements of

relief of distress and community benefit have been found to be present." Rev. Rul. 72-124, 1972-1 C.B. 145.

> Revenue Ruling [72-124] makes clear that a home for the aged will be deemed "charitable" if it meets the special needs of the elderly such as the need for health care, financial security, and residential facilities designed to meet specific physical, social, and recreational requirements of the elderly. Such a home need not provide direct financial assistance to the elderly in order to be "charitable," since poverty is only one form of distress to which the elderly as a class are particularly susceptible.

Rev. Rul. 79-18, 1979-1 C.B. 194. *See also* Rev. Rul. 75-198, 1975-1 C.B. 157. Indeed, the North Carolina Department of Revenue has itself recognized plaintiffs as "bona fide nonprofit, charitable organizations" for the purposes of exemption from State corporate income and franchise taxes under other applicable sections of the Revenue Act.

Our decisions in *In re Chapel Hill Residential Retirement Center, supra,* and *In re Appeal of Barham, supra,* do not control the resolution of this case. In those cases, the issue was whether the property owned by the two non-profit corporations and used as residential care facilities for the elderly, under arrangements similar to those operated by the present plaintiffs, qualified for the *ad valorem* tax exemption provided by G.S. §§ 105-278.6 and 105-278.7 of the Machinery Act, G.S. 105-271 *et seq.* and Article V, § 2(3) of the North Carolina Constitution. We determined that the property did not qualify for the exemption because it was not being held for charitable purposes. The General Assembly responded to our decisions by enacting G.S. § 105-275(32) which specifically excludes from *ad valorem* taxation property owned by "a home for the aged, sick, or infirm . . . and used in the operation of that home." In any event, our Supreme Court has recognized that the rules for determining whether property is exempt from *ad valorem* taxes are distinct from those determining whether a corporation is exempt from the taxes imposed by the Revenue Act. *In re Vanderbilt University,* 252 N.C. 743, 114 S.E.2d 655 (1960).

We hold that even construed strictly, the term "charitable organization" easily accommodates the nature of plaintiff corporations. Plaintiffs are clearly engaged in an humane and philanthropic endeavor to aid and assist the rapidly growing class of elderly citizens of this State, and their activities certainly benefit the larger community which only recently has come to realize the problems associated

with an aging population. Therefore, the trial court erred in concluding that plaintiffs are not charitable organizations.

Because we have determined that plaintiffs are charitable organizations, they are entitled, pursuant to the provisions of G.S. § 105-164.14(b), to refunds of the sales and use taxes paid by them. We need not determine whether they are also religious organizations, nor is it necessary that we determine whether defendant's enforcement of the statute violated plaintiffs' constitutional rights. The judgment ordering defendant to pay such refunds is affirmed, although for reasons different from those stated by the trial court.

Modified and affirmed.

Judges EAGLES and WALKER concur.

STATE OF NORTH CAROLINA v. DAVID LOUIS ODUM

No. 9410SC571

(Filed 1 August 1995)

Searches and Seizures § 27 (NCI4th)— seizure of cocaine at train station—reasonableness of warrantless search

In a prosecution for trafficking in cocaine, a drug interdiction officer's warrantless seizure of defendant's gym bag at a train station until it could be checked by a drug-sniffing dog was lawful, and the trial court properly denied defendant's motion to suppress cocaine seized from the bag pursuant to a warrant after the dog alerted to the bag, where defendant traveled to and from a source city for narcotics in a two-day period; he traveled with a small gym bag instead of luggage; he paid for the $107 ticket in cash with small bills; the woman identified by defendant as his ride did not acknowledge defendant and later left the train station without him; defendant could not readily produce identification and became visibly nervous; defendant had previously been arrested in New Jersey for attempted armed robbery; and he appeared to be concealing something from the officers while he searched his bag for identification.

Am Jur 2d, Searches and Seizures § 71.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 13 December 1993 by Judge Coy E. Brewer in Wake County Superior Court. Heard in the Court of Appeals 1 March 1995.

Attorney General Michael F. Easley, by Associate Attorney General Robert O. Crawford, III, for the State.

Thomasin Elizabeth Hughes for defendant appellant.

COZORT, Judge.

Defendant was arrested on 29 April 1993 for trafficking in cocaine, after being stopped at the Raleigh train station upon his return from New York City. Defendant's motion to suppress the physical evidence found in his bag was heard in Wake County Superior Court on 10 August 1993 and denied by Judge Robert L. Farmer on 13 December 1993. Defendant pled guilty to the charges on 13 December 1993, reserving his right to appeal pursuant to N.C. Gen. Stat. § 15A-979(b) (1988). Judge Coy E. Brewer accepted defendant's plea and sentenced him to a prison term of seven years and a $50,000.00 fine. Defendant appeals Judge Farmer's denial of his motion to suppress. We affirm.

On 29 April 1993, Special Agents William Weis and Terry Turbeville of the North Carolina State Bureau of Investigation and Wake County Deputy Sheriff Mel Hicks were working drug interdiction at the Raleigh train station. They had earlier received information from a ticket agent that defendant purchased a train ticket with cash using small bills, departed Raleigh for New York City on 27 April, returning on the afternoon of 29 April. In researching defendant's criminal record, the officers discovered that defendant had previously been arrested for attempted robbery in New Jersey, a charge which was later dismissed.

Agent Weis testified at the suppression hearing that he uses many factors in deciding whom to approach when working drug interdiction. The factors include making quick turnaround times, paying cash for tickets, using small bills when paying, carrying small amounts of baggage, displaying nervousness when buying tickets or when approached by officers, having a criminal record, and traveling from a "source city" for drugs. Agent Weis testified that any major city in the United States would be considered a source city for narcotics.

Agent Weis testified that, in his experience, a combination of these factors means that the person is likely to be carrying narcotics.

Defendant's train arrived at approximately 4:30 p.m. on 29 April 1993. Defendant, a black male wearing glasses and carrying a red nylon bag, matched the description the ticket agent gave to the officers. Defendant left the train and appeared headed toward a car in the parking lot in which a female was sitting. Agent Weis and Deputy Hicks approached defendant, showed him their badges, and asked him to answer a few questions. The officers were dressed in casual clothes and talked in a conversational tone with defendant. Defendant agreed to talk with them, and they moved over to the sidewalk.

Agent Weis asked defendant to produce his train ticket. Defendant showed them his ticket stub bearing his name, "D. Odum." Agent Weis then asked defendant for some identification, but defendant was unable to locate any in his pockets. Defendant became visibly nervous when he could not find his identification. While defendant looked in his bag for identification, Agent Weis observed that defendant was apparently trying to conceal the contents of the bag. Defendant finally told the officers that he could not find any identification.

Agent Weis asked defendant if he could search the bag, and defendant refused a search unless the officers could produce a search warrant. Agent Weis then informed defendant that he was going to seize the bag and hold it until a drug-sniffing dog could examine the bag. Defendant objected, stating the bag contained his personal belongings. Agent Weis nonetheless took the bag, placed it out of defendant's reach, and told defendant that he was free to leave. Agent Weis informed defendant that if he left an address he would have the bag delivered to him. During this time, defendant informed the officers that the woman sitting in the car was his ride. Agent Weis testified that the woman neither spoke nor made eye contact with defendant during the entire questioning. After Agent Weis seized the bag at approximately 4:45 p.m., the woman drove away.

Defendant refused to leave without his bag and waited with the officers for the drug-sniffing dog. While they were waiting, defendant located a North Carolina driver's permit bearing his name and date of birth. Deputy LeBeuf arrived with the drug-sniffing dog at approximately 5:15 p.m. Agent Weis lined up some bags in the baggage storage area, and the dog alerted on defendant's red bag. Agent Weis

informed defendant that he was no longer free to leave. Deputy LeBeuf took the bag to a magistrate, obtained a search warrant, and searched the bag, finding approximately 30 grams of cocaine. He informed Agent Weis, who placed defendant under arrest.

Judge Robert L. Farmer heard defendant's motion to suppress in Wake County Superior Court on 10 August 1993. Agent Weis testified for the State and defendant offered no evidence. Judge Farmer denied the motion in an order dated 13 December 1993. Defendant then pled guilty, reserving his right to appeal. For reasons which follow, we find the trial court did not err in denying defendant's motion to suppress.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In most cases, the seizure of an individual's personal property, such as luggage, requires a judicial warrant issued upon probable cause and particularly describing the items to be seized. *United States v. Place*, 462 U.S. 696, 701, 77 L.Ed.2d 110, 116-17 (1983). The courts have held, however, that certain seizures are valid based on less than probable cause. Because a canine sniff is limited in scope, the United States Supreme Court has held that it is not a search, but that the detention of the bag is a seizure within the meaning of the Fourth Amendment. *Id.* at 707, 77 L.Ed.2d at 121. When a law enforcement officer's observations lead him to reasonably believe that a person is carrying luggage which contains narcotics, the principles of *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968), permit the officer to detain the luggage briefly to investigate the circumstances which aroused his suspicion, provided that the investigative detention is properly limited in scope. *Place*, 462 U.S. at 706, 77 L.Ed.2d at 120.

The standard established by Terry for testing the conduct of law enforcement officers in effecting a warrantless seizure is that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Id.* at 21, 20 L.Ed.2d at 906. The circumstances leading to the seizure should not be viewed in isolation. Instead, they should be viewed as a whole "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143 (1979).

Agent Weis testified that there were numerous factors he took into consideration when deciding to approach defendant and seize

the bag. The factors utilized by Agent Weis were: (1) defendant traveled to and from a source city for narcotics; (2) defendant's trip was short in duration; (3) defendant traveled with a small gym bag instead of luggage; (4) defendant paid for the $107.00 ticket in cash with small bills; (5) the woman identified by defendant as his ride did not acknowledge defendant and later left without him; (6) defendant could not readily produce identification and became visibly nervous; (7) defendant had previously been arrested in New Jersey for attempted robbery; and (8) defendant appeared to be concealing something from the officers while he searched his bag for identification. Although the issue presented is an extremely close call, we find the factors identified by Agent Weis, taken together, provide the reasonable suspicion necessary for a seizure.

The United States Supreme Court stated in *United States v. Cortez*, 449 U.S. 411, 418, 66 L.Ed.2d 621, 629 (1981), that a court analyzing conclusions made by a trained officer such as Agent Weis should consider the circumstances "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." Our own Supreme Court has also held that the circumstances leading to a seizure should be viewed not in isolation but as a whole, "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979). In his work on the Drug Interdiction Squad, Agent Weis has received specialized training in interdiction procedures and has personally opened almost 200 cases and assisted in hundreds of others. The actions of law enforcement here did not involve personally intrusive procedures to the defendant and indeed did not even involve *his* detention; only his unopened bag was briefly held.

Defendant's behavior was consistent with that of other suspects in drug trafficking situations. His actions, coupled with the refusal of the woman awaiting him to so much as acknowledge his presence or inquire as to why he was being detained before driving away when approached by another officer, also aroused a reasonable suspicion in the mind of Agent Weis. While defendant's behavior and characteristics may seem somewhat "ordinary" to most people, Agent Weis believed his behavior was consistent with that of travelers of a different kind; those who traffic in illegal drugs. "It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*, 364 U.S. 206, 222, 4 L.Ed.2d 1669, 1680 (1960). "And in deter-

mining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19-20, 20 L.Ed.2d at 905. Agent Weis's actions were reasonable, and we affirm the trial court's decision to deny defendant's motion to suppress the evidence.

Affirmed.

Judge LEWIS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I do not believe the seizure of defendant's bag was based on a reasonable, articulable suspicion, and I would reverse the order of the trial court denying defendant's motion to suppress. The factors that Agent Weis observed, taken as a whole, could easily be associated with many travelers and would therefore subject them to unwarranted and unlawful intrusions into their privacy.

The decision to focus on defendant began when a ticket agent informed the authorities that defendant had purchased a round-trip train ticket to New York City with cash and that the trip was of a short duration. Many travelers embark on similar trips on a daily basis, and the fact that defendant paid for his ticket in cash is not remarkable, considering the price was only $107.00.

The tip caused the officers to run a check of defendant's criminal records which revealed an arrest for robbery, a charge subsequently dismissed. Agent Weis testified that it did not matter to him whether it was a conviction or an arrest. He also testified that there was no record that defendant had any previous involvement with drugs. A prior arrest for robbery that is later dismissed is not a sufficient reflection of an individual's propensity to be involved in drug trafficking. Nevertheless, the officers determined that they would observe defendant upon his return because they suspected him of carrying drugs. Based on what the officers knew at this time, a sufficient basis for a seizure of defendant's bag did not exist.

The officers observed defendant exiting the train and carrying a small gym bag. Although carrying one bag is consistent with the

length of defendant's stay in New York, the officers decided nonetheless to approach defendant. Agent Weis testified that during the course of their discussion, defendant did not give him any false information. The officers never inquired about the nature of the trip, nor is there evidence of any questions that might have bolstered their suspicions. At this point, there was nothing upon which to base a reasonable suspicion.

Defendant became visibly nervous when he could not find his identification. It is not uncommon for an individual to appear nervous when approached by a law enforcement officer. While it is now apparent from hindsight that defendant's nervousness was due to his possession of cocaine, the facts known by the officers at the time, including defendant's nervousness, were not enough to arouse a reasonable, articulable suspicion. Further, the actions of the woman in the car and defendant's reluctance to let Agent Weis see what was in his bag did not provide the level of suspicion to warrant a seizure.

ROBERT E. HORNE, PLAINTIFF v. UNIVERSAL LEAF TOBACCO PROCESSORS, EMPLOYER; AETNA LIFE & CASUALTY COMPANY, Carrier; Defendants

No. COA94-886

(Filed 1 August 1995)

1. Workers' Compensation § 213 (NCI4th)— prior compensable injury—subsequent automobile accident—no independent intervening cause—aggravation of compensable injury

Plaintiff's October 1992 automobile accident was an aggravation of plaintiff's prior compensable injury of 22 October 1990 and was thus compensable, and the Industrial Commission erred in concluding that it was an "independent, intervening cause" of plaintiff's continuing disability. Even if the automobile accident was an independent, intervening cause of plaintiff's disability, the aggravation of the compensable injury was compensable where there was no evidence that the accident was attributable to plaintiff's own intentional conduct.

Am Jur 2d, Workers' Compensation §§ 368-371.

2. Workers' Compensation § 408 (NCI4th)— maximum medical improvement—finding unsupported by evidence

The Industrial Commission erred in finding as fact that plaintiff would have reached maximum medical improvement by October 1992 had he not been involved in an automobile accident where there was no evidence in the record that plaintiff's compensable injury had completely improved or that his condition had stabilized.

Am Jur 2d, Workers' Compensation § 618.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 11 April 1994. Heard in the Court of Appeals 9 May 1995.

On 22 October 1990, plaintiff suffered a compensable back injury at defendant's tobacco processing plant while removing 250-280 pound sheets of tobacco from a conveyor line with the assistance of another employee. On 7 November 1990, the parties entered into an "Agreement for Compensation for Disability" (I.C. Form 21) for plaintiff's back injury which was approved by the Industrial Commission (hereinafter Commission) on 21 November 1990.

Plaintiff was initially treated on the day of the accident by Dr. Michael Bowen and referred to Dr. Michael Glover, an orthopaedic surgeon. On 27 February 1991, Dr. Glover performed a "right sided" laminectomy and discectomy at the L5-S1 level of plaintiff's lower back. Dr. Glover then referred plaintiff to Dr. David Tomaszek, a neurosurgeon. Dr. Tomaszek performed a re-do discectomy at the L5-S1 level of plaintiff's back on 22 June 1992. Sometime in October 1992, plaintiff was involved in an automobile accident. Plaintiff alleges that the accident aggravated his 22 October 1990 injury. Plaintiff is currently under the care of Dr. Tomaszek.

Dr. Glover testified that while plaintiff was under his care, plaintiff was temporarily totally disabled and had not reached maximum medical improvement. Defendant's carrier had plaintiff examined by Dr. Lee Whitehurst on three separate occasions. Dr. Whitehurst initially assigned plaintiff a 15% permanent partial disability rating to plaintiff's back. Dr. Whitehurst testified that plaintiff was able to return to work on 6 October 1992, even though he did not know what type of work plaintiff was engaged in prior to his compensable accident.

On 22 June 1992, Dr. Tomaszek performed a second surgery on plaintiff's back to remove a recurrent ruptured disk at the L5-S1 level. Dr. Tomaszek testified in his initial deposition that he did not fully release plaintiff to return to work and that he would have assigned plaintiff a 25% permanent partial disability rating of plaintiff's back in September 1992. When Dr. Tomaszek was redeposed on 9 March 1993, he had obtained additional information from Dr. Whitehurst and had done an additional examination of plaintiff. Based on the additional information, Dr. Tomaszek testified that the recurrent disk rupture shown on the MRI dated 26 October 1992 may have enlarged or become more symptomatic by the automobile accident of October 1992. Dr. Tomaszek further testified that plaintiff had a "residual recurrent herniated disk" prior to the automobile accident in October 1992 and that the accident worsened the abnormal disk.

Plaintiff testified since he was injured at work on 22 October 1990, he could do very little lifting, walking or standing. He is unable to bend or sit for longer than 45 minutes. Plaintiff has not returned to work since the October 1990 accident.

The Deputy Commissioner found that plaintiff's October 1992 automobile accident was an "independent, intervening cause" of plaintiff's continuing disability and that plaintiff had reached maximum medical improvement as of 31 October 1992. The Full Commission affirmed and adopted the Deputy Commissioner's opinion and award. Plaintiff appeals.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by W. Earl Taylor, Jr., for plaintiff-appellant.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for defendant-appellees.

EAGLES, Judge.

Plaintiff contends that the Commission erred in concluding that plaintiff's automobile accident was an "independent, intervening cause" of plaintiff's continuing disability. Plaintiff also contends that the Commission erred in its factual finding that plaintiff would have reached maximum medical improvement had he not been in the automobile accident. We reverse and remand.

I.

[1] Plaintiff assigns error to the following portion of the Commission's conclusions of law:

> 1. As a result of the October 22, 1990 injury by accident giving rise hereto and two corrective surgeries necessitated thereby, plaintiff was temporarily totally disabled . . . . [H]owever by the last mentioned date (October 31, 1992) plaintiff would have been able to return to light, sedentary and/or medium work . . . had he not earlier been involved in an automobile accident in October of 1991 resulting in the recurrent disc herniation that has totally disabled him since and is the independent, intervening cause of the continuing total disability that plaintiff has experienced since October 31, 1992.

The aggravation of an injury is compensable if the primary injury arose out of and in the course of employment, and the subsequent aggravation of that injury is a natural consequence that flows from the primary injury. *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379, 323 S.E.2d 29, 30 (1984). Unless the subsequent aggravation is the result of an independent intervening cause attributable to claimant's own intentional conduct, the subsequent aggravation of the primary injury is also compensable. *Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E.2d 485, 488 (1983). An "intervening cause" in the context of the Workers' Compensation Act (hereinafter Act) is an occurrence "entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result." *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 380, 323 S.E.2d 29, 30 (1984) (quoting *Petty v. Transport, Inc.*, 276 N.C. 417, 426, 173 S.E.2d 321, 328 (1970)).

In *Heatherly*, plaintiff suffered a compound angulated fracture of his right middle distal tibia (right leg) on 24 October 1980 in the course and scope of his employment. On 4 July 1981, plaintiff sustained a compound refracture of his tibia and a fracture of his fibula when his left foot slipped from under him. The Commission held that the fracture of 4 July 1981 was the direct and natural result of the compensable 24 October 1980 injury. The defendants appealed.

Plaintiff's attending physician for the second fracture, Dr. McConnachie, testified that he was aware of plaintiff's previous fracture and that in his opinion, the refracture of plaintiff's tibia was along the same fracture line. Dr. McConnachie also stated that the first fracture of plaintiff's tibia was healing, but was not "rock-solid" at the time of the refracture. The significance of the first fracture not being completely healed at the time of the refracture is that "prior to

complete healing the fractured bone would be weaker than surrounding bone, but after complete healing it would be stronger than surrounding bone." *Heatherly*, 71 N.C. App. at 381, 323 S.E.2d at 31. This Court held that Dr. McConnachie's testimony was sufficient evidence to support the Commission's conclusion that plaintiff's second fracture was the direct and natural result of his original injury.

Here, plaintiff sustained a compensable injury to his back on 22 October 1990. Dr. Michael Glover performed an "L-5 laminectomy on the right with an L-5 S-1 discectomy" on plaintiff's lower back. Dr. David Tomaszek performed a "re-do" discectomy at the L5-S1 level of plaintiff's back on 22 June 1992 to remove a recurrent ruptured disc at that level. Dr. Tomaszek testified that as of 23 September 1992, plaintiff was making reasonable progress after the second surgery and that plaintiff was "able to drive a car, stand, walk, twist, bend, without difficulty." Sometime in October 1992, plaintiff was injured in an automobile accident and his condition worsened. In his first deposition, Dr. Tomaszek testified that in his opinion, the accident of 22 October 1990 was the cause of plaintiff's continuing disability. After his first deposition in this matter, Dr. Tomaszek re-examined plaintiff and obtained additional information from Dr. Lee Whitehurst, who had also examined plaintiff on three prior occasions. Dr. Tomaszek testified at his second deposition, that based on the additional information he had obtained, including an MRI dated 26 October 1992, plaintiff had a recurrent disc rupture at the L5-S1 level, the same area of plaintiff's back as the first surgery. Dr. Tomaszek further testified as follows:

> Q. And, Dr. Tomaszek, do you have an opinion as to whether or not the large recurrent disc that you have noticed . . . on the M. R. I. of October 26th, 1992, was [] the result of his work-related injury on October 22 of 1990 or whether it was caused by the automobile accident in late October 1992?
>
> A. Well, there is no way to answer that question definitively, but I feel that the most logical thing that happened is that he did have a recurrent disc prior to his automobile accident, which may have enlarged or become more symptomatic. My justification for saying that is that he was complaining of back and leg pain that was at least moderately severe prior to the accident occurring. After the accident there is no question that it became worse and it's my belief that the disc was at least partially ruptured or may have had a small to moderate size

rupture which explained his symptoms. The accident may have caused it to rupture further but I don't feel that it caused the disc rupture brand new.

Q. Dr. Tomaszek, in your opinion the fusion that you have recommended for [plaintiff]—is that as a result of the work-related accident on October 22, 1990, or is that as a result of the automobile accident of late October, 1992?

A. Well, the pathology all stems back to the work-related accident. Though his symptoms may have worsened after the automobile accident this man was by no means asymptomatic or at least by report to Dr. Whitehurst comfortable with his surgical results prior even to the automobile accident. So, I do throw the pathology back as it were to the original injury.

There is no evidence in the record that any other physician or medical expert offered a different opinion as to whether plaintiff's automobile accident aggravated his prior injury.

Accordingly, the Commission erred in concluding that plaintiff's October 1992 automobile accident was an "independent, intervening cause" of plaintiff's continuing disability. Furthermore, even assuming *arguendo*, that the automobile accident was an independent, intervening cause of plaintiff's disability, we find no evidence in the record that the accident was attributable to plaintiff's own intentional conduct. *See Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 308 S.E.2d 485 (1983); *Starr v. Paper Co.*, 8 N.C. App. 604, 175 S.E.2d 342 (1970). An aggravation of a compensable injury is also compensable, "unless it is the result of an independent, intervening cause attributable to claimant's own intentional conduct." *Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E.2d 485, 488 (1983). Defendants concede that the record before us does not show that plaintiff's "own intentional conduct" caused the October 1992 automobile accident and his subsequent injury. In sum, we conclude that plaintiff's October 1992 automobile accident was an aggravation of plaintiff's prior compensable injury of 22 October 1990.

II.

[2] Plaintiff also contends that the Commission erred in finding as fact that plaintiff would have reached maximum medical improvement by October 1992 had he not been involved in an automobile accident. We agree.

The term "maximum medical improvement" is not defined in the statutes and has been the source of some confusion. G.S. 97-31 provides compensation for temporary disability during the "healing period." The healing period ends when "after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established." *Crawley v. Southern Devices*, Inc., 31 N.C. App. 284, 289, 229 S.E.2d 325, 329 (1976). The point at which the injury has stabilized is often called "maximum medical improvement." *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 330 (1985). In *Carpenter*, this Court discussed the term "maximum medical improvement" and its relation to the termination of the "healing period" required by G.S. 97-31.

> [Maximum medical improvement] connotes that a claimant is only temporarily totally disabled and his body healing when his condition is steadily improving, and/or he is receiving medical treatment. Yet, recovery from injuries often entails a healing period of alternating improvement and deterioration. In these cases, the healing period is over when the impaired bodily condition is stabilized, or determined to be permanent, and not at one of the temporary high points. Moreover, in many cases the body is able to heal itself, and during convalescence doctors refrain from active treatment with surgery or drugs. Thus, the absence of such medical treatment does not mean that the injury has completely improved or that the impaired bodily condition has stabilized.

Id. at 311, 326 S.E.2d at 330. Here, Dr. Tomaszek testified that prior to plaintiff's automobile accident in October 1992, plaintiff was in the process of recovering from his work-related injury. Dr. Tomaszek testified that he had not released plaintiff to return to work prior to the automobile accident. There is no evidence in the record that plaintiff's injury had completely improved or that his condition had stabilized. Accordingly, the Commission erred in this factual finding.

In sum, we conclude that the Commission erred in concluding as a matter of law that plaintiff's automobile accident of October 1992 was an "independent, intervening cause" of plaintiff's continuing disability and in finding as fact that plaintiff would have reached maximum medical improvement on October 1992 had he not been reinjured in the automobile accident. We reverse and remand to the Commission for further proceedings to determine whether plaintiff

has reached maximum medical improvement, and what additional benefits, if any, to which plaintiff is entitled under the Act.

Reversed and remanded.

Chief Judge ARNOLD and Judge WYNN concur.

STATE OF NORTH CAROLINA v. ANTONIO BERNARD LOVETT

No. COA95-255

(Filed 1 August 1995)

1. Evidence and Witnesses § 1832 (NCI4th)— chemical analysis of blood—written notice of rights given

There was no merit to defendant's contention that the trial court erred by denying his motion to suppress blood test results because the chemical analyst did not give him notice in writing of his rights, since the chemical analyst placed the written rights form with defendant's emergency room chart; defendant was not capable of signing the form because his hands were strapped down and IVs were in both arms; there was effectively no other means by which the notice could have been given to him; and defendant was clearly informed of his rights and waived them. N.C.G.S. § 20-16.2.

Am Jur 2d, Evidence §§ 1021, 1022.

2. Automobiles and Other Vehicles § 789 (NCI4th)— felony death by vehicle—no lesser included offense of involuntary manslaughter

The trial court did not err in failing to instruct the jury on felony death by vehicle, since that is not a lesser included offense of involuntary manslaughter.

Am Jur 2d, Automobiles and Highway Traffic §§ 328 et seq.

3. Criminal Law § 1214 (NCI4th)— defendant's remorse—failure to find mitigating factor—no error

The trial court did not err in failing to find as a nonstatutory mitigating factor for second-degree murder that defendant showed remorse, was sorry, and accepted full responsibility.

Am Jur 2d, Homicide §§ 549-555.

Appeal by defendant from judgment entered 1 September 1994 by Judge J. Marlene Hyatt in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 July 1995.

Defendant was charged with the murder of Billy Mayhew in violation of N.C. Gen. Stat. § 14-17 (1993). Evidence was presented by the State at trial as follows:

Robert Woods testified that on 18 December 1993 he and defendant, who is his cousin, were shooting some pool and drinking beer with friends at the Blue Star Lounge in Charlotte. Sometime around 11:00 p.m., Woods decided he wanted to leave. After he and the others got out the door, Woods thought he had left his car keys inside and he went back inside. When he walked back outside, defendant was driving his car up the street. Woods and the others were shocked by defendant's actions. After waiting for defendant to return, Woods left the scene in a taxi. He eventually reported what had happened to the police.

Woods further testified that he later saw defendant at the hospital. Defendant told him he did not know what happened. He also told Woods: "[H]ey, I can't bring back anybody and the car is gone; so, you know, you got to keep on moving on."

Mike Stevens testified that between 10:30 and 11:00 p.m. on 18 December 1993, he and his wife were travelling down The Plaza in Charlotte in their van when a car without its headlights on ran a stop sign and struck the van. The van was knocked into a nearby parking lot. Stevens got out of the van expecting to find someone hurt in the small car. Instead, he saw the car proceeding down The Plaza dragging metal.

Officer Robert Gilbert of the Charlotte-Mecklenburg Police Department testified that on 18 December 1993 he was responding to a call when he saw several people in two different stopped cars attempting to flag him down. The people seemed excited and irate. After speaking with the people, Officer Gilbert turned his car around and headed toward The Plaza. He saw another two stopped vehicles. A woman in one of them was pointing down the road. As Officer Gilbert drove in the direction the woman had pointed, another officer riding with him heard a loud noise. Officer Gilbert drove in the direction of the noise and found a "real bad traffic accident." A small vehicle and a Lincoln Continental had collided. Officer Gilbert approached the small vehicle. In the driver's seat of the car was

defendant who seemed to be pinned. A "very, very strong odor of alcohol" was coming from the car. Defendant kept saying that he was thrown into the vehicle.

Lafayette Butler, a railroad police officer, testified that on 18 December 1993 he and another officer were patrolling railroad property when they approached an intersection. A station wagon was stopped at the light. When the light turned green, the station wagon entered the intersection and a small car without its headlights on ran the red light, forcing the station wagon off the street. Butler and the other officer followed the car which continued at a high rate of speed without its headlights on. At the next intersection, the car ran a red light without its brake lights coming on.

Tommy Hanks, a railroad police officer, testified that he was with Officer Butler on 18 December 1993. He and Butler were about fifty yards behind defendant's car when it collided with a bigger car in an intersection. The traffic light was red when defendant's car entered the intersection.

June Clark, Jr., testified that he was a captain with the Charlotte Fire Department. On 18 December 1993 Clark rode with two paramedics to the scene of the accident. He approached defendant's car and asked him some questions to assess his injuries. Defendant said that he had been drinking and that he did not care what the police did with him or his car.

Denna Gaston, a paramedic, testified that she attended to defendant after the accident on 18 December 1993. Defendant smelled of alcohol and told Gaston that he had been drinking.

Charles Adkins, a Charlotte police officer, testified that he asked defendant to submit to a breathalyzer test at the hospital. Another officer read defendant his rights to refuse chemical analysis. When given the option of submitting to a breathalyzer or having blood taken, defendant asked which test would result in the most pay for the officers. One of the officers said that it did not matter either way, and defendant said: "Well, I don't give a shit; do whatever you want to, then." Blood was then drawn from defendant.

James Ploger, a sergeant with the Mecklenburg County Sheriff's Department, testified that he was called to the Carolinas Medical Center in the early morning hours of 19 December 1993 to inform defendant of his rights and witness the taking of a blood sample. After Ploger read defendant his rights, defendant said that he did not want

an attorney. Defendant could not sign the rights form because he was strapped down and had IVs in his arms.

Tony Aldridge testified that he was a criminalist for the Charlotte-Mecklenburg Police Department. He analyzed the blood taken from defendant and found the blood alcohol concentration to be .143.

The jury found defendant guilty of second degree murder. From a judgment imposing a prison sentence of forty-five years, defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Linda M. Fox, for the State.

Paul J. Williams for defendant appellant.

ARNOLD, Chief Judge.

[1] Defendant first argues that the trial court erred by denying his motion to suppress the blood test results. Specifically, defendant contends the chemical analyst did not give him a notice in writing of his rights in violation of N.C. Gen. Stat. § 20-16.2 (1993). We disagree.

N.C. Gen. Stat. § 20-16.2 (1993) provides in pertinent part as follows:

> [B]efore any type of chemical analysis is administered the person charged must be taken before a chemical analyst authorized to administer a test of a person's breath, who must inform the person orally and also give the person a notice in writing that:
>
> (1) He has a right to refuse to be tested.
>
> (2) Refusal to take any required test or tests will result in an immediate revocation of his driving privilege for at least 10 days and an additional 12-month revocation by the Division of Motor Vehicles.
>
> (3) The test results, or the fact of his refusal, will be admissible in evidence at trial on the offense charged.
>
> (4) His driving privilege will be revoked immediately for at least 10 days if:
>
> a. The test reveals an alcohol concentration of 0.08 or more; or
>
> b. He was driving a commercial motor vehicle and the test reveals an alcohol concentration of 0.04 or more.

(5) He may have a qualified person of his own choosing administer a chemical test or tests in addition to any test administered at the direction of the charging officer.

(6) He has the right to call an attorney and select a witness to view for him the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time he is notified of his rights.

Defendant does not contend that he was not informed orally of his rights or that he did not waive them. Instead, he contends the chemical analyst failed to "give" him notice in writing.

Evidence presented at the suppression hearing shows that the chemical analyst, Deputy Ploger, placed the written rights form with defendant's emergency room chart. Defendant was not capable of signing the form since his hands were strapped down and IVs were in both arms. Deputy Ploger testified that he would normally have placed the written rights form in defendant's "E.R. bag," but that defendant did not have one.

Deputy Ploger's placement of the written rights form with defendant's emergency room chart was tantamount to "giving" defendant notice in writing. In light of the treatment defendant was receiving for his injuries, there was effectively no other means by which the notice could have been given to him. Clearly, defendant was informed of his rights and he waived them. The trial court did not err by denying defendant's motion to suppress.

[2] Defendant next argues that the trial court committed "plain error" by failing to instruct the jury on felony death by vehicle because it is a lesser included offense of involuntary manslaughter and by erroneously instructing the jury regarding misdemeanor death by vehicle. We disagree.

Defendant did not object to the trial court's omission of an instruction on felony death by vehicle. Nor did he assign error to the trial court's instructions on this basis. He contends this Court should nonetheless address his argument pursuant to a "plain error" analysis.

The "plain error" rule, adopted by our Supreme Court in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), allows for review of alleged errors although no objection was made to them at trial. The rule mitigates the potential harshness of Rules 10(b)(1) and 10(b)(2)

of the North Carolina Rules of Appellate Procedure. However, the rule does not waive N.C.R. App. P. 10(a) which limits the scope of appellate review to the assignments of error set out in the record on appeal. Therefore, a "plain error" analysis is not available to defendant in this case since he failed to make the trial court's omission of the instruction in question, the subject of an assignment of error.

Even if the question were properly before this Court, it is meritless. It is well-settled that felony death by vehicle is not a lesser included offense of involuntary manslaughter. *State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992); *State v. Williams*, 90 N.C. App. 614, 369 S.E.2d 832, *disc. review denied*, 323 N.C. 369, 373 S.E.2d 555 (1988).

Defendant contends the trial court erred by instructing the jury that speeding was the underlying offense as to misdemeanor death by vehicle. While there was ample evidence to instruct that running the red light was the underlying offense, there was also sufficient evidence to show that speeding was the underlying offense. Defendant, having been found guilty of second degree murder, has failed to show that he was prejudiced in any way by the trial court's instruction as to misdemeanor death by vehicle. His argument is meritless.

[3] Finally, defendant argues that the trial court erred by failing to find as a nonstatutory mitigating factor that he "showed remorse, was sorry, and accepted full responsibility." We disagree.

Failure to find a nonstatutory mitigating factor, even if it is supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent an abuse of discretion. *State v. Spears*, 314 N.C. 319, 333 S.E.2d 242 (1985). In this case, the evidence showed that defendant told his cousin that he was sorry and took full responsibility, but he also said to his cousin: "[H]ey, I can't bring back anybody and the car is gone; so, you know, you got to keep on moving on." During sentencing, defendant asked the victim's family to forgive him for his negligence or irresponsibility. While this evidence may show that defendant had some regrets concerning his actions, particularly following his conviction for second degree murder, it does not mandate a finding of a nonstatutory mitigating factor. The trial court did not abuse its discretion by failing to find the factor.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. STEVEN MARK BISHOP AKA KEITH DARREN WILLIAMS

No. 9418SC433

(Filed 1 August 1995)

1. **Weapons and Firearms § 11 (NCI4th)— possession of firearm by felon—sufficiency of indictment**

An indictment charging defendant with possession of a firearm by a felon did not need to allege possession away from defendant's home or business, since situs is an exception to the offense, not an essential element; nor did the indictment need to allege that a Florida felony of which defendant was convicted was "substantially similar" to a particular North Carolina crime, since the indictment gave sufficient notice to defendant of the offense charged. N.C.G.S. § 14-415.1.

Am Jur 2d, Weapons and Firearms § 24.

Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons. 43 ALR4th 788.

2. **Weapons and Firearms § 12 (NCI4th)— conviction of prior felony—sufficiency of evidence**

The trial court's finding that the crime to which defendant pled guilty in Florida was punishable by a term exceeding two years and was substantially similar to the N.C.G.S. § 14-258.2, along with the fact that the current charge occurred within five years of defendant's release in Florida, satisfied the requirements of N.C.G.S. § 14-415.1(b) and properly allowed defendant to be convicted of possession of firearms by a felon.

Am Jur 2d, Weapons and Firearms § 24.

Sufficiency of prior conviction to support prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons. 39 ALR4th 983.

Appeal by defendant from judgment entered 29 January 1993 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 24 January 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Valerie B. Spalding, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., and Assistant Appellate Defender J. Michael Smith, for defendant appellant.

COZORT, Judge.

The jury found defendant guilty of possession of firearms by a felon while being an habitual felon, and Judge William H. Freeman sentenced him to a term of life in prison. Defendant appealed. We find no error.

On 23 October 1991, Sergeant W.C. Barnes of the Greensboro Police Department was searching for a truck as part of an ongoing investigation. Sergeant Barnes radioed Officer S.E. Sanders and instructed him to stop the truck if he located it. Officer Sanders spotted this particular truck and stopped it. Defendant, the passenger, identified himself as "Keith Williams" and produced a North Carolina drivers license bearing that name. Defendant told Sergeant Barnes that the truck belonged to him and handed over registration in the name of Keith Williams.

Detective Chris Frazier was the lead detective on the case Sergeant Barnes had been investigating. Detective Frazier conducted the search after defendant's truck was stopped. Detective Frazier found a leather jacket in the cab with a loaded .38 caliber pistol inside and another jacket in the truck bed containing a loaded .22 caliber pistol. A second .38 caliber pistol was found in a nylon bag, and an unloaded shotgun was discovered behind the driver's seat.

The trial court ruled during pretrial motions that defendant had been convicted of "Possession, Introduction or Removal of Contraband" in Florida. The term of imprisonment for this felony exceeded two years, to which defendant stipulated. The court also ruled that the crime was substantially similar to N.C. Gen. Stat. § 14-258.2, even though the sentence for § 14-258.2 does not exceed two years. As a result of the Florida conviction, defendant was confined in prison until 28 September 1988. Defendant's release was part of a supervised community release program, and he retained the status of prison inmate until his sentence expired on 1 December 1988.

At the close of the evidence, the jury found defendant guilty of possession of firearms by a felon, a violation of N.C. Gen. Stat. § 14-415.1. The trial then moved into the habitual felon phase where the State introduced evidence of defendant's four felony convictions in Florida and one felony conviction in Virginia. The jury found defendant guilty of being an habitual felon.

Defendant's appeal is based on three grounds: (1) the indictment was insufficient; (2) the evidence was insufficient to establish each element of the offense; and (3) the instructions to the jury were erroneous. We disagree with defendant's contentions and find no error.

Defendant was indicted for and convicted of Possession of a Firearm by a Felon, a violation of N.C. Gen. Stat. § 14-415.1, which provides in pertinent part:

> (a) It shall be unlawful for any person who has been convicted of any crime set out in subsection (b) of this section to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c), within five years from the date of such conviction, or the unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later.
>
> Every person violating the provisions of this section shall be punished as a Class I felon.
>
> Nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business.
>
> (b) Prior convictions which cause disentitlement under this section shall only include:
>
> (1) Felonious violations of Articles 3, 4, 6, 7A, 8, 10, 13, 14, 15, 17, 30, 33, 36, 36A, 52A, or 53 of Chapter 14 of the General Statutes, or of Article 5 of Chapter 90 of the General Statutes;
>
> (2) Common law robbery and common law maim; and
>
> (3) Violations of criminal laws of other states or of the United States substantially similar to the crimes covered in subdivisions (1) and (2) which are punishable where committed by imprisonment for a term exceeding two years.
>
> * * * *

> (c) The indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section. An indictment which charges the person with violation of this section must set forth the date that the prior offense was committed, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein.

N.C. Gen. Stat. § 14-415.1 (1993).

The first paragraph of subsection (a) creates a substantive criminal offense, complete and definite in its description. *State v. McNeill*, 78 N.C. App. 514, 516, 337 S.E.2d 172, 173 (1985), *disc. review denied*, 316 N.C. 383, 342 S.E.2d 904 (1986). The third paragraph of the subsection creates an exception to the offense which allows possession within one's home or place of business. *Id.* A defendant who is charged with the substantive offense and seeks to utilize the exception has the burden of bringing himself within the exception. *Id.* Absent any evidence that defendant is within the exception of the statute, the State is required to prove only that defendant possessed a handgun within five years of his conviction of or release from prison for a felony specified in N.C. Gen. Stat. § 14-415.1(b). *McNeill*, 78 N.C. App. at 517, 337 S.E.2d at 174.

[1] Defendant claims that the indictment was invalid because it failed to allege: (1) that possession of the firearm was away from defendant's home or business; (2) that defendant's prior Florida felony was "substantially similar" to a particular North Carolina crime; and (3) to which North Carolina statute the Florida conviction was similar.

The sufficiency of an indictment under N.C. Gen. Stat. § 14-415.1 arose in *State v. Riggs*, 79 N.C. App. 398, 339 S.E.2d 676 (1986). The defendant in *Riggs* challenged the indictment because it did not state the length of the pistol. *Id.* at 402, 339 S.E.2d at 680. We held that the indictment was sufficient even without that element because it gave the defendant notice of the offense charged and allowed defendant to prepare his defense. *Id.*

Omission of the situs of the offense in the present case was not an error because situs is an exception to the offense, not an essential element. Defendant was not within the exception because he did not

present any evidence that the possession occurred at his home or place of business. Omission of a statement that the Florida felony was "substantially similar" to a particular North Carolina crime was not an error because the indictment in the present case gave sufficient notice to defendant of the offense charged and allowed him to prepare his defense. The indictment clearly described the felony committed in Florida, satisfying the requirements of § 14-415.1(b)(3) and properly charging defendant with possession of firearms by a felon.

Most of defendant's contentions regarding the sufficiency of the evidence echo his assignments of error regarding the indictment and were addressed above. The only evidentiary argument that has not been addressed is that the Florida felony conviction would be only a misdemeanor in North Carolina and therefore does not satisfy the statutory requirement.

[2] N.C. Gen. Stat. § 14-415.1(b) lists the prior convictions which bring a person within the statute. Section 14-415.1(b)(3) includes violations in another state which are "substantially similar" to those in (b)(1) and (b)(2) and punishable *where committed* by more than two years in prison. During pretrial motions the court ruled that the crime to which defendant pled guilty in Florida was punishable by a term exceeding two years and that it was substantially similar to N.C. Gen. Stat. § 14-258.2, entitled "Possession of Dangerous Weapons in Prison." Defendant stipulated to the court's ruling. This finding, along with the fact that the current charge occurred within five years of defendant's release in Florida, satisfied the requirements of § 14-415.1(b) and properly allowed defendant to be convicted of possession of firearms by a felon.

Defendant claims the trial court failed to conform the material aspects of the jury charge to the allegations in the indictment. More precisely, defendant asserts that the jury instructions were erroneous because the court added the element of situs in its charge to the jury. As stated above, defendant was not entitled to an instruction on the situs exception because he offered no evidence that the possession occurred at his home or place of business. The fact that the trial court instructed the jury that the State had to prove that the possession occurred outside defendant's home or place of business did not prejudice the defendant in any manner.

Defendant also contends that it was error for the trial court to instruct the jury to find only that defendant was convicted of a felony in Florida in order to satisfy the "substantially similar" requirement of

§ 14-415.1(b)(3). Defendant argues that it should have been a jury question as to whether the Florida felony was "substantially similar" to a North Carolina crime. We disagree. This issue is a question of law which was properly determined by the trial court during pretrial motions. The court properly presented the jury with the question of fact which they properly determined. There was no error in the manner that the court presented this element to the jury.

The indictment in the present case was sufficient, the jury was properly instructed on the elements of the offense, and the evidence was more than adequate to convict defendant of possession of firearms by a felon. There was no error in the defendant's convictions of possession of firearms by a felon and being an habitual felon and his sentence of life in prison.

No error.

Judges MARTIN, John C., and JOHN concur.

GOVERNMENT EMPLOYEES INSURANCE COMPANY, PLAINTIFF-APPELLEE v. NEW SOUTH INSURANCE COMPANY, DEFENDANT-APPELLANT

No. COA94-1028

(Filed 1 August 1995)

1. Insurance § 627 (NCI4th)— insurance premium finance company—ineffective cancellation of policy

An insurance premium finance company did not satisfy the requirements of N.C.G.S. § 58-60(2) and therefore did not effectively cancel an automobile insurance policy written by defendant insurer, since the company failed to mail defendant insurer a request for cancellation, including a copy of the power of attorney, and to mail a copy of the request for cancellation to the insured. N.C.G.S. § 58-60.

Am Jur 2d, Automobile Insurance §§ 36 et seq.

2. Insurance § 907 (NCI4th)— existence of coverage under insurance policy—genuine controversy—plaintiff's standing to sue

Since plaintiff, as an uninsured motorist carrier, sought to avoid defending an action by bringing suit for a declaratory judg-

ment that coverage was provided by the policy issued by defendant at the time of the accident in question, a genuine controversy existed, and plaintiff therefore had standing to bring this action.

Am Jur 2d, Insurance §§ 1894 et seq.

Appeal by defendant from judgment entered 19 July 1994 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 May 1995.

Kennedy Covington Lobdell & Hickman, L.L.P., by F. Fincher Jarrell, for plaintiff-appellee.

Golding, Meekins, Holden, Cosper & Stiles, by Paul R. Dickinson, Jr., for defendant-appellant.

WALKER, Judge.

On 15 July 1989, a Datsun automobile owned by Karen Geiser was involved in a collision with an automobile owned and operated by Glenn Martin, who died as a result of injuries from the accident. Karen Geiser, Lisa Gieser and Shirley Pearson were occupants of the Datsun and were injured. In July 1992 they filed separate suits against the Adminstrator of the Estate of Glenn Martin.

At the time of the accident, plaintiff Government Employees Insurance Company had in effect an automobile liability insurance policy issued to Karen Geiser on her Datsun which included uninsured motorists coverage. Plaintiff was served in the above suits in its capacity as uninsured motorist carrier and is defending the suits as an unnamed party. Defendant New South Insurance Company, which issued a personal automobile policy no. 2656237 to Martin for the period of 28 April 1989 to 28 October 1989, refused to defend these suits, contending that it had effectively cancelled the insurance policy on 25 June 1989 pursuant to N.C. Gen. Stat. § 58-60 (1988 Cum. Supp.).

In order to avoid defending the suits as an uninsured motorist carrier, plaintiff brought this action seeking a declaratory judgment that defendant affords liability insurance coverage under policy no. 2656237 in connection with this accident. Plaintiff argued that defendant did not comply with the requirements of N.C. Gen. Stat. § 58-60 and thus the policy was not cancelled as of 15 July 1989. Both parties moved for summary judgment and the trial court allowed plaintiff's motion and entered a judgment declaring that defendant

provides liability coverage under policy no. 2656237 with respect to these claims.

[1] The main issue in this appeal is whether or not defendant effectively cancelled policy no. 2656237. Martin financed the policy premium through Salem Underwriters, Inc. under a premium finance agreement in which he appointed Salem Underwriters his attorney-in-fact with authority to cancel the policy. When Martin failed to make any premium payments, Salem Underwriters purported to cancel the policy. The procedure which an insurance premium finance company must follow in order to effectively cancel an insurance contract where its agreement authorizes it to do so is set forth in N.C. Gen. Stat. § 58-60 (1988 Cum. Supp.) which provides, in pertinent part:

> When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract . . . listed in the agreement, the insurance contract . . . shall not be cancelled unless such cancellation is effectuated in accordance with the following provisions: (1) Not less than 10 days' written notice be mailed to the last known address of the insured . . . of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. A notice thereof shall also be mailed to the insurance agent.
>
> (2) After expiration of such period, the insurance premium finance company shall mail the insurer a request for cancellation, including a copy of the power of attorney, and shall mail a copy of the request for cancellation to the insured. . . .
>
> (3) Upon receipt of a copy of such request for cancellation notice by the insurer, the insurance contract shall be cancelled with the same force and effect as if the aforesaid request for cancellation had been submitted by the insured himself. . . .

See Graves v. ABC Roofing Co., 55 N.C. App. 252, 255, 284 S.E.2d 718, 719 (1981) (holding that Industrial Commission erred in concluding that N. C. Gen. Stat. § 58-60 had been complied with and that workers' compensation policy had thus been effectively cancelled). "[T]he burden is upon the insurance company to show that all statutory requirements have been complied with, including the ten days written notice by the premium finance company to the insured together with said notice to the insurance agent, prior to the premium financing

company requesting cancellation of the policy." *Grant v. Insurance Co.*, 1 N.C. App. 76, 80, 159 S.E.2d 368, 371, *cert. denied*, 273 N.C. 657 (1968).

It is undisputed that Salem Underwriters mailed the insured a ten days' written notice of intent to cancel in compliance with N.C. Gen. Stat. § 58-60(1) and that when no payments were received, Salem Underwriters mailed a letter to the insured which was entitled "Notice of Cancellation," was dated 19 June 1989, and showed that a copy was sent to defendant. The letter indicated that the policy would be cancelled as of 25 June 1989. Plaintiff argued below that Salem Underwriters failed to satisfy the procedural requirements set forth in N.C. Gen. Stat. § 58-60(2) because the letter: (1) was entitled "Notice of Cancellation" instead of "Request for Cancellation," (2) did not include a copy of the power of attorney, and (3) was addressed to the insured instead of defendant.

Defendant argues that Salem Underwriters satisfied the procedural requirements set forth in N.C. Gen. Stat. § 58-60(2) and thus summary judgment should have been granted in its favor. In particular, defendant argues that N.C. Admin. Code tit. 11, r. 13.0318 (effective 1 May 1989-31 August 1991), expressly requires that "[t]he notice of cancellation as described in General Statute 58-60(2) . . . shall have in bold print at its top the wording "Notice of Cancellation." Defendant further argues that the fact that Salem Underwriters addressed the letter to the insured instead of defendant and that Salem Underwriters failed to enclose a copy of the power of attorney is insignificant since a copy of the letter was mailed to defendant and defendant already had a copy of the power of attorney on file. While it appears that Salem Underwriters did comply with the regulation's requirement that the notice have the wording "Notice of Cancellation" in bold print at the top, we nonetheless find that Salem Underwriters did not comply with the statute's requirements since it failed to "mail the insurer a request for cancellation, including a copy of the power of attorney, and [to] mail a copy of the request for cancellation to the insured" and thus affirm summary judgment for plaintiff. *See Unison Ins. Co. v. Goodman*, 117 N.C. App. 454, 457, 451 S.E.2d 4, 6 (1994) (where premium finance company sent request for cancellation to the insurance company, policy deemed cancelled as of the date the insurance company received request for cancellation).

[2] Defendant also argues that plaintiff did not have the requisite standing by which to bring this cause of action. This argument is with-

out merit. A declaratory judgment action may be brought to determine whether coverage exists under an insurance policy. *Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, 522, 369 S.E.2d 128, 129 (1988). "Questions involving the liability of an insurance company under its policy, in cases where a genuine controversy exists, are a proper subject for a declaratory judgment." *Nationwide Mut. Ins. Co. v. Surety Co.*, 1 N.C. App. 9, 12, 159 S.E.2d 268, 271 (1968). In *Nationwide*, this Court found that a genuine controversy exists where plaintiff insurance company seeks a determination that coverage is not provided under its policy and is instead provided under policies issued by defendant insurance companies. *Id.* Since Government Employees Insurance Company, as an uninsured motorist carrier, seeks to avoid defending an action by bringing suit for a declaratory judgment that coverage was provided by the policy issued by defendant at the time of the accident in question, we find that a genuine controversy exists.

The judgment of the trial court holding that policy no. 2656237 was in full force and effect at the time of the accident and thus had not been cancelled is

Affirmed.

Judges COZORT and JOHN concur.

O'HENRY LYON, JR., PLAINTIFF v. WILLIS D. MAY, JR., DEFENDANT

No. 948SC361

(Filed 1 August 1995)

Damages § 127 (NCI4th)— punitive damages—sufficiency of evidence

Evidence was sufficient to support an award of punitive damages to defendant where it tended to show that plaintiff deliberately asserted a claim to insurance proceeds, in which he did not have an interest, by demanding participation in the settlement of the proceeds and by ordering an attorney to tie up the proceeds; plaintiff contacted the North Carolina Department of Insurance suggesting that the insurance company could not pay the claim; the insurance company was forced to filed a declaratory judgment action to determine who was entitled to the proceeds; this

delay resulted in defendant's not receiving FmHA financing for the 1987 crop year and in his defaulting on farm leases; defendant was forced to work as a farm laborer at minimum wage and lost his car, tractor, and good credit rating; and even after a court found that defendant and FmHA were entitled to the proceeds, plaintiff continued his efforts to tie up the proceeds and filed the present action, obtaining an attachment on the proceeds.

Am Jur 2d, Damages § 906.

Sufficiency of showing of actual damages to support award of punitive damages—modern cases. 40 ALR4th 11.

Appeal by plaintiff from judgment entered 4 October 1993 by Judge Thomas S. Watts in Greene County Superior Court. Heard in the Court of Appeals 1 February 1995.

Hunton & Williams, by Margaret C. Lumsden and Michael L. Unti, for plaintiff appellant.

Lonnie W. Carraway, P.A., by Lonnie W. Carraway and Donna M. Lee, for defendant appellee.

COZORT, Judge.

Plaintiff appeals from a judgment granting defendant punitive damages and the denial of his motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. Plaintiff contends on appeal that the trial court erred in (1) denying plaintiff's motion for continuance, (2) admitting evidence related to the 1987 Attachment proceeding, (3) admitting hearsay statements regarding an "investigation" of Alliance by the North Carolina Department of Insurance, (4) admitting evidence relating to defendant's claim of actual damages, (5) admitting evidence relating to plaintiff's 1991 financial statement at the 1993 retrial, (6) denying plaintiff's motion for directed verdict and for judgment notwithstanding the verdict because the evidence did not support an award of more than nominal damages, and (7) denying plaintiff's motion for a new trial. We find no error.

This case is before this Court for the second time. The facts were sufficiently summarized in our first opinion, *Lyon v. May*, 108 N.C. App. 633, 424 S.E.2d 655 (1993), and need not be repeated here. In that first opinion, we reviewed the May 1991 trial of this case wherein the jury and the court found defendant May owed $19,566.40 to plaintiff on plaintiff's claim and that plaintiff owed defendant $6,518.92 on

various counterclaims and $100,000.00 in punitive damages. After proper offsets, the trial court entered judgment for defendant for $86,952.52. In our first opinion we found the trial court erred by denying plaintiff's motion for judgment notwithstanding the verdict on the abuse of process counterclaim. We remanded the matter to superior court to "recalculate damages which may be necessary due to the decision in favor of plaintiff on the abuse of process issue." *Id.* at 641, 424 S.E.2d at 659-60. Our Supreme Court denied discretionary review. *Lyon v. May*, 333 N.C. 791, 431 S.E.2d 25 (1993).

On remand defendant moved for an order affirming the 1991 judgment. Judge Thomas Watts heard this matter on 2 August 1993. Judge Watts denied defendant's motion and ordered a retrial limited to one issue: "What amount of punitive damages, if any, should be awarded to Willis May, said punitive damages arising from and flowing from the plaintiff Lyon's unjustifiable interference with the contract between defendant May and Alliance Mutual Insurance Company?" At the close of all the evidence, plaintiff moved for a directed verdict awarding nominal damages of $1.00, which was denied by the trial court. The jury awarded $250,000.00 in punitive damages to defendant on 22 September 1993. After credits and offsets, the trial court entered judgment for defendant for $236,950.52. Plaintiff moved for JNOV, or in the alternative, for a new trial, motions the trial court denied on 4 October 1993. Plaintiff appealed 7 October 1993.

We note initially that plaintiff has failed to cite any authority for his first five assignments of error. "Assignments of error not set out in the appellant's brief, or 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); *see also Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987). These assignments of error are deemed abandoned and are hereby dismissed.

In his sixth assignment of error, plaintiff contends that the trial court erred in denying plaintiff's Rule 50 motion for directed verdict and for judgment notwithstanding the verdict. Plaintiff contends the evidence did not support an award of more than nominal damages. We disagree.

Upon a motion for a directed verdict, the test is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. *Allison v. Food Lion, Inc.*, 84 N.C. App. 251, 254, 352 S.E.2d 256, 257 (1987). The evidence is taken as true, and the non-moving party is entitled to every reasonable inference to be drawn therefrom resolving all con-

tradictions, conflicts, and inconsistencies in his favor. *Moon v. Bostian Heights Volunteer Fire Dept.*, 97 N.C. App. 110, 111-12, 387 S.E.2d 225, 226 (1990). A motion for directed verdict should be denied where the court finds more than a scintilla of evidence to support each element of the non-moving party's claim. *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C. App. 237, 242, 446 S.E.2d 100, 103 (1994).

The test for allowing judgment notwithstanding the verdict is the same as for granting a directed verdict. *Gray v. Hoover*, 94 N.C. App. 724, 728, 381 S.E.2d 472, 474, *disc. review denied*, 325 N.C. 545, 385 S.E.2d 498 (1989). A motion for judgment notwithstanding the verdict should be denied where the court finds more than a scintilla of evidence to support each element of the non-moving party's case. *Ace Chemical Corp.*, 115 N.C. App. at 242, 446 S.E.2d at 103.

The issue presented by plaintiff's argument is whether defendant presented sufficient evidence to support the jury's award of punitive damages. Punitive damages may be awarded where the aggrieved conduct is wilful, wanton, malicious, or demonstrates a reckless and wanton disregard of a person's rights. *Robinson v. Duszynski*, 36 N.C. App. 103, 106, 243 S.E.2d 148, 150 (1978). In the case below, defendant's evidence showed that plaintiff deliberately asserted a claim to insurance proceeds, in which he did not have an interest, by demanding participation in the settlement of the proceeds and by ordering his attorney to tie up the proceeds. Plaintiff contacted the North Carolina Department of Insurance suggesting Alliance could not pay the claim. Alliance was forced to file a declaratory judgment action to determine who was entitled to the proceeds. This delay resulted in defendant's not receiving FmHA financing for the 1987 crop year and in his defaulting on his farm leases. Defendant was forced to work as a farm laborer at minimum wage and lost his car, tractor, and good credit rating. Even after a court found that defendant and FmHA were entitled to the proceeds, plaintiff continued his efforts to tie up the proceeds and filed the present action, obtaining an attachment on the insurance proceeds. This evidence supports a finding that plaintiff's conduct was wilful and in reckless and wanton disregard of defendant's rights. Viewing the evidence in the light most favorable to defendant, the non-moving party, we find sufficient evidence to warrant the case going to jury and to support the jury's verdict on the issue of punitive damages. The trial court properly denied plaintiff's motions for directed verdict and judgment notwithstanding the verdict.

In his last assignment of error, plaintiff contends the trial court erred in denying his Rule 59 motion for a new trial. We disagree.

When a motion for judgment notwithstanding the verdict is joined with a motion for a new trial, the trial court must rule on both motions. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 379, 329 S.E.2d 333, 343 (1985). Whether to grant a motion in the alternative for a new trial is within the sole discretion of the trial court and will not be disturbed absent a showing of 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). Upon review of the record, we find no abuse of discretion.

In sum, we find no error in the trial court's judgment awarding defendant damages of $236,950.52.

No error.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL THOMAS

No. 934SC1056

(Filed 15 August 1995)

Evidence and Witnesses § 929 (NCI4th)— child sexual abuse—victim's statements to friends—friends' statements to mothers—admissibility of mothers' testimony

The trial court erred in a prosecution for first degree sexual offense and taking indecent liberties with a child by admitting under the excited utterance exception to the hearsay rule the testimony of the mothers of two of the victim's kindergarten classmates as to what the daughters said that the victim had said to them about what her father had done. The testimony was offered to prove that defendant committed the crimes with which he was charged and was double hearsay because there were two out-of-court statements involved. The victim's conversation with her classmates was of such a nature as to have been properly admitted under the excited utterance exception to the hearsay rule; although the precise date of the alleged assault is unclear, the trial court found that it came within a four to five day period of the incident and, in the circumstances of this case, the passage of

four or five days does not detract from the "spontaneity" of the response. However, as to the statements by the classmates to their mothers, it is open to question as to whether the receipt of a communication that one's friend has been the victim of sexual assault constitutes a sufficiently startling or stressful event for purposes of the exception; and, even so, the declarations were not made in reaction to the central event, nor did either child witness or participate in the alleged abuse; in neither instance was the child's statement to her mother made under the influence of apparent distress caused by receipt of the information; and the remarks of the classmates to their mothers appear to be of narrative rather than instinctive character and would not have been admissible as part of the *res gestae*, the precursor to the "excited utterance" exception. Given the substantial importance of the testimony as the only direct evidence pointing to defendant's guilt, the error was prejudicial. It was noted that the trial court's analysis and findings herein were directed at the excited utterance exception and not the special requirements of N.C.G.S. § 8C-1, Rule 803(24).

Am Jur 2d, Evidence § 865.

Time element as affecting admissibility of statement or complaint made by victim of sex crime as res gestae, spontaneous exclamation, or excited utterance. 89 ALR3d 102.

Necessity, in criminal prosecution, of independent evidence of principal act to allow admission, under res gestae or excited utterance exception to hearsay rule, of statement made at time of, or subsequent to, principal act. 38 ALR4th 1237.

When is hearsay statement an "excited utterance" admissible under Rule 803(2) of the Federal Rules of Evidence. 48 ALR Fed. 451.

Appeal by defendant from judgment entered 20 April 1993 by Judge William C. Gore, Jr. in Jones County Superior Court. Heard in the Court of Appeals 23 August 1994.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Wanda G. Bryant, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defenders Mark D. Montgomery and Gordon Widenhouse, for defendant-appellant.

JOHN, Judge.

Defendant appeals convictions on two counts of first degree sexual offense (by anal and genital penetration) and one count of taking indecent liberties with a minor child. By judgment entered 20 April 1993, the trial court imposed concurrent sentences of life imprisonment on the first degree sexual offense counts and the presumptive three-year sentence on the indecent liberties charge, also to run concurrently.

In his appellate brief, defendant brings forth seven assignments of error for our consideration, six of which concern evidentiary rulings made by the court. In particular, defendant maintains the court erred to his prejudice by allowing the testimony of Teresa Meadows (Meadows) and Angela Eubanks (Eubanks) under the "excited utterance" exception to the hearsay rule, thereby entitling him to a new trial. As we agree with this contention, we do not address defendant's remaining arguments.

In pertinent part, the evidence at trial tended to show the following: In the fall of 1990, Meadows' daughter L. attended the same kindergarten class as A. (defendant's five-year-old daughter, the alleged victim), and the two girls were good friends. According to Meadows, on the Wednesday evening after Thanksgiving 1990, L. was "moping around" instead of being her normal "active" self. When Meadows asked L. if she was sick, the latter replied that "she had something on her mind." Upon further questioning by her mother, L. related that A. was crying earlier that day on the playground because her "pee pee hurt." When L. had asked A. what was wrong, A. explained that her father, defendant herein, had "got drunk over the weekend and was playing with her pee pee." L. also informed her mother that A. had exacted a promise from L. and another friend B. not to reveal to anyone what they had heard. Nevertheless, upon the suggestion of the girls' kindergarten teacher, Meadows subsequently reported the details of L.'s account to the Jones County Department of Social Services (DSS). When Meadows asked L. about the incident shortly before trial, however, the latter did not remember it.

Eubanks testified that her five-year-old daughter B. was also in A.'s kindergarten class. According to Eubanks, as she was putting B. to bed the Wednesday night after Thanksgiving 1990, B. told her A. had said her parents were getting a divorce. B. was "not upset or anything," but "seemed to be concerned." Eubanks attempted to reassure her daughter, whereupon B. further related that A. had mentioned her

father had been drinking a lot recently and that "over the holidays . . . he had gotten drunk and played with her private parts." Eubanks testified that she advised B. to tell A. to report the matter to their kindergarten teacher. When B. came home from school the next day, however, she told her mother A. had not spoken with the teacher because she was afraid. Eubanks observed that when reporting A.'s inaction, B. "was not upset." At that point, Eubanks herself called the teacher and later contacted DSS as well. Eubanks did not discuss the matter further with her daughter and believed at trial that "with the time frame . . . she wouldn't remember."

A. did not testify at trial, nor did either of her two kindergarten classmates.

Defendant's initial assignment of error is directed at the testimony of Meadows and Eubanks. He argues evidence elicited from each consisted of "double hearsay" not falling within the "excited utterance" hearsay exception, and that its admission constituted prejudicial error. We agree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c) (1992). Any such statement is "inadmissible except as provided by statute or the rules of evidence." *State v. Rogers*, 109 N.C. App. 491, 498, 428 S.E.2d 220, 224, *disc. review denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 128 L. Ed. 2d 54, *reh'g denied*, 128 L. Ed. 2d 495 (1994); *see also* N.C.R. Evid. 802 (1992).

In the case *sub judice*, the challenged testimony by Meadows and Eubanks was offered to prove that defendant committed the crimes with which he was charged. With respect to the presentation by each woman, there were *two* out-of-court assertions involved—that is, A.'s comments to L. and B., and the subsequent statements L. and B. made to their respective mothers. Because in each instance the

> out-of-court statements [were] offered for the truth of the matter, . . . this is a double hearsay situation. Each statement, therefore, must fall within an exception to the hearsay rule in order to [have] be[en] admissible.

State v. Perry, 54 N.C. App. 479, 481, 283 S.E.2d 569, 571 (1981) (citation omitted).

The trial court proceeded in a most conscientious and thorough manner. After conducting an extensive *voir dire* hearing into the circumstances surrounding A.'s statement to L. and B. and each child's respective report thereafter to her mother, it recited detailed findings in support of its decision to allow the challenged testimony under the "excited utterance" exception to the hearsay rule. *See* N.C.R. Evid. 803(2) (1992). Pertinent particulars of the trial court's rulings will be included herein as necessary.

I.

We first consider A.'s conversation with L. and B. As noted above, on the Wednesday following Thanksgiving 1990, L. and B. discovered A. in tears on the playground at kindergarten. Because they were concerned about A.'s distress, the girls inquired of her what was wrong. A. related that her father had gotten drunk over the weekend and "play[ed] with her pee pee" or "played with her private parts." The trial court specifically found that A.'s statement to L. and B. was a spontaneous response to their questions, made while A. was under "obvious distress" precipitated by events which occurred "within a four to five day period at most." Reasoning that a child of five "is characteristic[ally] free of conscious fabrication for longer periods [of time] including . . . four or five days," the court concluded that A.'s assertions to L. and B. fell within the excited utterance exception to the hearsay rule. *See* Rule 803(2).

Rule 803(2) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (2) Excited Utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

It is well-established that in order for an assertion to come within the parameters of this particular exception, "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985) (citation omitted). While the period of time between the event and the statement is without doubt a relevant factor, the element of time is not always material. *State v. Deck*, 285 N.C. 209, 213-14, 203 S.E.2d

830, 833-34 (1974). " '[T]he modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement.' " *Smith*, 315 N.C. at 87, 337 S.E.2d at 841 (quoting with approval J. Bulkley, *Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial*, Child Sexual Abuse and the Law 153, 155 (1983)).

In addition, the requirements of a sufficiently stressful event and of spontaneity entail subjective standards. *Rogers*, 109 N.C. App. at 501, 428 S.E.2d at 226. For example,

> [w]ith regard to statements made by young children, our Courts have adopted "a broad and liberal interpretation [of the requirements of Rule 803(2)]," and in doing so recognize that "the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than in adults."

Id. (quoting *Smith*, 315 N.C. at 87, 337 S.E.2d at 841). Further,

> "This ascertainment of prolonged stress is born of three observations. First, a child is apt to repress the incident. Second, it is often unlikely that a child will report this kind of incident to anyone but the mother. Third, the characteristics of young children work to produce declarations 'free of conscious fabrication' for a longer period after the incident than with adults."

Smith, 315 N.C. at 87-88, 337 S.E.2d at 841 (quoting *State v. Padilla*, 329 N.W.2d 263, 266 (Wis. Ct. App. 1982)).

We hold the victim's conversation with L. and B. on the playground was of such a nature as to have been properly admitted under the excited utterance exception to the hearsay rule. Although the precise date of the alleged assault is unclear from the record, A. told her friends on the Wednesday after Thanksgiving that it occurred sometime during the previous weekend. As the trial court found, therefore, A.'s statement on the playground came "within a four to five day period at most" of the incident of which she spoke. In the circumstances of this case, we do not believe the passage of four or five days detracts from the "spontaneity" of A.'s response. *See Smith*, 315 N.C. at 90, 337 S.E.2d at 843 (child's statement to her grandmother between two and three days of being sexually abused held admissible under the excited utterance exception to the hearsay rule); *see also Rogers*, 109 N.C. App. at 501, 428 S.E.2d at 226 (five-year-old told a playmate's mother she was sexually abused three days after the event); *see also State v. Jones*, 89 N.C. App. 584, 595, 367 S.E.2d 139,

146 (1988) (statement of victim within ten hours of time she left her abuser's custody).

Nor do we agree with defendant's suggestion that because A.'s comments were made in response to questions posed by her friends, they necessarily lacked spontaneity. *See State v. Murphy*, 321 N.C. 72, 77, 361 S.E.2d 745, 748 (1987) ("The fact that the victim spoke in response to a question does not defeat the trustworthiness of her utterance.") (citation omitted); *but see Rogers*, 109 N.C. App. at 501, 428 S.E.2d at 226 (circumstance that child's statements "not in response to any questioning on the part of the *adult* to whom they were made" a factor in determining admissibility) (emphasis added).

Significantly, A. was crying and obviously upset when she confided in her little friends, an emotional state indicating she remained "under the . . . stress caused by the event" at the time of her statement. *State v. Jolly*, 332 N.C. 351, 360, 420 S.E.2d 661, 667 (1992). In addition, the infliction of sexual abuse upon a five-year-old child by a parent indisputably constitutes a "sufficiently startling experience" for purposes of the exception. *See Rogers*, 109 N.C. App. at 501, 428 S.E.2d at 226.

Accordingly, although A.'s out-of-court statements to L. and B. were offered to prove the truth of the matter asserted (i.e, that A. had been sexually abused by defendant), we hold the trial court properly concluded that the *first level* of the "double hearsay" testimony at issue fell within the excited utterance exception to the hearsay rule.

II.

We are faced with a more troubling circumstance, however, when considering the *second level* of hearsay contained in the testimony of Meadows and Eubanks, that is, the statements made by L. and B. to their mothers.

Of the factors noted above—occurrence of a stressful event, passage of time between the event and statement, emotional state indicating declarant remained under stress of the event, and whether the statement came in response to interrogation, especially of a child by an adult—to be considered in ruling upon an "excited utterance," only the temporal aspect of the second hearsay level compares favorably with the first in terms of admissibility. *See Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988) (recitation of factors to be considered in determining whether statement was offered while declarant remained under the stress of the startling event).

First, it is at a minimum open to question whether receipt of a communication that one's friend has been the victim of sexual abuse (as opposed to being victimized oneself), while no doubt a shocking or disturbing revelation, constitutes a sufficiently startling or stressful event for purposes of the exception. *See, e.g., State v. Wingard*, 317 N.C. 590, 597-99, 346 S.E.2d 638, 643-44 (1986) (immediately after seeing defendant shoot a woman in the head, and while defendant remained bent over her holding the gun, out-of-court declarant made a statement which was overheard by others); *see also State v. Kerley*, 87 N.C. App. 240, 241-43, 360 S.E.2d 464, 465-66 (1987) (between eight and fifteen minutes after the mattress upon which he was sleeping was intentionally set afire, out-of-court declarant escaped from a burning building and gave a statement to responding officers), *disc. review denied, appeal dismissed*, 321 N.C. 476, 364 S.E.2d 661 (1988); *see also Murphy*, 321 N.C. at 76-77, 361 S.E.2d at 747-48 (out-of-court declarant told a policeman a man had entered her home and raped her approximately ten minutes after the alleged attack occurred). Moreover, B.'s first declaration to her mother, arguably the matter uppermost in her mind, was that A.'s parents were getting a divorce, not that A. had revealed sexual abuse by her father.

In this context, we also note authority requiring that the stressful event giving rise to the excited utterance exception of Rule 803(2) must "relate to the main event," *State v. Jones*, 362 S.E.2d 330, 333 (W. Va. 1987), or "lie at the heart of the suit." *See* 4 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence*, § 435 (2d ed. 1994); *see also Jones*, 362 S.E.2d at 333 (an admissible excited utterance must have been made by "one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.") (citation omitted). The declarations of L. and B. to Meadows and Eubanks were not made in reaction to the central event at issue herein, that is, the alleged sexual abuse of A., nor did either child witness or participate in that alleged abuse. Under the reasoning adopted by the foregoing authorities, therefore, the statements of the two girls could not qualify as excited utterances. However, while such prerequisites for admissibility may have merit, our decision herein need not be grounded upon this analysis.

Next, assuming *arguendo* that the passage of several hours between the receipt of A.'s revelation by L. and B. and their subsequent reports to their mothers was insufficient to dilute the spontaneity of the children's comments, we consider the emotional state of L. and B. during the conversations at issue. In neither instance was

the child's statement to her mother made under the influence of apparent distress caused by receipt of the information. Neither child was crying or appeared emotionally moved. L. was described by her mother as "moping around" and explained simply that she had something on her mind. Meadows did not relate any trauma involved on the part of L. in recounting what was "on her mind." According to Eubanks, B. seemed "concerned," but "not upset," when she volunteered to her mother during their customary nighttime conversation that A.'s parents were getting a divorce and that A. had stated her father had "gotten drunk and played with her private parts."

By contrast, A. was crying and visibly disturbed at the time of her statement to her friends. *See, e.g., Jolly*, 332 N.C. at 360, 420 S.E.2d at 667 (out-of-court declarant was "crying quite a bit, very upset[;] [h]ysterical."); *see also Murphy*, 321 N.C. at 77, 361 S.E.2d at 748 (out-of-court declarant was "crying and extremely upset" when she gave a statement); *see also Kerley*, 87 N.C. App. at 243, 360 S.E.2d at 466 (out-of-court declarant was "very upset and excited" and a police officer "had to tell him to calm down and take a minute" before he made a statement).

Additionally, in the case of L., she spoke of the incidents on the playground only in response to her mother's questioning whether she was sick. *See Rogers*, 109 N.C. App. at 501, 428 S.E.2d at 226.

Finally, we note that the excited utterance exception to the hearsay rule is a codification of the common law exception of "spontaneous utterance." *Wingard*, 317 N.C. at 598, 346 S.E.2d at 644 (citation omitted). Pre-Rule cases used the term *res gestae*, meaning "things done," to describe spontaneous utterances. *See* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 221 at 102-05 (4th ed. 1993). Under the *res gestae* rule, a statement made spontaneously and concurrently with an incident carries with it an inherent degree of credibility and will be admissible as a hearsay exception because of its spontaneous nature. *See Carroll v. Guffey*, 156 N.E.2d 267, 270 (Ill. Ct. App. 1959). In other words, " '[a] statement made as part of the *res gestae* does not **narrate** a past event, but it is the event speaking through the person and therefore . . . precludes the idea of design.' " *State v. Rinck*, 303 N.C. 551, 570, 280 S.E.2d 912, 925 (1981) (emphasis added) (quoting *State v. Connley*, 295 N.C. 327, 342, 245 S.E.2d 663, 672 (1978), *vacated on other grounds*, 441 U.S. 929, 60 L. Ed. 2d 657 (1979)).

Three requirements were established for admissibility as part of the *res gestae*:

> (a) The declaration must be of such spontaneous character as to be a sufficient safeguard of its trustworthiness; that is, preclude the likelihood of reflection and fabrication; *instinctive rather than narrative*; (b) it must be contemporaneous with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom; and (c) must have some relevancy to the fact sought to be proved.

Little v. Brake Co., 255 N.C. 451, 455-56, 121 S.E.2d 889, 891-92 (1961) (emphasis added) (citations omitted).

"Closely scrutinized," *see Brantley v. State*, 338 S.E.2d 694, 696 (Ga. Ct. App. 1985), the remarks of L. and B. to their mothers appear to be of "narrative" rather than "instinctive" character. L. was described by her mother as "moping around" and acting as if something was on her mind, prompting Meadows' inquiry into what was troubling her; B.'s mother recalled her daughter seemed "concerned." The conversation between each girl and her mother was in the nature of reporting the day's events. L. related what she heard that day after questioning by her mother, and B. recounted her conversation with A. during a routine mother-daughter talk before bedtime. The girls' statements would thus not have been admissible as part of the *res gestae*, the precursor to the "excited utterance" exception. *See, e.g.*, *Cannon v. State*, 623 S.W.2d 412, 413-14 (Tex. Crim. App. 1981) (testimony of neighbor recounting statement to her by victim's mother (defendant's wife) of defendant's inculpatory remarks made twenty-four hours prior to conversation between neighbor and victim's mother constituted double hearsay not within either excited utterance or *res gestae* exceptions to hearsay rule).

Based on the foregoing, we hold the statements of out-of-court declarants L. and B. to their mothers—the *second level* of hearsay contained in the testimony of Meadows and Eubanks—do not fall within the "excited utterance" exception to the hearsay rule. Accordingly, admission of those statements into evidence as "excited utterances" was improper.

III.

Although the "[e]rroneous admission of hearsay . . . evidence . . . is not always so prejudicial as to require a new trial," *State v. Sills*, 311 N.C. 370, 378, 317 S.E.2d 379, 384 (1984) (citations omitted), given

the substantive importance of the testimony of Meadows and Eubanks as the only direct evidence pointing to defendant's guilt, such error was indeed prejudicial to defendant's case. Accordingly, we must award a new trial. *State v. Milby and State v. Boyd*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981) ("The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction . . . .")

We note in closing that during oral argument before this Court, counsel expressed the opinion that the hearsay statements of L. and B. to their mothers may have been admissible under the "catch-all" hearsay exception. *See* N.C.R. Evid. 803(24) (1992); *see also* Susan K. Datesman, *State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases*, 64 N.C.L. Rev. 1352 (1986). While the prosecutor at the *voir dire* hearing in the trial court suggested the evidence might be admissible under Rule 803(24), the State may seek admission of testimony pursuant to this exception only if it:

> gives written notice stating [its] intention to offer the statement and the particulars of it . . . to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

See Rule 803(24). No such notice appears of record herein. *See In re Hayden*, 96 N.C. App. 77, 82, 384 S.E.2d 558, 561 (1989) (testimony properly excluded when record discloses notice requirement not satisfied).

Because the trial court did not admit the evidence under Rule 803(24) and the State does not argue this position in its brief, moreover, the feasibility of this particular exception is not presented for our review. *See* N.C.R. App. P. 28(a); *see also Smith*, 315 N.C. at 90, 337 S.E.2d at 843. In any event, admissibility of evidence under the "catch-all" exception is proper only after the trial court undertakes a particularized analysis and thereafter "enter[s] appropriate statements, rationale, or findings of fact and conclusions of law . . . in the record to support his discretionary decision . . . ." *Id.* at 97, 337 S.E.2d at 847. While extensive, the trial court's analysis and findings herein were directed at the excited utterance exception and not the special requirements of Rule 803(24). *See id.* at 90-98, 337 S.E.2d at 843-48.

Because of our disposition of this matter, we decline to address defendant's remaining assignments of error (relating primarily to certain evidentiary rulings made by the court). *See Akzona, Inc. v.*

Southern Railway Co., 314 N.C. 488, 497-98, 334 S.E.2d 759, 765 (1985). "Our trial judges are eminently capable of ruling on evidentiary issues. We feel it is proper to defer these matters to the trial judge who presides over the continuation of this case." *Id.* at 498, 334 S.E.2d at 765.

New trial.

Judges GREENE and MARTIN, Mark D. concur.

WILLIAM BARNETT, JR., DIANA ALSTON, JESSIE ALSTON, WILLIE GEORGE BROOKS, CRISTIFUS BROWN, TERRY CLARK, EMMA COUNCIL, MAXINE COUNCIL, BORIS EDWARDS, KENNETH EDWARDS, MARGARET B. FOSTER, ANITA GATTIS, CATHERINE DIANE GORDON, BARRY NELSON HARRINGTON, CECIL B. JACOBS, LOUIS J. JACOBS, RICKY LEE JACOBS, BESSINE B. LYONS, LIMWOOD MARTIN, JESSIE McLEOD, JOANN McLEOD, CHARLES MITCHELL, CHERYL MITCHELL, KEITH A. MITCHELL, BUDD NORWOOD, LARRY LENNIE O'NEAL, ANTHONY PAGE, JR., DIANA D. RILEY, LONNETTA RILEY, WILLIE ROBINSON, AUDREY R. SMITH, JEFFERY SMITH, ROBERT TAYLOR, ANTHONY LOUIS WEBB, DONNIE C. WEBB, LOUIS E. WEBB, AND SAUNDRA WOODS, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, PLAINTIFFS v. RALPH KARPINOS, INDIVIDUALLY AND IN HIS POSITION AS TOWN ATTORNEY FOR THE TOWN OF CHAPEL HILL, ARNOLD GOLD, INDIVIDUALLY AND IN HIS POSITION AS CHIEF OF POLICE FOR THE TOWN OF CHAPEL HILL, LINDY PENDERGRASS, INDIVIDUALLY AND IN HIS POSITION AS SHERIFF OF ORANGE COUNTY, THOMAS SNIPES, INDIVIDUALLY AND IN HIS POSITION AS CHIEF OF THE DETECTIVE BUREAU, CHAPEL HILL POLICE DEPARTMENT, BEN WISEMAN, INDIVIDUALLY AND IN HIS POSITION AS DETECTIVE, CHAPEL HILL POLICE DEPARTMENT, MELISSA G. McCALL, INDIVIDUALLY AND IN HER POSITION AS DETECTIVE, CARRBORO POLICE DEPARTMENT, MARSHA E. GALE, INDIVIDUALLY AND IN HER POSITION AS DETECTIVE, CHAPEL HILL POLICE DEPARTMENT, TOWN OF CHAPEL HILL, A MUNICIPAL CORPORATION, ORANGE COUNTY, A MUNICIPAL CORPORATION, ROBERT MORGAN, INDIVIDUALLY AND IN HIS POSITION AS DIRECTOR, NORTH CAROLINA STATE BUREAU OF INVESTIGATION, CHARLES DUNN, INDIVIDUALLY AND IN HIS POSITION AS DEPUTY DIRECTOR, NORTH CAROLINA STATE BUREAU OF INVESTIGATION, AND SEVERAL UNKNOWN AGENTS OF THE NORTH CAROLINA STATE BUREAU OF INVESTIGATION, INDIVIDUALLY, DEFENDANTS

No. 9315SC1316

(Filed 15 August 1995)

1. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— drug raid—city block sealed—§ 1983 action

In an action under 42 U.S.C. § 1983 arising from a drug raid in which a city block was cordoned off, the trial court erred in granting defendants' motion for summary judgment based on immunity

arising from official capacity. There was sufficient evidence to withstand the motion in that Chapel Hill law enforcement policy is developed by the police chief in consultation with the Town Manager; the decision to obtain the search warrant originated with defendants Gale, Wiseman, and McCall, detectives with the Chapel Hill and Carrboro police departments; after drafting the affidavit and accompanying warrant, they conferred with defendant Gold, the Chapel Hill police chief, and defendant Karpinos, the Chapel Hill Town Attorney; both men gave the operation their approval; defendant Gold kept the Town Manager abreast of the situation and how it was being handled; and, when asked what the Town Manager said about the planned operation, Gold stated "I venture to say he just listened and said okay." A § 1983 claim against the individual defendants in their official capacity is essentially a claim against Chapel Hill, and, because Chapel Hill is not immune from suit, neither are defendants in their official capacity. However, summary judgment was correctly granted as to defendant McCall because no evidence was presented as to policy or custom by the Town of Carrboro and summary judgment was also correctly granted to the extent plaintiffs sought punitive damages.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-95.

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under 42 USCS sec. 1983, or in *Bivens* action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

2. Searches and Seizures § 1 (NCI4th)— drug raid—city block cordoned off—§ 1983 action— defendants' individual capacity

The trial court erred in granting summary judgment for defendants in their individual capacity in a 42 U.S.C. § 1983 action arising from a drug raid in which officers, many in camouflage and black masks, surrounded and sealed off a city block and ordered all people congregating on a street and inside a club to either lie face down or stand against a wall with their hands up until one of three detectives could identify them as not being one of the targets of the search. The specific right allegedly violated in this case is plaintiffs' right to be free from unreasonable search and seizure and, while there is an absolute dearth of case law regarding this type of mass search and seizure, this absence does

not preclude a determination that plaintiffs' right was clearly established as there is an abundance of case law on each individual's right to be free from unreasonable search and seizure. The search warrant here is invalid as little more than a general warrant unsupported in many respects by the requisite probable cause. Moreover, defendants' decision to detain and frisk all persons found within the block during the raid was based on a generalized presumption of "guilt" by presence which does not support the measures taken against each individual. Finally, the officers conducted much more than a weapons frisk and plaintiffs had a clearly established right to be free from full searches based on anything short of probable cause. A question of material fact exists as to whether a reasonable person in these defendants' position would have known their conduct violated plaintiffs' clearly established rights.

Am Jur 2d, Searches and Seizures § 3.

3. Constitutional Law § 85 (NCI4th)— drug raid—city block cordoned off—state constitutional remedy—common law remedy

The trial court did not err in an action arising from a drug raid in which a city block was cordoned off by dismissing plaintiffs' state constitutional claims because plaintiffs' constitutional claims are adequately protected by their common law tort claims.

Am Jur 2d, Constitutional Law §§ 557-573.

4. Municipal Corporations § 446 (NCI4th)— drug raid—mass search—common law claim—official capacity—purchase of insurance

The trial court erred in an action arising from a drug raid in which a city block was cordoned off by granting summary judgment for plaintiffs on the issue of immunity from common law claims where plaintiffs alleged and Chapel Hill acknowledged the purchase of liability insurance and there was no evidence that this claim was excluded from coverage.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 37-41.

Comment Note.—Municipal immunity from liability for torts. 60 ALR2d 1198.

5. Sheriffs, Police, and Other Law Enforcement Officers § 1 (NCI4th)— drug raid—mass search—common law tort claims— individual immunity

The trial court did not err by granting summary judgment for defendants in their individual capacity on common law tort claims in an action arising from a drug raid in which a city block was cordoned off. Defendants exercised their judgment and discretion within the scope of their official authority and there is no evidence that defendants acted either corruptly or maliciously.

Am Jur 2d, Sheriffs, Police, and Constables §§ 46-67.

6. Declaratory Judgment Actions § 7 (NCI4th)— drug raid—city block cordoned off—declaratory judgment as unlawful—not a justiciable controversy

The trial court properly granted summary judgment for defendants in an action arising from a mass drug raid where plaintiffs sought a declaratory judgment that this and similar raids are unlawful and in violation of the right to be free from unreasonable search and seizure. The search has already taken place and an action seeking to have it and similar searches declared invalid is not appropriate. N.C.G.S. § 1-253.

Am Jur 2d, Decaratory Judgments §§ 29-32.

Appeal by plaintiffs from orders entered 25 May 1993 and 26 May 1993 by Judge Knox V. Jenkins, Jr., in Orange County Superior Court. Heard in the Court of Appeals 5 April 1995.

Beginning at 9:00 p.m. on 16 November 1990, Chapel Hill law enforcement, assisted by the special response team of the State Bureau of Investigation, executed a search warrant on the one hundred block of Graham Street in Chapel Hill. The raid, known as "Operation Readi-Rock," was conducted to locate and identify a small number of individuals suspected of drug trafficking and culminated from several months of surveillance on Graham Street. In executing the warrant, officers and agents, many outfitted in camouflage and black masks, surrounded and sealed off the block. According to plaintiffs, they ordered all people congregating on Graham Street and inside a club known as the Village Connection to either lie face down on the floor or stand against a wall with their hands up.

During the raid, sixty to one hundred people were searched and detained until one of three detectives who could identify the targets

of their search determined they were not one of the individuals being sought. Many plaintiffs claim they were fully searched during the raid. Many also complained that officers failed to identify themselves, leading them to believe they were being robbed or attacked. Others reported injuries at the hands of officers. All of those detained were African-American and many stated that whites were allowed to leave the area during the raid. During the raid officers seized approximately $700.00 to $2,000.00 in cash, $1,000.00 to $2,000.00 in cocaine, and some weapons. Several arrests were made but none were prosecuted.

Plaintiffs filed this action alleging violations of 42 U.S.C. § 1983 (section 1983), Article I, §§ 1, 18, and 20 of the North Carolina Constitution, and the common law torts of assault, battery, false imprisonment, and malicious prosecution. They also sought a declaration under N.C. Gen. Stat. § 1-253 (1983) that this and similar raids were unconstitutional.

Plaintiffs voluntarily dismissed their claims for monetary damages against defendants Morgan and Dunn. In addition, they voluntarily dismissed all claims against defendants Pendergrass and Orange County. Defendants Town of Chapel Hill (Chapel Hill), Karpinos, Gold, Snipes, Wiseman, McCall, and Gale filed motions for summary judgment on the basis of immunity. The trial court granted their motion on all causes of action. Plaintiffs appeal.

Glover & Petersen, P.A., by James R. Glover, for plaintiff appellants.

Bailey & Dixon, by Gary S. Parsons, Patricia P. Kerner, and Kenyann G. Brown, for defendant appellee Karpinos.

Cranfill, Sumner & Hartzog, L.L.P., by Dan M. Hartzog and Patricia L. Holland, for defendant appellees Gold, Snipes, Wiseman, Gale, and Town of Chapel Hill.

Michael B. Brough & Associates, by Michael B. Brough, for defendant appellee McCall.

ARNOLD, Chief Judge.

This appeal involves defendants Chapel Hill, Karpinos, Gold, Snipes, Wiseman, Gale, and McCall. Plaintiffs argue that the trial court erred in dismissing their claims against these defendants.

I. 42 U.S.C. § 1983

[1] Plaintiffs' first cause of action is grounded in section 1983, under which they seek compensatory and punitive damages, as well as equitable relief. They alleged officers used unreasonable and excessive force in executing the search warrant, and that defendants detained them without a valid warrant, probable cause, or reasonable suspicion, all in violation of the right to be free from unreasonable search and seizure. Plaintiffs sued defendants in both their official and individual capacity.

A. Official Capacity

Plaintiffs contend immunity does not apply to this claim and that the trial court erred in dismissing it on that basis. We agree.

Municipalities may be sued under section 1983 where the allegedly unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 635 (1978). "[M]unicipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. Cincinnati*, 475 U.S. 469, 480, 89 L. Ed. 2d 452, 463 (1986). In *Pembaur*, the Court added that:

> a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.

Id. at 481, 89 L. Ed. 2d at 463-64.

Chapel Hill law enforcement policy is developed by the police chief who "[r]ecommends and enforces departmental policies, rules, and regulations . . . [and] determines practices and methods to be used by departmental personnel in consultation with the Town Manager." The decision to obtain the search warrant originated with defendants Gale, Wiseman, and McCall. After drafting the affidavit and accompanying warrant, they conferred with defendant Gold, the

police chief, and defendant Karpinos. Both men gave the operation their approval. Defendant Gold kept the Town Manager abreast of the situation and how it was being handled. When asked what the Town Manager said about the planned operation, Gold stated "I venture to say he just listened and said okay."

This evidence of policy is sufficient to withstand defendants' motion for summary judgment and the trial court erred in dismissing this portion of plaintiffs' section 1983 claim. A section 1983 claim against the individual defendants in their official capacity is essentially a claim against Chapel Hill. Because Chapel Hill is not immune from suit, neither are defendants in their official capacity. However, we affirm summary judgment as to defendant McCall as plaintiffs presented no evidence of policy or custom on the part of her employer, the Town of Carrboro.

Moreover, we affirm summary judgment to the extent plaintiffs sought punitive damages under section 1983. *See Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 69 L. Ed. 2d 616 (1981) (holding that a municipality is immune from punitive damages under section 1983); *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982). In addition, we reverse summary judgment as to plaintiffs' claim for injunctive relief. *See Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, — U.S. —, 121 L. Ed. 2d 431 (1992).

B. Individual Capacity

[2] Plaintiffs also argue that defendants are not entitled to qualified immunity under section 1983. In reviewing this argument, we apply the following standard:

> "The test of qualified immunity for police officers sued under [section 1983] is whether [the officers' conduct violated] clearly established statutory or constitutional rights of which a reasonable person would have known." *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994) (citations omitted). In ruling on the defense of qualified immunity we must: (1) identify the specific right allegedly violated; (2) determine whether the right allegedly violated was clearly established at the time of the violation; and (3) if the right was clearly established, determine whether a reasonable person in the officer's position would have known that his actions violated that right. *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). The first two determinations are questions of law for the court and should always be decided at

> the summary judgment stage. *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992); *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994). However, "the third [determination] . . . require[s] [the factfinder to make] factual determinations [concerning] disputed aspects of the officer[s'] conduct." *Lee v. Greene*, 114 N.C. App. at 585, 442 S.E.2d at 550 (citations omitted).

Davis v. Town of Southern Pines, 116 N.C. App. 663, 670, 449 S.E.2d 240, 244 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995).

The specific right allegedly violated in this case is plaintiffs' right to be free from unreasonable search and seizure. There is an absolute dearth of case law regarding this type of mass search and seizure. We do not agree, however, that this absence precludes a determination that plaintiffs' right was clearly established as there is an abundance of case law on each individual's right to be free from unreasonable search and seizure. " 'Clearly established' . . . includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992).

This operation offends those core principles in many respects, the first being the warrant itself. "The fourth amendment's requirement that warrants must particularly describe the items to be searched for and seized is designed to prevent law enforcement officials from engaging in general searches." *State v. Williams*, 315 N.C. 310, 317, 338 S.E.2d 75, 80 (1986). Here, defendants contend they intended only to briefly detain and frisk people located within the cordoned-off block to search for a small number of individuals suspected of drug trafficking. The warrant, however, authorized a much broader search. For example, the warrant application stated that there was "probable cause to believe that *cocaine, drug paraphernalia, currency, [and] records indicating transactions of drugs*" would be found on the persons or places identified below. The places identified for a search were "107 and 115 on Graham Street, between W. Rosemary Street and West Franklin Street." The persons identified for a search were those "persons congregating in the block of Graham Street between W. Franklin and W. Rosemary Streets on sidewalks, alleyways and parking lots and street areas as more fully described in the attached Affidavit." Defendants admit probable cause was lacking to search the individuals identified above.

While we appreciate the difficulties inherent in conducting drug investigations, we cannot condone such a broadly stroked approach to law enforcement. The warrant is invalid as little more than a general warrant unsupported in many respects by the requisite probable cause. Indeed, Magistrate Riley testified that she had strong reservations about the warrant and several statements within the supporting affidavit, but felt pressured by defendant Gale to sign it. Plaintiffs had a clearly established right to be free from searches derived from search warrants based on less than probable cause.

Moreover, defendants' decision to detain and frisk all persons found within the block during the raid was based on a generalized presumption of "guilt" by presence. This presumption does not support the measures taken against each individual. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238 (1979) (mere propinquity to people independently suspected of criminal activity, without more, does not give probable cause to search that person); *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992) (mere proximity to a high drug area is insufficient to allow a seizure, and to do so is unreasonable). Defendants admit they had no knowledge of many plaintiffs' identity or reputation. Their interest in locating the individuals suspected of drug trafficking is grossly outweighed by the infringement on the rights of the sixty to one hundred searched and detained. *See Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979). Moreover, assuming plaintiffs' allegations to be true, as we must, the officers conducted much more than a weapons frisk. Plaintiffs had a clearly established right to be free from full searches based on anything short of probable cause, *see State v. Pittman*, 111 N.C. App. 808, 433 S.E.2d 822 (1993), and probable cause was lacking for a full search.

We must now determine whether a reasonable person in these defendants' position would have known their conduct violated plaintiffs' clearly established rights. We believe a question of material fact exists on this point precluding summary judgment. " '[I]f there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial.' " *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994) (quoting *Pritchett*, 973 F.2d 307, 313 (4th Cir. 1992)).

II. State Constitutional Claims

[3] Plaintiffs contend the trial court erred in dismissing their state constitutional claims brought against defendants in their official

capacity, arguing that immunity is not a defense. Defendants maintain that *Corum* precludes a direct cause of action under the North Carolina Constitution where adequate state remedies exist to redress violations of individual rights. We agree. Moreover, we agree with defendants that this claim cannot be brought against them in their individual capacities. *See Corum*, 330 N.C. 761, 413 S.E.2d 276.

"[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. 761, 782, 413 S.E.2d 276, 289. The judiciary, however, "must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power." *Id.* at 784, 413 S.E.2d at 291.

In *Davis v. Town of Southern Pines*, plaintiff presented a state constitutional claim under Article I, §§ 1 and 19. Acknowledging *Corum's* limitation on direct actions, we held that "[p]laintiff's constitutional right not to be unlawfully imprisoned and deprived of her liberty are adequately protected by her common law claim of false imprisonment, which protects her right to be free from unlawful restraint." *Davis*, 116 N.C. App. 663, 675, 449 S.E.2d 240, 248. We now hold that plaintiffs' constitutional rights are adequately protected by their common law tort claims, and that a direct cause of action is not warranted in this case.

III. Common Law Tort Claims

[4] Plaintiffs sued defendants under four common law tort theories. They first contend the trial court erred in dismissing these claims because discovery, as limited by defendants, related only to immunity which does not apply to these claims. We do not agree.

A. Official Capacity

Plaintiffs contend that "[w]hen a city official is sued for tort in his official capacity, state sovereign immunity is waived by the purchase of liability insurance." They argue that Chapel Hill acknowledges it purchased liability insurance and that defendants acted within the course and scope of their employment; therefore, defendants are not shielded by immunity. We agree.

"[A] municipality and its officers or employees sued in their official capacities are immune from suit for torts committed while the officers or employees are performing a governmental function."

Morrison-Tiffin v. Hampton, 117 N.C. App. 494, 504, 451 S.E.2d 650, 657, *appeal dismissed and disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995). Municipalities may waive immunity, pursuant to N.C. Gen. Stat. § 160A-485 (1994), by purchasing liability insurance. *Id.*

Here, plaintiffs alleged, and Chapel Hill acknowledged, the purchase of liability insurance. There is no evidence that this claim is excluded from coverage, nor are we aware that defendants deny coverage. Accordingly, the trial court erred in granting summary judgment for defendants. We do not address the underlying merits of these claims, believing that such an undertaking would be premature.

B. Individual Capacity

[5] Plaintiffs argue that defendants are not immune from these claims in their individual capacity. They argue that "[a] public official has no state sovereign immunity defense for tort claims when sued in his individual capacity."

In *Smith v. State*, our Supreme Court stated that " 'a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto.' " *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (quoting *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952)). As long as the official lawfully exercises his judgment or discretion, stays within the scope of his official authority, and does not act with malice or corruption, he is protected from liability. *Id.*

Here, defendants exercised their judgment and discretion within the scope of their official authority. While we disagree with the outcome of that exercise, there is no evidence that defendants acted either corruptly or maliciously. The trial court did not err in granting summary judgment for defendants in their individual capacity.

IV. Declaratory Relief Claim

[6] Plaintiffs sought a declaratory judgment that this and similar raids are unlawful and in violation of the right to be free from unreasonable search and seizure. They contend the trial court erred in dismissing this claim because it is not barred by immunity.

N.C. Gen. Stat. § 1-253 (1983) states that "[c]ourts . . . shall have power to declare rights, status, and other legal relations." This requires an actual controversy. "An actual controversy exists when

litigation arising out of conflicting contentions as to rights and liabilities appears unavoidable." *Majebe v. North Carolina Board of Medical Examiners*, 106 N.C. App. 253, 257, 416 S.E.2d 404, 406, *appeal dismissed and disc. review denied*, 332 N.C. 484, 421 S.E.2d 355 (1992).

In *Majebe*, plaintiff sought a declaration regarding the validity of a search of her office, claiming that the warrant was defective. We held that since the search had already taken place there was "no controversy appropriate for a declaratory judgment." *Id.* at 259, 416 S.E.2d at 407 (stating that if the State prosecuted plaintiff that proceeding would "be the proper forum to challenge the search"). Here, as in *Majebe*, the search has already taken place. An action seeking to have this and similar searches declared invalid is not appropriate.

In summation, we affirm summary judgment on plaintiffs' (1) claims for punitive damages under section 1983, (2) claims under our state constitution, (3) common law tort claims against defendants in their individual capacity, and (4) N.C. Gen. Stat. § 1-253 (1983). We reverse summary judgment on plaintiffs' (1) section 1983 claims against defendants in their official capacity, with the exclusion of defendant McCall, (2) section 1983 claims against defendants in their individual capacity, and (3) common law tort claims against defendants in their official capacity.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and JOHN concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. F. ROGER PAGE, JR., DORIS B. PAGE AND PACE OIL CO., INC., DEFENDANTS

No. COA94-1085

(Filed 15 August 1995)

1. Appeal and Error § 87 (NCI4th)— certification of case for appeal—signing of appeal entry ineffective

The trial court's attempt to certify an interlocutory order for appeal was ineffective, since the signing of an appeal entry by the trial court cannot, in and of itself, be held to satisfy the affirmative act of certification required by N.C.G.S. § 1A-1, Rule 54(b).

Am Jur 2d, Appellate Review §§ 84-87, 89, 117.

2. Appeal and Error § 121 (NCI4th)— two of three defenses dismissed—no substantial right affected—appeal premature

The trial court's order dismissing two of defendants' defenses but leaving one defense intact did not subject defendants to the possibility of inconsistent verdicts, since defendants contended that plaintiff's conduct in withholding its performance under a 1987 agreement unless and until defendants executed the 1989 supplemental agreement and guaranty amounted to coercion and duress; the only difference between defendants' second, third, and fourth defenses was that the second defense involved the effect of plaintiff's conduct on the 1987 agreement while the third and fourth defenses involved the effect of the conduct on the 1989 supplemental agreement and guaranty; by granting summary judgment for plaintiff on defendants' third and fourth defenses but leaving their second defense intact, the trial court left for the jury the questions of whether plaintiff coerced defendants into signing the 1989 supplemental agreement and guaranty and, if so, whether this conduct amounted to a breach of the 1987 agreement; and the trial court's order thus did not preclude defendants from fully defending against plaintiff's claims, and thus affected no substantial right.

Am Jur 2d, Appellate Review §§ 300, 301.

Appeal by defendants from order entered 13 May 1994 by Judge Jerry R. Tillett and from rulings on 16 May 1994 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 26 May 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Emmett B. Haywood, for plaintiff-appellee.

Robinson Maready Lawing & Comerford, L.L.P., by William F. Maready, Clifford Britt, and H. Stephen Robinson, for defendants-appellants.

WALKER, Judge.

This appeal arises out of a contractual dispute between plaintiff North Carolina Department of Transportation (the Department) and defendant F. Roger Page, Jr. (Page) concerning the relocation of State Secondary Road 1568 (SR 1568) on Topsail Island, North Carolina. Page owned numerous properties on Topsail Island, including one

tract which was under option to Resort Equities, Inc., who planned to build a condominium resort (Villa Capriani) on the site. Resort Equities' plans required the relocation of SR 1568, and Page agreed to assist Resort Equities in negotiating the relocation of the road. On 13 January 1987, Page and the Department executed an "Agreement for Relocation of SR 1568" (the 1987 agreement). Page agreed to construct the entire 4.0 mile portion of the new SR 1568 at his expense and to obtain the necessary right-of-ways. Page further agreed to deed the relocated SR 1568 and associated right-of-ways to the Department upon completion. The Department agreed to accept Page's tender of the road and to abandon the corresponding portion of the old SR 1568 upon completion of construction.

Construction of Phase I of the new SR 1568 began more than a year after the 1987 agreement was executed. This delay occasioned a corresponding delay in the construction of Villa Capriani. These delays, combined with overruns in construction costs for the road relocation, caused severe financial difficulties for Page, who had invested considerable funds into both the development of Villa Capriani and the road relocation.

On 20 September 1989, Page tendered Phase I of the new SR 1568 to the Department and requested that the Department accept it and abandon the corresponding section of the old road. The Department refused Page's tender. On 13 October 1989, the Board of Transportation passed a resolution which conditioned the Department's acceptance of Phase I and its abandonment of the corresponding section of the old road on, among other things, the execution of "a supplemental agreement ensuring completion of the remainder of SR 1568" and Page's provision of a "surety or cash bond in an amount determined by the Secretary of Transportation . . . to be adequate to cover the estimated cost of the right of way and construction of the uncompleted portion of SR 1568. . . ." On 19 October 1989, the parties executed a "Supplemental Agreement for Relocation of SR 1568," and Page and his wife, Doris, signed a "Guaranty of Performance" individually and as officers of defendant Pace Oil Company, Inc. On the following day, the Department accepted Phase I and abandoned the corresponding portion of the old road. Page did not complete the remainder of the construction of the new SR 1568, and the Department completed the project.

On 29 April 1991, the Department filed suit alleging that Page breached the 1987 and 1989 agreements and that Doris Page and Pace

Oil Company, Inc. had guaranteed his performance in the 1989 guaranty. Defendants answered and counterclaimed, alleging that the Department breached the 1987 agreement by conditioning its performance thereunder on the execution of the 1989 supplemental agreement and guaranty; that the agreements were void as illegal bargains; that the State interfered with Page's performance through a campaign of harassment, interference, and delay; and that the 1989 supplemental agreement and guaranty were obtained by coercion and duress.

The Department moved for summary judgment on all issues except damages, and defendants moved for summary judgment on all issues. On 13 May 1994, the trial court denied defendants' motion and granted the Department's motion as to defendants' first defense (alleging the State's interference with Page's performance), their third and fourth defenses (alleging that the 1989 supplemental agreement and guaranty were obtained through coercion and duress), their tenth defense (alleging illegality), and their eleventh defense (alleging frustration of purpose). The trial court denied the Department's motion as to the remaining defenses.

During pretrial hearings, the Department moved that defendants be prevented from presenting any evidence which, but for the court's summary judgment order, might have been used to show that the 1989 supplemental agreement and guaranty were obtained by coercion and duress. Defendants argued that this evidence was necessary to show that the Department breached the 1987 agreement by conditioning its performance thereunder on defendants' execution of the 1989 supplemental agreement and guaranty. The trial court granted the Department's motion. After the jury was empaneled, but before opening statements began, defendants gave notice of appeal, and the trial court declared a mistrial.

The Department argues that the trial court's order and rulings are interlocutory and not immediately appealable. An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy. *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993). There is generally no right to appeal an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). The purpose of this rule is " 'to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring

the case to final judgment before it is presented to the appellate courts.' " *Id.* (*quoting Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. rev. denied*, 315 N.C. 183, 337 S.E.2d 856 (1985)).

However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. *Id.*

[1] Defendants appeal the trial court's order granting the Department's motion for summary judgment on defendants' third and fourth defenses, alleging coercion and duress, and denying defendants' motion for summary judgment on their second defense, alleging that the Department breached the 1987 agreement by conditioning its performance thereunder on defendants' signing the 1989 supplemental agreement and guaranty. The court's order did not completely dispose of the case and is therefore interlocutory. *See Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253 (granting of partial summary judgment is interlocutory order from which there is ordinarily no right of appeal); *Fraser*, 75 N.C. App. at 655, 331 S.E.2d at 218 (denial of summary judgment is not final judgment and is not immediately appealable).

In the instant case, it appears that the trial court attempted to certify the case for immediate appeal under Rule 54(b), stating,

> [T]he Court has . . . no bases in law that I can determine to prevent the defendants from giving notice of appeal, and the law seems to be clear once notice of appeal is given, until the Court of Appeals or some Appellate Court determines this is an interlocutory appeal that does not affect a substantial right, that I have no way of precluding counsel from giving notice of appeal and have no way of causing this trial to go forward.

The court signed an appeal entry on 8 June 1994. This Court has held that "the signing of an appeal entry by the trial court cannot, in and of itself, be held to satisfy the affirmative act of certification required by Rule 54(b)." *Leasing Corp. v. Myers*, 46 N.C. App. 162, 171-172, 265

S.E.2d 240, 247, *appeal dismissed*, 301 N.C. 92, (1980) (subsequent history not reported in S.E.2d). Thus, the trial court's attempt to certify the case for appeal is ineffective.

[2] However, defendants may still pursue an immediate appeal of the trial court's order and rulings under the substantial right doctrine. This doctrine, derived from N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1), provides in effect that "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 333, 299 S.E.2d 777, 779 (1983). North Carolina courts have long acknowledged that the substantial right doctrine

> is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978); *see generally* J. Brad Donovan, *The Substantial Right Doctrine and Interlocutory Appeals*, 17 Campbell L. Rev. 71 (1995). However, in dealing with the doctrine, our courts have developed certain general principles by which we are guided.

In *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), the North Carolina Supreme Court held that the right to avoid a trial is generally not a substantial right, but the right to avoid two trials on the same issue may be. *Id.* at 608, 290 S.E.2d at 596. The Court stated that "the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Id.* In *Liggett Group v. Sunas*, 113 N.C. App. 19, 437 S.E.2d 674 (1993), this Court expanded on the *Green* holding, stating that

> [a] substantial right . . . is considered affected if "there are overlapping factual issues between the claim determined and any claims which have not yet been determined" because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues.

Id. at 24, 437 S.E.2d at 677 (citation omitted). This Court has interpreted the language of *Green* and its progeny as creating a two-part

test requiring a party to show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists. *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 697 (1994).

Defendants argue that under the holdings in *Green*, *Liggett*, and *Moose*, they are entitled to an immediate appeal because the trial court's order exposes them to the possibility of inconsistent verdicts upon the "overlapping factual issues" of their second, third, and fourth defenses. After carefully reviewing the pleadings and the procedural development of this case, we disagree.

Defendants' second defense contains the following detailed factual allegations: Defendant Page tendered performance of Phase I of the relocated road to the Department in September 1989 and asked the Department to accept the new road and abandon the corresponding section of the old road as contemplated in the 1987 agreement. The Department wrongfully rejected the tender. Instead, the Department conditioned its performance on defendants' execution of the 1989 supplemental agreement and guaranty. At the time the Department made this demand, it knew that Page's ability to pay the construction loans for Villa Capriani depended upon his timely receipt of the Department's performance under the 1987 agreement and that Page's loans would go into default if this performance were withheld. The second defense then states,

> 6. On or about October 19, 1989, and because of the DOT's wrongful refusal to accept his tender of SR 1568 with the resulting consequences discussed above, *Page was coerced into executing the second agreement for relocation of SR 1568, and defendants were also coerced into executing a purported guaranty of Page's performance of the new agreement.*
>
> 7. After the second agreement and guaranty were executed, the DOT finally agreed to perform under the first agreement, accepted Page's tender of 2.7 miles of new SR 1568 and abandoned all right, title, and interest in old SR 1568.
>
> 8. *Plaintiff breached the January 13, 1987 contract by its failure and refusal to accept Page's tender of the completed portion of SR 1568 and to abandon all right, title, and interest in old SR 1568, until defendants executed a new agreement and guaranty.*

(Emphasis added.) Defendants' third and fourth defenses seek rescission of the 1989 supplemental agreement and guaranty on the grounds that they were obtained by coercion and duress respectively.

Defendants' central position in this case is that the Department's conduct in withholding its performance under the 1987 agreement unless and until defendants executed the 1989 supplemental agreement and guaranty amounted to coercion and duress. The only difference between defendants' second, third, and fourth defenses is that the second defense involves the effect of the Department's conduct on the 1987 agreement while the third and fourth defenses involve the effect of the conduct on the 1989 supplemental agreement and guaranty. By granting summary judgment for the Department on defendants' third and fourth defenses but leaving their second defense intact, the trial court left for the jury the questions of whether the Department coerced defendants into signing the 1989 supplemental agreement and guaranty and, if so, whether this conduct amounted to a breach of the 1987 agreement. Since the trial court's order does not preclude defendants from fully defending against the Department's claims, no substantial right has been affected.

The instant case is distinguishable from *Liggett*, upon which defendants rely. In that case, Liggett alleged that Sunas had patented a process in his own name which had been developed using information acquired while he was employed by Liggett. Liggett's action stated six claims, the first of which was a request for declaratory relief ordering Sunas to assign the patent to Liggett. *Liggett*, 113 N.C. App. at 22-23, 437 S.E.2d at 676-77. The trial court granted summary judgment for Liggett on its first claim and on all of Sunas' counterclaims, but expressly withheld determination regarding Liggett's remaining claims. *Id.* at 23, 437 S.E.2d at 677. This Court allowed Liggett's appeal, stating:

> By granting summary judgment on Liggett's first claim, thereby ordering Sunas to assign the patent, the trial court effectively decided ownership of the patented . . . process rested with Liggett. This determination is fundamental to the disposition of Liggett's remaining claims. If Liggett prevailed at trial on those counts, and upon Sunas' subsequent appeal this Court held ownership of the process to be a jury question, Sunas would thereby likely be awarded a new trial on all . . . six of Liggett's claims. Requiring such adjudication of the same claims in two separate

> trials would result in needless expense to the parties as well as to our court system.

Id. at 24, 437 S.E.2d at 677-78. In the instant case, defendants' second defense did not depend on the third and fourth defenses; indeed, the third and fourth defenses were essentially duplicative of the second defense. As we have stated, the trial court's orders left for the jury the questions of whether the Department coerced defendants into signing the 1989 supplemental agreement and guaranty and, if so, whether this conduct amounted to a breach of the 1987 agreement, and we fail to see how defendants can now claim that they are exposed to the possibility of inconsistent verdicts.

Defendants also assert that the trial court's pretrial ruling that defendants could not introduce evidence of the circumstances surrounding the signing of the 1989 supplemental agreement and guaranty rendered them incapable of fully presenting their second defense. However, at trial of the case, defendants will have the opportunity to fully develop their surviving claims in defense of this action, consistent with this opinion.

In sum, we hold that the trial court's order and rulings did not deprive defendants of a substantial right which would be lost absent immediate appellate review. Defendants' appeal must therefore be dismissed.

To avoid "fragmentary, premature and unnecessary appeals," we encourage trial judges to carefully review the procedural posture of each case in which dispositive rulings have been made in order to determine whether those rulings prevent the parties from fully presenting their remaining claims and defenses. If not, the trial court should go forward with the trial of the action.

Dismissed.

Judges WYNN and JOHN concur.

LOVE v. TYSON

[119 N.C. App. 739 (1995)]

JAMES F. LOVE, III, INDIVIDUALLY, AND L&L PARTNERSHIP, A NORTH CAROLINA PARTNERSHIP v. CARLTON TYSON, TYSON REALTY, INC., SANFORD L. STEELMAN, SUBSTITUTE TRUSTEE FOR NATIONSBANK, RAY D. VAUGHN, TRUSTEE FOR WACHOVIA BANK OF NORTH CAROLINA, N.A., AND OKEY M. LANDERS, JR. AND WIFE, CAROL D. LANDERS

No. 9420SC527

(Filed 15 August 1995)

1. Attorneys at Law § 36 (NCI4th); Parties § 12 (NCI4th)— disqualification of attorney—only one defendant previously represented by attorney—standing of either defendant to raise issue

One defendant had standing to raise the issue of attorney disqualification, though that defendant did not allege that plaintiffs' attorney had represented him in the past but only that the attorney had represented "codefendants," since both codefendants were equally at risk to lose a substantial amount of money and real estate should the plaintiffs prevail; the attorney's representation of plaintiffs, when there had been no consent to this arrangement by the codefendant previously represented by the attorney, was likely to interfere with both codefendants' rights to a fair hearing; and defendant met the test of standing in that he was an aggrieved party and had suffered a "distinct and palpable injury" likely to be redressed by granting the requested relief.

Am Jur 2d, Attorneys at Law §§ 49, 119, 184; Parties §§ 34 et seq.

2. Attorneys at Law § 36 (NCI4th)— disqualification of attorney—sufficiency of findings of fact

The trial court's disqualification of plaintiffs' attorney was based on the attorney's prior representation of a codefendant, the codefendant's failure to agree to the attorney's representation of plaintiffs, and the possibility that the representation of plaintiffs might be adverse to defendant; therefore, the trial court was not required to make a finding of fact that the attorney had previously represented defendant "in similar transactions to the one in dispute" in order to disqualify the attorney.

Am Jur 2d, Attorneys at Law §§ 49, 184-187.

Representation of conflicting interests as disqualifying attorney from acting in a civil case. 31 ALR3d 715.

3. Attorneys at Law § 36 (NCI4th)— disqualification of attorney—sufficiency of evidence

The evidence was sufficient to support the trial court's order disqualifying plaintiffs' attorney where it tended to show that the attorney had represented the partnership comprised of the individual plaintiff and defendant in numerous transactions similar to the one in dispute over a five-year period; the attorney had represented the individual plaintiff and the defendant in various matters; and defendant objected to the attorney's representation of plaintiffs because he thought it would be adverse to his interests.

Am Jur 2d, Attorneys at Law §§ 49, 184-187.

Representation of conflicting interests as disqualifying attorney from acting in a civil case. 31 ALR3d 715.

Appeal by plaintiff from order entered 3 March 1994 by Judge Preston Cornelius in Union County Superior Court. Heard in the Court of Appeals 27 January 1995.

Defendants Carlton Tyson and Tyson Realty Inc. filed a motion in Union County Superior Court for an order compelling plaintiffs' attorney, Frank L. Bryant, to withdraw as counsel of record for plaintiffs. Judge Preston Cornelius heard the motion on 21 February 1994. On 3 March 1994 he granted defendants' motion, entering an order disqualifying Frank L. Bryant from further representation of the plaintiffs in this action. From this order, plaintiffs appeal.

Perry and Bundy, by H. Ligon Bundy, for plaintiff-appellants.

Singer & McGirt, P.A., by Allan W. Singer, and Griffin, Caldwell, Helder & Lee, by Jake C. Helder, for defendant-appellees.

McGEE, Judge.

In 1984 plaintiff James F. Love, III and defendant Okey M. Landers, Jr., became general partners in L&L Partnership, a business organized to acquire, develop and sell real property and other assets. Landers managed partnership assets in North and South Carolina and Love oversaw the assets in West Virginia.

Affidavits filed by the parties show at least ten transactions were completed under this partnership arrangement, many involving new automobile dealerships. Depending upon the requirements of the par-

ticular automobile manufacturer, the ownership in the various car dealerships was often held separately by Landers or Love with an oral agreement between the two partners that each held that particular interest equally for the benefit of the other unnamed partner. L&L Partnership employed attorney Frank L. Bryant to handle several of these real property transactions.

Problems developed in the partnership and in December, 1990 Bryant filed an action in Mecklenburg County Superior Court on behalf of Love against Landers, L&L Partnership and Landers Oldsmobile-Cadillac, Inc. Among other things, Love alleged Landers mishandled partnership assets and conducted unauthorized land transactions, some of which involved defendants Carlton Tyson and Tyson Realty, Inc.

In March 1992, Landers filed a motion in the Mecklenburg County action requesting Bryant be removed as counsel for plaintiff under Rule 5.2(C) of the Rules of Professional Conduct. Landers claimed that in the past, Bryant had been involved with L&L Partnership in various property transactions and that Bryant would be a necessary witness in the lawsuit. Judge Claude Sitton denied the motion saying "it appears to the Court that, at this time, it is not apparent that counsel for the Plaintiff should withdraw under the provisions of Rule 5.2(c) of the North Carolina Code of Professional Conduct."

Love filed a second lawsuit against Landers in June 1993 in Union County Superior Court and Love was joined as a plaintiff by L&L Partnership. Among others, they named Carlton Tyson and Tyson Realty, as well as Okey Landers and his wife, Carol, as defendants in the action. This complaint was an action to quiet title to 68.643 acres of land located in Union County, the bulk of which plaintiffs alleged Landers fraudulently conveyed to one of Landers' corporations, Myrtle Beach Chrysler Plymouth, Inc., with a smaller acreage conveyed to Carlton Tyson and Ty-Par Realty, Inc.

In February 1994, defendants Carlton Tyson and Tyson Realty, Inc. filed a motion to disqualify Bryant and his law firm from further representing plaintiffs in this Union County action. Defendants argued Bryant and his firm previously represented co-defendant Landers in transactions similar to the one now in dispute and that Landers had not consented to such representation. Judge Preston Cornelius heard the motion on 21 February 1994. In an order filed 3 March 1994, the trial court granted the motion to disqualify Bryant saying:

> It appears to the court that Frank L. Bryant and the law firm of Morton, Bryant, McPhail & Hodges have previously represented Plaintiff L & L Partnership, a general partnership comprising of Love and Landers, and Defendant Landers, ~~in similar transactions to the one in dispute in this case~~ [handwritten initials: PC] and defendant Landers has not consented to such representation.

Plaintiffs objected to the trial court's order disqualifying Bryant from further representing plaintiffs in this matter and they have brought forward three arguments: (1) defendants Carlton Tyson and Tyson Realty, Inc. did not have standing to raise the issue of attorney disqualification; (2) there were insufficient facts to support the court's order; and (3) there was insufficient evidence to sustain the court's ruling. We disagree with plaintiffs' contentions and we affirm the decision of the trial court.

I. STANDING

[1] Tyson's disqualification motion states that Bryant "[has] previously represented *co-defendants* in similar transactions to the one in dispute with the Plaintiff and the record does not disclose a consent to such representation by the co-defendant. . . ." (emphasis added). Plaintiffs argue Tyson does not have standing to raise the issue of attorney disqualification because Tyson has not alleged Bryant represented Tyson in the past, only that Bryant represented "co-defendants." Plaintiffs cite two cases in support of their contention that Tyson does not have standing. We find both cases distinguishable.

In *Saintsing v. Taylor*, 57 N.C. App. 467, 291 S.E.2d 880, *disc. review denied*, 306 N.C. 558, 294 S.E.2d 224 (1982), plaintiffs sued their foster child, Evelyn Taylor, and her former husband, Norman Taylor, regarding a real estate matter. Plaintiffs hired as their attorney in the case the attorney who had previously represented co-defendant Evelyn Taylor in her divorce proceeding against Norman Taylor. Co-defendant Norman Taylor objected to this representation on the grounds that it was a conflict of interest and he would suffer prejudice by his former wife's attorney now representing plaintiffs in this matter. This Court stated:

> We agree with the trial judge that defendant has no standing to complain of a conflict. The plaintiffs in this case knew of Attorney Haworth's previous representation of Evelyn Taylor and both Evelyn Taylor and the plaintiffs agreed to Haworth's representation of plaintiffs in this action.

Saintsing, 57 N.C. App. at 471, 291 S.E.2d at 883. *Saintsing* is distinguishable from this case because the co-defendant consented to her attorney's representation of the plaintiffs in the real estate matter. Because of the previous client's consent, the Rules of Professional Conduct were not breached and, therefore, co-defendant Norman Taylor lacked standing to pursue the issue since there was no justiciable controversy.

The other case which plaintiff cites is *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), *disc. review denied, appeal dismissed*, 296 N.C. 740, 254 S.E.2d 181-83 (1979). Swenson is a derivative shareholder lawsuit in which thirty-three minority shareholders of All American Assurance Company brought suit in the name of All American against the named defendants, who were officers and directors of All American, alleging "self-dealing and negligent acquiescence . . . amounting to 'looting' of [All American's] assets." *Swenson*, 39 N.C. App. at 84, 250 S.E.2d at 285. The defendants filed a motion to disqualify plaintiffs' attorney based, among other things, on a conflict of interest in that plaintiffs' attorney was using confidences gained by having previously represented All American. The *Swenson* Court first discussed the unique nature of a derivative shareholder lawsuit and whether a corporation can defend itself against a derivative action when it is a named party defendant. The court held "the corporation All American should not be allowed to defend this action on its merits" and it dismissed portions of All American's appeal for lack of standing. *Swenson*, 39 N.C. App. at 100, 250 S.E.2d at 294. As to the attorney disqualification issue, the Court stated:

> The representation by CLP&Y [the attorney], whether actually or derivatively of All American, has continued from its inception to serve *only* the interests of the corporate entity. . . . [W]e held above that the corporate entity All American must be treated as a party plaintiff for purposes of litigation on the merits of this action. . . . It is abundantly clear from the record that no confidential relationship was ever developed between any of the individual defendants and CLP&Y, and so if any privilege is to be asserted as to any communications made . . . it must be asserted by the corporate defendant or not at all. We conclude that All American lacks standing as a party plaintiff to assert this privilege against itself. Likewise, the individual defendants have no standing, upon the record before us, to assert this privilege. . . .

Swenson, 39 N.C. App. at 112, 250 S.E.2d at 301. In effect, the *Swenson* Court determined that All American was a party plaintiff, not a defendant, and therefore defendants lacked standing to pursue the attorney disqualification issue.

This case presents different facts from *Saintsing* or *Swenson*. We have the lawyer of one co-defendant now representing the plaintiff without that co-defendant's consent; yet it is the other co-defendant who filed the motion to disqualify his co-defendant's attorney.

This Court has defined standing as a " 'distinct and palpable injury' likely to be redressed by granting the requested relief." *Landfall Group v. Landfall Club, Inc.*, 117 N.C. App. 270, 273, 450 S.E.2d 513, 515 (1994) (quoting *Valley Forge College v. Americans United*, 454 U.S. 464, 488, 70 L. Ed. 2d. 700, 719 (1982)). Black's Law Dictionary defines standing as being when "[a] party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy (citation omitted)." Black's Law Dictionary (6th ed. 1990).

Both co-defendants are equally at risk to lose a substantial amount of money and real estate should the plaintiffs prevail. Bryant's representation of plaintiffs, when there has been no consent to this arrangement by the co-defendant previously represented by Bryant, is likely to interfere with both co-defendants' rights to a fair hearing. Therefore, Tyson meets the test of standing in that he is an aggrieved party and has suffered a " 'distinct and palpable injury' likely to be redressed by granting the requested relief." *See Landfall Group*, 117 N.C. App. at 273, 450 S.E.2d at 515. Tyson is equally as entitled to move for disqualification of Bryant and his law firm as is Landers.

II. Sufficiency of the Facts

[2] Plaintiffs next argue the trial court erred in granting the motion to disqualify Bryant because the facts found by the court to support its order are insufficient, as a matter of law, to sustain the ruling. They contend Tyson's disqualification motion was based solely on Bryant's previous representation of Landers, in violation of Rule 5.1(D) of the Rules of Professional Conduct. By the court's striking through the phrase "in similar transactions to the one in dispute" and only disqualifying Bryant because he had "previously represented Plaintiff L & L Partnership, a general partnership comprising of Love and Landers, . . . and defendant Landers has not consented to such

representation," plaintiffs argue the trial court erred as a matter of law because the language, "in similar transactions to the one in dispute," is a requirement under Rule 5.1(D).

Defendants counter that there is sufficient evidence to support the court's order and that there is nothing in the record to support plaintiffs' conclusion that only Rule 5.1(D) is implicated in their motion. They point out there is evidence that over the span of several years, Bryant handled a variety of legal matters for Landers both personally and in his capacity as a general partner in L&L and there is no evidence of Bryant ever having terminated this attorney-client relationship, or of Landers having given his consent to Bryant's representation of plaintiffs.

After careful review of the record, we disagree with plaintiffs that only Rule 5.1(D) is implicated. Neither the motion to disqualify, the supporting affidavits, nor the court's order specifically address Rule 5.1(D), and there is evidence that other Rules of Professional Conduct, including the rules relating to client confidentiality, may have been at issue. There is nothing in the record showing Bryant terminated his representation of Landers and under Rule 5.1(A) of the Rules of Professional Conduct, a lawyer is unable to represent a client if that representation is likely to be adverse to another client unless the lawyer believes the representation will not be adverse and the clients consent to the arrangement.

III. SUFFICIENCY OF THE EVIDENCE

[3] Plaintiffs' final argument is that there is insufficient evidence to sustain the trial court's ruling on the disqualification motion. We disagree.

"Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992).

In a sworn affidavit, Bryant admitted he had represented L&L Partnership "in connection with financing and transfer of another parcel of real estate in Union County, and financing and transfer of a parcel of real estate belonging to the partnership located in Myrtle Beach, South Carolina." There were allegations that Bryant had, over a five-year period, represented L&L Partnership in various other transactions including: the attempted sale of Myrtle Beach Chrysler

Plymouth; the sale of an automobile dealership to Elmer Moore, along with certain environmental claims arising out of the sale of this property; real estate transactions involving the Jim Brown Chevrolet dealership in Myrtle Beach; and loan transactions for Landers Oldsmobile-Cadillac. It was also alleged that Bryant served as counsel individually for both plaintiff Love and defendant Landers. This included representing defendant Landers in a loan transaction when Landers individually borrowed funds to loan to L&L Partnership to pay off an L&L Partnership debt.

Defendant Landers' stated in his affidavit:

> 9. Attorney Frank Bryant and his law firm has [sic] represented me as a partner in L & L Partnership and as the individual who managed some of these entities on behalf of L & L, such as Elmer Moore Chevrolet and Jim Brown Chevrolet during the same period of time as the [sic] alleged in this complaint. I relied on him and placed confidence in him as the attorney for L & L and myself [sic] in the conduct of some of the affairs of Mr. Love and myself [sic] and Bryant was directly involved in performing legal services for me as a general partner and an individual involving the business conducted between Mr. Love and I [sic] which is presently in dispute.
>
> 10. I have objected to Mr. Bryant and his law firm representing the plaintiff in this case and in the Love v. Landers case as it involves patterns of business conduct between his present client and me which are substantially similar or related to the matters in conflict in these cases and believe that his continued involvement on behalf of Mr. Love, whose interests are materially adverse to my interest, is a conflict of interest to which I specifically have not consented.

After a thorough hearing and review of the pleadings, attachments and supporting affidavits, the trial court disqualified Bryant from further representing plaintiffs in this matter. We find there was evidence to support the trial court's decision and the trial court did not abuse its discretion in granting defendants' disqualification motion.

The judgment of the trial court is affirmed.

Judges LEWIS and WYNN concur.

MANDY WRIGHT HOLTMAN, PLAINTIFF v. KATHY MORGAN REESE AND DURHAM TAXICAB ASSOCIATION, DEFENDANTS

No. COA94-1032

(Filed 15 August 1995)

1. Damages § 166 (NCI4th)— doctrine of peculiar susceptibility and aggravation of preexisting condition—instruction proper

In an action to recover for personal injuries sustained in an automobile accident, the trial court did not err in instructing the jury on the doctrine of peculiar susceptibility and aggravation of a preexisting condition based on the testimony of a chiropractor who had treated plaintiff over a seven-year-period for various ailments, including injuries allegedly sustained in three other automobile accidents.

Am Jur 2d, Damages § 997.

2. Damages § 161 (NCI4th)— avoidable consequences—instruction proper

In an action to recover for personal injuries sustained in an automobile accident, the trial court did not err in charging the jury on the doctrine of avoidable consequences, since, given plaintiff's medical history and the recommendations of her chiropractor, the evidence supported an instruction on whether plaintiff's participation in vigorous physical activities was inappropriate and unreasonable.

Am Jur 2d, Damages §§ 980, 981.

3. Costs § 40 (NCI4th)— witness not subpoenaed—witness fees not awarded as matter of law—no error

The trial court properly denied, as a matter of law, defendants' motion for an assessment of witness fees incurred in the deposition of plaintiff's chiropractor who had not been subpoenaed. N.C.G.S. § 7A-314.

Am Jur 2d, Costs § 65.

Appeal by plaintiff from judgment signed 13 June 1994 and filed 14 June 1994 and from order signed 27 June 1994 and filed 15 July 1994 by Judge Henry V. Barnette, Jr., in Wake County Superior Court, and appeal by defendants from order signed 27 June 1994 and filed 15

July 1994 by Judge Barnette. Heard in the Court of Appeals 24 May 1995.

E. Gregory Stott for plaintiff.

Newsom, Graham, Hedrick, Kennon & Cheek, P.A., by Joel M. Craig, for defendants.

LEWIS, Judge.

Plaintiff brought this action to recover for personal injuries allegedly sustained in an automobile accident with defendant Reese (hereinafter "Reese"). From a jury verdict in favor of defendants and from an order denying their post-trial motions, plaintiff appeals. Defendants' motion for taxation of costs was denied in part, and from that order defendants appeal.

On the morning of Friday, 20 September 1991, Reese drove a taxicab titled in the name of defendant Durham Taxicab Association, Inc. diagonally across a shopping center parking lot and into plaintiff's lane. The front bumper of plaintiff's vehicle collided with the right front wheel area of the taxicab at a speed estimated by the responding patrolman to be two (2) miles per hour. After the collision, plaintiff was able to exit her car, berate Reese for her driving, call the police, converse with the officer, and drive on to work.

Later that day, plaintiff alleged pain and stiffness in her neck, and scheduled an appointment with her regular chiropractor, Jack Gorlesky (hereinafter "Gorlesky"). Plaintiff had begun seeing Gorlesky in 1983 for sinus headaches and back pain. Plaintiff was involved in automobile accidents in November of 1984 and June of 1985, and Gorlesky had seen her no fewer than 123 times by October of 1986 for treatment related to those accidents. Plaintiff continued to see Gorlesky following yet another automobile accident in November of 1988, and had visited him as recently as June of 1991 prior to the subject accident that September. After seeing Gorlesky following her latest collision, plaintiff underwent an examination with Dr. Stephen Montgomery of Raleigh Orthopaedic Clinic upon defendants' request, some eleven days after the 1991 accident. Interestingly, she denied having any significant previous medical history, reported no prior episodes of back pain, displayed full range of motion in her neck and back, walked with a normal gait, and was able to touch the floor with her fingers during this visit. Plaintiff's treatments with the chiropractor after her latest accident continued over the nearly three years that

led up to the trial, for which plaintiff incurred expenses of approximately $5000.00.

After plaintiff's first accident, Gorlesky described her prognosis as "guarded" and stated that "this traumatically induced weakening of the supporting soft tissue structure will predispose these areas to post-traumatic pathology." Following plaintiff's second accident, Gorlesky deemed her prognosis "poor," stated that "a permanent conditioning has resulted," and predicted "a chronic course with infrequent acute episodes that are directly proportional to her level of activity" with "early diskal/joint degeneration with surgical intervention likely at some future date." Gorlesky informed plaintiff's attorney after the 1991 accident that her previous accidents and injuries "greatly complicated the present prognosis, which is poor," and likened soft tissue injuries in the neck to "a bruised apple in that they can never be returned to their original state after injury." Further comments by Gorlesky are addressed where relevant later in this opinion.

The trial court instructed the jury that although defendants stipulated that Reese's negligence caused the 1991 collision, plaintiff still had the burden of proving that Reese's negligence was the proximate cause of plaintiff's injury. The court then charged the jury in accordance with the Pattern Jury Instructions on Multiple Causes (N.C.P.I. Civil 102.19) and Peculiar Susceptibility and Aggravation (N.C.P.I. Civil 102.20(A) and (C), since incorporated as one instruction, N.C.P.I. Civil 102.20). The jury found that Reese's negligence had not proximately caused any injury to plaintiff, and the court entered judgment on the verdict. Following a denial of plaintiff's post-trial motions, plaintiff now makes six assignments of error, and defendants appeal from a partial denial of their post-trial motion for costs.

PLAINTIFF'S APPEAL

[1] Plaintiff's first argument as appellant is that the trial court erred by instructing the jury on the doctrine of peculiar susceptibility and aggravation of a pre-existing condition. Our Supreme Court adopted the doctrine of peculiar susceptibility in *Lockwood v. McCaskill*, 262 N.C. 663, 670, 138 S.E.2d 541, 546 (1964), recognizing that a defendant whose negligent act would not have resulted in any injury to an ordinary person will not be liable for its consequences to one of peculiar susceptibility. As for aggravation, our case law indicates that where a pre-existing mental or physical condition is aggravated or enhanced by a defendant's negligence, the defendant is liable only to the extent

that the underlying condition is enhanced and not for damages attributable to the original condition. *See Potts v. Howser*, 274 N.C. 49, 54, 161 S.E.2d 737, 742 (1968).

Central to plaintiff's assignment of error seems to be the fact that Gorlesky stated on direct examination that he was treating plaintiff for different injuries related to the most recent accident. However, we cannot overlook his comments during cross-examination regarding plaintiff's susceptibility to further injury and the potential aggravation of her pre-existing problems. Gorlesky testified that these previous injuries were permanent, that soft tissue injuries in the neck "can never be returned to their original state after injury," that plaintiff was "susceptible" to neck pain and injuries because of her pre-existing neck injuries, and that her pre-existing neck problems were a "contributing factor" in the problems she had after the most recent accident.

While a trial court need not explain the application of the law to the evidence, N.C.G.S. § 1A-1, Rule 51 (1990), "it remains the duty of the court to instruct the jury upon the law with respect to every substantial feature of the case." *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 445, 361 S.E.2d 608, 612 (1987). As such, "the trial court must instruct on a claim or defense if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense." *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994). It seems perfectly reasonable to infer from Gorlesky's testimony on cross-examination that jury instructions on the doctrines of peculiar susceptibility and aggravation of a pre-existing condition were appropriate, and we find no error in this regard.

[2] Plaintiff next argues that the trial court erred in charging the jury on the doctrine of avoidable consequences. These instructions dealt with plaintiff's failure to mitigate her damages and were based largely on N.C.P.I. Civil 106.45, which reads in part, "A party is not permitted to recover for damages that he could have avoided by using means which a reasonably prudent person would have used to cure his injury or alleviate his pain."

Gorlesky testified that "routine levels of physical exertion" prior to the most recent accident left plaintiff in pain sufficient to require her to seek further chiropractic treatment. Since this accident, plaintiff has engaged in high-impact aerobics (against Gorlesky's advice), snow-skiing, and water-skiing. The avoidable consequences doctrine

allows the jury to relieve the defendant of responsibility for the consequences of an injury to the extent that it finds that the plaintiff acted unreasonably and thereby enhanced his or her damages. *Snead v. Holloman*, 101 N.C. App. 462, 466, 400 S.E.2d 91, 94 (1991). Given plaintiff's medical history and the recommendations of her chiropractor, the evidence supports an instruction on whether her participation in vigorous physical activities was inappropriate and unreasonable. Thus, the trial court did not err in charging the jury on the doctrine of avoidable consequences.

Plaintiff's third argument is that the trial court erred by not submitting the issue of defendant Durham Taxicab Association's negligence to the jury. This could be done only on the theory of vicarious liability, but plaintiff never requested that this issue be submitted to the jury. Furthermore, the jury's answer of "no" to the first issue, "Was the Plaintiff Mandy Wright Holtman injured by the negligence of the Defendant Kathy Morgan Reese?" cures any alleged error in this regard since the employer could not be held vicariously liable for a tort its employee did not commit.

Next, plaintiff claims that the trial court erred in refusing to instruct the jury that it had granted a directed verdict in plaintiff's favor on the issue of negligence. The trial court recognized that the attorney for the defendants "in effect conceded" negligence in his opening statement, but noted that he never officially "stipulated" it. The fact that the trial court initially granted plaintiff's motion for a directed verdict on the issue of negligence but, upon reconsideration, instructed the jury that defendants had stipulated to negligence in the operation of the vehicle is of little consequence to plaintiff's case. Negligence was not the disputed issue; proximate cause was. The court's instruction on this issue was not prejudicial.

Plaintiff lists two more errors but addresses them simply by stating, "Plaintiff incorporates herein her arguments contained in Arguments I through IV herein." Having resolved those arguments in favor of defendants, we need not address further assignments of error based on those arguments alone.

DEFENDANTS' APPEAL

[3] Defendants paid Gorlesky $1,167.75 for his discovery depositions but the trial court denied, as a matter of law, defendants' motion for an assessment of witness fees in this amount. Defendants argue on appeal that while the trial court may award or decline to award wit-

ness fees as an exercise of discretion, it may not decline to exercise its discretion by making this determination as a matter of law. This argument does not apply where, as here, the witness was not subpoenaed.

Defendants rely heavily on the language of N.C.G.S. § 7A-314, and quote the following subsections of that statute as being pertinent:

> (a) A witness under subpoena, bound over, or recognized . . . shall be entitled to receive five dollars ($5.00) per day, or fraction thereof . . .
>
> (d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize.

N.C.G.S. § 7A-314(a) and (d) (1989). Defendants also urge this Court to follow the precedent of *Williams v. Boylan-Pearce*, 69 N.C. App. 315, 317 S.E.2d 17 (1984), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985), and rule that witness fees are awarded or declined not as a matter of law, but in the discretion of the court.

Defendants overlook the importance of the language of the very statute they cite. Section 7A-314(a) begins, "A witness under subpoena . . ." is entitled to fees, but there is nothing in the record to indicate that defendants subpoenaed Gorlesky for his deposition. The *Williams* case did not address subpoenas, so defendants' reliance on it is misplaced. A case more relevant to the issue at hand but less helpful to defendants is *Brandenburg Land Co. v. Champion International Corp.*, 107 N.C. App. 102, 418 S.E.2d 526 (1992). In *Brandenburg*, the appellant also sought to recover fees incurred during discovery proceedings but this request was denied for lack of subpoena. *Id.* at 104-05, 418 S.E.2d at 528-29. We stated in *Brandenburg* that we were bound by *State v. Johnson*, 282 N.C. 1, 191 S.E.2d 641 (1972) ("[o]nly witnesses who have been subpoenaed may be compensated"), *Brandenburg*, 107 at 104-05, 418 S.E.2d at 528-29, and we are similarly bound in this action, since there is nothing in the record that indicates that Gorlesky was subpoenaed for his deposition. As such, the trial court properly denied, as a matter of law, defendants' motion for an assessment of witness fees incurred in the deposition of Gorlesky.

For the reasons stated, we find no error with the judgment and order of the trial court with regards to plaintiff's appeal. The order with regards to defendants' appeal is affirmed.

No error.

Chief Judge ARNOLD and Judge McGEE concur.

MADELYN B. BROWN, ADMINISTRATOR OF THE ESTATE OF ROGER MACK BROWN, III, PLAINTIFF v. FRIDAY SERVICES, INC. (FORMERLY KNOWN AS FRIDAY TEMPORARY SERVICES, INC.), G.M. KASSEM, INC. AND WESTINGHOUSE ELECTRIC CORPORATION, DEFENDANTS

No. COA94-1116

(Filed 15 August 1995)

1. **Labor and Employment § 182 (NCI4th)— wrongful death—hidden danger claim defeated by complaint**

In a wrongful death action where plaintiff alleged that decedent was assigned by defendant temporary service to defendant roofing contractor and fell through a skylight while working on a roof owned by defendant Westinghouse, plaintiff's complaint by implication alleged that defendant roofing contractor knew about the dangers posed by the skylight and thus disclosed a fact which defeated her "hidden danger" claim against defendant Westinghouse.

Am Jur 2d, Independent Contractors §§ 24 et seq.

2. **Labor and Employment § 192 (NCI4th)— fall through skylight—no allegation that roofing work was inherently dangerous**

There was no merit to plaintiff's contention that Westinghouse, as owner of the roof in question, had a nondelegable duty to a roofing contractor's workers to see that they were provided a safe place to work, since a property owner is not required to provide an independent contractor's workers with a safe place to work unless the work being done is inherently dangerous, and plaintiff made no such allegation.

Am Jur 2d, Independent Contractors §§ 40 et seq.

3. Workers' Compensation § 62 (NCI4th)— employer engaged in misconduct substantially certain to cause serious injury or death—insufficiency of complaint

Plaintiff's allegations that defendant temporary service did not screen decedent to determine if he had experience in roofing work at high elevations, did not properly train him, and failed to provide him with a safe place to work did not sufficiently state a claim that defendant engaged in misconduct knowing that it was substantially certain to cause serious injury or death.

Am Jur 2d, Workers' Compensation §§ 75 et seq.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

4. Workers' Compensation § 45 (NCI4th)— decedent as loaned servant—claims barred by exclusivity provisions of Workers' Compensation Act

At the time of his death, decedent was performing work as a loaned servant on behalf of defendant roofing contractor, and all claims against the contractor were therefore barred by the exclusivity provisions of the Workers' Compensation Act.

Am Jur 2d, Workers' Compensation § 231.

Appeal by plaintiff from judgments entered 25 July 1994 and 27 July 1994 by Judge W. Steven Allen, Sr. in Davidson County Superior Court. Heard in the Court of Appeals 6 June 1995.

Peebles & Schramm, by John J. Schramm, Jr., for plaintiff-appellant Madelyn B. Brown.

Petree Stockton, L.L.P., by Edwin W. Bowden and Christopher C. Fox, for defendant-appellee Westinghouse Electric, Corp.

Roberts Stevens & Cogburn P.A., by Steven W. Sizemore, for defendant-appellee Friday Services, Inc.

Maupin Taylor Ellis & Adams, P.A., by Karon B. Thornton and Thomas W.H. Alexander, for defendant-appellee G.M. Kassem, Inc.

WYNN, Judge.

This appeal arises from a wrongful death action brought on behalf of Roger M. Brown, III ("decedent") who fell through a skylight

while working on a roof owned by defendant Westinghouse Electric Corporation ("Westinghouse"). The decedent was employed by defendant Friday Services, Inc. ("Friday Services"), a temporary employment agency which in turn assigned the decedent to work for defendant Kassem, Inc. ("Kassem"), a roofing contractor. Kassem then directed the decedent to work on a roof at the Westinghouse plant in Asheville.

On 22 December 1993, plaintiff Madelyn B. Brown, administratrix of the decedent's estate, filed a wrongful death action against defendants. Defendants Westinghouse and Friday Services moved to dismiss for failure to state a claim pursuant to Rule 12(b)(6) and defendant Kassem moved to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The trial court granted defendants' motions. Plaintiff appealed.

I.

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is to test the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). Our Supreme Court has stated:

> A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.

Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981) (citing *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E.2d 690 (1970)). As such, a motion to dismiss is properly granted when it appears that the law does not recognize the plaintiff's cause of action or provide a remedy for the alleged. Thus, the question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 355 S.E.2d 838 (1987).

A. WESTINGHOUSE

[1] Plaintiff first contends that the trial court erred by granting Westinghouse's Rule 12 (b)(6) motion. We disagree.

Specifically, plaintiff argues that Westinghouse had a common law duty not to expose decedent to hidden dangers. Hidden dangers are considered dangers that are unknown to the independent contractor, but that are known or should have been known to the owner. *Wellmon v. Hickory Construction Co. Inc.*, 88 N.C. App. 76, 80, 362 S.E.2d 591, 593 (1987).

> The owner is not responsible to an independent contractor for injuries from defects or dangers of which the contractor knew or should have known, "but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this, he is liable for resultant injury."

Deaton v. Board of Trustees of Elon College, 226 N.C. 433, 438, 38 S.E.2d 561, 565 (1946) (quoting *Douglass v. Peck & L. Co.*, 89 Conn. 622, 629, 95 A.2d 22, 25 (1915)).

In order for the skylight to have been considered a hidden danger, neither decedent nor Kassem could have been aware of its existence. Plaintiff, however, refutes the notion that Kassem was unaware of the danger posed by the skylight by alleging in her complaint that Kassem failed to erect warning lines around the skylight. "Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure when . . . some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Hooper v. Liberty Mut. Ins. Co.*, 84 N.C. App. 549, 551, 353 S.E.2d 248, 249-250 (1987) (citing *Forbis*, 301 N.C. at 701, 273 S.E.2d at 241 (1981)). Since plaintiff's complaint by implication alleges that Kassem knew about the dangers posed by the skylight, it discloses a fact which defeats her "hidden danger" claim.

[2] Plaintiff also argues that Westinghouse, as owner of the plant, had a nondelegable duty to Kassem's workers to see that they were provided a safe place to work. We have previously narrowed the scope of this issue by holding that a property owner is not required to provide an independent contractor's workers with a safe place to work unless the work being done is inherently dangerous.

> Unless the activity undertaken is inherently dangerous, an owner or occupier of land who hires an independent contractor is not required to provide employees of the independent contractor a safe place to work nor is he required to take proper safeguards

against dangers which may be incident to the work undertaken by the independent contractor.

Cook v. Morrison, 105 N.C. App. 509, 515, 413 S.E.2d 922, 926 (1992) (citing *Brown v. Texas Co.*, 237 N.C. 738, 741, 76 S.E.2d 45, 46-47 (1953)).

The question of whether roofing a building is an inherently dangerous activity was answered in the negative by this Court in *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 334, 363 S.E.2d 367, 378, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862 (1988). However, the practice of judicially determining that certain activities, as a matter of law, are inherently dangerous while others are not, has since been rejected by our Supreme Court in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). In *Woodson*, the Supreme Court stated that "bright line rules and mathematical precision are not always compatible with discerning whether an activity is inherently dangerous." *Id.* at 353, 407 S.E.2d at 236. *Woodson*, therefore, compels us to determine whether the subject complaint sufficiently alleges that the roofing work done on the Westinghouse plant was inherently dangerous.

A brief review of plaintiff's complaint makes the resolution of this issue easy. Her complaint merely alleges that Westinghouse "failed to provide Kassem's employees a safe place to work." By relying on such bare bones pleadings, the complaint does not sufficiently allege that the roofing work performed on the Westinghouse plant was inherently dangerous. This assignment of error is without merit.

B. FRIDAY

[3] Plaintiff next contends that the trial court erred by granting Friday Services' Rule 12(b)(6) motion to dismiss. Specifically, plaintiff argues that Friday Services engaged in intentional conduct which was substantially certain to cause serious injury or death to the decedent. We disagree.

Traditionally, the Workers' Compensation Act has provided the sole remedy for an employee who was injured on the job as a result of an accident. *See Regan v. Amerimark Bldg. Products, Inc.*, *118* N.C. App. 328, 454 S.E.2d 849 (1995). In *Woodson*, however, our Supreme Court held:

[W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to

> employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228.

In *Powell v. S & G Prestress*, 114 N.C. App. 319, 442 S.E.2d 143 (1994), this Court stated that the type of misconduct exhibited in the following example satisfied the substantial certainty standard set forth in *Woodson*.

> A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that this act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.

Powell, 114 N.C. App. at 325, 442 S.E.2d at 147 (quoting Restatement (Second) of Torts § 8A illus. 1 (1965)). *Powell* further stated that substantial certainity requires more than a mere possibility or substantial probability of serious injury or death. *Powell* at 325, 442 S.E.2d at 147. We are constrained by *Powell's* adaptation of the Restatement's definition of substantial certainty. *In Re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) (A panel of the Court of Appeals is bound by a prior decision of another panel).

In the subject case, plaintiff alleges that Friday Services did not screen the decedent to determine if he had experience in roofing work at high elevations; did not properly train him; and failed to provide him with a safe place to work. Following *Powell*, we find that these allegations do not sufficiently state a claim that Friday Services engaged in misconduct knowing that it was substantially certain to cause serious injury or death. This assignment of error is meritless.

II.

[4] Lastly, plaintiff contends that the trial court erred by granting Kassem's Rule 12(b)(1) motion to dismiss on the grounds that her action was barred by the exclusivity provision of the Workers' Compensation Act. Specifically, plaintiff argues that the Workers' Compensation Act does not apply to Kassem because the decedent was employed by Friday Services, not Kassem. We disagree.

N.C. Gen. Stat. § 97-2(2) defines an employee as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written. . . ." This Court has recognized the "special employment" or "borrowed servant" doctrine which holds that under certain circumstances a person can be an employee of two different employers at the same time. *Henderson v. Manpower of Guilford County, Inc.*, 70 N.C. App. 408, 413, 319 S.E.2d 690, 693 (1984).

> . . . [T]he courts have long recognized that a general employee of one can also be the special employee of another while doing the latter's work and under his control [citation omitted] [a]nd it goes without saying that if a loaned servant is the borrower's servant also when doing the borrower's work and under his control, a servant especially hired for that very purpose is likewise.

Id. (citing *Leggette v. McCotter, Inc.*, 265 N.C. 617, 144 S.E.2d 849 (1965)).

The test for determining the liability of special employers in loaned employee cases is stated as follows:

> When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if (a) the employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has a right to control the details of the work. When all three of the conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 459, 204 S.E.2d 873, 876, *cert. denied*, 285 N.C. 589, 206 S.E.2d 862 (1974) (quoting 1A, Larson, *Workmen's Compensation Law*, § 48.00). Under this test and its typical application, . . . "joint employer status does not provide an injured plaintiff-employee with two recoveries; rather, it merely provides two potential sources of recovery." *Pinckney v. United States*, 671 F.Supp. 405, fn.2 (E.D.N.C. 1987). Therefore, once recovery is obtained under the statutory mechanism of workers' compensation, the plaintiff is barred from proceeding against either of his employers at common law. *Id.*

In the subject case, all three conditions of the "special employment" test, as outlined in *Collins*, have been met. First, an implied

contract existed between the decedent and Kassem since the decedent accepted the assignment from Friday Services and performed the work at the direction and under the supervision of Kassem. Furthermore, an express contract existed between Friday Services and Kassem for the use of the decedent's services. This contract provided that Kassem would pay Friday Services who, in turn, would pay the decedent. Second, Westinghouse hired Kassem to replace the roof. Thus, decedent was performing work for Kassem when fatally injured. And finally, Kassem controlled the details of decedent's work. In sum, we conclude that at the time of his death, decedent was performing work as a loaned servant on behalf of Kassem. Accordingly, all claims against Kassem are barred by the exclusivity provisions of the Workers' Compensation Act.

It should be noted that numerous other jurisdictions have considered whether a temporary employee is an employee of both the temporary agency and the temporary employer. The majority of these jurisdictions have also held that a temporary employee is an employee of both the temporary agency and the temporary employer, making workers' compensation the employee's exclusive remedy. *See, e.g., Evans v. Abbott Products, Inc.* 150 Ill. App.3d 845, 502 N.E.2d 341 (1986); *Hoffman v. National Machine Co.*, 113 Mich. App. 66, 317 N.W.2d 289 (1982); *English v. Lehigh County Authority*, 286 Pa. Super. 312, 428 A.2d 1343 (1981); *Whitehead v. Safeway Steel Products, Inc.* 304 Md. 67, 497 A.2d 803 (1985).

Affirmed.

Judges EAGLES and MARTIN, Mark D. concur.

ALLEN v. SEA GATE ASSN.

[119 N.C. App. 761 (1995)]

BURNICE A. ALLEN AND WIFE, JEAN J. ALLEN; DALE W. BARNES; DAVID E. BROWN AND WIFE, BRENDA T. BROWN; DWIGHT BROWN; H.B. BUCHANAN; WILLIAM G. CORGEY, JR. AND WIFE, NAOMI J. CORGEY; LARRY CRAVY AND WIFE, ELAINE CRAVY; ROBERT V. FERNANDEZ AND WIFE, MARIANNE G. FERNANDEZ; WALTER F. GASKINS AND WIFE, SALLY GASKINS; JOHN M. HINSON AND WIFE, DAPHNE HINSON; R.L. JOHNSON AND WIFE, FRANCES W. JOHNSON; JOE H. JONES; E. NIVEN MILLER; LINDA ONSTOTT; CHARLES ROMAN AND WIFE, MARY JOYCE ROMAN; JANE W. RUBIN AND HUSBAND, SEYMOUR P. RUBIN; LARRY W. SWANSON; KATRINE WADE; BARBARA WISE, PLAINTIFFS v. SEA GATE ASSOCIATION, INC., DEFENDANT

No. COA94-913

(Filed 15 August 1995)

1. Appeal and Error § 120 (NCI4th)— interlocutory order—possibility of two trials on same issues—order appealable

The trial court's partial summary judgment for plaintiffs which did not address defendant's counterclaims was interlocutory because it did not dispose of the case in its entirety; however, the appeal was permitted because the issues on plaintiffs' claims and defendant's counterclaims were the same, and it was possible that dismissal of the appeal would result in two trials on the same issues.

Am Jur 2d, Appellate Review §§ 117, 118.

2. Deeds § 81 (NCI4th)— dues and assessments—provisions not specific—void provisions—no extension of restrictive covenants after expiration

A restrictive covenant requiring the owner to pay an annual charge of $60.00 "for the maintenance, upkeep and operations of the various areas and facilities by Sea Gate Association, Inc." was void and unenforceable, since it did not name specific property which was to be maintained, and there was no standard by which it could be assessed how defendant chose which properties to maintain.

Am Jur 2d, Covenants, Conditions and Restrictions §§ 180-182.

3. Deeds § 67 (NCI4th)— restrictive covenants—power to alter, amend, or revoke—no power to extend time

A provision in a declaration of restrictive covenants allowing the covenants to be "altered, amended, or revoked" upon written agreement of two-thirds of the lot owners did not confer the

power to extend the covenants beyond the date of expiration stated in the declaration.

Am Jur 2d, Covenants, Conditions and Restrictions §§ 180, 181, 268-270.

4. Limitations, Repose, and Laches § 67 (NCI4th)— assessments under restrictive covenant—applicable statute of limitations

The six-year statute of limitations of N.C.G.S. § 1-50(3) applied to defendant's counterclaims for assessments pursuant to a restrictive covenant.

Am Jur 2d, Covenants, Conditions and Restrictions § 315.

Appeal by defendant from order entered 22 April 1994 by Judge Herbert O. Phillips, III in Carteret County Superior Court. Heard in the Court of Appeals 10 May 1995.

Lamar Jones, P.A., by Lamar Jones, for plaintiffs-appellees.

Beswick, Coyne & Simpson, by H. Buckmaster Coyne, Jr., for defendant-appellant.

LEWIS, Judge.

This appeal concerns the validity of the dues and assessment provisions of restrictive covenants affecting subdivision lots owned by plaintiffs.

Defendant appeals the grant of partial summary judgment to plaintiffs. The verified pleadings, affidavits, documentary evidence, and stipulations presented by the parties show the following: The original Declaratory of Protective Covenants, (hereinafter original Declaratory), recorded in May 1972 in Book 337, Page 172, Carteret County Registry provides, *inter alia*, for assessment of dues, to be paid to defendant, for the maintenance of areas and facilities in the subdivision, authorizes alteration, amendment, or revocation of the restrictions, and sets an expiration date of 1 January 1992. On 31 December 1991, defendant recorded a document entitled Amended and Restated Declaration of Protective Covenants, Sea Gate Subdivision, (hereinafter Amended Declaration) in Book 675, Page 56, Carteret County Registry. It was executed, as required by the original Declaratory, by owners of more than two thirds of the lots. By

this document, defendant sought to extend the original Declaratory past its expiration date and to amend many of its provisions.

Plaintiffs filed a complaint for, *inter alia*, declaratory relief declaring that the dues and assessment provisions of the original Declaratory are void and unenforceable and that the covenants may not be extended past 1 January 1992. Defendant answered and asserted counterclaims for assessments allegedly owed by plaintiffs pursuant to the original Declaratory. Defendant obtained partial summary judgment as to some of the plaintiffs by orders filed 24 November 1994. The remaining plaintiffs obtained partial summary judgment on all claims relevant to this appeal in the order signed 15 April 1994, filed 21 April 1994, and entered 22 April 1994. From this order, defendant appeals.

[1] We must first address whether the interlocutory nature of this appeal precludes review. There has been no judgment on defendant's counterclaims. Thus, the court's partial summary judgment is interlocutory because it leaves further action for the trial court and does not dispose of the case in its entirety. *See Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). However, an appeal from an interlocutory order is permitted under N.C.G.S. § 1-277 and N.C.G.S. § 7A-27(d) when it affects "a substantial right which may be lost or prejudiced if not reviewed prior to final judgment." *Dalton Moran Shook Inc. v. Pitt Dev. Co.*, 113 N.C. App. 707, 710, 440 S.E.2d 585, 588 (1994). The right to avoid the possibility of two trials on the same issues can be a substantial right that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

Here, the issues of whether the dues assessment and enforcement provisions of the original Declaratory, whether the attempted extension is valid, and what the appropriate statute of limitations is on defendant's counterclaims all involve issues of fact common to defendant's counterclaim for the amounts it claims are due under the assessment provisions. Hence, it is possible that a dismissal of the appeal would result in two trials on the same issues. Since this appeal involves a substantial right that could be prejudiced if the appeal is dismissed, we address the merits.

[2] Defendant first contends that the court erred in ruling that the dues assessment and enforcement provisions of the original

Declaratory are void and unenforceable, and on this basis, granting summary judgment to plaintiffs. We disagree. Covenants that impose affirmative obligations on property owners are strictly construed and unenforceable unless the obligations are imposed "in clear and unambiguous language" that is "sufficiently definite" to assist courts in its application. *Beech Mountain Property Owners' Ass'n, Inc. v. Seifart*, 48 N.C. App. 286, 295, 269 S.E.2d 178, 183 (1980). To be enforceable, such covenants must contain "some ascertainable standard" by which a court "can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant." *Id.* Assessment provisions in restrictive covenants (1) must contain a " 'sufficient standard by which to measure . . . liability for assessments,' " . . . (2) "must identify with particularity the property to be maintained," and (3) "must provide guidance to a reviewing court as to which facilities and properties the . . . association . . . chooses to maintain." *Figure Eight Beach Homeowners' Ass'n, Inc. v. Parker*, 62 N.C. App. 367, 376, 303 S.E.2d 336, 341 (1983) (quoting and citing *Beech Mountain*, 48 N.C. App. at 295-96, 269 S.E.2d at 183-84), *disc. review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983).

The dues assessment and enforcement provisions of the original Declaratory are similar to those held void and unenforceable in *Snug Harbor Property Owners Association v. Curran*, 55 N.C. App. 199, 284 S.E.2d 752 (1981), *disc. review denied*, 305 N.C. 302, 291 S.E.2d 151 (1982). The void provisions in *Snug Harbor* provided that the assessments were to be used "for the maintenance of the recreation area and park" and for "the maintenance and improvement of Snug Harbor and its appearance, sanitation, easements, recreation areas and parks." *Id.* at 201, 203-04, 291 S.E.2d at 753-54.

The provisions in this case are even less specific than those in *Snug Harbor*, to wit: "The Buyer . . . agrees to pay . . . $60.00 . . . , said annual charge being a reasonable, necessary and proportionate charge for the maintenance, upkeep and operations of the various areas and facilities by Sea Gate Association, Inc., ... " No specific property is named, and there is no standard by which we can assess how the Association chooses which properties to maintain. These provisions are much less specific and certain than those held valid in *Figure Eight*, relied upon by defendant. *See Figure Eight*, 62 N.C. App. at 377, 303 S.E.2d at 342. Nor is there evidence in the record, as in *Figure Eight*, showing whether plaintiffs were made aware by ref-

erences in their deeds to maps or to the original Declaratory as to which properties and facilities were to be maintained and improved by the assessments. *See id.* The assessment and enforcement provisions in the original Declaratory are invalid and unenforceable; the trial court did not err in granting summary judgment to plaintiffs on this issue.

[3] Defendant also argues that the trial court erred in granting summary judgment to plaintiffs on the ground that the language in the original Declaratory did not give defendant the power to extend the covenants beyond 1 January 1992. The provision in question reads as follows:

> 12. . . . All of the restrictions, conditions, covenants and agreements contained herein shall continue until January 1, 1992, except that they may be changed, altered, amended or revoked in whole or in part by the record owners of the lots in the Subdivision whenever the individual and corporate record owners of at least 2/3 of said platted lots so agree in writing.

Defendant contends that this provision allowing the covenants to be "altered, amended, or revoked" upon written agreement of two-thirds of the lot owners confers the power to extend. We disagree. Covenants that restrict the use of property are "strictly construed against limitation on use . . . and will not be enforced unless clear and unambiguous." *Beech Mountain*, 48 N.C. App. at 295, 269 S.E.2d at 183.

The provision allowing alteration, amendment, or revocation follows a provision stating emphatically that all restrictions will end on 1 January 1992. There is no provision that clearly permits an extension. As phrased, the expiration date deals with the ending of all restrictions; it is not of the same nature as the other restrictions. At most, the phrase allowing alteration, amendment, or revocation creates an ambiguity as to whether the expiration date may be extended. Since we must construe any ambiguity in favor of limited duration and against restricting property, *Edney v. Powers*, 224 N.C. 441, 443, 31 S.E.2d 372, 374 (1944), we read these provisions as failing to provide for extension of the expiration date. Such a construction is reasonable in light of the clearly established expiration date and the lack of a provision permitting extension. Accordingly, the original Declaratory expired on 1 January 1992, and could not be extended.

[4] Defendant also contends that the trial court erred by ordering that any recovery by defendant against plaintiffs is limited by a three-year statute of limitations. The record shows that defendant received partial summary judgment against some of the plaintiffs on plaintiffs' third claim. It is not clear from the record whether these judgments entitle defendant to recover anything from these plaintiffs on its counterclaims. However, since there has been no judgment on defendant's counterclaims, we must assume for purposes of this appeal that some recovery is possible. Accordingly, we address the issue of what statute of limitations governs defendant's counterclaims for assessments under the original Declaratory.

Defendant argues that a ten-year statute of limitations for instruments under seal applies. *See* N.C.G.S. § 1-47(2). Plaintiff argues, and the trial court held, that a three-year statute of limitations applies. *See* N.C.G.S. § 1-52(1). Although one case has applied a ten-year statute of limitations to a restrictive covenant as a contract under seal, *see Harris & Gurganus v. Williams*, 37 N.C. App. 585, 587, 246 S.E.2d 791, 794 (1978), we believe subsequent precedent requires us to apply the six-year statute of limitations in N.C.G.S. § 1-50(3). *See Hawthorne v. Realty Syndicate, Inc.*, 43 N.C. App. 436, 440, 259 S.E.2d 591, 593 (1979), *aff'd*, 300 N.C. 660, 268 S.E.2d 494 (1980) (this court held that § 1-50(3) applied to restrictive covenants; our Supreme Court affirmed the opinion "in all respects" but did not address this issue directly). Accordingly, a six-year statute of limitations applies to defendant's counterclaims.

We conclude the trial judge did not err in concluding that there are no genuine issues of material fact and that plaintiffs are entitled to partial summary judgment as provided in the order entered 22 April 1994.

Affirmed.

Chief Judge ARNOLD and Judge McGEE concur.

MEDICARE RENTALS, INC., PLAINTIFF v. ADVANCED SERVICES, THE MOSES H. CONE MEMORIAL HOSPITAL, WESLEY LONG COMMUNITY HOSPITAL, AND HIGH POINT REGIONAL HOSPITAL, DEFENDANTS

No. 9418SC31

(Filed 15 August 1995)

1. Estoppel § 10 (NCI4th)— antitrust action—judicial estoppel inapplicable

Plaintiff's antitrust claims against defendants were not barred by judicial estoppel because plaintiff did not disclose these claims during its Chapter 11 bankruptcy reorganization proceedings where there is no evidence that plaintiff was aware of any potential antitrust claims against defendants while it was undergoing bankruptcy reorganization or that plaintiff intentionally misled the bankruptcy court about the possibility of an antitrust action against defendants.

Am Jur 2d, Judgments §§ 415-429.

2. Limitations, Repose, and Laches § 48 (NCI4th)— continuing antitrust violations—action not barred by statute of limitations

Plaintiff's complaint in an antitrust action was not barred by the four-year statute of limitations of N.C.G.S. § 75-16.2, since plaintiff alleged that defendants engaged in continuous violations of Chapter 75; under N.C.G.S. § 75-8 each subsequent violation was a separate offense for the purpose of the statute of limitations; and plaintiff would thus be barred only from recovering for any injuries sustained before 26 May 1989, four years before the complaint was filed.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 713.

Time when cause of action accrues for civil action under state antitrust, monopoly, or restraint of trade statutes. 90 ALR4th 1102.

Appeal by plaintiff from order entered 9 November 1993 by Judge Melzer A. Morgan, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 5 April 1995.

Smith, Follin & James, by Norman B. Smith and Marion G. Follin, III, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr. and M. Elizabeth Gee, for defendants-appellees.

Smith, Helms, Mulliss & Moore, by Larry B. Sitton, for defendant-appellee The Moses H. Cone Memorial Hospital.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jeffrey E. Oleynik, for defendant-appellee Wesley Long Community Hospital.

WYNN, Judge.

Plaintiff Medicare Rentals, Inc. provides home medical services and equipment such as wheelchairs, hospital beds and walkers. Defendant Advanced Services is a joint venture formed in 1986 by defendants The Moses Cone Memorial Hospital, Wesley Long Community Hospital, and High Point Regional Hospital to provide home health equipment and supplies.

In 1987, plaintiff filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. Plaintiff's president, Frederick Tolin, informed the company's creditors of the reasons the company filed for bankruptcy in a letter which stated:

> In the years before the bankruptcy the Company grew rapidly, primarily by acquiring other similar companies. The problems of the company arose as a result of a large amount of debt incurred in the acquisition of other companies, the loss of management control by myself, and major changes in Medicare billing requirements.

In 1990, the Bankruptcy Court entered a final decree which released plaintiff from bankruptcy.

In 1989, while plaintiff was still in bankruptcy proceedings, Mr. Tolin wrote a letter to defendant The Moses Cone Memorial Hospital asking it to open up the referral process for discharged patients who needed home health care equipment. The hospital responded that it provided its patients with a list of firms that provided home health care services.

Plaintiff filed its complaint against defendants on 26 May 1993 which alleged six causes of action; (1) conspiracy in restraint of

trade, (2) conspiracy to monopolize, (3) monopoly, (4) attempted monopoly, (5) using monopoly power to gain an unfair advantage, and (6) unfair methods of competition and unfair acts and practices affecting commerce. Defendants filed a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds of judicial estoppel and that the action was barred by the statute of limitations. The parties submitted additional materials regarding the issue of judicial estoppel and the trial court converted that motion to a motion for summary judgment. The trial court granted defendants' motion for summary judgment on the grounds of judicial estoppel and denied their motion to dismiss on the grounds that the statute of limitations had expired. From this order granting summary judgment, plaintiff appeals. Defendants cross-assign as error the denial of their motion to dismiss on the grounds that the statute of limitations had expired.

I.

[1] Plaintiff argues that the trial court erred by granting defendants' motion for summary judgment on the grounds of judicial estoppel. We agree.

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 genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The moving party assumes the burden of clearly showing absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *James v. Clark*, 118 N.C. App. 178, 454 S.E.2d 826 (1995), *disc. rev. denied*, 458 S.E.2d 187 (1995).

Judicial estoppel, or preclusion against inconsistent positions, is an equitable doctrine designed to protect the integrity of the courts and the judicial process. *Guinness PLC v. Ward*, 955 F.2d 875, 899 (4th Cir. 1992). Judicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation. *Virginia Sprinkler Co. v. Local Union 669 V.A., AFL-CIO*, 868 F.2d 116 (4th Cir. 1989). The doctrine prevents the use of "intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

The purpose of judicial estoppel is to prevent litigants from playing "fast and loose" with the courts and deliberately changing posi-

tions according to the exigencies of the moment. *United States v. McCaskey*, 9 F.3d 368 (5th Cir. 1993), *cert. denied* 114 S.Ct. 1565 (1994); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162 (4th Cir. 1982). Courts are divided as to whether the party asserting the doctrine must have relied on the opposing party's previous assertion or suffer some other prejudice. *Compare Jackson Jordan, Inc. v. Plasser American Corp.*, 747 F.2d 1567, 1580 (Fed. Cir. 1984) ("[W]e see no justification for wholly dispensing with reliance and prejudice as minimum requirements under the doctrine of preclusion of inconsistent positions.") *with Tenneco Chemicals v. William T. Burnett & Co.*, 691 F.2d 658, 665 (4th Cir. 1982) ("Reliance is . . . not the linchpin to application of judicial estoppel; rather the determinative factor is whether the appellant intentionally misled the court to gain an unfair advantage."); *see generally*, Douglas W. Henkin, Comment *Judicial Estoppel—Beating Shields Into Swords and Back Again*, 80 U. Pa. L. Rev. 1711 (1991); Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 N.W. U. L. Rev. 1244 (1987).

In the instant case, defendants argue that plaintiff's antitrust claims are barred by judicial estoppel because plaintiff did not disclose these claims during its bankruptcy proceedings. Section 1125 of the Bankruptcy Code requires the debtor in a Chapter 11 reorganization to file a disclosure statement providing "adequate information" in which a hypothetical investor could make an informed judgment about the proposed reorganization plan. 11 U.S.C. § 1125. Under this disclosure requirement, the debtor must disclose any litigation likely to arise in a non-bankruptcy context. *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3d Cir. 1988). A debtor who fails to disclose potential litigation in the bankruptcy proceeding is estopped from subsequently pursuing the claims. *Id.* at 419.

In the present case, however, there is no evidence that plaintiff was aware of any potential antitrust claims against defendants while it was undergoing bankruptcy reorganization from 1987 to 1990. Mr. Tolin, plaintiff's president, states in an affidavit that "[I] was not aware that Medicare Rentals, Inc. had any claims for damages which could be made against . . . [defendants] until I read about a similar case in Venice, Florida sometime in 1991." Defendants contend, however, that plaintiff, through Mr. Tolin, had sufficient knowledge of the facts surrounding its antitrust action when it was in bankruptcy and failed to properly investigate and disclose these facts in its bankruptcy proceedings.

Judicial estoppel is a harsh doctrine and requires at a minimum that the party against whom the doctrine is asserted intentionally have changed its position in order to gain an advantage. *Allen*, 667 F.2d at 1167; *see Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993) ("Judicial estoppel is strong medicine, and this has led courts and commentators to characterize the grounds for its invocation in terms redolent of intentional wrongdoing."). In the present case, there is no evidence in the record that plaintiff intentionally misled the bankruptcy court regarding the possibility of an antitrust action against defendants. Since there is no evidence that plaintiff was playing "fast and loose" with the courts, the trial court erred by granting summary judgment for defendants on the grounds of judicial estoppel and this order is reversed.

II.

[2] Defendants cross-assign as error the trial court's denial of their motion to dismiss plaintiff's complaint on the grounds that the statute of limitations had expired. We find that plaintiff's complaint is not barred by the statute of limitations.

"A statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784 (1994), *disc. rev. denied*, 338 N.C. 672, 453 S.E.2d 177 (1994); *Fleet Real Estate Funding Corp. v. Blackwelder*, 83 N.C. App. 27, 348 S.E.2d 611 (1986), *dis. rev. denied*, 319 N.C. 104, 353 S.E.2d 109 (1987). The applicable statute of limitations for violations of Chapter 75 is N.C. Gen. Stat. § 75-16.2 which provides in pertinent part: "Any civil action brought under this Chapter to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues." N.C. Gen. Stat. § 75-16.2 (1988). In addition, N.C. Gen. Stat. § 75-8 (1988) provides:

> Where the things prohibited in this Chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provisions shall continue shall be a separate offense.

N.C. Gen. Stat. § 75-8 (1988).

In the instant case, plaintiff filed its complaint on 26 May 1993 and is thus barred by N.C. Gen. Stat. § 75-16.2 from recovering for any injuries sustained before 26 May 1989. Plaintiff's complaint, however, alleges that defendants engaged in continuous violations of Chapter

75. Under section 75-8, each subsequent violation is a separate offense for the purpose of the statute of limitations. Therefore, we conclude that plaintiff's complaint does not, on its face, disclose that it is barred by the statute of limitations. Accordingly, the trial court properly denied defendants' motion to dismiss.

For the foregoing reasons, the trial court's order is

Reversed in part, affirmed in part, and remanded.

Chief Judge ARNOLD and Judge JOHN concur.

DOLORES D. SIMONEL, PETITIONER v. NORTH CAROLINA SCHOOL OF THE ARTS; THE UNIVERSITY OF NORTH CAROLINA; AND ALEXANDER C. EWING, RESPONDENTS

No. COA95-71

(Filed 15 August 1995)

Colleges and Universities § 12 (NCI4th)— N.C. School of the Arts—decision not to renew teacher's contract—decision made upon unlawful procedure

The trial court did not err in concluding that the chancellor of the N.C. School of the Arts exceeded his authority under the school's regulations by reviewing and rejecting a faculty grievance committee's report finding that his decision not to renew a faculty member's contract was based upon the impermissible ground of personal malice and that the final decision not to reappoint the faculty member was thus made upon an unlawful procedure where the regulations gave the faculty member the right to request a faculty grievance committee review of the chancellor's decision before appealing to the school's board of trustees; the faculty member exercised this right; and no provision of the regulations allowed the chancellor to review the faculty grievance committee report. The chancellor's general supervisory authority set forth in N.C.G.S. § 116-34(a) must be exercised consistent with the express language of the school's regulations.

Am Jur 2d, College and Universities §§ 1, 11, 16.

Appeal by respondents from judgment filed 3 October 1994 by Judge Howard R. Greeson, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 6 June 1995.

Elliot, Pishko, Gelbin & Morgan, P.A., by Robert M. Elliot, for petitioner-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas J. Ziko, for respondent-appellants.

MARTIN, MARK D., Judge.

Respondents appeal from judgment concluding the North Carolina School of Arts failed to follow its own regulations governing the review of petitioner's non-reappointment. We affirm.

On 30 August 1988 petitioner Dolores Simonel entered into a five-year, fixed-term contract as a faculty member of respondent North Carolina School of the Arts (NCSA). Petitioner's contract was expressly made subject to the NCSA Regulations on Academic Freedom and Faculty Appointments, Promotions, and Discharge (NCSA Regulations).

On 5 June 1992, following the required institutional review of petitioner's performance, NCSA Chancellor Alex C. Ewing informed petitioner of his decision not to renew her appointment to the NCSA faculty. Pursuant to section 8a of the NCSA Regulations, petitioner requested and was granted a meeting with Chancellor Ewing to discuss the reasons for non-reappointment. In a letter dated 12 June 1992, Chancellor Ewing restated his decision not to renew petitioner's contract.

On 23 June 1992, pursuant to section 8b, footnote 3 of the NCSA Regulations, petitioner requested review of the Chancellor's decision by the NCSA Faculty Grievance Committee (FGC). Petitioner appealed the Chancellor's decision on the grounds that it was based upon personal malice, violated her academic freedom, and violated her rights to procedural and substantive due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 19 of the North Carolina Constitution. In November 1992 the FGC conducted a hearing and found that the decision not to reappoint petitioner was (1) based upon the impermissible ground of personal malice; and (2) not based upon the impermissible ground of violation of First Amendment rights. The FGC sent a report to the Chancellor stating its findings. The Chancellor reviewed the FGC's decision and entered his second decision not to renew petitioner's contract.

In accordance with section 8b of the NCSA Regulations, petitioner appealed to the NCSA Board of Trustees. Petitioner contended the decision not to reappoint her was based upon the impermissible grounds of (1) personal malice (2) violation of petitioner's First Amendment Rights, and (3) unlawful age discrimination. In addition, petitioner contended the reappointment process violated her rights to procedural and substantive due process of law as guaranteed under the federal and state constitutions. A committee, appointed by the Board of Trustees, determined petitioner did not establish that failure to renew her contract was based on impermissible grounds. The committee, however, did not address petitioner's procedural claim.

Pursuant to section 8d of the NCSA Regulations and section 501C(4) of the Code of the Board of Governors of the University of North Carolina (the Code), petitioner appealed the Board of Trustees' decision to the President and Board of Governors of the University of North Carolina. On 10 September 1993 the Board affirmed the decision not to renew petitioner's contract and rejected her contention that Chancellor Ewing's review of the FGC decision was a procedural violation of the NCSA Regulations.

Petitioner then filed a petition for judicial review pursuant to N.C. Gen. Stat. § 150B-43. In her petition, she claimed the Board of Governors erred in affirming the NCSA's decision and alleged that the decisions of the Board of Governors and the NCSA were made upon unlawful procedure.

The trial court concluded in pertinent part:

> 1. Section 8b of the Regulations provides for review of the Chancellor's decision concerning non-reappointment of a faculty member. Within that procedure, footnote 3 permits the faculty member to request review by the Faculty Grievance Committee. There was no authority in the Regulations for the decision of the Faculty Grievance Committee to be reviewed by the Chancellor.
>
> . . . .
>
> 3. Since the Chancellor exceeded his authority under the Regulations and respondents' decision was made upon an unlawful procedure, the substantial rights of the petitioner may have been prejudiced in violation of N.C.G.S. § 150B-51(b) . . . .

The trial court ordered the reinstatement of petitioner to her former position for one year, and ordered the NCSA to fairly evaluate her during that period.

The question presented on appeal is whether the trial court erred in concluding that "the Chancellor exceeded his authority under the Regulations and respondents' decision was made upon an unlawful procedure."

Respondents contend the trial court erred in its construction of the review procedure set forth within the NCSA Regulations. Respondents argue that, under the NCSA Regulations, the FGC's authority is strictly advisory and the Chancellor retains the ultimate authority to reject the FGC's recommendations.

On appeal from a lower court's consideration of a final agency decision under the Administrative Procedure Act, N.C. Gen. Stat. §§ 150B-1, *et seq.*, our scope of review is to determine whether the trial court committed any errors of law. *Alexander v. N.C. Department of Human Resources*, 116 N.C. App. 15, 17, 446 S.E.2d 847, 849-850, *disc. review denied*, 338 N.C. 514, 452 S.E.2d 805 (1994). Moreover, an administrative agency's interpretation of its own regulation should be accorded due deference unless it is plainly erroneous or inconsistent with the regulation. *Pamlico Marine Co. Inc., v. N.C. Dept. of Natural Resources*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986).

Pursuant to authority granted by the Board of Governors of the University of North Carolina, the NCSA adopted regulations governing faculty employment policies. *The Code of the Board of Governors of the University of North Carolina*, § 602. The NCSA Regulations set forth specific procedures that employees seeking review of non-reappointment decisions must follow. Petitioner's contract with NCSA was expressly made subject to the NCSA Regulations.

Section 3c.(5) of the NCSA Regulations provides in pertinent part: "The Chancellor shall inform the faculty member . . . whether the faculty member's reappointment will be recommended to the Board of Trustees. This decision is final except as it may later be reviewed in accordance with the provisions of Section 8."

Section 8(b) of the NCSA Regulations states:

b. Request for Review by the Board of Trustees; Scope of Review

Within five days after he receives notice of an unfavorable action resulting from the conference with the Chancellor, the faculty member may request a review of the decision not to reappoint

> him by the Board of Trustees or a Board committee of not less than three members. [footnote 3]. Such review may be had solely to determine whether the decision not to reappoint was based upon any of the grounds stated to be impermissible in Section 3 d.

North Carolina School of Arts, *Regulations on Academic Freedom and Faculty Appointments, Promotions, and Discharge*, as approved by the Board of Governors of the University of North Carolina, August 8, 1980. (emphasis added).

Footnote 3 states:

> If the faculty member so desires, he may first request a review by the Faculty Grievance Committee. Such a review may be had solely to determine whether the decision not to re-appoint was based upon any of the grounds stated to be impermissible in Section 3d.

Id. (emphasis added).

The NCSA Regulations expressly gave petitioner the right to request FGC review of the Chancellor's final decision before appealing to the Board of Trustees. Petitioner exercised this right, and the FGC determined the Chancellor's decision not to reappoint was based upon impermissible grounds. We believe the Chancellor's subsequent review and ultimate rejection of the FGC's report does not comport with the review procedure expressly set forth in the NCSA Regulations.

In our view this construction is compelled by the express language of the NCSA Regulations as approved by the University of North Carolina Board of Governors pursuant to section 602 of the Code. There is no express provision within the NCSA Regulations which allowed the Chancellor to review the FGC report authorized by section 8b, footnote 3 of the NCSA Regulations.

Accordingly, we conclude the trial court did not err in concluding "the Chancellor exceeded his authority under the Regulations and respondents' decision was made upon an unlawful procedure."

We are not unmindful that N.C. Gen. Stat. § 116-34(a) vests supervisory authority in the Chancellor of each constituent institution of the University of North Carolina:

> The chancellor . . . shall exercise complete executive authority . . . subject to the direction of the President. He shall be responsible for carrying out policies of the Board of Governors and of the board of trustees.

N.C. Gen. Stat. § 116-34(a) (1994). See also Code of the Board of Governors of the University of North Carolina, § 502B(4). However, this general supervisory authority must be exercised consistent with the express language of the NCSA Regulations governing petitioner's employment contract with the NCSA.

Affirmed.

Judges EAGLES and WYNN concur.

DORIS R. HORTON v. CAROLINA MEDICORP, INC., FORSYTH COUNTY HOSPITAL AUTHORITY, INC. AND FORSYTH MEMORIAL HOSPITAL

No. COA94-935

(Filed 15 August 1995)

1. Hospitals and Medical Facilities or Institutions § 62 (NCI4th)— medical malpractice claim against hospital—applicability of continued course of treatment doctrine

The continued course of treatment doctrine applies in medical malpractice actions against hospitals.

Am Jur 2d, Hospitals and Asylums §§ 38, 39.

2. Limitations, Repose, and Laches § 24 (NCI4th)— medical malpractice of hospital alleged—claim not bared by statute of limitations

Plaintiff's medical malpractice action against defendant hospital was not barred by the statute of limitations where plaintiff alleged that, as a result of defendant's negligence, she sustained injuries, underwent a second surgery on 20 November 1990 to repair those injuries, and remained in the hospital until 6 December 1990; plaintiff filed her action on 6 December 1993; and the continued course of treatment doctrine applied.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 316 et seq.

Appeal by plaintiff from order entered 27 June 1994 by Judge James A. Beaty, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 11 May 1995.

Warren Sparrow and Cranwell & Moore, by C. Richard Cranwell, for plaintiff-appellant.

Wilson & Iseman, L.L.P, by G. Gray Wilson and Tamura D. Coffey, for defendant-appellee.

MARTIN, MARK D., Judge.

This appeal arises out of a medical malpractice action against a hospital wherein, on 27 June 1994, the trial court entered an order dismissing plaintiff's complaint with prejudice.

The record shows that on 15 November 1990 defendant Forsyth Memorial Hospital (Hospital) admitted plaintiff for a total abdominal hysterectomy. On 16 November 1990 a Foley catheter, inserted during surgery, was removed. After the removal of the catheter, plaintiff experienced difficulty urinating, causing her bladder to become distended. Plaintiff was unable to void her bladder for a twenty-four hour period, resulting in a vesico-peritoneal fistula in the bladder. Her condition was discovered on 17 November 1990 when a Foley catheter was reinserted. Plaintiff alleges that because the Hospital's nurses failed to monitor her bladder, she underwent a cystourethroscopy and pelvic examination, and an exploratory laparotomy on 20 November 1990. Postoperatively, plaintiff was transferred to the intensive care unit. On 6 December 1990 plaintiff was discharged from defendant Hospital with the Foley catheter in place.

On 6 December 1993 plaintiff instituted a medical malpractice action to recover damages from defendants, alleging negligence on the part of defendant Hospital's nursing staff. On 25 March 1994 the trial court granted defendants' motion for a more definite statement. On 14 April 1994 plaintiff filed her more definite statement. On 3 May 1994 defendants answered, denying the material allegations of the complaint and asserting various defenses to plaintiff's claim, including a motion to dismiss plaintiff's action because it was barred by the statute of limitations. On 29 June 1994 the trial court dismissed plaintiff's action with prejudice.

The question presented by this appeal is whether plaintiff's claim is barred by the running of the statute of limitations.

A statute of limitations defense is properly asserted in a motion to dismiss under Rule 12(b)(6). *Fleet Real Estate Funding Corp. v. Blackwelder*, 83 N.C. App. 27, 31, 348 S.E.2d 611, 614 (1986), *disc. review denied*, 319 N.C. 104, 353 S.E.2d 109 (1987). Once defendant raises a defense based on the statute of limitations, "the burden of showing that the action was instituted within the prescribed period [is] placed upon plaintiff." *Pembee Mfg. Corp v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 507, 317 S.E.2d 41, 42-43 (1984), *aff'd*, 313 N.C. 488, 329 S.E.2d 350 (1985) *(citing Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974)). To dismiss an action on the basis of a Rule 12(b)(6) motion, the complaint must fail to state any set of facts which would entitle plaintiff to relief. *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985). In considering the sufficiency of the complaint under Rule 12(b)(6), a court must accept as true the facts alleged therein. *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E.2d 282, 288 (1976).

All parties agree the applicable statute of limitations in this case is N.C. Gen. Stat. § 1-15(c). Under Section 1-15(c) a cause of action for malpractice arising out of the performance or failure to perform professional services accrues at the time of the occurrence of the last act of the defendant giving rise to the claim. N.C. Gen. Stat. § 1-15(c) (1983). From that date, plaintiff has a minimum of three years within which to bring a suit for medical malpractice, but must bring the suit within four years of the last act of the defendant giving rise to the cause of action. *Id.* An exception to the rule that the action accrues at the time of defendant's negligence is the continued course of treatment doctrine. *Stallings v. Gunter*, 99 N.C. App. 710, 714, 394 S.E.2d 212, 215, *disc. review denied*, 327 N.C. 638, 399 S.E.2d 125 (1990). Under this doctrine, the action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action. *Id.*

Defendants contend plaintiff's second surgery on 20 November 1990 represents the last act of defendant arising out of the alleged negligence, and therefore plaintiff's action filed on 6 December 1993 is barred by the statute of limitations. Plaintiff, however, contends the continued course of treatment doctrine exception to the three-year statute of limitations mandates that her cause of action accrue with her discharge from the Hospital on 6 December 1990. Because plain-

tiff filed her complaint on 6 December 1993, plaintiff argues she filed within the statutory period. In opposition, defendants contend plaintiff may not benefit from the continued course of treatment doctrine because the doctrine does not apply to hospital-patient relationships or, alternatively, if the doctrine does apply, plaintiff knew or should have known of her injury prior to her discharge on 6 December 1990.

[1] Therefore, the threshold issue in this case is whether the continued course of treatment doctrine applies in medical malpractice actions against hospitals.

This Court has recognized that hospitals may be liable in a medical malpractice action for damages for personal injury or death arising out of a hospital's furnishing or failure to furnish professional services. *Clark v. Perry*, 114 N.C. App. 297, 311, 442 S.E.2d 57, 65 (1994) (plaintiff may proceed against hospital in medical malpractice action).

Our legislature has indicated that a medical malpractice action is any action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services by a health-care provider as defined in G.S. 90-21.11. *Watts v. Cumberland County Hosp. System, Inc.*, 75 N.C. App. 1, 9, 330 S.E.2d 242, 249 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). Section 90-21.11 defines "health-care provider" as:

> [A]ny person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(e)(2); or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

N.C. Gen. Stat. § 90-21.11 (1993) (emphasis added).

The General Assembly has not accorded hospitals any preferential treatment over other health-care professionals under Section 90-21.11. We are not persuaded by defendants' argument that the doc-

trine should not apply because there is no alleged relationship of trust and confidence between a hospital and patient. Accordingly, we conclude the continued course of treatment doctrine applies to hospitals.

Having determined the continued course of treatment doctrine applies to hospitals, we now apply the doctrine to the present case.

[2] Plaintiff contends the Hospital failed to furnish a professional service because its nurses failed to monitor the voiding of her bladder for a twenty-four hour period. Plaintiff alleges as a result of the Hospital's negligence, she sustained injuries, underwent a second surgery on 20 November 1990 to repair those injuries, and remained in the hospital until 6 December 1990.

Under the continued course of treatment doctrine, plaintiff must show (1) the existence of a continuing relationship with the defendant and (2) that she received subsequent treatment from the defendant. *Stallings v. Gunter*, 99 N.C. App. at 715, 394 S.E.2d at 216. "Subsequent treatment must consist of 'either an affirmative act or an omission, [which] must be related to the original act, omission, or failure which gave rise to the cause of action.' " *Id.* However, "[m]ere continuity of the general [hospital]-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine." *Id.* Under the doctrine plaintiff's cause of action accrues "at the earlier of (1) the termination of defendant's treatment of the plaintiff or (2) the time at which the plaintiff knew or should have known of his injury." *Ballenger v. Crowell*, 38 N.C. App. 50, 60, 247 S.E.2d 287, 294 (1978).

Plaintiff's complaint and more definite statement reveal that she experienced difficulty in urinating on 16 November 1990 following her abdominal hysterectomy; that the Foley catheter was reinserted on 17 November 1990; and that on 20 November 1990 plaintiff underwent a second surgery as a result of the Hospital's alleged negligence.

Although plaintiff remained at the Hospital until 6 December 1990, mere continuity of the hospital-patient relationship, standing alone, is insufficient to toll the statutory limitations period pursuant to the continuing course of treatment doctrine. *See Stallings v. Gunter, supra.* Although we acknowledge "the burden of showing that the action was instituted within the prescribed period [is] placed upon plaintiff," *Pembee Mfg. Corp.*, 69 N.C. App. at 507, 317 S.E.2d at 42, after a careful review of plaintiff's complaint and more definite statement, we believe plaintiff has alleged sufficient facts in support

of her claim to survive defendants' Rule 12(b)(6) motion to dismiss. Accordingly, we reverse the order of the trial court dismissing this case and remand for further proceedings consistent with this opinion.

Reversed and Remanded.

Judges EAGLES and WYNN concur.

JAMES ANTHONY RICHARDSON AND WIFE, TERESA B. RICHARDSON, PLAINTIFFS v. VERSIE LYNCH WEBB, DON EDGAR WEBB, AND INTEGON GENERAL INSURANCE CORPORATION, DEFENDANTS

No. COA94-846

(Filed 15 August 1995)

Torts § 34 (NCI4th)— release of insurer—action to reform release—no showing of fraud, trickery, or special circumstances

The trial court did not err in directing verdict for defendant in plaintiffs' action to reform a release to cover property damages only based upon the alleged fraud of defendant insurance company's claim agent where the evidence tended to show that plaintiffs accepted payment for damage to their car and for rental of a vehicle after signing a release which precluded any subsequent claims, including those for personal injury, but plaintiffs presented no testimony showing any fraud or trickery by the agent or showing that they were prevented from reading or understanding the release.

Am Jur 2d, Release §§ 14-17, 21-25, 50-53.

Appeal by plaintiffs from order entered 23 March 1994 by Judge J. Richard Parker in Wilson County Superior Court. Heard in the Court of Appeals 8 May 1995.

On 14 April 1989, an automobile driven by defendant Versie Lynch Webb (Mrs. Webb) collided with a vehicle in which plaintiff James Anthony Richardson (Mr. Richardson) was a passenger. The automobile operated by Mrs. Webb was owned by her husband, defendant Don Edgar Webb, and insured by defendant Integon General Insurance Corporation (Integon). Plaintiff Teresa B. Richardson (Mrs. Richardson) owned the automobile in which Mr. Richardson was a passenger.

Robert Powell, a claims agent for Integon, contacted the Richardsons and took statements from Mr. Richardson and from his step-daughter, who was driving the Richardson vehicle at the time of the collision. Because of conflicting versions of the accident, Powell originally planned to deny the Richardsons' claim. After conferring with his supervisor, Powell decided to offer the Richardsons payment for property damage to their vehicle in full settlement of the claim.

On 18 May 1989, Powell met the Richardsons at the body shop where Mrs. Richardson's car was being repaired. Powell presented a check payable to Mrs. Richardson for damage to the car, and a check payable to both Mr. and Mrs. Richardson for loss of use of the car while it was being repaired. In exchange, Powell required the Richardsons to sign a document entitled "Release Of All Claims." The release read, in pertinent part, as follows:

> [T]he undersigned . . . do/does hereby . . . release, acquit and forever discharge [the defendants] . . . from any and all claims of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damages and the consequences thereof resulting or to result from the accident . . . The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this Release contains the entire agreement between the parties . . . .

Mr. and Mrs. Richardson signed the document just below two lines which stated in all capital letters: "THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT" and "CAUTION: READ BEFORE SIGNING BELOW." Both of the Richardsons testified they did not read the release before signing.

The Richardsons first discovered they had released the defendants from any liability for a personal injury claim when Mr. Richardson attempted to recover damages for a back injury allegedly sustained in the accident. They filed this suit on 3 March 1992, seeking to reform the release to cover property damage only, and seeking recovery for personal injury damages. In their complaint, plaintiffs alleged Powell falsely represented that the release would not affect any personal injury claim they might have.

The trial court bifurcated the two causes of action, and the action to reform the release was heard before a jury on 21 March 1994. At the close of plaintiffs' evidence, the court granted defendants' motion for a directed verdict. From the order granting the directed verdict, plaintiffs appeal.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson and C. Timothy Williford, for plaintiff-appellants.

Battle, Winslow, Scott & Wiley, P.A., by Samuel S. Woodley, Jr., for defendant-appellee Integon General Insurance Corporation.

Speight, Watson, Brewer & Stanley, by James M. Stanley, Jr., for defendant-appellees Webbs.

McGEE, Judge.

The issue before this Court is whether plaintiffs presented sufficient evidence to overcome defendants' motion for a directed verdict. We find they did not and affirm the order of the trial court.

Plaintiffs seek to reform the release based upon the alleged fraud of Integon's claim agent, Robert Powell. In order to reform an instrument based on false and fraudulent representations one must prove: 1) a false representation; 2) the person making the statement, or persons responsible for it, knew the statement to be untrue, or had a reckless disregard for its truth or falsity; 3) the statement was intended to mislead and induce the plaintiff to act; and 4) the plaintiff did rely and act upon the statement, and suffered damages as a result. *Kemp v. Funderburk*, 224 N.C. 353, 355, 30 S.E.2d 155, 156 (1944). Plaintiffs failed to meet this burden of proof.

As stated above, the first element of fraud is a false representation. In their complaint, plaintiffs alleged Powell represented that the release only covered property damages and would not affect a personal injury claim. However, a careful review of the trial transcript shows plaintiffs presented no evidence of a false representation by Powell.

Describing the events surrounding the signing of the release, Mrs. Richardson testified as follows:

> He [Powell] told us that we couldn't get the checks until we signed the paper saying this was for the car actually being fixed and for the rental car. That's all he told us. He didn't tell us any-

> thing else. . . . He just told us we needed to sign the form before he could [give] us the checks for the car and the car rental.

When asked whether there had been any discussion at the body shop about a personal injury claim by Mr. Richardson, Mrs. Richardson replied: "Not to my knowledge." She also testified she was present with Mr. Richardson the entire time Powell was there. When he was asked about his meeting with Powell at the body shop, Mr. Richardson testified: "Mr. Powell asked me to sign this paper for him to get Teresa car [sic] and for Teresa for a rental car. And so I signed the paper." When asked if there had been any discussion with Powell at that time concerning his back condition or any personal injury claim, Mr. Richardson answered: "None at all." Plaintiffs presented no testimony showing Powell made any representations the release covered only property claims and that it would not affect any personal injury claim. The evidence simply shows Powell told the Richardsons they had to sign the release before they received the checks. Plaintiffs failed to prove the first element of fraud and their cause of action fails.

North Carolina courts have frequently held that if no trick or device has prevented a person from reading a paper which he has signed or accepts as the contract prepared by the other party, then the failure to read the paper when he had an opportunity to do so bars any right to reformation. *Setzer v. Insurance Co.*, 257 N.C. 396, 401, 126 S.E.2d 135, 139 (1962). Plaintiffs presented no evidence of a "trick or device" by Powell to explain their failure to read the release before signing. The only evidence tending to show a trick is Mrs. Richardson's testimony that when Powell handed her the release to sign: "[H]e had something— I think it was the check he had on top. I'm not for sure." However, Mrs. Richardson gave no testimony that this prevented her in any way from being able to read the document. If evidence does no more than raise a possibility or conjecture of fact, it is insufficient to withstand a motion for a directed verdict. *Ingold v. Light Co.*, 11 N.C. App. 253, 259, 181 S.E.2d 173, 176 (1971). Similarly, Mr. Richardson gave no testimony showing he was prevented from reading the release before signing. The Richardsons failed to produce evidence showing their failure to read the release was caused by a trick or device by Powell. Absent such evidence, their failure to read the document bars any right to reformation.

"The law imposes on everyone a duty to act with reasonable prudence for his own safety. . . . One who signs a written contract with-

out reading it, when he can do so understandingly is bound thereby unless the failure to read is justified by some special circumstance." *Davis v. Davis*, 256 N.C. 468, 471-72, 124 S.E.2d 130, 133 (1962). In *Davis*, plaintiff satisfied such special circumstances by showing evidence of the following: 1) the insurance agent misrepresented the contents of the release, saying it only covered her medical bills; 2) she was told the doctor was demanding his money, and she had no funds to pay him; 3) she was suffering pain and sickness from injuries sustained in the accident; and 4) because of these facts she did not read the release, and since she had only a sixth grade education and difficulty reading, she could not have understood the release if she had attempted to read it. *Davis*, 256 N.C. at 470, 124 S.E.2d at 131. In determining whether plaintiff presented sufficient evidence to withstand defendant's motion for nonsuit, our Supreme Court held she did, but that it was a "close and narrow" question. *Id.* at 471, 124 S.E.2d at 133. Evidence of special circumstances justifying a failure to read the contract was not presented in this case. Both of the Richardsons have a high school diploma or its equivalent, and both have held jobs requiring reading and writing skills. They are bound by the release.

"If the plaintiffs fail to make a prima facie showing for relief, they are not entitled to have their case sent to the jury and the trial judge may rule on the issue as a matter of law." *Hong v. George Goodyear Co.*, 63 N.C. App. 741, 742-43, 306 S.E.2d 157, 159 (1983). In this case, plaintiffs failed to present evidence showing fraud, trickery, or special circumstances. Therefore, entry of a directed verdict was proper and the order of the trial court is affirmed.

Affirmed.

Chief Judge ARNOLD and Judge LEWIS concur.

LONNIE ANTHONY SCALES, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND KEVIN LEE CREWS, DEFENDANTS

No. COA94-755

(Filed 15 August 1995)

Insurance § 485 (NCI4th)— intentional shooting from vehicle—injured party not covered by owner's automobile insurance

An intentional shooting from an automobile is not an act arising out of the ownership, maintenance, or use of an insured vehicle within the meaning of an automobile liability insurance policy.

Am Jur 2d, Automobile Insurance §§ 194 et seq.

Automobile liability insurance: what are accidents or injuries "arising out of ownership, maintenance, or use" of insured vehicle. 15 ALR4th 10.

Appeal by plaintiff from order entered 4 April 1994 by Judge D. Jack Hooks, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 4 April 1995.

On 30 June 1990, plaintiff-appellant Lonnie Anthony Scales attended a party at an apartment complex in Winston-Salem. Scales was confronted by Earl Freddie Jefferson, who attempted to fight Scales. Scales left the party in a vehicle driven by Carlos Hickman. Jefferson chased the Hickman vehicle in an automobile owned and operated by defendant Kevin Lee Crews. During the pursuit, Jefferson began firing a handgun at Hickman's vehicle. Hickman made a U-turn and when the cars were parallel, Crews leaned back to allow Jefferson to shoot at the Hickman vehicle through the window on the driver's side. A bullet struck Hickman's wrist and passed through Scales' right arm.

Scales filed a claim against the insurer of the Crews vehicle, defendant-appellee State Farm Automobile Insurance Company (State Farm), to recover for his injuries. State Farm denied the claim. Scales then filed suit against Crews and Jefferson, and the trial court granted a directed verdict against Jefferson. The following issue was submitted to the jury: "Did the defendant, Kevin Lee Crews use his automobile to facilitate an assault on the plaintiff, Lonnie Scales by the defendant, Earl Freddie Jefferson?" The jury answered: "Yes." The parties had previously stipulated the trial court would determine

damages, and a judgment in the amount of $200,000 was entered jointly and severally against Crews and Jefferson.

Based upon that verdict, Scales filed this action to recover under Crews' State Farm automobile policy. State Farm moved to dismiss the action pursuant to N.C.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The trial court granted State Farm's motion, and from that order plaintiff appeals.

Charles O. Peed & Associates, by Charles O. Peed, for plaintiff-appellant.

Hutchens, Doughton & Moore, by H. Lee Davis, Jr. and David L. Hall, for defendant-appellee State Farm Mutual Automobile Insurance Company.

McGEE, Judge.

The issue presented by this appeal is whether Crews' general automobile liability policy issued by State Farm covers an intentional shooting from the insured vehicle. Based upon the facts presented, we find it does not and affirm the order of the trial court.

It is well established in North Carolina that the provisions of the Financial Responsibility Act are written into every automobile insurance policy. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538-39, 350 S.E.2d 66, 69 (1986). N.C. Gen. Stat. § 20-279.21(b)(2) (1993) states, in part, that an owner's policy of liability insurance will insure "against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use" of the insured vehicle. Plaintiff contends his injuries are compensable under the State Farm policy because they arose out of the "use" of the insured vehicle. We disagree.

In support of his argument, plaintiff cites *Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206, *disc. review denied*, 293 N.C. 159, 236 S.E.2d 704 (1977) and *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986). In these cases, automobile insurance policies were held to cover injuries sustained when guns were fired inside the insured vehicles. However, the cases are distinguishable. Both *Walker* and *State Capital* involved accidental discharges of rifles inside vehicles equipped with permanently mounted gun racks and regularly used to transport guns for hunting purposes. In fact, both vehicles were being used, or were about to be used, for hunting purposes when the guns fired. Therefore, the acci-

dental discharges occurred within the regular and normal use of the vehicles. In the case before us, Jefferson's firing of the gun was intentional and there is no evidence the vehicle was regularly used to transport guns. Therefore, neither *Walker* nor *State Capital* is applicable to the facts of this case.

Instead, we find the cases of *Wall v. Nationwide Mutual Ins. Co.*, 62 N.C. App. 127, 302 S.E.2d 302 (1983) and *Insurance Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, *disc. review denied*, 293 N.C. 589, 239 S.E.2d 263 (1977), to be controlling. In *Knight*, a dispute arose over physical custody of a child. After attempting to bodily take the child from his father, the child's mother and several of her family members engaged in a high-speed automobile chase with the father. During the chase, someone in the pursuing automobile began shooting at the father's vehicle. One of the bullets struck the child in the head. The father and child filed suit against the mother and her family members. The insurance carrier for the pursuing automobile filed a declaratory action to determine its liability. After distinguishing *Walker*, this Court stated: "We reject defendant's contentions and conclude that the wound caused by gunshots fired from the insured's moving automobile does not constitute an accident arising out of the ownership, maintenance or use of such automobile." *Knight*, 34 N.C. App. at 100, 237 S.E.2d at 344.

In *Wall*, the plaintiff was involved in a scuffle with a third-party defendant inside a store. As plaintiff left the store, the third-party defendant, seated inside a vehicle insured by the defendant insurance company, shot the plaintiff with a handgun kept on the vehicle's dash. This Court again distinguished *Walker*, finding plaintiff Wall's injuries resulted from an act wholly independent, remote, and disassociated from the vehicle's normal use. *Wall*, 62 N.C. App. at 128-29, 302 S.E.2d at 303. This Court, citing *Knight*, held there is no causal relationship between an occupant's discharge of a weapon from inside a vehicle and the ownership, maintenance, or use of the vehicle. *Id.* at 128, 302 S.E.2d at 303. Therefore, an injury so caused does not arise from the "use" of a vehicle and will not result in coverage under a standard automobile liability policy. *Id.*

Plaintiff contends his case is distinguishable from *Knight* and *Wall* because the jury found as a fact that Crews "use[d] his automobile to facilitate an assault" on plaintiff. We find no merit to this argument. While it is true the vehicle played an integral part in the assault, and in fact the assault could not have occurred without the vehicle,

as this Court has said: "[The] argument that 'but for the use of the automobile' to establish causation is too broad and is rejected." *Knight*, 34 N.C. App. at 100, 237 S.E.2d at 345.

Plaintiff's argument misconstrues the intended meaning of "use" of the automobile. In order for an injury to be compensable, there must be a causal connection between the use of the vehicle and the injury. *Casualty Co. v. Insurance Co.*, 16 N.C. App. 194, 198, 192 S.E.2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972). This connection is shown if the injury is the natural and reasonable consequence of the vehicle's use. *Id.* at 198-99, 192 S.E.2d at 118. However, an injury is not a "natural and reasonable consequence of the use" of the vehicle if the injury is the result of something "wholly disassociated from, independent of, and remote from" the vehicle's normal use. *See Walker*, 33 N.C. App. at 22, 234 S.E.2d at 211. Clearly, an automobile chase with guns blazing is not a regular and normal use of a vehicle.

An intentional shooting such as occurred in this case is not a compensable act arising out of the ownership, maintenance, or use of an insured vehicle. Plaintiff cannot recover under the State Farm policy. Dismissal pursuant to Rule 12(b)(6) is proper if the plaintiff is not entitled to relief under the stated, provable facts of the case, such as when there is no law to support the claim made. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 123, 401 S.E.2d 133, 135 (1991). Therefore, the trial court properly granted State Farm's Rule 12(b)(6) motion, and the order dismissing plaintiff's action is affirmed.

Affirmed.

Judges JOHNSON and COZORT concur.

DIANE WHITFORD v. DESSIE PITTMAN GASKILL AND ALICE PITTMAN LEWIS DURHAM

No. 943SC520

(Filed 15 August 1995)

Principal and Agent § 25 (NCI4th)— gift of real property— authority expressly required in power of attorney

A power of attorney purportedly granting the authority for making gifts of real property, to be effective, must expressly pro-

vide for making gifts of real property. Thus, a power of attorney in which the language "the power to transfer the real estate known as the homeplace" was added to the statutory form did not authorize the attorney-in-fact to convey the homeplace as a gift. N.C.G.S. § 32A-2(1).

Am Jur 2d, Agency §§ 30 et seq.

Appeal by defendants from judgment entered 30 July 1992 by Judge Herbert O. Phillips, III, in Carteret County Superior Court. Heard in the Court of Appeals 26 January 1995.

Nelson W. Taylor, III, for plaintiff appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, III, for defendant appellants.

COZORT, Judge.

Defendants appeal from order granting plaintiff's motion for summary judgment. Defendants contend the trial court erred in granting summary judgment for plaintiff, alleging there was a genuine issue of fact concerning the scope of the power of attorney. We hold that a power of attorney purportedly granting the authority for making gifts of real property must, to be effective, expressly provide for making gifts of real property, and we affirm the trial court.

George W. Pittman, Jr., deceased, owned a certain parcel of land in Merrimon Township, Carteret County, North Carolina, which was the family homeplace. In October 1988, Pittman and his wife, Rose Lupton Pittman, became concerned about what would happen to the homeplace should anything happen to him. In November 1988, Pittman and his wife contacted the defendants, Dessie Pittman Gaskill and Alice Pittman Lewis Durham, to discuss how to assure the homeplace would be protected from his daughter, the plaintiff, and his wife's daughter from a previous marriage. On 18 November 1988, Pittman consulted an attorney, John Harris, in Morehead City. He explained to his attorney that he wanted to be assured that neither his daughter, his wife's daughter, nor any federal agency could take the property from him. Mr. Harris drew a power of attorney giving Mrs. Pittman authority to act for Mr. Pittman. He added to the standard form: "the power to transfer the real estate known as the homeplace that I inherited from my mother." Mr. Pittman signed the power of attorney.

Mr. Pittman's attorney also prepared a deed conveying this property to defendants. Mrs. Pittman signed Mr. Pittman's name in the presence of a notary public. The deed was recorded in the Carteret County Register of Deed's office. Mrs. Pittman delivered the deed to defendants on 23 November 1988. This property was worth $75,000.00. No consideration was paid for the property.

George Pittman, Jr., died intestate on 22 April 1990 of Alzheimer's Disease. His wife and daughter, the plaintiff, are the only persons entitled to inherit under intestacy.

On 24 October 1990, plaintiff initiated this action alleging that the deed to the defendants by Rose Lupton Pittman as attorney-in-fact for George W. Pittman, Jr., was void. Plaintiff alleged in an amended complaint that the deed is invalid because her father was not mentally competent at the time he signed the power of attorney. After discovery, plaintiff filed a motion for summary judgment on 25 February 1992. Judge Herbert O. Phillips, III, heard this motion and granted partial summary judgment in plaintiff's favor, finding that the deed signed by plaintiff's father's attorney-in-fact is void and of no effect. Defendants appealed. On 28 September 1993, this Court dismissed the appeal as interlocutory because no damages had been determined. On remand, plaintiff filed a voluntary dismissal without prejudice as to her claim for damages. On 19 April 1994, defendants appealed from Judge Phillips' previous order granting partial summary judgment for plaintiff.

The sole issue on appeal is whether a power of attorney must expressly confer the authority to give a gift of real property. This appears to be a case of first impression in North Carolina. We hold that a power of attorney must expressly confer the authority to give a gift of real property. Accordingly, we affirm the trial court.

Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, and admissions on file, and through affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The party moving for summary judgment has the burden of showing that there is no triable issue of material fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). " 'The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential ele-

ment of his claim . . . .' " *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). Once the movant meets his burden, the burden then shifts to the non-moving party to show that a genuine issue exists by forecasting sufficient evidence of all essential elements of their claim. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). The court must look at the evidence in the light most favorable to the non-moving party and with the benefit of all reasonable inferences. *Isbey v. Cooper Companies, Inc.*, 103 N.C. App. 774, 775, 407 S.E.2d 254, 256 (1991), *disc. review denied*, 330 N.C. 613, 412 S.E.2d 87 (1992).

Finding no North Carolina cases which specifically address this issue, we look for guidance from other jurisdictions. A power of attorney creates an agency relationship between one who gives the power, the principal, and one who exercises authority under the power of attorney, the agent. *Kotsch v. Kotsch*, 608 So.2d 879 (Fla. App. 1992), *review denied*, 617 So.2d 319 (Fla. 1993). A power of attorney must be strictly construed and will be held to grant only those enumerated powers. *Id.*

In *Johnson v. Fraccacreta*, 348 So.2d 570 (Fla. App. 1977), Carmela Fraccacreta executed a power of attorney appointing her daughter, Delores, as her attorney-in-fact. The power of attorney gave Delores the authority to "bargain, sell, release, convey and mortgage lands . . . as she shall think fit . . . ." *Id.* at 571. Pursuant to the power of attorney, Delores conveyed real property owned by her mother to her and her husband. The court held that this transaction constituted a gift. The court cited the general rule as follows:

> "A general power of attorney authorizing an agent to sell and convey property, even though it authorizes him to sell for such price and on such terms as to him shall seem proper, implies a sale for the benefit of the principal, and *does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.*"

Id. at 572 (quoting 73 A.L.R. 884) (emphasis added). A power of attorney authorizing a person to sell, exchange, transfer or convey real property does not authorize a conveyance as a gift, and a conveyance outside the scope of the power of attorney is void. *Id.* An agent has no authority to give a gift of the principal's property unless it is expressly granted to the agent or is a necessary implication of the powers expressly conferred upon the agent. *Id.*

The power of attorney in *Johnson* is very similar to that in the case below. N.C. Gen. Stat. § 32A-2(1) (1993) provides in pertinent part that an attorney-in-fact has the authority to "rent, lease, sell, convey . . . and in any way or manner deal with all or any part of any interest in real property whatsoever . . . as said attorney-in-fact shall deem proper." Defendants argue that this language and the additional language of "including the power to transfer" gives the attorney-in-fact the authority to give a gift of real property. We disagree. As stated in *Johnson*, the power to give a gift of real property must be expressly conferred. Thus, general language of the power to transfer, along with the statutory form, will not suffice. If Mr. Pittman wanted to provide for giving gifts of real property, he could have specifically granted this power.

Moreover, under recognized canons of statutory construction, a statute is construed as excluding from its operation those things not expressly mentioned. *See Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993); *Jolly v. Wright*, 300 N.C. 83, 89, 265 S.E.2d 135, 141 (1980), *overruled on other grounds*, *McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993). Here, the statute provides for the real property transactions which a person may conduct pursuant to a power of attorney. This statute does not include giving gifts of real property. We conclude that the legislature did not intend to include the power to give a gift of real property under this statute.

For the foregoing reasons, we adopt as the rule in North Carolina that the authority to give a gift of real property must be expressly conferred in a power of attorney. The trial court is

Affirmed.

Judges MARTIN, John C., and JOHN concur.

HOLLAR v. HAWKINS

[119 N.C. App. 795 (1995)]

JAMIE LYNN HOLLAR, MINOR, BY AND THROUGH HER GUARDIANS AD LITEM, BOYD CARL HOLLAR AND DEBRA S. HOLLAR, AND BOYD CARL HOLLAR, INDIVIDUALLY, PLAINTIFFS v. JOHN PATRICK HAWKINS, AND ALLSTATE INSURANCE COMPANY, DEFENDANTS

No. COA94-1065

(Filed 15 August 1995)

Insurance § 527 (NCI4th)— automobile insurance—minimum bodily injury coverage—UIM coverage not required

Since the automobile insurance policy in question provided only the minimum statutorily required coverage for bodily injury, the policy was not required to provide UIM coverage under N.C.G.S. 20-279.21(b)(4).

Am Jur 2d, Automobile Insurance §§ 293-298.

Appeal by defendant from judgment entered 4 August 1994 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 25 May 1995.

Smith Helms Mulliss & Moore, L.L.P., by Stephen P. Millikin, for defendant-appellant Allstate Insurance Company.

Joel C. Harbinson for plaintiffs-appellees.

WYNN, Judge.

The parties stipulated to the following facts. On 6 October 1990, plaintiff Jamie Lynn Hollar was a passenger in an automobile driven by Juanita Belcher Stevens when it collided with an automobile driven by defendant John Patrick Hawkins. Mr. Hawkins had an insurance policy with bodily injury limits of $25,000 per person and $50,000 per accident which was exhausted to pay claims arising out of the accident.

Plaintiff's father, Boyd Carl Hollar, owned an automobile insurance policy issued by defendant Allstate Insurance Company ("Allstate"). This policy provided bodily injury coverage of $25,000 per person / $50,000 per accident and uninsured motorist ("UM") coverage of $25,000 per person / $50,000 per accident. The policy did not specifically provide any underinsured motorist ("UIM") coverage.

Plaintiff brought this action seeking to establish that Mr. Hollar's policy provided UIM coverage. The trial court found that Allstate was

required to provide UIM coverage of $25,000 per person / $50,000 per accident. The trial court also found that since the Allstate policy insured two vehicles, the UIM coverage could be stacked. The trial court concluded that since defendant Hawkins's policy only provided $25,000 in liability coverage, then Allstate was obligated to provide $25,000 in UIM coverage for plaintiff's claim. From this judgment, Allstate appeals.

Allstate argues that the trial court erred by concluding that Mr. Hollar's insurance policy contained UIM coverage. We agree.

In determining "whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). In the present case, the type of coverage at issue is UIM coverage and the relevant statute is N.C. Gen. Stat. § 20-279.21(b)(4). At the time of the accident, N.C. Gen. Stat. § 20-279.21(b)(4) provided in relevant part:

> [Automobile liability insurance policies] shall . . . provide underinsured motorist coverage, to be used only with policies that are written at limits that exceed those prescribed by subdivision (2) of this section and that afford underinsured motorist coverage as provided by subdivision (3) of this subsection, in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (1990). N.C. Gen. Stat. § 20-279.21(b)(2) established the minimum limits for an automobile liability insurance policy as:

> [T]wenty-Five Thousand Dollars ($25,000.00) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, Fifty Thousand Dollars ($50,000.00) because of bodily injury to or death of two or more persons in any one accident.

N.C. Gen. Stat. § 20-279.21(b)(2) (1990).

UIM coverage allows the insured to recover when the tortfeasor has insurance, but the coverage is insufficient to fully compensate the injured party. *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759 (1989), *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546

(1989). As provided by N.C. Gen. Stat. § 20-279.21(b)(4), UIM coverage "may be obtained only if the policyholder has liability insurance in excess of the minimum statutory requirement." *Smith*, 328 N.C. at 147, 400 S.E.2d at 50.

In the instant case, Mr. Hollar's Allstate insurance policy did not contain UIM coverage. The only way, therefore, that plaintiff could receive UIM coverage is if such coverage is written into the policy by statute as a matter of law. Since the policy provided only the minimum statutorily required coverage of $25,000 per person / $50,000 per accident, the policy was not required to provide UIM coverage under N.C. Gen. Stat. § 20-279.21(b)(4). Accordingly, the judgment of the trial court is

Reversed.

Judges EAGLES and MARTIN, Mark D. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS
FILED 1 AUGUST 1995

BRANTLEY v. N.C. DEPT. OF ECON. & COMM. DEV. No. 94-1119	Wake (92CVS2517)	Affirmed
CERVANTES v. J. L. DARR & SONS, INC. No. 94-418	Ind. Comm. (819801)	Affirmed
CLAY v. EMPLOYMENT SECURITY COMM. No. 94-435-2	Wake (90CVS5425)	Remanded
FIRST CITIZENS BANK & TRUST CO. v. SMITH-ALLEN CO. No. 94-182	Mecklenburg (92CVS10541)	Affirmed
FLEETWOOD FALLS, INC. v. JERNIGAN No. 94-247	Ashe (89CVD259) (89CVD260) (91CVD143) (91CVD144)	Affirmed
FOSTER v. BOISE CASCADE No. 95-78	Ind. Comm. (110667)	Affirmed
GREENSBORO v. KIRKMAN No. 94-717	Guilford (93CVS3701)	Dismissed
HATFIELD v. HOLLY FARMS/TYSON FOODS No. 94-685	Ind. Comm. (979330)	Affirmed
LONEY v. LONEY No. 94-91	Guilford (92CVD2982)	Affirmed
SMITH v. HELMS No. 94-942	Union (89CVD990)	Affirmed in Part, Reversed in Part & Remanded
STATE v. BROOKS No. 95-98	Pasquotank (94CRS594)	No Error
STATE v. DAVILA No. 95-282	Mecklenburg (93CRS10272) (93CRS10273) (93CRS10274) (93CRS10275)	No Error
STATE v. DEW No. 95-67	Mecklenburg (93CRS48195) (93CRS48196) (93CRS48197)	No Error

STATE v. GOFF No. 94-281	Wayne (92CRS5482)	Remanded
STATE v. JACKSON No. 95-116	Durham (93CRS16079) (93CRS16081)	No Error
STATE v. LEONARD No. 94-1424	Forsyth (93CRS7669)	No Error
STATE v. McCOY No. 95-68	Gaston (93CRS027464)	No Error
STATE v. ROYSTER No. 95-223	Mecklenburg (93CRS48861)	No Error
STATE v. ST. CLAIR No. 94-871	Alexander (91CRS3088)	No Error
STATE v. WILLIAMS No. 95-175	Mecklenburg (89CRS42458) (89CRS42459)	No Error
WELBORN v. CLASSIC SYNDICATE, INC. No. 94-304	Catawba (91CVS3120)	Affirmed
WILLIAMS v. NELLO L. TEER CO. No. 94-297	Ind. Comm. (130987) (000921)	Affirmed

FILED 15 AUGUST 1995

ALCO STANDARD CORP. v. RYDER TRUCK RENTAL No. 94-1122	Wake (94CVS1313)	Affirmed
ANDREWS v. FRYE No. 94-1077	Moore (92CVD664)	Affirmed
BAXTER v. HYDRO CONDUIT CORP. No. 94-1126	Ind. Comm. (866679)	Affirmed
DARDEN v. TRAVELERS INS. CO. No. 94-436	Cumberland (93CVS3038)	Reversed & Remanded
DENNY v. DENNY No. 94-1287	Wilson (91CVD872)	Affirmed
DOVER v. JOHNSON No. 94-917	McDowell (92CVS620)	Reversed & Remanded

DUNCAN v. TOWN OF LONG VIEW No. 94-831	Catawba (92CVS1448)	Affirmed
GABOR v. GABOR No. 95-200	Mecklenburg (93CVD14952)	Affirmed
IN RE APPEALS OF SEARS AND J. C. PENNEY No. 94-557	Prop. Tax Comm. (91PTC181) (91PTC203)	Reversed & Remanded
IN RE KRAFT No. 94-852	Rutherford (93J90)	Vacated & Remanded
JOHNSON v. UNICON TRIANGLE, INC. No. 94-1025	Wake (93CVS02288)	Affirmed
KIOUSIS v. KIOUSIS No. 94-75	Dare (88CVD446)	Reversed in Part; Affirmed in Part
MANLEY v. MOTOR SUPPLY CO. No. 94-496(	Ind. Comm. 939090)	Affirmed
MANSOUR v. WALLACE No. 94-845	Wake (93CVS00670)	Reverse the grant of JNOV to plaintiff, reverse the conditional grant of new trial, and reinstate the jury verdict in favor of defendants
MOSS v. MacKINNON No. 94-670	Wake (92CVS12394)	Affirmed
NEW BUCK CORP v. UNITED FINANCIAL OF ILLINOIS No. 94-1080	Guilford (92CVS11363)	Affirmed
PARKER v. LITTLE RIVER CORP. No. 94-505	Wake (91CVS01583)	Reversed & Remanded
RAINES v. DIXIE YARNS, INC. No. 95-242	Ind. Comm. (830754)	Affirmed
RUGGIERO v. DUKE UNIVERSITY No. 94-774	Edgecombe (92CVS898)	Affirmed
RUGGIERO v. DUKE UNIVERSITY No. 94-1320	Edgecombe (92CVS898)	Affirmed
RUPE v. INTEGON INDEMNITY CORP. No. 94-1102	Buncombe (92VS980)	Affirmed

SCHULHOFER v. INMAN No. 94-815	Haywood (92CVD390)	No Error
STATE v. ALSBROOKS No. 94-1177	Union (93CRS010794)	No Error
STATE v. BROADWAY No. 95-29	Cumberland (93CRS43507)	No Error
STATE v. GARCIA No. 95-137	Forsyth (94CRS4465) (94CRS4467)	No Error
STATE v. HAITH No. 94-1353	Forsyth 94CRS5746)	No Error
STATE v. HAYES No. 94-1309	Forsyth (93CRS36994) (93CRS36995)	No Error
STATE v. LINDSAY No. 95-133	Guilford (94CRS29379)	No Error
STATE v. MORTON No. 95-272	Beaufort (93CRS3539) (93CRS3540)	No Error
STATE v. PARTRIDGE No. 95-49	Wake (94CRS54745)	No Error
STATE v. PHIPPS No. 95-339	Washington (94CRS226)	Dismissed
STATE v. SUWANDI No. 94-22	Guilford (91CRS20560) (91CRS30841)	In 91CRS20560, the judgment for habitual felon status is vacated and remanded for entry of an order dismissing the indictment. In 94CRS30841), the case is remanded to Superior Court, Guilford County, for entry of judgment and resentencing.
STATE v. THOMAS No. 94-1422	Forsyth (94CRS20003) (94CRS20004)	No Error

STATE v. WILKINS No. 95-44	Guilford (94CRS71152)	No Error
STATE v. WILLIAMS No. 95-238	New Hanover (93CRS11177) (94CRS1103) (94CRS1104)	Appeal Dismissed
STATE v. WOOD No. 94-1362	Cumberland (93CRS41901)	Dismissed
THARP v. THARP No. 94-601	Wake (91CVD05627)	Affirmed
WOODS v. WOODS No. 94-911	Buncombe (93CVD3094)	Affirmed
YANCEY v. PURCELL No. 95-45	Hoke (94CVS117)	Dismissed
YARBROUGH v. KOONTS No. 94-1016	Davidson (92CVS786)	Remanded for Modification of the Judgment and Affirmed

APPENDIX

ORDER ADOPTING RULES
FOR DESIGNATION OF
COMPLEX BUSINESS CASES

Pursuant to the authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of an amendment to Rule 2.1 and by the adoption of new Rules 2.2 and 23.1.

Rule 2.1 shall be retitled and shall be amended to read as follows:

Designation of Exceptional Civil Cases and Complex Business Cases

(a) The Chief Justice may designate any case or group of cases as (a) exceptional or (b) "complex business." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional or complex business.

(b) Such recommendation for exceptional cases may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges. Every complex business case shall be assigned to a special superior court judge for complex business cases, designated by the Chief Justice under Rule 2.2, who shall issue a written opinion upon final disposition of the case.

(c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.

(d) Factors which may be considered in determining whether to make such designations include: the number and diverse interests of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases.

New Rule 2.2 shall be titled and read as follows:

Designation of Special Superior Court Judge for Complex Business Cases

The Chief Justice shall designate one or more superior court judges as special judges to hear and decide complex business cases as provided in Rule 2.1. Any judge so designated shall be

known as a Special Superior Court Judge for Complex Business Cases.

Comment

The portion of this rule providing for the designation of a case as "exceptional" has been in effect in North Carolina since January 5, 1988, and has been utilized numerous times in various situations. The portion of this rule providing for the designation of a "complex business case" was adopted by the North Carolina Supreme Court on August 28, 1995, as a result of a recommendation in the January 1995 ANNUAL REPORT OF THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY chaired by the North Carolina Attorney General.

The North Carolina Commission on Business Laws and the Economy was established by an executive order of the Governor on April 19, 1994, to recommend "any needed changes in existing statutes and regulations which affect the operation of businesses in North Carolina, particularly Chapter 55 of the North Carolina General Statutes . . . and to recommend any needed new statutes, rules and regulations designed to assure that North Carolina offers a legal environment which provides the flexibility and support to allow businesses to operate successfully in this state and which will attract them to locate and incorporate here."

The Commission's report noted that many national corporations incorporate in the state of Delaware because of that state's Chancery Court which provides a high level of judicial expertise on corporate law issues. It also observed the desirability of a state having a substantial body of corporate law that provides predictability for business decision making. Also, it is essential that corporations litigating complex business issues receive timely and well reasoned written decisions from an expert judge.

Accordingly, the Commission recommended that the North Carolina Supreme Court amend Rule 2.1 to allow the Chief Justice to designate certain cases as complex business cases. The Commission also recommended that the Governor appoint at least one expert in corporate law matters as a Special Judge to hear cases designated by the Chief Justice pursuant to Rule 2.2.

The term "complex business case" is purposely not defined in order to give litigants the flexibility to seek a designation as such with respect to any business issue that they believe requires special judicial expertise. It is anticipated that any case involving significant issues arising under Chapters 55, 55B, 57C, 59, 78A, 78B

and 78C of the General Statutes of North Carolina would be designated a complex business case.

New Rule 23.1 shall be entitled and read as follows:

Summary Procedure for Significant Commercial Disputes

(a) The senior resident superior court judge of any superior court district, or a presiding judge unless prohibited by local rule may, upon joint motion or consent of all parties, order Summary Procedures For A Significant Commercial Dispute ("Summary Procedures") in any case within the subject matter jurisdiction of the superior court that does not include a claim for personal, physical or mental injury where 1) the amount in controversy exceeds $500,000; 2) at least one party is a North Carolina citizen, corporation or business entity (or a subsidiary of such corporation or business entity) or has its principal place of business in North Carolina; and 3) all parties agree to forego any claim of punitive damages and waive the right to a jury trial. The joint motion or consent for summary procedures must be filed with the court on or before the time the answer or other responsive pleading is due.

(b) To the extent they are not inconsistent with these Rules, the North Carolina Rules of Civil Procedure shall apply to Summary Procedures.

(c) Summary Procedures are commenced by filing with the court and serving a complaint.

(d) The complaint and any accompanying documents shall be sent, via next-day delivery, to either a person identified in the agreement between the parties to receive notice of Summary Procedures or, absent such specification, to each defendant's principal place of business or residence.

(e) The complaint must state prominently on the first page that Summary Procedures are requested. The complaint also must contain a statement of the amount in controversy exclusive of interest and costs, a statement that one of the parties is a North Carolina citizen, corporation or other business entity, or a subsidiary of such corporation or business entity, or that such citizen, corporation or business entity has its principal place of business in North Carolina, and a statement that the defendant has agreed to submit to the court's jurisdiction for Summary Procedures.

(f) Any action pending in any other jurisdiction which could have been brought initially as a Summary Procedure in this state may, subject to the procedures of the court of the other jurisdiction, be transferred to the superior courts of this state and converted to a Summary Procedure. Any pending action in this state may be converted to a Summary Procedure subject to the provisions of this Rule 23.1. Within 15 days of transfer or conversion, the court shall hold a conference at which time a schedule for the remainder of the action shall be established that will conform as closely as feasible to these Rules. Unless cause not to do so is shown, the record from any prior proceedings shall be incorporated into the record of the Summary Procedure.

(g) A defendant shall serve an answer together with any compulsory counterclaims within thirty days after service of the complaint.

(h) A plaintiff shall serve a reply to any counterclaim within twenty days after service of the counterclaim. Any answer or reply to a counterclaim shall be accompanied by a list of persons consulted, or relied upon, in connection with preparation of the answer or reply. Crossclaims, permissive counterclaims and third-party claims are not permitted absent agreement of all parties. Crossclaims, counterclaims and third-party claims, if any, are subject to the provisions of this Rule 23.1.

(i) A party may, in lieu of an answer, respond to a complaint or counterclaim by moving to dismiss. A motion to dismiss and accompanying brief must be served within thirty days after service of the complaint upon the defendant. A motion to dismiss a counterclaim and accompanying brief must be served within twenty days after service of the counterclaim. An answering brief in opposition to a motion to dismiss is due within fifteen days after service of the motion and accompanying brief. A reply brief in support of the motion to dismiss is due within ten days after service of the answering brief. The opening and answering briefs shall be limited to twenty-five pages, and the reply brief shall be limited to ten pages. Within thirty days after the filing of the final reply brief on all motions to dismiss, if no oral argument occurs, or within thirty days of oral argument if oral argument occurs, the court will either render to the parties its decision on such motions or will provide to the parties an estimate of when such decision will be rendered. Such additional time shall not normally exceed an additional thirty days. If a motion to dismiss a claim is denied, an answer to that claim shall be filed within ten days of such denial.

(j) Within seven days of filing of the answer, a plaintiff shall serve upon the answering defendant a copy of each document in the possession of plaintiff that plaintiff intends to rely upon at trial, a list of witnesses that plaintiff intends to call at trial and a list of all persons consulted or relied upon in connection with preparation of the complaint. Within thirty days of the filing of the answer, the answering defendant shall provide to all other parties a list of witnesses it intends to call at trial and all documents in its possession that it intends to rely upon at trial. A plaintiff against whom a counterclaim has been asserted shall serve upon the defendant asserting the counterclaim, within thirty days after such plaintiff receives from the defendant asserting the counterclaim the materials referred to in the preceding sentence, a list of witnesses it intends to call at trial in opposition to the counterclaim, all documents in its possession that it intends to rely upon at trial in opposition to the counterclaim and all persons consulted or relied upon in connection with preparation of the reply to the counterclaim.

(k) Any party may serve upon any other party up to ten written interrogatories (with any sub-part to be counted as a separate interrogatory) within thirty days after the filing of the last answer. Responses are due within twenty days after service of the interrogatories.

(l) Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents, said request to be served within thirty days after filing of the last answer. The response to a document request is due within thirty days after service of the document request and must include production of the documents at that time for inspection and copying.

(m) Any party may serve on any other party a notice of up to four depositions to begin no sooner than seven days from service of the deposition notice and subsequent to the filing of all answers. A party may also take the deposition of any person on the other party's witness list, as well as the deposition of all affiants designated under Section (s) of this Rule. The first deposition notice by a party shall be served not later than sixty days after the filing of the last answer. All depositions to be taken by a party are to be scheduled and completed within 120 days of the filing of the last answer.

(n) Any party may serve upon any other party up to ten requests for admission (with any sub-part to be counted as a sep-

arate request for admission) within thirty days of the filing of the last answer. Responses are due within twenty days after service.

(o) Parties are obligated to supplement promptly their witness list, the documents they intend to rely upon at trial and their discovery responses under this Rule.

(p) Discovery disputes, at the court's option, may be addressed by a referee at the expense of the parties or by the court.

(q) Unless otherwise ordered by the court, all discovery, except for discovery contemplated by Section (s) of this Rule, shall be completed within 180 days after the filing of the last answer.

(r) There shall be no motions for summary judgment in Summary Proceedings.

(s) If the parties notify the court within seven days after the close of discovery that the parties have agreed to forego witnesses at the trial of the case, the parties may submit briefs and appendices in support of their cause as follows:

(1) Plaintiff's Brief—thirty days following close of discovery;

(2) Defendant's Answering Brief—within thirty days after service of plaintiff's brief; and

(3) Plaintiff's Reply Brief—within fifteen days of service after Defendant's Answering Brief.

(t) The briefs must cite to the applicable portions of the record. Affidavits may be used but all affiants must be identified prior to the close of discovery and must, at the option of any other party, be produced for deposition within two weeks from the date discovery would otherwise close. The court shall make factual findings based upon the record presented by the parties.

(u) If the parties elect to forego witnesses at trial and submit briefs pursuant to Section (s) of this Rule, trial shall consist of oral argument, or submission on briefs if oral argument is waived by the parties with the consent of the court, to be scheduled and held by the court within one week of the close of briefing pursuant to Section (s).

(v) If the parties elect to present live witnesses at trial, the trial shall be scheduled to begin between thirty and sixty days after the close of discovery. Within thirty days after the close of discovery, the parties shall provide the court with an agreed upon pre-trial order. The pre-trial order shall include a summary of the claims or defenses of each party, a list of the witnesses each party expects to introduce at trial, a description of any evidentiary disputes, a statement of facts not in dispute and a statement of disputed issues of fact. Absent contrary court order, the trial shall be limited to five days, which shall be allocated equitably between the parties. Within ten days of the close of trial, each party shall file a post-trial brief including proposed findings of fact and conclusions of law. Each brief shall not exceed fifty pages.

(w) Within thirty days after the filing of the final brief, if no oral argument occurs, or within thirty days of argument if oral argument occurs, the court will either render to the parties its decision after trial or will provide the parties an estimate of when the decision will be rendered. Such additional time shall not normally exceed an additional thirty days.

(x) The schedule for trial or decision after trial or on motion to dismiss shall not be extended unless the assigned judge certifies that:

(1) the demands of the case and its complexity make the schedule under this Rule incompatible with serving the ends of justice; or

(2) the trial cannot reasonably be held or the decision rendered within such time because of the complexity of the case or the number or complexity of pending criminal cases.

The following comment to the new Rule 23.1 of the General Rules of Practice shall accompany the Rule:

This rule was adopted by the North Carolina Supreme Court on August 28, 1995 as a result of a recommendation in the January 1995 ANNUAL REPORT of THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY chaired by the North Carolina Attorney General.

In its report, the Commission observed that, historically, North Carolina has enjoyed a high quality, efficient civil justice system. In recent years, however, civil litigation (and in particular, complex commercial litigation) has become protracted and costly. This is the result of many factors, including more complex laws and regulations, legal tactics and increased caseload.

The North Carolina court system has responded by instituting a number of innovative programs designed to resolve civil disputes more efficiently. These include court-ordered arbitration and a pilot mediation program. Despite the success of these programs, resolution of complex business and commercial disputes in North Carolina can be slow and costly.

The Commission noted that a state court system that offers alternatives to the normal litigation process which can expedite the resolution of significant commercial and business disputes is an important element of a progressive, efficient business environment. States that can offer alternatives are more likely to attract new business organizations and incorporations as well as business expansions.

Accordingly, the Commission recommended that the State establish a summary procedure through which North Carolina citizens and business entities and their subsidiaries, and businesses which are headquartered in the State can more efficiently resolve significant commercial civil disputes. The Commission recommended that the availability of such a summary procedure be limited to civil actions in superior court where 1) at least $500,000 is in controversy, 2) at least one party is a North Carolina citizen or corporation, and 3) all parties consent to the summary proceeding. As part of that agreement, the parties to the summary proceeding must agree to waive punitive damages and a jury trial.

The summary procedure provided for in this Rule can be utilized only with consent of all parties. It does not restrict any parties' rights and is supplementary to, and not inconsistent with, the General Statutes. (See G.S. 7A-34.) Its purpose is to provide an alternative procedure for significant commercial disputes and thereby improve the overall efficiency of the court system.

Adopted by the Court in Conference this 28 day of August, 1995. This amendment, along with the commentary thereto, shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals and shall be effective upon adoption.

Orr, J.
For the Court

Witness my hand an the Seal of the Supreme Court of North Carolina, this the 28 day of August, 1995.

Christie Speir Cameron
Clerk of the Supreme Court

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ACCOUNTANTS

§ 20 (NCI4th). Liability to third party for negligent misrepresentation generally

Plaintiff's claim for negligent misrepresentation was not barred by the statute of limitations and statute of repose since the claim did not accrue until plaintiff suffered some harm because of the misrepresentation and discovered the misrepresentation, both of which occurred within three years of plaintiff's filing of the suit. **NCNB National Bank v. Deloitte & Touche**, 106.

§ 21 (NCI4th). Necessity of reliance upon accountants' audit statement

The evidence was sufficient to show that the tort of negligent misrepresentation occurred and that plaintiff relied upon financial statements prepared by defendant to its detriment. **NCNB National Bank v. Deloitte & Touche**, 106.

ADMINISTRATIVE LAW AND PROCEDURE

§ 52 (NCI4th). Judicial review; exhaustion of administrative remedies

The superior court is without jurisdiction to conduct a judicial review of an agency decision sought by an aggrieved party who has not first had the administrative hearing to which he is entitled. **Deep River Citizens Coalition v. N.C. Dept. of E.H.N.R.**, 232.

In an action regarding the denial of a contested case hearing where there was no error in the trial court's order denying the hearing, assignments of error to exhaustion of remedies, inaccuracies in the record on appeal, and petitioner's failure to account for modification of the permit were not addressed. **Rusher v. Tomlinson,** 458.

§ 63 (NCI4th). Procedures for seeking judicial review; contents of petition

The trial court erred by failing to dismiss petitioner's petition for judicial review of his dismissal as a county health department inspector because the petition failed to meet the specificity requirements of G.S. 150B-46. **Gray v. Orange County Health Dept.**, 62.

§ 67 (NCI4th). Applicability of "whole record test"

The trial court improperly applied the whole record test in reversing the decision of the county health department director dismissing petitioner on the ground of unacceptable personal conduct in making romantic overtures and inappropriate sexually suggestive comments to regulated parties. **Gray v. Orange County Health Dept.**, 62.

ADVERSE POSSESSION

§ 2 (NCI4th). Hostile and permissive use distinguished

Plaintiffs' evidence was insufficient to establish an easement where there was no evidence to show that plaintiffs' use of a drive over defendants' property was adverse, hostile, or under claim of right for the required twenty-year period. **Pitcock v. Fox,** 307.

APPEAL AND ERROR

§ 14 (NCI4th). Extension of time

The magistrate did not have authority under Rule 6(b) to extend the time for plaintiff to pay filing fees for an appeal from a small claims court to the district court. **Riverview Mobile Home Park v. Bradshaw,** 585.

APPEAL AND ERROR — Continued

§ 56 (NCI4th). *Appellate jurisdiction of district court generally;* appeals from small claims matters

The district court had no jurisdiction to decide defendant's Rule 60(b) motion for relief from a magistrate's order entered in a small claims court. **Stephens v. John Koenig, Inc.,** 323.

§ 87 (NCI4th). Other interlocutory orders in civil actions

The trial court's signing of an appeal entry was ineffective as a certification of an interlocutory order for appeal. **N.C. Dept. of Transportation v. Page,** 730.

§ 89 (NCI4th). Interlocutory orders; what constitutes order affecting substantial right, generally

The trial court's denial of defendant's motion for summary judgment on plaintiff's slander and malicious prosecution claims did not deprive defendant of a substantial right to claim immunity under G.S. 84-28.2, and defendant's interlocutory appeal is dismissed. **Wallace v. Jarvis,** 582.

§ 120 (NCI4th). Summary judgment orders; multiple claims or parties; appeal allowed

The trial court's partial summary judgment for plaintiffs which did not address defendant's counterclaims was immediately appealable because the issues on plaintiffs' claims and defendant's counterclaims were the same, and it was possible that dismissal of the appeal would result in two trials on the same issues. **Allen v. Sea Gate Assn.,** 761.

§ 121 (NCI4th). Summary judgment orders; multiple claims or parties; appeal dismissed

The trial court's order dismissing two of defendants' defenses but leaving one defense intact did not subject defendants to the possibility of inconsistent verdicts, did not preclude defendants from fully defending against plaintiff's claims, and thus affected no substantial right. **N.C. Dept. of Transportation v. Page,** 730.

§ 230 (NCI4th). Perfecting appeal in small claims actions in district court

Failure of the clerk of district court to collect fees required by G.S. 7A-228 for filing an appeal from small claims court does not excuse appellant for failing to ascertain the requirement and fulfilling it. **Riverview Mobile Home Park v. Bradshaw,** 585.

§ 331 (NCI4th). Record on appeal; preparation and delivery of transcript

A contract for the production of the transcript was formed on the day plaintiff affirmatively requested by letter within the ten-day deadline of Rule 7 of the Rules of Appellate Procedure that the court reporter provide the transcript. **Anuforo v. Dennie,** 359.

The court reporter's erroneous certification that the transcript was prepared and delivered within 60 days constituted excusable neglect justifying relief from the trial court's order dismissing plaintiff's appeal for the failure of counsel to seek an extension of time for production of the transcript under Rule 7(b)(1). **Ibid.**

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

An argument concerning dismissal of a claim based upon alleged negligence in programming a 911 system was abandoned where no argument was presented in the brief. **Davis v. Messer,** 44.

APPEAL AND ERROR — Continued

§ 510 (NCI4th). Frivolous appeals in appellate division

The Court of Appeals imposed sanctions upon plaintiff and her attorney because the appeal from summary judgment for defendants was frivolous where a trust benefitting plaintiff was funded by partnership stock which was bought by the remaining partner when plaintiff's husband died, and plaintiff brought an action for declaratory judgment and fraud because she thought the price of the stock was set too low. **Long v. Long,** 500.

ARBITRATION AND AWARD

§ 3 (NCI4th). Nature and construction of arbitration agreement

An arbitration provision in a termite contract was not void because it was not independently negotiated. **Red Springs Presbyterian Church v. Terminix Co.,** 299.

§ 26 (NCI4th). Matters arbitrable; miscellaneous claims

The arbitrator exceeded his authority by awarding liquidated damages and awarding monies for changes in a sprinkler system, neither of which was within the scope of the parties' agreement to arbitrate. **FCR Greensboro, Inc. v. C & M Investments,** 491.

§ 47 (NCI4th). Actions subject to arbitration

The trial court erred in failing to order arbitration of plaintiff's claims for fraud and unfair and deceptive practices arising out of its termite treatment agreement with defendant. **Red Springs Presbyterian Church v. Terminix Co.,** 299.

ASSAULT AND BATTERY

§ 25 (NCI4th). Assault with intent to kill or inflicting serious injury; sufficiency of evidence generally

One defendant was properly found guilty of aiding and abetting the commission of the offense of assault with a deadly weapon inflicting serious injury because his actions in driving a car from which several items were thrown by his passengers at other cars and in throwing items at other cars himself showed his consent to the criminal purpose and contribution to its execution. **State v. Poe,** 266.

§ 81 (NCI4th). Discharging firearm into occupied property; sufficiency of evidence

The evidence was sufficient for the jury in a prosecution of defendant for discharging a firearm into an occupied vehicle. **State v. Jackson,** 284.

ATTORNEYS AT LAW

§ 36 (NCI4th). Disqualification for conflict of interest; representation against former client

One defendant had standing to raise the issue of attorney disqualification even though that defendant did not allege that plaintiffs' attorney had represented him in the past but only that the attorney had represented "codefendants." **Love v. Tyson,** 739.

The trial court was not required to make a finding of fact that plaintiffs' attorney had previously represented defendant "in similar transactions to the one in dispute" in order to disqualify the attorney where the disqualification was based on the attorney's

ATTORNEYS AT LAW — Continued

prior representation of a codefendant and the codefendant's failure to agree to the attorney's representation of plaintiffs. **Ibid.**

The evidence was sufficient to support the trial court's order disqualifying plaintiffs' attorney where the attorney had represented the partnership comprised of the individual plaintiff and defendant in numerous transactions similar to the one in dispute, had represented the individual plaintiff and the defendant in various matters, and defendant objected to the attorney's representation of plaintiffs. **Ibid.**

§ 46 (NCI4th). Proof of malpractice; proximate cause

Defendant attorneys had a duty to plaintiff title insurer, a non-client, though there was no privity, where defendants furnished the title certificate to plaintiff for the purpose of inducing plaintiff to issue a title policy for the benefit of their client and it was foreseeable that plaintiff would be harmed by any failure to accurately certify the title. **Title Ins. Co. of Minn. v. Smith, Debnam, Hibbert and Pahl,** 608.

§ 49 (NCI4th). Professional malpractice; proof of damages

Although plaintiff title insurer had no actual damages at the time it filed a malpractice suit against the borrower's attorneys for negligent certification of title because it had received an assignment of rights under a superior deed of trust which had not yet been cancelled, the trial court properly denied defendant attorneys' motion for a directed verdict since the technical injury to plaintiff's rights entitled plaintiff to nominal damages; however, the court did err in entering judgment n.o.v. for plaintiff where plaintiff had not cancelled the deed of trust when it moved for directed verdict but cancelled the deed of trust during the jury's deliberations. **Title Ins. Co. of Minn. v. Smith, Debnam, Hibbert and Pahl,** 608.

§ 64 (NCI4th). Recovery of fees; power of court; fee in absence of agreement

The trial court in its order for judgment on the pleadings did not err in denying plaintiffs' prayer for attorney fees paid in clearing an encumbrance on land sold to plaintiffs by defendants. **Kornegay v. Broadrick,** 326.

§ 228 (NCI4th). Professional malpractice; proof of damages

A motor speedway's purchase price ($1,000,000) was competent evidence of its fair market value in plaintiffs' legal malpractice action against defendant attorney based on his failure to explain the legal effect of a $500,000 purchase money note and deed of trust which plaintiffs agreed to subordinate to a bank's deed of trust, so that plaintiffs recovered only $4,120 on their note when the bank foreclosed its deed of trust, and the trial court erred by directing a verdict for defendant attorney on the ground that plaintiff failed to produce evidence of damages. **Greene v. Carpenter, Wilson, Cannon and Blair,** 415.

AUTOMOBILES AND OTHER VEHICLES

§ 93 (NCI4th). Refusal to submit to chemical analysis; what constitutes willful refusal

The trial court properly declined to enter judgment in favor of petitioner where he petitioned for a determination that the revocation of his driver's license for willful refusal to take a breathalyzer was erroneous. Failure to follow the instructions of the breathalyzer operator is an adequate basis for concluding that petitioner willfully refused to submit to chemical analysis. **Tedder v. Hodges,** 169.

AUTOMOBILES AND OTHER VEHICLES — Continued

Petitioner was informed of his statutory rights with regard to a breathalyzer test and willfully refused the test even though he was not informed that a refusal could result in the denial of his right to seek a limited driving privilege. **Nowell v. Killens,** 567.

§ 117 (NCI4th). Proceedings relating to alcohol or drug-related offenses; judicial proceedings

There were sufficient findings to allow the Court of Appeals to determine whether the trial court's judgment and legal conclusions were a correct application of the law in an action arising from the revocation of a driver's license for refusal to take a breathalyzer. **Tedder v. Hodges,** 169.

§ 228 (NCI4th). Salvage or scrap vehicles; branding of title and registration cards

Plaintiff's evidence was sufficient for the jury in an action in which plaintiff alleged that defendant dealer sold him a used truck without disclosing that the truck had been involved in a collision requiring repairs costing in excess of 25% of the vehicle's fair market value in violation of G.S. 20-71.4(a) and G.S. 20-348(a). **Payne v. Parks Chevrolet, Inc.,** 383.

§ 487 (NCI4th). Exceeding reasonable speed at intersection

The trial court erred in directing verdict for defendant in an intersection accident case where the evidence was sufficient for the jury to find that plaintiff operated his auto at a speed greater than reasonable and prudent under the conditions, failed to decrease his speed when approaching and entering an intersection, and failed to keep a proper control of his vehicle. **McMahan v. Bumgarner,** 235.

§ 789 (NCI4th). Instruction as to death by vehicle and manslaughter

The trial court did not err in failing to instruct the jury on felony death by vehicle since it is not a lesser included offense of involuntary manslaughter. **State v. Lovett,** 689.

BANKS AND OTHER FINANCIAL INSTITUTIONS

§ 192 (NCI4th). Involuntary liquidation; receivers, generally

Where there was no evidence of a written agreement by an insured lender that it would leave superior liens on property, the title insurer could not use these exclusions against the Resolution Trust Corporation, which took over the lender. **Title Ins. Co. of Minn. v. Smith, Debnam, Hibbert and Pahl,** 608.

BUILDING CODES AND REGULATIONS

§ 24 (NCI4th). Qualifications of officials; sanctions

Respondent board properly revoked petitioner's building and electrical certificates based on evidence of plainly visible Residential Building Code violations but improperly revoked petitioner's mechanical and plumbing certificates. **Bunch v. N.C. Code Officials Qualifications Board,** 293.

CLERKS OF COURT

§ 14 (NCI4th). Custody, care, and disbursement of funds

There was nothing improper in the clerk's disbursement of deposited funds to two plaintiffs with their attorney also named as a payee on the check where the check was endorsed by plaintiffs and deposited in the attorney's trust account. **Poore v. Swan Quarter Farms, Inc.**, 546.

COLLEGES AND UNIVERSITIES

§ 12 (NCI4th). Faculty and visiting speakers

The trial court did not err in concluding that the chancellor of the N.C. School of the Arts exceeded his authority under the school's regulations by reviewing and rejecting a faculty grievance committee's report finding that his decision not to renew a faculty member's contract was based upon the impermissible ground of personal malice and that the final decision not to reappoint the faculty member was thus made upon an unlawful procedure. **Simonel v. N.C. School of the Arts**, 772.

CONSPIRACY

§ 31 (NCI4th). *Sufficiency of evidence; conspiracies to murder*

The evidence was sufficient to be submitted to the jury in a prosecution for conspiracy to commit murder of a witness. **State v. Worrell**, 592.

§ 45 (NCI4th). Conviction of some, but not all, conspirators

The conviction of one defendant in a conspiracy prosecution will be upheld where all alleged coconspirators are acquitted in a separate subsequent trial. **State v. Soles**, 375.

CONSTITUTIONAL LAW

§ 85 (NCI4th). Fundamental rights and liberties; other rights and liberties

The trial court did not err in an action arising from a drug raid in which a city block was cordoned off by dismissing plaintiffs' state constitutional claims because plaintiffs' constitutional claims are adequately protected by their common law tort claims. **Barnett v. Karpinos**, 719.

§ 105 (NCI4th). Property rights or interests protected by due process

Petitioner possessed a constitutionally protected property interest in retaining his position with a city, and the burden of proof placed upon petitioner to establish that he was terminated without justifiable cause as stated in the city's civil service commission rules violated petitioner's procedural due process rights. **Soles v. City of Raleigh Civil Service Comm.**, 88.

§ 342 (NCI4th). Presence of defendant at proceedings generally

Defendant's federal and state rights of confrontation were not violated when the trial court authorized the remote testimony by closed circuit television of the child witnesses in a hearing on two juvenile petitions alleging first-degree rape and first-degree sex offenses. **In re Stradford**, 654.

§ 359 (NCI4th). Self-incrimination; nontestimonial disclosures by defendant generally

The prosecutor's questions to the arresting officers concerning defendant's pre-Miranda post-arrest lack of explanation of the events in question did not violate

CONSTITUTIONAL LAW — Continued

defendant's right against self-incrimination where the line of questioning served only to show the extent of spontaneous utterances made by defendant. **State v. Alkano,** 256.

CORPORATIONS

§ 143 (NCI4th). Actions and proceedings generally

Plaintiff shareholders had no independent claims to the proceeds from the rental of a farm owned by the corporation but could claim only through the corporation as shareholders. **Poore v. Swan Quarter Farms, Inc.,** 546.

§ 213 (NCI4th). Judicial dissolution generally

The case is remanded for a hearing on the necessity of judicial dissolution of defendant corporation based on plaintiffs' allegations that the corporation has no assets or business purpose. **Poore v. Swan Quarter Farms, Inc.,** 546.

COSTS

§ 28 (NCI4th). Attorney's fees in caveat proceedings; actions to construe wills or trusts

In a declaratory judgment action to determine whether defendant is the legitimized son and sole heir of an intestate decedent, the trial court did not err by allowing defendant to recover costs and attorney fees from the estate where his claim had substantial merit and was successful, or by allowing plaintiffs and the aligned defendants to recover costs and attorney fees from the estate even though they were not successful on the merits where their claim had substantial merit. **Batcheldor v. Boyd,** 204.

§ 37 (NCI4th). Attorney's fees; other particular actions or proceedings

A creditor which perfected its security interest in the debtor's cattle was not entitled to recover attorney fees based on the security agreement from a third party creditor which had not perfected its security interest in the cattle and which converted the proceeds from the sale of the cattle. **Mountain Farm Credit Service v. Purina Mills, Inc.,** 508.

§ 40 (NCI4th). Witness fees; expert witnesses

The trial court properly denied defendants' motion for an assessment of witness fees incurred in the deposition of plaintiff's chiropractor who had not been subpoenaed. **Holtman v. Reese,** 747.

COUNTIES

§ 126 (NCI4th). Waiver of immunity by purchase of insurance

Summary judgment was properly granted for defendant county on a claim for negligently programming a 911 system in an action arising from a municipal fire department's refusal to fight a fire just outside its fire district where the record reveals only a single policy of insurance which did not provide coverage for plaintiffs' injuries. **Davis v. Messer,** 44.

COURTS

§ 15 (NCI4th). Grounds for personal jurisdiction; presence, domicile, or substantial activity within state

North Carolina had statutory jurisdiction over the male South Carolina defendants where they executed leases and guaranty agreements with plaintiff North Carolina bank, and defendants had sufficient minimum contacts with this state to allow the exercise of personal jurisdiction. **Centura Bank v. Pee Dee Express, Inc.,** 210.

The marital interest defendant nonresident wives potentially had in their husbands' company stock did not support the trial court's assertion of personal jurisdiction over them. **Ibid.**

§ 15.1 (NCI4th). Grounds for personal jurisdiction; actions involving domestic relations matters

The nonresident defendant did not have sufficient minimum contacts with North Carolina to give the trial court jurisdiction over her in this declaratory judgment action relating to a separation and property settlement agreement which became binding when defendant signed it in Louisiana. **Robinson v. Hinckley,** 434.

§ 137 (NCI4th). Enforcement of federal rights in state courts; generally

In an action regarding the denial of a contested case hearing arising from a CAMA permit to build berthing facilities in the Cape Fear River where a federal permit was also required, the Court of Appeals may not decide federal issues relating to the Rivers and Harbors Act of 1899, federal dredge and fill requirements, or vessel mooring safety issues controlled by the Coast Guard. **Rusher v. Tomlinson,** 458.

CRIMINAL LAW

§ 107 (NCI4th). Discovery proceedings; reports not subject to disclosure by State

There was no error in the prosecution of an inmate for possession of a controlled substance where defendant filed a motion for discovery but the State did not disclose the testimony of a detective on fingerprints. **State v. Lane,** 197.

§ 113 (NCI4th). Discovery proceedings; failure to comply

The defendant in an armed robbery prosecution was not entitled to relief under G.S. 15A-1411 because of the State's failure to provide him prior to trial with a surveillance tape taken from the crime scene where the State was not aware of the existence of the tape until trial had begun, the State made no attempt to introduce the tape into evidence, and defendant was afforded an opportunity to view the tape before the trial was concluded to determine whether it would assist in his case. **State v. Serzan,** 557.

§ 129 (NCI4th). Prosecution's withdrawal from plea arrangement

Where a twenty-two-year-old defendant was sentenced for armed robbery as a committed youthful offender pursuant to a plea agreement, and the State in effect rescinded the agreement while defendant was serving his sentence on the ground that defendant was not eligible to be sentenced as a committed youthful offender, defendant was entitled to have the committed youthful offender status accorded to him as provided in the plea agreement or, in the alternative, to withdraw his plea. **State v. Isom,** 225.

CRIMINAL LAW — Continued

§ 319 (NCI4th). Joinder of charges against multiple defendants charged with same offense; homicide

The trial court did not err in granting the State's motion for joinder for trial of murder charges against defendant and his codefendant, although their defenses were antagonistic, where the State presented plenary evidence of defendant's guilt apart from his codefendant's testimony. **State v. Burton,** 625.

§ 441 (NCI4th). Argument of counsel; comment on character and credibility of expert witnesses

There was no gross impropriety amounting to prejudicial error in a prosecution for first-degree sexual offense and taking indecent liberties with a child where the prosecutor argued to the jury that the State's witnesses were not paid to testify but the court had already signed orders for expert witness fees for three of the State's witnesses. **State v. Parker,** 328.

§ 468 (NCI4th). Argument of counsel; miscellaneous

There was no error in the prosecution of an inmate for possession of crack where the prosecutor argued that "DNA testing I submit to you is not an inexpensive type test. And I'd submit to you that's the type of test that you use when you have rape. . . ." **State v. Lane,** 197.

The trial court did not err in the prosecution of an inmate for possession of crack by sustaining the prosecutor's objection to defense counsel's closing argument that defendant can't call an expert from Raleigh. **Ibid.**

§ 557 (NCI4th). Circumstances in which mistrial may be ordered; defendant's other prior criminal activity

There was no abuse of discretion in not granting a mistrial in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant's children testified that their family had left a battered women's shelter because their father had threatened to blow the shelter up, but defendant's objection was sustained, the answer stricken, and the jury instructed to disregard that statement. There was also no abuse of discretion in not granting a mistrial where a suspicious package was found in an entrance to the courthouse after that testimony. **State v. Parker,** 328.

§ 754 (NCI4th). Instructions on burden of proof and presumptions; multiple indictments or charges

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking liberties with a child where defendant contended that the court erred in refusing to charge the jury as to each count of the indictment separately but the court's instructions in their entirety made it clear that the jury was to consider each charge separately. **State v. Parker,** 328.

§ 762 (NCI4th). Reasonable doubt; instruction omitting or including phrase "to a moral certainty"

There was no error in the trial court's reasonable doubt instruction. **State v. Harper,** 252.

The trial court's instruction on reasonable doubt did not violate due process where the court made two references to "moral certainty" and one reference to "honest substantial misgiving." **State v. Williams,** 601.

CRIMINAL LAW — Continued

§ 929 (NCI4th). Inconsistency of verdict; two or more defendants

Defendant was not entitled to have the judgment against him reversed because the jury found him guilty of voluntary manslaughter as an aider and abettor and his codefendant, who fired the fatal bullet, guilty of second-degree murder. **State v. Burton,** 625.

§ 1053 (NCI4th). Sentencing hearing generally; mandate, waiver, and time

Defendant was not prejudiced by the trial court's failure to announce its findings in open court with regard to aggravating and mitigating factors, or by having a different judge at this sentencing hearing from the judge who presided over his trial. **State v. Jackson,** 284.

§ 1060 (NCI4th). Evidence at sentencing hearing generally

The trial court's error in allowing the attorney for one victim, who was not called as a witness at the sentencing hearing, to address the court at the hearing was not prejudicial to defendant. **State v. Jackson,** 284.

§ 1113 (NCI4th). Nonstatutory aggravating factors under Fair Sentencing Act; bad conduct in prison

There was no error in a sentencing hearing for first-degree rape, first- and second-degree sexual offense, first-degree kidnapping, and robbery where the court noted defendant's conduct during pretrial confinement. **State v. Easterling,** 22.

§ 1120 (NCI4th). Nonstatutory aggravating factors under Fair Sentencing Act; impact of crime on victim

There was no error in sentencing defendant for first-degree rape, first- and second-degree sexual offense, first-degree kidnapping, and robbery where the court noted the especially destructive effect of the crimes on the victim, her parents, other women, and the fabric of society. **State v. Easterling,** 22.

§ 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 properly found as an aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person where the victim was killed by a bullet fired from a 9 mm semi-automatic handgun. **State v. Burton,** 625.

§ 1182 (NCI4th). Statutory aggravating factors under Fair Sentencing Act; proof of prior convictions

Defense counsel's statements at a preliminary sentencing hearing with regard to prior offenses amounted to admissions of those convictions, and the trial court did not err in finding prior convictions as an aggravating factor where the prosecutor merely recited defendant's prior convictions at the sentencing hearing. **State v. Jackson,** 284.

§ 1214 (NCI4th). Nonstatutory mitigating factors under Fair Sentencing Act; miscellaneous factors

The trial court did not err in failing to find as a nonstatutory mitigating factor for second-degree murder that defendant showed remorse and accepted full responsibility. **State v. Lovett,** 689.

CRIMINAL LAW — Continued

§ 1234 (NCI4th). Statutory mitigating factors under Fair Sentencing Act; age or immaturity of defendant

Evidence that defendant was seventeen years old at the time of the crime was insufficient, standing alone, to support a finding of the mitigating factor regarding immaturity. **State v. Burton,** 625.

§ 1284 (NCI4th). Ancillary nature of habitual felon indictment

The trial court erred by enhancing five convictions involving forgery and uttering to life sentences where there was only one habitual felon indictment. **State v. Patton,** 229.

§ 1687 (NCI4th). Resentence after appeal; consideration on resentence of aggravating and mitigating factors

Where the trial court, without finding aggravating or mitigating factors, originally sentenced defendant to 12 years imprisonment for first-degree kidnapping, it was error for the court at the resentencing hearing to sentence defendant to 24 years on this charge based on the finding of an aggravating factor even though the aggregate sentence imposed upon defendant at the resentencing remained the same. **State v. Nixon,** 571.

DAMAGES

§ 1 (NCI4th). Nominal damages generally

Where the jury found negligence by defendant and the absence of contributory negligence by plaintiff's intestate in a wrongful death action, the trial court erred in refusing to enter an award of nominal damages; statutory language stating that nominal damages are recoverable "when the jury so finds" does not require a different result. **Porter v. Leneave,** 343.

Although plaintiff title insurer had no actual damages at the time it filed a malpractice suit against the borrower's attorneys for negligent certification of title, the trial court properly denied defendant attorneys' motion for a directed verdict since the technical injury to plaintiff's rights entitled plaintiff to nominal damages. **Title Ins. Co. of Minn. v. Smith, Debnam, Hibbert and Pahl,** 608.

§ 127 (NCI4th). Sufficiency of evidence; punitive damages generally

The evidence was sufficient to support an award of punitive damages to defendant where plaintiff deliberately asserted a claim to insurance proceeds in which he did not have an interest by demanding participation in the settlement of the proceeds and by ordering an attorney to tie up the proceeds. **Lyon v. May,** 704.

§ 161 (NCI4th). Mitigation of damages; avoidable consequences

The trial court did not err in charging the jury on the doctrine of avoidable consequences where a question was presented as to whether plaintiff's participation in vigorous physical activities was inappropriate and unreasonable in light of her medical history. **Holtman v. Reese,** 747.

§ 166 (NCI4th). Injury to person of peculiar susceptibility

The trial court did not err in instructing the jury on the doctrine of peculiar susceptibility and aggravation of a preexisting condition based on the testimony of a chiropractor about his treatment of plaintiff for injuries sustained in three prior automobile accidents. **Holtman v. Reese,** 747.

DECLARATORY JUDGMENT ACTIONS

§ 7 (NCI4th). Requirement of actual judicial controversy

The trial court properly granted summary judgment for defendants in an action arising from a mass drug raid where plaintiffs sought a declaratory judgment that this and similar raids are unlawful and in violation of the right to be free from unreasonable search and seizure. **Barnett v. Karpinos,** 719.

DEEDS

§ 67 (NCI4th). Restrictive covenants in subdivisions generally

A provision in a declaration of restrictive covenants allowing the covenants to be "altered, amended, or revoked" upon written agreement of two-thirds of the lot owners did not confer the power to extend the covenants beyond the expiration date stated in the declaration. **Allen v. Sea Gate Assn.,** 761.

§ 81 (NCI4th). Enforcement of restrictive covenants; requirement of certainty and definiteness

A restrictive covenant requiring the owner to pay an annual charge of $60.00 "for the maintenance, upkeep and operations of the various areas and facilities by Sea Gate Association, Inc." was void and unenforceable since it did not name specific property which was to be maintained. **Allen v. Sea Gate Assn.,** 761.

§ 85 (NCI4th). Restrictive covenants; residential-only covenants

A drainage system built on defendants' lots was a nonresidential use in violation of restrictive covenants even though the system benefited residential property by assisting with drainage and preventing flooding problems within the subdivision. **Buie v. High Point Associates Ltd. Partnership,** 155.

The trial court did not abuse its discretion by issuing an injunction prohibiting defendants from maintaining a drainage system on their restricted lots to support a nonresidential use of adjacent unrestricted property and ordering defendants to return the restricted property to its undeveloped residential nature. ***Ibid.***

DISCOVERY AND DEPOSITIONS

§ 69 (NCI4th). Enforcing discovery; sanctions; striking of pleadings without dismissal or default judgment

The prohibition against entry of a default judgment against an uninsured motorist in G.S. 20-279.21(b)(3)(a) when plaintiff's uninsured motorist carrier has timely filed an answer prohibited the trial court from entering a sanction, pursuant to Rule 37, striking an uninsured motorist's answer and establishing his liability as a matter of law for his failure to comply with court orders to supply answers to plaintiff's interrogatories where plaintiff's uninsured motorist carrier filed an answer as an unnamed defendant. **Abrams v. Surette,** 239.

DIVORCE AND SEPARATION

§ 339 (NCI4th). Request for joint child custody

The trial court did not err by awarding joint custody of a child to plaintiff father without making findings with regard to the willingness of caretakers who would be with the child in plaintiff's absence. **Church v. Church,** 436.

DIVORCE AND SEPARATION — Continued

§ 439 (NCI4th). **Modification of child support order; decrease in noncustodial parent's income**

Notwithstanding that the needs of the children had not changed, a substantial change of circumstances could be found based on a parent's ability to pay. **Askew v. Askew,** 242.

Defendant failed to meet his burden of proving changed circumstances in a child support action where defendant had voluntarily left his job with an insurance company to become an independent agent and suffered reduced income. **Ibid.**

§ 552 (NCI4th). **Action for modification of support order**

The trial court in a child support action did not err by failing to make appropriate findings of fact that the actions which reduced defendant's income were not taken in good faith prior to imposing the earnings capacity rule. **Askew v. Askew,** 242.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 45 (NCI4th). **Dredging, filling, or altering bodies of water; permits**

The trial court properly dismissed petitioners' request for a contested case hearing in regard to the requirement of an easement, the interference of the proposed project with navigation, and the safety of the proposed project in an action arising from granting a CAMA permit to construct berthing facilities in the Cape Fear River. **Rusher v. Tomlinson,** 458.

ESTOPPEL

§ 10 (NCI4th). **Estoppel by record generally**

Plaintiff's antitrust claims against defendants were not barred by judicial estoppel because plaintiff did not disclose these claims during its Chapter 11 bankruptcy reorganization proceedings. **Medicare Rentals, Inc. v. Advanced Services,** 767.

EVIDENCE AND WITNESSES

§ 294 (NCI4th). **Suggestion or implication of other crimes, wrongs, or acts**

The trial court did not erroneously admit evidence of prior unrelated drug use by defendant where an investigator testified that he believed defendant was under the influence of "something" the evening of a murder, and he testified that defendant stated that he had abused a prescription drug in the past. **State v. Cannada,** 311.

§ 308 (NCI4th). **Other crimes, wrongs, or acts; admissibility to show identity of defendant; instrumentality linked to offense charged and other acts**

Evidence that defendant was firing the gun in question shortly before the events giving rise to this homicide prosecution was admissible to prove defendant's identity as the person who fired the stray bullet which killed the victim. **State v. Burton,** 625.

§ 364 (NCI4th). **Other crimes, wrongs, or acts; to show common plan, scheme, or design as part of same chain of circumstances**

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child in allowing one victim to testify concerning defendant's use of marijuana just before the abuse. **State v. Parker,** 328.

EVIDENCE AND WITNESSES — Continued

In a prosecution for assault by throwing a brick from a car into the victims' car, the trial court did not err in admitting testimony by one of defendant's passengers that defendant had thrown a bottle into another vehicle earlier in the evening. **State v. Poe,** 266.

§ 403 (NCI4th). Identification evidence; opportunity to observe defendant prior to commission of offense

In a prosecution for armed robbery of a motel clerk, the trial court did not err in admitting testimony by another motel employee that defendant was on the motel premises less than twenty-four hours before the robbery, that he asked about room rates, to use the phone, for a cup of coffee, and for a safety pin, and that he walked away when the employee denied all his requests. **State v. Serzan,** 557.

§ 697 (NCI4th). Offer of proof; form and content of record

A summary of excluded expert testimony was sufficient to preserve the exclusion for appeal in an action arising from the revocation of a driver's license for refusal to take a breathalyzer test. **Tedder v. Hodges,** 169.

§ 732 (NCI4th). Prejudicial error in the admission of evidence; statements by defendant

There was no prejudicial error in a prosecution for multiple counts of rape and sexual offense, and for robbery and kidnapping, where a detective approached defendant at police headquarters; defendant said that he wanted to talk to a lawyer; the detective stopped the interview and informed defendant that he would to go to his first appearance, where an attorney would be appointed; the detective left and returned five or ten minutes later; the detective asked "Who was Sherman"; defendant answered "White"; defendant subsequently made an inculpatory statement; and defendant testified at trial. His decision to testify was induced by the strength of the State's case and not by the erroneous admission of his statement. **State v. Easterling,** 22.

§ 747 (NCI4th). Cure of prejudicial error in admission of evidence by withdrawal of evidence from jury; basic rules

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant contended that the court erred in allowing certain testimony, but the court sustained defendant's objection to that testimony, allowed defendant's motion to strike, and instructed the jury to disregard the information. **State v. Parker,** 328.

§ 754 (NCI4th). Cure of prejudicial error in admission of evidence by admission of other evidence; evidence resulting from illegal search or seizure

The trial court erred in failing to rule on defendant's motion to suppress evidence seized during a search and then permitting testimony regarding the seized evidence, but such error was harmless where there was evidence from a number of witnesses that defendant had committed the robbery in question. **State v. Kirkland,** 185.

§ 762 (NCI4th). Cure of prejudicial error in admission of evidence by admission of other evidence; testimony of similar import brought out or established by objecting party

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant contended that the court erred in allowing a detective to testify regarding statements made by the victim

in an interview with a social worker but defendant introduced the entire video tape. **State v. Parker,** 328.

There was no error in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant challenged the identification of a telephone caller but acknowledged making the calls in his own testimony. **Ibid.**

§ 763 (NCI4th). Cure of prejudicial error in admission of evidence by admission of other evidence; substance of incompetent testimony established by competent evidence

Even though the trial court erroneously allowed inadmissible hearsay concerning what a murder victim said about her will, defendant was not prejudiced where other similar evidence was properly admitted. **State v. Cannada,** 311.

§ 764 (NCI4th). Objection to question sustained; question not answered

The defendant in a sex offense case was not prejudiced by the prosecutor's questions about drug use where defendant's objections were sustained, the court gave curative instructions, and no evidence of drug use was admitted or presented. **State v. Alkano,** 256.

§ 929 (NCI4th). Excited utterances generally; statement made while declarant still under stress of excitement

The trial court erred in a prosecution for first-degree sexual offense and taking indecent liberties with a child by admitting under the excited utterance exception to the hearsay rule the testimony of the mothers of two of the victim's kindergarten classmates as to what the daughters said that the victim had said to them about what her father had done. **State v. Thomas,** 708.

§ 1087 (NCI4th). Effect of silence or failure to respond; effect of accusation, lack of accusation, or other statements by law officer

The prosecutor's questions to the arresting officers concerning defendant's pre-Miranda post-arrest lack of explanation of the events in question did not violate defendant's right against self-incrimination where the line of questioning served only to show the extent of spontaneous utterances made by defendant. **State v. Alkano,** 256.

§ 1222 (NCI4th). Confessions and other inculpatory statements; use of, or threat to use, polygraph or polygraph facilities

The trial court properly denied defendant's motion to suppress a statement given by him as a result of a polygraph examination where his first statement was made when defendant was not under arrest so that he was not entitled to Miranda warnings, his second statement was therefore not fruit of an earlier illegally obtained statement, and defendant's waiver of his Miranda warnings before the second statement was not vitiated by the polygraph operator's questions off the polygraph or by questioning by officers. **State v. Soles,** 375.

§ 1256 (NCI4th). Confessions and other inculpatory statements; invocation of right to counsel; particular conduct as police initiation of conversation or interrogation

There was no prejudicial error in a prosecution for multiple counts of rape and sexual offense, and for robbery and kidnapping, where a detective approached defendant at police headquarters and advised defendant of his rights; defendant stated that

he needed to talk to a lawyer; the detective stopped the interview and told defendant that he would have to go for his first appearance, where an attorney would be appointed; the detective left the room and returned five or ten minutes later; the detective asked "Who was Sherman"; defendant answered "White"; defendant subsequently made a statement after being informed of his rights; and defendant testified at trial. The question "Who was Sherman" was designed to elicit an incriminating response and defendant's statement was nothing more than a continuation of the police initiated interrogation; however, defendant's decision to testify was induced by the strength of the State's case. **State v. Easterling,** 22.

§ 1470 (NCI4th). Admission of real evidence; effect of lack of positive identification of weapon; similar weapons

The trial court did not err in admitting testimony related to a coconspirator's possession of a pistol of the same caliber and type which killed the victim. **State v. Soles,** 375.

§ 1763 (NCI4th). Admissibility of test not scientifically accepted

The trial court did not err in excluding the opinion testimony of a clinical psychologist who specialized in sexual dysfunction concerning the likelihood that defendant committed a sexual offense to the extent the testimony was based on the results of a penile plethysmograph. **State v. Spencer,** 662.

§ 1789 (NCI4th). Lie detector; propriety of questions regarding test on cross-examination

It was not error for the trial court to allow the prosecution to elicit testimony from an investigator that, although defendant initially agreed to submit to a polygraph test, he refused some days later where defendant's attorney had asked extensive questions pertaining to defendant's willingness to cooperate with authorities and to defendant's signing of a Consent to Identification Procedures form which indicated defendant was willing to take a polygraph test. **State v. Cannada,** 311.

§ 1832 (NCI4th). Showing intoxication by chemical analysis; sufficiency of evidence to show defendant had been advised of rights

Blood test results were not inadmissible on the ground the chemical analyst did not give defendant notice in writing of his rights where the analyst placed the written rights form with defendant's emergency room chart, and defendant was not capable of signing the form because his hands were strapped down and IVs were in both arms. **State v. Lovett,** 689.

§ 2008 (NCI4th). Parol evidence affecting writings; evidence pertaining to collateral issues generally

The parol evidence rule did not bar evidence of defendant's oral statements concerning the condition of an automobile sold to plaintiff where the evidence was offered to prove an unfair or deceptive practice and not to contradict the terms of a written contract. **Torrance v. AS & L Motors,** 552.

§ 2103 (NCI4th). Speed of motor vehicles; effect of conditions and opportunity for observation

The trial court properly refused to allow plaintiff to state her opinion of defendant's speed before a collision where plaintiff's testimony clearly established that she had no reasonable opportunity to observe defendant's vehicle and judge its speed. **McNeil v. Hicks,** 579.

EVIDENCE AND WITNESSES — Continued

§ 2148 (NCI4th). Opinion testimony by experts; generally; when allowed; requirement of relevancy

There was no error in an action arising from the revocation of petitioner's driver's license in the exclusion of expert testimony concerning petitioner's ability to blow into the breathalyzer machine for a sufficient length of time. **Tedder v. Hodges,** 169.

§ 2211 (NCI4th). DNA analysis

DNA test results showing a greater than 99.99% probability that defendant's putative father was his actual father were sufficient to rebut the presumption that he was the child of the man married to his mother at the time of his birth and thus showed that he was a child born out of wedlock. **Batcheldor v. Boyd**, 204.

§ 2333 (NCI4th). Particular subjects of expert testimony; child abuse, rape, and sexual abuse of children; qualification of particular witnesses as experts

The trial court did not err in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where defendant contended that a State's witness was allowed to testify concerning matters in which he was not competent to testify. **State v. Parker,** 328.

§ 2593 (NCI4th). Competency of persons having particular status or relation to case; attorney generally

The trial court did not err in a prosecution for multiple counts for first-degree sexual offense and taking indecent liberties with a child by denying defense counsel's motion to be released from representation where defense counsel was called as a witness during a voir dire hearing to determine whether evidence had been tampered with or altered. **State v. Parker,** 328.

§ 2908 (NCI4th). Redirect examination; where defendant opens door

There was no error in the prosecution of an inmate for possession of crack where a detective testifying as an expert on fingerprint matters was questioned about DNA testing of saliva. **State v. Lane,** 197.

§ 2929 (NCI4th). Impeachment of own witness; contradiction of facts

The State did not offer extrinsic evidence to impeach its own witness in a prosecution for multiple counts of first-degree sexual abuse and taking indecent liberties with a child where one of the State's witnesses testified that he had seen defendant and several other codefendants walking around a trailer park but did not remember what they were wearing, the prosecutor asked if the witness remembered what he had told him in the presence of a detective, and the witness testified as to what he had said that people in the crowd were wearing. **State v. Parker,** 328.

§ 2949 (NCI4th). Basis for impeachment; intoxication

Cross-examination of defendant concerning whether he had consumed alcohol on the day of a sexual offense was not improper character evidence but was permissible for impeachment purposes. **State v. Alkano,** 256.

EVIDENCE AND WITNESSES — Continued

§ 3130 (NCI4th). Corroborating evidence in particular types of cases; sexual abuse

The trial court did not err in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child by refusing to allow defendant to introduce the results of medical examinations of other minor children who did not testify but who had allegedly participated and witnessed the abuse of victims who did testify. **State v. Parker,** 328.

There was no error in a prosecution for multiple counts of first-degree sexual abuse and taking indecent liberties with a child where defendant contends that the trial court erred in excluding the testimony of a doctor which was offered in support of the testimony of a codefendant who was cross-examined about a statement she had made to the doctor. **Ibid.**

EXECUTION AND ENFORCEMENT OF JUDGMENTS

§ 34 (NCI4th). Procedure for setting aside exempt property

When a matter relating to a judgment debtor's exemptions is transferred from the clerk to the district court, the district court has the authority to order the sale of the judgment debtor's exempt property having excess value. **Bromhal v. Stott,** 428.

FIRES AND FIREMEN

§ 21 (NCI4th). Firemen; liability; defense

Plaintiffs' claim against defendant town was sufficiently stated so as to avoid preclusion by G.S. § 160A-293(b) where plaintiffs alleged that the town fire department responded to a call of a fire at their residence but turned around .4 miles from their burning residence at the fire district border. **Davis v. Messer,** 44.

The trial court erred by granting defendant town's 12(b)(6) motion to dismiss arising from the town fire department's dispatch of a crew to fight a fire at plaintiffs' residence where the crew turned around at the fire district border. Plaintiffs alleged facts sufficient to establish a prima facie case of negligence as well as facts sufficient to place the plaintiffs' case within the special duty exception to the public duty doctrine. **Ibid.**

Plaintiffs' action against a fire chief for not fighting a fire just outside his fire district was not barred by the first clause of G.S. § 160A-293(b) because the alleged act of negligence was neither a failure nor a delay in answering an emergency call. The second clause is limited to the municipality and not the officers and employees. **Ibid.**

The trial court erred in granting a fire chief's 12(b)(6) motion where plaintiffs alleged that the town fire department turned around at the fire district border within sight of their burning house and their house was ultimately completely destroyed. Plaintiffs alleged facts adequate to establish a prima facie case of negligence as well as the substantive elements of the special duty exception sufficient to avoid the defense of public duty doctrine. **Ibid.**

A fire department was a component part of a town and lacked the capacity to be sued. **Ibid.**

FRAUD, DECEIT, AND MISREPRESENTATION

§ 25 (NCI4th). Misrepresentation or concealment

The trial court properly entered summary judgment for defendants on plaintiff's claims for fraud and misrepresentation where plaintiff made no showing that statements were made to deceive or in fact deceived her. **Long v. Long,** 500.

GRAND JURY

§ 2 (NCI4th). Term; recess

The trial court did not err by denying defendant's motion to dismiss a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where a grand jury was selected and discharged, the district attorney made an oral application to the trial judge to have the grand jury reconvene, the grand jury was reconvened, and defendant was indicted. **State v. Parker,** 328.

§ 30 (NCI4th). Selection of grand jurors; timeliness of challenge

The trial court did not err by summarily denying defendant's motions to compel disclosure of jury records and to quash the indictment where the motion to quash was not timely made. **State v. Kirkland,** 185.

GUARANTY

§ 17 (NCI4th). Discharge of guarantor

Defendant guarantors were not discharged from liability for the borrower's default on a construction loan based on plaintiff lender's failure to disburse certain remaining funds prior to the maturity date of the loan where plaintiff had no duty to disburse funds because debts to contractors and materialmen had not been paid. **Wachovia Bank & Trust Co. v. Carrington Development Assoc.,** 480.

HOMICIDE

§ 319 (NCI4th). Sufficiency of evidence; voluntary manslaughter; death resulting from shooting generally

The evidence was sufficient to support defendant's conviction for voluntary manslaughter by aiding and abetting a codefendant in the shooting of the victim. **State v. Burton,** 625.

§ 338 (NCI4th). Sufficiency of evidence; involuntary manslaughter; wanton or reckless use of firearm

The evidence was sufficient for the jury on the issue of defendant's guilt of involuntary manslaughter under the theory that defendant fired a gun killing the child victim or defendant acted in concert with a codefendant who fired the gun. **State v. Burton,** 625.

§ 620 (NCI4th). Instructions; self-defense; aggression or provocation by defendant generally

The evidence supported the trial court's instruction that defendant would not be entitled to the benefit of self-defense if he were the aggressor with the intent to kill or inflict serious bodily harm upon the victim. **State v. Burton,** 625.

§ 630 (NCI4th). Instructions; circumstances justifying use of deadly weapon

The trial court did not err in instructing that defendant would be excused of second-degree murder if it appeared to him and he believed it to be necessary to kill

HOMICIDE — Continued

the victim in order to save himself or others from death or great bodily harm. **State v. Burton,** 625.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 62 (NCI4th). Tort liability generally

The continued course of treatment doctrine applies in medical malpractice actions against hospitals. **Horton v. Carolina Medicorp, Inc.,** 777.

HUSBAND AND WIFE

§ 30 (NCI4th). Antenuptial agreements

Where decedent and his widow called off their wedding after executing a premarital agreement, but later reconciled and married, the premarital agreement remained in effect and barred the widow's right to dissent from decedent's will where the widow, after the wedding and at decedent's request, placed the agreement in a safe deposit box with other personal papers. **In re Estate of Pate,** 400.

ILLEGITIMATE CHILDREN

§ 47 (NCI4th). Legitimation; effect of subsequent marriage of parents

DNA test results showing a greater than 99.99% probability that defendant's putative father was his actual father were sufficient to rebut the presumption that he was the child of the man married to his mother at the time of his birth, and defendant was legitimized by the subsequent marriage of his mother and putative father and is entitled to be considered the child of his putative father for intestate succession purposes. **Batcheldor v. Boyd,** 204.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 42 (NCI4th). Bill of particulars; effect on state's evidence

The trial court did not err in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child where the bill of particulars listed the charge for first-degree sexual offense as indecent liberties and included a statement that the victim had been anally penetrated. **State v. Parker,** 328.

INJUNCTIONS

§ 33 (NCI4th). Jurisdiction

Where a nonparty received no notice and was not given an opportunity to be heard before entry of the trial court's order prohibiting him from harassing or contacting defendants, their employees and attorneys, communicating threats, or attending further proceedings in this action, the trial court lacked personal jurisdiction over the nonparty, and the order was void. **Helbein v. Southern Metals Co.,** 431.

INSURANCE

§ 153 (NCI4th). Imputation of agent's knowledge to insurer

A clause in a general liability policy excluding coverage if defendant were "in the business of selling alcoholic beverages" was a forfeiture provision subject to the doc-

trines of waiver and estoppel, and whether waiver or estoppel applied so as to preclude plaintiff insurer from asserting the policy exclusion depended on whether the independent insurance agent who procured the policy was an agent of the insured or the insurer since his knowledge could be imputed to the party for which he was an agent. **U.S. Fidelity & Guaranty Co. v. Country Club of Johnston County,** 365.

§ 485 (NCI4th). Automobile liability insurance; what constitutes injury arising out of ownership, maintenance, or use of vehicle

An intentional shooting from an automobile is not an act arising out of the ownership, maintenance, or use of an insured vehicle within the meaning of an automobile liability insurance policy. **Scales v. State Farm Mut. Automobile Ins. Co.,** 787.

§ 509 (NCI4th). Uninsured motorist coverage generally

The prohibition against entry of a default judgment against an uninsured motorist in G.S. 20-279.21(b)(3)(a) when plaintiff's uninsured motorist carrier has timely filed an answer prohibited the trial court from entering a sanction, pursuant to Rule 37, striking an uninsured motorist's answer and establishing his liability as a matter of law for his failure to comply with court orders to supply answers to plaintiff's interrogatories where plaintiff's uninsured motorist carrier filed an answer as an unnamed defendant. **Abrams v. Surette,** 239.

§ 511 (NCI4th). Uninsured motorist coverage; what must be shown to recover

The trial court properly granted defendant uninsured motorist insurer's motion to dismiss where the evidence was undisputed that there was no contact between plaintiff's vehicle and the unidentified vehicle which allegedly caused the accident. **McNeil v. Hicks,** 579.

§ 527 (NCI4th). Underinsured coverage generally

The trial court did not err in a declaratory judgment action arising from an automobile accident by granting summary judgment for plaintiff where defendant insurance company contended that the insured had rejected policy limit UIM coverage on a form other than the form promulgated by the Rate Bureau. **Hendrickson v. Lee,** 444.

An automobile insurance policy which provided only the minimum statutorily required coverage for bodily injury was not required to provide UIM coverage. **Hollar v. Hawkins,** 795.

§ 528 (NCI4th). Underinsured coverage; extent of coverage

Plaintiff, as the named insured under a policy covering his two automobiles, is a person insured of the first class who is entitled to benefits under the UIM coverage of the policy even though he was injured while operating his motorcycle. **Honeycutt v. Walker,** 220.

§ 530 (NCI4th). Underinsured coverage; reduction of insurer's liability

Summary judgment was properly granted for plaintiff in a declaratory judgment action arising from an automobile accident to determine whether a policy provided underinsured motorist coverage where the insurance company argued that the insured had previously rejected UIM coverage equal to liability limits on an unapproved form. **Hendrickson v. Lee,** 444.

The trial court did not err in a declaratory judgment action arising from an automobile accident by granting summary judgment for plaintiff where defendant insurance company contended that a document executed by the insured waiving policy limit UIM coverage substantially complied with the statutory mandate. **Ibid.**

INSURANCE — Continued

§ 532 (NCI4th). Underinsured coverage; effect of policy provisions being in conflict with underinsured motorist statutes

A family-owned exclusion clause in a policy covering insured's two automobiles did not prohibit the insured from recovering UIM benefits under this policy for injuries suffered while operating his motorcycle because this exclusion is contrary to the terms of G.S. 20-279.21(b)(4). **Honeycutt v. Walker**, 220.

§ 627 (NCI4th). Compulsory, financial responsibility, or assigned risk insurance; cancellation by insured or insured's agent

An insurance premium finance company did not satisfy the requirements of G.S. 58-60(2) and therefore did not effectively cancel an automobile insurance policy written by defendant insurer. **Government Employees Ins. Co. v. New South Ins. Co.**, 700.

§ 690 (NCI4th). Propriety of award of prejudgment interest

Plaintiff was not entitled to prejudgment interest on the personal injury portion of a judgment where this portion exceeded the uninsured motorist limit of liability in the policy issued by defendant, but plaintiff was entitled to prejudgment interest on the property damage verdict up to the policy limit where the verdict did not exceed this amount. **Godwin v. Nationwide Mutual Ins. Co.**, 303.

§ 895 (NCI4th). General liability insurance; what damages are covered

Defendant country club was in the business of selling alcoholic beverages where members could obtain beer in the snack bar at any time by charging it to a membership account, and a commercial general liability policy written by plaintiff thus did not apply where a member consumed alcohol at defendant's premises and subsequently caused an automobile collision which resulted in death and serious injury to occupants of the vehicle which he hit. **U.S. Fidelity & Guaranty Co. v. Country Club of Johnston County**, 365.

§ 907 (NCI4th). Actions on insurance contracts and policies; parties

Plaintiff uninsured motorist carrier had standing to bring an action for a declaratory judgment that coverage was provided by the policy issued by defendant at the time of an accident. **Government Employees Ins. Co. v. New South Ins. Co.**, 700.

§ 930 (NCI4th). Sufficiency of evidence to establish authority of agent to issue binders

The trial court properly submitted to the jury issues of actual and apparent authority by defendant agency to issue binders for property and casualty insurance on behalf of defendant insurer. **Capitol Funds, Inc. v. Royal Indemnity Co.**, 351.

JAILS, PRISONS, AND PRISONERS

§ 55 (NCI4th). Sentencing committed youthful offenders

Where a twenty-two-year-old defendant was sentenced for armed robbery as a committed youthful offender pursuant to a plea agreement, and the State in effect rescinded the agreement while defendant was serving his sentence on the ground that defendant was not eligible to be sentenced as a committed youthful offender, defendant was entitled to have the committed youthful offender status accorded to him as provided in the plea agreement or, in the alternative, to withdraw his plea. **State v. Isom**, 225.

JUDGMENTS

§ 53 (NCI4th). Necessity that judgment be against correct parties

A judgment was not required to be vacated because defendant partnership's interests in commercial property and easements over restricted subdivision property were transferred to another entity prior to entry of the judgment. **Buie v. High Point Associates Ltd. Partnership**, 155.

§ 94 (NCI4th). Modifying and correcting judgment in trial court; clerical errors; what changes are permissible

Where the decretal portion and conclusions of law in an alimony order clearly stated that defendant was entitled to alimony until she reached age 62, the statement of an incorrect date in the findings of fact was a typographical error which could be corrected under Rule 60(a). **Gordon v. Gordon,** 316.

§ 237 (NCI4th). Res judicata and collateral estoppel; persons regarded as privies; units of government

The State and a county were in privity so that the State's action to establish paternity and to recover assistance funds expended for prior maintenance of a minor child was barred by res judicata where the county had previously brought an action seeking the same reimbursement. **State ex rel. Tucker v. Frinzi,** 389.

§ 467 (NCI4th). Judgment against person not party

Where the clerk erroneously disbursed deposited farm rental proceeds to plaintiffs and their attorney, and it was thereafter determined on appeal that these proceeds belonged to the corporate defendant, the trial court had no authority to require the attorney to account for the funds plaintiffs received since he is not a party to this action. **Poore v. Swan Quarter Farms, Inc.,** 546.

JURY

§ 103 (NCI4th). Examination of veniremen individually or as group generally

The trial court did not err in denying counsel for plaintiff the opportunity to question a juror individually where the juror indicated he wished to tell plaintiff's counsel "something," the court advised counsel he would have to exercise his own best judgment as to how to handle the situation, and counsel chose not to question the juror further. **Simmons v. Parkinson,** 424.

§ 158 (NCI4th). Reopening of questioning and challenge to juror previously accepted

The trial court abused its discretion by not reopening voir dire and allowing counsel for plaintiff the opportunity to exercise a peremptory challenge to a juror who initially indicated he did not know the parties in a medical malpractice action but subsequently revealed his wife had been treated by defendant. **Simmons v. Parkinson,** 424.

§ 255 (NCI4th). Use of peremptory challenge to exclude on basis of race; examination of prosecutor by defendant in hearing on State's use of challenges

There was no error where a prosecution for conspiracy to traffic in cocaine had been remanded for a *Batson* hearing because the prosecutor had peremptorily challenged a black woman after asking the clerk whether there was a white man in the

venire; the prosecutor on remand took the witness stand and offered his explanation in a question and answer format without being sworn and without being subject to cross-examination; and the court found that the prosecutor's explanation was racially neutral. **State v. Sessoms,** 1.

§ 259 (NCI4th). Use of peremptory challenge to exclude on basis of race; sufficiency of evidence to show racial discrimination in use of peremptory challenges

There was no error where a prosecution for conspiracy to traffic in cocaine had been remanded for a *Batson* hearing because the prosecutor had peremptorily challenged a black woman after asking the clerk whether there was a white male in the venire and the prosecutor testified that a deputy had told him that the juror did not appear to be a leader, that she lived with people connected with drugs, and that the white male remaining in the pool would make a good leader. **State v. Sessoms,** 1.

§ 260 (NCI4th). Use of peremptory challenge to exclude on basis of race; effect of racially neutral reasons for exercising challenges

Defendant's *Batson* challenge in a rape prosecution was properly denied where the State voluntarily proffered explanations for its peremptory challenges of African-American jurors, the State explained that it was looking for a certain type of juror, and none of the jurors excused by the State had the employment or family history which the State was seeking. **State v. Easterling,** 22.

KIDNAPPING AND FELONIOUS RESTRAINT

§ 18 (NCI4th). Confinement, restraint, or removal as inherent and integral feature of another felony

The evidence was sufficient to support first-degree kidnapping for the purpose of facilitating robbery where the acts committed constituted neither a mere technical asportation nor an inherent and integral part of the robbery. **State v. Easterling,** 22.

LABOR AND EMPLOYMENT

§ 75 (NCI4th). Retaliatory discharge for filing workers' compensation claim

G.S. 97-6 does not apply to retaliatory discharge claims and did not bar a contract which gave plaintiff three months' severance pay in exchange for his agreement to make no claim of any kind upon defendant employer. **Tellado v. Ti-Caro Corp.,** 529.

§ 182 (NCI4th). Liability of contractee or owner to employees of independent contractor

Defendant owner was not liable to an employee of a contractor for the negligence of the contractor in conducting trenching operations where the owner did not supervise, participate in, or police the work done by the contractor. **O'Carroll v. Roberts Industrial Contractors,** 140.

Plaintiff's complaint by implication alleged that defendant roofing contractor knew about the dangers posed by a skylight on defendant owner's roof and thus disclosed a fact which defeated her hidden danger claim against defendant owner. **Brown v. Friday Services, Inc.,** 753.

LABOR AND EMPLOYMENT — Continued

§ 192 (NCI4th). Inherently dangerous work; injury to employee

The evidence was sufficient to survive summary judgment in an action to recover for the death of an employee of an independent contractor in a trenching accident on the ground that defendant owner had a nondelegable duty to provide employees of the independent contractor with a safe place to work where the evidence tended to show that the owner's employees knew that the trench had become inherently dangerous because it had not been sloped. **O'Carroll v. Roberts Industrial Contractors**, 140.

The owner of a roof did not have a nondelegable duty to a roofing contractor's workers to see that they were provided a safe place to work since the work being done on the roof was not inherently dangerous. **Brown v. Friday Services, Inc.**, 753.

§ 196 (NCI4th). Injuries to employees; sufficiency of evidence of failure to use due care

In an action to recover for injuries sustained in a workplace fall, the jury could find that the conduct of defendant general contractor constituted willful or wanton misconduct sufficient to overcome the bar of plaintiff's contributory negligence where defendant violated an OSHA standard requiring railing around the perimeter of an open floor, and defendant had a pattern of noncompliance and conscious disregard of OSHA standards. **Sloan v. Miller Bldg. Corp.**, 162.

LIBEL AND SLANDER

§ 43 (NCI4th). Sufficiency of evidence to take issues to jury; publication; privilege

Where both defendants made oral statements to third parties suggesting that plaintiff had kidnapped and murdered an investigator employed by plaintiff's former wife, the trial court properly granted summary judgment for defendant police officer since his statements were made in the course of an investigation into allegations of criminal conduct and were privileged, but there was a genuine issue of fact as to whether the second defendant's statements were privileged as those of an individual acting in good faith by reporting to a law officer information which had come to him concerning the possibility of criminal activity. **Averitt v. Rozier**, 216.

LIMITATIONS, REPOSE, AND LACHES

§ 24 (NCI4th). Malpractice; continued course of treatment

Plaintiff's medical malpractice action against defendant hospital filed in 6 December 1993 was not barred by the statute of limitations where plaintiff alleged that, as a result of defendant's negligence, she underwent a second surgery on 20 November 1990 and remained in the hospital until 6 December 1990. **Horton v. Carolina Medicorp, Inc.**, 777.

§ 48 (NCI4th). Unfair and deceptive trade practices

Plaintiff's complaint in an antitrust action was not barred by the four-year statute of limitations of G.S. 75-16.2 since plaintiff alleged that defendants engaged in continuous violations of Chapter 75, and plaintiff would thus be barred only from recovering for any injuries sustained more than four years before the complaint was filed. **Medicare Rentals, Inc. v. Advanced Services**, 767.

LIMITATIONS, REPOSE, AND LACHES — Continued

§ 67 (NCI4th). Deeds generally; covenants and incorporeal hereditaments

The six-year statute of limitations of G.S. 1-50(3) applied to defendant's counterclaims for assessments pursuant to a restrictive covenant. **Allen v. Sea Gate Assn.,** 761.

MUNICIPAL CORPORATIONS

§ 380 (NCI4th). Discharge of municipal employees; burden of proof

Petitioner possessed a constitutionally protected property interest in retaining his position with a city, and the burden of proof placed upon petitioner to establish that he was terminated without justifiable cause as stated in the city's civil service commission rules violated petitioner's procedural due process rights. **Soles v. City of Raleigh Civil Service Comm.,** 88.

§ 444 (NCI4th). Effect of procuring liability insurance generally

Defendant deputy sheriff was not entitled to summary judgment in plaintiffs' false arrest action based on immunity as to the claims against him in his official capacity where he failed to show that there was no genuine issue of material fact regarding insurance coverage. **Marlowe v. Piner,** 125.

Plaintiffs' complaint was sufficient to withstand defendant town's 12(b)(6) motion to dismiss where plaintiffs alleged that the town fire department responded to a call for a fire at their home but turned around .4 miles from their house at the fire district border and that the town had valid and enforceable liability insurance. **Davis v. Messer,** 44.

§ 446 (NCI4th). Torts of employees

The trial court erred in an action arising from a drug raid in which a city block was cordoned off by granting summary judgment for plaintiffs on the issue of immunity from common law claims. **Barnett v. Karpinos,** 719.

§ 450 (NCI4th). Tort liability; effect of duty being owed to general public rather than individual plaintiffs

The provisions of G.S. 160A-411 et seq. and the State Building Code do not create a special duty owed by defendants, a city and its building inspectors, to plaintiff homeowners over and above the duty owed to the general public so that plaintiffs' allegations that defendants failed to require correction of numerous building code violations in the construction of their residence and failed to advise them that the residence was unfit for occupation were insufficient to state a claim for negligence. **Sinning v. Clark,** 515.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 180 (NCI4th). Necessity and sufficiency of definition and explanation of constructive possession

There was no error in the prosecution of an inmate for possession of a controlled substance in the court's instruction on constructive possession where the evidence tended to show actual possession by defendant. **State v. Lane,** 197.

NEGLIGENCE

§ 29 (NCI4th). Contributory negligence; knowledge and appreciation of danger; degree and standard of care in discovery and avoidance of danger

One whose mental faculties are diminished is capable of contributory negligence but is held only to the standard of care of a person of like mental capacity under similar circumstances, and the issue of contributory negligence of plaintiffs' father, who suffered mental incompetence due to senility, in going onto defendant's construction site was properly submitted to the jury. **Stacy v. Jedco Construction, Inc.**, 115.

§ 38 (NCI4th). Imputed negligence

In an action to recover for personal injury to plaintiffs' father when he wandered from the care of his "sitter" onto defendant's construction site, the evidence was insufficient to support a finding of negligence imputable to the father on the part of the "sitter." **Stacy v. Jedco Construction, Inc.**, 115.

§ 106 (NCI4th). Premises liability; duty of reasonable care and to notify of unsafe condition; proximate cause

The evidence was sufficient to support a finding that plaintiffs' father fell and was injured as a proximate result of negligence by defendant contractor where the father wandered from a nursing home facility onto defendant's construction site, and defendant's superintendent directed him across the site to a doorway which had been designated a hazardous area. **Stacy v. Jedco Construction, Inc.**, 115.

The trial court properly granted summary judgment for defendant on plaintiff's negligence claim where plaintiff failed to offer evidence that defendant knew of the existence of tacks on its floor and failed to correct the condition. **Farrelly v. Hamilton Square**, 541.

§ 140 (NCI4th). Premises liability; notice or knowledge of condition; inspection

In slip and fall cases where defendant moves for summary judgment, it is appropriate to place upon defendant the initial burden of gathering information about whether, when, and by whom the premises were last inspected prior to plaintiff's injury, and the trial court erred in entering summary judgment for defendant where defendant failed to come forward with such information. **Trexler v. K-Mart Corp.**, 406.

§ 165 (NCI4th). Jury instructions; more than one aspect of negligence

The trial court's instructions on contributory negligence improperly allowed the jury to answer the issue without reaching a unanimous verdict as to whether plaintiffs' father contributed to his injury by his own negligence or whether he was contributorily negligent through the imputed negligence of his employee. **Stacy v. Jedco Construction, Inc.**, 115.

NEGOTIABLE INSTRUMENTS AND OTHER COMMERCIAL PAPER

§ 102 (NCI4th). Impairment of collateral

Defendant guarantors were not discharged from liability for the borrower's default on a construction loan based on wrongful impairment of collateral because of plaintiff lender's failure to disburse certain remaining funds prior to the maturity date of the loan where plaintiff had no duty to disburse funds when contractors and materialmen had not been paid. **Wachovia Bank & Trust Co. v. Carrington Development Assoc.**, 480.

PARTIES

§ 12 (NCI4th). Real party in interest; standing generally

One defendant had standing to raise the issue of attorney disqualification even though that defendant did not allege that plaintiffs' attorney had represented him in the past but only that the attorney had represented "codefendants." **Love v. Tyson,** 739.

PARTNERSHIP

§ 59 (NCI4th). Purchase of deceased partner's interest by surviving partner

Plaintiff was not entitled to a declaration of her rights under a deed of separation, an escrow agreement, and a stock buy-sell agreement between her husband and his partner since plaintiff had no rights under the documents which would allow her to challenge the stipulated price of the stock that was to fund a trust for her benefit and later became subject to a partnership buy-sell agreement. **Long v. Long,** 500.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 96 (NCI4th). Liability of primary physician for those assisting him

The trial court erred in granting summary judgment for a plastic surgeon in a medical malpractice action arising from an anesthesiologist's failure to tape closed the patient's eye during surgery where the facts were sufficient to create a jury question as to whether plaintiff reasonably assumed that the plastic surgeon was in charge of her entire surgical procedure, including anesthesia care and recovery. **Noell v. Kosanin,** 191.

§ 137 (NCI4th). Injuries arising from surgery or operation generally

The trial court erred by granting summary judgment for an anesthesiologist where, viewed in the light most favorable to plaintiff, the evidence established issues of fact as to whether the anesthesiologist breached the applicable standard of care and proximately caused plaintiff's injury by not properly taping her eyes during surgery. **Noell v. Kosanin,** 191.

PLEADINGS

§ 397 (NCI4th). Test to determine whether claim asserted in amendment relates back

Claims asserted in plaintiff's second amended complaint related back to her original complaint where the original complaint gave notice of the occurrences sought to be proved pursuant to the second amended complaint that defendants were negligent in performing a bone marrow harvest. **Bowlin v. Duke University,** 178.

§ 399 (NCI4th). Original complaint as giving notice of subject of amendment

Plaintiff did not forfeit her right to prosecute this lawsuit and obtain appellate review of the previous court orders by failing to seek a ruling of relation back prior to seeking a voluntary dismissal. **Bowlin v. Duke University,** 178.

PRINCIPAL AND AGENT

§ 25 (NCI4th). Powers of attorney; construction; effects of limits on authority

A power of attorney in which the language "the power to transfer the real estate known as the homeplace" was added to the statutory form did not authorize the attorney-in-fact to convey the homeplace as a gift. **Whitford v. Gaskill,** 790.

PROCESS AND SERVICE

§ 53 (NCI4th). Retroactive extension of time for serving summons

The trial court properly refused to set aside the order of dismissal in a medical malpractice action where the summons was returned unserved and plaintiff failed to secure an endorsement upon the original summons or sue out an alias or pluries summons. Any subsequent issuance of a summons would have resulted in the commencement of an entirely new action more than one year after a voluntary dismissal and otherwise outside the statutory limitations. **Locklear v. Scotland Memorial Hospital,** 245.

PUBLIC OFFICERS AND EMPLOYEES

§ 35 (NCI4th). Personal liability generally; negligence

A fire chief was not immune from liability for negligence in the performance of his duties where plaintiffs alleged that the fire department turned around at a fire district border within sight of their burning house and the record reveals no assertion by defendant of the affirmative defense of public official immunity. The complaint would have withstood that defense even if properly asserted because the conduct extends beyond mere negligence. **Davis v. Messer,** 44.

§ 59 (NCI4th). State personnel system; compensation and salaries generally

A disabled State employee who is terminated for just cause may elect to exhaust his accumulated vacation leave in lieu of receipt of his long-term disability benefits for the period of his accumulated vacation leave. **Williams v. N.C. Dept. of Economic and Community Development,** 535.

§ 67 (NCI4th). State personnel system; disciplinary actions; what constitutes "just cause"

Petitioner, a blind social worker, was improperly dismissed from her job on the ground of insubordination for refusing to provide hands-on training with sharp objects to a blind AIDS patient. **Mendenhall v. N.C. Dept. of Human Resources,** 644.

RAPE AND ALLIED SEXUAL OFFENSES

§ 151 (NCI4th). First-degree rape; infliction of serious injury

The trial court did not err in a first-degree rape prosecution by failing to give defendant's specific written request for an instruction on serious personal injury where the instruction given accurately reflects the applicable law; if a mental injury extends for some appreciable time, it is therefore a mental injury beyond that normally experienced in every forcible rape. **State v. Easterling,** 22.

RAPE AND ALLIED SEXUAL OFFENSES — *Continued*

§ 173 (NCI4th). Second-degree sexual offense generally

The trial court did not err in denying defendant's motion to dismiss a charge of second-degree sexual offense for insufficient evidence. **State v. Easterling,** 22.

ROBBERY

§ 66 (NCI4th). Sufficiency of evidence; armed robbery where weapon was firearm

The evidence was sufficient for the jury to find that defendant was the perpetrator of an armed robbery of a motel clerk although the victim may have expressed uncertainty about identifying defendant in a photographic lineup. **State v. Serzan,** 557.

SEARCHES AND SEIZURES

§ 1 (NCI4th). Prohibition against unreasonable searches and seizures

The trial court erred in granting summary judgment for defendants in their individual capacity in a 42 U.S.C. § 1983 action arising from a drug raid in which officers, many in camouflage and black masks, surrounded and sealed off a city block, and ordered all people congregating on the street and inside a club to either lie face down or stand against a wall with their hands up until one of the detectives could identify them as not being one of the targets of the search. **Barnett v. Karpinos,** 719.

§ 7 (NCI4th). What constitutes seizure of person

A police officer's questioning and request to frisk defendant who had just flown into Raleigh from New York did not constitute a seizure within the purview of the Fourth Amendment, and the Court therefore need not decide whether the officer had reasonable suspicion to believe defendant was armed and involved in criminal activity when he initiated the pat frisk. **State v. West,** 562.

§ 27 (NCI4th). Exceptions to warrant requirement; drug courier profile as basis for probable cause

In a prosecution for trafficking in cocaine, a drug interdiction officer's warrantless seizure of defendant's gym bag at a train station until it could be checked by a drug-sniffing dog was lawful, and the trial court properly denied defendant's motion to suppress cocaine seized from the bag pursuant to a warrant after the dog alerted to the bag. **State v. Odum,** 676.

§ 80 (NCI4th). Stop and frisk procedures; reasonable suspicion of criminal activity

Officers had a reasonable suspicion of criminal activity to justify an investigatory stop of defendant, and officers' actions during the stop were reasonable, where officers approached defendant at a place known for drug activity, defendant placed drugs in his mouth, an officer told defendant to spit out the drugs or the drugs would kill him, and an officer placed pressure on defendant's throat in order to make him spit out the drugs. **State v. Watson,** 395.

SECURED TRANSACTIONS

§ 34 (NCI4th). Required contents of security agreements; sufficiency of description

A security agreement in the debtors' cattle sufficiently identified the debtor where it listed the name of two individuals doing business as a farm rather than iden-

SECURED TRANSACTIONS — Continued

tifying the farm as a partnership, sufficiency identified the collateral as dairy cattle located on the debtors' farm and proceeds from milk sales, and sufficiently bound the partnership even though it was signed by only one partner individually. **Mountain Farm Credit Service v. Purina Mills, Inc.,** 508.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 1 (NCI4th). Matters relating to law enforcement officers, generally

The trial court did not err by granting summary judgment for defendants in their individual capacity on common law tort claims in an action arising from a drug raid in which a city block was cordoned off. **Barnett v. Karpinos,** 719.

§ 21 (NCI4th). Civil and criminal liability; death or injury caused by law enforcement officer

The trial court properly entered summary judgment for defendant deputy sheriff in a claim against him in his individual capacity for false imprisonment where plaintiffs' evidence at most tended to show that defendant negligently believed he had probable cause to arrest plaintiffs. **Marlowe v. Piner,** 125.

The trial court erred in entering summary judgment for defendant deputy sheriff in his official capacity in an action for false imprisonment where there was a genuine issue of fact as to whether probable cause existed for the arrest of plaintiffs. **Ibid.**

Defendant city and defendant police officer, in his official capacity, were entitled to partial summary judgment based on governmental immunity for any damages up to two million dollars in an action arising from a collision while the officer was chasing another vehicle, except as to contentions of negligence under G.S. 20-145, where the city has no liability insurance for that amount. **Young v. Woodall,** 132.

Defendant police officer who collided with plaintiff at an intersection while pursuing another vehicle was entitled to summary judgment in his individual capacity since public officers are absolutely immune from liability for discretionary acts absent a showing of malice or corruption. **Ibid.**

Defendant city and defendant police officer were not entitled to summary judgment under G.S. 20-145 where evidence that the officer pursued a vehicle through an intersection with a yellow flashing light without activating his siren or blue light created a genuine issue of fact as to whether the officer conducted himself as would a reasonably prudent person in the conduct of official duties of a like nature under like circumstances. **Ibid.**

§ 23 (NCI4th). Civil rights violations

In an action under 42 U.S.C. § 1983 arising from a drug raid in which a city block was cordoned off, the trial court erred in granting defendant's motion for summary judgment based on immunity arising from official capacity. **Barnett v. Karpinos,** 719.

STATE

§ 33 (NCI4th). Tort Claims Act; agents of the State within the Act

The Industrial Commission had subject matter jurisdiction of a claim against DHR for injuries sustained by the minor plaintiff at the hands of his stepfather after the county DSS was notified plaintiff was being abused since the county DSS is an agent of DHR with regard to providing protective services. **Gammons v. N.C. Dept. of Human Resources,** 589.

TAXATION

§ 30 (NCI4th). Exemption of particular properties and uses; charitable purposes

The operators of homes for the elderly which required entrance fees and monthly service fees were charitable organizations so as to qualify for refunds of sales and use taxes. **Southminster, Inc. v. Justus,** 669.

§ 82 (NCI4th). Property taxes; valuation of real property generally

A decision of the Property Tax Commission was remanded for a new hearing where the property was an anchor department store at a mall and the Commission relied on the cost rather than the income approach in reaching its decision. The standard operating agreement between the mall developer and the department store is an integral part of the market and the property must be valued according to that market. **In re Appeal of Belk-Broome Co.,** 470.

The Property Tax Commission erred by using the cost approach in valuing petitioner's department store property, and the case is remanded for a new hearing so the Commission can redetermine the value of the property with emphasis on the income approach to valuation. **In re Appeal of May Department Stores Co.,** 596.

TORTS

§ 34 (NCI4th). Grounds for relief from release; evidence of fraud

The trial court properly directed a verdict for defendant in plaintiffs' action to reform a release to cover property damages only based upon the alleged fraud of defendant insurance company's claim agent where plaintiffs presented no testimony showing any fraud or trickery by the agent or showing that they were prevented from reading or understanding the release. **Richardson v. Webb,** 782.

TRIAL

§ 59 (NCI4th). Time for filing affidavits in support of summary judgment

The trial court did not err in denying defendant's motion for continuance of a summary judgment hearing on the ground that affidavits were not timely filed where the affidavits were filed in sufficient time before the hearing to prevent any prejudice to defendants and they contained only information already known to defendants. **Wachovia Bank & Trust Co. v. Carrington Development Assoc.,** 480.

§ 213 (NCI4th). Voluntary dismissal generally

Plaintiff, a former savings and loan, was entitled to take a voluntary dismissal of its claims and refile them within one year where defendants' counterclaims were completely adjudicated at the time plaintiff took its voluntary dismissal. **Berkeley Federal Savings Bank v. Terra Del Sol, Inc.,** 249.

§ 444 (NCI4th). Articles or exhibits in jury room

The trial court's submission of a witness's statement to the jury to take to the jury room over one defendant's objection was prejudicial to the defendant who objected, but the other defendant who did not object was not prejudiced. **State v. Poe,** 266.

§ 471 (NCI4th). What constitutes inconsistency in jury verdict or findings

The trial court erred by entering judgment upon an inconsistent verdict where the jury found that plaintiffs did not trespass upon defendants' property but also found that plaintiffs owed defendants $430 for damages. **Pitcock v. Fox,** 307.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 39 (NCI4th). Evidence that alleged act was unfair or deceptive

Plaintiff lender's failure to disburse funds pursuant to a construction loan contract did not amount to an unfair or deceptive practice. **Wachovia Bank & Trust Co. v. Carrington Development Assoc.**, 480.

Plaintiff lender did not commit an unfair or deceptive practice by its application of proceeds from the sale of a portion of the secured property where defendants agreed beforehand to plaintiff's application of the sale proceeds. **Ibid.**

Plaintiff lender did not commit an unfair or deceptive practice by having a receiver appointed for shopping center property. **Ibid.**

The trial court did not err in holding that defendant's statements that an automobile sold to plaintiff had not been wrecked amounted to an unfair and deceptive practice. **Torrance v. AS & L Motors**, 552.

§ 54 (NCI4th). Findings necessary to support award of attorney's fees

The trial court erred in awarding attorney fees in an unfair and deceptive practices case where the court failed to make findings as to whether defendant willfully engaged in the deceptive act and made an unwarranted refusal to resolve the issue. **Torrance v. AS & L Motors**, 552.

WEAPONS AND FIREARMS

§ 11 (NCI4th). Requirements for indictment for unlawful possession of firearm by felon

An indictment charging defendant with possession of a firearm by a felon did not need to allege possession away from defendant's home or business or that a Florida felony of which defendant was convicted was "substantially similar" to a particular North Carolina crime. **State v. Bishop**, 695.

§ 12 (NCI4th). What constitutes felony for purposes of Felony Firearms Act

Defendant was properly convicted of possession of firearms by a felon where the trial court found that the crime to which defendant pled guilty in Florida was punishable by a term exceeding two years, was substantially similar to G.S. 14-258.2, and the current charge occurred within five years of defendant's release in Florida. **State v. Bishop**, 695.

WORKERS' COMPENSATION

§ 45 (NCI4th). Special employers; lent employees

Decedent was performing work as a loaned servant on behalf of defendant roofing contractor, and all claims against the contractor were barred by the exclusivity provisions of the Workers' Compensation Act. **Brown v. Friday Services, Inc.**, 753.

§ 60 (NCI4th). Agreements to waive right to compensation under Act

G.S. 97-6 does not apply to retaliatory discharge claims and did not bar a contract which gave plaintiff three months' severance pay in exchange for his agreement to make no claim of any kind upon defendant employer. **Tellado v. Ti-Caro Corp.**, 529.

§ 62 (NCI4th). Misconduct tantamount to intentional tort; "substantial certainty" test

Plaintiff's allegations that defendant temporary service did not screen decedent to determine if he had experience in roofing work at high elevations, did not properly

train him, and failed to provide him with a safe place to work did not state a *Woodson* claim against defendant. **Brown v. Friday Services, Inc.**, 753.

§ 122 (NCI4th). Failure to use safety device; violation of employer's safety rule or warning

The case is remanded for findings as to whether plaintiff's failure to use a jack stand to prop up a press and thus avoid having his hands crushed in the machine was willful, thereby entitling defendants to a ten percent reduction in plaintiff's benefits under G.S. 97-12. **Bursey v. Kewaunee Scientific Equipment Corp.**, 522.

§ 127 (NCI4th). Employee's intoxication or use of controlled substance

The Industrial Commission did not err in finding that defendants did not prove that plaintiff's injury was a proximate result of his having been under the influence of controlled substances although blood tests indicated that plaintiff had used crack cocaine and marijuana. **Bursey v. Kewaunee Scientific Equipment Corp.**, 522.

§ 129 (NCI4th). Evidence of intoxication as proximate cause of injury

The Industrial Commission did not err in finding that the employee's intoxication was not a proximate cause of his death where there was testimony that alcohol was a contributing circumstance, but there was also testimony that the accident could have occurred even if the employee had not been drinking. **Strickland v. Carolina Classics Catfish**, 97.

§ 154 (NCI4th). Injuries sustained while in, on way to, or from parking lots on employer's premises

Plaintiff sustained an injury by accident arising out of and in the course of his employment where he was struck by a car when he attempted to walk across a public highway that separated his place of employment from a parking lot owned and operated by defendant employer. **Royster v. Culp, Inc.**, 598.

§ 164 (NCI4th). Compensability of back injuries; pre-existing condition

The Industrial Commission did not err in finding and concluding that plaintiff did not sustain an injury by accident or by specific traumatic incident while employed by defendant where the evidence showed plaintiff injured her back during her previous employment. **Thompson v. Tyson Foods, Inc.**, 411.

§ 206 (NCI4th). Occupational diseases; other conditions resulting from repetitive movements

The evidence supported the Industrial Commission's finding that plaintiff did not develop a back-related occupational disease as a result of repetitive motion while working for defendant but that her back problem resulted from her prior employment. **Thompson v. Tyson Foods, Inc.**, 411.

§ 213 (NCI4th). Subsequent injury caused by original, compensable injury

Plaintiff's October 1992 automobile accident was an aggravation of plaintiff's prior compensable injury in October of 1990 and was thus compensable. **Horne v. Universal Leaf Tobacco Processors**, 682.

§ 236 (NCI4th). Availability of employment as evidence of earning capacity

An employee who suffers a work-related injury is not precluded from workers' compensation benefits when that employee, while employable within limitations in

certain kinds of work, cannot after reasonable efforts obtain employment due to unavailability of jobs. **Fletcher v. Dana Corporation**, 491.

§ 273 (NCI4th). Children as dependents of deceased employee; adopted children

Where adoption proceedings had begun but were not finalized prior to the injury of the employee, the child was not a "dependent child" entitled to compensation benefits until she reached the age of eighteen. **Lennon v. Cumberland County,** 275.

§ 341 (NCI4th). Relief from or modification of agreement and award

The Industrial Commission erred in concluding that plaintiff's compensable injury did not cause her current disability and that plaintiff was not entitled to receive further disability benefits where the sole issue before the Commission was whether plaintiff's disability compensation should continue. **Dalton v. Anvil Knitwear,** 275.

§ 372 (NCI4th). Discovery; depositions and production of records

The Industrial Commission did not err by denying defendants' untimely request for additional time to depose a toxicologist. **Bursey v. Kewaunee Scientific Equipment Corp.,** 522.

§ 408 (NCI4th). Sufficiency of findings of fact; extent and duration of disability

The Industrial Commission erred in finding as fact that plaintiff would have reached maximum medical improvement by October 1992 had he not been involved in an automobile accident. **Horne v. Universal Leaf Tobacco Processors,** 682.

§ 415 (NCI4th). Appeal of initial award to full Commission; reconsideration of findings of fact and conclusions of law

There was no abuse of discretion in a workers' compensation action in which a master carver sought compensation for an injury to his elbow where plaintiff contended that the full Commission erred by failing to review the deputy commissioner's opinion and award de novo and by failing to allow plaintiff's motion for additional evidence. **Agee v. Thomasville Furniture Products,** 77.

§ 416 (NCI4th). Appeal of initial award to full Commission; consideration of newly discovered or additional evidence

There was no abuse of discretion in a workers' compensation action in which a master carver sought compensation for an injury to his elbow where plaintiff contended that the full Commission erred by failing to allow plaintiff's motion for additional evidence. **Agee v. Thomasville Furniture Products,** 77.

§ 427 (NCI4th). What constitutes change of condition; where evidence supports increase in compensation

Evidence that the continuous pain stemming from plaintiff's injury eventually rendered her totally incapable of earning any wages was sufficient to justify a finding that a substantial change in plaintiff's back condition had occurred since her initial award for permanent partial disability. **East v. Baby Diaper Services, Inc.,** 147.

Where a plaintiff is examined by several physicians over the course of treatment for a compensable injury, each physician may testify as to plaintiff's condition at the time she was examined, and proof should not be limited to the testimony of a physician who examined plaintiff both before and after the change in plaintiff's condition. **Ibid.**

WORKERS' COMPENSATION — Continued

§ 454 (NCI4th). Conclusiveness of Industrial Commission's credibility determinations

The Industrial Commission did not err by concluding that plaintiff's elbow injury was not the result of an accident arising out of and in the course of his employment and that he was not entitled to compensation and treatment for the injury based upon findings that plaintiff's testimony was not credible. **Agee v. Thomasville Furniture Products,** 77.

§ 460 (NCI4th). Review of Industrial Commission's findings of fact and conclusions of law; sufficient evidence to support particular factual findings

The evidence in a workers' compensation hearing involving plaintiff's wrist and elbow injury supported the Commission's finding that plaintiff's wrist had reached maximum medical improvement and the inferences that defendant employer had suitable work available for plaintiff and that his wage loss after that date was not due to his compensable wrist injury. **Agee v. Thomasville Furniture Products,** 77.

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§ 123 (NCI4th). Judicial review of zoning matters; administrative record for review; transcripts

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