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TABLE OF CONTENTS

Judges of the Court of Appeals iv

Superior Court Judges vi

District Court Judges x

Attorney General xvi

District Attorneys xviii

Public Defenders xix

Table of Cases Reported xx

Table of Cases Reported Without Published Opinions xxiv

General Statutes Cited and Construed xxx

Rules of Evidence Cited and Construed xxxii

Rules of Civil Procedure Cited and Construed xxxii

Constitution of North Carolina Cited and Construed xxxii

Constitution of United States Cited and Construed xxxiii

Rules of Appellate Procedure Cited and Construed xxxiii

Opinions of the Court of Appeals 1-884

Analytical Index 887

Word and Phrase Index 928

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2. Recalled 1 September 1995.

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1. Appointed and sworn in 9 May 1996 to a new position.
2. Appointed and sworn in 3 June 1996 to a new position.
3. Appointed and sworn in 24 April 1996 to a new position.
4. Resigned 15 March 1996.
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	PAGE
Allen v. N.C. Dept. of Transportation	627
Amethyst Corp., Johnson v.	529
Anderson, Venture Properties I v.	852
Andrews v. Fulcher Tire Sales and Service	602
Appalachian Poster Advertising Co. v. Harrington	72
Appeal of Mount Shepherd Methodist Camp, In re	388
Appeal of Ramseur, In re	521
Arroyo v. Scottie's Professional Window Cleaning	154
Aune v. University of North Carolina	430
Badgett, Colvin v.	810
Baker v. City of Sanford	783
Barber, State v.	505
Barger v. McCoy Hillard & Parks	326
Barkley, 84 Lumber Co. v.	271
Bass v. Sides	485
Beam v. Kerlee	203
Better Business Forms, Inc. v. Davis	498
Bivens v. Cottle	467
Blair, Walters v.	398
Board of Education of Hickory v. Seagle	566
Bonds, State v.	546
Branch Banking and Trust Co. v. Staples	227
Brandon, State v.	815
Brown, State v.	276
Brunson, State v.	571
Bryan-Barber Realty, Inc. v. Fryar	178
Byrd, Wrenn v.	761
Cannon v. City of Durham	612
Capoferi, Lumley v.	578
Carolina Coach Co., Smith v.	106
Carolina Hardwood Co., Jackson v.	870
Carrier v. Starnes	513
Carteret County v. United Contractors of Kinston	336

	PAGE
Caswell County v. Hanks	489
Cassell v. Collins	798
Chancellor, Devane v.	636
Chapman v. Janko, U.S.A.	371
Charlotte Housing Authority v. Patterson	552
City of Charlotte, Lyles v.	96
City of Clinton, Tucker v.	776
City of Creedmoor, Moore v.	27
City of Durham, Cannon v.	612
City of Sanford, Baker v.	783
Clyburn, State v.	377
Collins, Cassell v.	798
Colvin v. Badgett	810
Cornelius v. Helms	172
Cothran, State v.	633
Cottle, Bivens v.	467
Cowley, In re	274
Dammons, State v.	182
Davie County, Williams v.	160
Davis, Better Business Forms, Inc. v.	498
Devane v. Chancellor	636
Dinkins v. Federal Paper Board Co.	192
Dockery v. N.C. Dept. of Human Resources	827
Duane White Land Corp., Vance Construction Co. v.	401
Easter, Guilford County ex rel. Easter v.	260
84 Lumber Co. v. Barkley	271
Evans, State v.	752
Federal Paper Board Co., Dinkins v.	192
Fink v. Fink	412
Finney v. Rose's Stores, Inc.	843
First Homes of Craven County, Inc., Nohejl v.	188
Fox, Town of Chapel Hill v.	630
Friends of Weymouth, Inc., Johnson v.	255
Fryar, Bryan-Barber Realty, Inc. v.	178
Fulcher Tire Sales and Service, Andrews v.	602

	PAGE
Garrett v. Winfree	689
Griffin v. Sweet	166
Guilford County ex rel. Easter v. Easter	260
Gulley, Sharp v.	878
Hanks, Caswell County v.	489
Harding, N.C. Dept. of Correction v.	451
Harrington, Appalachian Poster Advertising Co. v.	72
Hawkins, In re	585
Haywood Street Redevelopment Corp. v. Peterson Co.	832
H.D.A. Entertainment, Kath v.	264
Helms, Cornelius v.	172
Hensley, State v.	313
Heritage Pointe Bldrs. v. N.C. Licensing Bd. of General Contractors	502
Holly, Huberth v.	348
Holmes, State v.	54
Hospital Corp. of N.C. v. Iredell County	445
Howard v. Jackson	243
Huberth v. Holly	348
Huckabee, State ex rel. Employment Security Comm. v.	217
In re Appeal of Mount Shepherd Methodist Camp	388
In re Appeal of Ramseur	521
In re Cowley	274
In re Hawkins	585
In re Robinson	874
Ingram v. Kerr	493
Interstate Casualty Ins. Co., State ex rel. Long v.	743
Iredell County, Hospital Corp. of N.C. v.	445
Isenhour Brick & Tile Co., Rose v.	235
Jackson v. Carolina Hardwood Co.	870
Jackson, Howard v.	243
Janko, U.S.A., Chapman v.	371
Johnson v. Amethyst Corp.	529

	PAGE
Johnson v. Friends of Weymouth, Inc.	255
Johnson v. Johnson	1
Jones v. Kearns	301
Jones v. Willamette Industries, Inc.	591
Jordan, State v.	364
Kalen v. Kalen	196
Kath v. H.D.A. Entertainment	264
Kearns, Jones v.	301
Kelly, State v.	821
Kerlee, Beam v.	203
Kerr, Ingram v.	493
Kirkpatrick, State v.	405
Lambert v. Riddick	480
Lavelle v. Schultz	857
Lechmere, Inc., Pleasant Valley Promenade v.	650
Ledbetter, State v.	117
Lee v. Lyerly	250
Leighow v. Leighow	619
Lindquist, Metropolitan Prop. and Casualty Ins. Co. v.	847
Long v. University of North Carolina at Wilmington	267
Lumley v. Capoferi	578
Lyerly, Lee v.	250
Lyles v. City of Charlotte	96
Mark's Inc., Ross v.	607
McAbee, State v.	674
McAnelly v. Wilson Pallet and Crate Co.	127
McBride, State v.	623
McCoy Hillard & Parks, Barger v.	326
McLean, State v.	838
Merritt, State v.	732
Metromont Materials Corp. v. R.B.R. & S.T.	616
Metropolitan Prop. and Casualty Ins. Co. v. Lindquist	847
Miesch v. Ocean Dunes Homeowners Assn.	559
Moore v. City of Creedmoor	27

	Page
Moricle v. Pilkington	383
Myers, N.C. Dept. of Correction v.	437
N.C. Council of Churches v. State of North Carolina	84
N.C. Dept. of Correction v. *Harding*	451
N.C. Dept. of Correction v. Myers	437
N.C. Dept. of Correction, Williams v.	356
N.C. Dept. of Human Resources, Dockery v.	827
N.C. Dept. of Transportation, Allen v.	627
N.C. Licensing Bd. of General Contractors, Heritage Pointe Bldrs. v.	502
New Hanover County, Sullivan v.	641
Nohejl v. First Homes of Craven County, Inc.	188
Ocean Dunes Homeowners Assn., Miesch v.	559
Patterson, Charlotte Housing Authority v.	552
Perkins v. Perkins	638
Peterson Co., Haywood Street Redevelopment Corp. v.	832
Phillips v. U.S. Air, Inc.	538
Pilkington, Moricle v.	383
Pleasant Valley Promenade v. Lechmere, Inc.	650
Pope, State v.	462
Precision Fabrics Group v. Transformer Sales and Service	866
R.B.R. & S.T., Metromont Materials Corp. v.	616
Rhome, State v.	278
Riddick, Lambert v.	480
RJR Nabisco, Zanone v.	768
Roberts v. Young	720
Robinson, In re	874
Rose v. Isenhour Brick & Tile Co.	235
Rose's Stores, Inc., Finney v.	843
Ross v. Mark's Inc.	607
Royall v. Sawyer	880
Sammartino, State v.	597
Sawyer, Royall v.	880
Schroader v. Schroader	790
Schultz, Lavelle v.	857
Scottie's Professional Window Cleaning, Arroyo v.	154
Seagle, Board of Education of Hickory v.	566
Sharp v. Gulley	878
Sides, Bass v.	485
Simpson, Swaim v.	863
Smith v. Carolina Coach Co.	106
Staples, Branch Banking and Trust Co. v.	227
Starnes, Carrier v.	513
State v. Barber	505
State v. Bonds	546
State v. Brandon	815
State v. Brown	276
State v. Brunson	571
State v. Clyburn	377
State v. Cothran	633
State v. Dammons	182
State v. Evans	752
State v. Hensley	313
State v. Holmes	54
State v. Jordan	364
State v. Kelly	821
State v. Kirkpatrick	405
State v. Ledbetter	117
State v. McAbee	674
State v. McBride	623
State v. McLean	838
State v. Merritt	732
State v. Pope	462
State v. Rhome	278
State v. Sammartino	597
State v. Watkins	804
State v. Young	456
State ex rel. Employment Security Comm. v. Huckabee	217

	PAGE
State ex rel. Long v. Interstate Casualty Ins. Co.	743
State of North Carolina, N.C. Council of Churches v.	84
Strother v. Strother	393
Sullivan v. New Hanover County	641
Swaim v. Simpson	863
Sweet, Griffin v.	166
Taha v. Thompson	697
Thompson, Taha v.	697
Thompson v. Town of Warsaw	471
Tilley, West v.	145
Tinch v. Video Industrial Services	640
Tower Development Partners v. Zell	136
Town of Chapel Hill v. Fox	630
Town of Warsaw, Thompson v.	471
Transformer Sales and Service, Precision Fabrics Group v.	866
Tucker v. City of Clinton	776
United Contractors of Kinston, Carteret County v.	336
University of North Carolina, Aune v.	430
University of North Carolina at Wilmington, Long v.	267
U.S. Air, Inc., Phillips v.	538
Vance Construction Co. v. Duane White Land Corp.	401
Venture Properties I v. Anderson	852
Video Industrial Services, Tinch v.	640
Walters v. Blair	398
Watkins, State v.	804
Watkins v. Watkins	475
West v. Tilley	145
Willamette Industries, Inc., Jones v.	591
Williams v. Davie County	160
Williams v. N.C. Dept. of Correction	356
Williams v. Williams	707
Wilson Pallet and Crate Co., McAnelly v.	127
Winfree, Garrett v.	689
Wrenn v. Byrd	761
Young, Roberts v.	720
Young, State v.	456
Zanone v. RJR Nabisco	768
Zell, Tower Development Partners v.	136

	Page
Aetna Casualty & Surety Co. v. McSwain	409
Allen, Guinn v.	407
Alliance Ins. Group, Whitin Roberts Co. v.	884
Allstate Ins. Co., Crockett v.	407
Allstate Ins. Co., Saunders v.	883
American Thread Co., Bateman v.	883
Anderson, State v.	647
Anderson, In re	642
Apo v. MacDonald	409
Appert, Bass v.	200
Apple v. White	200
Atlantic Aero, Inc., Hedrick v.	410
Averitt, McLaurin v.	643
Ayers, In re	646
Bailey v. Kidd	407
Barnette, State v.	201
Bartlett, Republican Party of N.C. v.	643
Bass v. Appert	200
Bateman v. American Thread Co.	883
Beall v. Eastwood	410
Beaufort County Bd. of Ed., Moore v.	408
Bell v. Builders Transport	642
Bethea, State v.	647
Betz, Miller v.	646
Billings Freight Systems, Gilbert v.	410
Bingham v. Bingham	883
Bivens, State v.	408
Blakeney, State v.	647
Blickensderfer, Board of Education of Hickory v.	645
Blue Ridge Lines v. Fox	645
Blue Ridge Ltd. Partnership v. Peanut Shack of America	642
Board of Education of Hickory v. Blickensderfer	645
Board of Education of Hickory v. Brittain	645
Board of Education of Hickory v. Latta	645
Boisseau v. Robert Bosch Power Tool Corp	645
Bolch, Bradshaw v.	642
Bonham, State v.	643
Boston, State v.	201
Boulware, State v.	643
Boyd v. Commissioners of Hyde County	645
Bradley v. United Merchants & Mfg.	642
Bradshaw v. Bolch	642
Brantley v. Phillips	407
Branton v. Schneider Mills, Inc.	642
Bright, State v.	647
Britt v. Britt	645
Brittain, Board of Education of Hickory v.	645
Brown, Chasson v.	645
Brown, State v.	408
Brown, State v.	647
Broyhill Furniture Industries, Starnes v.	201
Bryan Easler Enterprises, Tweed v.	649
Buckeye Construction Co., Corn v.	407
Builders Transport, Bell v.	642
Burnette v. MacDonald	410
Caldwell, State v.	201
Carolina Imprints, Inc. v. United Brands International	407
Caroway v. Coats American, Inc.	410
Carriage Park Dev. Corp., Vaughn & Melton v.	411
Carter, State v.	410
Cecil King Trucking Co., McCormick v.	646
Central Carolina Bank & Trust Co., Trull v.	202
Chapel Hill-Carrboro Bd. of Educ., Kryder v.	646
Chasson v. Brown	645
Childress v. Trion, Inc.	645
City of Charlotte v. Gateway Outdoor Advertising	883
City of Durham v. Lodal, Inc.	407
City of Greensboro v. Kirkman	410
Coats American, Inc., Caroway v.	410
Coffey, State v.	647
Coggins v. Coggins	642

PAGE

Colburn, State v. 647
Collins, Taylor v. 202
Collins & Aikman,
Congress v. 645
Colony Knits, Inc., Gardon v. 200
Commissioners of Hyde
County, Boyd v. 645
Congress v. Collins & Aikman 645
Corn v. Buckeye
Construction Co. 407
Crawford v. Lloyd Table Co. 410
Crescent Inks, Inc., Sheppard v. . . . 408
Crockett v. Allstate Ins. Co. 407
Cronland Lumber Co.,
Reinhardt v. 883
Crummy, State v. 647
Curly's Harley Davidson,
Winfree v. 649

Daniels, State v. 201
Davis v. Davis 645
Dean v. Fowler 642
Dellinger, Richardson v. 883
Dickens v. Key 642
Dockery v. Woody 200
Don Love, Inc., Hardin v. 407
Dorsette, State v. 643
Doster, In re 883
Douglas v. Ford 200
Duke, State v. 647

Earley v. Earley 883
Eastwood, Beall v. 410
Edmondson v. Jones 410
Elastic Fabrics of America,
Jones v. 407
Ellis, State v. 643
Ellis, State v. 648
Engel v. Hoffstedder 410
Evans, Miller v. 410
Fashaw, State v. 648
Fields v. Fields 642
Fields, State v. 408
First Carolina Communications,
Nobles v. 200
Ford, Douglas v. 200
Foreclosure of Taylor, In re 407
Forrest v. Forrest 200
Fowler, Dean v. 642

PAGE

Fox, Blue Ridge Lines v. 645
Frank v. Star Trax, Inc. 200
Franklin v. N.C. Alcoholic
Beverage Control Comm. 883
Frito-Lay, Inc., Richardson v. 410
Frizzell v. Mullen 200
Fulchon v. Fulchon 200

Gaddy, State v. 201
Gardon v. Colony Knits, Inc. 200
Garrison, State v. 643
Gateway Outdoor Advertising,
City of Charlotte v. 883
General Spray & Maintenance
Service, McLean v. 646
Gilbert v. Billings Freight
Systems 410
Guinn v. Allen 407
Gwyn, State v. 408

Hair v. Hair 645
Hall, State v. 884
Hammonds v. Hammonds 407
Hancock v. McGee 200
Hardesty, State v. 408
Hardin v. Don Love, Inc. 407
Harper, State v. 410
Harrell v. Kentucky Derby
Hosiery 407
Harrison, State v. 201
Harvey v. Harvey 642
Hedrick v. Atlantic Aero, Inc. 410
Herold, Resort Shops, Inc. v. 647
Hester, State v. 201
Hester, Pruitt v. 646
Hewett v. Wilson Tree Co. 407
Hinton, State v. 408
Hinton, State v. 643
Hoffstedder, Engel v. 410
Holloway, State v. 201
Holly, State v. 408
Home Loan Mortgage
Assistance, State v. 410
Honablew, State v. 408
Honeycutt, State v. 884
Hood, State v. 201
Hooper, State v. 648
Hoots v. Wilkins 645
Howell v. Owen Mfg. Co. 642

	PAGE
In re Anderson	642
In re Ayers	646
In re Doster	883
In re Foreclosure of Taylor	407
In re Jerry C.	642
In re Judd	407
In re Maxwell	646
In re Parrish	642
In re Waldren	646
In re Will of Mason	646
In re Wyatt	646
Integon Indemnity Corp., Winner v.	645
Inzar, State v.	201
Jackson, State v.	648
James, State v.	884
Jenkins, State v.	648
Jenkins v. Wilson	642
Jerry C., In re	642
Johnson, State v.	408
Johnson, State v.	643
Johnson v. Wachovia Bank & Trust Co.	646
Jones v. Elastic Fabrics of America	407
Jones, Edmondson v.	410
Jones, State v.	201
Jordan v. Pfeiffer College	646
Judd, In re	407
Kentucky Derby Hosiery, Harrell v.	407
Key, Dickens v.	642
Kidd, Bailey v.	407
Kiehart v. O'Neill	643
Kirk, Smith v.	643
Kirkman, City of Greensboro v.	410
Kryder v. Chapel Hill-Carrboro Bd. of Educ.	646
Lacy v. Weyerhaeuser Co.	646
Latta, Board of Education of Hickory v.	645
Lawson, State v.	408
Ledford, State v.	409
Lenoir, State v.	409
Lewis v. Nationwide Mutual Ins. Co.	883

	PAGE
Lewis, State v.	884
Lewis v. Yonkers Contracting/ Diversified Concrete Products	646
Liberman v. Liberman	643
Lloyd Table Co., Crawford v.	410
Lodal, Inc., City of Durham v.	407
Love v. Tyson	643
Lucas, State v.	884
Lyles, State v.	648
MacDonald, Apo v.	409
MacDonald, Burnette v.	410
Marshall v. MBG Management, Inc.	883
Marshall, State v.	884
Martin v. Piedmont Asphalt & Paving	643
Massie Furniture Co., Owens v.	643
Maxwell, In re	646
MBG Management, Inc., Marshall v.	883
McCain v. Mid-State Ford, Inc.	646
McCormick v. Cecil King Trucking Co.	646
McGee, Hancock v.	200
McLaurin v. Averitt	643
McLean v. General Spray & Maintenance Service	646
McMackin, Smith v.	884
McManus, State v.	409
McNair, State v.	409
McSwain, Aetna Casualty & Surety Co. v.	409
Mid-State Ford, Inc., McCain v.	646
Miles Inc. v. Photo Magic, Inc.	883
Miller v. Betz	646
Miller v. Evans	410
Miller, State v.	201
Miller, Vosburgh v.	649
Miller, State v.	648
Millsaps, State v.	648
Milton, State v.	644
Moore v. Beaufort County Bd. of Ed.	408
Mosby, State v.	648
Motley, State v.	648
Mullen, Frizzell v.	200
Murphy v. Vanderpool	883

	PAGE
Murphy v. Williams	883
Nationwide Mutual Ins. Co., Lewis v.	883
N.C. Alcoholic Beverage Control Comm., Franklin v.	883
N.C. Dept. of Correction v. Patterson	408
N.C. High School Athletic Assn., Ragsdale v.	200
Newsome, State v.	884
Nimer, State v.	644
Nobles v. First Carolina Communications	200
North American Philips Consumer Electronics, Wager v.	411
O'Brien v. Terrell Gear Drives	410
O'Neill, Kiehart v.	643
Obieschi, State v.	648
Ormond, State v.	648
Ostling, State v.	884
Owen Mfg. Co., Howell v.	642
Owens v. Massie Furniture Co.	643
Paris v. Woolard	200
Parker, Street v.	409
Parrish, In re	642
Patterson, N.C. Dept. of Correction v.	408
Peanut Shack of America, Blue Ridge Ltd. Partnership v.	642
Perdue Farms, Inc., Tripp v.	644
Perdue Farms, Inc., Weaver v.	202
Perry, Quality Food Management v.	883
Pfeiffer College, Jordan v.	646
Phillips, Brantley v.	407
Phipps, State v.	648
Photo Magic, Inc., Miles Inc. v.	883
Piedmont Asphalt & Paving, Martin v.	643
Pone, State v.	644
Poole, State v.	648
Price, State v.	648
Proctor, State v.	644
Pruitt v. Hester	646
Pulley, State v.	648

	PAGE
Purifoy v. Spivey	643
Quality Food Management v. Perry	883
Ragsdale v. N.C. High School Athletic Assn.	200
Raintree Country Club, Village of Raintree Homeowners v.	411
Ratliffe v. Sun State Drywall	647
Raymer, State v.	884
Reddick, State v.	644
Reed v. Town of Longview	408
Reese, State v.	649
Reinhardt v. Cronland Lumber Co.	883
Republican Party of N.C. v. Bartlett	643
Resort Shops, Inc. v. Herold	647
Rhodie, State v.	201
Rhodie, State v.	649
Richardson v. Dellinger	883
Richardson v. Frito-Lay, Inc.	410
Robert Bosch Power Tool Corp, Boisseau v.	645
Roberts, State v.	409
Rorie, State v.	409
Sanchez, State v.	411
Saunders v. Allstate Ins. Co.	883
Schneider Mills, Inc., Branton v.	642
Sheppard v. Crescent Inks, Inc.	408
Sides, State v.	644
Simpson, State v.	649
Smith v. Kirk	643
Smith v. McMackin	884
Smith v. Smith	884
Smith, State v.	201
Smith, State v.	644
Smith v. Wiscassett Mills Co.	408
Smoky Mtn. Area Mental Health, Strickland v.	202
Smyre, State v.	202
Southerland, State v.	409
Southwestern Freight Carriers, Thompson v.	884
Spears v. Talford	647
Spivey, Purifoy v.	643

	Page
St. John, State v.	884
Star Trax, Inc., Frank v.	200
Starnes v. Broyhill Furniture Industries	201
State v. Anderson	647
State v. Barnette	201
State v. Bethea	647
State v. Bivens	408
State v. Blakeney	647
State v. Bonham	643
State v. Boston	201
State v. Boulware	643
State v. Bright	647
State v. Brown	408
State v. Brown	647
State v. Caldwell	201
State v. Carter	410
State v. Coffey	647
State v. Colburn	647
State v. Crummy	647
State v. Daniels	201
State v. Dorsette	643
State v. Duke	647
State v. Ellis	643
State v. Ellis	648
State v. Fashaw	648
State v. Fields	408
State v. Gaddy	201
State v. Garrison	643
State v. Gwyn	408
State v. Hall	884
State v. Hardesty	408
State v. Harper	410
State v. Harrison	201
State v. Hester	201
State v. Hinton	408
State v. Hinton	643
State v. Holloway	201
State v. Holly	408
State v. Home Loan Mortgage Assistance	410
State v. Honablew	408
State v. Honeycutt	884
State v. Hood	201
State v. Hooper	648
State v. Inzar	201
State v. Jackson	648
State v. James	884
State v. Jenkins	648
State v. Johnson	408
State v. Johnson	643
State v. Jones	201
State v. Lawson	408
State v. Ledford	409
State v. Lenoir	409
State v. Lewis	884
State v. Lucas	884
State v. Lyles	648
State v. Marshall	884
State v. McManus	409
State v. McNair	409
State v. Miller	201
State v. Miller	648
State v. Millsaps	648
State v. Milton	644
State v. Mosby	648
State v. Motley	648
State v. Newsome	884
State v. Nimer	644
State v. Obieschi	648
State v. Ormond	648
State v. Ostling	884
State v. Phipps	648
State v. Pone	644
State v. Poole	648
State v. Price	648
State v. Proctor	644
State v. Pulley	648
State v. Raymer	884
State v. Reddick	644
State v. Reese	649
State v. Rhodie	201
State v. Rhodie	649
State v. Roberts	409
State v. Rorie	409
State v. Sanchez	411
State v. Sides	644
State v. Simpson	649
State v. Smith	201
State v. Smith	644
State v. Smyre	202
State v. Southerland	409
State v. St. John	884
State v. Stewart	644
State v. Stewart	644
State v. Thomas	202
State v. Tilley	649
State v. Toney	644

	PAGE
State v. Wadsworth	649
State v. Wallace	644
State v. Welch	411
State v. Whitaker	884
State v. Whitfield	409
State v. Williams	649
State v. Wooten	202
State v. Workman	644
State v. Worley	644
State v. Worley	644
State v. Yancey	409
State v. Yon	649
Staveren v. Staveren	411
Stewart, State v.	644
Stewart, State v.	644
Street v. Parker	409
Strickland v. Smoky Mtn. Area Mental Health	202
Sun State Drywall, Ratliffe v.	647
Talford, Spears v.	647
Taylor v. Collins	202
Terrell Gear Drives, O'Brien v.	410
Terry v. Terry	644
Thomas, State v.	202
Thompson v. Southwestern Freight Carriers	884
Tilley, State v.	649
Toney, State v.	644
Town of Longview, Reed v.	408
Trion, Inc., Childress v.	645
Tripp v. Perdue Farms, Inc.	644
Trull v. Central Carolina Bank & Trust Co.	202
Tweed v. Bryan Easler Enterprises	649
Tyson, Love v.	643
United Brands International, Carolina Imprints, Inc. v.	407
United Merchants & Mfg., Bradley v.	642
Vanderpool, Murphy v.	883
Vaughn & Melton v. Carriage Park Dev. Corp.	411
Vick v. Williams	644
Village of Raintree Homeowners v. Raintree Country Club	411

	PAGE
Vosburgh v. Miller	649
Wachovia Bank & Trust Co., Johnson v.	646
Wadsworth, State v.	649
Wager v. North American Philips Consumer Electronics	411
Waldren, In re	646
Wallace, State v.	644
Weaver v. Perdue Farms, Inc.	202
Welch, State v.	411
Weyerhaeuser Co., Lacy v.	646
Whitaker, State v.	884
White, Apple v.	200
Whitfield, State v.	409
Whitin Roberts Co. v. Alliance Ins. Group	884
Wilkie v. Wilkie	645
Wilkie, Wilkie v.	645
Wilkins, Hoots v.	645
Will of Mason, In re	646
Williams, Vick v.	644
Williams, Murphy v.	883
Williams, State v.	649
Wilson, Jenkins v.	642
Wilson Tree Co., Hewett v.	407
Winfree v. Curly's Harley Davidson	649
Wingo v. Wingo	649
Wingo, Wingo v.	649
Winner v. Integon Indemnity Corp.	645
Wiscassett Mills Co., Smith v.	408
Woody, Dockery v.	200
Woolard, Paris v.	200
Wooten, State v.	202
Workman, State v.	644
Worley, State v.	644
Worley, State v.	644
Wyatt, In re	646
Yancey, State v.	409
Yon, State v.	649
Yonkers Contracting/ Diversified Concrete Products, Lewis v.	646

G.S.	
1-15(c)	Garrett v. Winfree, 689
1-54.1	Thompson v. Town of Warsaw, 471
1-75.4(5)(a)	Chapman v. Janko, U.S.A., 371
1-292	Venture Properties I v. Anderson, 852
1-567.2	Carteret County v. United Contractors of Kinston, 386
1A-1	See Rules of Civil Procedure, infra
6-19.1	N.C. Dept. of Correction v. Harding, 451
	N.C. Dept. of Correction v. Myers, 437
6-21.1	West v. Tilley, 72
7A-314(d)	Town of Chapel Hill v. Fox, 630
7A-666	In re Robinson, 874
7A-667(2)	In re Robinson, 874
8-50.1	Johnson v. Johnson, 1
8-50.1(b)	Johnson v. Johnson, 1
8C-1	See Rules of Evidence, infra
14-7.3	State v. Young, 456
14-7.5	State v. Brunson, 571
14-90	State v. Rhome, 278
14-149	State v. Sammartino, 597
14-230	State v. Rhome, 278
14-269.2(b)	In re Cowley, 274
15-11.1(a)	State v. Bonds, 546
15A-926(a)	State v. Holmes, 54
15A-926(b)(2)	State v. Holmes, 54
15A-975(c)	State v. Watkins, 804
15A-979(b)	State v. McBride, 623
15A-1213	State v. Brunson, 571
15A-1231(b)	State v. Brunson, 571
15A-1232	State v. Hensley, 313
	State v. Merritt, 732
15A-1340.4(a)(1)(a)	State v. Holmes, 54
15A-1340.4(a)(1)(f)	State v. Evans, 752

G.S.	
15A-1340.4(a)(1)(g)	State v. Evans, 752
15A-1340.4(e)	State v. Jordan, 364
20-138.2	State v. Cothran, 633
24-5	Roberts v. Young, 720
24-5(a)	Metromont Materials Corp. v. R.B.R. & S.T., 616
Chapter 47A	Miesch v. Ocean Dunes Homeowners Assn., 559
Chapter 47C	Miesch v. Ocean Dunes Homeowners Assn., 559
50A-7	Watkins v. Watkins, 475
52A-3(4)	Kalen v. Kalen, 196
52A-11	Kalen v. Kalen, 196
52-10.1	Williams v. Williams, 707
58-30-220	State ex rel. Long v. Interstate Casualty Ins. Co., 743
67-4.1	Caswell County v. Hanks, 489
67-4.1(a)(2)c	Caswell County v. Hanks, 489
96-8(6)a	State ex rel. Employment Security Comm. v. Huckabee , 217
97-2	McAnelly v. Wilson Pallet and Crate Co., 127
97-47	Dinkins v. Federal Paper Board Co., 192
	Garrett v. Winfree, 689
97-63	Walters v. Blair, 398
105-278.3	In re Appeal of Mount Shepherd Methodist Camp, 388
115C-517	Board of Education of Hickory v. Seagle, 566
126-7.1(c)	Dockery v. N.C. Dept. of Human Resources, 827
126-85	Aune v. University of North Carolina, 430
131E-6(4)	Hospital Corp. of N.C. v. Iredell County, 445
131E-13(d)	Hospital Corp. of N.C. v. Iredell County, 445
136-130	Appalachian Poster Advertising Co. v. Harrington, 72
136-133	Appalachian Poster Advertising Co. v. Harrington, 72
150B-51(a)	In re Appeal of Ramseur, 521
Chapter 160A	Thompson v. Town of Warsaw, 471
160A-485(a)	Lyles v. City of Charlotte, 96

RULES OF EVIDENCE CITED AND CONSTRUED

Rule No.	
404	State v. Holmes, 54
404(b)	State v. Barber, 505
	Johnson v. Amethyst Corp., 529
411	Carrier v. Starnes, 513
608(b)	Johnson v. Amethyst Corp., 529
803(24)	State v. Rhome, 278

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
11	Pleasant Valley Promenade v. Lechmere, Inc., 650
11(a)	Bass v. Sides, 485
15(b)	Johnson v. Friends of Weymouth, Inc., 255
26(g)	Williams v. N.C. Dept. of Correction, 356
36(b)	Roberts v. Young, 720
37(b)(2)	Williams v. N.C. Dept. of Correction, 356
41(a)(1)	Roberts v. Young, 720
41(b)	Beam v. Kerlee, 203
	84 Lumber Co. v. Barkley, 271
42(b)	Roberts v. Young, 720
56	Venture Properties I v. Anderson, 852

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 14	N.C. Council of Churches v. State of North Carolina, 84

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

Amendment I	Moore v. City of Creedmoor, 27
Amendment XIV	Moore v. City of Creedmoor, 27

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
7	Thompson v. Town of Warsaw, 471
10(b)(2)	Roberts v. Young, 852
35(a)	Thompson v. Town of Warsaw, 471

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SAMMY ROGER JOHNSON, JR., PLAINTIFF v. LISA McGHEE JOHNSON (MEEHAN), DEFENDANT AND LISA McGHEE JOHNSON (MEEHAN), PLAINTIFF v. THOMAS C. MEEHAN, DEFENDANT

No. 9411DC552

(Filed 5 September 1995)

1. Evidence and Witnesses § 1920 (NCI4th); Illegitimate Children § 7 (NCI4th)— blood grouping tests—standing of defendant to request

The putative father of a child born to defendant mother during her marriage to plaintiff was an "interested party" within the meaning of N.C.G.S. § 8-50.1(b) and as such could move the trial court to order blood grouping tests to establish or disprove parentage, since the mother filed a separate action against the putative father to compel him to submit to blood grouping tests; her action was consolidated with plaintiff husband's original action against the mother for temporary custody of the minor child; and the putative father filed an acknowledgment of paternity.

Am Jur 2d, Illegitimate Children § 27.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights. 87 ALR4th 572.

2. Illegitimate Children § 7 (NCI4th)— presumption of legitimacy of child—blood grouping tests admissible to rebut presumption

When the question of paternity arises, N.C.G.S. § 8-50.1 allows the results of blood grouping tests to be used to rebut any presumptions of paternity in both criminal and civil actions. In this case, the putative father, who is now married to the mother, presented other facts and circumstances sufficient to question the presumption that the child in question, though born during the mother's marriage to plaintiff, was legitimate, where the putative father and the mother both filed acknowledgments of paternity of the minor child; while plaintiff husband was absent in Saudi Arabia for a six-month period ending 15 March 1991, the mother had intercourse with the putative father on numerous occasions; the mother did not have intercourse with anyone else during that period; when plaintiff husband returned 15 March 1991, he and the mother had intercourse on at least one occasion; the husband and the mother had been trying unsuccessfully to conceive a child for at least one year prior to the husband's leaving for Saudi Arabia; and the mother learned she was pregnant in early April 1991.

Am Jur 2d, Illegitimate Children § 27.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights. 87 ALR4th 572.

3. Evidence and Witnesses § 1920 (NCI4th); Illegitimate Children § 7 (NCI4th)— "alleged parent defendant"—applicability to presumed father-husband—husband compelled to submit to blood grouping tests

The term "alleged parent defendant" may apply to a presumed father-husband as well as a third party putative father; therefore, plaintiff husband could be compelled to submit to blood grouping tests under N.C.G.S. § 8-50.1(b), as he was the named defendant in the mother's counterclaim and in the paramour's crossclaim, and the husband alleged in his own complaint that he was the parent of the child.

Am Jur 2d, Illegitimate Children § 27.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights. 87 ALR4th 572.

4. Divorce and Separation § 350 (NCI4th)— custody action—blood grouping tests to determine paternity—best interests of child served by test

In the context of a proceeding to award custody of a minor child, an order compelling the parties to submit to blood grouping and DNA testing to determine paternity will best promote the interests and welfare of the child.

Am Jur 2d, Divorce and Separation § 974.

Right of putative father to custody of illegitimate child. 45 ALR3d 216.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights. 87 ALR4th 572.

Judge WALKER dissenting.

Appeal by plaintiff Sammy Roger Johnson, Jr., from order entered 19 January 1994 by Judge Franklin F. Lanier in Johnston County District Court. Heard in the Court of Appeals 21 February 1995.

Plaintiff Sammy Roger Johnson (hereinafter Mr. Johnson) appeals from an order granting defendant Thomas C. Meehan's motion to compel Mr. Johnson to submit to blood-grouping and DNA testing pursuant to G.S. 8-50.1. Mr. Johnson and defendant Lisa McGhee Johnson (hereinafter Mrs. Meehan) were married on 22 October 1988. On 1 December 1991, Mrs. Meehan gave birth to a baby girl, Samantha Renee Johnson. Samantha's birth certificate listed Mr. Johnson and Mrs. Meehan as parents.

The parties were separated on 8 August 1992. On 6 July 1992, Mr. Johnson filed a complaint seeking divorce from bed and board and temporary custody of the minor child. Mrs. Meehan answered and counterclaimed for child custody, support and paternity determination. Mrs. Meehan alleged that Mr. Johnson was not the natural father of the minor child and requested the trial court to order Mr. Johnson, Mrs. Meehan and the minor child to submit to blood testing pursuant to G.S. 8-50.1(b) for the purpose of establishing or disproving parentage.

On 27 August 1992, Mrs. Meehan filed a separate action against Thomas C. Meehan alleging that defendant Meehan was the father of her minor child and moved for an order that defendant Meehan, the minor child and Mrs. Meehan submit to blood group testing pursuant to G.S. 8-50.1(b). On 31 August 1992, Mr. Meehan filed an Acknowledgment of Paternity, alleging that he was the natural, biological father of Samantha Renee Johnson. On 9 October 1992, Mrs. Meehan moved the court to require Mr. Johnson to submit to blood-grouping testing pursuant to G.S. 8-50.1.

On 7 October 1992, the trial court consolidated Mr. Johnson's original action and Mrs. Meehan's action for blood testing. On 22 October 1992, the trial court entered an order denying Mrs. Meehan's motion to order Mr. Johnson to submit to blood-grouping testing pursuant to G.S. 8-50.1(b). Although Mr. Meehan was a party to the action prior to the hearing on Mrs. Meehan's motion, Mr. Meehan was not served by either party and did not attend the hearing or present evidence. On 19 November 1992, pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure, Mr. Meehan moved for a new trial and relief from the 22 October 1992 Order. On 10 November 1993, the trial court granted Mr. Meehan's motion for a new trial and relief from the 22 October 1992 Order.

On 19 January 1994, the trial court entered the following order compelling all parties, including Mr. Johnson, to submit to blood-grouping and DNA testing pursuant to G.S. 8-50.1:

FINDINGS OF FACT

. . . .

5. In addition to the issues of custody and support of Samantha Johnson, this action involves the issue of paternity in that Thomas C. Meehan and Lisa McGhee Johnson (Meehan) contend that Thomas C. Meehan is the biological father of the child. Sammy Roger Johnson contends that he is the biological father of the child. The paternity issue is pending for later determination.

6. Sammy Roger Johnson, Jr. filed an action for, among other things, child custody, against Mrs. Meehan on July 6, 1992. Thereafter, on August 3, 1992, Mrs. Meehan filed an Answer and Counterclaim against Mr. Johnson. In her Counterclaim, Mrs. Meehan asserted a claim for custody and a claim requesting the court to determine the paternity of Samantha Renee Johnson. On August 17, 1992, Mrs. Meehan filed a separate action in file num-

ber 92 CVD 1631, for a determination of the paternity of Samantha Renee Johnson. The two cases (92 CVD 1258 and 92 CVD 1631) were consolidated by Order of this court on October 7, 1992, making Mr. Meehan a party to both actions. Mr. Meehan filed a Crossclaim against Mr. Johnson for a determination of paternity.

7. On 21 October 1992, a hearing was held on Lisa McGhee Johnson's Motion for Blood Testing and/or Physical Examination. The Honorable O. Henry Willis, Jr. entered an order denying this motion.

8. Although Mr. Meehan was a party to this action prior to the hearing on 21 October 1992, he was not served by either Sammy Roger Johnson, Jr. or Lisa McGhee Johnson or their attorneys with notice of the hearing held on 21 October 1992. Mr. Meehan did not attend the hearing or present any evidence and was not represented by counsel at the hearing. On or about 10 November 1993, an Order was entered by the undersigned granting Thomas Meehan's Motion for New Trial.

9. Sammy Roger Johnson was out of the United States in Saudi Arabia for a six (6) month period ending on 15 March 1991. During February 1991, Lisa Johnson (Meehan) had sexual intercourse with Thomas Meehan approximately twenty (20) times. Lisa testified that in February 1991, she did not have sexual intercourse with anyone other than Thomas Meehan. From 1 March 1991 until 15 March 1991, Lisa Johnson Meehan had sexual intercourse with Thomas Meehan approximately ten (10) times. From 1 March 1991 until 15 March 1993, Lisa Johnson (Meehan) did not have sexual intercourse with anyone other than Thomas Meehan.

10. Sammy Roger Johnson returned to the United States on 15 March 1991 and he and Lisa Johnson (Meehan) had sexual intercourse at least one time on this occasion.

11. Lisa Johnson (Meehan) and Thomas Meehan testified that they have married and have a daughter named Amanda Meehan, born 5 August 1993, who is the sister of the child Samantha Johnson. Amanda was born twelve months after Mr. Johnson and Mrs. Meehan separated from one another. Sammy Johnson testified that he is not the father of Amanda Meehan. However, Sammy Roger Johnson's name appears on Amanda Meehan's birth certificate, since he was still married to Lisa Johnson on Amanda's date of birth.

12. On or about 7 March 1992, Lisa Johnson (Meehan) told Sammy Roger Johnson that she had an affair with Thomas Meehan and that Sammy Roger Johnson was not the biological father of Samantha Renee Johnson.

13. Sammy Roger Johnson testified that Mrs. Meehan told him that he was not the biological father of Samantha Renee Johnson, but that she did not know who was the biological father.

14. Mrs. Meehan and Mr. Meehan have both submitted to blood and DNA testing in September 1992. The results of these tests were offered into evidence by Mr. Meehan at this hearing, but were not admitted into evidence by the court, and were neither available or ready at the time this court heard Mrs. Meehan's Motion for Blood Testing and/or Physical Examination on October 7, 1992, in File Number 92 CVD 1258.

15. For a period of at least one (1) year before Sammy Roger Johnson left for Saudi Arabia, he and Lisa Johnson (Meehan) had sexual intercourse without any contraception and had not conceived. The question of their ability to conceive and have a child arose before Sammy Johnson left for Saudi Arabia and he went for infertility testing to see if he had a problem.

16. The Court considered the information contained in Meehan's Exhibit 6.

17. Mrs. Meehan first learned that she was pregnant with Samantha Renee Johnson in or around early April, 1991. She had begun having morning sickness at that time, and she missed her monthly menstrual period. Mrs. Meehan went to the doctor in April, 1991, and her pregnancy was confirmed at that time. Samantha Renee Johnson was born on December 1, 1991, was a full-term baby, and was not born prematurely.

18. Mrs. Meehan testified that she believes that Mr. Meehan is the father of Samantha Renee Johnson. Mr. Meehan testified that he believes that he is the father of Samantha Renee Johnson. Mr. Johnson testified that he believes that he is the father of Samantha Renee Johnson.

19. Although Mrs. Meehan and Mr. Meehan, through their attorneys of record request to the court to grant Mr. Meehan's Motion for DNA and Blood Testing pursuant to both N.C.G.S. 8-50.1 and Rule 35 of the North Carolina Rules of Civil Procedure,

the Court finds that the Motion should be allowed only pursuant to N.C.G.S. 8-50.1.

20. There has been good cause shown for the granting of Mr. Meehan's Motion for Blood Testing.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. This matter is properly before the court and all parties have received proper notice of the hearing.

3. The issue of paternity has been properly raised and pled by Mrs. Meehan in her Counterclaim and by Mr. Meehan in his Crossclaim filed in these actions.

4. Sammy Roger Johnson is an "alleged-parent defendant" by virtue of the counterclaim and crossclaim filed against him by Lisa Johnson (Meehan) and Thomas Meehan.

5. Mr. Meehan's Motion for Blood and DNA Testing should be granted, pursuant to N.C.G.S. 8-50.1.

6. There has been good cause shown for the granting of Mr. Meehan's Motion for Blood Testing.

7. Sammy Roger Johnson, Jr., Lisa McGhee Johnson Meehan, and Thomas C. Meehan are all parties to this action in which their physical conditions and blood groupings are in controversy. Samantha Renee Johnson is a child in the custody of a party or parties to this action, and her physical condition, including her blood grouping, is in controversy.

It is therefore ORDERED as follows:

1. All parties are ordered to submit themselves to Roche Biomedical Laboratory, 1643-A Owen Drive, Fayetteville, North Carolina (1-800-726-7624) for DNA and Blood Grouping testing, within forty five (45) days from entry of this Order on 19 January 1994. Sammy Roger Johnson, Jr. and Lisa McGhee Johnson Meehan, who have temporary joint custody, without prejudice, of Samantha Renee Johnson, are ordered to and shall submit Samantha Renee Johnson to Roche Biomedical Laboratory,

1643-A Owen Drive, Fayetteville, NC, for DNA testing and Blood Grouping testing within forty five (45) days from entry of this Order on 19 January 1994. The results of the tests are to be submitted to the attorneys for all of the parties in this action by Roche Biomedical Laboratory within thirty days after the testing occurs. . . .

2. Thomas C. Meehan shall pay all costs associated with the DNA and Blood testing ordered herein.

Mr. Johnson appeals.

Mast, Morris, Schulz & Mast, P.A., by George B. Mast, Bradley N. Schulz and Christi C. Stem, for plaintiff-appellant.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellee Meehan.

EAGLES, Judge.

Mr. Johnson appeals the trial court's order compelling him to submit to blood-grouping and DNA testing pursuant to G.S. 8-50.1(b). After careful review, we affirm.

I.

We note initially that "[a] court order requiring parties and their minor child to submit to bloodgrouping testing does not affect a substantial right and is, therefore, interlocutory and not [immediately] appealable." *State Ex Rel. Hill v. Manning*, 110 N.C. App. 770, 772, 431 S.E.2d 207, 208 (1993). However, this Court may issue a writ of certiorari to review a trial court's order " 'when no right of appeal from an interlocutory order exists.' " *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984), *quoting* N.C. R. App. P. 21(a)(1). We choose to treat Mr. Johnson's interlocutory appeal as a petition for writ of certiorari and address the merits.

II.

[1] Mr. Johnson first contends that Mr. Meehan has no standing to move for blood-grouping tests under G.S. 8-50.1(b). We disagree. Mr. Johnson cites the United States Supreme Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L.Ed.2d 91 (1989), as authority for the proposition that a third-party, such as Mr. Meehan, has no standing to compel the husband of the biological mother to submit to a

blood test to establish or disprove the paternity of a child born during the marriage. We find *Michael H.* inapposite. *Michael H.* involved the constitutionality of a California statute which prohibited a third party from seeking parental rights of a child born during the marriage of the biological mother to another man. The California statute at issue in *Michael H.* provided that " 'the issue of a wife cohabiting with her husband, who is not impotent or sterile, is *conclusively presumed* to be a child of the marriage.' " *Michael H.*, 491 U.S. at 115, 105 L.Ed.2d at 101, *quoting* Cal. Evid. Code Ann. § 621(a) (West Supp. 1989) (emphasis added). The statute further provided explicitly that only the husband or wife could move for blood tests to determine paternity and then only within two years of the child's birth. *Michael H.*, 491 U.S. at 115, 105 L.Ed.2d at 101, citing Cal. Evid. Code Ann. §§ 621 (c) & (d). The Supreme Court held that the California statute did not deny third parties any substantive due process right to establish a parental relationship with the child. The Court did not hold that a putative father never has standing to challenge the marital presumption of legitimacy. Rather, the Court there held that states could place limits on such challenges.

The California statute at issue in *Michael H.* is far more restrictive than the North Carolina statute at issue here, G.S. 8-50.1(b). It provides in pertinent part:

> (b) In the trial of any civil action in which the question of parentage arises, the court before whom the matter may be brought, upon motion of the plaintiff, alleged-parent defendant, or other interested party, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage.

Here, Mr. Meehan is an "interested party" under the statute. Mrs. Meehan filed a separate action against Mr. Meehan to compel Mr. Meehan to submit to blood-grouping tests pursuant to G.S. 8-50.1(b) to establish or disprove parentage. Mrs. Meehan's action against Mr. Meehan was consolidated with Mr. Johnson's original action against Mrs. Meehan for temporary custody of the minor child. Mrs. Meehan and Mr. Meehan have both filed acknowledgments of paternity. Under these facts, Mr. Meehan is clearly an "interested party" within the meaning of the statute and as such may move the trial court to order blood-grouping tests.

III.

[2] Mr. Johnson further argues that the minor child was born during his marriage to Mrs. Meehan and is presumed to be legitimate. Mr. Johnson further argues that Mr. Meehan has no standing to rebut the marital presumption and that G.S. 8-50.1 should not be construed to confer standing to Mr. Meehan to challenge this presumption. We disagree. In *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968), our Supreme Court stated:

> When a child is born in wedlock, the law presumes it to be legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access to his wife.

Id. at 197, 159 S.E.2d at 568. The presumption that a child born during the marriage is legitimate is a *rebuttable* presumption. *Eubanks*, 273 N.C. at 189, 159 S.E.2d at 562. It may be rebutted "only by facts and circumstances which show that the husband could not have been the father, *as that* he was impotent or could not have had access to his wife." *Id.* (emphasis added). As our Supreme Court further explained in *Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972), "[i]mpotency and nonaccess are set out therein [in *Eubanks*] as *examples* of types of evidence that would 'show that the husband could not have been the father.' " *Id.* at 171, 188 S.E.2d at 325.

In *Wright, supra*, plaintiff-wife instituted an action against defendant-husband for alimony *pendente lite*, custody of and support for her minor child. *Wright*, 281 N.C. at 160, 188 S.E.2d at 318. Defendant-husband answered and admitted that the minor child was "entitled to support from him, regardless of the court's decision relative to custody of the said child." Plaintiff-wife, however, objected to thirty interrogatories submitted to her by Mr. Wright which called for her to answer detailed questions concerning whether plaintiff-wife was having an adulterous affair at the time of the minor child's conception. *Id.* at 161, 188 S.E.2d at 319. The trial court then allowed defendant-husband's motion that plaintiff-wife, defendant-husband and the minor child submit to blood-grouping tests pursuant to G.S. 8-50.1. *Id.* This Court reversed the trial court's order requiring the parties to submit to blood-grouping tests. *Id.* at 163, 188 S.E.2d at 320.

Our Supreme Court reversed and held that defendant-husband was entitled to have the order for blood-grouping tests. *Id.* at 173, 188

S.E.2d at 326. At the time of the Court's decision in *Wright*, G.S. 8-50.1 provided:

> Competency of evidence of blood tests.—In the trial of any criminal action or proceedings in any court in which the question of paternity arises, *regardless of any presumptions with respect to paternity*, the court before whom the matter may be brought, upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test . . . . *Such evidence shall be competent to rebut any presumptions of paternity.*
>
> In the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person.

Wright, 281 N.C. at 168-69, 188 S.E.2d at 323-24. Although the first paragraph of G.S. 8-50.1 authorizing the trial court to order blood-grouping tests "regardless of any presumptions with respect to paternity" arguably could have been read to apply only in criminal actions in which the question of paternity arose, the Supreme Court stated:

> [W]e are of opinion and hold that in both criminal and civil actions in which the question of paternity arises, the results of such blood-grouping tests must be admitted in evidence when offered by a duly licensed practicing physician or other qualified person, "regardless of any presumptions with respect to paternity," and that "[s]uch evidence shall be competent to rebut any presumptions of paternity."

Id. at 170, 188 S.E.2d at 324. The Court further concluded that, "[a]ssuming the blood-grouping tests are made and offered in evidence by qualified persons, the results thereof, if they tend to exclude defendant as the father of the child, may be offered in evidence to rebut the common-law presumption of legitimacy." *Id.* at 172, 188 S.E.2d at 326.

Here, Mr. Meehan has presented "other facts and circumstances" sufficient to question the presumption that the child, though born during the marriage, is legitimate. Mr. Meehan and Mrs. Meehan have

both filed acknowledgments of paternity of the minor child. In the trial court's 19 January 1994 Order compelling the parties to submit to blood-grouping tests, the trial court found that while Mr. Johnson was absent in Saudi Arabia for a six month period ending 15 March 1991, Mrs. Meehan had sexual intercourse with Mr. Meehan on numerous occasions. Mrs. Meehan did not have sexual intercourse with anyone else during that period. When Mr. Johnson returned 15 March 1991, Mr. Johnson and Mrs. Meehan had sexual intercourse on at least one occasion. Mr. Johnson and Mrs. Meehan had been trying unsuccessfully to conceive a child for at least one year prior to Mr. Johnson leaving for Saudi Arabia. Mrs. Meehan learned that she was pregnant in early April 1991.

Mr. Johnson did not assign error to any of these findings of fact and there is competent evidence in the record to support each of them. The factual findings are sufficient "other facts and circumstances" to challenge the presumption of legitimacy. Based on our Supreme Court's holding in *Wright v. Wright*, 281 N.C. at 170, 188 S.E.2d at 324, we conclude that when the question of paternity arises, G.S. 8-50.1 allows the results of blood-grouping tests to be used to rebut any presumptions of paternity in both criminal and civil actions.

IV.

[3] Mr. Johnson next contends that he cannot be compelled to submit to blood-grouping tests because under G.S. 8-50.1(b) only "the alleged-parent defendant, the known natural parent, and the child" can be ordered to submit to blood-grouping tests. Mr. Johnson argues that as the "presumed father-husband," he cannot be the "alleged-parent defendant." We disagree. From the pleadings, it is clear that Mr. Johnson is the named defendant in Mrs. Meehan's counterclaim and in Mr. Meehan's crossclaim. Mr. Johnson has alleged in his own complaint that he is the parent of the child. Accordingly, Mr. Johnson is an "alleged-parent defendant" as determined by the trial court in its conclusions of law and is subject to being required to submit to blood-grouping tests. The trial court concluded that "good cause" had been shown for the granting of Mr. Meehan's motion for blood-grouping tests and therefore ordered all the parties to submit to DNA and blood-grouping testing that would provide to the court the most dependable evidence available to determine paternity.

In *Ban v. Quigley*, 812 P.2d 1014 (Ariz. Ct. App. 1990) the Arizona Court of Appeals rejected the petitioners' argument that the word

"father" in a statute allowing the mother, father or guardian of the child to bring paternity actions was meant to include only the presumptive father-husband as opposed to the putative father. The Court held that the term "father" was "intended to mean the putative father, presumed or otherwise." *Quigley*, 812 P.2d at 1017. We likewise conclude that the term "alleged-parent defendant" may apply to a presumed father-husband as well as a third party putative father.

V.

[4] Finally, Mr. Johnson contends that allowing Mr. Meehan to rebut the marital presumption of legitimacy by compelling Mr. Johnson to submit to blood-grouping tests pursuant to G.S. 8-50.1(b) would violate public policy and would not be in the child's best interest. The trial court's order compelling Mr. Johnson to submit to DNA and blood-grouping tests to determine paternity arose in the context of deciding whether Mr. Johnson or Mrs. Meehan should have temporary custody of the minor child pending the parties' divorce proceeding. An order awarding custody of a minor child should award custody to the person that "will best promote the interest and welfare of the child." G.S. 50-13.2. " '[T]he welfare of the child is the paramount consideration to which all other factors, including common law preferential rights of the parents, must be deferred or subordinated.' " *Surles v. Surles*, 113 N.C. App. 32, 37, 437 S.E.2d 661, 663 (1993) (quoting *Plemmons v. Stiles*, 65 N.C. App. 341, 345, 309 S.E.2d 504, 506 (1983)). Evidence of paternity may be considered in determining what is in the child's best interest. *Surles*, 113 N.C. App. at 36, 437 S.E.2d at 663. We also note that in those jurisdictions that allow a putative father to bring a paternity action to establish the paternity of a child born during the marriage of the biological mother to another man, the trial courts are required to consider whether allowing the putative father to assert paternity and seek blood-grouping tests in an attempt to prove or disprove his paternity would be in the child's best interest. In *Ban v. Quigley*, 812 P.2d 1014 (Ariz. Ct. App. 1990), the Court of Appeals of Arizona held:

> Arizona has a strong public policy of preserving the family unit when neither the mother nor the mother's husband disavows the latter's paternity of the child. Because of that policy, we conclude that the trial court must specifically consider whether it would be in the best interests of the child for the case to proceed before a putative father may be permitted to seek blood tests in an attempt to rebut the presumption of the husband's paternity.

Id. at 1017. Washington, Massachusetts, Maryland and Kansas all have similar requirements that the trial court first consider whether ordering the blood tests and the potential impact of the results will be in the child's best interest. *See McDaniels v. Carlson*, 738 P.2d 254 (Wash. 1987); *C.C. v. A.B.*, 550 N.E.2d 365 (Mass., 1990); *Turner v. Whisted*, 607 A.2d 935 (Md. 1992); *In re Marriage of Ross*, 783 P.2d 331 (Kan. 1990). For these reasons, we conclude that in the context of a proceeding to award custody of a minor child, an order compelling the parties to submit to blood-grouping and DNA testing to determine paternity "will best promote the interest and welfare of the child." G.S. 50-13.2. Accordingly, we affirm the trial court's order compelling Mr. Johnson to submit to blood-grouping and DNA testing pursuant to G.S. 8-50.1(b).

Affirmed.

Judge McGEE concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

The legal issue presented is a narrow one: Does the language of N.C. Gen. Stat. § 8-50.1 in effect when this action originated confer standing upon an alleged natural parent such as Mr. Meehan to compel a presumed father such as Mr. Johnson to submit to a blood test to determine the paternity of a child born during the marriage of the presumed father to the natural mother? A careful review of the statute and the arguments of the parties in this case leads me to conclude that it does not. I must therefore respectfully dissent from the majority's holding.

I.

I believe that the resolution of this issue must begin with an examination of the marital presumption and its applicability to the present case. The marital presumption has been expressed as follows:

> When a child is born in wedlock, the law presumes it to be legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access to his wife.

Eubanks v. Eubanks, 273 N.C. 189, 197, 159 S.E.2d 562, 568 (1968) (citations omitted); *see also In re Legitimation of Locklear*, 314 N.C. 412, 419, 334 S.E.2d 46, 51 (1985). "This rebuttable presumption of legitimacy of a child born to a married woman 'is one of great antiquity, and, doubtless [was applied] to avoid the serious disabilities attaching to the status of illegitimacy . . . .' " *Locklear*, 314 N.C. at 419, 334 S.E.2d at 51 (*quoting* 10 Am. Jur. 2d *Bastards* § 11, at 852 (1963)). The presumption "is universally recognized and considered one of the strongest known to the law." *Id.* Our Supreme Court has recognized the continuing validity of the marital presumption:

> There is strong public policy supporting this presumption. The law, as it ought, favors the legitimacy of children. Children of a married woman ought to be, and almost always are in fact, fathered by her husband. The presumption recognizes this. It presumes and promotes the integrity of the family—the seminal unit of society as we know it.

State v. White, 300 N.C. 494, 508, 268 S.E.2d 481, 490 (1980); *see also L.C. v. T.L.*, 870 P.2d 374, 380 (Wyo.) (citation omitted) (" 'the presumption of legitimacy is . . . based on an overriding social policy derived from the relationship of a presumed father and the child at the time of birth' "), *cert. denied, Lawrence C. v. Timothy L.*, — U.S. —, 130 L. Ed. 2d 127 (1994).

Since Samantha was born during the marriage of Lisa Johnson and Sammy Johnson, the marital presumption clearly applies here, and I agree with the majority's opinion to the extent it implicitly rejects Mr. Meehan's argument to the contrary. However, I cannot agree with the majority's conclusion that, under the facts of this case, N.C. Gen. Stat. § 8-50.1 allows Mr. Meehan to rebut the presumption by compelling Mr. Johnson to submit to blood tests which allegedly would show that Mr. Johnson cannot be Samantha's father.

II.

I acknowledge that this State has long recognized that the marital presumption is rebuttable by evidence of non-access, impotence, or other circumstances tending to show that the mother's husband could not be the father. *Eubanks*, 273 N.C. at 197, 159 S.E.2d at 568; *Locklear*, 314 N.C. at 419, 334 S.E.2d at 51. The majority, perhaps recognizing that Mr. Meehan's evidence is insufficient to *rebut* the presumption, nonetheless concludes that "Mr. Meehan has presented

'other facts and circumstances' sufficient to question the presumption that the child, though born during the marriage, is legitimate."

The majority first notes that both Mr. Meehan and Ms. Meehan have filed acknowledgements of paternity of the minor child. I have found no authority for the proposition that self-serving acknowledgements of paternity by a natural mother and putative father, standing alone, constitute evidence sufficient to rebut the marital presumption. Perhaps recognizing this, the majority goes on to note that the trial court in its 19 January 1994 order found that during Mr. Johnson's six-month tour of duty in Saudi Arabia, which ended on 15 March 1991, Ms. Meehan had sexual intercourse with Mr. Meehan on numerous occasions; that she did not have sexual intercourse with anyone else during that period; that Mr. Johnson and Ms. Meehan had sexual intercourse at least once upon his return on 15 March 1991; and that Mr. Johnson and Ms. Meehan had been trying unsuccessfully to conceive a child for at least a year prior to Mr. Johnson's absence. The majority points out that Mr. Johnson did not assign error to any of these findings. However, he did object and except to entry of the court's order; by doing so, he preserved for review the question of whether the court's findings supported its conclusions of law and its order. *See Morris v. Morris*, 90 N.C. App. 94, 97, 367 S.E.2d 408, 410 (1988) (where appellant's only exception and assignment of error is to trial court's entry of judgment, reviewing court may determine whether findings of fact support conclusions of law and judgment entered thereon).

The record contains facts not mentioned by the majority which, in my opinion, should have been considered in the majority's determination that Mr. Meehan presented "other facts and circumstances" sufficient to question the presumption of legitimacy. For example, Mr. Johnson testified that when he went for infertility testing after he and Lisa Johnson had tried unsuccessfully to conceive a child, the results of his sperm count test were inconclusive and did not show that he had a fertility problem. He also testified that upon his return from Saudi Arabia on 15 March 1991, he and Lisa Johnson had sexual relations on that day and regularly for two weeks thereafter.

The majority recites the trial court's findings that Lisa Johnson and Sammy Johnson resumed their sexual relationship on 15 March 1991 and that Samantha was born "full-term" on 1 December 1991, implying that Samantha's conception had to have occurred prior to 15 March 1991. The duration of a human pregnancy is 280 days, with a

standard deviation of 14 days. *Obstetrics: Normal and Problem Pregnancies* 229 (Stephen G. Gabbe, M.D. et al. eds., 2d ed. 1991). However, "[t]he time when conception could have occurred will vary from case to case," and "whether a particular pregnancy could have extended for a longer or shorter period may be a proper subject for expert medical opinion." *State v. White*, 300 N.C. at 510, 268 S.E.2d at 491. No expert medical testimony was presented in this case, and in the absence of such testimony no inference regarding the possible date of Samantha's conception may be drawn from the evidence.

I am concerned that the majority is formulating a threshhold showing that must be made by someone such as Mr. Meehan in order to have standing to move for blood tests under N.C. Gen. Stat. § 8-50.1 in spite of the marital presumption. However, just what must be shown is unclear from the majority's opinion. For example, suppose that in the instant case there was no evidence regarding the Johnsons' inability to conceive a child prior to Mr. Johnson's departure for Saudi Arabia or suppose that Mr. Johnson had returned from Saudi Arabia and resumed sexual relations with his wife in February 1991 instead of on 15 March. Would the majority still consider the evidence sufficient to question the presumption of legitimacy? I believe it is for the legislature, and not this Court, to determine what, if any, threshhold requirement must be met before standing is conferred to challenge the presumption under N.C. Gen. Stat. § 8-50.1.

Finally, the majority notes that the trial court concluded that "good cause" had been shown for the granting of Mr. Meehan's motion. "Good cause" is the appropriate standard for ruling on motions predicated on Rule 35 of the North Carolina Rules of Civil Procedure; the trial court in Finding of Fact 19 specifically stated that it was allowing Mr. Meehan's motion "only pursuant to N.C.G.S. § 8-50.1." Thus, whether or not "good cause" was shown for the granting of Mr. Meehan's motion is irrelevant to the issue at hand.

III.

Resolution of the issue at hand turns, in my opinion, on the correct interpretation of N.C. Gen. Stat. § 8-50.1. I recognize that in *Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972), our Supreme Court interpreted the statute to permit the use of blood tests to rebut the marital presumption in civil as well as criminal actions in which the question of parentage arises. However, I do not believe the fact that the Court approved the use of blood tests to rebut the marital presumption in civil cases is dispositive of the issue here. We must

inquire further as to whether the statute allows the court to order a blood test *in the specific factual setting of this case.* In other words, we must determine whether Mr. Meehan, a third-party alleged father, has standing under the statute to compel Mr. Johnson, the presumed father, to submit to such a test. The plain language of N.C. Gen. Stat. § 8-50.1 does not permit such a result.

The version of the statute governing this case provides that upon the motion of the plaintiff, alleged-parent defendant, or other interested party, the court "shall order that *the alleged-parent defendant, the known natural parent, and the child* submit to . . . blood tests. . . ." N.C. Gen. Stat. § 8-50.1(b) (1986) (emphasis added). Thus, the language of the statute only permits the court in this case to order Mr. Meehan (the alleged-parent defendant in Ms. Meehan's action), Ms. Meehan (the known natural parent), and Samantha (the child) to submit to blood tests. The statute does not authorize the court to order the presumed father, Mr. Johnson, to submit to the tests.

The majority attempts to avoid the logical import of this language by stating that since Mr. Johnson is the named defendant in Ms. Meehan's counterclaim and in Mr. Meehan's crossclaim, and since he has alleged in his own complaint that he is Samantha's father, he is an "alleged-parent defendant" and thus can be subjected to blood testing. This argument is disingenuous for two reasons. First, while Mr. Johnson was designated as "defendant" in both Ms. Meehan's counterclaim and Mr. Meehan's crossclaim, neither of these claims alleged that he was Samantha's "parent." Indeed, both claims contain specific allegations that Mr. Johnson is *not* Samantha's parent. Second, while Mr. Johnson's own complaint alleges that he is Samantha's "parent," he is not a "defendant" in his own action. The language of the pleadings cannot convert Mr. Johnson into an "alleged-parent defendant" when in fact he is not.

I do not find the *Ban* decision helpful here. The statute at issue in *Ban* did not involve blood testing, but merely provided that a proceeding to establish paternity of a child born out of wedlock and to compel support could be brought by the mother, the father, or a guardian, conservator, or best friend of the child. The *Ban* court simply held that the term "father" was "intended to mean the putative father, presumed or otherwise." *Ban v. Quigley*, 812 P.2d 1014, 1017 (Ariz. Ct. App. 1990). The *Ban* decision contains no mention whatsoever of the term "alleged-parent defendant" and thus is inapplicable to the instant case.

I construe N.C. Gen. Stat. § 8-50.1 as applying only in cases where there is a denial of paternity by one or more parties to the action. For example, suppose the facts of the instant case were changed as follows: Lisa Johnson has a child while married to Sammy Johnson. Believing that Mr. Meehan is the child's natural father, Lisa Johnson sues Mr. Meehan for support. Mr. Meehan denies that he is Samantha's father, and he joins Mr. Johnson as a defendant, alleging that Mr. Johnson is Samantha's natural father. Mr. Johnson denies such allegation. In this hypothetical, the proceeding would be an adversarial one, with each man denying paternity of Samantha, and I would find that under the statute, Mr. Meehan could successfully move for blood tests from Mr. Johnson. This would be true because Mr. Johnson would be an "alleged-parent defendant" in Mr. Meehan's action against him. In contrast, the present proceeding involves a "friendly" action in which Lisa Johnson and Mr. Meehan are joining forces to try to prove that Mr. Johnson, *who has not denied paternity of Samantha*, cannot be Samantha's father.

"In construing a statute, the Court must first ascertain the legislative intent to assure that the purpose and intent of the legislation are carried out. To make this determination, we look first to the language of the statute itself. If the language used is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993) (citations omitted). I am convinced that the language of N.C. Gen. Stat. § 8-50.1 fails to include Mr. Johnson in the group of persons who can be compelled to submit to blood testing.

IV.

Because the language of N.C. Gen. Stat. § 8-50.1 is unambiguous, there is no need to go behind the statute to determine the legislature's intent in passing it. However, I choose to briefly address the legislative history because I believe it supports my position that the statute was not intended to be used in situations such as the present case. There is a clear expression of legislative intent in the preamble to the 1979 version of the statute:

> Whereas, . . . a recent breakthrough in medical science now enables extended factor blood tests to show the inclusionary probability that a putative parent is the biological parent of a child; and

> Whereas, a great many of the children born out of wedlock join the public welfare rolls and thereby increase the burden on State taxpayers; and
>
> Whereas, the availability of inclusionary . . . results of extended blood factor tests promotes the use of objective medical evidence in parentage matters . . . and thereby facilitates the plaintiffs' ability to fairly and accurately meet their burden of proof; and
>
> Whereas, [this] has the effect of placing the burden of supporting illegitimate children on the persons who should be responsible, the biological parents. . . .

1979 N.C. Sess. Laws ch. 576, § 1.

There is nothing in the foregoing statement to suggest that N.C. Gen. Stat. § 8-50.1 is intended to serve the purpose of declaring a child illegitimate when that child is otherwise presumed legitimate. Rather, the manifest purpose of the statute is to ease the evidentiary burden on parties seeking child support by allowing the results of blood tests to be admitted as proof of the identity of the child's biological parent(s), thereby making it more likely that the child will receive support from the responsible persons. This expressed purpose is fully consistent with the legislative intent behind other statutes dealing with the status of illegitimacy. *See, e.g., Tidwell v. Booker*, 290 N.C. 98, 106, 225 S.E.2d 816, 821 (1976) (purpose behind N.C. Gen. Stat. § 49-2, making willful failure to support an illegitimate child a misdemeanor, is "not to confer rights on either the mother or the father but to protect the child and to protect the State against the child's becoming a public charge"); *Wright v. Gann*, 27 N.C. App. 45, 47, 217 S.E.2d 761, 763 (N.C. Gen. Stat. § 49-14, governing civil actions to determine paternity, was intended by legislature "to establish a means of support for illegitimate children"), *cert. denied*, 288 N.C. 513, 219 S.E.2d 348 (1975). Because Mr. Johnson has acknowledged and met his obligation of support, this case is beyond the purview of N.C. Gen. Stat. § 8-50.1.

V.

In considering cases of first impression, and especially cases involving important public policy concerns, it is often instructive to examine decisions from other jurisdictions which, though perhaps factually different, provide insight into how other courts have resolved similar issues.

In *Petitioner F. v. Respondent R.*, 430 A.2d 1075 (Del. 1981), the respondent mother gave birth to a child and named her husband as the father on the birth certificate. Two days later, the petitioner initiated an action alleging he was the child's natural father and seeking in effect to determine his parentage of the child. *Id.* at 1076-77. The mother moved to dismiss the petition on the basis that the marital presumption precluded the petitioner's action, and she and her husband filed affidavits certifying their parentage of the child. The lower court granted the mother's motion, holding that the petitioner lacked standing to file the petition. The petitioner appealed, arguing that the denial of standing violated his due process and equal protection rights. *Id.* at 1077.

The Delaware Supreme Court rejected the petitioner's argument, noting that under the pertinent custody statute only a "parent" had standing to initiate a custody proceeding or to seek visitation if custody was denied. *Id.* Because the term "parent" was not defined in the statute, the court examined the legislative intent and concluded that the General Assembly did not intend to include in its definition of the word "parent" a putative father in the petitioner's situation. *Id.*

> [T]o assume otherwise would be to conclude that the General Assembly intended to open the door to the invasion of continuing family stability by any man, whatever his motive, who may choose to claim an illicit paternity, thereby not only endangering that stability but also refuting the time-honored presumption of legitimacy of a child born during wedlock.

Id. Addressing the petitioner's constitutional arguments, the court acknowledged that the United States Supreme Court has generally recognized that unwed fathers are entitled to the protections of the Constitution, *see, e.g., Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972), but stated that

> the Supreme Court has not held in our view, that a man claiming paternity has a constitutionally protected interest in a determination of his parental status for purposes of obtaining custody or visitation rights with respect to a child conceived and born during the marriage and cohabitation of the child's mother to and with another who has not disavowed the child's legitimacy.

Id. at 1078-79. Furthermore, assuming *arguendo* that the putative father had a constitutionally protected interest, "that interest would be outweighed by the competing public interest and public policy" of

preserving the intact family unit and "protecting the minor child from confusion, torn affection, and the life-long stigma of illegitimacy." *Id.* at 1079. The court concluded its opinion as follows:

> "The application of the presumption of legitimacy of a child born to a married woman would be in the child's interest in practically all cases. If the mother's husband does not disavow paternity, there is no reason to go after the child's true father. Whatever the current weight of the family protection argument may be, it certainly should prevent the illegitimate father from seeking to assert his claim to a child resulting from his union with a married mother."

Id. at 1080 (*quoting* Harry D. Krause, *Illegitimacy: Law and Social Policy* 77 (1971)).

In the *Michael H.* case, discussed by the majority, the United States Supreme Court upheld a California statute providing that the marital presumption could be rebutted only by the husband or wife and then only in limited circumstances. The petitioner alleged that he was the biological father of Victoria D. and that the statute violated due process by preventing him from exercising his parental rights. *Michael H. v. Gerald D.*, 491 U.S. 110, 115-16, 105 L. Ed. 2d 91, 100-01. The Supreme Court's first inquiry was whether the petitioner, as an outsider to the marriage, had the requisite standing to assert any parental rights. *Id.* at 120, 105 L. Ed. 2d at 103-04. The Court denied such standing and held that California had a substantive interest in limiting third parties' ability to assert parental rights over a child born into a woman's marriage to another man:

> [T]he ability of a person in Michael's position to claim paternity has not been generally acknowledged . . . . What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so.

Id. at 125, 127, 105 L. Ed. 2d at 107-08.

As the majority notes, the *Michael H.* Court did not hold that presumptive fathers can never have standing to challenge the marital presumption of legitimacy. However, the Court did recognize the states' ability to place limitations on such standing. I believe that N.C. Gen. Stat. § 8-50.1, though admittedly less restrictive than the statute at issue in *Michael H.*, contains just such a limitation.

In *Ex parte Presse*, 554 So. 2d 406 (Ala. 1989), the Alabama Supreme Court extended the rationale of *Michael H.* to a case involving a motion for blood testing. The facts showed that Ms. Presse had an affair with Dr. Koenemann while she was married to Mr. Presse. She subsequently gave birth to a child. After the Presses divorced, Ms. Presse married Dr. Koenemann. The child then came to live with the Koenemanns, who sought to have Dr. Koenemann declared the father. At their request the court ordered blood tests of all the parties which showed a 99% probability that Dr. Koenemann was the child's natural father but did not exclude Mr. Presse as the natural father. The lower court ruled that Dr. Koenemann was the natural father, *id.* at 408, and the Alabama Supreme Court reversed, phrasing the issue as follows:

> Does a man claiming to be the father of a child conceived and born during the marriage of its mother to another man have standing under the [Alabama Uniform Parentage Act] to initiate an action to establish that he is the father of the child, where the presumed father persists in the presumption that he is the father?

Id. at 411. The court then answered this "first impression issue" in the negative. *Id.*

The Alabama Uniform Parentage Act (UPA) in effect at the time provided that

> [a] man is presumed to be the natural father of a child if:
>
> (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage. . . .

Ala. Code § 26-17-5(a) (1986 Repl. Vol.). Dr. Koenemann argued that in spite of this presumption, he should be declared the child's natural father because, after marrying Ms. Presse, he "receive[d] the child into his home" (one of several bases upon which paternity could be asserted under the UPA).

The court rejected this argument:

> We cannot accept the proposition that our Legislature, in adopting the UPA, intended for a third party to be able to assert his paternity, to the exclusion of a man who was married to the child's mother when the child was conceived and born, simply because the third party has since married the man's divorced wife and, in so doing, allowed the child into his home. That argument does not comport with our understanding of the statute.

Presse, *supra*, at 411. The court noted that Mr. Presse was clearly entitled to the marital presumption codified in subsection (a)(1), *id.*, and held that Dr. Koenemann's attempt to assert his paternity under the presumption in (a)(4) failed for lack of standing under the rationale of *Michael H.*, *id.* at 414, concluding:

> In this case, as in *Michael H.*, the legal question is whether a man has standing to bring an action seeking to declare a child illegitimate and to have himself declared the father of that child. This is not permitted under the UPA, as long as there is a presumed father, pursuant to § 26-17-5(a)(1), who has not disclaimed his status as the child's father; consequently, another man, though he later marries the mother and lives with the mother and child, has no standing to challenge the presumed paternity of the child. Put another way, so long as the presumed father persists in maintaining his paternal status, not even the subsequent marriage of the child's mother to another man can create standing in the other man to challenge the presumed father's parental relationship.

Id. at 418.

The court in *John M. v. Paula T.*, 571 A.2d 1380 (Pa.), *cert. denied*, 498 U.S. 850, 112 L. Ed. 2d 107 (1990) addressed the same issue before our Court under facts which closely parallel those in this case. Paula T. and John M. had an affair while Paula was married to Michael. After the affair ended, Paula gave birth to the second child born during her marriage to Michael. John moved to compel Michael to submit to a blood grouping test to prove that John was the child's natural father. *Id.* at 1381-82. He predicated his motion on a rule providing that

> [w]hen the mental or physical condition (including blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination . . . only on motion for good cause shown. . . .

Id. at 1383 (*quoting* Pa. R. Civ. P. 4010(a)). The trial court denied John's motion, holding that he had not overcome the presumption of legitimacy, *id.* at 1382, but on appeal the superior court reversed the trial court.

The Pennsylvania Supreme Court then reversed the superior court, holding that the Uniform Act on Blood Tests to Determine Paternity (the Act), 42 Pa. C.S.A. §§ 6131 to 6137,

> relaxes the [marital] presumption "to some extent" for it explicitly provides that the presumption "is overcome if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child." However, the Act does not relax the presumption to the extent that a "putative father," a third party who stands outside the marital relationship and attempts to establish paternity over a child born to the marriage, may compel the "presumptive father," the husband, to submit to blood tests on the strength of such evidence as has been presented herein.
>
> Indeed, section 6133 of the Act does not give the putative father the *right* to compel a presumptive father (husband) to submit to blood tests. That section provides: "In any matter . . . in which paternity . . . of a child is a relevant fact, the court . . . upon motion of any party . . . shall order the mother, child *and alleged father* to submit to blood tests." Superior Court has previously interpreted section 6133 as affording no right to an "alleged father" in appellee's situation to compel a "presumptive" father-husband to submit to a blood test.

Id. at 1384-85 (emphasis in original) (citations omitted).

The common thread in these cases is the requirement that in considering whether a state statute confers standing upon a third-party alleged father to rebut the marital presumption, a court must construe the statute narrowly to afford maximum protection to the interests of the presumed father and the child. I agree with the *John M.* court that "[t]he right of any person to question paternity is not without limitation" and must be balanced with the rights of the person whose blood sample is sought, the needs and interests of the child, and the needs and interests of the wife-mother. *John M., supra,* at 1385-86.

VI.

I am in agreement with the majority that when making a decision which will affect a child, a court must consider first and foremost "the best interests of the child." *See, e.g., Glesner v. Dembrosky,* 73 N.C. App. 594, 598, 327 S.E.2d 60, 63 (1985) ("trial courts have the duty to decide domestic disputes, guided always by the best interests of the child"). *See also Cleo A.E. v. Rickie Gene E.,* 438 S.E.2d 886, 889 (W. Va. 1993) (citation omitted) (in holding that a mother and father could not enter into a stipulation which would have the effect of bastardiz-

ing the child born during their marriage, the court was "guided by the cardinal principal that 'the best interests of the child is the polar star by which decisions must be made which affect children' ").

The majority notes that the trial court's order arose in the context of a proceeding involving custody and that in such proceedings, the court, in determining the child's best interests, may consider evidence of paternity. The majority cites decisions from various jurisdictions to support its conclusion that "in the context of a proceeding to award custody of a minor child, an order compelling the parties to submit to blood-grouping and DNA testing to determine paternity 'will best promote the interest and welfare of the child.' " I cannot agree with this conclusion. The trial court's order, which is the subject of this appeal, made no findings regarding custody of Samantha Johnson. In the absence of such findings and objections thereto, this Court is powerless to assert any opinion about what is in Samantha's best interests. Moreover, the majority's conclusion seems to reach beyond the facts of this case to make a general pronouncement that in *all cases* involving child custody where blood tests are sought, the trial court is *bound* to allow the tests. In effect, the majority has removed all discretion from trial judges to determine what is in the best interests of the child in those cases.

Even if this Court were empowered to determine what is in Samantha's best interests, I would not agree with the majority's holding in this case. In spite of the Johnson's divorce, there is still a parent-child relationship which deserves protection here. *See Happel v. Mecklenburger*, 427 N.E.2d 974, 983 (Ill. App. Ct. 1981) (where parents were divorced, but child visited father on vacations, father visited child when possible, and father "continued to shoulder the parental responsibility of the child," court found challenge to child's legitimacy was not in child's best interests). I find the State's interest in protecting the relationship between Samantha and Mr. Johnson no less compelling simply because the Johnsons are no longer married. Furthermore, if not for the fact that Lisa Johnson and Mr. Meehan have now married, the effect of the majority's holding would be to declare Samantha illegitimate. In future cases with similar facts, children could indeed be declared illegitimate, and I fail to see how such a result would ever be in their best interests.

VII.

The legislature has defined the circumstances in which a party may invoke N.C. Gen. Stat. § 8-50.1 to use blood tests to rebut the

marital presumption. It is for the legislature to extend the reach of the statute to give standing to a third-party putative father to require a presumed father to submit to a blood test. I would therefore hold that the trial court erred in allowing Mr. Meehan's motion to compel Mr. Johnson to submit to a blood test pursuant to N.C. Gen. Stat. § 8-50.1, and I would reverse.

JAMES Y. MOORE, TRADING AND DOING BUSINESS AS MOORE'S DINETTE, AND GRACYE MOORE, PLAINTIFFS-APPELLANTS v. CITY OF CREEDMOOR, RALPH D. SEAGROVES, INDIVIDUALLY AND AS CHIEF OF POLICE OF THE CITY OF CREEDMOOR, AND VANCE DOUGLAS HIGH, INDIVIDUALLY AND AS A COMMISSIONER OF THE CITY OF CREEDMOOR, DEFENDANTS-APPELLEES

No. 939SC1073

(Filed 5 September 1995)

1. Malicious Prosecution § 4 (NCI4th)— malicious prosecution claim based on civil nuisance action—action "initiated" by defendants

Notwithstanding that the prior proceeding herein was a civil nuisance action, evidence considered in the light most favorable to plaintiffs tending to show defendants "initiated" or "instituted, procured or participated in" that action would suffice, for purposes of surviving summary judgment, to present the first element of a malicious prosecution claim.

Am Jur 2d, Malicious Prosecution §§ 7, 10.

2. Malicious Prosecution § 17 (NCI4th)— nuisance abatement action—initiation by police chief—sufficiency of evidence

The evidence was sufficient to raise a genuine issue of material fact regarding whether defendant police chief "initiated" or "instituted, procured, or participated in" an earlier nuisance abatement action upon which this malicious prosecution action was based where it tended to show that, at a meeting of the City Board of Commissioners, defendant suggested that plaintiffs' dinette be declared a public nuisance and permanently closed; in support of his proposal, defendant submitted a collection of police reports concerning the dinette and its patrons which officers had compiled over the years at his direction; after the Board passed a resolution requesting the district attorney to undertake a nuisance abatement action, defendant himself took that docu-

ment and the list of incidents from the police log to the district attorney; and defendant characterized himself as "the motivating force" behind the nuisance action.

Am Jur 2d, Malicious Prosecution §§ 139, 140, 150, 184.

3. Malicious Prosecution § 17 (NCI4th)— nuisance abatement action—initiation by defendants—sufficiency of evidence

The evidence was sufficient to raise a genuine issue of material fact regarding whether defendant city initiated an earlier nuisance abatement action upon which this malicious prosecution action was based where it tended to show that the Board of Commissioners frequently discussed closing plaintiffs' dinette; the Board member who served as Police Commissioner often met in conference with the police chief and spoke about the "problem" the dinette was creating in the community; the Board discussed specific methods of closing the dinette on numerous occasions; when presented with the police chief's recommendation, the Board voted to adopt the resolution and directed the chief to confer with the district attorney about the matter; and at all times the chief acted as the agent and employee of the police department and acted within the course and scope of his agency.

Am Jur 2d, Malicious Prosecution §§ 139, 140, 150, 184.

4. Malicious Prosecution § 17 (NCI4th)— nuisance abatement action—initiation by defendant city commissioner—insufficiency of evidence

The evidence was insufficient to raise a genuine issue of material fact regarding whether defendant city commissioner initiated an earlier nuisance abatement action upon which this malicious prosecution action was based where defendant was no longer a commissioner and thus neither voted on nor was involved in the passage of the resolution requesting the district attorney to institute the nuisance abatement action.

Am Jur 2d, Malicious Prosecution §§ 139, 184.

5. Malicious Prosecution § 19 (NCI4th)— evidence of presence and absence of probable cause for underlying action—summary judgment improper

Since the evidence before the trial court reflected both the presence and absence of probable cause for the bringing of a pub-

lic nuisance abatement action by defendants, the trial court in a malicious prosecution action erred in entering summary judgment in favor of defendants.

Am Jur 2d, Malicious Prosecution §§ 159, 169, 184.

6. Malicious Prosecution § 19 (NCI4th)— absence of probable cause—sufficiency of evidence of malice

Since the evidence raised a justiciable issue of fact as to whether defendants initiated a nuisance abatement action without probable cause, and based upon the inference of implied malice arising from evidence of the absence of probable cause, plaintiffs presented sufficient factual evidence to support an award of compensatory damages and to withstand defendants' motion for summary judgment in the malicious prosecution action.

Am Jur 2d, Malicious Prosecution §§ 152, 169, 184.

7. Malicious Prosecution § 21 (NCI4th)— action based on prior civil proceeding—sufficiency of evidence of special damages

The evidence was sufficient to forecast the sort of special damages necessary when a malicious prosecution action is based upon a prior civil proceeding where the uncontroverted evidence showed that plaintiffs' disco-dancing business was enjoined from operation for seven months pending trial.

Am Jur 2d, Malicious Prosecution § 10.

8. Municipal Corporations §§ 444, 446 (NCI4th)— claim against city—no governmental immunity—claim against police chief—no governmental immunity—issue as to whether conduct corrupt of malicious

Plaintiffs' malicious prosecution claim against defendant city was not barred by governmental immunity where the city had purchased liability insurance; nor was their claim against defendant police chief barred in his official capacity, as public officers share in the immunity of their governing municipality, or in his individual capacity, as the evidence raised an issue of material fact as to whether his conduct was corrupt or malicious.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 37, 38.

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

9. *Intentional Infliction of Mental Distress* § 2 (NCI4th)— intentional infliction of emotional distress—insufficiency of evidence of outrageous conduct

The trial court did not err in allowing the motion for summary judgment by defendant city and defendant police chief with respect to plaintiffs' intentional infliction of emotional distress claim where plaintiffs' evidence that defendants "manufactured" complaints about plaintiffs' business, sought and obtained an injunction for the abatement of a nuisance, and shut plaintiffs' dance and disco business down for seven months did not raise a question of fact as to whether defendants' conduct was "extreme and outrageous," nor was there evidence that defendants intended for plaintiffs to suffer severe emotional distress.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4, 5.

Modern status of intentional infliction of mental distress as independent tort; "outrage". 38 ALR4th 998.

10. Constitutional Law § 86 (NCI4th)— monetary damages for alleged violations of constitutional rights—no relief against city or city employees in official capacities

Because plaintiffs sought monetary damages for alleged violation of their constitutional rights, they were not entitled to relief under 42 U.S.C. § 1983 against a city or the individual defendants in their official capacities, as the city and the individual defendants were not "persons."

Am Jur 2d, Civil Rights § 4.

Supreme Court's views as to who is "person" under civil rights statute (42 USCS sec. 1983) providing private right of action for violation of federal rights. 105 L. Ed. 2d 721.

11. Constitutional Law § 115 (NCI4th)— violation of constitutional rights by city employees—matter of public concern outweighed by governmental interest

The trial court properly granted summary judgment for the defendant police commissioner and defendant police chief in

their individual capacities on plaintiffs' claims that defendants violated their First Amendment right to free speech and to petition the government for redress of grievances, since there was no showing that plaintiff's complaints about the police department's handling of his calls for assistance pertained to a matter of public concern which outweighed the governmental interest in efficient operations.

Am Jur 2d, Consitutional Law §§ 496, 501, 510.

12. Constitutional Law § 86 (NCI4th)— alleged racial discrimination—summary judgment for defendants proper

Summary judgment was properly granted for defendant police commissioner and defendant police chief in their individual capacities on plaintiffs' claim that their Fourteenth Amendment right to equal protection was violated by defendants' conspiracy to discriminate against them on the basis of race and defendants' selective enforcement of a no parking ordinance.

Am Jur 2d, Civil Rights § 3; Constitutional Law §§ 735, 738.

Judge GREENE concurring in part and dissenting in part.

Appeal by plaintiffs from summary judgment entered 25 May 1993 by Judge B. Craig Ellis in Granville County Superior Court. Heard in the Court of Appeals 26 May 1994.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for plaintiffs-appellants.

McDaniel & Anderson, by William E. Anderson, for defendants-appellees.

JOHN, Judge.

Plaintiffs James and Gracye Moore (plaintiffs or the Moores) appeal the trial court's grant of summary judgment in favor of defendants the City of Creedmoor (the City), Police Chief Ralph D. Seagroves (Seagroves or the Chief) and former City Commissioner Vance Douglas High (High or Commissioner High). As discussed herein, we find plaintiffs' assignments of error regarding their claim of malicious prosecution in the main persuasive, but conclude the remainder cannot be sustained.

Pertinent facts and procedural information include the following: Since 1947, plaintiff James Y. Moore (Moore) has operated a diner known as Moore's Dinette (the Dinette) in a building located on Lyon Street in Creedmoor, North Carolina. His wife, plaintiff Gracye Moore (Mrs. Moore), is the Dinette's bookkeeper and cook. During the week, the Dinette functions primarily as an eating establishment patronized predominantly by the black community of Creedmoor. On weekend nights (Friday through Sunday), however, disco-dancing is offered inside the Dinette between the hours of 10:00 p.m. and 1:30 a.m. All applicable ABC licenses for the sale of beer are properly maintained.

The City of Creedmoor is governed by a Board of Commissioners (the Board) composed of five Commissioners and headed by the Mayor. The Commission votes on City ordinances and resolutions which, once enacted, represent the official policy of the City. Defendant High was a member of the Board from December 1977 through December 1989, and served as "Police Commissioner" for a significant portion of that time. Since 17 May 1983, defendant Ralph D. Seagroves has occupied the position of Police Chief. The City's Police Chief attends all Commission meetings and reports directly to the Board.

On 4 November 1982, Moore petitioned the Board to rezone an area adjacent to the Dinette in order to construct a parking lot. Although the local Planning Agency approved the request and recommended it be allowed, the matter ultimately was "tabled" by the Board of Commissioners and thus effectively denied.

On 29 December 1982, Moore telephoned for police assistance in quelling a disturbance involving two female customers of the Dinette. However, the two responding officers allegedly merely watched the women fight in the street. Moore subsequently filed an official written grievance, resulting in the reprimand of both officers and suspension of one.

Although the grievance was filed several months before Chief Seagroves assumed his duties, he testified in deposition that he believed the officers should not have been reprimanded. Within a year after his job commenced, Seagroves targeted the Dinette as a "problem area" because of "the traffic . . . and the street problem . . . , the fights that you have down there." During the winter of 1983-1984, he hired Vermadine Clark (Clark), a black female officer from nearby Oxford, to conduct undercover surveillance activities. Clark was instructed by the Chief to collect evidence regarding illegal alcohol

and drug sales at the Dinette. However, despite substantial effort on her part, Clark found no evidence of illegal activity taking place at the Dinette; moreover, it was her opinion that the Moores would not tolerate unlawful behavior of any kind in their establishment. It is undisputed that until sometime in 1991, the Moores were unaware Clark had visited the Dinette in the capacity of undercover officer.

In February 1986, a .38 Special handgun was stolen from the Dinette during a break-in. Following his initial report of the incident, Moore spoke repeatedly with Seagroves and other officers about the status of his weapon. Although the Creedmoor Police Department (the Department) received notification in or around September 1987 that the gun was recovered in Jacksonville, North Carolina, it was subsequently destroyed by Jacksonville authorities. Because he had persistently sought information about the status of the weapon, Moore attributed this destruction to the willful failure of the Department to seek return of the handgun and to the Department's desire to leave his business defenseless.

In June 1988, a fire was deliberately started at the Dinette and the letters "KKK" painted on the dumpster. Although Moore immediately called the Department, he perceived its response to be intentionally slow. When he conveyed this to Seagroves and demanded an investigation, the Chief replied he already knew the fire had not been started by the Ku Klux Klan. The arson case was never resolved.

Following this series of events, Seagroves instructed his officers to begin making written reports regarding any time spent responding to calls at the Dinette. During late 1988 and early 1989, also upon the Chief's instructions, police began ticketing automobiles of Dinette patrons for parking violations along Lyon Street.

At a 24 January 1989 appearance before the Board, Seagroves recommended that the City outlaw all parking along Lyon Street. Commissioner High moved for adoption of the ordinance, which passed without notice to the Moores. In their complaint, plaintiffs allege the ordinance was not enforced on week nights nor during daytime hours, but that when the Dinette opened for disco-dancing on the weekends, officers appeared and immediately began ticketing and towing automobiles of Dinette patrons.

On 28 March 1989, Moore formally complained at a Board meeting concerning conduct of the Department. Specifically, he contested the Department's alleged (1) negligent or deliberate failure to return

his stolen gun; (2) intentionally slow response to his calls and the failure on a particular occasion to arrest an unruly customer; (3) selective enforcement of the no-parking ordinance against Dinette customers; and (4) enforcement of the public parking ordinance on a privately-owned vacant lot adjacent to the Dinette. High and Seagroves both were in attendance at this meeting.

Following Moore's complaint to the Board, City officers continued their practice of recording each incident involving Dinette patrons. In July 1990, two events occurred which, according to Seagroves, "finalized" his decision to request that the District Attorney commence procedures to close the Dinette.

In the first, a driver backed his automobile into a parking lot on Main Street where Seagroves was seated in his patrol car, causing a collision with the Chief's vehicle. In the second, labelled a "mob scene" or "riot" by defendants, two men began fighting in a parking lot behind a drug store on Main Street, a crowd gathered to watch, and shots allegedly were fired into the air. It is undisputed, however, that although these two incidents occurred in an area near the Dinette, they were never directly linked to the Moores, the Dinette or any of its patrons.

On 24 July 1990, Seagroves appeared before the Board and recommended it seek to have the Dinette proclaimed a public nuisance and shut down. The Chief submitted a collection of police reports allegedly generated since 1988 as a result of activities at the Dinette or the conduct of its patrons. He also revealed in deposition testimony that he and the Board had previously discussed the "problem" of the Dinette on numerous occasions.

After hearing from Seagroves, the Board passed a Resolution on 24 July 1990 requesting the local District Attorney to institute a nuisance abatement action against the Moores pursuant to N.C. Gen. Stat. § 19-1 (1983 & Cum. Supp. 1994) and N.C. Gen. Stat. § 19-2.1 (1983). High was no longer a Commissioner on the date the Resolution issued and was not involved in its passage.

Seagroves personally delivered the Resolution to the District Attorney who on 1 August 1990 filed a nuisance abatement action against the Moores in Granville County Superior Court. The complaint was verified by Seagroves. On that same date, the Superior Court issued a temporary restraining order enjoining the Moores from operating the Dinette in any capacity and ordering Seagroves to pad-

lock the premises. Following a hearing, the court entered a preliminary injunction on 10 August 1990 prohibiting operation of the business between the hours of 9:00 p.m. and 7:00 a.m.

The nuisance abatement trial commenced 20 March 1991, and on 26 March 1991 the jury returned a verdict finding the Moores' operation of the Dinette did not constitute a public nuisance. Judgment was entered upon the verdict 11 April 1991, dissolving the preliminary injunction and awarding the Moores attorney fees in the amount of $14,000.00, plus additional costs totalling $578.40.

On 24 January 1992, plaintiffs filed the instant action against the City, Seagroves (individually and in his official capacity as Police Chief), and High (individually and in his official capacity as City Commissioner). In their complaint, plaintiffs alleged, *inter alia*, the following separate claims for relief with respect to each named defendant: malicious prosecution; intentional infliction of emotional distress; and violation of federal constitutional rights secured by the First, Fifth and Fourteenth Amendments to the United States Constitution. Both compensatory and punitive damages were sought from each defendant.

Defendants answered denying liability. Citing occurrences subsequent to conclusion of the nuisance action, Seagroves separately counterclaimed alleging a new public nuisance action.

On 2 December 1992, plaintiffs moved for summary judgment on Seagroves' counterclaim; on 11 January 1993, defendants likewise filed a motion for summary judgment as to all counts contained in plaintiffs' complaint. Following a hearing, the trial court granted both motions. Only plaintiffs appeal.

I. State Claims

A. Malicious Prosecution

Plaintiffs first contend the trial court erred by allowing summary judgment on their claim of malicious prosecution. We believe this contention has merit in regards to Seagroves and the City.

Summary judgment is a procedural device designed to allow penetration of an unfounded claim or defense before trial by exposing a fatal weakness therein. *Patrick v. Hurdle*, 16 N.C. App. 28, 37, 190 S.E.2d 871, 877 (citation omitted), *disc. review denied*, 282 N.C. 304, 192 S.E.2d 195 (1972). It 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(c) (1990).

The party moving for summary judgment bears the burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Normile v. Miller and Segal v. Miller*, 63 N.C. App. 689, 692, 306 S.E.2d 147, 149 (1983) (citations omitted), *modified on other grounds and aff'd*, 313 N.C. 98, 326 S.E.2d 11 (1985). A movant may meet its burden by showing either that: (1) an essential element of the non-movant's case is nonexistent; or (2) based upon discovery, the non-movant cannot produce evidence to support an essential element of its claim; or (3) the movant cannot surmount an affirmative defense which would bar the claim. *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985) (citation omitted), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

In addition, because summary judgment is a drastic remedy, *Anderson v. Canipe*, 69 N.C. App. 534, 537, 317 S.E.2d 44, 47 (1984) (citation omitted), the record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably may be drawn therefrom. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974) (citations omitted).

Malicious prosecution based upon a prior *civil* proceeding (such as a public nuisance action, *see* G.S. § 19-2.1) consists of four elements:

> (1) . . . initiat[ion by the defendant of] the [prior] proceedings, (2) . . . [with] malic[e] and without probable cause, (3) . . . terminat[ion of those proceedings] in plaintiff's favor, and (4) . . . special damages beyond the ordinary expense and inconvenience of litigation.

Abram v. Charter Medical Corp. of Raleigh, 100 N.C. App. 718, 722, 398 S.E.2d 331, 333-34 (1990) (citation omitted), *disc. review denied*, 328 N.C. 328, 402 S.E.2d 828 (1991); *see also Stanback v. Stanback*, 297 N.C. 181, 202-03, 254 S.E.2d 611, 625 (1979) (citations omitted).

The public nuisance action (the prior proceeding) indisputably was resolved in favor of the Moores. However, defendants maintain plaintiffs' malicious prosecution claim was fatally deficient because the evidence raised no question of fact (1.) regarding "initiation" of that action by any of the named defendants (2.) maliciously *or* with-

out probable cause, or (3.) regarding whether plaintiffs incurred any resultant "special damages."

We discuss each of these elements separately.

1.

Plaintiffs contend the evidence, viewed in the most favorable light, indicates defendants "instituted, procured or participated in" the public nuisance action. *See Williams v. Kuppenheimer Manufacturing Co.*, 105 N.C. App. 198, 200, 412 S.E.2d 897, 899 (1992) (citation omitted).

Defendants counter, however, that the contours of the first element of a malicious prosecution claim based upon an earlier *civil* proceeding differ from one grounded upon a prior *criminal* proceeding. More particularly, they argue a plaintiff in circumstances such as those *sub judice* "must show . . . that defendant *initiated* [in the sense of *actually filed*] the prior civil proceeding . . . ." *Stanback*, 297 N.C. at 203, 254 S.E.2d at 625 (emphasis added) (citations omitted). In other words, plaintiffs' malicious prosecution claim cannot be based upon defendants' "procuring" the prior civil proceeding, or "causing" it to be brought by someone other than the named defendants, such as the District Attorney. Defendants cite language in *Hawkins v. Webster*, 78 N.C. App. 589, 337 S.E.2d 682 (1985), as follows:

> there is no allegation that defendants . . . ever initiated a prior action against [plaintiff]; rather, [plaintiff] alleges that defendants "procured or caused to be instituted against [him]" the third party indemnity actions filed by the Bank. This does not, in our estimation, satisfy the requirement that the defendant *initiate* a prior proceeding.

Hawkins, 78 N.C. App. at 593, 337 S.E.2d at 685 (third alteration in original) (emphasis added) (Court was examining the propriety of trial court's *Rule 12(b)(6)* dismissal of plaintiff's malicious prosecution claim.).

Defendants rely upon the District Attorney's affidavit submitted to the trial court asserting that "in [his] opinion, after a review of the police reports and available information, [he] was satisfied that probable cause existed for the filing of such a nuisance abatement action and the seeking of injunctive relief." It is not disputed that based upon this conclusion, the District Attorney filed the complaint against plaintiffs on behalf of the State of North Carolina. Therefore, defend-

ants argue, although the matter was initially brought to the prosecutor's attention by Seagroves and the Board, the ultimate decision to file (i.e., "initiate") the action was made solely by the District Attorney in the exercise of his discretion. Accordingly, defendants continue, neither the City, Seagroves, nor High can be held responsible for having "initiated" the prior nuisance proceeding.

We do not interpret the "initiation" requirement as narrowly as defendants, nor do we read either *Stanback* or *Hawkins* as creating a rule of law that whenever a malicious prosecution claim is based upon a prior civil (as opposed to criminal) proceeding, a plaintiff must put forth evidence that the defendant initiated, in the sense of *actually filed*, the earlier action.

We first note that Webster's defines "to initiate" as "to begin or set going: make a beginning of: perform or facilitate the first actions, steps, or stages of . . . ." Webster's Third New International Dictionary 1164 (1966). Black's Law Dictionary ascribes the following meaning to the term: "Commence, start; originate; introduce . . . . To propose for approval . . . ." Black's Law Dictionary 705 (5th ed. 1979).

Moreover, when discussing the tort of malicious prosecution generally, our cases indicate a liberal reading of the requirement that the defendant have "initiated" the earlier proceeding. For example, while some of our decisions involving a claim based upon a prior criminal action have stated a plaintiff must prove the defendant *initiated* the prior criminal proceeding, *see, e.g., Alt v. Parker*, 112 N.C. App. 307, 312, 435 S.E.2d 773, 776 (1993), *disc. review denied*, 335 N.C. 766, 442 S.E.2d 507 (1994), and others have said a plaintiff must show defendant *instituted* the prior proceeding, *see, e.g., Juarez-Martinez v. Deans*, 108 N.C. App. 486, 491, 424 S.E.2d 154, 157, *disc. review denied*, 333 N.C. 539, 429 S.E.2d 558 (1993), still others have held a plaintiff must establish that the defendant "instituted, procured *or participated in* the criminal proceeding against plaintiff." *Williams*, 105 N.C. App. at 200, 412 S.E.2d at 899 (citation omitted) (emphasis added).

Additional decisions indicate this Court evaluates the "initiate" or "institute, procure or participate in" element of malicious prosecution claims based upon prior civil or criminal actions in the same manner. *See U v. Duke University*, 91 N.C. App. 171, 177, 371 S.E.2d 701, 706 ("To recover for malicious prosecution *based on all types of actions*, the plaintiff must show that the defendant *initiated* the earlier pro-

ceeding . . . .") (emphasis added) (citation omitted), *disc. review denied*, 323 N.C. 629, 374 S.E.2d 590 (1988).

[1] We hold that, notwithstanding that the prior proceeding herein was a civil nuisance action, evidence considered in the light most favorable to plaintiffs tending to show defendants "initiated" *or* "instituted, procured or participated in" that action would suffice, for purposes of surviving summary judgment, to present the first element of a malicious prosecution claim. Accordingly, we examine the evidence as to each defendant.

Chief Seagroves

[2] It was uncontroverted below that at a Board meeting held 24 July 1990, Seagroves suggested the Dinette be declared a public nuisance and permanently closed. In support of his proposal, Seagroves submitted a collection of police reports concerning the Dinette and its patrons which officers had compiled over the years at his direction. After the Board passed a resolution requesting the District Attorney to undertake a nuisance abatement action, Seagroves himself took that document and the list of "Incidents involving Moore's [Dinette] or Moore's Patrons from the Creedmoor Police Log" to the District Attorney. The Chief thus single-handedly provided both the Board and the District Attorney with the information upon which their respective determinations ultimately were based. Moreover, in deposition testimony, Seagroves characterized himself as "the motivating force" behind the nuisance action. He also verified the complaint against plaintiffs, attesting that all information contained therein was "true to the best of his knowledge . . . ."

We believe consideration of the foregoing in the light most favorable to plaintiffs, *Whitley*, 24 N.C. App. at 206-07, 210 S.E.2d at 291 (citations omitted), raises a genuine issue of material fact regarding whether Seagroves "initiated" (or "instituted, procured or participated in") the nuisance abatement action. In this regard, the following language from the *Williams* case is instructive:

> [D]efendant contends it did not institute, procure or participate in the prior . . . proceeding, rather it merely provided assistance and information to the prosecuting authorities. The act of giving honest assistance and information to prosecuting authorities does not render one liable for malicious prosecution. *However, in the present case, the jury could find defendant's actions went further than merely providing assistance and information.*

> *Defendant brought all the documents used in the prosecution to the police. . . . Except for the efforts of defendant, it is unlikely there would have been a criminal prosecution of plaintiff.* Under these circumstances, the trial court was correct in determining this was a factual matter for the jury.

Williams, 105 N.C. App. at 200-01, 412 S.E.2d at 900 (emphasis added) (citations omitted).

Similarly, in the case *sub judice*, "[e]xcept for the efforts of" Seagroves, it is unlikely the Board would have adopted the nuisance resolution nor would the District Attorney have filed the nuisance abatement action against plaintiffs. A jury could thus reasonably find that the Chief "beg[a]n or set going: ma[d]e a beginning of: perform[ed] or facilitate[d] the first actions, steps, or stages of" the public nuisance action. *See* Webster's at 1164.

The City

[3] The deposition testimony of Seagroves and High indicated that the Board frequently discussed closing plaintiffs' Dinette. For example, while serving as Police Commissioner for the Board, High often met in conference with Seagroves and spoke about the "problem" the Dinette was creating in the Creedmoor community. Further, both men acknowledged the Board discussed specific methods of closing the Dinette on numerous occasions during High's tenure as a Commissioner, including on one occasion asking the town attorney about the plausibility of using the nuisance laws against plaintiffs. Moreover, when presented with Seagroves' 24 July 1990 recommendation, the Board voted to adopt the resolution and directed the Chief to confer with the District Attorney about the matter.

Finally, plaintiff alleged, and the evidence at a minimum tended to show that, at all relevant times, "Seagroves acted as the agent and employee of the Police Department of the City of Creedmoor and acted within the course and scope of his agency." In that event, the City would be vicariously liable for the actions of Seagroves, *see, e.g.*, *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 279, 450 S.E.2d 753, 757 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 318 (1995), which we have previously determined to be sufficient for purposes of summary judgment on the first element of a claim of malicious prosecution.

Construed in the light most favorable to plaintiffs, therefore, *Whitley*, 24 N.C. App. at 206-07, 210 S.E.2d at 291 (citations omitted),

the evidence adequately raised an issue of fact as to whether defendant City (i.e., the Board) "initiated" the public nuisance action.

Commissioner High

[4] With respect to defendant High, however, we believe the evidentiary showing was insufficient.

It is undisputed that High served on the Board from December 1977 through December 1989. As he was thus no longer a Commissioner in January 1990, High neither voted on the resolution nor was he involved in its passage. Even though High may have voiced his disapproval of the Dinette at earlier Board meetings, such expressions of opinion do not as a matter of law constitute evidence of "initiation" of (or "institut[ion] [of], procure[ment] [of] or particIpat[ion] in") the public nuisance action. *See Williams*, 105 N.C. App. at 200, 412 S.E.2d at 899 (citation omitted).

As evidence in support of an essential element of plaintiffs' malicious prosecution action against High was nonexistent, the trial court properly entered summary judgment in his favor as to that particular claim. *See, e.g., Messick v. Catawba County*, 110 N.C. App. 707, 712, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993).

2.

[5] We next consider the second element of a claim for malicious prosecution—i.e., that defendants initiated the public nuisance proceeding "maliciously and without probable cause."

(a.) Probable Cause

In a malicious prosecution action, "probable cause 'has been properly defined as the existence of such facts and circumstances, known to [defendants] at the time, as would induce a reasonable man to commence a prosecution.' " *Pitts v. Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978) (quoting *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907)); *see also Allison v. Food Lion, Inc.*, 84 N.C. App. 251, 254, 352 S.E.2d 256, 257 (1987) (test for determining absence of probable cause is "whether a [person] of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation") (citation omitted).

Defendants contend probable cause was evidenced by the allegations contained in the nuisance action, including the list of incidents compiled by the Department, which defendants maintain sets out

dozens of events constituting "breaches of the peace." *See* G.S. § 19-1. In addition, defendants point to the trial court's issuance of a preliminary injunction and its denial of plaintiffs' dismissal motion at the nuisance trial.

However, plaintiffs' evidence indicated that many of the listed incidents involved neither the Dinette nor its patrons. Moreover, neither of the two occurrences which Seagroves stated "finalized" his decision to seek action from the Board, that is, the wreck of Seagroves' patrol car and the parking lot "riot" near Main Street, were shown by any evidence to be linked to the Moores or the Dinette. Therefore, because the factual matters upon which defendants relied to establish "probable cause" are disputed, the existence of probable cause is properly a question for the jury. *Flippo v. Hayes*, 98 N.C. App. 115, 118, 389 S.E.2d 613, 615 (citation omitted), *aff'd*, 327 N.C. 490, 397 S.E.2d 512 (1990).

Further, when evidence is presented showing both the existence and the absence of probable cause, a malicious prosecution action should proceed to trial. *Williams*, 105 N.C. App. at 202, 412 S.E.2d at 901; *see also, e.g.*, *Jones v. Gwynne*, 312 N.C. 393, 403, 323 S.E.2d 9, 18 (1984). Thus, where *prima facie* evidence of the existence and the absence of probable cause respectively is produced, the issue should be left to determination by the jury and not ruled upon as a matter of law. *Id.*; *see also Messick*, 110 N.C. App. at 716, 431 S.E.2d at 495 ("[B]ased on the facts illustrated by [officers'] testimony, probable cause did exist to arrest [plaintiff]. *Because the plaintiff has presented no forecast of evidence to the contrary*, summary judgment on the malicious prosecution claim was proper.") (emphasis added).

In the case *sub judice*, both direct and circumstantial evidence was presented tending to show a lack of probable cause for the institution of the public nuisance proceedings. In addition to the disputed evidence mentioned above, for example, Seagroves in deposition testimony specifically admitted he had no reason to believe the Moores themselves ever created a nuisance. Further, in uncontradicted affidavits, several individuals residing on Lyon Street indicated they were not disturbed by operation of the Dinette, and that the Moores were "decent law-abiding citizens who work very hard to conduct a business where people can meet, socialize, eat, dance and assemble on weekends." Undercover officer Clark pointedly asserted that neither plaintiff tolerated illegal activity or breaches of the peace in the Dinette or on its premises. Similarly, by way of petition, some fifty-

seven citizens from Creedmoor and surrounding communities stated "Moore operates [the] Dinette in a manner that is peaceful, safe, lawful. He does not permit . . . anyone else to conduct acts which create and constitute breaches of the peace." Indeed, it appears the jury deliberated a mere ten minutes before rejecting the public nuisance claims against plaintiffs.

Accordingly, as evidence before the trial court reflected both the presence and absence of probable cause for the bringing of a public nuisance action against defendants Seagroves and the City, we agree with plaintiffs that the trial court erred in entering summary judgment in favor of those defendants insofar as this portion of the malicious prosecution claim is concerned.

(b.) Malice

[6] In the trial court, defendants proffered certain affidavits tending to show the public nuisance action against plaintiffs was commenced with probable cause and not maliciously. Citing *Middleton v. Myers*, 299 N.C. 42, 45, 261 S.E.2d 108, 110 (1980), defendants assert that once they submitted such evidence negating the element of malice, plaintiffs were "required to come forward with [their] own affidavits or evidence setting forth *specific facts* as to the maliciousness of defendant[s'] prosecution." *Id.* We do not disagree with defendants' general statement of law. However, the circumstances *sub judice* mandate a result different from that reached in *Middleton*.

In an action for malicious prosecution, the malice element may be satisfied by a showing of either *actual* or *implied (legal)* malice. *See, e.g., Best v. Duke University*, 112 N.C. App. 548, 552, 436 S.E.2d 395, 399 (1993) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 337 N.C. 742, 448 S.E.2d 506, *reh'g denied*, 338 N.C. 525, 452 S.E.2d 807 (1994); *see also Alt*, 112 N.C. App. at 312, 435 S.E.2d at 776 (citation omitted). "Actual malice . . . is defined as 'ill-will, spite, or desire for revenge, or under circumstances of insult, rudeness or oppression, or in a manner evidencing a reckless and wanton disregard of [plaintiff's] rights.' " *Williams*, 105 N.C. App. at 202-03, 412 S.E.2d at 901 (alteration in original) (quoting *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)). Actual malice, which "is more difficult to substantiate . . . is only required if plaintiff is seeking punitive damages." *Id.* at 202-03, 412 S.E.2d at 901 (citation omitted).

Implied (or legal) malice, on the other hand, "may be inferred from want of probable cause in reckless disregard of plaintiff[s'] rights." *Pitts*, 296 N.C. at 86-87, 249 S.E.2d at 379 (citations omitted); *see also Williams*, 105 N.C. App. at 203, 412 S.E.2d at 901 ("legal malice may be inferred from a lack of probable cause") (citations omitted).

Our determination above that the evidence (detailed *supra*) raised a justiciable issue of fact as to whether defendants initiated the nuisance abatement action without probable cause resolves the implied malice question as well. *Id.* Based upon the inference of implied malice arising from evidence of the absence of probable cause, plaintiffs presented sufficient factual evidence to support an award of compensatory damages and to withstand defendants' motion for summary judgment.

As there was no showing of actual malice, however, plaintiffs' claim for punitive damages based upon their malicious prosecution action must fail. *See Williams*, 105 N.C. App. at 203, 412 S.E.2d at 901 ("[A] showing of actual malice is only required if plaintiff is seeking punitive damages . . . [;] [l]egal malice suffices to support an award of compensatory damages for malicious prosecution.") (citations omitted).

Notwithstanding, plaintiffs contend that because the evidence construed in their favor demonstrates the public nuisance action was commenced in "retaliation for the exercise of [the Moores'] First Amendment rights and/or corruption within the municipal government and/or racial prejudice," they have presented sufficient evidence of actual malice. As discussed further *infra* at section II, however, we are not persuaded by this argument.

3.

[7] Defendants also maintain the evidence failed to forecast the sort of special damages necessary when a malicious prosecution action is based upon a prior civil proceeding. We disagree.

Our Supreme Court has explained:

> The gist of such special damage is a substantial interference either with the plaintiff's person or his property such as . . . causing an injunction to issue prohibiting plaintiff's use of his property in a certain way.

Stanback, 297 N.C. at 203, 254 S.E.2d at 625 (citations omitted); *see also Abram*, 100 N.C. at 722, 398 S.E.2d at 333-34 ("[A] claim of malicious prosecution requires proof . . . that there are special damages beyond the ordinary expense and inconvenience of litigation.") (citation omitted); *see also Finance Corp. v. Lane*, 221 N.C. 189, 196, 19 S.E.2d 849, 853 (1942) ("[A] suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with by . . . the granting of an injunction . . . .") (quotation omitted).

Defendants respond that because "[i]n the unique facts of a nuisance abatement case, a restraining order is inherent as the means by which the plaintiff would prevail if it won. . . . Being enjoined from operating the alleged nuisance is . . . not a special damage as contemplated for the malicious prosecution tort." *See* G.S. § 19-1. In addition, defendants argue that a malicious prosecution action cannot be grounded upon "[e]mbarrassment, expense, inconvenience, lost time from work or pleasure, stress, strain and worry [such as] are experienced by all litigants, to one degree or another . . . ." *Brown v. Averette*, 68 N.C. App. 67, 70, 313 S.E.2d 865, 867 (1984).

We believe the uncontroverted evidence that the Moores' disco-dancing business was enjoined from operation for seven months pending trial adequately establishes "a substantial interference with . . . plaintiff[s'] . . . property," *Stanback*, 297 N.C. at 203, 254 S.E.2d at 625 (citations omitted), sufficient to withstand defendants' motion for summary judgment. Indeed, at the hearing in the trial court, counsel for defendants conceded that "because of the injunction . . . there is probably enough to get [them] into the door to talk about some special damages."

Immunities

[8] In the event we were to determine, as we have, that plaintiffs' action for malicious prosecution survives the foregoing summary judgment hurdles, defendants Seagroves and the City argue the claim is nonetheless barred by virtue of certain immunities. In other words, they maintain plaintiffs cannot surmount an applicable affirmative defense. *See, e.g., Taylor v. Ashburn*, 112 N.C. App. 604, 606-07, 436 S.E.2d 276, 278 (1993) (citation omitted), *disc. review denied*, 336 N.C. 77, 445 S.E.2d 46 (1994).

a. The City

"Under the doctrine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are

committed [in the performance of] a governmental function." *Id.* at 607, 436 S.E.2d at 278 (citations omitted); *see also Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985) (citations omitted). Our cases have long held that "[a] police officer in the performance of his duties is engaged in a governmental function." *Mullins v. Friend*, 116 N.C. App. 676, 680, 449 S.E.2d 227, 230 (1994) (citation omitted). When enacting resolutions and ordinances, a City's Board of Commissioners and the officers of which it is composed are likewise engaged in a governmental function. Accordingly, the City would ordinarily not be liable for the torts (such as malicious prosecution) of Seagroves or the Board. *See, e.g., Davis v. Messer*, 119 N.C. App. 44, 52, 457 S.E.2d 902, 907 (1995).

However, a municipality may waive governmental immunity by the purchase of liability insurance, *see 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 presented uncontroverted evidence establishing that the City purchased liability insurance covering the malicious prosecution claim, and defendants concede as much in their appellate brief. The City, therefore, has waived any defense of governmental immunity with respect to this cause of action to the extent plaintiff's damages do not exceed the amount of coverage. *See, e.g., Mullins*, 116 N.C. App. at 681, 449 S.E.2d at 230 (citation omitted).

b. Chief Seagroves

Seagroves was sued in both his official and his individual capacities. Since public officers, such as policemen, share in the immunity of their governing municipality, they are generally "immune from suit for torts committed while . . . performing a governmental function." *Id.* at 680, 449 S.E.2d at 230 (citation omitted); *Taylor*, 112 N.C. App. at 607, 436 S.E.2d at 278 (citations omitted). This is because "[a]n action brought against individual officers in their official capacities is an action against the municipality." *Gregory*, 117 N.C. App. at 102, 450 S.E.2d at 352-53 (citation omitted). However, where, as here, the City has waived its sovereign immunity with the purchase of liability insurance, public officers such as Seagroves are likewise not entitled

to raise governmental immunity as a defense to liability, at least as to the amount of coverage purchased. *See Mullins*, 116 N.C. App. at 680-81, 449 S.E.2d at 230.

As to the claim against Seagroves in his individual capacity, it is uncontroverted that a public official sued individually is "shielded from liability" unless his conduct was " 'corrupt or malicious,' " or he " 'acted outside of and beyond the scope of his 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)).

Moreover, our courts have repeatedly observed that "an action in tort for malicious prosecution is based upon a defendant's *malice* in causing process to issue." *Middleton*, 299 N.C. at 44, 261 S.E.2d at 109 (emphasis added). As we have determined, the forecast of evidence regarding plaintiffs' malicious prosecution claim against Seagroves to be sufficient to withstand summary judgment, we also hold the evidence raised an issue of material fact as to whether his conduct was "corrupt or malicious." Seagroves' affirmative defense notwithstanding, summary judgment was improperly entered in his favor.

In sum, we hold the trial court erred by granting summary judgment in favor of the City and Seagroves as to plaintiffs' malicious prosecution cause of action for compensatory damages only. However, summary judgment as to those defendants for punitive damages and as to defendant High on this claim is affirmed.

B. Intentional Infliction of Emotional Distress

[9] Plaintiffs next argue the trial court erred by allowing each defendant's motion for summary judgment with respect to plaintiffs' intentional infliction of emotional distress claim. This argument cannot be sustained.

The elements of a claim for intentional infliction of emotional distress are that the defendant "(1) engaged in extreme and outrageous conduct, (2) which was intended to cause and did cause (3) severe emotional distress." *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 6-7, 437 S.E.2d 519, 522 (1993) (citation omitted), *disc. review denied, appeal dismissed*, 336 N.C. 71, 445 S.E.2d 29 (1994). Assuming *arguendo* sufficient evidence supported the third element, evidentiary infirmities with respect to the remaining elements nonetheless rendered summary judgment appropriate.

In particular, as this Court stated recently:

> To meet the essential element of extreme and outrageous conduct, the conduct must go beyond all possible bounds of decency, and "be regarded as atrocious, and utterly intolerable in a civilized community. The liability clearly does not extend to mere insults, indignities, threats . . . ."

Wagoner v. Elkin City Schools' Bd. of Education, 113 N.C. App. 579, 586, 440 S.E.2d 119, 123 (quoting *Daniel v. Carolina Sunrock Corp.*, 110 N.C. App. 376, 383, 430 S.E.2d 306, 310, *rev'd in part*, 335 N.C. 233, 436 S.E.2d 835 (1993)), *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). Further, plaintiffs must set forth "specific incidents" of conduct, *see Bryant*, 113 N.C. App. at 7, 437 S.E.2d at 523 (citation omitted), which "go beyond all possible bounds of decency," and are such as could be considered " 'atrocious, and utterly intolerable.' " *Wagoner*, 113 N.C. App. at 586, 440 S.E.2d at 123 (quotation omitted).

Suffice it to observe that we do not believe the record discloses any evidence which raises a question of fact as to whether defendants' conduct was "extreme and outrageous." Nor is there evidence indicating that by their conduct defendants *intended* for plaintiffs to suffer severe emotional distress. Accordingly, the trial court properly entered summary judgment as to all defendants on plaintiffs' cause of action for intentional infliction of emotional distress.

II. FEDERAL CONSTITUTUIONAL CLAIMS

[10] Plaintiffs next contend summary judgment was improperly granted as to their claims for violations of the United States Constitution. More particularly, plaintiffs assert their First Amendment rights to free speech and to petition the government for redress of grievances as well as their Fourteenth Amendment rights to equal protection and to substantive due process were violated by defendants' conduct. We are not persuaded by plaintiffs' arguments relative to this assignment of error.

"Section 1983 affords the claimant a civil remedy for a deprivation of federally protected rights by persons acting under the color of state law." *Majebe v. N.C. Bd. of Medical Examiners*, 106 N.C. App. 253, 259, 416 S.E.2d 404, 407, *disc. review denied, appeal dismissed*, 332 N.C. 484, 421 S.E.2d 355 (1992). *See* 42 U.S.C. § 1983. However, as "[t]he text of section 1983 permits actions only against a 'person,' " *Corum v. University of North Carolina*, 330 N.C. 761, 771, 413 S.E.2d 276, 282 (citation omitted), *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664,

cert. denied, 121 L. Ed. 2d 431, 61 U.S.L.W. 3287, 61 U.S.L.W. 3369, 61 U.S.L.W. 3370 (1992), our cases have held that:

> when an action is brought under section 1983 in state court against the State, its agencies, and/or its officials acting in their official capacities, neither a State nor its officials acting in their official capacity are "persons" under section 1983 when the remedy sought is monetary damages.

Id. at 771, 413 S.E.2d at 282-83 (citation omitted); *see also Lenzer v. Flaherty*, 106 N.C. App. 496, 513, 418 S.E.2d 276, 287 (citation omitted), *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). Because plaintiffs in the case *sub judice* seek monetary damages for alleged violation of their constitutional rights, they are not entitled to relief under section 1983 against the City, or against Seagroves and High in their *official* capacities, *Corum*, 330 N.C. at 771, 413 S.E.2d at 283; *see also Messick*, 110 N.C. App. at 713-14, 431 S.E.2d at 493 (citations omitted), and summary judgment was proper as to those claims.

However, as public officials, Seagroves and High "will be *personally* answerable for damages under section 1983 . . . where qualified immunity is not available to shield [them] from liability for deprivation of federal rights." *Lenzer*, 106 N.C. App. at 506, 418 S.E.2d at 282-83 (emphasis added) (citation omitted).

As discussed below, we find the evidentiary forecast insufficient with respect to plaintiffs' federal constitutional claims brought against defendants Seagroves and High in their individual capacities. It is therefore unnecessary to address the issue of qualified immunity. *See, e.g., Messick*, 110 N.C. App. at 717, 431 S.E.2d at 495.

A.

[11] Concerning the alleged violation of their First Amendment right to free speech and to petition the government for redress of grievances, plaintiffs' primary contention is that defendants' efforts to close the Dinette originated in retaliation for Moore's complaints against the Department. In this context, plaintiffs correctly observe that a citizen's right to criticize government includes the right to criticize police officials in the performance of their duties. *See, e.g., Hague v. C.I.O.*, 307 U.S. 496, 513, 83 L. Ed. 1423, 1435 (1939), and that decisions by public officials made in retaliation for the exercise of such constitutionally protected rights are actionable under § 1983. *Madewell v. Roberts*, 909 F.2d 1203, 1206 (8th Cir. 1990) (citations omitted).

However, as this Court has stated:

> To maintain [a] claim [for violation of federal free speech rights] under section 1983, [a] plaintiff must first establish that the conduct was protected by showing that (i) the speech pertained to a matter of public concern and (ii) the public concern outweighed the governmental interest in efficient operations.

Lenzer, 106 N.C. App. at 506-07, 418 S.E.2d at 283 (citation omitted). Assuming *arguendo* that Moore's complaints about the Department's handling of his calls for assistance "pertained to a matter of *public* concern," *id.* (emphasis added), we nevertheless hold summary judgment was proper as to this claim because there was no evidentiary showing, nor do plaintiffs argue the point in their brief, that this "public concern" outweighed "the governmental interest in efficient operations."

We observe at this juncture that a municipality and its officers have a "duty to keep the public streets . . . open for travel and free from unnecessary obstructions." *See* N.C. Gen. Stat. § 160A-296(a)(2) (1994). Further, a city is authorized to enact ordinances which "define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances." *See* N.C. Gen. Stat. § 160A-174(a) (1994); *see also Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 442-43, 358 S.E.2d 372, 374 (1987). Similarly, the officers of a municipality, such as Seagroves and High, are entitled to take reasonable actions incident to enforcement of the city's proclamations.

B.

[12] As to the Fourteenth Amendment right to equal protection under the law, plaintiffs contend defendants conspired to discriminate against them on the basis of race and selectively enforced the no-parking ordinance enacted by the Board in 1989. We are not persuaded by plaintiffs' arguments relative to this assignment of error.

To support the proposition of impermissible racial discrimination, plaintiffs are able to point only to the circumstance that the Dinette is owned, operated and primarily frequented by members of the black race, coupled with the assertion that Seagroves, High and the Board conspired to close it, and the bald, unsupported suggestion that Seagroves and High were motivated by racist leanings or tenden-

cies. The evidence is wholly inadequate on the claim of racial discrimination.

Regarding their argument that the no-parking ordinance was selectively enforced, plaintiffs refer to evidence that while vehicles of Dinette patrons were routinely ticketed or towed if left along Lyon Street during the Dinette's weekend operating hours, automobiles were regularly parked along Lyon Street on weekday nights and Sunday mornings during church without being ticketed or towed.

However, our courts have frequently pointed out that "selective enforcement of a law is not itself a constitutional violation . . . ." *State v. Davis*, 96 N.C. App. 545, 550, 386 S.E.2d 743, 745 (1989) (citation omitted); rather, a plaintiff must present evidence that the defendant was motivated by "an invidious purpose" in selectively enforcing the particular law. *Id.* Stated otherwise, plaintiffs must have been:

> singled out for prosecution while others similarly situated and committing the same acts [were] not . . . [*and*] the discriminatory selection for [enforcement must have been] invidious and done in bad faith in that it rest[ed] upon such impermissible considerations as race, religion or the desire to prevent [their] exercise of constitutional rights.

Majebe, 106 N.C. App. at 260-61, 416 S.E.2d at 408 (emphasis added) (quoting *State v. Howard*, 78 N.C. App. 262, 266-67, 337 S.E.2d 598, 601-02 (1985), *disc. review denied, appeal dismissed*, 316 N.C. 198, 341 S.E.2d 581 (1986)); *see also Grace*, 320 N.C. at 445, 358 S.E.2d at 376 ("The party who alleges selective enforcement of an ordinance has the burden of showing that the ordinance has been administered 'with an evil eye and an unequal hand.' ") (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 30 L. Ed. 220, 227 (1886)).

Defendants relied in the trial court upon Seagroves' deposition testimony as indicating a legitimate purpose for the enactment of the no-parking ordinance on Lyon Street and for the manner in which it was enforced. In particular, defendants presented substantial and uncontroverted evidence to the effect that Lyon Street was obstructed only during hours the Dinette offered disco-dancing, and further that the Department had received citizen complaints about parking, noise and frightening crowds only during those same late night, early morning weekend hours.

No evidence countered the foregoing so as to indicate an "invidious purpose" on the part of defendants in their enforcement of the no-

parking ordinance. Absent evidence of a discriminatory purpose or effect, no material issue of fact was raised concerning violation of plaintiffs' rights to equal protection under the law, *see Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 453 (1962) (conscious exercise of some selectivity in enforcement is not necessarily a federal constitutional violation); *see also Grace*, 320 N.C. at 445, 358 S.E.2d at 376 ("Mere laxity in enforcement does not satisfy the elements of a claim of selective or discriminatory enforcement in violation of the equal protection clause.") (citation omitted), and summary judgment against them on this claim was proper.

In view of the foregoing holding, we decline to address plaintiffs' related contention that because the public nuisance action was instituted with the intent to deprive them of equal protection under the law, their malicious prosecution claim was also cognizable under § 1983.

C.

Finally, although plaintiffs allege their constitutional right to substantive due process was violated by defendants' conduct, no evidence of record establishes on any defendant's part the sort of abuses of governmental authority amounting to "conduct which shocks the conscience" necessary to sustain plaintiffs' claim of a due process violation. *See Rochin v. California*, 342 U.S. 165, 172, 96 L. Ed. 183, 190 (1952); *see also Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (In order to be litigable, substantive due process claims must relate to action which "amount[s] to a brutal and inhumane abuse of official power literally shocking to the conscience.").

Based on the foregoing, we hold there was no error in the trial court's entry of summary judgment on plaintiffs' federal constitutional claims in favor of the City as well as Seagroves and High in both their official and individual capacities.

CONCLUSION

For the reasons discussed hereinabove, the trial court erred by granting summary judgment in favor of defendants Seagroves and the City on plaintiffs' state tort claim of malicious prosecution. Upon remand, however, plaintiffs are entitled to pursue only compensatory damages against those defendants. The court properly entered summary judgment in favor of all defendants on plaintiffs' remaining claims.

Affirmed in part; reversed and remanded in part.

Chief Judge ARNOLD concurs.

Judge GREENE concurring in part and dissenting in part.

Judge GREENE concurring in part and dissenting in part.

I believe the trial court correctly entered summary judgment for all defendants on each of the claims asserted by the plaintiffs. I therefore disagree with the majority that the trial court erred in granting summary judgment for defendants Seagroves and the City on the malicious prosecution claim.

The majority concludes that the nuisance abatement action filed by the district attorney on 1 August 1990 was in fact "initiated" by the City and Seagroves. I disagree. The civil abatement action, which is the basis of the present malicious prosecution action, was filed pursuant to N.C. Gen. Stat. § 19-2.1 and the plaintiff in that action was "The State of North Carolina on relation of David R. Waters, District Attorney." Although the abatement action is required to be filed in the name of the State, "the Attorney General, district attorney, or any private citizen of the county," N.C.G.S. § 19-2.1 (1983), can "become relators and prosecute the cause in the name of the State." *Dare County v. Mater*, 235 N.C. 179, 180-81, 69 S.E.2d 244, 245 (1952). Instead of becoming a relator in the case, Seagroves on behalf of the City presented the information to the district attorney who reviewed the material and "was satisfied that probable cause existed for the filing of . . . a nuisance abatement action" and filed and signed the complaint seeking the injunction. The abatement action was thus "initiated" by the district attorney and the fact that the City supplied the information to the district attorney is not dispositive. *See Hawkins v. Webster*, 78 N.C. App. 589, 593, 337 S.E.2d 682, 685 (1985) (action of defendants in procuring earlier civil action filed by third party did not constitute "initiation" within meaning of malicious prosecution).

STATE OF NORTH CAROLINA v. MICHAEL LYNN HOLMES AND LAURA MARIE AUTRY HOLMES

No. 9412SC499

(Filed 5 September 1995)

1. Criminal Law § 326 (NCI4th)— joinder of cases against mother and son—defendants not prejudiced

The trial court's joinder for trial of defendant son's substantive trafficking offenses with defendant mother's conspiracy offense did not deprive each of them of a fair trial in light of the structure of the trial and the limiting instructions given during testimony. N.C.G.S. § 15A-926(b)(2).

Am Jur 2d, Actions § 137.

2. Criminal Law § 304 (NCI4th)— one defendant—two charges involving drug dealing—consolidation proper

The trial court did not err in consolidating for trial the charge of conspiracy to traffic in controlled substances and the charge of substantive trafficking against one defendant. N.C.G.S. § 15A-926(a).

Am Jur 2d, Actions § 137.

Consolidated trial upon several indictments or informations against same accused, over his objection. 59 ALR2d 841.

3. Criminal Law § 412 (NCI4th)— facts misstated in opening statement—no curative instruction given—defendants not prejudiced

The trial court did not abuse its discretion by failing to give a curative instruction when the prosecutor in her opening statement incorrectly indicated an overlap between drug conspiracy charges against both defendants and a drug trafficking charge against one defendant since it was not until after the completion of all opening statements that an objection was raised to the prosecutor's remark; defense counsel requested a curative instruction at that time; the judge responded that he would have to rule on the evidence as it came in; and the court later gave general clarifying instructions.

Am Jur 2d, Trial § 522.

4. Criminal Law § 720 (NCI4th)— incorrect instruction on conspiracy given before opening statements—defendants not prejudiced

The trial court did not commit plain error when it misinstructed the jury on conspiracy law prior to evidence being presented, since the instruction in question was given to the jury before opening statements to assist the jury in listening to the opening statements of counsel and the evidence; neither defendant objected at the time the instruction was given; the jury charge at the close of all evidence correctly stated the law on conspiracy and resolved any confusion that might have occurred as a result of the court's earlier statement; and an improper instruction later corrected is completely lacking in prejudicial effect.

Am Jur 2d, Appellate Review § 743.

5. Evidence and Witnesses § 2983 (NCI4th)— prior bad acts of witnesses—admission of evidence—no error

There was no merit to defendants' contention that the trial court erred by allowing into evidence testimony of the prior bad acts of witnesses in violation of N.C.R. Evidence 404, since that rule is applicable only to parties and not to witnesses. N.C.G.S. § 8C-1, Rule 404.

Am Jur 2d, Witnesses § 969.

Admissibility of evidence of commission of similar crime by one other than accused. 22 ALR5th 1.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged. 41 ALR Fed. 497.

6. Evidence and Witnesses § 2618 (NCI4th)— instruction on marital privilege—defendants not prejudiced

Defendants were not prejudiced by the trial court's instruction with regard to the marital privilege where defendants requested the instruction and did not object at trial.

Am Jur 2d, Witnesses § 309.

7. Criminal Law § 374 (NCI4th)— explanation of evidentiary rulings—no expression of opinion

The trial court's explanations of its rulings on evidentiary matters did not constitute impermissible expressions of opinion on the evidence.

Am Jur 2d, Trial § 284.

8. Narcotics, Controlled Substances, and Paraphernalia § 220 (NCI4th)— trafficking by sale and trafficking by delivery— consecutive sentences—no double jeopardy

Defendant's consecutive sentences for trafficking by sale and trafficking by delivery did not violate double jeopardy.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 27, 27.15.

9. Criminal Law § 1133 (NCI4th)— aggravating factor of being leader in charged crimes—no error

In a prosecution of defendants for conspiracy to sell cocaine and trafficking in cocaine, the trial court did not err in sentencing defendants to the maximum allowable sentences by finding that each was a leader in the charged crimes. N.C.G.S. § 15A-1340.4(a)(1)(a) (1988).

Am Jur 2d, Criminal Law § 599.

10. Criminal Law § 788 (NCI4th)— instructions not repeated for codefendant—codefendant not prejudiced

Defendant mother was not deprived of a fair trial despite the court's decision not to repeat the entire instruction on conspiracy, having just given it for defendant's son.

Am Jur 2d, Trial § 1144.

Appeal by defendants Michael Lynn Holmes and Laura Marie Autry Holmes from judgments entered 13 October 1993 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 31 January 1995.

Attorney General Michael F. Easley, by Associate Attorney General William B. Crumpler, for the State.

Yurko & Cogburn, P.A. by Lyle J. Yurko and Max O. Cogburn, Jr., and Cutter, Wells & Porter, P.A. by John H. Cutter III for defendant-appellants Michael Lynn Holmes and Laura Marie Autry Holmes.

McGEE, Judge.

In 1992 defendant Michael Lynn Holmes (hereinafter Michael) was indicted for trafficking in a controlled substance by possession, by sale, by delivery, and by transportation in violation of N.C. Gen.

Stat. § 90-95(h)(3)(c). He was also indicted for conspiracy to traffic in a controlled substance in violation of N.C. Gen. Stat. §§ 90-95(1) and 90-95(h)(3)(a). Defendant Laura Marie Autry Holmes (hereinafter Marie) was indicted for conspiracy to traffic in a controlled substance in violation of N.C. Gen. Stat. §§ 90-95(1) and 90-95(h)(3)(a). The State's motions for joinder of defendants for trial and joinder of Michael's offenses were granted and a joint trial was held.

During the trial the State first presented approximately eight days of testimony relating to Michael and Marie's joint conspiracy charge. The State's evidence tended to show that the sale of cocaine was a family business in which Vinston Holmes (the father), Marie (the mother), and Michael (the son) participated. During the conspiracy period from 6 August 1988 through 18 August 1990, Vinston Holmes (hereinafter Vinston) was the central figure in the family drug business. Michael participated by retrieving cocaine and delivering it to the buyer for his father, and selling cocaine when Vinston was not available. Marie's participation was primarily collecting and counting the money from cocaine sales, although on occasion she also sold cocaine.

Cocaine transactions were generally conducted at Holmes Garage, where the family also ran an auto repair shop. Rosa Elaine Ashford, the bookkeeper for Holmes Garage, testified she assisted in the laundering of money from the Holmes family cocaine business by falsifying records for the garage, first at the direction of Vinston, and later as instructed by Michael and Marie. Ashford frequently purchased cocaine from Vinston until the end of 1989 when Vinston decided to stop selling smaller quantities and began selling kilograms (referred to as kilos) because there was "too much traffic at the garage." She testified that from 1988 through 1990 she often observed the activities of drug dealers who came to the garage to purchase cocaine. She also testified about specific instances when she saw Michael sell cocaine and Marie handle the cocaine money.

Drug dealers Russell Butler, Gloria Jones, Belinda Melvin and Darryl Jones testified about specific contact they had with Vinston, Michael and Marie during the conspiracy period. Their testimony tended to show that cocaine purchases were sometimes made directly from Michael and on at least one occasion from Marie. Michael often retrieved the cocaine for buyers at Vinston's direction. Each of the dealers testified about one or two occasions when they

observed Marie handle the money from cocaine sales, either by collecting or counting it.

Kimberly Johnson, Michael's ex-wife, testified that on one occasion before the conspiracy period she helped Michael tape a large sum of money to his body before he flew to an unknown destination. On another occasion in the fall of 1988, she saw Michael and Marie counting large stacks of money.

Ezumer Palmer testified about his drug operation in Georgia and his dealings with Vinston and Michael. In the summer of 1988, Vinston, Michael and Ezumer Palmer met to discuss arrangements to purchase cocaine from Ezumer Palmer. During that summer an unnamed man from Vinston's operation drove to Georgia on two occasions and picked up a total of ten kilos of cocaine, and on another occasion Michael personally went to Georgia and purchased eight kilos of cocaine.

The State next presented approximately two days of testimony relating to Michael's separate drug trafficking charges. Cleo Spears testified that in November 1990 he went to Fayetteville, North Carolina and purchased five kilos of cocaine from Michael at Holmes Garage.

Mark Francisco, an agent of the North Carolina State Bureau of Investigation, testified that Cleo Spears had been under surveillance since his arrival in Fayetteville. Spears was stopped on his way out of town by SBI agents who discovered five kilos of cocaine in his truck. Upon his arrest Spears told the agents he had purchased the cocaine from Michael.

Neither defendant offered any evidence.

The jury found defendant Michael Holmes guilty of the substantive trafficking charges and conspiracy to traffic in a controlled substance. The jury also found defendant Marie Holmes guilty of conspiracy to traffic in a controlled substance. Michael appeals from a judgment imposing a prison sentence of five consecutive forty-year terms and a fine of $250,000. Marie appeals from a judgment imposing a forty-year prison sentence and a $250,000 fine.

Michael identifies 292 assignments of error within ten issues for this Court to consider. Marie sets forth 191 assignments of error within nine issues. A number of these issues are identical for both

Michael and Marie, and where appropriate, we have combined discussion of both defendants' issues.

I. Joinder of Defendants

[1] Both defendants argue the trial judge's joinder for trial of Michael's substantive trafficking offenses with Marie's conspiracy offense deprived each of them of a fair trial. We disagree.

Joinder of defendants for trial is provided for in N.C. Gen. Stat. § 15A-926(b)(2) (1988):

> Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
>
> a. When each of the defendants is charged with accountability for each offense; or
>
> b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
>
> 2. Were part of the same act or transaction; or
>
> 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

At trial defendant Marie conceded the propriety of joinder of the conspiracy charges. However, she argues that since she is not accountable for Michael's substantive trafficking offenses, her case does not comply with G.S. § 15A-926(b)(2). Joinder of defendants is within the trial court's discretion and will not be disturbed absent a showing that joinder deprived the defendant of a fair trial. *State v. Wilson*, 108 N.C. App. 575, 589, 424 S.E.2d 454, 462, *appeal dismissed and disc. review denied*, 333 N.C. 541, 429 S.E.2d 562 (1993). "A defendant may be deprived of a fair trial where evidence harmful to the defendant is admitted which would not have been admitted in a severed trial." *Id.* Marie contends she was prejudiced by having to sit through testimony relating to Michael's substantive trafficking charges at the close of presentation of evidence on her conspiracy charge. In support of her argument she cites *Wilson* in which this Court held that the joinder of charges for trial against the co-defendants was prejudicial and deprived one defendant of a fair trial. 108 N.C. App. at 589, 424 S.E.2d at 462. In so holding the Court noted that as a result of joinder, the defendant was "forced to sit through the testi-

mony of eleven witnesses and two and one-half days of trial before any evidence was received as against him." *Id.* Further, the trial court's limiting instructions "did not operate to dispel the resulting prejudice." *Id.*

The case before this Court is distinguishable from *Wilson.* Here, the structure of the trial and the trial court's limiting instructions *did* serve to minimize prejudice, if any, to Marie. The trial was structured so that the jury first heard approximately eight days of testimony relating to the defendants' common conspiracy charge, followed by approximately two days of testimony dealing almost exclusively with Michael's substantive trafficking charges. Of the twenty trial witnesses, fifteen testified only about the conspiracy, and two testified only as to the trafficking charges.

Three witnesses, Agent Mark Francisco, J.D. Sparks, and Cleo Spears, were crossover witnesses who testified as to both issues. Agent Mark Francisco was called to the witness stand twice, first during the State's presentation of evidence about the conspiracy, and later to testify regarding Michael's trafficking charges. J.D. Sparks, the SBI forensic chemist, testified about the chemical analysis performed on drug evidence. The trial court gave the following instruction to the jury regarding the portion of J. D. Sparks' testimony dealing with evidence collected in Michael's separate trafficking charges:

> Ladies and gentlemen of the jury, the evidence received on today's date, that being 66A through E, and the accompanying lab report contained in State's Exhibit 76, are offered and received against the defendant Michael Holmes only on the substantive charges of trafficking cocaine.

The trial court also clearly marked the dividing line between Cleo Spears' initial testimony relating to the conspiracy period and his subsequent testimony offered on the issue of Michael's separate offenses by providing the following limiting instructions to the jury:

> THE COURT: Ladies and gentlemen of the jury, I think it would be fair to instruct you at this time that the defendant, Michael Holmes, as I've already indicated, is charged with some separate offenses occurring on or about November 8, 1990, that being trafficking cocaine by possession of four hundred grams or more, by sale, delivery, by transportation.
>
> And Ms. Strickland, having met with me at the bench with the defendant's attorneys, this evidence is offered on that issue; is that correct?

MS. STRICKLAND: That's correct, Judge.

THE COURT: All right. You may proceed. It's admissible as to the defendant Michael Holmes only.

In light of the structure of the trial and the limiting instructions given during testimony, we find that Marie was not prejudiced.

Michael also has not demonstrated how joinder prejudiced him. He asserts misjoinder "led to manifest unfairness because the jury, the Court and the prosecution were unnecessarily confused by the overlapping facts and legal principles." However, a defendant's "unsupported statement of possible prejudice is not sufficient to show abuse of discretion on the part of the trial judge in allowing the motion to consolidate." *State v. Ruffin*, 90 N.C. App. 712, 714, 370 S.E.2d 279, 280 (1988) (quoting *State v. Davis*, 289 N.C. 500, 508, 223 S.E.2d 296, 301, *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976)). Since neither Michael nor Marie have shown how joinder of defendants deprived them of a fair trial, we hold the trial court did not abuse its discretion in joining the defendants for trial.

II. Joinder of Offenses

[2] Michael contends the consolidation of his conspiracy charge and his substantive trafficking charges in one trial was improper as a matter of law. We disagree.

Joinder of offenses is provided for in N.C. Gen. Stat. § 15A-926(a) (1988) which states that "[t]wo or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." If no transactional connection is found, the ruling is improper as a matter of law. *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). As the State points out in its brief, "drug dealing by its very nature ordinarily involves a series of acts or transactions connected together or constituting part of a single scheme or plan." The specific sale of cocaine from which Michael's substantive trafficking charges arose was part of the overall "business" plan by the Holmes family to sell drugs. In *State v. Styles*, 116 N.C. App. 479, 482, 448 S.E.2d 385, 387 (1994), *disc. review denied*, 339 N.C. 620, 454 S.E.2d 265 (1995), this Court found that joinder of the charges of (1) knowingly keeping a dwelling for the purpose of keeping or selling controlled substances, and (2) possession of marijuana with intent to sell and deliver, with (3) selling marijuana to a minor, was proper. Despite the one month time gap between the

offenses sought to be joined, the Court determined that a transactional connection existed, noting "[t]he 'common thread' is the selling and distribution of marijuana. The 'scheme' was to sell the illegal substance for profit." *Id.* Similarly, Michael's conspiracy charge and his trafficking charges are "acts connected together" by the common thread of selling and distributing cocaine, and "constituting parts . . . of a single scheme" to sell the illegal substance for profit within G.S. § 15A-926(a).

Since a transactional connection has been found, the trial court's ruling on joinder of offenses will only be disturbed where it was "so arbitrary that it could not have been the product of a reasoned decision." *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993). Such an abuse of discretion may occur when the offenses are "so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *State v. Corbett*, 309 N.C. 382, 389, 307 S.E.2d 139, 144 (1983). Michael's conspiracy offense and his substantive trafficking offenses do not meet that criteria and, therefore, we find no error in their joinder for trial.

III. Opening Statement

[3] Both defendants contend the State misstated the facts in its opening statement and the court committed reversible error in failing to provide a curative instruction. We find no error.

N.C. Gen. Stat. § 15A-1221(a)(4) permits each party in a criminal jury trial to make an opening statement but does not define the scope of that statement. *State v. Mash*, 328 N.C. 61, 64-65, 399 S.E.2d 307, 310 (1991). However, wide latitude is generally allowed with respect to its scope. *State v. Summerlin*, 98 N.C. App. 167, 171, 390 S.E.2d 358, 360, *disc. review denied*, 327 N.C. 143, 394 S.E.2d 183 (1990). "Control of the parties' opening statements is within the discretion of the trial court." *State v. Gibbs*, 335 N.C. 1, 40, 436 S.E.2d 321, 343 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 881 (1994).

During her opening statement in this case, the prosecutor stated:

> The evidence will show that Michael Holmes is guilty of selling those five kilograms of cocaine, as well as the agreement between him and his mother and the other testifying co-conspirators to do this act. The agreement is the crime. And there was an agreement between them.

> At the close of the state's evidence, we ask that you return a verdict of guilty for both Michael Lynn Holmes for conspiracy to trafficking cocaine of four hundred grams or more, trafficking cocaine by possession, trafficking cocaine by sale, trafficking cocaine by delivery, and trafficking cocaine by transportation, as well as finding Marie Holmes guilty of conspiracy of trafficking cocaine of four hundred grams or more.

It was not until after the completion of all opening statements that an objection was raised to the prosecutor's remark which incorrectly indicated an overlap between the conspiracy charges and the substantive trafficking charges. At that time, counsel for the defendants requested the jury be given a curative instruction. The trial judge responded, "I'll have to rule on the evidence as it comes in. And I'll give the jury the necessary instructions as I perceive them to be as the evidence is offered." The court later gave general clarifying instructions. In light of the trial judge's control of the opening statement, he did not abuse his discretion. We find no error.

IV. Jury Instruction Before Testimony

[4] Both Michael and Marie argue the trial court committed reversible error when it misinstructed the jury on conspiracy law prior to evidence being presented. We find no merit to their argument.

After the jurors were sworn, and prior to the beginning of testimony, the trial court addressed the jury:

> Ladies and gentlemen of the jury, the next stage of the trial process in just a few moments will be the right of the attorneys to make an opening statement to you. Prior to doing that and in view of the fact that the attorneys in the trial of this case have forecast the evidence phase consuming approximately three to four weeks, the Court feels it appropriate to give you some preliminary instructions in order to assist you in listening to the opening statements of counsel and the evidence.
>
> The Court hastens to add that you'll receive at the conclusion of the case particularized instructions based upon the evidence produced in the case.
>
> Each of the separate defendants is charged with the offense of conspiracy to trafficking cocaine in an amount of four hundred grams or more. The general rules of conspiracy are as follows:

> A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act or to do a lawful act in an unlawful way, or by unlawful means. The unlawful agreement and not the execution of the agreement is the offense.
>
> To constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object. Rather, a mutual implied understanding is sufficient so far as the combination for conspiracy is concerned to constitute the offense.
>
> If a number of parties conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design, notwithstanding that such acts were not intended or contemplated as part of the original undertaking.

We note that defendants failed to raise an objection at the time the instruction was given, and thus, have not preserved the question for appellate review as required in N.C.R. App. P. 10(b)(1). Nevertheless, the question may be the basis of an assignment of error if it amounts to plain error. *See* N.C.R. App. P. 10(c)(4). "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where . . . it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done'. . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). To satisfy the requirements of the plain error rule, the Court must find error, and that if not for the error, the jury would likely have reached a different result. *State v. Reid*, 335 N.C. 647, 667, 440 S.E.2d 776, 787 (1994).

Citing *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980), the defendants argue the Court misstated the law regarding conspiracy by suggesting that an act of one partner in furtherance of the conspiracy is attributable to all, and thereby prejudiced the defendants. However, in response to *Small*, the statute upon which that decision was based was repealed and replaced with N.C. Gen. Stat. § 14-5.2, "which abolished the distinctions between accessories before the fact and principals and requires that the former be treated now as principals . . . ." *State v. Rowe*, 81 N.C. App. 469, 472, 344 S.E.2d 574, 576, *dismissal allowed, disc. review allowed in part*, 318 N.C. 419, 349

S.E.2d 604 (1986). While the instruction might have been more exact, it does not constitute reversible error.

Assuming, *arguendo*, that the court misstated the law on conspiracy, defendants have failed to demonstrate prejudicial impact on the jury. "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. The instruction in question was given to the jury before opening statements to assist the jury "in listening to the opening statements of counsel and the evidence." The jury charge at the close of all evidence correctly stated the law on conspiracy and resolved any confusion that might have occurred as a result of the court's earlier statement. An improper instruction later corrected is "completely lacking in prejudicial effect." *Reid*, 335 N.C. at 667, 440 S.E.2d at 787, (quoting *State v. Wells*, 290 N.C. 485, 498, 226 S.E.2d 325, 334 (1976)). After examining the record, we find no plain error.

V. Evidentiary Issues

Both defendants identify numerous assignments of error in testimony admitted at trial which can be categorized into two evidentiary issues.

A.

[5] Defendants argue the trial court erred by allowing into evidence testimony of the prior bad acts of witnesses in violation of N.C.R. Evid. 404. We find their argument without merit.

We first note that of the more than 100 questions at trial assigned as error by each defendant, Marie raised an objection to only eight, and Michael objected to only thirteen. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion . . . ." N.C.R. App. P. 10(b)(1). We confine our review to those questions objected to at trial because after examining the record, we find that the errors not objected to at trial are not so fundamental as to amount to plain error. *See* N.C.R. App. P. 10(c)(4).

N.C.R. Evid. 402 states the general rule: "All relevant evidence is admissible, except as otherwise provided [by constitution, by statute] . . . or by these rules." An exception to the general rule of admissibility is set out in N.C.R. Evid. 404(b). Rule 404(b) provides "[e]vidence

of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." "Rule 404(b) has been interpreted as applicable only to parties and, in a criminal case, would usually be applicable only to a defendant." *State v. Morgan*, 315 N.C. 626, 636, 340 S.E.2d 84, 91 (1986). The testimony of "crimes, wrongs, or acts" objected to in this case is that of the witnesses and not of the defendants. Therefore, Rule 404(b) is not applicable. Since the evidence is not excluded under an exception to the general rule, it is admissible if it is relevant. " '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.R. Evid. 401. As the State suggests, "the testimony in question was relevant in serving purposes like showing a witness's qualifications to discuss the drug trade generally or the circumstances of this case particularly." Since the evidence was relevant and thus admissible, the trial court properly overruled defendants' objections. We find no error.

B.

Defendants argue the trial court erred in allowing inadmissible hearsay which did not satisfy the co-conspirator exception of N.C.R. Evid. 801(d)(E). We find no prejudical error.

As a general rule, hearsay is inadmissible. N.C.R. Evid. 802. However, "[t]he law is well established regarding the admissibility of statements by co-conspirators. A statement by one conspirator made during the course and in furtherance of the conspiracy is admissible against his co-conspirators." *State v. Mahaley*, 332 N.C. 583, 593, 423 S.E.2d 58, 64 (1992), *cert. denied*, — U.S. —, 130 L. Ed. 2d 649 (1995); N.C.R. Evid. 801(d)(E).

Defendant Michael identifies ninety-five assignments of error, all of which he characterizes as inadmissible hearsay. We have reviewed the record and note that only eighteen assignments of error were objected to at trial and are properly preserved for this Court's review. *See* N.C.R. App. P. 10(b)(1). Of those eighteen, eight fell within the co-conspirator exception of Rule 801(d)(E), four were admitted for non-hearsay purposes, and three were objected to on grounds other than hearsay. Our review of defendant Marie's sixty-eight assignments of error reveals that an objection was raised at trial to only twenty. Of those, three fell within the co-conspirator exception, seven were admitted for non-hearsay purposes, and two were objected to on

grounds other than hearsay. In addition, Marie's objections were sustained three times. On one of the three occasions, the court gave a jury instruction and on another, allowed a motion to strike.

Assuming, *arguendo*, that Michael and Marie's remaining objections were instances of inadmissible hearsay, we note that "the erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986). Defendants must show they were "prejudiced by the error and that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed." *State v. Sills*, 311 N.C. 370, 378, 317 S.E.2d 379, 384 (1984). Defendants have failed to make the required showing. Further, we find none of the errors identified by defendants but not objected to at trial, rise to the level of plain error. *See* N.C.R. App. P. 10(c)(4). Therefore, we hold that any allegedly erroneous admission of hearsay was harmless.

VI. Marital Privilege Instruction

[6] Both Michael and Marie contend the trial court violated due process and deprived them of a fair trial by informing the jury that the marital privilege prohibited the jury from hearing relevant evidence. We disagree.

The trial court interrupted the testimony of Kimberly Johnson, Michael's ex-wife, and met with the attorneys out of the jury's presence. The judge asked the State "to define for me the parameters [of Kimberly Johnson's testimony] as it relates to the marital period between Michael Holmes and Ms. Johnson as to what kind of information you're going to be eliciting." After a brief discussion, the judge explained to Kimberly Johnson that under N.C. Gen. Stat. § 8-57 she would be prohibited from "testifying as to those acts or declarations that were made during the time frame of the marriage to Michael Holmes that are one-on-one situations." Defendants' counsel asked for a jury instruction, and upon the jury's return to the courtroom, the trial court stated:

> Ladies and gentlemen of the jury, we have in the State of North Carolina a statute designated as North Carolina General Statute eight dash fifty-seven, which in summary form is a confidential communication statute between husband and wife.
>
> Therefore, as a result of a review of that statute, I will prohibit the State of North Carolina from eliciting information of a

> confidential communication between Ms. Johnson, who was the former wife of Michael Holmes, from the date and time of July 11, 1987, through May of 1990, which as I understand to be the date and time of the divorce, of eliciting information of a confidential communication made that occurred during that time frame. The State may proceed.

Defendants made no objection to this instruction at trial.

We find nothing in the facts that supports defendants' contention that "the jury was told in effect that they were prohibited by the defendant's marital privilege from hearing *relevant* evidence." (emphasis added). The court merely instructed the jury on the law as requested by defendants. Therefore, we find no error.

VII. Judicial Expression of Opinion

[7] Defendants argue the trial court committed reversible error by expressing an opinion in violation of N.C. Gen. Stat. § 15A-1222. We find no merit to their argument.

In *State v. Grogan*, this Court summarized the law regarding the application of N.C. Gen. Stat. § 15A-1222 prohibiting the judicial expression of opinion in a criminal trial:

> A trial judge is prohibited from expressing any opinion which is calculated to prejudice either of the parties at any time during the trial. The slightest intimation from the trial judge as to the weight or credibility to be given evidentiary matters will always have great weight with the jury, and great care must be exercised to insure that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. Not every indiscreet and improper remark by a trial judge is of such harmful effect as to require a new trial . . . . The probable effect upon the jury determines whether the conduct or language of the judge amounts to an expression of opinion which will entitle the defendant to a new trial.

State v. Grogan, 40 N.C. App. 371, 373-74, 253 S.E.2d 20, 22-23 (1979) (citations omitted).

Both Michael and Marie raise the issue of the propriety of the trial court's remarks by (1) reading to the jury two witness immunity letters which had been received in evidence and published to the jury, (2) explaining the law regarding confidential communications between husband and wife in connection with the exclusion of cer-

tain testimony, (3) explaining its ruling on the introduction of a transcription of only a portion of a video tape, and (4) taking judicial notice of a sentence imposed on a witness for which the trial court judge had been the sentencing judge. In addition, Marie takes issue with the trial court's (1) response to defense counsel's cross-examination of a witness regarding the transcription of a portion of video tape not offered in evidence, (2) repetition of a witness' answer regarding the time period to which his testimony related, (3) explanation of the court's ruling saying it was defense counsel's "jury argument," and (4) interruption of defendants' closing argument and explanation to the jury of how substantial assistance is determined in relation to witness immunity.

We note that "[g]enerally, ordinary rulings by the court in the course of trial do not amount to an impermissible expression of opinion." *State v. Welch*, 65 N.C. App. 390, 393-94, 308 S.E.2d 910, 913 (1983). Defendants cite no authority to support their contention that a trial court's explanation of its ruling amounts to an impermissible expression of opinion. "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). After a careful review of the record, we find that none of the trial court's remarks at issue violated the judge's required neutrality and resulted in an impermissible expression of opinion.

VIII. Double Jeopardy

[8] Michael contends this trial violated due process by placing him in double jeopardy by sentencing him consecutively for trafficking by sale and trafficking by delivery. We disagree.

The double jeopardy clause of the United States Constitution and the North Carolina Constitution prohibits, among other things, multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). However, under N.C. Gen. Stat. § 90-95(h), "[s]ale, manufacture, delivery, transportation, and possession of . . . [cocaine] are separate trafficking offenses for which a defendant may be separately convicted and punished." *State v. Diaz*, 317 N.C. 545, 554, 346 S.E.2d 488, 494 (1986); *see also State v. Perry*, 316 N.C. 87, 103-04, 340 S.E.2d 450, 461 (1986). Therefore, defendant's consecutive sentences for trafficking by sale and trafficking by delivery do not violate double jeopardy and we find no error.

IX. Sentencing

[9] Both defendants argue the court erred in sentencing them to the maximum allowable sentences by finding that each was a leader in the charged crimes. We disagree.

The trial court found as a factor in aggravation that both Michael and Marie "occupied a position of leadership or dominance of other participants." N.C. Gen. Stat. § 15A-1340.4(a)(1)(a) (1988) (repealed effective October 1, 1994). In *State v. Hayes*, this Court noted:

> In order to be valid, an aggravating factor must be supported by sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence. The trial court should be permitted wide latitude, however, in arriving at the truth as to the existence of aggravating and mitigating factors, for it alone observes the demeanor of the witnesses and hears the testimony.

102 N.C. App. 777, 781, 404 S.E.2d 12, 15 (1991) (citations omitted). Moreover, "[e]vidence tending to show that a defendant occupied a position of leadership over *one* of the participants in the offense is sufficient to support this aggravating factor, regardless of whether the evidence also shows that others exercised leadership or control in the commission of an offense." *Id.* at 782, 404 S.E.2d at 15.

With respect to the conspiracy charge, the evidence tended to show that Michael assumed a leadership role and individually completed drug deals, particularly when Vinston Holmes was absent. He instructed Rosa Elaine Ashford to falsify garage records in order to launder money from cocaine sales. Michael and Vinston Holmes met with Ezumer Palmer and arranged to purchase large quantities of cocaine from him, and Michael personally purchased eight kilos of cocaine from Palmer on one occasion. In the substantive trafficking charges, Michael set up the cocaine sale to Cleo Spears. He agreed to the financial arrangements and contacted Spears when the pick-up was ready.

With respect to Marie's conspiracy charge, there was evidence tending to show she played a significant role with the money from cocaine sales. She picked up and counted the money, and on one occasion indicated the money received from Russell Butler was incorrect resulting in an additional payment to complete the transaction. Marie also instructed Rosa Elaine Ashford to falsify garage records. Belinda Melvin indicated to Gloria Jones that dealing directly with Marie meant that Gloria was now a trusted member of the organiza-

tion. This evidence is sufficient to support the trial court's findings that each defendant occupied a position of leadership. We find no error.

X. Jury Charge

[10] Defendant Marie contends the trial court deprived her of a fair trial and thus committed plain error by not adequately instructing the jury on the nature of her conspiracy charge. We disagree.

The primary purpose of a jury charge is to inform the jury of the law as it applies to the evidence "in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971). While the court must explain each essential element of the offense charged, the manner in which it chooses to do so is within its discretion. *State v. Young*, 16 N.C. App. 101, 106, 191 S.E.2d 369, 373 (1972).

The judge met with the attorneys outside the presence of the jury to discuss the jury charge. He proposed that he first give the instruction on Michael's substantive offenses and then instruct the jury as to Michael's conspiracy offense and the lesser-included offenses. He further proposed:

> Because I am giving the lesser-included offenses in each case, as to Ms. Holmes and Mr. Holmes, I would ask permission of both sides not to have to redefine conspiracy at each time, that I can simply refer back to the first definition that I've given. Because that would just be repeating. I will repeat it if you feel it adds anything to the instructions.

Defendants' attorney responded, "I think one description as to conspiracy will be sufficient."

The judge instructed the jury regarding Michael's trafficking offenses. He then turned to the conspiracy charge:

> Ladies and gentlemen of the jury, each defendant is charged with conspiracy to trafficking cocaine in an amount of four hundred grams or more, I shall give you the lesser-included offenses as the charge relates to the defendant Michael Lynn Holmes. And thereafter I shall ask you to recall the instructions as to the defendant Laura Marie Autry Holmes without repeating the instructions as to the conspiracy charge.

After giving instructions as to the general rules of conspiracy and the lesser-included offenses, he stated: "Ladies and gentlemen of the jury, I've already given you the instructions on conspiracy and the lesser-included offenses as they related to the defendant, Michael Lynn Holmes. Those instructions are equally applicable to the defendant, Laura Marie Autry Holmes. And I ask you to recall them."

Defendants made no objection after the completion of the jury charge when given the opportunity to do so, and as such are not entitled to relief unless the error, if any, constituted plain error. "[T]o rise to the level of plain error, the error in the instructions must be 'so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.' " *State v. Barton*, 335 N.C. 696, 702, 441 S.E.2d 295, 298 (1994) (quoting *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)). After reviewing the trial court's instruction on conspiracy, we find that defendant Marie was not deprived of a fair trial despite the court's decision not to repeat the entire instruction, having just given it for Michael. Therefore, the trial court did not commit plain error.

We have carefully considered all of defendants' assignments of error and find that both Michael Lynn Holmes and Laura Marie Autry Holmes received a fair trial free from prejudicial error.

No error.

Judges EAGLES and WALKER concur.

APPALACHIAN POSTER ADVERTISING COMPANY, INC., PETITIONER v. JAMES E. HARRINGTON, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. 9410SC477

(Filed 5 September 1995)

Highways, Streets, and Roads § 32 (NCI4th)— roadside sign erected prior to enactment of OACA—no authority of Department of Transportation to regulate

The Department of Transportation had no authority to promulgate any regulation with respect to petitioner's particular sign which was within 660 feet of an interstate, was located in a noncommercial/nonindustrial area, and was undisputedly a noncon-

forming sign which was in existence prior to the enactment of the Outdoor Advertising Control Act. N.C.G.S. §§ 136-130, 136-133.

Am Jur 2d, Advertising § 25.

Municipal power as to billboards and outdoor advertising. 58 ALR2d 1314.

Classification and maintenance of advertising structure as nonconforming use. 80 ALR3d 630.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway. 81 ALR3d 564.

Judge LEWIS dissenting.

Appeal by petitioner from judgment and order entered 13 December 1993 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 2 February 1995.

Wilson & Waller, P.A., by Betty S. Waller and Brian E. Upchurch, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth N. Strickland and Associate Attorney General Sarah A. Fischer, for respondent-appellee.

GREENE, Judge.

Appalachian Poster Advertising Company, Inc. (petitioner) appeals from the trial court's 13 December 1993 decision to affirm the North Carolina Department of Transportation's (the Department) revocation of a roadside sign permit issued to petitioner.

The undisputed facts are as follows: On 13 June 1973, the Department issued an outdoor advertising permit to petitioner for a "nonconforming, pre-existing sign" adjacent to Interstate 40 in McDowell County. The sign is located in a noncommercial/nonindustrial area within 660 feet of the interstate and was in existence prior to enactment of the Outdoor Advertising Control Act (the OACA). Petitioner's employees removed the sign face, repainted it, and altered it to conform with the requirements of a new advertiser, Western Steer/Econolodge, in September 1985. Originally, the sign was 35 feet long and 20 feet high for a total of 700 square feet. The

1985 modification changed the sign to 47.5 feet long and 14 feet high for a total of 665 square feet. Petitioner added new cross braces to the sign and replaced the support poles which were showing signs of age and wind stress. In addition, petitioner moved the sign back approximately three to five feet.

On 28 September 1985, the district engineer for the Department observed the new alterations to the sign. The engineer inspected the sign and discovered: (1) the structure was five feet farther from the highway than the permit had originally allowed; (2) the new poles were three feet taller than the original poles; and (3) the message on the sign's face had completely changed.

The district engineer notified petitioner on 8 October 1985 that the sign permit had been revoked because the alterations of the structure "are in violation of the Outdoor Advertising Control Act and rules and regulations promulgated thereto." Petitioner appealed the revocation to the Secretary of the Department, who affirmed the revocation by letter dated 16 December 1985. In the letter, the Secretary stated that regulations "19A NCAC 2E.0210(6) & (12)," promulgated by the Department pursuant to the OACA, provided that the district engineer shall revoke a sign permit for the rebuilding of a sign. Petitioner petitioned the Wake County Superior Court pursuant to N.C. Gen. Stat. § 136-134.1 for review of the decision. By order dated 2 July 1987, the trial court upheld the decision of the Secretary. Petitioner appealed. In *Appalachian Poster Advertising Co., Inc. v. Harrington*, 89 N.C. App. 476, 366 S.E.2d 705 (1988), we remanded the case to the trial court for more specific findings of fact and conclusions of law. Without hearing additional arguments or evidence, the trial court entered an order on 13 December 1993 determining that: (1) petitioner replaced the original sign with a new sign which was not substantially the same as the original sign; (2) the Department had properly revoked petitioner's outdoor advertising permit pursuant to the Outdoor Advertising Control Act; (3) the Department had the authority to revoke the permit; and (4) the regulations upon which the revocation was based were not unconstitutional. Petitioner appeals from the 1993 judgment.

The dispositive issue presented is whether the Department has the authority to promulgate any regulation with respect to petitioner's particular sign (displaying an advertisement for Western Steer/Econolodge) which is within 660 feet of an interstate, is located in a noncommercial/nonindustrial area, and is undisputed to be a non-

conforming sign which was in existence prior to the enactment of the OACA.

Assuming petitioner's rebuilding of the sign violated the Department's regulations, we agree with petitioner that the regulations did not apply to petitioner's sign. A study of N.C. Gen. Stat. § 136-130, the only source of authority for the enactment of rules and regulations with respect to outdoor signs, reveals that the petitioner's sign in question is not included within those signs that can be regulated by the Department. Section 136-130 provides:

> The Department of Transportation is authorized to promulgate rules and regulations in the form of ordinances governing:
>
> (1) The erection and maintenance of outdoor advertising permitted in G.S. 136-129,
>
> (2) The erection and maintenance of outdoor advertising permitted in G.S. 136-129.1,
>
> (2a) The erection and maintenance of outdoor advertising permitted in G.S. 136-129.2,
>
> (3) The specific requirements and procedures for obtaining a permit for outdoor advertising as required in G.S. 136-133 and for the administrative procedures for appealing a decision at the agency level to refuse to grant or in revoking a permit previously issued, and
>
> (4) The administrative procedures for appealing a decision at the agency level to declare any outdoor advertising illegal and a nuisance as pursuant to G.S. 136-134, as may be necessary to carry out the policy of the State declared in this Article.

N.C.G.S. § 136-130 (1993). Petitioner's sign does not fall within Section 136-129.1 because it is within 660 feet of I-40 and does not fall within Section 136-129.2 because it is not adjacent to scenic highways, State and National Parks, or historic areas. The sign was not erected or maintained in violation of state law and therefore is not illegal. N.C.G.S. § 136-128(0.2) (1993) (defining illegal). Therefore, the Department has no authority to promulgate rules applying to petitioner's sign under Sections 136-130(2), 136-130(2a) or 136-130(4).

Section 136-129 provides the following:

> No outdoor advertising shall be erected or maintained within 660 feet of the nearest edge of the right-of-way of the interstate or

> primary highways in this State so as to be visible from the main-traveled way thereof after the effective date of this Article as determined by G.S. 136-140, except the following:
>
> (1) Directional and other official signs and notices, which signs and notices shall include those authorized and permitted by Chapter 136 of the General Statutes, which include but are not limited to official signs and notices pertaining to natural wonders, scenic and historic attractions and signs erected and maintained by a public utility, electric or telephone membership corporation, or municipality for the purpose of giving warning of or information as to the location of an underground cable, pipeline or other installation.
>
> (2) Outdoor advertising which advertises the sale or lease of property upon which it is located.
>
> (2a) Outdoor advertising which advertises the sale of any fruit or vegetable crop by the grower at a roadside stand or by having the purchaser pick the crop on the property on which the crop is grown provided . . . .
>
> (3) Outdoor advertising which advertises activities conducted on the property upon which it is located.
>
> (4) Outdoor advertising, in conformity with the rules and regulations promulgated by the Department of Transportation, located in areas which are zoned industrial or commercial under authority of State law.
>
> (5) Outdoor advertising, in conformity with the rules and regulations promulgated by the Department of Transportation, located in unzoned commercial or industrial areas.

N.C.G.S. § 136-129 (1993). This section specifies the signs which are permitted to be erected and maintained in North Carolina and petitioner's sign is not included among those permitted. Thus, the Department had no authority to promulgate rules or regulations that apply to petitioner's sign under Section 136-130(1).

N.C. Gen. Stat. § 136-133 provides the following:

> No person shall erect or maintain any outdoor advertising within 660 feet of the nearest edge of the right-of-way of the interstate or primary highway system, except those allowed under G.S. 136-129, subdivisions (2) and (3) in this Article, or beyond

> 660 feet of the nearest edge of the right-of-way of the interstate or primary highway system, except those allowed under G.S. 136-129.1, subdivisions (2) and (3), without first obtaining a permit from the Department of Transportation . . . . The permit shall be valid until revoked for nonconformance with this Article or rules and regulations promulgated by the Department . . . .

N.C.G.S. § 136-133 (1993). This section requires a person seeking to erect or maintain some of the outdoor advertising signs permitted under Section 130-129 to receive a permit, from the Department, before construction. Because petitioner's sign does not fall within any of the signs permitted to be erected and maintained under Section 130-129, Section 136-133 does not apply to petitioner's sign. Therefore, Section 136-130(3) does not give the Department the authority to promulgate rules governing petitioner's sign.[1]

If the Department cannot apply the rules or regulations it promulgates to signs such as petitioner's which is a nonconforming, preexisting sign, the Department argues "any permit holder in a zoned agricultural/residential area with a nonconforming or 'grandfathered' sign would have carte blanche to violate all outdoor advertising regulations." The OACA, however, specifically instructs the Department on how to deal with such signs:

> The Department of Transportation is authorized to acquire by purchase, gift, or condemnation all outdoor advertising and all

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1. We reject the argument, adopted by the dissent, that the "petitioner essentially erected a new sign" when it repaired the sign, losing its status as a nonconforming sign and was therefore subject to the permitting process of N.C.G.S. § 136-130 and N.C.G.S. § 136-133. Although the Legislature likely could have promulgated a constitutional statute limiting the number of years the nonconforming signs could remain in place or limiting the extent of repairs to the signs, *see State v. Joyner*, 286 N.C. 366, 373, 211 S.E.2d 320, 324-25 (approving use of time limits on nonconforming uses), *appeal dismissed Joyner v. North Carolina*, 422 U.S. 1002, 45 L. Ed. 2d 666 (1975); Douglas Hale Gross, Annotation, *Zoning: Right to Repair or Reconstruct Building Operating as Nonconforming Use, After Damage or Destruction by Fire or Other Casualty*, 57 A.L.R. 3d 419 (1974) (statutes serving to prohibit restoration of nonconforming structures are generally held constitutional), it did not do so. In the absence of such a statute, signs retain their nonconforming status as long as the "nature and extent of the use . . . remain[s] the same as it was before the enactment" of the Outdoor Advertising Control Act. Timothy E. Travers, Annotation, *Classification and Maintenance of Advertising Structure as Nonconforming Use*, 80 A.L.R. 3d 630, 657 (1977). In this case there is no suggestion that the "nature and extent of the use" of the sign was altered. Furthermore to permit the Department to require removal of a reconstructed nonconforming sign would violate the specific legislative mandate that compensation be made for the removal of nonconforming signs. N.C.G.S. § 136-131.

> property rights pertaining thereto which are prohibited under the provisions of G.S. 136-129, 136-129.1 or 136-129.2, provided such outdoor advertising is in lawful existence on the effective date of this Article as determined by G.S. 136-140, or provided that it is lawfully erected after the effective date of this Article as determined by G.S. 136-140.

N.C.G.S. § 136-131 (1993). This section also provides for just compensation to be paid to the owner of the outdoor advertising sign. *Id.* Therefore, with respect to nonconforming, pre-existing advertising signs, this section and the corresponding federal act, 23 U.S.C. § 131, specifically require cash compensation to sign owners whose signs are removed pursuant to those acts. *Givens v. Town of Nags Head*, 58 N.C. App. 697, 700-01, 294 S.E.2d 388, 390, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982).

Because "[t]he agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislative grant of authority," *In re Community Assoc.*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980), the Department only had the authority under the OACA "to acquire by purchase, gift, or condemnation" petitioner's nonconforming, pre-existing sign, and did not have the authority to require removal of petitioner's billboard pursuant to Section 136-130 without just compensation. For these reasons, the decision of the trial court to affirm the Department's revocation of petitioner's permit is reversed. Because of our decision on this issue in favor of petitioner, we need not address petitioner's remaining arguments.

Reversed.

Judge COZORT concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I disagree with the majority's conclusion that the Department of Transportation (hereinafter "Department") does not have the authority to regulate petitioner's sign.

N.C.G.S. section 136-130 confers permitting power, specifically authorizing the Department to promulgate rules and regulations governing, *inter alia*,:

> (3) The specific requirements and procedures for obtaining a permit for outdoor advertising as required in G.S. 136-133 and for the administrative procedures for appealing a decision at the agency level to refuse to grant *or in revoking a permit previously issued*, ...

N.C.G.S. § 136-130 (1993) (emphasis added). N.C.G.S. section 136-133, referenced in the authorizing section above, further delineates this permitting power:

> No person *shall erect or maintain* any outdoor advertising . . . without first obtaining a permit from the Department . . . pursuant to the procedures set out by rules and regulations promulgated by the Department . . . . The permit shall be valid until revoked for nonconformance with this Article or rules and regulations promulgated by the Department . . . thereunder.

N.C.G.S. § 136-133 (1993) (emphasis added). Read together, these two sections grant the Department the authority to grant new permits, to revoke existing permits, and to promulgate rules and regulations for this purpose. As discussed below, instead of making repairs to an existing sign, petitioner essentially erected a new sign. Thus, petitioner's "new" sign was subject to the permitting process set up by these sections. I do not agree that the Department can only regulate signs "permitted" under N.C.G.S. sections 136-129, 136-129.1, 136-129.2. The Department is given, both directly and implicitly, the authority to determine which signs meet the requirements set forth in these sections and which signs do not. The power to make this determination in essence is the power to regulate.

The language of a statute will be construed, whenever possible, "so as to avoid an absurd consequence." *State v. Spencer*, 276 N.C. 535, 547, 173 S.E.2d 765, 773 (1970). It is absurd to conclude that the Legislature intended to permit advertisers to circumvent the purposes of the Outdoor Advertising Control Act by converting old, nonconforming signs into new signs thereby avoiding regulation of these "new" signs. This would allow the unending converting of all existing nonconforming signs into "new" signs. Under the majority opinion, these new signs could be erected in different locations, be of increased or decreased size, the same or another message, and of any shape and construction. This would be the ultimate loophole for roadside advertising. For those who believe:

> I think that I shall never see
> A billboard lovely as a tree
> Indeed, unless the billboards fall
> I'll never see a tree at all
>
> Ogden Nash, *Song of the Open Road*,

the majority is bad news indeed. Since I find the above issue not to be dispositive, I necessarily address the remaining issues: (1) whether the trial court erred in upholding the decision of the Secretary of Transportation; (2) whether the pertinent regulations are unconstitutionally vague; and (3) whether the regulations are an unconstitutional delegation of legislative power. I find all of petitioner's arguments on these issues unpersuasive.

The General Assembly enacted the Outdoor Advertising Control Act ("OACA") in 1967 in order, *inter alia*, "to promote the safety, health, welfare, and convenience and enjoyment of travel on and protection of the public investment in highways within the State." N.C.G.S. § 136-127 (1993). The OACA authorizes the Department to promulgate rules and regulations regarding outdoor advertising. *See* N.C.G.S. § 136-130 (1993). The regulations which applied at the time of the revocation and which were applied by the trial court in its *de novo* review provided in pertinent part:

> Any valid permit issued for a lawful outdoor advertising structure shall be revoked by the appropriate district engineer for any one of the following reasons:
>
> * * * *
>
> (6) any alteration of a nonconforming sign or a sign conforming by virtue of the grandfather clause which would cause it to be *other than substantially the same* as it was on the date of issuance of a valid permit; examples of alterations which are not allowed for nonconforming signs or signs conforming by virtue of the grandfather clause include: extension, enlargement, replacement, rebuilding, re-erecting or addition of illumination;
>
> * * * *
>
> (12) abandonment, discontinuance, or destruction of a sign; . . . .

N.C. Admin. Code tit. 19A r. 2E.0210 (August 1986) (emphasis added).

Petitioner first contends the trial court erred by finding and concluding the sign was substantially changed. I disagree.

We have previously interpreted "substantially" as used in this regulation to mean " 'essentially, in the main, or for the most part' " and as " '[i]n a substantial manner, in substance, essentially.' " *Appalachian Poster Advertising Co. v. Bradshaw*, 65 N.C. App. 117, 121, 308 S.E.2d 764, 766 (1983) (internal citations omitted). "Substantially" does not mean "an accurate or exact copy." *Id.*

The sign in *Bradshaw* underwent the following alterations: (1) the dimensions had changed from 25 feet by 12 feet to 30 feet by 10 feet; (2) the height of the poles increased from 20 feet to 30 feet; and (3) the number of poles increased from three to four. *Id.* at 118, 308 S.E.2d at 765. The wording on the face of the sign was not changed, although it was rearranged, and the advertiser remained the same. *Id.* After the changes, the sign retained the same square footage and remained in the same location. *Id.* at 121, 308 S.E.2d at 766. In light of these facts, we affirmed the trial court's holding that the changes to the sign were not substantial.

The facts here are distinguishable from those in *Bradshaw*, and I would affirm the trial court's finding that the changes were "substantial." First, the sign here was completely replaced, distinguishing it from the sign in *Bradshaw*. The original facing of the sign was removed and taken to petitioner's shop where it was repainted and altered to conform with the requirements of a new advertiser. New cross braces were added to the sign. Petitioner also replaced the support poles with new ones which were three feet taller. The whole structure was moved three to five feet farther from the highway. The dimensions were changed and the square footage altered. These changes are much more significant than those found not substantial in *Bradshaw*. As such, these changes constitute "replacement, rebuilding, and re-erecting," alterations prohibited by N.C. Admin. Code tit. 19A r. 2E.0210(6). The changes to the sign also violated N.C. Admin. Code tit. 19A r. 2E.0210(12). Petitioner destroyed and discontinued the permitted sign and replaced it with the new creation. Instead of making repairs to an existing sign, petitioner erected an entirely new sign in a new location.

The trial court's review of the decision of the Secretary of Transportation is without a jury and is *de novo*. N.C.G.S. § 136-134.1 (1993). The court may affirm the decision, or the court may reverse or modify the decision if it finds the decision to be: (1) in violation of a constitutional provision; or (2) not made in accordance with the OACA or the rules or regulations promulgated by the Department; or

(3) affected by other error of law. *Id.* The standard by which this court reviews the findings of fact of a trial court sitting without a jury is whether any competent evidence exists in the record to support the findings. *Hollerbach v. Hollerbach*, 90 N.C. App 384, 387, 368 S.E.2d 413, 415 (1988).

The trial court in the present case made the following pertinent finding of fact:

> 8. The new sign structure had all new support poles, a new cross bracing and an entirely new sign face. The dimensions of the new structure had different dimensions from the originally permitted nonconforming sign. The dimensions of the original sign were 35 feet in length and 20 feet in height. The new sign's dimensions are 47 and 1/2 feet in length and 14 feet in height. The shape of the sign had changed due to the difference in the dimensions of the original sign and the new sign. The new sign was located in a different location approximately three to five feet behind the location of petitioner's originally permitted sign. The words on the sign face changed from the original sign face to the new sign face.

There is sufficient evidence in the record to support this finding and the other findings of fact. In turn, the findings support the court's conclusions of law, succinctly stated in conclusion number six:

> 6. The Secretary properly upheld the District Engineer's revocation of petitioner's permit due to discontinuance of the original sign and due to substantial alteration of the originally permitted nonconforming sign which caused it to be other than substantially the same as it was on the date the permit was issued, and that decision was in accordance with the Outdoor Advertising Control Act and rules and regulations promulgated by the Board of Transportation thereto.

We agree that the sign, as altered, was not substantially the same as when the permit was issued. The trial court properly upheld the decision of the Secretary of Transportation to revoke petitioner's permit.

Petitioner also contends it was denied due process of law because N.C. Admin. Code tit. 19A r.2E.0210(6) is unconstitutionally void for vagueness. I disagree. " . . . [A] statute is void for vagueness if its terms are so vague, indefinite, and uncertain that a person cannot determine its meaning and therefore cannot determine how to order his behavior to meet its dictates." *Nestler v. Chapel Hill/Carrboro City Schools Bd. of Educ.*, 66 N.C. App. 232, 238, 311

S.E.2d 57, 60, *disc. review denied*, 310 N.C. 745, 315 S.E.2d 703 (1984). Our previous definition in *Bradshaw* of "substantially" as used in N.C. Admin. Code tit. 19A r.2E.0210(6) demonstrates that the regulation is not vague, indefinite or uncertain. Requiring the owner of an outdoor advertising sign to maintain the sign "essentially, in the main, or for the most part" as it was when it became nonconforming gives sufficient notice for the ordinary, reasonable and prudent person to avoid revocation of the permit. Further, the regulation gives examples of changes deemed to be "substantial." The regulation is not unconstitutional.

Petitioner next argues the regulation in question is void, asserting that the regulations are the result of an unconstitutional delegation of legislative power. Specifically, petitioner contends the General Assembly failed to set forth sufficient standards for the control of billboards by which the Department may be guided in adopting the rules and regulations in questions. I do not agree.

The process of determining whether an act unconstitutionally delegates authority to an agency was set forth in explicit detail by Justice Huskins for our Supreme Court in *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 696-98, 249 S.E.2d 402, 410-11 (1978). Without repeating all the criteria there, I simply note that "the primary sources of legislative guidance" are "the declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers." *Id.*, 295 N.C. at 698, 249 S.E.2d at 411. The declaration of policy for the Outdoor Advertising Control Act is found in N.C.G.S. section 136-127 (1993):

> The General Assembly hereby finds and declares that outdoor advertising is a legitimate commercial use of private property adjacent to roads and highways but that the erection and maintenance of outdoor advertising signs and devices in areas in the vicinity of the right-of-way of the interstate and primary highways within the State should be controlled and regulated in order to promote the safety, health, welfare and convenience and enjoyment of travel on and protection of the public investment in highways within the State, to prevent unreasonable distraction of operators of motor vehicles and to prevent interference with the effectiveness of traffic regulations and to promote safety on the highways, to attract tourists and promote the prosperity, economic well-being and general welfare of the State, and to preserve and enhance the natural scenic beauty of the highways and

areas in the vicinity of the State highways and to promote the reasonable, orderly and effective display of such signs, displays and devices. *It is the intention of the General Assembly to provide and declare herein a public policy an statutory basis for the regulation and control of outdoor advertising.*

(Emphasis added). The section of the General Statutes following § 136-127 provides for limitation of outdoor advertising devices (§ 136-129); limitations of advertising beyond 660 feet (§ 136-129.1); limitations of advertising adjacent to scenic highways, State and National Parks, and historic areas (§ 136-129.2); removal of existing non-conforming advertising (§ 136-131); a permitting process (§ 136-133); and judicial review of final administrative decisions (§ 136-134.1). Further, N.C. Gen. Stat. § 136-130 specifically authorizes the Department to promulgate rules and regulations governing §§ 136-129, -129.1, -129.2 and -133.

The declarations of findings and goals set forth in § 136-127 and the provisions of the sections referenced above are as specific as reason requires and give adequate guidance to the Department in implementing its delegated powers. I would find these regulations a rational, reasonable and constitutional delegation of legislative power.

I would affirm the judgment in all respects.

NORTH CAROLINA COUNCIL OF CHURCHES AND JIMMY CREECH, PLAINTIFFS v. STATE OF NORTH CAROLINA; NORTH CAROLINA DEPARTMENT OF CORRECTION; AND FRANKLIN FREEMAN, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. 9310SC1162

(Filed 5 September 1995)

1. Appeal and Error § 175 (NCI4th)— case technically moot—case capable of repetition yet evading review—case not dismissed

Although this case wherein plaintiffs sought a permit to hold a vigil outside Central Prison prior to the execution of John Gardner would seem to be moot, since John Gardner was executed in 1992, the case is not dismissed because it is one which is "capable of repetition yet evading review."

Am Jur 2d, Appellate Review § 646.

2. Constitutional Law § 115 (NCI4th)— execution vigil—denial of permission to hold on prison property—no denial of free speech rights—no evidence of viewpoint discrimination

Summary judgment for defendants was proper on plaintiffs' free speech claim under Article I, § 14 of the North Carolina Constitution where plaintiffs claimed that denial of a permit to hold a vigil on a grassy knoll on prison property prior to an execution violated their right to free speech, but defendants acted reasonably in denying plaintiffs access to the grassy knoll, given past disturbances during such vigils, the serious need for prison security at all times but especially during executions, and the proximity of the grassy knoll to the prison. Furthermore, since plaintiffs neither alleged nor offered evidence of any affirmative acts by defendants that could constitute viewpoint discrimination, summary judgment for defendants was proper on this claim as well.

Am Jur 2d, Consitutional Law §§ 496, 506, 510, 517, 518.

3. Trial § 64 (NCI4th)— continuance of summary judgment hearing pending discovery denied—no error

The trial court did not abuse its discretion in denying plaintiffs' motion to deny summary judgment for defendants or to continue the summary judgment hearing pending further discovery in an action challenging the denial of a permit to hold a vigil on a grassy knoll on prison property during an execution where plaintiffs did not show by affidavit, deposition, or otherwise any facts concerning past prison disruptions or lack of disruptions during execution vigils or the risk of disruptions at plaintiffs' proposed vigil; they did not offer any other evidence to refute the reasonableness of defendants' denial of their permit request; and plaintiffs did not state a claim for viewpoint discrimination.

Am Jur 2d, Summary Judgment § 12.

4. Pleadings § 374 (NCI4th)— amendment of complaint denied—amendment futile—denial proper

The trial court did not err in denying plaintiffs' second motion to amend their complaint to add claims for viewpoint discrimination and violation of equal protection based on the failure of defendants to interfere with a demonstration by death penalty

proponents on a grassy knoll on prison property without a permit from the Department of Correction, though with a permit from the City of Raleigh, since failure to interfere in itself did not constitute viewpoint discrimination or amount to denial of equal protection, and an amendment amplifying these claims would therefore be futile.

Am Jur 2d, Pleading § 323.

Judge GREENE dissenting.

Appeal by plaintiffs from order filed 12 August 1993 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 5 April 1995.

Patterson, Harkavy & Lawrence, by Burton Craige, for plaintiffs-appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General James Peeler Smith, Special Deputy Attorney General Jacob L. Safron, and Associate Attorney General William McBlief, for defendants-appellees.

LEWIS, Judge.

On 4 September 1992 plaintiffs, opponents of the death penalty, applied to the North Carolina Department of Administration for a permit to conduct a vigil on the "grassy knoll" near Central Prison in Raleigh during the 24 hours preceding the execution of John Gardner scheduled for 23 October 1992. The grassy knoll, prison property used for vigils in 1984, 1986, and 1991, is located on the north side of Western Boulevard, about 100 yards south of the prison. The permit was denied verbally and this denial confirmed in a 14 September 1992 letter from W.L. Kautzky, Deputy Secretary of Correction, to plaintiff Creech.

On 1 October 1992 proponents of the death penalty obtained a permit from the City of Raleigh to stage a demonstration prior to and during Gardner's execution on the northern right of way of the 1300 block of Western Boulevard. Both plaintiffs and defendants agree that this right of way covers a portion of the grassy knoll. In support of their claim that a State right of way covers part of the grassy knoll, plaintiffs presented an affidavit dated 21 October 1992 by Jimmie L. Beckom, Chief Engineer of the City of Raleigh at that time. Mr.

Beckom testified that Western Boulevard and the right of way along Western Boulevard are owned by the State. Defendants claim that the City has authority to regulate picketing on state highways within a municipality and that the State of North Carolina does not regulate such picketing through the Department of Transportation. Neither party disputes the statutory authority of the Department of Correction, pursuant to N.C.G.S. § 148-5, to manage prison property, and the record before us indicates that the grassy knoll is located on prison property.

On 19 October 1992, plaintiffs filed this action for declaratory and injunctive relief to gain access to the grassy knoll prior to and during Gardner's execution. On 21 October 1992 the Court denied plaintiffs' motion for preliminary relief. On 21 October 1992 plaintiffs filed a motion for a preliminary mandatory injunction requiring defendants to grant permission for a vigil on property north of the 1400 block of Western Boulevard. Plaintiffs filed an amended complaint on 21 October 1992. Claiming that the denial of a permit violated their free speech rights under Article I, section 14 of the North Carolina Constitution, plaintiffs, in their amended complaint, prayed for: a declaratory judgment declaring that their rights had been violated, a temporary restraining order or preliminary injunction ordering defendants to permit access prior to and during the execution to the grassy knoll or to the 1400 Western Boulevard site, a permanent injunction precluding defendants from closing the grassy knoll to the public during executions, and attorney fees and costs. On 22 October 1992 the court entered an order allowing plaintiffs access to a site south of Western Boulevard rather than the alternative site requested.

Defendants filed motions to dismiss and for summary judgment. Plaintiffs filed a motion to amend their complaint, seeking to add allegations and claims concerning events that took place after the filing of their first amended complaint. Plaintiffs served their first set of interrogatories and first request for production of documents on 4 June 1993. In response, defendants served a motion for a protective order rather than answering the interrogatories or producing the requested documents. Plaintiffs filed motions to compel discovery, and to deny defendants' motion for summary judgment, or to continue the summary judgment motion, under Rule 56(f), until plaintiffs could conduct discovery. By order filed 12 August 1993, the court denied plaintiffs' motions and granted defendants' motion for summary judgment. Plaintiffs appeal this order.

Plaintiffs assert on appeal that the trial court erred by (1) granting summary judgment to defendants, (2) prematurely hearing the summary judgment motion and denying plaintiffs' Rule 56(f) motion to deny summary judgment or to continue the summary judgment hearing, and denying plaintiffs' motion to compel discovery, and (3) denying plaintiffs' motion to amend their complaint.

We first note that the briefs and record raise an issue as to whether either the State of North Carolina (through the Department of Correction or otherwise) or the City of Raleigh, or both, have the authority to control access to and grant permits for vigils on the grassy knoll, part of which, according to the record, covers the northern right of way of Western Boulevard. Since this issue is not properly before us for review, we do not decide. However, for the purposes of this appeal, we assume that defendants did in fact have authority to issue or deny such a permit.

Mootness

[1] Defendants contend that this case is moot. The exclusion of moot questions in state court is a principle of judicial restraint. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Such restraint is applied as follows:

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

Id.

However, even a case which is technically moot will be considered if it satisfies the requirements of the " 'capable of repetition yet evading review' " exception to the mootness doctrine. *See In re Jackson*, 84 N.C. App. 167, 170-71, 352 S.E.2d 449, 452 (1987). This exception applies when:

> (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Crumpler v. Thornburg, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989) (quoting *Leonard v. Hammond*, 804 F.2d 838, 842 (4th Cir. 1986)), *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770-71 (1989).

Under these facts, defendants' denial of a permit request before an execution could not be fully litigated and appealed. Execution dates established pursuant to N.C.G.S. § 15-194 are set for not less than 60 days nor more than 90 days from the date of the hearing held to set the date of execution. N.C.G.S. § 15-194 (1983). Plaintiffs then have from 60 to 90 days from the date of hearing to seek a permit for their vigil. If the permit is denied, they do not then have time to develop a factual record and obtain plenary review of the denial prior to the execution. Once the execution is held, the case is moot, leaving plaintiffs with no opportunity to fully litigate their claim.

There is also a reasonable expectation that this situation will recur. Plaintiffs have sought to hold such vigils on the grassy knoll at several executions since 1984 and give every reason to believe they intend to hold such vigils at future executions. Given the proximity of the site to the prison and the concern for prison security, it is likely that defendants will deny plaintiffs permits for vigils on the grassy knoll at future executions. Unlike the plaintiff in *Crumpler* whose case did not come within the mootness exception because he could not demonstrate that there was a reasonable expectation that the challenged statute would be unconstitutionally applied to him again, plaintiffs have shown that requests for similar permits may well be denied for future executions. *See Crumpler*, 92 N.C. App. at 724, 375 S.E.2d at 711-12.

Thus, although this case would seem to be moot since John Gardner has been executed, we shall not dismiss it because it is "capable of repetition yet evading review."

(1) Propriety of Summary Judgment on Plaintiffs' Claims

[2] Plaintiffs claim that the denial of the permit for a vigil on the grassy knoll violated their rights of free speech under the North Carolina Constitution which provides in Article I, section 14:

> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

N.C. Const. Art. I, § 14 (1984). The free speech clause in this section was added in 1971. *See* J. Orth, *The North Carolina State Constitution: A Reference Guide* 51 (1993).

The parties have offered no North Carolina cases on point to suggest how the North Carolina constitutional protection of free speech

applies to the facts of this case and we have not found any. Given this scarcity of case precedent, we turn to factually similar cases decided under the First Amendment to the United States Constitution for guidance. We note the North Carolina Constitution includes the phrase ". . . every person shall be held responsible for their abuse"; the United States Constitution has no equivalent.

Under the First Amendment of the United States Constitution, a state may place reasonable, viewpoint-neutral restrictions on expressive conduct that takes place on publicly owned property that is not a public forum. *Int'l Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. —, 120 L. Ed. 2d 541, 550 (1992). In a case decided prior to the addition of the 1971 free speech clause to our North Carolina Constitution, our Supreme Court similarly concluded that freedom of speech is not absolute and that a state may place reasonable restrictions on the time and place of expressive activity. *State v. Wiggins*, 272 N.C. 147, 157-58, 158 S.E.2d 37, 45 (1967), *cert. denied*, 390 U.S. 1028, 20 L. Ed. 2d 285 (1968).

Regulations of expressive activity in a public forum, in contrast, must be "narrowly drawn to achieve a compelling state interest." *Int'l Society for Krishna Consciousness, Inc.*, 505 U.S. at —, 120 L. Ed. 2d at 550. The United States Supreme Court has held that prison property is not a public forum. *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 134-36, 53 L. Ed. 2d 629, 644-45 (1977). Since the grassy knoll is located on prison property, it is not a traditional public forum.

Public property that is not a traditional public forum can attain public forum status only if it qualifies as a designated public forum. *Int'l Society for Krishna Consciousness, Inc.*, 505 U.S. at —, 120 L. Ed. 2d at 550. A state does not create a designated public forum simply by inaction or by permitting members of the public to visit the property freely. *Id.* at —, 120 L. Ed. 2d at 551. Rather, the property must be intentionally opened by the state for public discourse. *Id.*

The simple fact that defendants have given limited permission for vigils on the grassy knoll at past executions does not convert the knoll into a forum intentionally opened perpetually for public discourse. *See id.* In fact, the record shows that the Department of Administration refused to grant a permit for a 24 hour vigil on the grassy knoll in January 1992 although remaining willing to consider a permit for a shorter time period similar to the limited time period for which a permit was issued in October 1991.

Since the grassy knoll is not a public forum, regulations on expressive conduct there need only be reasonable and viewpoint-neutral. *See id.* at —, 120 L. Ed. 2d at 550. Since the grassy knoll is prison property located in close proximity to the prison itself, courts should give appropriate deference to the decision of prison officials in regulating activity on the grassy knoll, particularly preceding and during an execution when prisoners are already likely to become agitated. *See Jones*, 433 U.S. at 125-26, 136, 53 L. Ed. 2d at 638-39, 645.

Although plaintiffs' affidavits indicate that vigil participants have protested peacefully and quietly in past vigils held by plaintiffs, defendants' affidavits show that the inmates have not behaved in such a solemn manner. Defendants present uncontradicted affidavits showing that there were serious inmate disruptions during the 18 October 1991 execution of Michael V. McDougall, and that these disruptions were more intense than those at past executions. Prisoners started fires in the prison, mimicked the candles held by the persons holding the vigil, shouted to those outside, and one prisoner threw a burning object from a prison window. The prison had to reassign and employ additional staff persons to handle the disturbances. Affidavits from both plaintiffs and defendants show that prisoners can easily view the grassy knoll from within the prison. Because of these past disturbances, prison officials testified that increased staffing would be required during the execution if a vigil were held on the grassy knoll. Given the serious need for prison security at all times, especially during a tense time like an execution, and the proximity of the grassy knoll to the prison, defendants acted reasonably in denying plaintiffs access to the grassy knoll during the 23 October 1992 execution of John Gardner. Plaintiffs remained free to obtain and, in fact, did obtain permission to demonstrate on another nearby site. Accordingly, summary judgment for defendants was proper on plaintiffs' free speech claim under Article I, section 14 of the North Carolina Constitution.

Plaintiffs also claim that defendants have discriminated on the basis of viewpoint in denying them a permit. However, this is not a case in which defendants granted the death penalty proponents a permit to demonstrate on the grassy knoll while denying such a permit to plaintiffs. Rather, the death penalty proponents obtained a permit from the City of Raleigh to demonstrate on the right of way of Western Boulevard, part of which covers the grassy knoll. Plaintiffs base their viewpoint discrimination claim solely on the assertion that defendants should have intervened and prevented the death penalty

proponents from demonstrating on the grassy knoll during the execution. We do not see how this lack of intervention alone can constitute viewpoint discrimination. Plaintiffs neither allege nor offer any other facts to show that defendants denied the permit based on either the content of the protest or on plaintiffs' viewpoint. Since plaintiffs have neither alleged nor offered evidence of any affirmative acts by defendants that could constitute viewpoint discrimination, we hold that summary judgment for defendants was proper on this claim.

(2) Denial of Plaintiff's Rule 56(f) and Rule 37(a) Motions

[3] Plaintiffs claim that summary judgment was premature and that the court erred in denying their motion to continue the summary judgment hearing pending further discovery. Plaintiffs also assert that the court erred in denying their Rule 37(a) motion to compel discovery.

Plaintiffs served their first set of interrogatories and their first request for production of documents two months prior to the date scheduled for the summary judgment hearing. Defendants moved for a protective order and refused to respond to plaintiffs' discovery requests. Plaintiffs then moved to compel discovery, and under Rule 56(f) to deny summary judgment or to continue the summary judgment hearing pending further discovery. In their Rule 56(f) request and supporting affidavit, plaintiffs claimed that they were unable to respond adequately to defendants' summary judgment motion because they had not yet obtained discovery from defendant concerning (1) the risk of prison disruption during execution vigils and (2) facts relevant to plaintiffs' viewpoint discrimination claim.

A trial court is not barred in every case from granting summary judgment before discovery is completed. *Evans v. Appert*, 91 N.C. App. 362, 367-68, 372 S.E.2d 94, 97, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584-85 (1988). Further, the decision to grant or deny a continuance is solely within the discretion of the trial judge and will be reversed only when there is a manifest abuse of discretion. *Id.* at 368, 372 S.E.2d at 97.

Here, we hold it was not an abuse of discretion for the trial judge to refuse to grant a continuance or deny summary judgment under Rule 56(f). Plaintiffs have not shown by affidavit, deposition or otherwise, any facts concerning past prison disruptions, or lack of disruptions, during execution vigils or the risk of disruptions at plaintiffs' proposed vigil. They also have not offered any other evidence to refute the reasonableness of the defendants' denial of their permit

request. In addition, since plaintiffs' allegations do not state a claim for viewpoint discrimination, the court also did not abuse its discretion in denying the Rule 56(f) motion as to this claim.

Since summary judgment was proper on the materials presented at this stage of the proceedings, we need not further address plaintiffs' assertion that the court erred by refusing to compel discovery.

(3) Denial of Motion to Amend

[4] In seeking to amend their complaint a second time, plaintiffs sought to add claims for damages, to add additional factual allegations supporting their claim for viewpoint discrimination, and to assert a cause of action for violation of equal protection of the law under Article I, section 19 of the North Carolina Constitution. Plaintiffs assert that this amendment was needed to cover events occurring and claims arising after the filing of their first amended complaint.

Plaintiffs made their motion under Rule 15(a) of the North Carolina Rules of Civil Procedure. Under this rule, after a complaint has been amended once, it may be amended subsequently "only by leave of court or by written consent of the adverse party." N.C.G.S. § 1A-1, Rule 15(a) (1990). Rule 15(a) further provides that leave to amend "shall be freely given when justice so requires." *Id.* The denial of a motion to amend is reviewed for clearly shown abuse of discretion. *House of Raeford Farms v. City of Raeford*, 104 N.C. App. 280, 282, 408 S.E.2d 885, 887 (1991). When an amendment would be futile in light of the propriety of summary judgment on a plaintiff's claim, it is not an abuse of discretion for the trial court to deny the amendment. *Olive v. Williams*, 42 N.C. App. 380, 388, 257 S.E.2d 90, 96 (1979).

The claims plaintiffs seek to add for viewpoint discrimination and violation of equal protection are based on the failure of defendants to interfere with the demonstration by the death penalty proponents on the grassy knoll without a permit from the Department of Correction, though with a permit from the City of Raleigh. Since we have held that this failure to interfere in itself does not constitute viewpoint discrimination, an amendment amplifying this claim would be futile. Plaintiffs' attempt to add an equal protection claim based solely on this failure to interfere is also futile. We find no constitutional violation in the defendants' inaction toward the proponent's exercising their permit from the City to be on the grassy knoll. Since we have

held that the actions of defendants in denying the permit did not violate the freedom of speech guarantee set forth in Article I, section 14 of the North Carolina Constitution, an amendment to add a claim for damages for this violation would also be futile.

The trial court did not abuse its discretion in denying the motion to amend. Even if we treat the motion to amend as a Rule 15(d) motion to serve supplemental pleadings, as requested by plaintiffs, the proposed changes would still be futile since plaintiffs' claims, even as amended, cannot survive summary judgment.

For the reasons stated, the Final Order of the Court granting summary judgment to defendants and denying plaintiffs' motions is affirmed in all respects.

Judge WALKER concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's opinion that the court correctly denied plaintiffs' motion for an extension of time under Rule 56(f).

I agree with the majority that the grassy knoll is not a public forum and that restrictions of expressive conduct on this public property can occur if the restrictions are reasonable and viewpoint-neutral. *Krishna Society*, 505 U.S. at —, 120 L. Ed. 2d at 550; *Wiggins*, 272 N.C. at 147-58, 158 S.E 2d at 37-45. I also agree that the trial court, as a general rule, is not required to wait until discovery is completed before entering summary judgment. *Evans v. Appert*, 91 N.C. App. 362, 368, 372 S.E.2d 94, 97, *disc. rev. denied*, 323 N.C. 623, 374 S.E.2d 584 (1988). In those instances, however, where the uncompleted discovery relates to facts the movant asserts in support of the summary judgment motion and the party opposing the motion does not otherwise have access to the facts, the summary judgment motion should be continued "to permit . . . discovery to be had." N.C.G.S. § 1A-1, Rule 56(f) (1990). This is especially so when the facts are within the sole control of the movant. *Joyner v. Wilson Memorial Hosp.*, 38 N.C. App. 720, 723, 248 S.E.2d 881, 882 (1978).

In this case, whether the restriction on the use of the grassy knoll was reasonable depends in large part on whether previous vigils on the grassy knoll caused serious disruptions within the prison. Indeed,

the majority determines that the denial of the permit was reasonable on the basis of "past disturbances" within the prison. The defendants presented affidavits showing that the previous vigils on the grassy knoll caused serious disruptions within the prison. This was information peculiarly within the control of the defendant. The plaintiffs requested a continuance of the summary judgment hearing in order to pursue discovery of whether previous vigils had caused any disruptions within the prison. In support of their motion under Rule 56(f), plaintiffs submitted the affidavit of their attorney, William G. Simpson, Jr. His affidavit stated in pertinent part:

> 5. Plaintiffs seek to establish that the supposed risk of disruption within Central Prison did not justify denying plaintiffs' request for access to the "grassy knoll" during the time of John Gardner's execution.
>
> . . . .
>
> 10. The discovery requests filed by plaintiff seeks [sic] evidence that is relevant to defendants' motion for summary judgment. In particular, plaintiffs seek information concerning the supposed risk of disruption purportedly relied upon by defendants to deny plaintiffs request for a permit. Plaintiffs also seek information and materials relevant to their claim of viewpoint discrimination.

The trial court denied the plaintiffs' request for continuance, denied their request for discovery and entered summary judgment for the defendant.

It is true, as the majority states, that the "[p]laintiffs have not shown by affidavit, deposition or otherwise, any facts concerning past prison disruptions . . . ." Although they have not done so and may not be able to do so, they are entitled to an opportunity to discover if any such evidence exists. For these reasons the trial court erred in denying plaintiffs' Rule 56(f) motion to continue the summary judgment hearing and their motion seeking discovery. The entry of summary judgment must therefore be vacated as it was premature. On remand the plaintiffs should be permitted reasonable discovery and then a new hearing on defendants' summary judgment motion.

DEBRA KAY LYLES, PLAINTIFF v. THE CITY OF CHARLOTTE AND MOTOROLA, INC., DEFENDANTS

No. 9426SC134

(Filed 5 September 1995)

Municipal Corporations § 444 (NCI4th)— defendant participant in local government risk pool—right to assert governmental immunity waived

Defendant city's "risk management operations," carried out in cooperation with Mecklenburg County and the local school board, fell within the definition of a "local government risk pool" as contemplated by N.C.G.S. § 160A-485(a), so that defendant waived the right to assert governmental immunity in bar to plaintiff's action in which she contended that her police officer husband's cause of death was the improper training he allegedly received from defendant regarding use of a portable radio.

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.

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.

Appeal by defendant City of Charlotte from order entered 20 October 1993 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 1994.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III, and Richard B. Fennell and William K. Diehl, Jr., for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by L.D. Simmons, II, Robert B. Cordle and Leigh F. Moran, for defendant-appellant City of Charlotte.

JOHN, Judge.

In this action brought pursuant to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), defendant City of Charlotte (the City)

appeals the trial court's denial of its motion for summary judgment. More particularly, the City contends it neither purchased liability insurance covering plaintiff's claim nor participated in a "local government risk pool," and that it therefore was entitled to assert the defense of governmental immunity in bar to plaintiff's action. Accordingly, the City continues, the trial court committed reversible error by denying its motion for summary judgment on these grounds. We disagree.

Pertinent factual and procedural information is as follows: On the evening of 5 August 1990, Charlotte Police Officer Milus Terry Lyles (Lyles) and his partner Officer Villines (Villines) responded to a call involving a domestic dispute. At the scene, the officers arrested Calvin Cunningham (Cunningham), purportedly searched him for weapons, and, after he was handcuffed, placed him in the back seat of Lyles' squad car. Villines then drove away in a separate vehicle. As Lyles was transporting Cunningham to the Mecklenburg County Jail, the latter managed to retrieve a small pistol hidden on his person and shot the officer twice in the back. Although Lyles' bullet-proof vest prevented the shots from penetrating his body, the impact caused him to lose control of the squad car and crash into a parked dump truck.

According to allegations in the complaint, Lyles then exited the driver's seat and, following training received from the City's Police Department (the Department), moved towards the rear of the vehicle to call for assistance with his assigned Motorola portable radio. In accordance with standard instructions, he crouched down and pressed the "E" (emergency) button on the radio and stated "140 to Villines . . . 140." It is alleged that Lyles had been informed that depressing the "E" button would access "a clear channel to communicate with all police officers and the dispatcher." In reality, however, the portable radio "did not send his distress signal to the other officers," and as a consequence Lyles received no response. In conformity with his training, Lyles attempted to return to the front of the vehicle to summon help on the squad car radio. As Lyles passed the left rear window of the wrecked automobile, Cunningham fired another shot from the back seat, hitting Lyles in the right eye and killing him.

On 4 August 1992, plaintiff Debra Kay Lyles (Lyles' widow) filed the instant action against the City and Motorola, Inc., contending that a proximate cause of Lyles' death was the improper training he

allegedly received from defendants regarding use of the Motorola portable radio. Plaintiff further alleged the Department:

> 20. . . . had received complaints from officers prior to the death of . . . Lyles regarding malfunctioning of the emergency button, and knew that it did not function as . . . Lyles . . . had been trained. It intentionally did not take adequate steps, however, to ensure that the radios were operating properly.
>
> 21. The . . . Department knew at and before the time of . . . Lyles' death that the training it had given him, particularly the information regarding the functioning of the "E" button on the portable units, was inadequate and improper . . . . It intentionally did not take adequate steps, however, to ensure that the police officers were trained regarding the functioning of the radios.
>
> 22. The . . . Department knew that its officers would be governed in their reaction to distress and emergency situations by this training, and act in accordance with it. The . . . Department also knew that its officers would rely on the representations made regarding the functioning of the radio. The . . . Department knew, or should have known, that officers' reliance on this training and these representations would lead to situations in which it was substantially certain that an officer would be seriously injured or killed.
>
> 23. The . . . Department's conduct, in particular its failure to advise . . . Lyles that he should no longer rely on the training and information he had received regarding his portable radio unit, was a proximate cause of his death. . . . Lyles was shot while attempting to act in accordance with his training.

In answer to the complaint, the City raised numerous affirmative defenses, including "governmental and sovereign immunity." Thereafter, on 7 September 1993, the City moved for judgment on the pleadings pursuant to N.C.R. Civ. P. 12(c) (1990) or, in the alternative, for summary judgment "based solely on the affirmative defense of sovereign immunity." In support of its summary judgment motion, the City submitted the affidavits of the City's Deputy Finance Director Gregory C. Gaskins (Gaskins) and Frank T. Weber (Weber), Vice President of a regional insurance brokerage firm.

The trial court denied each motion by order entered in open court 20 October 1993 and signed 27 October 1993, stating the City "is not

immune from liability in this particular case and thus this Court has personal jurisdiction over Defendant [City]."

At the outset, we resolve plaintiff's argument that this appeal is premature and should be dismissed. While denial of summary judgment is generally considered interlocutory and not immediately appealable, *Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978), this Court has repeatedly held that when "the grounds for [a party's] motion for summary judgment are governmental immunity . . . the denial of [the] motion is immediately appealable." *Taylor v. Ashburn*, 112 N.C. App. 604, 606, 436 S.E.2d 276, 278 (1993) (citations omitted), *disc. review denied*, 336 N.C. 77, 445 S.E.2d 46 (1994); *see also Hickman v. Fuqua*, 108 N.C. App. 80, 82, 422 S.E.2d 449, 450 (1992) (citations omitted), *disc. review denied*, 333 N.C. 462, 427 S.E.2d 621 (1993); *see also* N.C. Gen. Stat. § 1-277 (1983). Accordingly, we examine the merits of the City's appeal.

The City contends it waived governmental immunity neither through participation in a "local government risk pool" nor by purchasing liability insurance covering plaintiff's claim, and that denial of summary judgment in its favor was therefore error. Because we determine the City's "risk management operations" fall within the definition of a "local government risk pool" as contemplated by our General Assembly, however, we uphold the court's ruling and decline to address the issue of liability coverage.

A party moving for summary judgment bears the burden of establishing the absence of any genuine issue of material fact and its entitlement to judgment as a matter of law. *Normile v. Miller and Segal v. Miller*, 63 N.C. App. 689, 692, 306 S.E.2d 147, 149 (1983) (citation omitted), *modified on other grounds and aff'd*, 313 N.C. 98, 326 S.E.2d 11 (1985); *see also* N.C.R. Civ. P. 56 (1990). A defendant who moves for summary judgment may meet this burden by showing either that (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim. *Taylor*, 112 N.C. App. at 606-07, 436 S.E.2d at 278 (citation omitted).

In the case *sub judice*, the City contends the uncontradicted affidavits offered in support of its motion established plaintiff's inability to overcome the affirmative defense of governmental immunity.

The common law doctrine of governmental immunity insulates a city or county from liability for injuries arising from governmental (as opposed to proprietary) activities. *See, e.g., Gregory v. City of Kings Mountain*, 117 N.C. App. 99, 103, 450 S.E.2d 349, 352 (1994). In other words, a municipality is not generally liable for torts committed by its officers and employees while performing governmental functions. *Young v. Woodall*, 119 N.C. App. 132, 135, 458 S.E.2d 225, 228 (1995) (citation omitted).

Governmental functions have been described as "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State . . . ." *Britt v. Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952); *see also Clark v. Scheld*, 253 N.C. 732, 735, 117 S.E.2d 838, 841 (1961) (Governmental activities are those which promote or protect the "health, safety, security or general welfare of [a municipality's] citizens.") (citation omitted). "Ordinarily, a municipality providing police services is engaged in a governmental function . . . ." *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5 (citation omitted), *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988).

In her complaint, plaintiff alleged Lyles was killed as the result of improper training by the City's agents regarding operation of his portable Motorola radio. We agree with the City that the training and supervision of officers by a police department are embraced within the concept of "provi[sion] [of] police services"—a governmental function. *Id.* Accordingly, the City would ordinarily be immune from liability for torts committed by its officers and agents while engaged in instructing Lyles in the emergency use of a portable radio.

However, N.C. Gen. Stat. § 160A-485 (1994) "establishes an exception to the common-law rule." *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985); *see also Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E.2d 427, 429 (1970) (in the absence of statutory authority, a municipality cannot waive governmental immunity). In pertinent part, the statute provides:

> (a) Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity

> shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability.

G.S. § 160A-485(a).

Therefore, "a municipality may waive governmental immunity by the purchase of liability insurance." *Davis v. Messer*, 119 N.C. App. 44, 52, 457 S.E.2d 902, 907 (1995) (citation omitted). Moreover, the statute explicitly equates participation in a "local government risk pool" with the purchase of insurance for the purposes of a city's immunity from liability. *See* G.S. § 160A-485(a); *see also* Comment, *Waiving Local Government Immunity in North Carolina: Risk Management Programs **are** Insurance*, 27 Wake Forest L. Rev. 709, 731 (1992) ("The rationale underlying this amendment [legislatively declaring local government risk pools as the equivalent of liability insurance] is sound: once local government funds are pooled, the third party administrator of the pool acts as the insurer, paying the claims from a centralized fund.").

Thus, G.S. § 160A-485(a) provides two methods by which a municipality may waive governmental immunity—(1) purchase of liability insurance covering the particular claim, or (2) joining a "local government risk pool." The City asserts it "has taken neither action."

We first consider whether the City was a participant in a "local government risk pool" at the time of Lyles' death. "Article 23 of General Statute Chapter 58" provides in relevant part as follows:

> [T]wo or more local governments may enter into contracts or agreements pursuant to this Article for [1] the joint purchasing of insurance or [2] to pool retention of their risks for property losses and liability claims and to provide for the payment of such losses of or claims made against any member of the pool on a cooperative or contract basis with one another, or may enter into a trust agreement to carry out the provisions of this Article.

N.C. Gen. Stat. § 58-23-5 (1994).

The City reads the above-quoted section as signifying that in order for an agreement between governmental entities to be considered a "local government risk pool," the agreement must be entered into for the specific purpose of either (1) the joint purchase of insurance, or (2) the pooling of funds on a cooperative or contract basis for payment of claims brought against pool members.

Plaintiff counters that the "requisite characteristic of a risk pool . . . is the participation of two or more local governments in a joint risk management program, providing for the 'payment of such losses of or claims made against any member of the pool on a cooperative or contract basis with one another.' " In other words, according to plaintiff, the statute restricts neither the manner in which municipalities choose to organize pools nor the purposes for which those pools may be established. *See generally* Comment, *Waiving Local Government Immunity in North Carolina: Risk Management Programs* ***are*** *Insurance*, *supra* at 711.

However, we need not resolve directly the parties' disagreement over how best to read G.S. § 58-23-5. Even utilizing the City's narrower interpretation of the section, we conclude the risk management program in which the City participates falls within the scope of the statute.

The City contends the affidavits it submitted to the trial court established that it neither purchased insurance jointly nor pooled retention of risks under the contractual "risk management operations" entered into by the City in 1988 with Mecklenberg County (the County) and the Charlotte-Mecklenburg Board of Education (the Board). Thus, the City's argument continues, governmental immunity was not waived by its participation in a "local government risk pool" at the time of Lyles' death.

The City in particular points to Gaskins' affidavit discussing specifics of the risk management program entered into by the City, the County and the Board, as compared with the organization and operation of the North Carolina League of Municipalities (the League) risk coverage program described in detail by Weber in his affidavit.

For example, regarding "local government risk pools" generally, Weber stated:

> A local government risk pool permits a group of municipalities to join together to purchase insurance or to pool their funds on a cooperative basis for the purposes of paying claims made against members of the pool. *A key feature of a risk pool is the sharing of risk by the participants in the pool.*

(Emphasis added). Under the League's program, for instance, each participant initially contributes an actuarially determined amount into the pool. Thereafter, funds from the pool are used to pay claims brought against any member up to a previously fixed amount ($250,000.00 under the League's plan). For coverage of claims exceed-

ing that amount, the League purchases reinsurance on behalf of all participants.

Upon commencement of each fiscal year, the annual contribution of each entity is recalculated with reference to "exposures and experience" in the previous year. No individual member of the League is reassessed an additional amount during that year, however, regardless of the number or dollar amount of claims ultimately brought against it. If further assessments become necessary during a given year, they are lodged against all participants based upon their *pro rata* contributions at the beginning of that fiscal year. As Weber explained:

> It is in this fashion that the municipalities share risk. No one city faces unlimited exposure. The group of cities collectively bear the risk that one (or more) cities will receive and pay claims exceeding the amount that that city (or cities) contributed to the pool at the beginning of the year.

In contrast, the City contends the "claims and risk management unit" the City has operated in conjunction with the County and the Board since March 1988 involves no sharing of risk of liability among the participating entities. Because under G.S. § 58-23-5 the sharing (or pooling) of risks either by the joint purchase of insurance or the pooling of retained risks is the "key feature" of a "local government risk pool," the City argues its program is outside the purview of the statute. *See* G.S. § 58-23-5; *see also Antiporek v. Village of Hillside*, 499 N.E.2d 1307 (Ill. 1986).

The program at issue was entered into by the City, the County and the Board on 30 March 1988 and denominated the Joint Undertaking Agreement (the Joint Agreement). It provided that the Division of Insurance and Risk Management (DIRM) of the City's Finance Department would thereafter adjust claims for damages made against the City, the County and the Board. In addition, DIRM was given authority to "exercise [all] insurance and risk management decisions" on behalf of the three participants.

The "basic structure" of the program administered by DIRM is described as "a two tiered self-insurance program . . . ." Under the first tier "[e]ach of the parties to th[e] [Joint] Agreement will finance its own loss exposures in the above areas of liability and risk by retaining the first $500,000 per occurrence of losses." Although DIRM is to "h[o]ld and invest[]" each entity's first tier contributions, "[t]hese funds will be owned by the party paying the[m] . . . with investment

income and amounts remaining at the end of each fiscal year going into [each party's] respective accounts . . . ."

Further, with regard to "those risks which can best be covered by the purchase of insurance and reinsurance," DIRM was charged ("consistent with sound risk management and financial principles") with the responsibility of purchasing each entity's insurance. However, "the parties to this Agreement . . . shall be billed in an amount equal to the net cost of the insurance and reinsurance." The City maintains the uncontradicted evidence therefore reflects no sharing of risk of liability among the participants in the Joint Agreement. First, the City asserts, because each entity pays for and maintains independent insurance policies and coverage, there is no "joint purchase" of insurance among or between the three. *See* G.S. § 58-23-5. Second, the City continues, although the participants have "consolidated their risk management operations in DIRM," each is required to keep sufficient funds in separate trust accounts from which all claims against it will be paid. For example, claims against the City are paid exclusively from the City's trust account; if that account is depleted by claims, the City alone is responsible for raising the balance to an acceptable level. Thus, the argument concludes, there is also no "pool[ed] retention of . . . risks for . . . liability claims" among or between itself, the County and the Board. *See id.*

While the City properly emphasizes the sharing or pooling of risks between entities as an essential characteristic of a "local government risk pool," we find the distinctions the City attempts to draw regarding the Joint Agreement unpersuasive.

For example, although under the Joint Agreement each participant in the City's "risk management program" a) retains the risk for the first $500,000.00 of losses and b) claims falling within that amount are paid from "Tier 1" funds set aside by and for the individual pool members, the "basic structure" of the program is nevertheless "two-tiered."

As described in the Joint Agreement:

> Each of the parties will jointly establish the "Tier 2 Reserve Fund," from which losses in excess of the Tier 1 level and up to $1 million per occurrence may be paid. . . . *[A]ll monies in the Tier 2 Reserve Fund will be available to any party to this Agreement* . . . .
>
> . . . .

> If a party has claims paid on its behalf from funds in the Tier 2 Reserve Fund taken from the account of another party, these funds will be repaid with interest . . . .

(Emphasis added). To effectuate the Joint Agreement, the City, the County and the Board also executed a Trust Agreement:

> to provide a self-insurance reserve fund from which distributions can be made to satisfy liability claims against any of the Participants . . . [and] specifically for the purpose of providing the "Tier 2 Reserve Fund" . . . . This trust will insure the loss liability of each Participant against losses exceeding $500,000 but not exceeding $1,000,000 per occurrence . . . .

As further set forth in the Trust Agreement:

> Any such payments [for Tier 2 claims] shall be made first out of the separate trust account of the Participant against whom the claim was made and the excess, if any, shall be made out of the other Participants' separate trust accounts, pro rata.
>
> In the event such payments completely exhaust a Participant's separate trust account and are made out of the other Participants' separate trust accounts, the Participant against whom the claim was made will . . . make sufficient additional contributions to the trust to replenish the principal amount paid out of the other Participants' separate trust accounts, plus interest . . . . Upon notice from [DIRM], the Participant shall make all reasonable efforts to make such additional contributions to the trust as may be necessary to replenish such principal amount and interest thereon within thirty (30) days after its next annual appropriation.

Thus, under the City's "risk management operations," once a participant has depleted the funds held by DIRM on its behalf for the payment of Tier 1 claims, it is entitled to dip into the "Tier 2" pool *which is funded by all participants.*

Conceding "it is technically possible for the City to use funds placed into the trust accounts by the County and the School Board to pay claims against the City," the City nonetheless attempts to minimize the significance of this obvious "risk sharing" element by insisting it has never exercised the option to borrow money from the Tier 2 pool. Further, should Tier 2 money be utilized by the City to pay claims brought against it, the City points out it would be obligated to repay that amount, plus interest. Therefore, the City concludes, since "all claims against the City that are satisfied through the use of funds

placed in the Tier 2 fund are ultimately paid by the City," there is "no sharing of risk."

However, the City's assertions cannot be sustained. First, the City's failure to exercise the option of using Tier 2 funds does not detract from the nature of the Tier 2 pool itself and is immaterial for purposes of characterizing the City's arrangement. In addition, as plaintiff notes, "[t]he purpose of this fund could only be to provide a means for its members to pay claims with other members' money." As such, one of the component parts of the Joint Agreement provides a mechanism by which participants may "pool retention of their risks for property losses and liability claims and . . . provide for the payment of such losses of or claims made against any member of the pool on a cooperative or contract basis with one another," *see* G.S. § 58-23-5, albeit with an eventual obligation to repay the pool. *See* Trust Agreement ¶ 2.9(A.) ("Participant shall make all reasonable efforts to make such additional contributions to the trust as may be necessary to replenish such principal amount and interest thereon within thirty (30) days after its next annual appropriation.").

Based on the foregoing, we conclude the City was indeed a participant in a "local government risk pool" on the date of Lyles' death and thereby waived the right to assert governmental immunity in bar to plaintiff's claim. *See* G.S. § 160A-485(a). The trial court therefore properly denied the City's motion for summary judgment grounded upon the defense of immunity.

Affirmed.

Judges GREENE and WYNN concur.

CLARENCE SMITH, PLAINTIFF v. CAROLINA COACH COMPANY, DEFENDANT

No. COA94-896

(Filed 5 September 1995)

1. Principal and Agent § 18 (NCI4th)— conversion by subagent—agent's liability to principal—jury question

A jury question was presented as to whether plaintiff agent was liable for his subagent's conversion of defendant bus company's property and thus breached his contract with defendant

under the theory that an agent is responsible to the principal for the conduct of a subagent with reference to the principal's affairs entrusted to the subagent where the evidence tended to show that plaintiff contracted to operate defendant's Washington and Greenville bus terminals; plaintiff hired a subagent to operate the terminals and to sell the tickets which defendant assigned to plaintiff pursuant to defendant's inventory control procedures; the subagent conspired with two of defendant's employees to sell tickets stolen from the Raleigh terminal and split the profits; evidence that the subagent could not have sold the stolen tickets without the use of the validator machines at plaintiff's terminals supports a conclusion that the subagent acted with reference to the principal's affairs entrusted to him; and evidence that plaintiff was only authorized to sell tickets which were entrusted and assigned to him supports a conclusion that the subagent did not act with reference to the principal's affairs entrusted to him.

Am Jur 2d, Agency §§ 157-167.

2. Principal and Agent § 18 (NCI4th)— subagent's sales of stolen tickets—agent's failure to report—no breach of agency agreement

Defendant bus company failed to establish that plaintiff ticket agent breached provisions of its agency agreement by failing to report the sales of stolen tickets by a subagent, to hold the proceeds of those tickets in trust, and to indemnify defendant for the proceeds of the sales of the stolen tickets where defendant presented no evidence that plaintiff ever received the proceeds of the sale of the stolen tickets or that plaintiff either knew or should have known about their sale.

Am Jur 2d, Agency §§ 157-167, 333-335, 338.

3. Libel and Slander § 43 (NCI4th)— defamation claim— insufficiency of evidence of publication and prejudice

The trial court did not err in granting defendant's motion for directed verdict on plaintiff's defamation claim since letters from defendant's counsel to plaintiff's counsel regarding plaintiff agent's contractual liability for the proceeds of the sale of stolen tickets contained no defamatory statements and were privileged as communications relevant to proposed judicial proceedings; persons who were eight to ten feet away when one of defendant's agents accused plaintiff of stealing tickets and not reporting their

sale could not recall hearing any defamatory remarks and were distracted by a customer; statements made by defendant's agent in the presence of plaintiff's fiancee had no tendency to prejudice plaintiff in his reputation, office, trade, or business or hold him up to disgrace, ridicule, or contempt because plaintiff had previously advised his fiancee that defendant's agent had falsely accused him of stealing tickets; and plaintiff failed to establish publication of statements to customers because the proximity of the customers to defendant's agent was unclear.

Am Jur 2d, Libel and Slander § 443.

Appeal by plaintiff and defendant from judgment entered 28 March 1994 by Judge J. Richard Parker in Beaufort County Superior Court. Heard in the Court of Appeals 10 May 1995.

Wayland J. Sermons, Jr., P.A. for plaintiff-appellant/appellee.

Parker, Poe, Adams & Bernstein, L.L.P., by Renee J. Montgomery, John J. Butler, and Jim Wade Goodman, for defendant-appellee/appellant.

WALKER, Judge.

Plaintiff sued defendant for breach of contract and defamation arising out of defendant's termination of written agency agreements (agreements) by which plaintiff operated defendant's Washington and Greenville bus terminals as its exclusive agent. Under the agreements, plaintiff was to serve as defendant's commission agent for the sale of tickets, provide passenger and freight services, and conduct station operations at defendant's Washington and Greenville stations. Defendant terminated the agencies in late April 1992, after plaintiff refused defendant's requests that plaintiff reimburse it for 230 tickets which had been sold at plaintiff's agencies and for which sales proceeds had not been remitted. These tickets bore the imprinter stamp of the validator machines at plaintiff's stations and were from a series of 1250 tickets missing from defendant's ticket supply.

Defendant counterclaimed for breach of contract and conversion. Defendant alleged, in part, that plaintiff breached his obligations under paragraphs 3(b),(c), and (e) of the agreements by failing to: (1) prepare and submit accurate and complete reports accounting for all sales and collections made at the Washington and Greenville stations, (2) hold in trust and deposit daily in the bank designated by defend-

ant all funds collected at these stations, and (3) indemnify defendant for loss of its property represented by the tickets that had been sold at the Washington and Greenville stations and had not been remitted to defendant. Defendant further alleged that plaintiff's employees, who were hired by plaintiff to sell defendant's tickets, converted approximately $123,400 worth of defendant's tickets for which plaintiff was thus liable.

At the close of plaintiff's evidence, defendant moved for a directed verdict on all claims and counterclaims. The trial court granted defendant's motion on plaintiff's defamation claim and denied it on the remaining claims and counterclaims. At the close of all the evidence, plaintiff moved for a directed verdict on all counterclaims and defendant moved for a directed verdict on all remaining claims and counterclaims, which motions were denied. The jury answered all issues against the defendant and found for plaintiff on his breach of contract claim. Defendant moved for judgment notwithstanding the verdict, which the trial court denied. From the denial of his motions for directed verdict and judgment notwithstanding the verdict, defendant appeals. Plaintiff appeals from the grant of a directed verdict for defendant on the defamation claim.

[1] We first address the denial of defendant's motion for directed verdict and judgment notwithstanding the verdict on defendant's counterclaims for conversion and breach of contract and plaintiff's claim for breach of contract. In determining whether the evidence is sufficient to withstand a motion for 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, and resolving any conflicts, contradictions and inconsistencies in his favor. *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 62 N.C. App. 419, 422, 303 S.E.2d 332, 334, *cert. denied*, 309 N.C. 451, 307 S.E.2d 364, 365 (1983). The same standard applies for determining whether to grant a judgment notwithstanding the verdict. *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 745, 253 S.E.2d 625, 627 (1979).

Ordinarily, it is not permissible to direct a verdict in favor of a party who carries the burden of proof. *Stutts v. Green Ford, Inc.*, 47 N.C. App. 503, 517, 267 S.E.2d 919, 927 (1980). However, a directed verdict for the party with the burden of proof is not improper where its right to recover does not depend on the credibility of its witnesses and the pleadings, evidence, and stipulations show that there is no

issue of genuine fact for jury consideration. *Paccar Fin. Corp. v. Harnett Transfer, Inc.*, 51 N.C. App. 1, 5, 275 S.E.2d 243, 246, *cert. denied*, 302 N.C. 629, 280 S.E.2d 441 (1981). But where an issue is controverted, a directed verdict is improper even though the evidence is uncontradicted. *Cutts v. Casey*, 278 N.C. 390, 417, 180 S.E.2d 297, 311 (1971).

The parties introduced the agreements into evidence, which contained the following provisions:

> 3. Agent's Obligations.
>
> . . .
>
> (b) Agent shall prepare and submit accurate and complete reports accounting for all sales and collections in strict compliance with Company's instructions.
>
> (c) All funds collected by Agent for Company shall be the property of Company and shall be held in trust exclusively for the Company's benefit, deposited daily in a bank or banks designated by Company.
>
> . . .
>
> (e) Agent shall indemnify and save Company harmless from and against any and all claims, liabilities and causes of action for injury to or death of any person[s] . . ., or loss or damage to any property . . . arising out of or attributable to the performance of Agent or any of his employees or agents, or any injury to or death of Agent's employees, except when such injury to or death of persons or damage to or loss or property is due solely to the negligence of Company.
>
> . . .
>
> (g) Agent will safeguard and account for all tickets and busbills assigned and entrusted to him. When documents cannot be located, it is agreed they shall be settled by Agent paying the Company an amount equal to the average sales price for that ticket or busbill actually sold by the Agent during the week the missing ticket or busbill would have been sold.

Plaintiff's evidence showed that in May 1990 plaintiff hired Caesar Freeman to operate the Washington and Greenville terminals and to sell the tickets which defendant assigned to him pursuant to defendant's inventory control procedures. These procedures pro-

vided that plaintiff fill out a requisition form to obtain tickets for sale at his terminals, which defendant would ship to plaintiff on an incoming bus. After acknowledging receipt of the tickets, plaintiff was responsible for their cash value. These procedures were part of the "instructions" referred to in paragraph 3(b). Unknown to the plaintiff, Freeman conspired with a bus driver who was employed by defendant to sell tickets which had been stolen from the stock room of defendant's Raleigh office and split the proceeds of their sale with the bus driver and defendant's stock room clerk. Plaintiff testified to the effect that, pursuant to paragraph 3, sections (b) and (c), he prepared accurate and complete reports and deposited all funds received for tickets that were entrusted and assigned to him.

Defendant's evidence showed that 230 tickets which had been stolen from defendant's stock room in Raleigh bore the stamp of the validating machines at plaintiff's agencies. The stolen tickets could not have been sold without the use of the validating machines at plaintiff's agencies. Defendant presented no evidence tending to show that defendant either knew or should have known about the sale of the stolen tickets.

The trial court instructed the jury that if it found plaintiff liable for conversion, it must also find him liable for breach of the agency agreements. Defendant argues that under *Colony Associates v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 300 S.E.2d 37 (1983), plaintiff is strictly liable to defendant for the acts of his subagent and that the trial court should have granted its motion for directed verdict on its counterclaims for conversion and breach of contract since the uncontradicted evidence shows that plaintiff's subagent converted 230 tickets for which defendant sustained damages of $23,926.

We disagree that plaintiff, as defendant's agent, is strictly liable for the acts of his subagent. In *Colony Associates*, we reversed the entry of directed verdict and judgment notwithstanding the verdict for defendant on plaintiffs' claim against their agent, Clapp, and remanded for a new trial. *Colony Associates*, 60 N.C. App. at 636, 300 S.E.2d at 39. Plaintiffs sought to recover a good faith deposit of $11,000 made to Clapp's subagent, Global. Clapp forwarded the deposit to Global in order to obtain refinancing for plaintiffs and Global improperly refused to refund the deposit. *Id.* at 635-36, 300 S.E.2d at 38. One of plaintiffs' theories of recovery was that Clapp was liable for the improper actions of its subagent. We found that there was sufficient evidence from which the jury could find an

agency relationship between plaintiffs and Clapp and held that Clapp, as agent for plaintiffs, could be responsible to plaintiffs for the acts of his subagent. *Id.* at 638-39, 300 S.E.2d at 40. In so holding, we cited with approval the Restatement (Second) of Agency § 406 (1957), which provides that "[u]nless otherwise agreed, an agent is responsible to the principal for the conduct of a . . . subagent with reference to the principal's affairs entrusted to the subagent . . . ." *Id.* at 639, 300 S.E.2d at 40.

In the case *sub judice*, the trial court instructed the jury in accordance with section 406 of the Restatement and defendant did not object to these instructions. Defendant contends that the uncontradicted evidence that Smith delegated his duties of selling tickets at the Washington and Greenville terminals to Freeman and that Freeman sold stolen tickets from these agencies established plaintiff's liability under section 406 of the Restatement of Agency as a matter of law. We disagree. On the one hand, evidence that plaintiff delegated his duties of selling tickets to Freeman and that Freeman could not have sold the stolen tickets without the use of the validator machines at plaintiff's terminals supports a conclusion that Freeman acted with reference to the principal's affairs. On the other hand, evidence which tended to show that plaintiff was only authorized to sell tickets which were entrusted and assigned to him suppports a conclusion that Freeman did not act with reference to the principal's affairs entrusted to him. We find that the issue of whether Freeman's actions constituted conduct with reference to the principal's affairs was controverted and was properly submitted to the jury.

[2] Defendant next argues that the trial court should have granted its motions for directed verdict and judgment notwithstanding the verdict on its breach of contract counterclaim because the uncontradicted evidence establishes that plaintiff breached paragraphs 3(b), (c), and (e) of the agreements, respectively, by failing (1) to report the sales of the 230 tickets, (2) to hold the proceeds of those tickets in trust and to deposit them in the bank, and (3) to indemnify defendant for the tickets that had been sold at the stations and had not been remitted to defendant. Defendant further argues that a directed verdict should have been granted for defendant on plaintiff's breach of contract claim because the uncontradicted evidence shows that defendant justifiably terminated the agencies pursuant to paragraph 5 of the agreements, which provides that the company may declare the agreements null and void if plaintiff fails to maintain records as directed by defendant or to account for and/or pay sums of money due.

Plaintiff contends that he complied with all the terms of the agreement. The facts surrounding the purported breach were undisputed and the contract language is unambiguous. Thus, we find that defendant failed to establish a breach of these provisions as a matter of law and we overrule defendant's assignments of error to the denial of its motions for directed verdict and judgment notwithstanding the verdict on defendant's breach of contract counterclaim and plaintiff's breach of contract claim.

Defendant presented no evidence that plaintiff ever received the proceeds of the sale of the stolen tickets or that plaintiff either knew or should have known about their sale. We do not construe paragraphs 3(b) and (c) as requiring plaintiff to prepare and submit reports for the sale of those tickets and to hold the proceeds of those tickets in trust for defendant under these circumstances. Moreover, we reject defendant's contention that it was entitled to reimbursement for its losses under paragraph 3(e), the indemnnity provision. Defendant cites *Lumberton v. Hood, Commissioner*, 204 N.C. 171, 167 S.E. 641 (1933) for support. In *Hood*, the court construed an agreement between defendant bank and plaintiff municipality whereby defendant agreed to post security bonds to the plaintiff to prevent damage to it in the event defendant wrongfully refused to release funds deposited by plaintiff and subject to its use. *Id.* at 172, 167 S.E. at 642. In holding that the indemnity agreement applied to plaintiff's own damage due to the defendant's conduct, the court noted that "indemnity signifies that which is given to a person to save him from suffering damage." *Id.* at 175, 167 S.E. at 644. We find *Hood* distinguishable. The primary purpose in construing a contract of indemnity is to ascertain and give effect to the intention of the parties. *Dixie Container Corp. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968). In *Dixie Container Corp.*, our Supreme Court held that an indemnitee could not recover for damage to its property caused by the indemnitor where the indemnity provision provided that "[indemnitor] shall indemnify and save harmless the . . . [plaintiff], and their principals against all loss, cost, including reasonable attorney's fees, or damages on account of injury to persons or property occurring in the performance of this contract and agreement." *Id.* at 625, 628, 160 S.E. at 709, 711. The Court stated that:

> [w]e think it is reasonably clear that in the 'indemnify and save harmless' clause, defendant only bound itself to reimburse plaintiff for any damages it became obligated to pay third persons as a result of defendant's activity on the leased premises. Ordinarily,

> indemnity connotes liability for derivative fault. . . .' In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which he has incurred or is about to incur to a third party. . . .'

Id. at 628, 300 S.E.2d at 711 (citations omitted). The clear and express purpose of the agreement in *Hood* was to protect plaintiff from losing money on deposit with defendant in the event defendant wrongfully refused to return the deposit. In this case, as in *Dixie Container Corp.*, the indemnity provision was clearly intended to make good and save defendant harmless from loss or obligation which defendant incurs to a third party, not to protect defendant from loss of property directly caused by plaintiff or his employees. Thus, defendant could not recover for the loss occasioned by the sale of stolen tickets under the indemnity provision.

Defendant also argues that the court should have granted its motions for directed verdict and judgment notwithstanding the verdict on plaintiff's breach of contract claim because plaintiff presented insufficient evidence of damages. Defendant cannot assert this on appeal because it failed to raise this issue before the trial court on its motions for directed verdict and judgment notwithstanding the verdict. *See Broyhill v. Coppage*, 79 N.C. App. 221, 225, 339 S.E.2d 32, 36 (1986) (a motion for directed verdict must state the grounds therefor, N.C. Gen. Stat. § 1A-1, Rule 50(a), and grounds not asserted in the trial court may not be asserted on appeal).

[3] Finally, we address plaintiff's argument that the trial court erred in granting defendant's motion for directed verdict on his defamation claim. Plaintiff contends that he produced sufficient evidence to establish a prima facie case of defamation in the form of slander and libel. At trial, plaintiff argued that letters from defendant's counsel to plaintiff's counsel regarding plaintiff's contractual liability for the proceeds of the sale of the stolen tickets constituted libel and that statements made by defendant's division manager, Elvis Latiolais, on three separate occasions, constituted slander. We need not address the sufficiency of the evidence on the libel claim because plaintiff does not state any reason or argument nor does he cite any authority for support of his contention that there was sufficient evidence of libel and thus has abandoned his assignment of error with respect to the libel claim. *See* N.C. R. App. P. 28(b)(5) (1995). Nevertheless, we agree with defendant that the letters contained no defamatory statements and were privileged as communications relevant to proposed

judicial proceedings. *See Harris v. NCNB*, 85 N.C. App. 669, 674, 355 S.E.2d 838, 841 (1987).

Plaintiff presented evidence of three instances in which Latiolais allegedly accused him in the presence of others of stealing the tickets. Plaintiff argues that this evidence, when viewed in the light most favorable to him, is sufficient to establish a claim for slander per se. "To establish a claim for slander per se, a plaintiff must prove: (1) defendant spoke base or defamatory words which tended to prejudice him in his reputation, office, trade, business or means of livelihood or hold him up to disgrace, ridicule or contempt; (2) the statement was false; and (3) the statement was published or communicated to and understood by a third person." *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988).

Plaintiff's evidence tended to show that on 29 April 1992, plaintiff met Latiolais at the Greenville station to discuss a problem they had with the tickets. Latiolais was there with Detective Edward Mayhue Haddock of the Greenville Police Department and David Nichols, defendant's auditor. Freeman was at the ticket counter selling tickets to a couple of customers. Plaintiff testified that as soon as he walked into the station, Latiolais loudly accused him of stealing the tickets and not reporting the sale of the tickets. Plaintiff and Latiolais were standing behind the ticket counter, approximately eight to ten feet away from Freeman, who was selling tickets to customers.

Detective Haddock and Nichols testified about what they heard on 29 April 1992. Haddock testified that he stood beside the counter with Nichols and Freeman and watched Nichols perform an audit of the Greenville station while plaintiff and Latiolais stood near the back door "at almost the opposite end of the counter and back in a corner, . . . where the back door is where the freight goes in and out, away from the counter area." Haddock heard voices, but could not recall any specific things that were said because his attention was drawn to a customer who came into the station and walked up beside him in front of Mr. Freeman and asked for a bus ticket. Freeman testified that he heard Latiolais "saying like you got employee [sic] working for you, and you don't know what they're doing or some stuff like that, and I heard him say like you got to pay the money for those tickets."

Several days later, plaintiff and his then fiancee, Linda Cox (Smith), returned to the Greenville station to pick up some papers. Latiolais had taken over the station and was operating it. Plaintiff testified that just as they reached the door, Latiolais asked him if he was

bringing him the money he had embezzled from the company. Linda Cox Smith testified that she and plaintiff stood at the customer side of the counter and waited for five to ten minutes for Latiolais to acknowledge them. There were customers in there at the time. No customers testified at trial. The evidence also showed that plaintiff had advised his fiancee that Latiolais had previously falsely accused him of stealing the tickets. Thus, we find that, as to Linda Cox Smith, the statements had no tendency to prejudice plaintiff in his reputation, office, trade, or business or hold him up to disgrace, ridicule or contempt and conclude that plaintiff failed to establish a claim for slander per se as to Mrs. Smith.

Plaintiff recalled a third meeting with Latiolais in which Latiolais made defamatory remarks. However, he did not recall Mrs. Smith being present.

Plaintiff argues that the evidence was sufficient to create a jury issue as to whether the statements were published or communicated to and understood by a third person. Plaintiff mainly relies on *Harris v. Temple*, 99 N.C. App. 179, 182, 392 S.E.2d 752, 753, *review denied*, 327 N.C. 428, 395 S.E.2d 678 (1990), in which this Court held that evidence was sufficient to support a finding that slanderous statments were heard and understood by several people other than plaintiff. In *Harris*, plaintiff testified that she was standing a few feet away from defendant near the entry and exit doors of the grocery store when she heard defendant loudly accuse her of paying with a worthless check. She further testified that people were coming in and out of the store at the time, that a lady was standing immediately behind her, and that there were cashiers and bagboys at the checkout booths, the closest of which was ten feet away. *Harris*, 99 N.C. App. at 182-83, 392 S.E.2d at 753. The Court distinguished the case from *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 365 S.E.2d 621 (1988), in which our Supreme Court held that plaintiffs' evidence of several other persons gathered in front of the store while defendant accused plaintiffs of not paying for merchandise was insufficient to create an issue for the jury as to whether other persons heard and understood the statements. *Id.* at 181-82, 392 S.E.2d at 753. In that case, the Court reasoned that because the proximity of the onlookers to the speaker was not clear, the evidence indicated only a possibility that someone might have heard the statements and that a possibility is not enough. *Id.*

In holding the evidence in *Harris* sufficient, the Court stated that evidence "that plaintiff heard slanderous remarks spoken in a loud

voice from a few feet away is some evidence that others a similar distance from the speaker also heard" and recited the evidence of the proximity of other persons to the speaker. *Id.* at 182, 392 S.E.2d at 753. The Court further noted that "[s]ince there is no evidence of any noises that might have drowned out [the speaker's] accusations, and the evidence is that he made them in a loud voice, it is inferable that they were heard well beyond a distance of 10 to 15 feet by those in the vicinity of the other checkout counters." *Id.* at 183, 392 S.E.2d at 754.

Although in this case, as in *Harris*, the evidence regarding the 29 April 1992 incident clearly indicates the proximity of other persons to Latiolais, we find *Harris* distinguishable. In this case, unlike *Harris*, the evidence shows that the plaintiff and the speaker had their backs turned away from everyone and that two of the individuals standing within eight feet of the speaker did not hear any defamatory remarks. Moreover, the evidence indicates that these individuals were distracted by a customer who was inquiring about ticket prices. Plaintiff's evidence of publication several days after the 29 April 1992 incident was insufficient because, as in *West v. King's Dept. Store*, the proximity of the customers to Latiolais is unclear and thus was not established. After carefully reviewing the record, we find no error in the trial court's failure to submit the defamation claim to the jury.

No error.

Judges COZORT and JOHN concur.

STATE OF NORTH CAROLINA v. JOHN P. LEDBETTER

No. 9421SC380

(Filed 5 September 1995)

Searches and Seizures § 109 (NCI4th)— purchase of controlled substance from confidential informant within six days—sufficiency of affidavit to support issuance of search warrant

Probable cause existed for issuance of a search warrant where a confidential informant made a purchase of cocaine from defendant at his residence; the officer's affidavit gave a precise and detailed recitation of his observations regarding the controlled purchase; and the statement that the one-time controlled

purchase occurred within six days of the application for the search warrant was placed in the affidavit in an effort to conceal the identity of the informant and did not render the controlled purchase stale from the passage of time.

Am Jur 2d, Searches and Seizures § 124.

Search warrant: sufficiency of showing as to time of occurrence of facts relied on. 100 ALR2d 525.

Appeal by defendant from judgment entered 3 February 1994 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 31 January 1995.

Attorney General Michael F. Easley, by Associate Attorney General William B. Crumpler, for the State.

Marilyn E. Massey for defendant-appellant.

JOHN, Judge.

Defendant pled guilty to charges of trafficking in cocaine, possession with intent to sell and deliver heroin, maintaining a dwelling for the purposes of violating the Controlled Substances Act, and possession of drug paraphernalia. He was sentenced to a term of fourteen (14) years imprisonment in addition to a fine of $100,000.00.

Pursuant to N.C. Gen. Stat. § 15A-979(b) (1988), defendant appeals the trial court's denial of his motion to suppress certain evidence. He contends the trial court erred because there existed no probable cause for the issuance of a search warrant. For the reasons set forth herein, we find defendant's argument unpersuasive.

The State's evidence presented at the hearing on defendant's motion to suppress tended to show the following: On 9 July 1993, Detective H. C. Gray of the Forsyth County Sheriff's Department (Gray) received information from a confidential informant concerning illegal drug activity at 25 Monmouth Street in Winston-Salem. Gray had previously received a similar report of suspected narcotics activity at the same address through Crimestoppers. The report to Crimestoppers disclosed the possible sale of cocaine at that location, and further indicated the residence belonged to defendant.

Gray thereafter initiated a controlled purchase of narcotics through the informant at the suspected address. The confidential source was searched prior to entering the premises and given a sum

of money which was marked and labelled. This individual had previously negotiated similar purchases under supervision of the Sheriff's Department, and such assistance had "led to several search warrants and several felony arrests."

Officers observed the informant enter defendant's residence, remain inside momentarily, and then return to the officers' location. At that time, the informant handed Gray "one baggie" containing a substance which was field tested at the scene and determined to be cocaine. The informant told Gray the cocaine had been obtained from defendant.

Gray thereafter applied for a search warrant. In an affidavit submitted to the Deputy Clerk of Superior Court, Gray stated *inter alia* the following:

> Within six days prior to the making of this application for this search warrant, the applicant received information from a person known to officers of the Forsyth County Sheriff's Department Vice and Narcotics, who fears for his/her safety should his/her name become known. . . .
>
> To the applicant's knowledge, this confidential and reliable source has never given false information to any law enforcement officer. This confidential and reliable [source] has admitted to the use of and is familiar with, cocaine. The confidential and reliable source has, in the past, purchased marijuana from individuals who are currently under investigation by the Forsyth County Sheriff's Department's Vice and Narcotics Division.
>
> In the six days prior to the making of this application for this search warrant, the applicant met with the confidential and reliable source for the purpose of making a controlled purchase of cocaine in accordance with the procedures used by the Forsyth County Sheriff's Department Vice and Narcotics Division to assure that no controlled substances were on his person. . . .
>
> The confidential and reliable source was clearly observed driving to 25 Monmouth Street and entering same. Visual surveillance was maintained on the confidential and reliable source by the applicant until he went to 25 Monmouth Street, Winston-Salem, North Carolina.
>
> During the time that the confidential and reliable source was in 25 Monmouth Street, Winston-Salem, North Carolina, no other per-

> sons entered or left 25 Monmouth, Winston-Salem, NC. Visual surveillance was maintained until the confidential and reliable source exited 25 Monmouth Street, Winston-Salem, NC and returned to a predetermined location where the applicant met him. At that time the confidential and reliable source turned over a quantity of cocaine. This substance was alter field tested by the applicant and the results indicated the presence of cocaine, a Schedule II controlled substance under the North Carolina Controlled Substance Act.
>
> For [the] above stated reasons, the applicant believes that the Schedule II controlled substance marijuana, is being sold and stored from 25 Monmouth Street, Winston-Salem, NC. . . .

A search warrant was subsequently issued for 25 Monmouth Street and executed 9 July 1993. At the residence, officers discovered scales, plastic baggies containing crack cocaine, plastic baggies containing heroin, cash money, pipes customarily used for smoking crack cocaine, hypodermic needles, and numerous weapons. Additionally, they recovered a box of Arm & Hammer Baking Soda tainted with over 200 grams of cocaine. Defendant voluntarily stated to the officers that the controlled substances and contraband found belonged to him. Defendant was arrested and indicted on the charges to which he later pled guilty.

On 17 September 1993, defendant moved to suppress the items seized as a result of the search, alleging the warrant was invalid. *See* N.C. Gen. Stat. § 15A-974 (1988). The trial court denied defendant's motion in open court 1 February 1994, concluding "that under the totality of the circumstances there was probable cause set forth in the affidavit for the issuance of a search warrant" and "that none of the defendant's constitutional rights under the North Carolina constitution or the United States constitution or any of his statutory rights were violated by the issuance of the search warrant or by the subsequent search and seizure."

Defendant gave notice of appeal to this Court 1 February 1994.

Defendant's sole contention on appeal is "that the evidence as a whole, in the present case, did not provide a substantial basis for concluding that probable cause exist[ed]" for issuance of a search warrant. We disagree.

The standard for a court reviewing the issuance of a search warrant is "whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *Massachusetts v. Upton*, 466 U.S. 727, 728, 80 L. Ed. 2d 721, 724 (1984).

N.C. Gen. Stat. § 15A-244 (1988) states an application for a search warrant must contain the following:

> (2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; . . . .

Whether an applicant has submitted sufficient evidence to establish probable cause to issue a search warrant is a "nontechnical, common-sense judgment[] of laymen applying a standard less demanding than those used in more formal legal proceedings." *Illinois v. Gates*, 462 U.S. 213, 235-36, 76 L. Ed. 2d 527, 546, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983). "The affidavit [in support of an application for a search warrant] is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (citing *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1976)).

In *Gates*, the United States Supreme Court adopted a "totality of the circumstances" test:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Gates, 462 U.S. at 238-39, 76 L. Ed. 2d at 548 (quoting *Jones v. United States*, 362 U.S. 257, 271, 4 L. Ed. 2d 697, 708 (1960)). Moreover, great deference is to be paid the magistrate's determination of probable

cause, and reviewing courts "should not conduct a *de novo* review of the evidence to determine whether probable cause existed at the time the warrant was issued." *State v. Greene*, 324 N.C. 1, 9, 376 S.E.2d 430, 436 (1989), *vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990) (citations omitted).

Defendant argues at length in his appellate brief regarding the applicability of cases dealing with search warrants issued upon affidavits in which information was obtained from confidential informants. We conclude the search warrant herein was issued in reliance upon recitation in the affidavit of a controlled purchase of cocaine. Therefore, both defendant's argument and the cases he cites are inapposite, and other decisions from this Court control.

In *State v. McLeod*, 36 N.C. App. 469, 244 S.E.2d 716, *disc. review denied*, 295 N.C. 555, 248 S.E.2d 733 (1978), for example, the State appealed the trial court's allowance of defendant's motion to suppress evidence seized during a search pursuant to a search warrant. *Id.* at 471, 244 S.E.2d at 718; *see* N.C. Gen. Stat. § 15A-979(c) (1988). The officer's affidavit attached to the search warrant application detailed a controlled purchase of narcotics at the premises in question. *Id.* at 471-72, 244 S.E.2d at 718. This Court reversed the trial court, stating:

> We find the information in the affidavit . . . relative to the purchase . . . of marijuana from the building to be searched, *sufficient, standing alone*, to show the probable cause necessary to support the search warrant issued . . . [The affiant officer] related that he and another officer . . . observed a person go into the building, for which the search warrant was issued, and come out with approximately one ounce of marijuana which the person then gave to [the affiant officer]. This person had been previously sent into the building by the officers for the purpose of buying marijuana. *No more information was required in order to establish the probable cause necessary to support the search warrant issued by the magistrate.*
>
> . . . .
>
> *The fact that the person sent into the building to buy marijuana was an informant does not*, in itself, alter the nature of the officer's personal observations and *render this a search warrant issued upon the hearsay statement of a confidential informant for purposes of determining probable cause.*

Id. at 472-73, 244 S.E.2d at 718-19 (emphasis added) (citation omitted).

In *State v. Hamlin*, 36 N.C. App. 605, 244 S.E.2d 481 (1978), the search warrant applicant's affidavit stated:

> The Special Operations Division has received information that Phencyclidine (PCP) is being sold at said place. On September 9, 1977 an operative working under supervision of Special Operations Agents [affiant] and Toth, made a controlled purchase of PCP from [defendant] at said place. Said purchase was controlled by [affiant] and Toth by watching said operative go in and come out of said place. [Affiant] took custody of the purchased evidence.

Id. at 606, 244 S.E.2d at 482.

Defendant's motion to suppress had been allowed by the trial court on grounds the affidavit was insufficient to establish probable cause. *Id.* at 605, 244 S.E.2d at 481. This Court disagreed, pointing out that

> [i]n the present case, . . . *the initial hearsay statement in the affidavit*, that the Special Operations Division (SOD) had received information of the sale of PCP, *is not the focal point of the sworn statement*. Information contained in the officer's affidavit describes a controlled purchase at the premises to be searched. Two SOD officers observed the operative go into the place and come out with PCP of which one of the officers took custody.

Id. at 607, 244 S.E.2d at 482 (emphasis added). We held the affidavit "supplied a 'reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty . . . .' " *Id.* at 607, 244 S.E.2d at 482 (quoting *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971)).

In the case *sub judice*, Gray's affidavit similarly contained the statement he had received information from a confidential informant and thereafter described the controlled purchase of narcotics at the premises to be searched. As in *Hamlin*, Gray's statement he had "received information" was not the "focal point" of his affidavit, but rather his precise and detailed recitation of his observations regarding the controlled purchase. This latter component of Gray's affidavit

is sufficient, under both *Hamlin* and *McLeod,* to establish that the warrant was issued upon probable cause. The trial court therefore did not err in denying defendant's motion to suppress as the Deputy Clerk of Court possessed a " 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates*, 462 U.S. at 238-39, 76 L. Ed. 2d at 548 (citation omitted).

Notwithstanding, defendant argues the evidence of the controlled purchase was stale from the passage of time. This contention fails.

"When evidence of previous criminal activity is advanced to support a finding of probable cause, a further examination must be made to determine if the evidence of the prior activity is stale." *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990). " '[A] one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best.' " *Id.* (quoting LaFave, *Search and Seizure*, § 3.7(a) at 78).

Gray's affidavit stated the one-time controlled purchase of cocaine from defendant's residence occurred within the six days prior to the date of application for the search warrant. While Gray explained at the suppression hearing that the time period of six days was placed in his affidavit in an effort to conceal the identity of the informant, the date asserted in the affidavit controls our review on the issue of timeliness. *See Greene*, 324 N.C. at 9, 376 S.E.2d at 436 (citation omitted) (magistrate must consider evidence presented at time of application).

In *State v. Louchheim*, 296 N.C. 314, 323, 250 S.E.2d 630, 636, *cert. denied*, 444 U.S. 836, 62 L. Ed. 2d 47 (1979), our Supreme Court discussed the timeliness of information issue by quoting a Maryland appellate decision as follows:

> "The ultimate criterion in determining the degree of evaporation of probable cause, however, is . . . reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc." *Andresen v. Maryland*, 24 Md. App. 128, 172, 331 A.2d 78, 106

(1975), *cert. denied*, 274 Md. 725 (1975), *aff'd*, 427 U.S. 463, 49 L. Ed. 2d 627 (1976).

In a more recent Maryland case, *Davidson v. State*, 54 Md. App. 323, 330, 458 A.2d 875, 879 (1983), the court considered the timeliness of information in an affidavit dated 1 May 1981. The affiant indicated an informant had purchased a controlled substance with funds furnished by officers "on an unspecified occasion between April 12-30, 1981 . . . ." *Id.* The Maryland court held that the test

> is whether the information constituting the probable cause in the search warrant is so remote from the date of the affidavit "as to render it improbable that the alleged violation of law authorizing the search was extant at the time the application for the search warrant was made." The time element, while a factor to consider, is not the only factor. . . As colorfully stated by the *Andresen* court: "The hare and the tortoise do not disappear at the same rate of speed."

Id. at 331, 458 A.2d at 880 (citations omitted). The court noted that drug dealing "is ordinarily a regenerating activity carried on over a period of time," and held the "probable case for the search and seizure continued to exist on the date of the execution of the warrant." *Id.*

We believe the Maryland test to be apt, and consider particularly that the "regenerating activity" of the sale of cocaine depicted in the affidavit herein was stated and observed to have been conducted at defendant's residence, indisputably a "secure operational base." *Louchheim*, 296 N.C. at 323, 250 S.E.2d at 636 (citation omitted). Taken as a whole, therefore, and according due deference to the Clerk's determination, *Greene*, 324 N.C. at 9, 376 S.E.2d at 436, the affidavit contained sufficient timely information to support a finding there was " 'a fair probability' " that the controlled substance sought was to be found in the location to be searched. *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (quoting *Gates*, 462 U.S. at 238, 76 L. Ed. 2d at 548); *see also McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358 (two controlled buys occurring within ten days of the application, albeit at different locations rented by defendant, sufficient to withstand objection to timeliness); *State v. Shanklin*, 16 N.C. App. 712, 716-17, 193 S.E.2d 341, 345 (1972), *cert. denied*, 282 U.S. 674, 194 L. Ed. 2d 154 (1973) (where property stolen six days prior to execution of affidavit, observation of property by informant recited therein was adequately timely because it "had to have been made within that six day period").

In conclusion, we consider defendant's complaint that the application makes a single reference to "the Schedule II controlled substance *marijuana*" (emphasis added) as being sold and stored at 25 Monmouth Street. The trial court determined this was a "typographical error." Given that the controlled purchase referred to in the affidavit was specified to be cocaine and that we may take note that cocaine is a *Schedule II* controlled substance under our Controlled Substances Act, N.C. Gen. Stat. § 90-90(a)(4) (1993 & Cum. Supp. 1994), (and marijuana a Schedule VI substance, N.C. Gen. Stat. § 90-94 (1993)), we agree.

As our Supreme Court has stated,

> "[a] grudging or negative attitude by reviewing courts towards warrants," is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Gates*, 462 U.S. at 236, 76 L. Ed. 2d at 547 (quoting *United States v. Ventresca*, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 689 (1965)). "[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

State v. Riggs, 328 N.C. 213, 222, 400 S.E.2d 429, 434-35 (1991) (citations omitted); *see State v. Beddard*, 35 N.C. App. 212, 214-15, 241 S.E.2d 83, 85 (1978) (typographical error in affidavit as to year informant purchased marijuana not "fatal to the sufficiency of the affidavit").

Affirmed.

Judges JOHNSON and MARTIN, Mark D. concur.

DAVID GEORGE McANELLY, EMPLOYEE, PLAINTIFF v. WILSON PALLET AND CRATE COMPANY, EMPLOYER; AND AETNA CASUALTY AND SURETY COMPANY, CARRIER, DEFENDANTS

No. 9410IC318

(Filed 5 September 1995)

1. **Workers' Compensation § 118 (NCI4th)— two automobile accidents—injury arising from second accident—sufficiency of evidence**

The record contained competent evidence to support the Industrial Commission's finding that plaintiff's disability arose from a 17 November 1989 job-related automobile accident instead of an 18 October 1989 accident where the evidence tended to show that plaintiff had a history of hip problems and had a hip prosthesis; after the first accident plaintiff had some tenderness in the hip area and consulted his doctor, but the discomfort did not interfere with his ability to perform his regular work duties; the impact of the second accident caused plaintiff's knee to be jammed into the dashboard and caused such excruciating pain that plaintiff could not move; he was taken by ambulance to the hospital where he stayed for a month; plaintiff's pain was attributable to a separation of the parts of his prosthesis; and defendant had not reached maximum medical improvement and had been unable to return to work.

Am Jur 2d, Workers' Compensation §§ 317, 593.

Sufficiency of proof that musculoskeletal condition resulted from accident or incident in suit rather than from pre-existing condition. 2 ALR3d 290.

2. **Workers' Compensation § 252 (NCI4th)— plaintiff's temporary total disability—sufficiency of evidence**

The evidence was sufficient to support the Industrial Commission's finding that plaintiff was temporarily totally disabled as a result of his injury arising out of and in the course of his employment where two doctors offered medical testimony with regard to plaintiff's inability to work.

Am Jur 2d, Workers' Compensation §§ 381, 382, 593.

3. Workers' Compensation § 263 (NCI4th)— sole proprietor—business not profitable—basis for award of compensation

Where plaintiff lawfully elected to be treated as any other employee of his company under the sole proprietor provision of N.C.G.S. § 97-2, the Industrial Commission could not properly base its award for compensation on whether the employer showed a profit, but should instead have based its award on the wages paid to the employee.

Am Jur 2d, Workers' Compensation §§ 418, 425.

Appeal by plaintiff and cross-notice of appeal by defendants from the Opinion and Award entered 22 December 1993 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 April 1995.

Lee, Reece & Weaver, by Cyrus F. Lee and Rachel V. Lee, for plaintiff-appellant/appellee.

Ward and Smith, P.A., by William Joseph Austin, Jr., for defendant-appellants/appellees.

McGEE, Judge.

Plaintiff David McAnelly owned and operated the Wilson Pallet and Crate Company as a sole proprietorship. Plaintiff was actively engaged in the operation of the business, performing managerial and administrative duties as well as driving a forklift, loading trucks, operating the saw, assembling pallets, and making deliveries. Pursuant to N.C. Gen. Stat. § 97-2(2) (1991), plaintiff elected to include himself as an employee under the workers' compensation coverage for the business.

Plaintiff was injured 17 November 1989 in a job-related motor vehicle accident which gave rise to this workers' compensation claim. At a pre-trial conference the parties stipulated to the following:

1. The parties are subject to and bound by the provisions of the Workers' Compensation Act.

2. The employer-employee relationship existed between plaintiff and defendant-employer.

3. Aetna was the compensation carrier on the risk.

4. On 17 November 1989 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer.

A hearing was held 8 May 1991 before Deputy Commissioner Tamara R. Nance. Based on the above stipulations and several findings of fact, including a finding that at the time of plaintiff's injury he was earning an average weekly wage of $573.07, the Deputy Commissioner concluded plaintiff was entitled to "temporary total disability benefits at the maximum compensation rate of $376.00 per week, from 17 November 1989 to the present, and until further order of the Industrial Commission."

Defendants gave notice of appeal and application for review to the North Carolina Industrial Commission. A hearing was held 27 April 1993 at which the Full Commission adopted the stipulations entered into by the parties, and indicated it would take testimony on the remaining issues of plaintiff's average weekly wage and the causally related compensable consequences of the injury of 17 November 1989. At the conclusion of the hearing, the Full Commission made no finding of fact regarding plaintiff's average weekly wage, but found that "[t]he claimant, a sole proprietor, did not earn a net profit during the 52 weeks preceding his injury." Based upon this and other findings of fact, the Full Commission concluded "plaintiff is entitled to temporary total disability benefits payable at the minimum rate of $30.00 per week, from the date of the injury until further orders of the Commission." The Commission modified the Deputy Commissioner's award from $376.00 to $30.00 per week, and both plaintiff and defendants appeal.

Defendants raise two issues and plaintiff raises one issue on appeal. The standard of review for this Court in a worker's compensation claim directs that "[t]he findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings. Conclusions of law based on these findings, however, are subject to review by the appellate courts." *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989) (citations omitted).

I.

[1] Defendants contend plaintiff failed to carry his burden of proof as to his disability from the 17 November 1989 accident. We disagree.

Defendants argue the evidence presented shows plaintiff has a history of hip problems and has had a hip prosthesis for several years. They point out plaintiff was involved in another automobile accident on 18 October 1989, approximately one month before the accident giving rise to the present claim, and suggest the October accident is the cause of plaintiff's disability. However, it is well established that while evidence might support contrary findings of fact, if there is competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal. *See Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

Both the Deputy Commissioner and the Full Commission made the following findings of fact:

> 4. On 18 October 1989 plaintiff was involved in an automobile accident in a parking lot. Following this accident plaintiff experienced some tenderness over the trochanteric area of the right hip, which prompted him to return to Dr. Abda's office to have it checked out. On 20 October 1989 he saw Dr. Friedrich, Dr. Abda's partner. Dr. Friedrich noted broken trochanteric wires but did not feel that the accident was the cause of the fractured wires. While the condition of the hip prosthesis was not good on 20 October 1989, Dr. Friedrich did not believe that the broken trochanteric wires were affecting the stability of the hip. Overall, aside from some vision problems which affected plaintiff's ability to drive a motor vehicle, the accident on 18 October 1989 did not interfere with plaintiff's ability to perform his regular work duties.
>
> 5. On 17 November 1989, plaintiff was in another motor vehicle accident arising out of and in the course of his employment with defendant-employer. The impact caused plaintiff's right knee to be jammed into the dashboard and caused plaintiff to experience such excruciating hip and knee pain that he could not move. He was taken by ambulance to the Wilson Memorial Hospital Emergency Room, where he came under the care of Dr. Vanden Bosch. Dr. Vanden Bosch noted bleeding in the hip joint and extreme discomfort with movement of the hip in any direction. Plaintiff was hospitalized from the date of injury to 20 December 1989 for symptomatic treatment, then referred to Dr. Callahan at Duke. Surgery was recommended, but due to lack of funds plaintiff had to wait until August 1990 for Medicaid to pay for the surgery.

6. On 27 June 1990, plaintiff came under the care of Dr. Griffin, a specialist in joint replacement. Plaintiff presented with excruciating groin pain and considerable mid-thigh pain attributable to a non-union of the trochanter and a loose acetabular and femoral component. Plaintiff underwent two hip replacements by Dr. Griffin on 21 August 1990 and 12 June 1991. As of the end of July 1991, plaintiff had not yet reached maximum medical improvement and was not bearing weight on his right leg.

7. Plaintiff has been unable to work and earn any wages since the injury on 17 November 1989. He tried selling safety products strictly on commission, but found the pain intolerable and was unable to earn enough to cover his expenses.

Plaintiff testified he had some soreness after the 18 October accident, but after the soreness went away he resumed his regular work activities. The record also shows plaintiff was transported by ambulance from the scene of the 17 November accident to Wilson Memorial Hospital where he remained for more than a month. Dr. Vanden Bosch, who treated plaintiff after the November accident testified: "I believe that again—that the accident was sufficient force to aggravate or cause the loosening of his hip components, therefore causing the pain in this experience, and therefore caused his inability to work or be gainfully employed." The record contains competent evidence to support the Full Commission's finding that plaintiff's disability arose from the 17 November 1989 accident.

II.

[2] Defendants contend the Industrial Commission erred in its finding that the plaintiff was totally disabled as a result of the injury on 17 November 1989, and also in its conclusion and award of continuing temporary total disability benefits following that date. We disagree.

In support of their contention, defendants argue that according to the testimony of Dr. Griffin, plaintiff could resume normal duties as of August 26, 1991 and, therefore, continued disability payments after that date are improper. However, as we noted previously, the Commission's findings of fact are conclusive on appeal if supported by competent evidence "even if there is evidence that would support contrary findings." *Richards*, 92 N.C. App. at 225, 374 S.E.2d at 118. Moreover, "[i]t is not for a reviewing court . . . to weigh the evidence before the Industrial Commission in a workmen's compensation case.

By authority of G.S. 97-86 the Commission is the sole judge of the credibility and weight to be accorded to the evidence and testimony before it." *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980).

Responding to an inquiry as to plaintiff's prognosis, Dr. Vanden Bosch, the physician in charge of plaintiff's care immediately following the November accident testified:

> If his—if he has successful revision arthroplasty performed this week or next week or have—has had it done already, all of the real hope for that is to relieve the pain. He's certainly going to have to—he's still a young man. He's going to have to be very careful what he does. He's certainly not going to be able to do any hard labor, lifting, or long walking. He's got to take it real easy on that hip for the rest of his life, because he's—there's not going to be that many revisions that can be done anymore. He's very fortunate one can still be done.

In response to the question of whether plaintiff is totally disabled, Dr. Griffin, who performed the most recent surgery on plaintiff, stated:

> The Witness: At the time I saw him at the end of the [sic] July he was not—I was not allowing him to put weight on the right leg and—but he was out of pain, you know, there's a lot of different ways to earn wages; so that's why they come up with a partial disability, I guess—
>
> Mr. Lee: But—
>
> The Witness: I would—if he has a specific —and I guess he could sit in a chair and stuff envelopes if he wanted to, but that's—

We conclude the Commission's finding of fact regarding plaintiff's total disability is supported by competent evidence and thus, the Commission's conclusion that plaintiff is entitled to temporary total disability benefits is proper.

III.

[3] Plaintiff contends the Full Commission erroneously modified the Deputy Commissioner's Opinion and Award from $376.00 per week to $30.00 per week. We agree.

Plaintiff elected to provide workers' compensation coverage for himself as an employee pursuant to N.C. Gen. Stat. § 97-2(2) (1991) which provides:

> Any sole proprietor or partner of a business whose employees are eligible for benefits under this Article may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

This provision clearly contemplates that a sole proprietor who elects to be included as an employee in compliance with the statute will be treated as an employee under other provisions. As such, plaintiff is entitled to have his average weekly wages determined like any other employee.

G.S. § 97-2(5) provides four methods of determining average weekly wages:

> [1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.
>
> [2] Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> [3] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

> [4] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

A review of the cases interpreting G.S. § 97-2 provides guidance regarding the choice of method for determining average weekly wages under the statute. In *Liles v. Electric Co.*, 244 N.C. 653, 657-58, 94 S.E.2d 790, 794 (1956), our Supreme Court said, "If the employee has worked in such employment during the period of fifty-two weeks immediately preceding the day of injury, the prescribed (first) method is to divide his total earnings during that period by fifty-two." The Court went on to find this first method inapplicable because the employee had not been employed for fifty-two weeks prior to his injury. The Court then considered the second method, which the Commission had rejected after finding that the results obtained would be unfair or unjust. Next, the Court examined the third method, and determined that there was "no factual basis for its application." *Id.* at 658, 94 S.E.2d at 794. Finally, after analyzing all of the preceding methods, the Court considered the "catch-all" provision to be used "where for exceptional reasons the foregoing would be unfair." *Id.* The Court noted that "[t]his provision, while it prescribes no precise method for computing 'average weekly wages,' sets up a standard to which results fair and just to both parties must be related." *Id.* After observing that the dominant intent of G.S. § 97-2 is that results that are fair and just to both parties be reached, the Supreme Court explained:

> The words "fair and just" may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission. These words must be related to the standard set up by the statute. Results fair and just, within the meaning of G.S. 97-2, consist of such "average weekly wages" as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury.

Id. at 660, 94 S.E.2d at 796.

Subsequent cases continued to apply the analysis used in *Liles*. In *Wallace v. Music Shop*, 11 N.C. App. 328, 181 S.E.2d 237 (1971), this Court rejected defendant's argument that the Industrial Commission

should have computed average weekly wages under the "exceptional reasons" provision. The Court found the first method inapplicable to the facts of the case, and noted "[t]he fourth prescribed method may not be used unless there has been a finding that use of the second method would produce results unfair and unjust to either the employee or employer." *Id.* at 331, 181 S.E.2d at 239. More recently, in *Postell v. B&D Construction Co.*, 105 N.C. App. 1, 411 S.E.2d 413, *disc. review denied*, 331 N.C. 286, 417 S.E.2d 253 (1992), this Court upheld the determination of average weekly wages under the fourth provision only after concluding that there was competent evidence to support the Commission's findings that the preceding three methods were either inapplicable or would lead to results that were unfair and unjust. *See also Holloway v. T.A. Mebane, Inc.*, 111 N.C. App. 194, 431 S.E.2d 882 (1993) (upholding a determination of average weekly wages under the fourth method where the Commission found that the first two methods would be unfair and unjust, and that it would not be possible at all under the third method).

In this case the Deputy Commissioner found that "[w]hile plaintiff retained significant impairment to his hip prior to the injury of 17 November 1989, he was nevertheless capable of performing heavy labor and was earning an average weekly wage of $573.07." This figure was determined using the first method prescribed by the statute. We find in the record competent evidence to support the Deputy Commissioner's finding, including Wilson Pallet and Crate Company's federal and state quarterly wage reports indicating wages paid to plaintiff, the employer's payroll record showing plaintiff's wages, and copies of checks written on the employer's account to plaintiff and his landlord for the period January 1989 through November 1989. The Full Commission made no finding of fact as to average weekly wages, and instead, replaced the Deputy Commissioner's finding with "[t]he claimant, a sole proprietor, did not earn a net profit during the 52 weeks preceding his injury." Based on that finding, the Full Commission modified the award to a payment at the minimum rate of $30.00 per week.

The Full Commission's determination that plaintiff is entitled to $30.00 per week is a conclusion of law that is fully reviewable by this Court. *See Richards*, 92 N.C. App. 222, 374 S.E.2d 116. We find nothing in the statute defining average weekly wages nor in the cases interpreting that statute which warrants a conclusion that plaintiff is entitled to payment at the minimum rate of $30.00 per week based on a finding that his business failed to show a net profit for the fifty-two

weeks preceding his injury. Under G.S. § 97-2, average weekly wages must be related to an employee's earnings, not to his earning capacity. *Liles*, 244 N.C. at 657, 94 S.E.2d at 794. "[T]he profit or loss of [a] business may not necessarily reflect the value of the plaintiff's services to it." *York v. Unionville Volunteer Fire Dept.*, 58 N.C. App. 591, 593, 293 S.E.2d 812, 814 (1982). Moreover, plaintiff lawfully elected to be treated as any other employee of Wilson Pallet and Crate Company under the sole proprietor provision of the statute. The Commission would not base their award for any other employee on whether or not the employer showed a profit, rather than on the wages paid to the employee.

While it appears there is sufficient evidence to support Deputy Commissioner Nance's finding of fact regarding plaintiff's average weekly wage, we recognize that it is the province of the Full Commission to make such a determination. We hold it was error for the Full Commission to determine the amount of the award based on the net profits of the employer. Therefore, we reverse the award of the Full Commission and remand for further consideration, including a determination of plaintiff's average weekly wage consistent with the guidelines herein expressed, and the entry of an appropriate award based on that finding.

Affirmed in part; reversed in part and remanded.

Judges JOHNSON and COZORT concur.

TOWER DEVELOPMENT PARTNERS, PLAINTIFF-APPELLANT v. SAMUEL ZELL, TRUSTEE UNDER TRUST AGREEMENT DATED OCTOBER 14, 1991; THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, THE CITY OF DURHAM, DEFENDANTS-APPELLEES

No. COA94-1017

(Filed 5 September 1995)

1. Dedication §§ 12, 13 (NCI4th)— dedication of partial or entire street—adequacy of offer and acceptance

There was a valid dedication of an entire street where the original owner, T. F. Stone Companies, recorded a plat of the subdivision showing the entire street and sold lots referring to the recorded plat; the plat included a statement, signed by the com-

pany president, which specifically dedicated the streets to the public; the company president was clothed with apparent authority such that the company was bound by his acts; defendant city maintained the streets, adopted the recorded plat into its official zoning map, and removed the land covered by the dedication from its tax rolls; and the entire street was dedicated by virtue of the fact that part of the street had been opened and used by the public since 1988.

Am Jur 2d, Dedication §§ 22-24, 41-50.

Dedication: acceptance of some of streets, alleys, and the like appearing on plat as acceptance of all. 32 ALR2d 953.

Construction or maintenance of sewers, water pipes, or the like by public authorities in roadway, street, or alley as indicating dedication or acceptance thereof. 52 ALR2d 263.

2. Dedication § 11 (NCI4th)— dedication not signed by trustee—implied consent to dedication—dedication survives foreclosure

Where a trustee does not sign a dedication, the dedication is made subject to the deed of trust and is cut off by a subsequent foreclosure; however, when the mortgagee gives implied consent to the dedication by releasing lots sold referring to the plat which dedicates the streets, as the trustee in this case did, then the dedication is enforceable.

Am Jur 2d, Dedication §§ 27, 28.

3. Easements § 9 (NCI4th)— driveway easements—no creation by express grant—no use of land belonging to another

Creation of driveway easements through express grant failed *ab initio* where the original owner of the land was the beneficial owner of both tracts when it purported to create the driveway easements; an easement is the right to use the land of another; and it would be inconsistent to grant the original owner an easement in the land, despite bare legal title resting in different trustees.

Am Jur 2d, Easements and Licenses § 1.

4. Easements § 6 (NCI4th)— driveway easements—no creation by dedication

Driveway easements were not created by dedication, since the driveways at issue were not offered to the public and accepted by some public authority as streets.

Am Jur 2d, Dedication §§ 22, 42; Easements and Licenses § 17.

5. Easements § 17 (NCI4th)— easement by implication—18 months insufficient to establish

A use of eighteen months is insufficient to create an easement by implication.

Am Jur 2d, Easements and Licenses § 31.

Appeal by plaintiff from order granting summary judgment signed 20 May 1994 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 23 May 1995.

Petree Stockton, L.L.P., by J. Anthony Penry, Robert H. Lesesne, and David C. Hall, for plaintiff-appellant.

Newsom, Graham, Hedrick, & Kennon, P.A., by William P. Daniell and Joel M. Craig, for defendant-appellee Zell.

Attorney General Michael F. Easley, by Assistant Attorney General Emmett B. Haywood, for defendant-appellee North Carolina Department of Transportation.

Office of the City Attorney, by Assistant City Attorney Karen A. Sindelar, for defendant-appellee City of Durham.

MARTIN, MARK D., Judge.

This suit involves a dispute over several easements claimed to burden plaintiff's land in southwest Durham County. Plaintiff contends the easements were either void *ab initio* or were later extinguished, while defendants contend the easements were validly created and continue to burden plaintiff's land. Plaintiff brought this action for a declaratory judgment as to the existence and validity of the easements.

The questions presented for review are whether the trial court erred by granting defendants' motion for summary judgment and by denying plaintiff's motion for summary judgment. We affirm in part and reverse in part.

The facts of the case are as follows. Plaintiff owns property in Durham County ("Tract One") adjacent to property owned under a trust by defendant Zell ("Tract Two"). These lands were originally one tract owned by the T.F. Stone Companies ("Stone"), a commercial development company, who replatted the land into separate tracts as part of an overall development plan.

In 1985 Stone requested and received approval of the site development plan by the City of Durham ("Durham"), and recorded the site map with the Register of Deeds. As a condition for approving the development plan, Durham required Stone to dedicate and build as a public street the 80-foot right-of-way known as Tower Boulevard. The street was shown on the recorded site development map and was to be built in stages as the different tracts were developed.

In October 1985 Stone executed and recorded a deed of trust encumbering Stone's entire tract in favor of Irving Trust Company. Irving Trust also agreed to finance the construction of a 17-story office building on Tract Two. Construction of the office tower began that same fall. The construction activities included clearing and grubbing for the first stage of Tower Boulevard and for the disputed driveways.

Stone later wished to develop or sell Tract One separately from Tract Two, and sought to have Tract One released from the Irving deed of trust. Irving Trust would not consent to releasing the tract unless Stone formally granted driveway, sewer and drainage easements over Tract One in favor of Tract Two. On 14 March 1986 Stone recorded a declaration of easement and subjected Tract One to a new deed of trust in favor of First City Savings Association. Irving Trust then released Tract One from its deed of trust. When the entire transaction was completed, bare legal title to Tracts One and Two had been separated and vested in different entities, but Stone retained beneficial ownership to the entire subdivision.

On 7 November 1986 Stone recorded a final plat showing the subdivision's lots and Tower Boulevard extending from Highway 15-501 to Pickett Road. The plat contained a statement, signed by Stone's president, Tommy F. Stone, that the plat was prepared at his direction and all streets shown thereon were dedicated to the public. Because of this offer to dedicate, Durham removed the proffered land from the tax rolls and has not assessed property tax on this land. Durham also included Tower Boulevard in its official zoning atlas.

When Stone recorded the plat dedicating Tower Boulevard, the trustee, First City, did not sign the dedication. First City, however, subsequently released lots from the deed of trust as Stone sold them, and Stone sold the lots referring to the recorded plat.

In May 1987 Stone conveyed its interest in Tract Two and the office tower to Triangle Equities, Inc. The office tower was completed and opened during the Fall of 1987 and the driveways crossing Tract One have been in continuous public use ever since. In June 1989 Irving Trust foreclosed on the deed of trust on Tract Two and sold the land and office tower to Landmark Tower, Inc. ("Landmark"). The deed to Landmark stated it passed "all privileges and appurtenances" belonging to the land, but did not explicitly refer to the driveway easements. On 16 October 1991 Landmark conveyed the land and office tower to defendant Zell. The deed to Zell specifically mentioned the driveway easements.

Paving of the first stage of Tower Boulevard was completed by 28 May 1988. On 16 April 1991 Durham requested that defendant North Carolina Department of Transportation ("NCDOT") complete the second stage of Tower Boulevard, connecting the street through to Pickett Road. Durham accepted maintenance of the road on 17 June 1991.

In May 1992 First City foreclosed on the deed of trust on Tract One and conveyed the property to plaintiff Tower Development Partners. However, defendants Durham and NCDOT, owners of the road easement, did not receive notice of the foreclosure proceedings.

Plaintiff instituted this action in September 1993 seeking a declaration that the driveway easements and the remainder of the Tower Boulevard easement were invalid. The trial court granted summary judgment in favor of all defendants on both issues and denied plaintiff's motion for summary judgment. Plaintiff appeals to this Court.

I.

[1] Plaintiff does not contest the dedication of the portion of Tower Boulevard completed in 1988, only its planned completion to Pickett Road. The issue is whether Stone's dedication of the entire street was valid.

Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply. *Emanuelson v. Gibbs*, 49 N.C. App. 417, 419,

271 S.E.2d 557, 558 (1980). The issue therefore narrows to whether Stone validly offered to dedicate the entire street and whether Durham validly accepted that offer.

Generally, where lots are sold and conveyed by reference to a plat which represents the division of a tract into streets and lots, recordation of the plat is an offer to dedicate those streets to the public. *Wofford v. Highway Commission*, 263 N.C. 677, 683, 140 S.E.2d 376, 381, *cert. denied*, 382 U.S. 822, 15 L. Ed. 2d 67 (1965). Stone recorded its 1986 plat of the subdivision, which showed Tower Boulevard extending from Highway 15-501 to Pickett Road, and sold lots referring to that recorded plat. Moreover, the plat included a statement, signed by Tommy F. Stone, which specifically dedicated the streets to the public.

Plaintiff asserts the offer to dedicate was invalid because the plat was not signed by the owner of the property, T.F. Stone Companies, but by Tommy F. Stone in his individual capacity. Nevertheless, the plat clearly states it was prepared for T.F. Stone Companies, Inc., and was signed by the company president whose name the business bears. We find, even if Tommy Stone did not sign the plat in his capacity as company president, he was clothed with apparent authority such that the company is bound by his acts. *See Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 595, 324 S.E.2d 889, 892 (1985).

We therefore hold there was a valid offer to dedicate the entire street from Highway 15-501 to Pickett Road.

The dedication is only complete, however, when the offer is accepted in some proper way by the responsible public authority. *Wofford*, 263 N.C. at 683, 140 S.E.2d at 381. Acceptance may be manifested not only by maintenance and use as a public street, but by official adoption of a map delineating the area as a street, followed by other official acts recognizing its character as such. *Bryan v. Sanford*, 244 N.C. 30, 35, 92 S.E.2d 420, 423 (1956).

Durham has not only maintained Tower Boulevard since June 1991 as one of its city streets, but has adopted the recorded plat into its official zoning map and has removed the land covered by the dedication from its tax rolls. These are sufficiently official actions to accept an offer to dedicate land. *See Id.*; *Lee v. Walker*, 234 N.C. 687, 696, 68 S.E.2d 664, 670 (1952) (holding taxes collected on land to be a factor to consider in determining the public character of land);

Bryan, 244 N.C. 30, 35, 92 S.E.2d 420, 424 (holding the city had accepted the dedication by approving the map and incorporating it into the city's zoning ordinance). We therefore hold Durham validly accepted Stone's offer to dedicate the entire street.

Plaintiff contends Durham has only accepted the completed portion of Tower Boulevard, but not the planned completion. Plaintiff in effect argues the dedication of this portion of Tower Boulevard has been withdrawn. The dedication of a street, however, may not be withdrawn if the dedication has been accepted and the street, *or any part of it*, is actually opened and used by the public. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 29, 265 S.E.2d 123, 129 (1980). Since part of Tower Boulevard has been opened and used by the public since 1988, we find the dedication of the remainder of Tower Boulevard to be operative.

[2] The dispositive issue becomes whether the dedication was extinguished by the foreclosure proceedings. Plaintiff claims, since the trustee did not sign the dedication, the dedication was made subject to the deed of trust and was cut off by the subsequent foreclosure. While this generally stated rule is correct, an exception applies. When the mortgagee gives implied consent to the dedication by releasing lots sold referring to the plat which dedicates the streets, then the dedication is enforceable. *Collins v. Asheville Land Co.*, 128 N.C. 563, 566-67, 39 S.E. 21, 22 (1901). First City released lots from the deed of trust as they were sold and thereby consented to the dedication of Tower Boulevard. Durham and NCDOT were consequently owners of an interest in land, entitled to notice of the foreclosure proceedings under our State's foreclosure statute. *See* N.C. Gen. Stat. § 45-21.16(b)(3) ("Notice of hearing shall be given . . . to . . . any person owning a present or future interest of record in the real property which interest would be affected by the foreclosure proceeding . . . ."). N.C. Gen. Stat. § 45-21.16(b)(3) (Cum. Supp. 1994). Their interest was therefore not extinguished by the foreclosure proceedings.

We have carefully reviewed plaintiff's remaining contentions in connection with the dedication issue and conclude they are without merit.

II.

Defendant Samuel Zell ("Zell") asserts the driveway easements were validly created under any of the following principles: (1) express grant; (2) dedication; or (3) implication. We will address each of these principles in turn.

[3] It is axiomatic in property law that one may not have an easement in his or her own land. *See Patrick v. Jefferson Standard Life Ins. Co.*, 176 N.C. 660, 670, 97 S.E. 657, 661 (1918); Patrick K. Hetrick and James B. McLaughlin, Jr., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA, § 15-30 (4th ed. 1994). Zell admits Stone was the beneficial owner of both tracts when it purported to create the driveway easements. Nevertheless, Zell relies on *Heritage Communities v. Powers*, 49 N.C. App. 656, 272 S.E.2d 399 (1980), and argues there was sufficient separation of title to create the driveway easements under applicable law.

In *Powers* a tract of land benefitted by an access easement was conveyed to the owner of the servient estate. *Id.* at 657, 272 S.E.2d at 400. Ordinarily the doctrine of merger would apply and extinguish the easement; however, the conveyance of the dominant estate was subject to a pre-existing deed of trust. This Court held that the estate of the trustee was an intermediate, determinable estate that defeated application of the doctrine of merger. The easement was valid despite both tracts being under common ownership when the dominant estate was subject to a different deed of trust. *Id.* at 659, 272 S.E.2d at 401.

We find *Powers* distinguishable from the case *sub judice*. First, the instant case arises out of an attempt to create an easement, whereas *Powers* dealt with an easement already extant. Second, Zell's predecessor in title was the equitable owner of both tracts and merely divided bare legal title between different trustees. In *Powers*, on the other hand, legal and equitable title were clearly separated before, and the equitable titles merged when the servient estate was conveyed to the owner of the dominant estate. Third, the trustee's estate in *Powers* was intermediate between the legal and equitable estates, whereas no intermediate estate existed between Stone's legal and equitable titles to prevent the operation of merger.

Moreover, as the equitable owner of the land, Stone had the real and beneficial use of both tracts. Because an easement is the right to *use* the land of another, *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972), it would be inconsistent to grant Stone an easement in this land, despite bare legal title resting in different trustees. Therefore, we hold creation of the driveway easements through express grant failed *ab initio*.

[4] Zell alternatively asserts the driveway easements were created by dedication. In a strict sense, however, a dedication must be made to

the public, and not to part of the public nor to private owners of particular land. In this latter situation the right is in the nature of an easement appurtenant. *Land Corp. v. Styron*, 7 N.C. App. 25, 27-28, 171 S.E.2d 215, 217 (1969). Furthermore, a dedication is not valid until the offer to dedicate is accepted by the responsible public authority. *Wofford*, 263 N.C. at 683, 140 S.E.2d at 381. Zell does not suggest the driveways at issue have been offered to the public and accepted by some public authority as streets. Accordingly, Zell's reliance on the principle of easement by dedication is inappropriate.

[5] Zell finally asserts the driveway easements were created by implication from prior use. The requirements for creation of an easement by implication are: (1) a separation of title; (2) the claimed use must have been so obvious and long continued as to show it was meant to be permanent; and (3) the easement must be reasonably necessary to the enjoyment of the benefitted land. *Hodges v. Winchester*, 86 N.C. App. 473, 475, 358 S.E.2d 81, 82 (1987). The first and third requirements are not disputed. The issue therefore lies in the second requirement: Was the driveway use so obvious and long continued as to show it was meant to be permanent?

The record does not clearly show when the driveways were paved, a factor we view as important in determining the permanence of the driveways. If the driveways were not yet paved when title was separated, we would view them to be insufficiently permanent to imply an easement.

However, the issue is not resolved even if the driveways were paved when title was separated. The use must still have been "so . . . long continued as to show it was meant to be permanent." *Id.* Assuming the drives were paved at the earliest possible date, Fall 1985, they would have been in use only approximately eighteen months when Tract Two was conveyed in Spring 1987. Zell has not directed us to any authority which supports creation of an easement by implication in such a short time. Our review of prior caselaw indicates the shortest time heretofore recognized as sufficient to imply an easement is thirteen years. *See Potter v. Potter*, 251 N.C. 760, 112 S.E.2d 569 (1960). The typical case has a use in excess of 30 years. *See, e.g., Spruill v. Nixon*, 238 N.C. 523, 78 S.E.2d 323 (1953) (at least 35 years); *Biggers v. Evangelist*, 71 N.C. App. 35, 321 S.E.2d 524 (1984), *disc. review denied*, 313 N.C. 327, 329 S.E.2d 384 (1985) (30 years); *McGee v. McGee*, 32 N.C. App. 726, 233 S.E.2d 675 (1977) (60 years); *Dorman v. Ranch, Inc.*, 6 N.C. App. 497, 170 S.E.2d 509 (1969)

(42 years). We hold, under the facts of this case, that a use of eighteen months is insufficient to create an easement by implication.

In summary we hold Durham and NCDOT's property interest in the dedicated portion of Tower Boulevard was not extinguished by the foreclosure proceedings and accordingly affirm the trial court's grant of summary judgment on this issue for defendants Durham and NCDOT. We reverse the grant of summary judgment in favor of defendant Zell on the issue of whether the driveway easements were validly created and remand to the trial court for entry of summary judgment in favor of plaintiff.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and WYNN concur.

BRANDE M. WEST (MINOR) THROUGH HER GUARDIAN AD LITEM, WILLIAM C. FARRIS, PLAINTIFF v. TONI GRAY TILLEY, DEFENDANT

No. 947DC334

(Filed 5 September 1995)

1. Costs § 30 (NCI4th)— injured child—mother awarded medical expenses—mother not a party—judgment not over $10,000—recovery of attorney fees not barred

Although counsel stipulated to jury consideration of plaintiff child's medical expenses so as to prevent multiplicity of suits related to the same incident, the record reflected no formal motion by either plaintiff or defendant to add plaintiff's mother as a party; therefore, plaintiff's mother did not function as a "litigant," and the recovery attributed to her for plaintiff's medical expenses could not be incorporated with that of plaintiff in determining eligibility for attorneys' fees under N.C.G.S. § 6-21.1. Hence, there was no merit to defendant's contention that the court erred by allowing attorneys' fees upon a judgment in excess of the statutory limit.

Am Jur 2d, Costs § 64.

Supreme Court's views as to requisites for award of attorneys' fees. 77 L. Ed 2d 1540.

2. Parent and Child § 8 (NCI4th)— injured minor—parent's claim for medical expenses independent of child's claim—joinder not required

There was no merit to defendant's contention that the claim of plaintiff's mother for medical expenses was "derivative" of plaintiff child's claim, rendering the child a necessary party to the parent's claim and requiring the child and parent to be joined as plaintiffs in one action resulting in one judgment, since, in North Carolina, two independent causes of action arise when an unemancipated minor is injured through the negligence of another.

Am Jur 2d, Parent and Child § 97.

What items of damages on account of personal injury to infant belong to him, and what to parent. 32 ALR2d 1060.

3. Appeal and Error § 147 (NCI4th)— award of counsel fees—questions not properly preserved for review

Defendant did not properly preserve for review questions relating to the sufficiency of the trial court's findings and the reasonableness of its award of counsel fees.

Am Jur 2d, Appellate Review §§ 614, 690.

4. Costs § 32 (NCI4th)— award of attorney's fees—amount reasonable

The trial court did not abuse its discretion in awarding attorney's fees of $8,400 on a $10,000 judgment where the court carefully considered the time expended by counsel, exercising particular caution in omitting duplicate services, as well as the fees normally charged in the area for attorneys with similar experience and expertise, and plaintiff's recovery was well in excess of the amount originally offered as settlement, a circumstance properly compensated by attorney's fees.

Am Jur 2d, Costs § 62.

Appeal by defendant from judgment filed 18 August 1993, amended judgment filed 1 November 1993, and order entered 12 November 1993 by Judge Joseph J. Harper, Jr. in Wilson County District Court. Heard in the Court of Appeals 27 October 1994.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson, for plaintiff-appellee.

Thomas, Farris and Turner, P.A., by Allen G. Thomas and Page Thomas Smith, for plaintiff-appellee.

Wallace, Morris, Barwick & Rochelle, P.A., by Elizabeth A. Heath and Elizabeth H. McCullough, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's judgment granting plaintiff's request for attorneys' fees. He contends the award is barred because the court's judgment is in excess of $10,000.00, the limit imposed by N.C. Gen. Stat. § 6-21.1 (1986). Defendant further argues the trial court erred by basing its judgment upon insufficient evidence, by failing to make necessary findings of fact, and by allowing an "excessive, unreasonable, arbitrary, [and] capricious" award. For the reasons set forth herein, we believe defendant's assignments of error are unfounded.

Pertinent facts and procedural information are as follows: On 22 July 1992, Brande West (plaintiff) was injured in an automobile collision involving defendant's 1986 Ford vehicle. On 7 December 1992, plaintiff instituted the instant action by and through her guardian *ad litem* alleging defendant was negligent in the operation of his automobile thereby proximately causing injury to plaintiff. Defendant answered denying liability and further alleged plaintiff's contributory negligence as an affirmative defense.

The parties stipulated at trial that "[t]he medical expenses incurred on behalf of the minor Plaintiff . . . will be allowed into evidence and the jury will be able to consider these expenses as part of the damages to be considered in addition to the amount prayed for in the Complaint for personal injury."

The issues submitted by the trial court to the jury were answered as follows:

> ISSUE 1: Was the minor Plaintiff, Brande M. West, injured as a result of the negligence of the Defendant, Toni Gray Tilley?
>
> ANSWER: Yes.
>
> ISSUE 2: Did the minor Plaintiff, Brande M. West, by her own negligence, contribute to her injury?

ANSWER: No.

ISSUE 3: What amount is the minor Plaintiff, Brande M. West, entitled to recover for personal injury?

ANSWER: $9,000.00.

ISSUE 4: What amount, if any, is Gloria Williams, mother of the minor Plaintiff, entitled to recover for medical expenses?

ANSWER: $1,301.00.

The trial court subsequently entered judgment stating "Plaintiff is hereby awarded a Judgment against the Defendant, Toni Gray Tilley, in the sum of $9,000.00," and further awarded plaintiff attorneys' fees in the amount of $8,400.00.

Defendant moved for judgment notwithstanding the verdict, or in the alternative, for a new trial. The trial court denied defendant's motions, but subsequently entered an amended judgment to reflect the receipt by plaintiff's mother of $1,301.00 for medical expenses incurred as a result of plaintiff's injuries. Defendant gave notice of appeal to this Court 16 November 1993 and 18 November 1993.

I.

[1] Although the court's amended judgment provided separately for recovery by plaintiff of $9,000.00 and by Gloria Williams (plaintiff's mother; Ms. Williams) of $1,301.00, defendant contends the trial court "entered one judgment in the total amount of $10,301.00." Because the "judgment" intended by G.S. § 6-21.1 must necessarily include plaintiff's damages and the mother's award for medical expenses, defendant continues, the court erred by allowing attorneys' fees upon a judgment in excess of the statutory limit. We find defendant's argument unpersuasive.

G.S. § 6-21.1 states in pertinent part:

> In any personal injury or property damage suit, . . . where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

The statute, an exception to the general rule that counsel fees may not be included in costs recoverable by a successful party to an

action or proceeding, is remedial and should be construed liberally to accomplish the legislative purpose and to bring within it all cases fairly falling within its scope. *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973) (citations omitted).

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). The plain language of the statute at issue allows counsel fees to "the duly licensed attorney representing the *litigant* obtaining a judgment for damages . . . ." G.S. § 6-21.1 (emphasis added). "A party entitled to recover attorney's fees under N.C. Gen. Stat. § 6-21.1 is so entitled based upon his status as 'the litigant obtaining a judgment.' " *Mishoe v. Sikes*, 115 N.C. App. 697, 699, 446 S.E.2d 114, 115 (1994), *aff'd*, 340 N.C. 256, 456 S.E.2d 308 (1995) (citation omitted). The dispositive issue therefore becomes whether plaintiff's mother was indeed a "litigant" in the case *sub judice*.

A "litigant" is defined as "[a] party to a lawsuit; one engaged in litigation; usually spoken of active parties, not of nominal ones." Black's Law Dictionary 841 (5th ed. 1979). Although counsel herein stipulated to jury consideration of the child's medical expenses so as to prevent multiplicity of suits related to the same incident, the record reflects no formal motion by either plaintiff or defendant to add Gloria Williams as a party. She did not therefore function as a "litigant" herein. Accordingly, the recovery attributed to her for plaintiff's medical expenses may not be incorporated with that of plaintiff in determining eligibility for attorneys' fees under G.S. § 6-21.1. *Cf. Mickens v. Robinson*, 103 N.C. App. 52, 58, 404 S.E.2d 359, 363 (1991) (phrase "litigant obtaining a judgment" includes defendants prevailing on counterclaims for less than statutory amount).

The foregoing conclusion is consistent with the policies underlying G.S. § 6-21.1:

> The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations.

Hicks, 284 N.C. at 239, 200 S.E.2d at 42.

In *Hicks*, defendant argued plaintiff was not entitled to attorneys' fees in a case settled prior to trial because the language of the statute mandates that a "presiding judge" must enter the award. *Id.* Therefore, defendant continued, the case must proceed to *trial* to qualify under the statute for an award of counsel fees. *Id.* Our Supreme Court disagreed observing that "[t]o hold, as the defendant . . . contends, that this use of the adjective 'presiding' shows the Legislature intended that no fee be allowed in any case settled without actual trial is, in our opinion, to give this word an unreasonably strict construction." *Id.* at 240, 200 S.E.2d at 42.

Similarly, we believe defendant's argument insisting that the court's "judgment" herein (for purposes of determining eligibility for attorneys' fees) must necessarily include medical expenses obtained by a non-party requires an unnecessarily restrictive application of G.S. § 6-21.1. Absent the court's award of attorneys' fees, the minor plaintiff's recovery in the prosecution of her claim would be expended nearly *in toto* to compensate counsel. Such a result certainly would not be that intended by the General Assembly, and is one we are required to reject under the instant facts. *See State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992) (courts "must adhere to the intent of the legislature" in matters of statutory interpretation) (citation omitted).

[2] Defendant nonetheless suggests the claim of Williams as plaintiff's mother is "derivative" of her child's claim, "rendering the child a necessary party to the parent's claim and requiring the child and parent to be joined as plaintiffs in one action resulting in one judgment . . . ." This contention fails.

Our Rules of Civil Procedure state that "those who are united in interest must be joined as plaintiffs or defendants . . . ." N.C. Gen. Stat. § 1A-1, Rule 19(a) (1990). A necessary party is one "so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy" without the presence of that party. *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365-66 (1978) (citations omitted). "When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in." *Id.* at 156, 240 S.E.2d at 366 (citations omitted).

In North Carolina, two independent causes of action arise when an unemancipated minor is injured through the negligence of another: 1) a claim on behalf of the parent for medical expenses reasonably

necessary to treat the injury and for loss of services during the child's minority, and 2) a claim on behalf of the minor child to recover damages caused by the injury including, *inter alia*, pain and suffering and impairment of earning capacity following majority. *Brown v. Lyons*, 93 N.C. App. 453, 458, 378 S.E.2d 243, 246 (1989) (citing *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981)). The parents' right of action is based upon their duty to care for and maintain the child. *Flippin*, 301 N.C. at 120, 270 S.E.2d at 490 (citation omitted).

Only the minor child pursued her separate claim as a named plaintiff in the action *sub judice*. The participation of plaintiff's mother at trial was not essential to a determination of plaintiff's personal injury claim against defendant, and judgment therein was properly rendered "completely and finally determining the controversy," *Booker*, 294 N.C. at 156, 240 S.E.2d at 366 (citations omitted), without the presence as a party of Gloria Williams. Contrary to defendant's assertion, the interests of plaintiff and her mother were not so united as to require joinder of Ms. Williams under Rule 19(a).

II.

[3] In addition, defendant submits the trial court erred by awarding attorneys' fees without either sufficient evidence or findings of fact and conclusions of law that such award was reasonable. This contention is unfounded.

G.S. § 6-21.1 accords the trial court considerable discretion in affixing the amount of reasonable attorneys' fees. *Hill v. Jones*, 26 N.C. App. 168, 170, 215 S.E.2d 168, 170, *cert. denied*, 288 N.C. 240, 217 S.E.2d 664 (1975) (citation omitted). "Reasonableness, not arbitrary classification of attorney activity, is the key factor under all our attorneys' fees statutes." *Coastal Production v. Goodson Farms*, 70 N.C. App. 221, 228, 319 S.E.2d 650, 656, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984) (citations omitted). Therefore, the trial court's award will not be disturbed on appeal without a showing of manifest abuse of its discretion. *Lea Co. v. N.C. Board of Transportation*, 323 N.C. 691, 694-95, 374 S.E.2d 868, 870 (1989).

For the appellate court to determine if an award of counsel fees is reasonable, "the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney" based on competent evidence. *United Laboratories, Inc. v. Kuykendall*, 102 N.C.

App. 484, 494, 403 S.E.2d 104, 111 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993) (citations omitted).

Counsel for plaintiff herein submitted an affidavit to the trial court itemizing the services provided. Defendant's attorney professed not to have "any problem" with the affidavit being presented and indicated she did not question "whether he's done those things . . . that directly apply to me." The trial court observed, "[t]here's no question in my mind that based on the affidavit that the attorneys have the time in it that they say they have," at which point defense counsel interjected, "I'm not disputing anything you're saying." Following defense counsel's complaint that two attorneys represented plaintiff at trial, the court agreed it would base its computation of attorneys' fees for plaintiff on a total of fifty-six hours so as to "eliminate[] any duplication of hours" between plaintiff's two trial attorneys. Counsel for defendant then replied:

> Well, I like that better. And as far as the rate, you're just going to have to use your discretion about that . . . .

Thereafter, the court entered its award as follows:

> The court has considered the affidavits of the attorneys and finds that, and the statements of the attorneys, and finds that they have unduplicated hours totataling [sic] 56 hours and that the reasonable and customary fee that has been awarded in this district for attorneys with this experience and for this type of work is $150 per hour and sets an attorney fee at $8,400.

The court then asked counsel, "Anything further?" Defendant's attorney merely made inquiry regarding a matter unrelated to the matter of attorneys' fees and the case then concluded.

We do not believe the foregoing sufficiently constitutes preservation for our review of those questions relating to the sufficiency of the court's findings or to the reasonableness of its award of counsel fees. *See* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . ."). We therefore reject defendant's second argument.

Moreover, assuming *arguendo* defendant properly preserved the issue of the court's failure to find based upon competent evidence that the fee awarded was "reasonable," we nonetheless conclude,

considering the record and the cases cited hereinabove, that the trial court's stated determination as to reasonableness was sufficient. *See also Mickens*, 103 N.C. App. at 59, 404 S.E.2d at 363 (trial court "having carefully reviewed the petitioner's hours," showed no abuse of discretion in awarding $5,000.00 in attorneys' fees); *cf. Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120, — (1987) (court's award of one-third of total recovery for attorneys' fee error where judgment contained no findings regarding time and labor expended, skill required to perform services, customary fee, or experience and ability of attorney).

III.

[4] Lastly, defendant contends the trial court abused its discretion by awarding $8,400.00 in counsel fees because "the fees were excessive, unreasonable, arbitrary, capricious, and not supported by the evidence." As noted above, this assignment of error has not been properly preserved for our review, *see* N.C.R. App. P. 10(b)(1), and is thus without merit. Moreover, again assuming *arguendo* proper preservation for appellate review, defendant's argument cannot be sustained.

"A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." N.C. Rules of Professional Conduct, Canon II, Rule 2.6(b) (1995). The Rule sets out factors to be considered in determining whether the fee claimed is reasonable. *Id.* Among those factors are "the time and labor required," Rule 2.6(b)(1), "the fee customarily charged in the locality for similar legal services," Rule 2.6(b)(3), "the amount involved and the results obtained," Rule 2.6(b)(4), and "the experience, reputation, and ability of the lawyer or lawyers performing the services," Rule 2.6(b)(7).

Applying these factors to the record herein, we perceive no abuse of discretion by the trial court. It carefully considered the time expended by counsel, exercising particular caution in omitting duplicitous services, as well as the fees normally charged in the area for attorneys with similar experience and expertise. The record further suggests that plaintiff's recovery was well in excess of the amount originally offered as settlement, a circumstance properly compensated by attorneys' fees. *See Redevelopment Comm. v. Hyder*, 20 N.C. App. 241, 245, 201 S.E.2d 236, 239 (1973) (results obtained by attorney in excess of prior proposals are a legitimate consideration in determining the amount of his fee).

Based upon the foregoing, we affirm the judgment of the trial court.

Affirmed.

Judges ARNOLD and GREENE concur.

SANTOS ARROYO, PLAINTIFF/APPELLANT v. SCOTTIE'S PROFESSIONAL WINDOW CLEANING, INC., DEFENDANT/APPELLEE

No. COA94-1046

(Filed 5 September 1995)

Workers' Compensation § 62 (NCI4th)— employer intentionally engaged in tortious conduct—sufficiency of complaint

Plaintiff's allegations were sufficient to state a legally cognizable claim under *Woodson v. Rowland*, 329 N.C. 330, that defendant intentionally engaged in conduct that it knew was substantially certain to cause serious injury or death where plaintiff alleged that defendant was aware that the required safe methods for cleaning highly elevated windows were not being practiced; defendant's management accepted and encouraged this fact; the conduct of defendant's supervisor who required plaintiff to lean outward from a small ledge without full protection equipment and refused to allow a fellow employee to at least anchor plaintiff was substantially certain to result in serious injury or death; and plaintiff alleged that defendant knew of this supervisor's past record of ignoring safety requirements, and had in fact allowed this exact cleaning job to be performed in the same inherently dangerous manner by this supervisor.

Am Jur 2d, Workers' Compensation §§ 75-87.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Appeal by plaintiff from order entered 10 June 1994 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 25 May 1995.

By his amended complaint in this action, plaintiff seeks compensatory and punitive damages for injuries sustained in the course of his

employment with defendant. Plaintiff alleged that he was injured as a result of "wanton, reckless and grossly negligent misconduct substantially certain to cause serious injury or death," on the part of defendant. Defendant's motion to dismiss, made pursuant to G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted, was allowed and plaintiff's claim was dismissed. Plaintiff appeals.

Law Offices of Thomas J. White, III, by Thomas J. White, III, and Daniel B. Titsworth, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten, for defendant-appellee.

MARTIN, John C., Judge.

Contending that he has stated a claim against defendant based on *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), plaintiff assigns error to the dismissal of his action for failure to state a claim upon which relief can be granted. We find merit in his contention.

In our review of the dismissal of this action pursuant to Rule 12(b)(6), we must consider the allegations of plaintiff's complaint as true. *Hickman v. McKoin*, 337 N.C. 460, 446 S.E.2d 80 (1994). According to those allegations, defendant is a North Carolina corporation which provides window cleaning services to businesses, particularly specializing in the cleaning of exterior windows of tall, multi-story commercial office buildings. Defendant, a member of the International Window Cleaning Association (IWCA), had adopted the "Safety Guidelines for Window Cleaning" published by IWCA prior to plaintiff's injury.

Plaintiff, a 23 year old Mexican citizen, had worked as a window washer for defendant a few months in 1992 and continuously from April 1993 until his injury on 15 November 1993. Prior to his employment with defendant, plaintiff had no previous experience in washing the exterior windows of high-rise buildings. Although defendant was aware that the danger of falling and being injured was great in this type of work, plaintiff was never given safety training in the cleaning of high-rise exterior windows. Defendant did not have published safety rules of its own and its management did not enforce safety measures required by the Federal and State Occupational Safety and Health Acts (OSHA) or the IWCA "Safety Guidelines." Safety publications and instructions were not made available to employees despite

defendant's possession of such materials, and OSHA requirements and IWCA recommendations that defendant establish an effective means of communicating safety rules to its employees were not accomplished.

Plaintiff alleges defendant was aware that permitting or requiring a window washer to work from a great height off the ground without the use of a safety line or net was in violation of OSHA rules and IWCA guidelines, and would be inherently dangerous and substantially certain to cause serious injury or death to the worker. Nevertheless, defendant's management often required employees to work without safety lines, or with safety lines attached to the same anchorage as the work line supporting the employee, both of which violate OSHA regulations. Defendant had previously been cited and fined by the North Carolina Department of Labor for such OSHA violations.

By reason of defendant's failure to effectively communicate and enforce applicable safety requirements, and by requiring employees to save time and expense by avoiding "unnecessary" safety measures, defendant encouraged and permitted non-compliance with the safety rules among its supervisors and window washers. On 15 November 1993, defendant's lack of compliance with safety measures resulted in a fall and serious injury to plaintiff.

Defendant had entered into a contract to clean the windows of Burroughs Wellcome's Research Triangle Park office buildings for a fixed price, based primarily on an estimate of the time it would take to complete the job. Defendant's president, John McGrath, personally inspected the site and assessed the time and difficulty required in making the contract a profitable one for defendant. On 15 November 1993, plaintiff's crew of window washers was deployed to clean the windows at Burroughs Wellcome.

Defendant's foreman, Armando Estrada, who was acting within the scope of his employment and under the direction of defendant's management, was plaintiff's supervisor that day. In violation of OSHA regulations, no inspection of the job site was conducted by any member of defendant's management above Estrada during the course of the day plaintiff was injured. Estrada was known to management to be knowledgeable as to safe work methods, though careless and lax as to the enforcement of these safety measures. Estrada assigned the work to be done, selected the equipment to be used, and explained the manner in which the job was to be accomplished.

On the morning of 15 November 1993, Estrada directed plaintiff and another employee, Fernando Ramirez, to wash the exterior windows of an addition to Burroughs Wellcome's Main Administration Building. These particular windows follow the unusual geometric design of the building and are quite difficult to reach. Neither employee had ever washed these windows before, though Estrada had washed the same windows the previous Spring. Instead of washing the windows from the ground using either scaffolding or ladders or a telescoping power washer capable of reaching the windows, plaintiff and Ramirez were instructed to clean the windows from the roof. The safer methods of washing from the ground were considered too cumbersome and time consuming.

Plaintiff alleges that in violation of OSHA regulations and IWCA guidelines, plaintiff and Ramirez were given neither suspension equipment nor safety equipment to complete their task. Suspension and safety lines would have had to continually be attached, detached, and reattached as the employees progressed along the side of the building, interrupting and slowing the flow of work. Instead, plaintiff and Ramirez were instructed to go over the edge of the roof and climb down a ladder to the window ledges without any fall protection. The two employees were to wash the windows, climb back up the ladder, and then repeat the process at the next set of windows. This was the manner in which Estrada had washed the windows earlier. Estrada was well aware of the extreme hazard of falling and serious injury or death to plaintiff by working in this manner.

The design of the building was such that plaintiff was required to stand on a ledge approximately three feet wide and lean outward to wash the "wing" windows of rooms protruding from the side of the building. In order for plaintiff to keep his balance while doing this, plaintiff and Ramirez locked arms, or Ramirez held onto plaintiff's utility belt as plaintiff leaned out to reach the windows. During the lunch break, Estrada asked plaintiff and Ramirez how far they had been able to go that morning. When told that the two had to work slowly because Ramirez was holding onto plaintiff, Estrada instructed them to stop holding on to each other because they could work faster separately. Estrada ordered plaintiff to wash the "wing" windows which extended from the ledge, while Ramirez was to wash the other windows. Ramirez responded that plaintiff would fall, whereupon Estrada replied that plaintiff would not fall, and that the two employees should work separately and faster.

Plaintiff and Ramirez believed they would be fired or suspended if they did not work in the instructed manner, as they knew of other workers who had been fired or suspended for lesser infractions. Feeling they had no choice, plaintiff and Ramirez returned to the roof and began washing the windows separately. While leaning out to wash the "wing" windows, plaintiff lost his footing on the ledge and fell to the ground, suffering serious and permanent injury.

Plaintiff alleges that defendant, acting by and through Estrada, knew that to require plaintiff to work without fall protection from a small ledge while leaning off balance to clean protruding windows was substantially certain to result in plaintiff falling and being seriously injured. Defendant, with full knowledge and realization of the inherent and imminent danger presented, nevertheless consciously, intentionally, and personally ordered plaintiff to work in the described manner, resulting in plaintiff's fall and injury.

Plaintiff alleges defendant's conduct was wanton and grossly negligent and constructively constituted intentional tortious misconduct entitling plaintiff to bring this action. Defendant negligently and wantonly violated several OSHA regulations and IWCA guidelines, as well as defendant's duty to provide plaintiff a reasonably safe place to work and reasonably safe equipment with which to do his assigned work. Despite defendant's knowledge that the manner in which plaintiff had been ordered to work was substantially certain to result in serious injury to plaintiff, defendant took no measures reasonably calculated to reduce or prevent injury to plaintiff. Defendant's actions constituted wanton, reckless, and grossly negligent misconduct substantially certain to cause serious injury or death, and proximately caused the fall and the injuries and damages suffered by plaintiff.

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleadings, when taken as true, are legally sufficient to satisfy the elements of at least some legally recognized claim. *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). In ruling upon a Rule 12(b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim. *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902 (1995).

Generally, the Workers' Compensation Act provides the exclusive remedy for an employee injured in a workplace accident. *Regan v.*

Amerimark Building Products, Inc., 118 N.C. App. 328, 454 S.E.2d 849 (1995). However, in *Woodson, supra,* our Supreme Court created an exception allowing an employee to assert a claim against an employer for damages when the employer "intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees . . . ." *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228.

" 'Substantial certainty' under *Woodson* is more than the 'mere possibility' or 'substantial probability' of serious injury or death. No one factor is determinative in evaluating whether a plaintiff has stated a valid *Woodson* claim; rather, all of the facts taken together must be considered." *Regan*, 118 N.C. App. at 331, 454 S.E.2d at 852, *quoting Woodson*, 329 N.C. at 345, 407 S.E.2d at 231. In *Woodson*, our Supreme Court determined that evidence that the employer had allowed employees to work in a trench approximately fourteen feet deep, with vertical sides which were not braced or supported, was sufficient to create an issue of fact as to whether the employer had acted intentionally with knowledge that such conduct was substantially certain to cause a cave-in resulting in serious injury or death. Thus, summary judgment for the employer was reversed. In *Regan*, this Court decided that the plaintiff had sufficiently stated a *Woodson* claim by alleging the defendant installed inoperable emergency switches on machinery and allowed the plaintiff to clean the equipment without informing him that the switches were not working properly. We determined this conduct was substantially certain to result in serious injury or death. *See Mickles v. Duke Power Co.*, 115 N.C. App. 624, 633, 446 S.E.2d 369, 375 (1994) (stating "a reasonable juror could determine that Duke Power's act of sending a lineman up an electrical tower with faulty or incompatible safety equipment was 'substantially certain' to result in the death of a lineman").

In the present case, plaintiff alleges defendant was aware that the required safe methods for cleaning highly elevated windows were not being practiced, and that defendant's management accepted and encouraged this fact. The conduct of defendant's supervisor, Estrada, who required plaintiff to lean outward from a small ledge without fall protection equipment and refused to allow a fellow employee to at least anchor plaintiff, was substantially certain to result in serious injury or death. Plaintiff has alleged defendant knew of this supervisor's past record of ignoring safety requirements, and in fact, defendant had previously allowed this exact cleaning job to be performed in the same inherently dangerous manner by this supervisor. Liberally

construed, these allegations are sufficient to state a legally cognizable claim under *Woodson* that defendant intentionally engaged in conduct that it knew was substantially certain to cause serious injury or death.

Plaintiff has also alleged that defendant's conduct was intentional, wanton, reckless, and grossly negligent, and he has specifically asked for punitive damages. We hold, pursuant to *Regan, supra*, that plaintiff's allegations are sufficient to state a claim for punitive damages.

For the reasons stated, the order dismissing this action is reversed and this case is remanded for further proceedings.

Reversed and remanded.

Judges JOHNSON and GREENE concur.

JERRY T. WILLIAMS, PETITIONER-APPELLANT v. DAVIE COUNTY, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT-APPELLEES

No. COA94-901

(Filed 5 September 1995)

Labor and Employment § 161 (NCI4th)— failure to report phone tap to sheriff—violation of department policy not misconduct—denial of unemployment benefits improper

A discharged deputy sheriff's failure to inform the sheriff or chief deputy of a phone tap in his supervisor's office, though a violation of departmental policy, did not rise to the level of misconduct which would make the deputy ineligible for unemployment benefits, since the deputy had been given specific instructions not to discuss information about an ongoing drug investigation which might involve his supervisor; he accidentally discovered the phone tap; after talking with an SBI agent on Thursday, he decided to wait until Monday to decide whether to tell the sheriff what he had discovered; that Monday morning an FBI agent called the deputy at home and instructed him not to discuss the phone tap with anyone; and his failure to report to the sheriff the phone tap he had discovered was a reasonable response to the dilemma he faced.

Am Jur 2d, Unemployment Compensation §§ 81, 82.

Appeal by petitioner from judgment entered 2 March 1994 by Judge F. Fetzer Mills in Davie County Superior Court. Heard in the Court of Appeals 10 May 1995.

Elliot, Pishko, Gelbin & Morgan, P.A., by Ellen R. Gelbin, for petitioner appellant.

Chief Counsel T.S. Whitaker and Thelma M. Hill for respondent appellee Employment Security Commission.

COZORT, Judge.

In this case the petitioner, a deputy sheriff of Davie County assigned to work with state and federal agencies on drug conspiracies, was fired for failing to inform the sheriff that he had discovered unauthorized wiretaps on phones in the sheriff's department. State and federal agents had instructed petitioner not to discuss the wiretaps with anyone in the sheriff's department. After his dismissal, petitioner filed for unemployment benefits. The Employment Security Commission denied petitioner's claim, ruling that petitioner's failure to disclose the discovered wiretaps to his superiors amounted to misconduct which made petitioner ineligible for benefits. The superior court affirmed. We hold the court erred in affirming the Commission's conclusion that petitioner's actions constituted misconduct disqualifying petitioner from benefits.

The essential facts are undisputed. Petitioner was a detective with fourteen years' experience in the Davie County Sheriff's Department. Part of his duties included working with Internal Revenue Service (I.R.S.) and State Bureau of Investigation (S.B.I.) agents, who used sheriff's department facilities to investigate drug conspiracies. For about three years the I.R.S. and S.B.I. conducted an investigation of a drug conspiracy involving several people in Davie County. During this investigation, an informant implicated petitioner's supervisor, Lt. John Stephens, in the petitioner's presence. One of the lead federal agents conducting the investigation, I.R.S. Special Agent Ted Warren, told petitioner not to disclose this information.

On 2 March 1993 petitioner and another sheriff's detective, Arthur Ebright, found a recording device on Lt. Stephens' telephone which they suspected might be illegally recording third-party telephone conversations. Ebright testified he and petitioner entered Lt. Stephens' office that night because they thought the people who cleaned the

office had left it open, and the officers wanted to secure the office and lock the door. Ebright stated the two saw the tape recorder under a table near Lt. Stephens' desk, between one of the table's cross braces and the floor. Ebright and petitioner told federal agents about the recorder the next night. Ebright testified he unlocked the door to Stephens' office and went in the office with Sgt. Tommy Grubb of the sheriff's department, federal agents, and the petitioner. The recorder was still underneath the desk and was hooked to three phone lines. Sgt. Grubb opened Stephens' middle desk drawer and removed a tape. The officers listened to the tape and determined it was a recording of third-party conversations.

S.B.I. Special Agent Robert Risen testified that petitioner played the tapes for him in petitioner's car, and that a call Risen made to the Forsyth County Sheriff's Department was recorded on the tape. Risen testified petitioner told him petitioner could not tell the sheriff about the recorder because the sheriff would not do anything about it. Risen told petitioner he was going to talk to I.R.S. Special Agent Warren that afternoon. Special Agent Warren testified he thought it was possible some of the recorded conversations were linked to the investigation he was conducting. Warren testified the sheriff's officers and the federal investigators talked about what to do after discovering the recorder and tapes, but that no one was sure what should be done or who should be told about the phone tap. After talking to Warren, Risen wrote a memo to the special agent in charge of the S.B.I.'s Hickory office, who contacted the S.B.I.'s assistant director, who contacted the Federal Bureau of Investigation (F.B.I.). In a written discharge report filed with the Employment Security Commission petitioner stated that he received a telephone call on 6 March 1993 from an agent who told him not to take any actions regarding the telephone recordings, since the issue was in the hands of the F.B.I. On 8 March, F.B.I. Agent Dennis Baker called petitioner and told him not to discuss the phone tap with anyone. On 9 March, the F.B.I. served a search warrant on Davie County Sheriff William Wooten and confiscated the tapes and recorder.

Sheriff Wooten testified he asked petitioner to resign. When petitioner refused, the sheriff fired him. The sheriff testified his reasons for firing petitioner included tensions between petitioner and his supervisor, petitioner's failure to follow the chain of command, and statements petitioner made to the media. In response to the Employment Security Commission's request for information, the Davie County Finance Office listed as reasons for separation:

"Disloyalty to the Sheriff. Failing to keep the Sheriff informed of a clandestine investigation involving his supervisor. Illegal search of supervisor's office on two occasions, involving four other departments."

On 17 June 1993, petitioner applied to the Employment Security Commission for unemployment benefits. An adjudicator for the Commission determined petitioner was disqualified for benefits under N.C. Gen. Stat. § 96-14(2) because he was discharged for misconduct connected to his work. Petitioner appealed the ruling, and the parties presented arguments at a 22 July 1993 hearing. The appeals referee affirmed the adjudicator's decision, making the following pertinent findings of fact:

> 3. Claimant was discharged from this job for failing to follow departmental policy. The claimant discovered in his immediate superior's office a tape recorder that was being use [*sic*] to wiretap phone conversations there at the sheriff's department. He was concerned as to whether or not this was legal. He discovered the wiretap by accident. He did tell another deputy about this. He also told an SBI agent. The SBI agent then notified an IRS agent. The claimant was aware the IRS agent had been notified.
>
> 4. The claimant never notified the sheriff or the chief deputy about the wiretap. He was aware that under the department's chain of command proper procedure would be to go to either of them with a complaint about his immediate superior. That policy was contained in the policy and procedures manual for the sheriff's department. The claimant was familiar with this.
>
> 5. The claimant never notified anyone in his chain of command. The department only learned of the situation when a search warrant was served on it by the FBI. This occurred some nine days after the initial discovery of the wiretap.

The appeals referee concluded that petitioner's failure to notify the proper authorities within his chain of command of the discovery of the phone tap was a violation of departmental policy, amounting to misconduct. Petitioner appealed, and Deputy Commissioner James Haney affirmed the appeals referee's decision. Petitioner petitioned for judicial review of the Commission's decision in Davie County Superior Court. Judge F. Fetzer Mills affirmed the Commission's decision. Petitioner appealed to this Court.

The standard of review for a decision by the Employment Security Commission is whether (1) the evidence before the Commission supports its findings of fact and (2) the facts found by the Commission sustain its conclusions of law. *Reco Transportation, Inc. v. Employment Security Comm.*, 81 N.C. App. 415, 418, 344 S.E.2d 294, 296, *disc. review denied*, 318 N.C. 509, 349 S.E.2d 865 (1986).

Petitioner contends the Commission's conclusion that he is ineligible for unemployment compensation under N.C. Gen. Stat. § 96-14(2) because his actions constituted misconduct is unsupported by the Commission's findings of fact or the evidence. We agree.

Ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act. *In re Miller v. Guilford County Schools*, 62 N.C. App. 729, 731, 303 S.E.2d 411, 412, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 165 (1983). The employer bears the burden of rebutting this presumption by showing circumstances which disqualify the claimant. *Id.*

N.C. Gen. Stat. § 96-14(2) (1993) provides an employee shall be disqualified for unemployment benefits if the Commission determines he was discharged for misconduct connected with his work. The statute defines misconduct as:

> conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee . . . .

Id.

Violating a work rule is not willful misconduct if evidence shows the employee's actions were reasonable and were taken with good cause. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 375, 289 S.E.2d 357, 359 (1982). "Good cause [is] a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Id.* at 376, 289 S.E.2d at 359. If the discharged employee acts in a way which shows a wanton or willful disregard for the employer's interest, deliberately violates the employer's rules or displays wrongful intent, he is not entitled to unemployment compensation. *Id.* at 375, 289 S.E.2d at 359.

A federal investigator had given petitioner specific instructions not to discuss information about an ongoing drug investigation which

may involve his supervisor. The same investigator, I.R.S. Special Agent Ted Warren, testified he thought conversations recorded by petitioner's supervisor might be linked to this investigation. Petitioner stated that after talking to S.B.I. Agent Risen on Thursday, 4 March 1993, he decided to wait until the following Monday to decide whether to tell the sheriff what he had discovered. That Monday morning, an F.B.I. agent called petitioner at home and instructed him not to discuss the phone tap with anyone.

Petitioner's failure to inform the sheriff or chief deputy of the phone tap in Lt. Stephens' office was a violation of departmental policy, as found by the Commission. We hold that this violation does not rise to the level of misconduct. This evidence, and the Commission's findings, fail to support a conclusion that petitioner's conduct showed a wanton or willful disregard of his employer's interests. Rather, we find, given the unusual circumstances here, including the instructions petitioner received from state and federal agents, that petitioner's failure to report to the sheriff the phone tap he had discovered was a reasonable response to the dilemma petitioner faced.

In coming to this conclusion, we recognize the sheriff's right to remove petitioner from his department and do not purport to limit that right in this opinion. However, the sheriff's right to fire the petitioner does not bear on petitioner's right to receive unemployment benefits.

The purpose of denying a discharged employee unemployment benefits because of misconduct connected with work is to prevent these benefits from going to employees who lose their jobs because of "callous, wanton and deliberate misbehavior." *Interstate*, 305 N.C. at 375, 289 S.E.2d at 359. The evidence before the Commission and its findings of fact do not support its conclusion that petitioner's behavior was of this nature. We find petitioner's actions did not constitute misconduct.

The trial court's judgment affirming the Commission's decision is reversed. The matter is remanded to the Superior Court of Davie County for remand to the Employment Security Commission for entry of an award of unemployment benefits.

Reversed and remanded.

Judges JOHN and WALKER concur.

ED T. GRIFFIN D/B/A ED T. GRIFFIN BUILDERS v. JAMES H. SWEET, JR. AND WIFE, DEBRA H. SWEET

No. COA94-716

(Filed 5 September 1995)

1. Accord and Satisfaction § 6 (NCI4th)— sufficiency of evidence of accord

The settlement agreement reached by the parties, the terms and conditions of which were announced in open court and recorded by the court reporter, constituted an accord, and defendants could not successfully claim that there was no agreement where defendants were aware their attorneys were conducting settlement negotiations with opposing counsel; defendant husband, a college graduate, and defendant wife were present in the courtroom with their attorneys when the judge outlined the terms of the settlement agreement and asked counsel to inform him of any variations in the terms; and both of defendants' attorneys testified that their clients were fully informed of and agreed to the terms of the settlement agreement.

Am Jur 2d, Accord and Satisfaction §§ 5, 33 et seq.

2. Accord and Satisfaction § 8 (NCI4th)— sufficiency of evidence of satisfaction

The evidence was sufficient to show satisfaction, despite defendants' failure to negotiate plaintiff's checks, where it tended to show that plaintiff fully performed as required under the settlement agreement by releasing the lien on defendants' property and making two $5,000 installment payments within the time required and was thereby denied use of the money for other purposes; defendants personally returned plaintiff's ladder to plaintiff's attorney and, while at his office, requested the first payment; when they later went to collect the check, they objected to its being made out to their attorney; the checks tendered by plaintiff pursuant to the settlement agreement were ultimately forwarded to defendants' attorney who, acting on their behalf, accepted and endorsed both checks; and defendants did not instruct their attorney to return the checks to plaintiff until eight months after the first check had been issued and received and after plaintiff had released his lien on defendant's property.

Am Jur 2d, Accord and Satisfaction §§ 18-22.

Modern status of rule that acceptance of check purporting to be final settlement of disputed amount constitutes accord and satisfaction. 42 ALR4th 12.

Creditor's retention without negotiation of check purporting to be final settlement of disputed amount as constituting accord and satisfaction. 42 ALR4th 117.

Appeal by defendants from judgment entered 28 January 1994 by Judge Cyrus Grant in Halifax County Superior Court. Heard in the Court of Appeals 22 March 1995.

Dill, Fountain, Hoyle & Pridgen, L.L.P., by William S. Hoyle, for plaintiff-appellee.

Wood & Francis, PLLC, by Charles T. Francis, for defendant-appellants.

McGEE, Judge.

In the summer of 1989, defendants James H. Sweet, Jr. and wife Debra H. Sweet contracted with plaintiff Ed T. Griffin, d/b/a Ed T. Griffin Builders to construct a home in Halifax County, North Carolina. Defendants subsequently obtained a construction loan through Centura Bank f/k/a Peoples Bank, and as required by the lender, Griffin and his wife signed a personal guaranty for the construction loan. Plaintiff began work on the residence in early 1990.

During the summer, a dispute arose between the parties concerning the construction. Defendants notified Centura Bank that plaintiff was no longer authorized to make construction draws on the account. Plaintiff had the house appraised, determined the percentage of completion and filed a claim of lien against the property for the balance due on the contract. He also filed a lawsuit against defendants alleging breach of contract to collect the balance due for the completed portion of construction and to perfect his materialman's lien. Defendants filed an answer and counterclaim alleging the plaintiff breached the contract by failing to (1) construct the house in accordance with the contract, (2) comply with the state building code, and (3) perform the construction in a workmanlike manner.

A jury was selected and impaneled and plaintiff began presenting evidence in January 1993. During the second day of the trial, testimony was suspended and with the encouragement of the judge, settlement negotiations began. After several hours of negotiations in the

judge's chambers with the judge and attorneys for both parties present, a settlement was reached. The judge then instructed all parties and their attorneys to return to the courtroom where he dismissed the jury. He then stated, "I am going to recite what I consider to be the settlement, and if it varies from what you perceive the settlement to be, counsel, you should inform me." After the judge read into the record his understanding of the settlement agreement, attorneys for both parties were given an opportunity to include additional terms of the agreement which had been omitted by the judge, and to object to any variations from the terms which had been agreed upon. Although some terms were added, no objections were made by either side.

Under the settlement agreement, plaintiff agreed to pay $10,000 to defendants, $5,000 due within ten days and $5,000 due on or before 1 June 1993, and to release the lien on defendants' property. In exchange, defendants agreed to return a ladder belonging to plaintiff within ten days, and to indemnify the plaintiff and hold him harmless from any payment that he might be required to make to Centura Bank as a result of plaintiff's guaranty of the construction loan. The parties agreed to sign a consent judgment to be held by plaintiff's counsel until the conditions of the settlement agreement were met. The consent judgment was to be filed only if the conditions were not met by 2 June 1993.

Plaintiff complied with the terms of the settlement agreement by cancelling the lien on defendants' property and making the two installment payments of $5,000 within the time required. The checks were accepted by defendants' attorney, but were never negotiated by defendants. The defendants returned plaintiff's ladder as required, but refused to indemnify him for any payment he might be required to pay pursuant to the construction loan guaranty.

Plaintiff filed a supplemental complaint in November 1993 against defendants for breach of the settlement agreement. He alleged the agreement reached during the January 1993 trial, along with defendants' attorney's acceptance of plaintiff's installment payments, constituted accord and satisfaction.

In response to plaintiff's supplemental complaint, defendants alleged they never understood the settlement and did not agree to various provisions of the settlement agreement. Defendants argue that although the settlement agreement was read in court, they were not asked whether they understood or accepted its terms. They further argue that their counsel asked them for information during the

settlement negotiations but never discussed with them the terms of the settlement agreement, in particular the indemnification provision. Defendants contend it was not until they received a written copy of the settlement agreement and consulted with a North Carolina State University staff attorney that they understood the legal meaning of indemnification. They contacted their attorney by letter in March and April 1993 and "repudiated the purported agreement and stated that they did not understand the entire agreement . . . ." Defendants contend they never accepted compensation from plaintiff because they refused to cash the checks tendered by him and accepted by their original attorney. Defendants retained a new attorney who returned the non-negotiated checks to plaintiff's attorney in October 1993, eight months after the first check had been issued and received by defendants' original attorney.

Plaintiff filed a motion for summary judgment pursuant to N.C.R. Civ. P. 56 and in January 1994, at the conclusion of a hearing held on the motion, summary judgment was granted. Defendants appeal from that judgment.

The issue for this Court is whether the trial court properly granted summary judgment in favor of plaintiff when it found that there was no genuine issue of material fact as to accord and satisfaction. We hold summary judgment was proper and therefore affirm the trial court's judgment.

On a motion for summary judgment "the movant has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Taylor v. Ashburn*, 112 N.C. App. 604, 606, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (quoting 3 Barron and Holtzoff, *Federal Practice and Procedure* 1234 (Wright Ed., 1958)). An issue is material if the facts alleged are of "such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." *Id.* Plaintiff contends there is no genuine issue of material fact with respect to an accord and satisfaction between the parties and, therefore, he is entitled to judgment as a matter of law.

Accord and satisfaction is "a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by

substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement." *Prentzas v. Prentzas*, 260 N.C. 101, 103, 131 S.E.2d 678, 680 (1963). "The accord is the agreement, and the satisfaction is the execution or performance of such agreement." *Bizzell v. Bizzell*, 247 N.C. 590, 601, 101 S.E.2d 668, 676, *cert. denied*, 358 U.S. 888, 3 L. Ed. 2d 115 (1958), *reh'g denied*, 358 U.S. 938, 3 L. Ed. 2d 310 (1959). "Agreements are reached by an offer by one party and an acceptance by the other . . . even though the legal effect of the acceptance may not be understood." *Prentzas*, 260 N.C. at 104, 131 S.E.2d at 681.

[1] The record reveals defendants were aware their attorneys were conducting settlement negotiations with opposing counsel, and the defendants had contact with their attorneys at various times during that process. Further, Mr. Sweet, a college graduate, and Mrs. Sweet were present in the courtroom with their attorneys when the judge outlined the terms of the settlement agreement and asked counsel to inform him of any variations in the terms. Both of defendants' attorneys testified that their clients were fully informed of and agreed to the terms of the settlement agreement. Merely because defendants have second thoughts regarding their agreement to indemnify plaintiff now that they understand the legal effect of indemnification is irrelevant to the existence of the agreement. *See Prentzas*, 260 N.C. at 104, 131 S.E.2d at 681.

Upon review of the record, we conclude that the settlement agreement reached by the parties, the terms and conditions of which were announced in open court and recorded by the court reporter, constitutes an accord.

[2] As to the issue of satisfaction, defendants argue there was no satisfaction since they personally did not cash plaintiff's checks. We disagree.

Plaintiff fully performed as required under the settlement agreement. He released the lien on defendants' property. In addition, he made two $5,000 installment payments within the time required by the agreement, and was thereby denied use of the money for other purposes. By his performance of the terms, plaintiff relied on the agreement to his detriment.

Contrary to their claims, defendants' actions demonstrated their intent to satisfy the terms of the settlement agreement. There is evidence they personally returned the ladder to plaintiff's attorney, and

while at his office, requested the first payment. The check was not available at that time, so they returned on another occasion to collect the check. On that occasion, they left the attorney's office without the check because they objected to the check being made out to their attorney. These actions contradict defendants' claim that they never intended to accept the terms of the agreement.

The checks tendered by plaintiff pursuant to the settlement agreement were ultimately forwarded by certified mail to defendants' attorney who, acting on their behalf, accepted and *endorsed* both $5,000 checks. Since it is presumed that an attorney employed to prosecute an action to judgment is also authorized to receive the money demanded, *Harrington v. Buchanan*, 222 N.C. 698, 700, 24 S.E.2d 534, 536 (1943), defendants' attorney was acting within the scope of his authority when he accepted plaintiff's checks. Defendants did not instruct their attorney to return the checks to plaintiff until eight months after the first check had been issued and received, and after plaintiff had released his lien on the defendants' property. On these facts, we conclude that there was satisfaction, despite defendants' failure to negotiate the checks. *See FCX, Inc. v. Oil Co.*, 46 N.C. App. 755, 759, 266 S.E.2d 388, 391 (1980).

Although the existence of accord and satisfaction is generally a question of fact, "where the only reasonable inference is existence or non-existence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record." *Construction Co. v. Coan*, 30 N.C. App. 731, 737, 228 S.E.2d 497, 501, *disc. review denied*, 291 N.C. 323, 230 S.E.2d 676 (1976). The only reasonable inference to be drawn from the record in the case before this Court is that accord and satisfaction exist. Since accord and satisfaction operate as a bar to the assertion of any claims on the underlying contract, plaintiff is entitled to judgment as a matter of law. The trial court properly granted summary judgment for plaintiff and the judgment of the trial court is affirmed.

Affirmed.

Judges JOHNSON and COZORT concur.

C. PRESTON CORNELIUS AND WIFE, MARSHA H. CORNELIUS, PLAINTIFFS V. NEAL G. HELMS; PARHAM, HELMS & KELLAM, A PARTNERSHIP; FIRST UNION MORTGAGE CORPORATION; NOEL CLARK, HECHT REALTY, INC.; HARBORGATE GROUP, INC., DEFENDANTS

No. 9422SC445

(Filed 5 September 1995)

1. Attorneys at Law § 29 (NCI4th)— existence of attorney-client relationship—sufficiency of evidence

The evidence was sufficient to support the trial court's findings that an attorney-client relationship existed between plaintiff sellers and defendant attorney, who closed a real estate transaction, where it tended to show that plaintiffs relied on defendant to draw a purchase money note and deed of trust, and the trial court heard testimony from two experts who stated that, in their opinion, an attorney-client relationship existed between the parties.

Am Jur 2d, Attorneys at Law § 118.

2. Attorneys at Law § 44 (NCI4th)— attorney's breach of fiduciary duty—sufficiency of evidence

The evidence was sufficient to show that defendant attorney negligently breached his fiduciary duty to plaintiffs where it tended to show that defendant did not exert his best judgment in the closing of the sale of plaintiffs' property by failing properly to apply the land draw check toward the purchase of plaintiffs' lot in accordance with the terms of the closing instructions from the construction lender; defendant failed to ask plaintiffs or the construction lender how the terms of plaintiff's contract to sell their lot could be reconciled with the lender's closing instructions; as a result of defendant's action the purchaser was able to obtain double financing for the purchase of the same lot and received a windfall after the closing while plaintiffs were placed in a second lien position on the lot, even though no construction improvements had been made; and plaintiffs' purchase money deed of trust consequently was worthless and they suffered a loss of $88,600.00.

Am Jur 2d, Attorneys at Law § 197.

Appeal by defendants from order entered 13 December 1993 by Judge Marvin K. Gray in Iredell County Superior Court. Heard in the Court of Appeals 25 January 1995.

Weinstein & Sturges, P.A., by L. Holmes Eleazer, Jr. and J. Neal Rodgers, for defendants-appellants.

Doughton and Marshall, by Richard L. Doughton and Wm. Bynum Marshall, for plaintiffs-appellees.

WYNN, Judge.

In April 1990, plaintiffs C. Preston Cornelius and Marsha H. Cornelius agreed to list a piece of property with Noel Clark, a real estate agent for Hecht Realty, Inc. In June 1990, Ms. Clark notified plaintiffs that a local developer, Ron Major ("Major"), and his company, Mady Construction Company, Inc. ("Mady Co."), wished to purchase the lot. Plaintiffs agreed to sell the lot to Mady Co.

After various negotiations, plaintiffs entered into a real estate contract with Mady Co. for the purchase and sale of the lot. This contract included the following terms:

$ 1,000.00	Binder to be held by C-21 Hecht Realty
40,000.00	cash at closing on or before 7-15-90
88,600.00	Subordinate Note and Deed-of-Trust*
$ 129,600.00	Total Sales Price (plus Interest*)

. . .

SPECIAL INSTRUCTIONS

*Subordinate to 75% Loan-to-Value Construction Loan. Interest at 11% to be paid quarterly. Principal due 9-1-91.

Under the agreement, plaintiffs would hold a first lien purchase money deed of trust and note on the property until Mady Co. began construction on the lot. After construction was begun, plaintiffs' deed of trust and note would be subordinated to a "75% loan-to-value construction loan." However, unbeknownst to plaintiffs, Major had already secured a lot acquisition and construction loan from First

Union Mortgage Corporation ("First Union") and had requested that his attorney, Neal G. Helms ("Helms"), close both transactions simultaneously.

After executing the contract with plaintiffs, Major instructed Helms to prepare the closing documents for the sale in accordance with the plaintiffs' contract, Major's instructions, and the closing instructions provided by First Union. First Union's instructions required that it receive a first lien deed of trust on the property and that Helms report any subordinate liens.

At the closing on 3 July 1990, Major executed a purchase money deed of trust and promissory note to plaintiffs in the amount of $88,600.00 for the purchase of the lot. The purchase money deed of trust was drafted by Helms and provided that it was subject to the deed of trust to be executed by Mady Co. to First Union. This requirement was contrary to plaintiffs' sales contract which specified that their contract would be subordinate only to an amount equal to 75% of the value of the construction improvements on the lot. The effect of this provision was to enable Helms to close the construction loan from First Union simultaneously with the purchase transaction. As a result of these transactions, Major left the closing with over $89,000.00 of the land draw in his possession, and plaintiffs received $41,000.00 and the deed and note executed by Mady Co.

The deed from plaintiffs to Mady Co. was recorded on 5 July 1990. This recording was immediately followed by the recording of First Union's construction loan deed of trust and plaintiffs' purchase money deed of trust, which effectively placed plaintiffs in a second lien position behind the First Union construction loan deed of trust.

Prior to any payment by Mady Co. to plaintiffs, First Union foreclosed on the construction loan. At the foreclosure sale, First Union purchased the lot which destroyed plaintiffs' purchase money deed of trust. Mady Co. filed for bankruptcy and plaintiffs have not been paid for the lot as specified in their purchase money deed of trust and note.

Plaintiffs brought this action seeking damages from defendants Neal Helms and Parham, Helms & Kellam in the amount of $88,600.00 plus interest. Plaintiffs asserted that an attorney-client relationship existed between defendants and them and that defendants breached their fiduciary duty by not insuring that plaintiffs receive a first lien

mortgage on the property. The trial court entered judgment for plaintiffs. From this judgment, defendants appeal.

I.

Defendants first contend that the trial court erred by finding that an attorney-client relationship existed between plaintiffs and defendants such that the parties were in a fiduciary relationship. We disagree.

[1] Whether an attorney-client relationship existed between plaintiffs and defendants is a question of fact for the trial court and "our appellate courts are bound by the trial court's findings of facts where there is some evidence to support these findings, even though the evidence might sustain findings to the contrary." *In re Montgomery,* 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). As fact finder, the trial court is the judge of the credibility of the witnesses who testify. The trial court determines what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom. *General Specialties Co., Inc. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979).

"[T]he relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract." *The North Carolina State Bar v. Sheffield,* 73 N.C. App. 349, 358, 326 S.E.2d 320, 325, *cert. denied,* 314 N.C. 117, 332 S.E.2d 482, *cert. denied,* 474 U.S. 981, 106 S.Ct. 385, 88 L. Ed.2d 338 (1985). In the subject case, the trial court found that plaintiffs relied on Helms to draw the purchase money note and deed of trust. The trial court also heard testimony from experts "Buddy" O.H. Herring and Roger Lee Edwards who stated that, in their opinion, an attorney-client relationship existed between the parties. We have reviewed the record and find that this evidence was sufficient to support the trial court's findings that an attorney-client relationship existed between plaintiffs and defendants.

[2] Since an attorney-client relationship existed between the parties, defendants owed plaintiffs a fiduciary duty to render their professional services in a skillful and prudent manner. *See Hodges v. Carter,* 239 N.C. 517, 80 S.E.2d 144 (1954). Plaintiffs contend that defendants negligently breached this fiduciary duty and therefore are liable to plaintiffs for damages. In order to show negligence in a legal malpractice action, the plaintiff must first prove by the greater weight of the evidence that the attorney breached a duty owed to his client and

then show that this negligence proximately caused the plaintiff's damages. *Summer v. Allran*, 100 N.C. App. 182, 184, 394 S.E.2d 689, 690 (1990), *disc. rev. denied*, 328 N.C. 97, 402 S.E.2d 428 (1991). The duties an attorney owes his client are delineated in *Hodges*:

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action on behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Hodges at 519, 80 S.E.2d at 145-146.

In *Rorrer v. Cooke*, 313 N.C. 338, 356, 329 S.E.2d 355, 366 (1985), our Supreme Court further explained the standard of care for an attorney set forth in *Hodges*:

> The third prong of *Hodges* requires an attorney to represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. The standard is that of members of the profession in the same or similar locality under similar circumstances.

An attorney who acts in good faith is not liable for a mere error of judgment. *Hodges*, 239 N.C. at 520, 80 S.E.2d at 146. An attorney is, however, liable for "any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care." *Id.*

In the instant case, the trial court found that defendants did not exert their best judgment in the closing of the sale of plaintiffs' property nor did they exercise reasonable and ordinary care in handling this transaction. This conclusion is supported by evidence in the record. The evidence showed that Helms failed to properly apply the land draw check toward the purchase of the lot in accordance with the terms of the closing instructions from First Union. Helms also

failed to ask plaintiffs or First Union how the terms of plaintiffs' contract could be reconciled with the bank's closing instructions.

As a result of Helms' actions, Major was able to obtain double financing for the purchase of the same lot and received a windfall after the closing in the amount of $89,603.26. Plaintiffs, however, were placed in a second lien position on the lot, even though no construction improvements had been made. Consequently, plaintiffs' purchase money deed of trust is worthless and they suffered a loss of $88,600.00.

Accordingly, we conclude the trial court properly found that an attorney-client relationship existed between plaintiffs and defendants and that plaintiffs' damages were proximately caused by Helms' negligent handling of the real estate transaction.

II.

Defendants next contend that the trial court's findings of fact were not supported by competent evidence and assert that testimony from plaintiff Marsha Cornelius should not have been admitted. We disagree.

Marsha Cornelius testified about certain conversations that Ms. Clark had with Major and Helms. Defendants objected to Mrs. Cornelius' testimony regarding statements made by Major to Ms. Clark. Defendants, however, did not object to Mrs. Cornelius' testimony regarding statements made to Ms. Clark by Helms. "[T]he admission of incompetent evidence is not grounds for a new trial where there was no objection at the time the evidence was offered." *State v. Jones*, 280 N.C. 322, 340, 185 S.E.2d 858, 869 (1972). This testimony was admitted without objection, therefore defendants are precluded from raising such an objection for the first time on appeal. *State v. Jordan*, 49 N.C. App. 561, 568, 272 S.E.2d 405, 410 (1980). Accordingly, this assignment of error is without merit.

For the foregoing reasons, the judgment of the trial court is

Affirmed.

Judges LEWIS and McGEE concur.

BRYAN-BARBER REALTY, INC., CAROL H. HUTCHINSON AND ELIZABETH T. NORMAN, PLAINTIFFS v. HERMAN HAROLD FRYAR, JR., AND JUDITH PREAST FRYAR WALLACE, DEFENDANTS

No. COA94-891

(Filed 5 September 1995)

Divorce and Separation § 112 (NCI4th); Corporations § 187 (NCI4th)— stock transfer restriction—inapplicability to interspousal transfer of marital property

A restriction on the transfer of stock does not apply to interspousal transfers of stock incident to equitable distribution absent an express provision prohibiting such transfers.

Am Jur 2d, Corporations §§ 683-689; Divorce and Separation §§ 878 et seq.

Validity of restrictions on alienation or transfer of corporate stock. 61 ALR2d 1318.

Appeal by defendant Judith Preast Fryar Wallace from judgment entered 6 May 1994 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 10 May 1995.

Plaintiffs Carol H. Hutchinson and Elizabeth T. Norman each own and hold twenty-five percent of the outstanding capital stock in Bryan-Barber Realty, a closely held North Carolina corporation. Defendant Herman Harold Fryar, Jr. (Fryar) owned and held the remaining fifty percent of the outstanding capital stock. Pursuant to a restrictive stock agreement (agreement) shareholders, successors and assigns are prohibited from selling, assigning, encumbering, or otherwise disposing of the corporation's stock except as provided in the agreement. The agreement provides, in pertinent part, that "[a] shareholder desiring to dispose of or encumber his stock other than as expressly provided for in this agreement must first obtain the written consent of the other shareholders."

On 25 February 1991, Bryan-Barber Realty sued Fryar for alleged breaches of fiduciary duty by Fryar as a former officer and director of the corporation and moved for a temporary restraining order prohibiting Fryar from transferring his shares in violation of the agreement. A temporary restaining order was entered. However, the court determined that the motion for a preliminary injunction was moot in light of a consent judgment entered 12 February 1991 between Fryar

and Judith Preast Fryar Wallace (Wallace) on Fryar's action for absolute divorce and Wallace's counterclaim for equitable distribution. The consent judgment, which was entered by Judge Allen Harrell, contained a finding of fact that Fryar owns 7,750 shares of stock in Bryan-Barber Realty, Inc., that these shares are marital property with a value of $100,00.00 and shall be the property of Wallace, "free from any and all control . . . of [Fryar] in fee simple as of . . . February 12, 1991. . . ." Judge Harrell concluded that the division of property between the parties, including the division of marital property, was part of an agreed equitable distribution and ordered that Wallace be the sole owner of certain items of marital property, including the 7,750 shares in Bryan-Barber Realty.

In September 1992, Bryan-Barber Realty obtained a judgment against Fryar and attempted to execute on the judgment by holding a sale of Fryar's stock. However, before a sale of the stock could take place a consent order was entered on 5 February 1993 directing the sheriff to deliver the stock to Wallace in compliance with the consent judgment of 12 February 1991. Thereafter, on 25 March 1993, plaintiffs filed this action for declaratory judgment against Fryar and Wallace alleging that Fryar's attempted transfer of his shares to Wallace pursuant to the consent judgment and order was in violation of the restrictive stock agreement. Copies of the consent judgment and order were attached to the complaint.

In their complaint for declaratory judgment, plaintiffs prayed that the court construe the agreement and declare the rights, status and relationships of the parties with regard to the shares of stock previously issued to Fryar. In particular, plaintiffs prayed that the court declare that (1) the agreement is valid and enforceable under the circumstances set forth in the complaint, (2) the attempted transfer to Wallace was ineffective and void as to plaintiffs, (3) the consent judgment and order are void as to plaintiffs, and (4) Fryar remains the owner of the shares in question subject to the agreement and that the court order a return of the stock to Fryar.

Wallace filed an answer and counterclaim, aserting that she owned the shares by virtue of a court-ordered transfer and that Fryar had neither transferred nor attempted to transfer the shares to Wallace. A default judgment was entered against Fryar.

Both parties filed motions for summary judgment on the issue of the validity of the stock transfer to Wallace. After considering the

pleadings, affidavits, and arguments of counsel, the court found that there was no genuine issue of material fact and that plaintiffs were entitled to judgment as a matter of law. The court ordered (1) that the attempted transfer of shares was void as to the plaintiffs, (2) that Wallace deliver *to plaintiffs* the shares in her possession, and (3) that the execution sale previously set be rescheduled for ten days after the filing of the judgment, at which time the sheriff was directed to sell the shares free and clear of any lien or interest of Wallace.

Battle, Winslow, Scott & Wiley, P.A., by Thomas L. Young and W. Dudley Whitley, III, for plaintiffs-appellees.

McMillan, Kimzey & Smith, by James M. Kimzey and Martha K. Walston, for defendant-appellant.

WALKER, Judge.

The issue on appeal is whether the trial court erred in granting summary judgment for plaintiffs. "Summary judgment is appropriate where there is no genuine issue as to any material fact and the rights of the parties may be determined as a matter of law." *Avrett and Ledbetter Roofing and Heating Co. v. Phillips*, 85 N.C. App. 248, 250, 354 S.E.2d 321, 323 (1987). The only dispute between the parties is whether the agreement prohibits the transfer of stock to Wallace.

The question of whether a stock restriction agreement prohibits the transfer of stock which is classified as marital property between spouses is one of first impression for this Court. Other jurisdictions have considered whether a stock transfer restriction applies to transfers pursuant to a court order in a marriage dissolution proceeding. *See, e.g., Durkee v. Durkee-Mower, Inc.*, 428 N.E.2d 139 (Mass. 1981); *Castonguay v. Castonguay*, 306 N.W.2d 143 (Minn. 1981); *Messersmith v. Messersmith*, 86 So. 2d 169 (La. 1956), *superseded on another matter by statute as stated in Patterson v. Patterson*, 417 So. 2d 419 (La. Ct. App.), *cert. denied*, 420 So. 2d 983 (Mass. 1982); *Earthman's, Inc. v. Earthman*, 526 S.W.2d 192 (Tex. Civ. App. 1975).

In *Messersmith*, the Lousiana Supreme Court considered whether a first refusal option in a corporate charter prohibited a court-ordered transfer of stock which was community property from the husband to his wife. The court held that the restriction did not affect the status of the stock purchased during the existence of the

community or the rights the wife may assert thereunder. 86 So. 2d at 173. *See also Earthman*, 526 S.W.2d at 202.

In *Castonguay*, the Minnesota Supreme Court declined to adopt the community property rationale stated in *Messersmith* and instead held that a transfer of stock ordered by a court in a marriage dissolution proceeding is an involuntary transfer not prohibited under a corporation's general restriction against transfers unless the restriction expressly prohibits involuntary transfers. In so holding, the court adopted the majority rule that " 'restrictions on the sale of corporate stock apply only to voluntary sales, and not to transfers by operation of law, in the absence of a specific provision to that effect.' " 306 N.W.2d at 145 (citation omitted).

In *Avrett and Ledbetter Roofing and Heating Co. v. Phillips*, 85 N.C. App. 248, 250, 354 S.E.2d 321, 323 (1987), this Court considered whether a first refusal option which provided that each stockholder agrees "for himself, his heirs, legatees and assigns that he will not sell, transfer, assign, pledge, encumber or otherwise dispose of his stock . . . without first offering [it] to the other stockholders" applied to testamentary transfers upon the death of a shareholder. The Court noted that restrictions on alienation or transfer of stock are disfavored and thus strictly construed and that under the rule of strict construction, courts have required express restrictions on intestate or testamentary dispositions. *Id.* at 251-52, 354 S.E.2d at 323. Applying this rule, the Court held that the restriction did not apply since its terms and conditions became operative at the time of certain proposed voluntary, *inter vivos* transfers which did not include the passing of title by operation of law through a personal representative to the beneficiary of a deceased shareholder. Thus, the agreement did not expressly restrict testamentary transfers upon the death of a shareholder. *Id.* at 253, 354 S.E.2d at 324.

In the case *sub judice*, the agreement requires a shareholder who wishes to sell, assign, encumber or otherwise dispose of the corporation's stock other than as expressly provided for in the agreement to obtain the written consent of the other shareholders. The agreement contains no express provision regarding the interspousal transfer of shares incident to equitable distribution. The spouse has neither joined in the agreement nor has she waived her interest in the stock. We are not prepared to cut off the marital interest of a spouse under these circumstances. We hold that, under the rule of strict construc-

tion, a restriction on the transfer of stock does not apply to interspousal transfers of stock which is marital property absent an express provision prohibiting such transfers.[1] Thus, the transfer of stock from Fryar to Wallace was not in violation of the agreement and the entry of summary judgment for plaintiffs is reversed and remanded for entry of summary judgment for Wallace.

Reversed and remanded.

Judges COZORT and JOHN concur.

STATE OF NORTH CAROLINA v. CLAUDE EDWARD DAMMONS

No. COA94-1356

(Filed 5 September 1995)

1. Assault and Battery § 26 (NCI4th)— assault with deadly weapon inflicting serious injury—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury where evidence that defendant had been drinking, pointed a gun with no cock hammer in the victim's direction at close range, and intentionally pulled the trigger was sufficient to show defendant either intentionally shot the victim or that he acted with a reckless disregard for her safety and was therefore culpably negligent when he intentionally pulled the trigger of the gun.

Am Jur 2d, Assault and Battery §§ 37-42.

2. Criminal Law § 1193 (NCI4th)— prior conviction on appeal—consideration as aggravating factor—error—finding supported by other convictions

Though it is erroneous to find a prior conviction as an aggravating factor when this conviction is on appeal at the time of sen-

1. *See* Russell Robinson, II, *Robinson on North Carolina Corporation Law* § 9.6 (1990) (advising the drafter to deal specifically with divorce-related problems such as the applicability of the shareholders' agreement to valuation in a divorce proceeding and the voting of shares that are either tied up in a divorce action or distributed to a nonshareholder spouse under the equitable distribution laws, and suggesting that it may be necessary for the shareholder's spouse to join in the agreement).

tencing, the trial court in this case did not err in finding prior convictions as an aggravating factor where this finding was supported by three prior convictions admitted by defendant which were not on appeal.

Am Jur 2d, Trial § 501.

3. Criminal Law § 1094 (NCI4th)— balancing of aggravating and mitigating factors—consideration of conviction on appeal—abuse of discretion

Because the trial court may have improperly considered a conviction of defendant which was on direct appeal at the time of the sentencing, and because the conviction must reasonably have been considered by the court in its balancing of the factors in aggravation and mitigation of punishment, the trial court abused its discretion in weighing those factors.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 18 May 1994 by Judge D. Jack Hooks, Jr., in Lee County Superior Court. Heard in the Court of Appeals 12 June 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Lisa C. Bland, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

JOHN, Judge.

Defendant appeals convictions of assault with a deadly weapon inflicting serious injury and of being an habitual felon and subsequent sentence to a term of life imprisonment. In his appellate brief, defendant presents two arguments. We find the second persuasive.

Evidence presented at trial tended to show the following:

Teresa Stokes (Stokes) testified she and defendant lived together. On 29 January 1994, Stokes and defendant were seated in his automobile behind their apartment. Defendant asked Stokes to give him his money, and she bent over to reach her purse. When Stokes sat back up, defendant was pointing a .380 Magnum handgun at her. While the weapon had no cock hammer, it did have a safety. Defendant said, "[Y]ou know I love you, don't you," and then shot

Stokes. Shortly thereafter, Stokes opened the automobile door and fell from the vehicle. Defendant got out and picked her up. Stokes demanded that defendant take her to the hospital. Defendant inquired whether she would tell the police and directed her to say she had been shot in a gang fight. Defendant then drove around for fifteen or twenty minutes prior to transporting Stokes to the hospital. He neither assisted Stokes' admission to the hospital nor entered the hospital himself.

On cross-examination, Stokes indicated the gun did not go off by accident. When asked how she knew that, she replied, "Because he pulled the trigger."

Dr. Edward Stanton (Dr. Stanton), a general surgeon, related seeing Stokes on 29 January 1994 in the emergency room of Central Carolina Hospital. Stokes was in shock with low blood pressure and a high heart rate. She told Dr. Stanton she had been shot by her boyfriend. Dr. Stanton described Stokes' injuries as serious: she had lost a great deal of blood, and the bullet had passed through her stomach, grazed her pancreas, and had come to rest between her colon and liver.

Detective B.D. Barber (Barber) of the Sanford Police Department testified he spoke to Stokes at the hospital following her treatment by Dr. Stanton. Stokes told Barber defendant had shot her. Shortly thereafter, Barber arrested defendant who smelled of alcohol at the time but was not intoxicated.

Testifying on his own behalf, defendant stated he had consumed two or three drinks on 29 January 1994 throughout the day. While sitting in the automobile behind his residence, he had taken his gun out of his pocket in order to remove a slug from its barrel when the gun "just went off" because he "must have touched the trigger on it."

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant then pled guilty to habitual felon status. From the judgment imposed by the trial court, defendant appeals.

[1] Defendant first argues the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. He contends the State presented insufficient evidence that he intentionally shot Teresa Stokes. We disagree.

In ruling upon a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense, and of the defendant being the perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). The evidence is to be considered in the light most favorable to the State, and "the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117 (citations omitted).

"An assault is 'an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another . . . sufficient to put a [reasonable person] in fear of immediate bodily harm.' " *State v. Davis*, 68 N.C. App. 238, 244, 314 S.E.2d 828, 832 (1984) (quoting *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). "[I]ntent is an essential element of the crime of assault . . ., but intent may be implied from culpable or criminal negligence if the injury or apprehension thereof is the direct result of intentional acts done under circumstances showing a reckless disregard for the safety of others and a willingness to inflict injury." *State v. Coffey*, 43 N.C. App. 541, 543, 259 S.E.2d 356, 357 (1979) (citations omitted).

In the case *sub judice*, the trial court instructed the jury that the State was required to prove beyond a reasonable doubt that defendant "intentionally" shot Stokes with a handgun. The court further charged that defendant would not be guilty of the assault if the shooting was accidental, that a shooting is not accidental if it results from culpable negligence, and that the State had the burden of proving beyond a reasonable doubt the shooting was not accidental. The court also defined culpable negligence as "such gross negligence or carelessness as imparts a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."

Stokes testified defendant had been drinking, that he pointed a gun with no cock hammer in her direction at close range, and that he intentionally pulled the trigger on the weapon. Viewed in the light most favorable to the State, the evidence presented was sufficient to show defendant either intentionally shot Stokes or that he acted with a reckless disregard for her safety and was therefore culpably negli-

gent when he intentionally pulled the trigger of the gun. The trial court did not err by denying defendant's motion to dismiss and correctly instructed the jury as to the proof required in this case. Defendant's first argument fails.

[2] Defendant also maintains the trial court erred "by considering as an aggravating factor a prior conviction which was on direct appeal at the time defendant was being sentenced." Defendant states in his brief he "does not contend that the finding [that he had prior convictions for criminal offenses punishable by more than sixty days confinement] itself was erroneous." Instead, he contends the trial court may have weighed this factor more heavily because it relied on a prior conviction that could not properly be used to support the factor. We believe defendant's reasoning has merit.

Pursuant to N.C. Gen. Stat. § 15A-1340.4(b) (1988), the trial court may sentence a defendant to a prison term greater than the presumptive if the court determines the aggravating factors outweigh the mitigating factors. Aggravating factors must be proved by a preponderance of the evidence. *State v. Thompson*, 314 N.C. 618, 622, 336 S.E.2d 78, 80 (1985) (citation omitted). Our Supreme Court has addressed the effect of erroneous findings of aggravating factors:

> Reliance on a *factor* in aggravation determined to be erroneous may or may not have affected the balancing process which resulted in the decision to deviate from the presumptive sentence. . . . [I]n every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.

State v. Ahearn, 307 N.C. 584, 602, 300 S.E.2d 689, 700-01 (1983). It is erroneous to find a prior conviction as an aggravating factor when this conviction is on appeal at the time of sentencing. *State v. Dorsett*, 81 N.C. App. 515, 518, 344 S.E.2d 342, 344 (1986).

In the case *sub judice*, defendant pled guilty to habitual felon status, thereby admitting three prior convictions for criminal offenses punishable by more than sixty days confinement. Prior convictions used to establish a defendant's habitual felon status may also be used in aggravation of the sentence for the underlying felony. *State v. Roper*, 328 N.C. 337, 363, 402 S.E.2d 600, 615, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). However, in addition to the prior convictions admitted by defendant, it appears the trial court may also

have considered a 25 March 1994 conviction that was on direct appeal at the time of sentencing.

Notwithstanding, defendant has failed to show the finding of his prior convictions was not supported by a preponderance of the properly considered evidence. Unlike *Dorsett*, 81 N.C. App. at 518, 344 S.E.2d at 344, the finding in the case *sub judice* was supported by convictions *not* on direct appeal at the time of sentencing. The three prior convictions admitted by defendant supported the finding which, as defendant concedes in his brief, was therefore not erroneous. Absent such error, defendant is not entitled to resentencing unless the trial court abused its discretion in weighing the factors.

[3] The trial court found as a mitigating factor that defendant voluntarily pled guilty to habitual felon status. However, the court concluded that the aggravating factor of the prior convictions outweighed the mitigating factor and imposed the maximum punishment. The weight to be given aggravating and mitigating factors is a matter within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *State v. Teeter*, 85 N.C. App. 624, 639, 355 S.E.2d 804, 813, *appeal dismissed and disc. review denied*, 320 N.C. 175, 358 S.E.2d 67 (1987) (citations omitted).

Our Supreme Court has determined that although

> [r]eliance on a factor in aggravation determined to be erroneous may or may not have affected the balancing process which resulted in the decision to deviate from the presumptive sentence . . . it must, [however,] be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the *severity* of the sentence—the quantitative variation from the norm of the presumptive term.

State v. Ahearn, 307 N.C. at 602, 300 S.E.2d at 700-701 (emphasis in original).

We believe the court's analysis likewise controls the circumstance at issue herein. It can only reasonably be assumed that every prior conviction considered by the trial court as a basis for an aggravating factor contributes to the weight assigned that factor by the court in its discretionary balancing of factors in aggravation and mitigation of punishment. That being the case, every prior conviction must reasonably be assumed to contribute to the severity of the sentence ultimately imposed. *Id.*

Because it appears the trial court herein may have improperly considered a conviction of defendant which was on direct appeal at the time of sentencing, and because that conviction must reasonably have been considered by the court in its balancing of the factors in aggravation and mitigation of punishment, we conclude the trial court abused its discretion in weighing those factors and that defendant is therefore entitled to a new sentencing hearing. *Id.*

No error in trial; remanded for resentencing.

Judges EAGLES and McGEE concur.

GEORGE NOHEJL AND HOPE NOHEJL, PLAINTIFFS v. FIRST HOMES OF CRAVEN COUNTY, INC., DOUG K. SPEAR, WILSON CONSTRUCTION COMPANY, AND GEORGE WILSON, DEFENDANTS

No. COA94-1090

(Filed 5 September 1995)

Contempt of Court § 35 (NCI4th)— repairs to dwelling—enforcement of consent order by contempt—failure to provide means to purge—conditional award of attorney fees—error

A consent order regarding repairs to a dwelling was enforceable through the contempt powers of the trial court where it contained findings of fact and an order based on those findings; however, the trial court erred by failing to provide defendant with a means to purge himself of the contempt and by making a conditional award of attorney fees, absent statutory authority or an express contractual provision.

Am Jur 2d, Contempt §§ 104 et seq.

Appeal by defendant George Wilson from an order entered 28 January 1994 by Judge Herbert O. Phillips, III, in Craven County Superior Court. Cross-appeal by plaintiffs from an order entered by Judge Phillips on 18 August 1994. Heard in the Court of Appeals 26 May 1995.

Voerman & Carroll, P.A., by David P. Voerman, for plaintiff cross-appellants.

J. Randal Hunter for defendant appellant.

COZORT, Judge.

In this case, we must decide two main issues: (1) Is a consent order regarding repairs to a dwelling enforceable through the contempt powers of the trial court; and (2) if so, is the contempt order entered below in error for failing to provide a means for defendant to purge himself of the contempt? We hold the facts of this case are such that the trial court had the authority to enforce the consent order through contempt, and we further hold the trial court erred by failing to provide for a means for defendant to purge himself of the contempt.

On 28 April 1987, plaintiffs purchased a home built by defendants. Defendant George Wilson is the president of defendant Wilson Construction Company. Plaintiffs filed a complaint against defendants on 10 February 1989 for breach of warranty for workmanlike construction and negligence in the construction of the home. At the commencement of the trial, the parties entered into a consent order which specified that defendant George Wilson (hereinafter "defendant") would be responsible for repairs to the home; that defendant would bear the costs of the repairs; and that defendant would pay plaintiffs the sum of $4,000.00. The consent order contained a provision that all of its conditions would be completed within 120 days. In the event the conditions were not fulfilled, either party had the power to file the order in superior court and seek its enforcement "by specific performance, contempt, or any other method that may be available."

Defendant failed to comply within the 120-day period, and plaintiffs filed the order in Craven County Superior Court on 6 July 1992. On 15 February 1993 plaintiffs filed a motion for contempt based on the consent order. Judge Phillips issued a show cause order on 4 March 1993 directing defendant to appear in court to show cause why he should not be held in contempt for noncompliance with the consent order.

On 27 April 1993, defendant appeared before Judge Phillips, who entered an oral order appointing a general contractor, Mr. Alex Cardelli, to inspect plaintiffs' home and prepare a document outlining the repairs to be made by defendant. The trial court also required Mr. Cardelli to propose a timetable between sixty and ninety days for the completion of the repairs by defendant. The court reserved its right to rule on the contempt motion and an award of attorney fees to plaintiffs. Mr. Cardelli filed his report with the court on 19 May 1993.

Defendant was required to complete the repairs no later than 29 October 1993 because Judge Phillips did not sign the order until 29 July 1993.

Judge Phillips issued a second show cause order on 20 January 1994 because defendant still had not completed the repairs. On 28 January 1994, Judge Phillips conducted a hearing, found defendant in civil contempt, and sentenced defendant to 21 days in jail. The court again reserved the right to rule on plaintiff's motion for attorney fees and costs. Defendant filed notice of appeal from the contempt order on 23 February 1994.

The contempt order was filed with the Clerk of Superior Court on 14 July 1994, and on 26 July 1994 plaintiffs made a motion for attorney fees. Judge Phillips conducted a hearing on 15 August 1994 and ruled that the court lacked jurisdiction to enter an order regarding attorney fees because defendant had previously filed notice of appeal. The trial court further stated that if it did have jurisdiction, it would award attorney fees of $5,280.00 to plaintiffs' attorney. Plaintiffs filed notice of appeal from this order on 29 August 1994.

Defendant brings forth three issues on appeal: (1) whether the consent order was enforceable by contempt; (2) whether the findings of fact in the contempt order were supported by competent evidence; and (3) whether the contempt order was valid when it did not provide defendant a means of purging the contempt. Plaintiffs' only contention on appeal is that the trial court maintained jurisdiction to rule on attorney fees and should have entered an award of attorney fees for plaintiffs. We discuss defendant's arguments first.

If a consent judgment is merely a recital of the parties' agreement and not an adjudication of rights, it is not enforceable through the contempt powers of the court. *Crane v. Greene*, 114 N.C. App. 105, 107, 441 S.E.2d 144, 145 (1995). In *Crane*, the court observed that the consent judgment did not reflect any determination by the trial court because it contained no findings of fact and no conclusions of law. *Id.* Therefore, the judgment was enforceable only through a breach of contract action. *Id.*

The consent order in the present case was entered into by the parties as their trial commenced during the 3 February 1992 term of Craven County Civil Superior Court. After defendant failed to comply with the terms of the agreement, plaintiffs filed the consent order in superior court. The consent order was entered by Judge Phillips on 2

July 1992 and contained findings of fact and an order based on those findings. We find the order at issue here distinguishable from the order issued in *Crane*, and we hold the trial court below had the authority to enforce the order through contempt powers.

Defendant's contention that the findings of fact in the contempt order were not supported by competent evidence is unpersuasive. The trial court did not base its decision to find defendant in civil contempt on the findings of fact questioned by defendant as not supported by competent evidence. Those findings were ancillary to the court's order. For civil contempt, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply with the order. *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E.2d 786, 787 (1980). Judge Phillips' contempt order contained findings of fact, supported by competent evidence, which met this standard. The evidence supports a finding of civil contempt against defendant.

We are persuaded by defendant that the trial court erred by failing to provide defendant with a means to purge himself of the contempt. "The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt." N.C. Gen. Stat. § 5A-22(a) (1994 Cum. Supp.). The purpose of civil contempt is not to punish, but to coerce the defendant to comply with the order. *Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984). The contempt order in *Bethea* was vacated because it failed to specify how defendant could purge the contempt as required by N.C. Gen. Stat. § 5A-22(a). *Id.* The contempt order in the present case also fails to specify how defendant could purge the contempt. The order thus serves to punish defendant instead of coercing him to complete the overdue repairs. For this reason alone, the order must be remanded for entry of provisions regarding how defendant can purge the contempt.

We now turn to plaintiff's appeal. While we find the trial court maintained jurisdiction over the issue of attorney fees, we hold an award of fees and costs would not be proper in the present case. Absent express statutory authority for doing so, attorney fees are not recoverable as an item of damages or costs. *Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269, 275 (1991). Our Court has allowed attorney fees in limited types of civil contempt actions such as those involving child support and equitable distribution. *See, e.g., Blair v. Blair*, 8 N.C. App. 61, 173 S.E.2d 513 (1970). There is no express con-

tractual provision or statutory authority permitting plaintiffs to recover attorney fees in the present case. Plaintiffs may not recover attorney fees as damages or as costs. The trial court's order of 18 August 1994 making a conditional award of attorney fees is vacated.

For the reasons discussed above, we remand this case to the trial court for modification of the contempt order to include instructions regarding how defendant may purge himself of the contempt. The 18 August 1994 order pertaining to attorney fees is vacated.

Affirmed in part, reversed in part, vacated in part and remanded.

Judges JOHN and WALKER concur.

VANDER DINKINS, PLAINTIFF-EMPLOYEE v. FEDERAL PAPER BOARD COMPANY, INCORPORATED, DEFENDANT-EMPLOYER AND WAUSAU INSURANCE COMPANIES, DEFENDANT-INSURANCE CARRIER

No. COA94-844

(Filed 5 September 1995)

Workers' Compensation § 427 (NCI4th)— change of condition—additional compensation—erroneous conclusion by Industrial Commission

The Industrial Commission erred in concluding that plaintiff has not undergone a change of condition and is thus not entitled to additional compensation under N.C.G.S. § 97-47 where the Commission found that "plaintiff's back went from being relatively asymptomatic and returning to work to being unable to work for a period of time"; a physician's testimony could only support a finding and conclusion that the change of condition did affect plaintiff's capacity to earn wages; and there is no competent evidence in the record to support a finding and conclusion to the contrary. However, the proceeding must be remanded for a finding as to the time period during which plaintiff experienced this change of condition.

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

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 12 April 1994. Heard in the Court of Appeals 20 April 1995.

On 25 July 1995, plaintiff filed a Petition for Rehearing this case which had resulted in an unpublished opinion filed 20 June 1995. On 28 July 1995, we allowed this petition but stipulated that the case would be reconsidered without the filing of additional briefs and without oral argument. The following opinion supersedes and replaces the unpublished opinion filed 20 June 1995.

Patterson, Harkavy & Lawrence, by Henry N. Patterson, Jr. and Martha A. Geer, for plaintiff-appellant.

Hedrick & Blackwell, L.L.P., by P. Scott Hedrick, for defendants-appellees.

LEWIS, Judge.

On 28 January 1991 plaintiff sustained a back injury while working as a "rewinder helper" for defendant Federal Paper Board Company, Inc. Plaintiff was out of work until 6 February 1991. The parties entered into a Form 21 Agreement, which compensated plaintiff for a five percent permanent partial disability of the back. Plaintiff worked from 6 February until 16 July 1991 with no complaints, but then had a flare-up of a long-standing gout problem. Plaintiff saw a doctor and was out of work because of the gout until 22 July 1991. Plaintiff had no further complaints until September 1991, when his gout again flared up. Plaintiff left work on 21 September 1991 and went to Cape Fear Memorial Hospital the next day. About the second week plaintiff was out of work, he began to use wooden crutches. After a few days, plaintiff experienced low-back pain which he described as being "worse" and more extensive than before. Plaintiff reported this increased pain to Dr. Scully on 28 October 1991. Dr. Scully placed him out of work again and considered him to be temporarily totally disabled until 22 May 1992 when he returned plaintiff to work.

On 6 May 1992 plaintiff requested a hearing, pursuant to N.C.G.S. § 97-47 (1991), on the issue of whether he had suffered a change of condition. Deputy Commissioner Scott M. Taylor entered an opinion and award finding that plaintiff had not suffered a change of condition. He therefore denied plaintiff's request for additional compensation. Plaintiff appealed to the full Commission (hereinafter "the Commission"), which concluded in its opinion and award that plaintiff had not suffered a change of condition. It denied plaintiff's request for additional compensation but, based on a recent decision of the Supreme Court, *Hyler v. GTE Products Co.*, 333 N.C. 258, 425

S.E.2d 698 (1993), concluded that plaintiff was entitled to recover for future medical expenses as a result of his 28 January 1991 injury. From the opinion and award of the Commission, plaintiff appeals.

Plaintiff's sole contention on appeal is that the Commission erred in finding and concluding that plaintiff had not suffered a change in condition. Our task in reviewing the Commission's findings and conclusions is to determine whether the findings of fact are supported by any competent evidence and whether the findings of fact support the conclusions of law. *Nelson v. Food Lion, Inc.*, 92 N.C. App. 592, 593, 375 S.E.2d 162, 163, *disc. review denied*, 324 N.C. 336, 378 S.E.2d 795 (1989).

N.C.G.S. § 97-47 provides that an injured employee may seek compensation in addition to that previously awarded to him if the employee has had a change in condition. This Court has emphasized that " '[i]n determining if a change of condition has occurred . . . the primary factor is a change in condition *affecting the employee's physical capacity to earn wages . . . .*' " *East v. Baby Diaper Services, Inc.*, 119 N.C. App. 147, 151, 457 S.E.2d 737, 740 (1995) (quoting *Lucas v. Bunn Manuf. Co*, 90 N.C. App. 401, 404, 368 S.E.2d 386, 388 (1988)). The pertinent findings and conclusions here are the following:

FINDINGS OF FACT

> 12. Although *the condition of plaintiff's back went from being relatively asymptomatic and returning to work to being unable to work for a period of time*, plaintiff's complaints are the same. Plaintiff's back does not have a different condition as that which it had at the time of plaintiff's five percent permanent partial disability rating of his back.

CONCLUSION OF LAW

> Since his permanent partial disability rating of five percent of the back attributable to his compensable injury on 28 January 1991, *plaintiff has not undergone a change of condition, and is not, therefore, entitled to additional compensation.* G.S. 97-47 . . . .

(Emphasis added).

The Commission's findings do not support its conclusion of law that plaintiff has not undergone a change of condition. Rather, finding 12 supports the opposite conclusion. In finding 12, the Commission found that plaintiff "went from being relatively asymptomatic and

returning to work to being unable to work for a period of time." This finding was based on competent evidence, and in particular, on the testimony of Dr. Scully who was asked at his deposition if plaintiff had "really had any change in his condition." Dr. Scully responded:

> I would have to say no. I mean, I thought he had, and certainly he had elements of recovery. *Let me rephrase that. I think he definitely had a change in his condition in that he went from being relatively asymptomatic and returning to work to being unable to work but that the complaint is the same.* It is not a new or different condition.

He also testified that the "onset of radicular complaints" supported his conclusion that plaintiff had undergone a change of condition. Further, when asked if plaintiff's "pain had become so severe that he was unable to work after October 28th," Dr. Scully responded, "I am convinced."

Consequently, the Commission's findings fail to support its conclusion of law. Viewed in its entirety, Dr. Scully's testimony can only support a finding of fact and conclusion of law that the change in condition experienced by plaintiff *did* affect his physical capacity to earn wages. There is no competent evidence in the record to support a finding and conclusion to the contrary.

It further appears that the Commission applied the wrong legal standard in reaching its conclusion of law in that it failed to recognize that a change in physical capacity to earn wages alone is sufficient to support an award of additional compensation for change of condition. When "facts are found or the Commission fails to find facts under a misapprehension of the law, a remand may be necessary so that the evidence may be considered in its true legal light." *Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 158, 314 S.E.2d 833, 838 (1984).

In finding 12, the Commission found that plaintiff was "unable to work for a period of time," yet there is no finding as to the time period during which plaintiff experienced this change. A remand is needed here since the Commission's findings are not sufficient to determine the rights of the parties, *for e.g.*, there is no finding as to the time period during which plaintiff experienced this change of condition. *See id.* (remand necessary when findings insufficient to determine rights of parties).

For the reasons stated, the opinion and award of the Commission is reversed in part and remanded for findings of fact and conclusions

of law consistent with this opinion. The Commission's award of future medical expenses has not been appealed and is not affected by this opinion.

Reversed in part and remanded.

Judges GREENE and MARTIN, Mark D. concur.

BONITA R. KALEN, PLAINTIFF v. ANDREW C. KALEN, DEFENDANT

No. COA94-1000

(Filed 5 September 1995)

Parent and Child § 81 (NCI4th)— URESA action for child support arrearages—plaintiff living in Georgia—standing of Georgia to initiate action in North Carolina

The trial court erred in concluding that Georgia did not have standing to initiate an action for child support arrearages under a Virginia child support order, since plaintiff resided in Georgia when she filed her petition to enforce the Virginia order, and Georgia was the initiating state. N.C.G.S. §§ 52A-3(4), 52A-11.

Am Jur 2d, Divorce and Separation § 1020.

Long-arm statutes: obtaining jurisdiction over nonresident parent in filiation or support proceeding. 76 ALR3d 708.

Appeal by plaintiff from judgment entered 10 June 1994 by Judge Alexander Lyerly in Watauga County District Court. Heard in the Court of Appeals 23 May 1995.

Michael F. Easley, Attorney General, by T. Byron Smith, Assistant Attorney General, for the State.

Gail P. Fannon, Attorney for the defendant-appellee.

WYNN, Judge.

Plaintiff, a Georgia resident, obtained a child support order from a Virginia court against defendant, a Virginia resident, as provided by the Uniform Reciprocal Enforcement of Support Act ("URESA"). Defendant subsequently moved to North Carolina.

On 4 January 1994, plaintiff filed a petition pursuant to Georgia's version of URESA seeking to collect from defendant $9,850 in arrearages which had accrued under the Virginia order. The Georgia Office of Child Support Enforcement processed plaintiff's request and forwarded it to North Carolina for prosecution. Plaintiff then filed the petition in Watauga County, North Carolina, but never registered the Virginia order in this state.

Defendant moved to dismiss plaintiff's petition. The trial court granted defendant's motion to dismiss and stated:

> [T]his is the third time that this action for arrearages under a purported Virginia order has been initiated by the State of Georgia. The matter has twice been dismissed for the reason that Georgia has no standing to initiate an action to enforce a Virginia order in North Carolina. It is therefore ordered that this matter be and the same is hereby dismissed with prejudice.

From this order, plaintiff appeals.

Plaintiff contends that the trial court erred by concluding that Georgia did not have standing to initiate this action for child support arrearages. We agree.

N.C. Gen Stat. § 52A-2 provides that the purpose of URESA is to "improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with regard thereto." N.C. Gen. Stat. § 52A-2 (1992). This statute facilitates the enforcement and collection of child support obligations when the mother and father live in different states. URESA provides an additional remedy to enforce a duty that has already been judicially determined at a fair hearing. Thus, before this type of URESA action can be brought, a state must render a support order. The state which enters this support order is referred to as the "rendering state." N.C. Gen. Stat. § 52A-3(11). The state which files the URESA petition is the "initiating state." N.C. Gen. Stat. § 52A-3(4). The petition is then certified and forwarded from a court in the initiating state to a court in the state where the obligor resides. N.C. Gen. Stat. § 52A-11. The obligor's state is referred to as the "responding state." N.C. Gen. Stat. § 52A-3(12).

Ordinarily, the initiating state is also the state that renders the original support order, thus there are usually only two states involved in an URESA action. In the instant case, however, there are three states involved; Virginia, Georgia, and North Carolina. Virginia is the

"rendering state," Georgia is the "initiating state," and North Carolina is the "responding state."

In *Mahan v. Read*, 240 N.C. 641, 83 S.E.2d 706 (1954), our Supreme Court held that when an obligee moves from an initiating state to another state, a North Carolina court does not have jurisdiction to transmit a support order to the initiating state. The facts of *Mahan*, however, are distinguishable from the instant case because here the *obligor* has moved, not the *obligee*. *Mahan*, 240 N.C. at 647, 83 S.E.2d at 711 ("The case before us presents the problem of the *roving obligee* rather than that of the *fugitive obligor*."). In *Mahan*, the obligee filed a petition under Arkansas' URESA seeking child support from her husband, a North Carolina resident. When the case was heard before the North Carolina court, the obligee had moved to Virginia. Consequently, the trial court held that "to permit the *obligee* to pursue a remedy through the courts of two states when the *obligee is not present in either one of them* and perhaps is on the move from place to place would so complicate and confuse the procedure thereunder as to impair its manifest purpose . . . ." *Mahan* at 647, 83 S.E.2d at 711 (emphasis added).

When plaintiff filed her petition to collect the arrearages which had accrued under the Virginia order, she resided in Georgia, the initiating state. Then, as required by N.C. Gen. Stat. § 52A-11, she forwarded the petition to North Carolina, the responding state, for a hearing on her claims as required by N.C. Gen. Stat. § 52A-12. If the obligee resides in the initiating state when the petition is filed, that state has an interest in the URESA proceedings and, therefore, has standing to initiate an action against the obligor. *Mahan* at 647, 83 S.E.2d at 711. Since plaintiff resided in Georgia when she filed her petition to enforce the Virginia order, Georgia has standing to initiate an action against defendant in this State. *See Mahan*, 240 N.C. at 647, 83 S.E.2d at 711 ("So long as the obligee is present in [the initiating] state, it has a definite interest in the proceedings.") Defendant also argues that plaintiff is barred from bringing this URESA action because she did not register the Virginia order in North Carolina. N.C. Gen. Stat. § 52A-25 provides, however, that the registration of a foreign support order is an option, not a requirement. *Silvering v. Vito*, 107 N.C. App. 270, 276, 419 S.E.2d 360, 364 (1992) (Greene, J., concurring). This argument is without merit. For the foregoing reasons, we conclude that the trial court erred by concluding that Georgia did not have standing to initiate this action for support. Accordingly, the trial court's order is

Reversed and remanded.

Judges EAGLES and MARTIN, Mark D. concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 5 SEPTEMBER 1995

APPLE v. WHITE No. 94-1112	Guilford (92CVS10144)	Affirmed
BASS v. APPERT No. 94-997	Nash (92CVS1691)	Affirmed in part, Reversed in part and Remanded
DOCKERY v. WOODY No. 94-271	Clay (92CVS97)	Reversed
DOUGLAS v. FORD No. 95-326	Caldwell (84CVS886)	Appeal Dismissed
FORREST v. FORREST No. 94-1120	Forsyth (91CVD7798)	Affirmed
FRANK v. STAR TRAX, INC. No. 94-730	Mecklenburg (90CVS8083)	Affirmed in Part, Reversed in Part and Remanded
FRIZZELL v. MULLEN No. 94-228	Ind. Comm. (209076)	Dismissed
FULCHON v. FULCHON No. 95-147	Guilford (93CVD8971)	Appeal Dismissed
GARDON v. COLONY KNITS, INC. No. 94-1057	Ind. Comm. (115813)	Affirmed
HANCOCK v. McGEE No. 94-888	Guilford (93CVS8175)	The Judgment of the trial court is reversed, and this cause is remanded for entry of judgment for plaintiff in the amount of $503.60, and is in all other respects affirmed
NOBLES v. FIRST CAROLINA COMMUNICATIONS No. 94-745	Nash (88CVS820)	Affirmed
PARIS v. WOOLARD No. 95-183	Craven (92CVS246)	Appeals Dismissed
RAGSDALE v. N.C. HIGH SCHOOL ATHLETIC ASSN. No. 95-257	Guilford (94CVS10242)	Dismissed

STARNES v. BROYHILL FURNITURE INDUSTRIES No. 94-835	Ind. Comm. (114623)	Affirmed
STATE v. BARNETTE No. 95-221	Pender (94CRS2192)	No Error
STATE v. BOSTON No. 95-333	Guilford (94CRS36178)	No Error
STATE v. CALDWELL No. 95-263	Cabarrus (93CRS14181)	No Error
STATE v. DANIELS No. 94-1019	Rowan (93CRS288)	No Error
STATE v. GADDY No. 95-290	Wake (94CRS24345) (94CRS24346) (94CRS24347)	No Error
STATE v. HARRISON No. 95-231	Wilkes (94CRS003262)	No Error
STATE v. HESTER No. 95-157	Guilford (94CRS30375)	No Error
STATE v. HOLLOWAY No. 95-261	Gaston (92CRS28798) (92CRS28799) (92CRS28800)	No Error
STATE v. HOOD No. 95-256	Mecklenburg (93CRS55308)	No Error
STATE v. INZAR No. 95-60	Forsyth (94CRS5845) (94CRS5846) (94CRS6088)	Affirmed
STATE v. JONES No. 95-34	Mecklenburg (94CRS019560)	No Error
STATE v. MILLER No. 94-882	Guilford (93CRS70503) (93CRS70504) (93CRS70505)	No Error
STATE v. RHODIE No. 95-260	Forsyth (93CRS36742)	No Error
STATE v. SMITH No. 95-86	Columbus (93CRS7045) (93CRS7046)	No Error

STATE v. SMYRE No. 95-280	Iredell (94CRS11602)	No Error
STATE v. THOMAS No. 95-331	Forsyth (93CRS44644) (94CRS4716)	No Error
STATE v. WOOTEN No. 95-297	Pitt (93CRS2334)	No Error
STRICKLAND v. SMOKY MTN. AREA MENTAL HEALTH No. 93-1245	Cherokee (91CVS19)	Affirmed in Part, Reversed in Part
TAYLOR v. COLLINS No. 94-868	Nash (92CVS1535)	Affirmed
TRULL v. CENTRAL CAROLINA BANK & TRUST CO. No. 94-778	Wake (93CVS03695)	Affirmed
WEAVER v. PERDUE FARMS, INC. No. 94-1134	Ind. Comm. (170931)	Remanded

LOUISE T. BEAM AND THOMAS ANDREW CARL HALL, TRUSTEE FOR WILLIAM CARL HALL AND WIFE, HELEN LEE HALL, PLAINTIFFS v. DAVID FRANKLIN KERLEE, DEFENDANT

No. COA94-1123

(Filed 19 September 1995)

1. Quieting Title § 27 (NCI4th)— marketable title—adverse possession—issues of fact—summary judgment properly denied

The trial court in an action to quiet title did not err in denying plaintiffs' motion for summary judgment where the pleadings and other documents did not settle the dispute over whether defendant or plaintiffs had marketable record title, and where defendant's averments in answers to plaintiffs' interrogatories were sufficient to support his claim to title by adverse possession.

Am Jur 2d, Quieting Title and Determination of Adverse Claims §§ 78 et seq.

2. Quieting Title § 29 (NCI4th)— claim to marketable record title—directed verdict for plaintiffs properly denied

The trial court did not err in denying plaintiffs' motion for directed verdict on defendant's counterclaim to quiet title where the deeds and expert testimony presented by defendant constituted more than a scintilla of evidence to support his theory that he had marketable record title to the property under the Marketable Title Act.

Am Jur 2d, Quieting Title and Determination of Adverse Claims §§ 78 et seq.

3. Adverse Possession § 23 (NCI4th)— adverse possession for twenty years—sufficiency of evidence

The evidence was sufficient to establish defendant's adverse possession of disputed land for the twenty-year statutory period where it tended to show that defendant, who was forty years old at the time of trial, began to go on the land with his father when he was ten or eleven years old; they hunted and fished on the property, and he continued to do so after his father died; defendant put up no trespassing signs and had been running people off the land for years; and defendant cut out property lines very close to those subsequently located by a surveyor.

Am Jur 2d, Adverse Possession §§ 318, 319, 321.

4. Trial § 624 (NCI4th)— motion to dismiss complaint—granting in jury trial erroneous—error not prejudicial

Though defendant's motion to dismiss plaintiffs' complaint at the close of plaintiffs' evidence and the court's granting of the motion were improper since this was a jury trial and the proper motion would have been a motion for a directed verdict, such error was harmless in that the jury could not have been influenced by the trial court's dismissal of plaintiffs' case because it never knew the case had been dismissed, and plaintiffs were given an opportunity to rebut defendant's evidence. N.C.G.S. § 1A-1, Rule 41(b).

Am Jur 2d, Trial §§ 857 et seq.

5. Quieting Title § 20 (NCI4th)— admissible and inadmissible evidence—no error

In an action to quiet title, the trial court did not err in (1) refusing to allow plaintiffs to introduce deeds which were not listed in plaintiffs' pretrial order, since plaintiffs' counsel was able to refer to and use the deeds during his cross-examination of defendant's witnesses; (2) allowing defendant to introduce old maps into evidence and allowing defendant's witness to testify about conclusions drawn from the maps, since the court found the relevancy and materiality of the exhibits were supported by previous testimony not objected to by plaintiffs and defendant's surveyor was presented as an expert witness; (3) allowing defendant to testify he had been "in possession" of the disputed land, since this was based on his experiences on the land and was critical to the determination of the controversy; and (4) refusing to allow plaintiffs to introduce into evidence sketches made by plaintiffs' counsel, since counsel could introduce the sketches only if he planned to testify.

Am Jur 2d, Quieting Title and Determination of Adverse Claims §§ 78 et seq.

Appeal by plaintiffs from judgment entered 2 February 1994 by Judge Beverly T. Beal in McDowell County Superior Court. Heard in the Court of Appeals 8 June 1995.

Carnes, Franklin & Evans, P.A., by Everette C. Carnes, for plaintiff appellants.

Stephen R. Little, Attorney, P.A., by Stephen R. Little, for defendant appellee.

COZORT, Judge.

The issue in this case is whether there was sufficient evidence to support the jury's verdict that defendant had superior title to a disputed parcel of land on the grounds defendant had marketable record title to the land and, alternatively, had acquired title to the land by adverse possession.

Plaintiffs bring forward on appeal fifteen assignments of error. Those assignments raise seven major issues, alleging the trial court committed reversible error by (1) denying plaintiffs' motions for summary judgment and for directed verdict; (2) dismissing plaintiffs' case at the close of plaintiffs' evidence; (3) refusing to permit plaintiffs to introduce into evidence exhibits that were not listed in the pretrial order; (4) permitting defendant to introduce old maps into evidence and allowing defendant's witness to testify about conclusions drawn from the maps; (5) permitting defendant to testify he had been "in possession" of the disputed land; (6) refusing to admit sketches drawn by plaintiffs' counsel into evidence; and (7) refusing to grant plaintiffs' motion for a new trial.

We find there was sufficient evidence to support the jury's verdict and find no reversible error by the trial court. The facts and procedural history follow.

Plaintiffs filed an action on 14 July 1992 to quiet title to a parcel of land lying partly in Old Fort Township, McDowell County, and partly in Broad River Township, Buncombe County. In their complaint, plaintiffs claimed to have marketable record title to the disputed land. Plaintiffs traced their chain of title to a deed from John M. Houck to E.M. Crawford recorded 18 December 1917 on page 40 of McDowell County Deed Book 52. Plaintiffs traced the conveyances leading to their deed as follows:

1. E. M. Crawford to Ellen J. Crawford by 20 December 1917 deed, recorded in McDowell County Deed Book 51 on page 581.

2. Ellen J. Crawford to W. B. Harris and Robert McCraw, by 9 May 1953 deed, recorded in McDowell County Deed Book 125 on page 12.

3. Willard B. Harris and wife, and Robert McCraw and wife, to Joe M. Spainhour and others, by 21 December 1964 deed, recorded in McDowell County Deed Book 181 on page 419.

4. Mary N. Spainhour and others to Hugh Beam and wife, Louise Beam, by 17 August 1967 deed, recorded in McDowell County Deed Book 235 on page 30.

5. Louise T. Beam, widow, to W. C. Hall and wife, Helen Hall, by 19 October 1974 deed, recorded in McDowell County Deed Book 243 on page 378, conveying undivided one-half interest in said land.

6. W. C. Hall and wife, Helen Lee Hall, to Thomas Andrew Carl Hall, trustee, by 23 September 1986 deed, recorded in McDowell County Deed Book 359 on page 679, conveying said undivided one-half interest.

Plaintiffs contended a 16 April 1992 general warranty deed from Grace J. Kerlee to defendant recorded in McDowell County Deed Book 437 on page 758 and in Buncombe County Deed Book 1692 on page 271 covered some or all of the land plaintiffs claimed. Plaintiffs argued defendant did not have title to the land because the defendant's grantor did not own the land. Plaintiffs requested that the trial court declare the 16 April 1992 deed to defendant void.

Defendant counterclaimed to quiet title, asking the court to declare him owner of the disputed land. Defendant denied in his answer that plaintiffs had marketable title to the land described in the complaint. Defendant claimed to own a parcel of land lying in Old Fort and Crooked Creek Townships, McDowell County, and in Broad River Township, Buncombe County. Defendant claimed to have marketable record title to the land and traced the conveyances leading to his deed as follows:

1. W. J. Souther and wife, Nancy Souther, and J.H. Lytle to C.P. Kerlee and wife, Mary E. Kerlee, by 24 February 1898 deed recorded in McDowell County Deed Book 26 on page 382. The land described in this deed formerly belonged to Noah Souther.

2. Carl Kerlee, Jr., and Daniel Kerlee, attorneys in fact for the heirs of C.P. Kerlee and Mary Kerlee, deceased, to Leander Kerlee by 31 October 1950 deed recorded in McDowell County Deed Book 134 on page 444.

3. Leander Kerlee and wife, Blanche Kerlee, to Daniel Kerlee and wife, Grace Kerlee, by 31 November 1950 deed recorded in McDowell Deed Book 113 on page 538.

4. Grace J. Kerlee, widow of Daniel Kerlee, and Paul Kerlee to David Franklin Kerlee by 24 September 1991 quitclaim deed recorded in McDowell County Deed Book 429 on page 430 and in Buncombe County Deed Book 1667 on page 169.

5. Grace J. Kerlee, widow of Daniel Kerlee, to David Franklin Kerlee by 16 April 1992 general warranty deed recorded in McDowell County Deed Book 437 on page 758 and in Buncombe County Deed Book 1692 on page 271.

Defendant then amended the counterclaim, claiming he had title to the disputed land because he had possessed it under color of title for seven years and, alternatively, that he and his predecessors in title adversely possessed the land for more than twenty years.

Plaintiffs filed a motion for summary judgment on 28 September 1993, and the trial court denied the motion. On 24 January 1994, the trial court entered a pretrial order agreed to by the parties. Section (8) of that order stipulated:

> Opposing counsel has seen all of the exhibits and has been furnished, or will be before this case is called for trial, a copy of each exhibit identified by the Defendant, except for those items for which copying is not practical.

The case was tried before a jury. At the close of plaintiffs' case and outside the presence of the jury, defendant made a motion to dismiss the complaint. The judge allowed the motion, stating that plaintiffs had produced no evidence that the parcel of land they contended to own was the same parcel of land defendant contended he owned. The jury was not informed of this ruling, and the trial continued as to the defendant's counterclaim.

Defendant testified his father took him on to the disputed land when he was about ten or eleven years old. He stated he and his father went on the property numerous times trying to locate property lines. They also hunted and fished on the land. Defendant testified: "My family has used that piece of property for thirty plus years."

Defendant said he began posting the property with no trespassing signs in 1991, when he decided to build a home on the land and move his family there. Before hiring a surveyor to get a legal description of the land and define its acreage, defendant and a friend cut a path around the property where defendant believed the boundary lines were located. Phillip Reese, a Registered Land Surveyor, testified that the 404 acres he surveyed as Kerlee land reflected the remaining property of C.P. Kerlee, which was conveyed through a series of deeds to the defendant. The surveyor testified he formed his conclusions by relating the written information from a property owner's

deed and information from deeds of adjoining property owners to the physical information on the ground.

At the close of defendant's evidence, the trial judge reinstated the plaintiffs' case on the grounds that it would be unfair to allow defendant to proceed with his marketable record title action without giving plaintiffs an opportunity to have the jury consider their marketable record title claim. The jury was not in the courtroom when plaintiffs' case was reinstated. Plaintiffs were given the opportunity to further cross-examine defendant and defendant's surveyor.

The jury was asked to render its verdict by answering issues relating to plaintiffs' marketable record title claim, defendant's marketable record title claim, defendant's adverse possession claim, and defendant's color of title claim. The jury found that plaintiff did not have marketable record title to the property, that defendant did have marketable record title to the property, and that defendant had acquired title to the land by adverse possession for twenty years. Plaintiffs made a motion for judgment notwithstanding the verdict and a motion to set aside the verdict. The trial court denied plaintiffs' motion. Plaintiffs appealed to this Court.

[1] We first consider plaintiffs' argument that the trial court erred in denying their motion for summary judgment. Our standard of review for summary judgment is whether there is any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Aetna Casualty & Surety Co. v. Welch*, 92 N.C. App. 211, 212, 373 S.E.2d 887, 888 (1988). In ruling on a summary judgment motion, the court should consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. *See Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). The party making the motion bears the burden of showing summary judgment is appropriate. *Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 201, 377 S.E.2d 285, 287, *disc. review denied*, 324 N.C. 578, 381 S.E.2d 774 (1989). Furthermore, in ruling on the motion, the trial court must view the evidence presented by both parties in the light most favorable to the nonmoving party. *Davis*, 116 N.C. App. at 666, 449 S.E.2d at 242. Summary judgment is proper when it appears that even if the facts as claimed by the nonmoving party are taken as true, there can be no recovery. *Hudson v. All Star Mills*, 68 N.C. App. 447, 450, 315 S.E.2d 514, 516, *disc. review denied*, 311 N.C. 755, 321 S.E.2d 134 (1984). Summary judgment is also appropriate

when the movant proves an essential element of his opponent's claim does not exist. *Leake*, 93 N.C. App. at 201, 377 S.E.2d at 287. Summary judgment has been called a "drastic remedy" to be used to save time and money for litigants in cases where there is no dispute as to any material fact. *See Hayes v. Turner*, 98 N.C. App. 451, 456, 391 S.E.2d 513, 516 (1990).

Both parties claimed to own the land through a chain of title which could be traced back for the thirty years required to establish marketable record title under N.C. Gen. Stat. § 47B-2 (1984). Plaintiffs contend defendant's claim for marketable record title was unsubstantiated based on their interpretation of the property descriptions in the deeds that made up defendant's chain of title. We disagree. Defendant supported his claim by referring to the map drawn by a registered land surveyor who studied the deeds, the physical layout of the land, and the deeds of adjoining landowners and concluded that the 404 acres he designated on the map was Kerlee land. The pleadings and other documents did not settle the dispute over whether defendant or plaintiffs had marketable record title, and summary judgment was properly denied on these grounds.

In answering interrogatories posed by plaintiffs, defendant supported his claim to title by adverse possession. Defendant stated his father and other relatives had walked the property for more than fifty years, hunting, fishing and otherwise using the property. Defendant stated he had used the property in this same way. Defendant also stated he had posted no trespassing signs and streamers and flags around the boundary lines of the property. Defendant talked with other landowners about access to his property and with people interested in buying timber off the land. These averments, which must be taken as true, are sufficient to support defendant's claim to title by adverse possession. Plaintiffs' summary judgment motion was properly denied on these grounds.

Similarly, defendant's claim to possession by adverse possession for seven years under color of title should not have been disposed of by plaintiffs' summary judgment motion. The deeds defendant included in his chain of title were sufficient evidence of color of title to withstand the plaintiffs' summary judgment motion.

We thus find there were material issues of fact in dispute when plaintiffs moved for summary judgment. When viewing the evidence in the light most favorable to the defendant, it is clear that defendant

put forward sufficient evidence to withstand plaintiffs' motion. We affirm the trial court's denial of that motion.

[2] Plaintiffs assign as error the trial court's denial of their motion for a directed verdict on defendant's counterclaim at the close of the evidence. A directed verdict is properly granted where it appears, as a matter of law, that the nonmoving party cannot recover upon any view of the facts which the evidence reasonably tends to establish. *Sheppard v. Zep Manufacturing Co.*, 114 N.C. App. 25, 30, 441 S.E.2d 161, 164 (1994). Under this standard, this Court must determine whether defendant's evidence, when considered in the light most favorable to defendant, was legally sufficient to withstand plaintiffs' motion for a directed verdict as to any of defendant's claims. *See Sheppard*, 114 N.C. App. at 30, 441 S.E.2d at 164. "The motion for directed verdict should be denied if there is more than a scintilla of evidence supporting each element of the nonmovant's case." *Pridgen v. Shoreline Distributors, Inc.*, 114 N.C. App. 94, 96, 441 S.E.2d 184, 186, *disc. review denied*, 338 N.C. 669, 453 S.E.2d 180 (1994).

Defendant based his ownership of the disputed property on three theories: marketable record title, adverse possession for twenty years, and adverse possession under color of title for seven years. In order to prove he had title to the land under the Real Property Marketable Title Act, N.C. Gen. Stat. § 47B-2 (1984), defendant had to establish: (1) that defendant, alone or together with his predecessors in title, was vested with an estate in real property which had been of record for at least thirty years; (2) the public record showed a title transaction at least thirty years old which purported to vest title in defendant or some other person from whom, by one or more title transactions, the property had passed to defendant; and (3) that nothing appeared of record to divest defendant of the estate.

Defendant testified as to five deeds he claimed formed his chain of title to the land, the oldest of which was the 24 February 1898 deed from W.J. Souther and wife, Nancy Souther, and J.H. Lytle to C.P. Kerlee (defendant's exhibit 1). These lands were formerly owned by Noah Souther, who was deceased at the time of the 1898 deed. Defendant's exhibit 2 was a 31 October 1950 deed from Carl Kerlee, Jr., and Daniel Kerlee, attorneys in fact for the heirs of C.P. Kerlee and Mary Kerlee, to Leander Kerlee. Defendant's exhibit 3 was a 1 November 1950 deed from Leander Kerlee and wife, Blanche Kerlee, to Daniel Kerlee and wife, Grace J. Kerlee. These deeds satisfied the first requirement of the Marketable Title Act by virtue of being title

transactions affecting the property that took place more than thirty years before the filing of this action.

Defendant's exhibit 4 was a non-warranty deed from Grace Kerlee to defendant, and exhibit 5 was a warranty deed from Grace Kerlee to defendant, purporting to convey the same property. Considered together, these five exhibits satisfy the second element of the Marketable Title Act by vesting title more than thirty years before the action was filed in one of defendant's predecessors in title. As to the third requirement—that nothing of record appears that divests him of the property he claims—defendant offered the testimony of Surveyor Phillip Reese to demonstrate the land defendant claimed had not been conveyed away. The surveyor's map states as its source of title:

> The 404.0 ACRES are all the remaining property as set forth in that certain deed dated February 24, 1898 from W.J. Souther, et al to C.P. Kerlee and wife Mary E. Kerlee as recorded in Deed Book 26, Page 382 (McDowell Co.), specifically Tracts 10, 11 and all Tracts thereafter to the terminus of said description, less and excepting all Tracts or portions thereof previously conveyed.

In response to cross-examination by plaintiffs, the surveyor testified that it would be a "massive undertaking" to examine each land tract obtained by Noah Souther and determine every out-conveyance, overlap and double grantage of the property. The surveyor further testified:

> Based upon all the adjoining properties, the terminology within those deeds that that was Noah Souther land. Noah Souther evolved into the Kerlee chain.
>
> . . . .
>
> It's not an assumption. It's deriving the terminology of the deeds based upon physically surveying the subject property and how adjoining properties are related to it.

The deeds and expert testimony presented by defendant constitute more than a scintilla of evidence to support his theory that he has marketable record title to the property under the Marketable Title Act.

[3] Next, plaintiffs contend their motion for a directed verdict should have been granted as to defendant's claim to title by more than twenty years of adverse possession and as to defendant's claim that he acquired title by seven years of adverse possession under color of

title. To acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for twenty years under known and visible lines and boundaries. *Curd v. Winecoff*, 88 N.C. App. 720, 722, 364 S.E.2d 730, 732 (1988); N.C. Gen. Stat. § 1-40 (1983). Successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years. *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974). It is permissible under the legal principle of tacking to tie the possession of an ancestor to that of the heir when there was no hiatus or interruption in the possession. *International Paper Co. v. Jacobs*, 258 N.C. 439, 444, 128 S.E.2d 818, 822 (1963).

Plaintiffs claim defendant failed to show he possessed the land for the twenty-year statutory period either through defendant's occupation of land or through tacking defendant's possession to his father's possession. Plaintiffs further claim defendant's possession was not exclusive and adverse as to all others or under known and visible lines and boundaries. We disagree.

Defendant, who was forty years old at the time of trial, testified his father began taking him on the land when defendant was about ten or eleven years old. He stated he and his father had hunted and fished on the property, and that he had continued to use the land on his own after his father's death. "I have used this property very extensively since I was a kid," defendant testified. Defendant testified his family had used the property for more than thirty years: "[We] just used the property as Kerlee property just on and on and on any way you could a piece of property." Defendant stated he and a friend spent six months cutting out property lines before he hired Phillip Reese to survey the land. Considered in the light most favorable to defendant, this evidence was sufficient to establish possession of the land for the twenty-year statutory period.

When questioned about other people's use of the land, defendant testified that he put up no trespassing signs in 1991 and asked hunters he found on the property to leave. Defendant said he had been running people off the land long before he posted the property—"for twenty plus years." This evidence was sufficient to support defendant's claim that his possession of the land was exclusive and adverse as to all others.

To substantiate a claim for title to land by adverse possession, the claimant must show he possessed the land under known and visible boundaries such as to apprise the true owner and the world of the extent of the possession claimed. *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 303, 144 S.E.2d 59, 63 (1965). Defendant showed that he knew the boundary lines of the property by cutting out the lines before he hired a surveyor. Defendant testified: "[T]he Surveyor didn't have to locate any lines at all. I was very close on my cuts. . . . The most, I guess, I was off was maybe 20 foot . . . ." Defendant testified he and his father located the boundaries of the property when he was between ten and fifteen years old. This testimony provides evidence of known and visible boundaries sufficient to withstand plaintiffs' motion for a directed verdict.

Plaintiffs also claim the trial court should have granted their motion for directed verdict as to defendant's claim that he acquired title to the land by seven years' adverse possession with color of title under N.C. Gen. Stat. § 1-38 (1983). We need not consider this issue. Even if the trial court had erred, any such error would have been harmless because the jury's verdict did not address this issue. We find the trial court did not err in refusing to grant plaintiffs' motion for directed verdict.

[4] Plaintiffs next contend the trial court erred in dismissing plaintiffs' case at the close of plaintiffs' evidence. After the plaintiffs presented their evidence, the defendant made a motion to dismiss the plaintiffs' complaint. The proper motion for the defendant to make at this stage of the proceedings would have been a motion for a directed verdict rather than a motion to dismiss the complaint. N.C. Gen. Stat. § 1A-1, Rule 41(b) (1990) provides that a party may move for an involuntary dismissal for failure of the plaintiff to prosecute or comply with the rules of civil procedure or any order of the court. Only in an action tried without a jury may the defendant move for an involuntary dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. *Id.* Since this case was a jury trial, the defendant's motion to dismiss was improper as was the court's granting of the motion. We find this error harmless.

The burden is on the appellant to show the error probably influenced the jury against him. *Freeman v. Preddy*, 237 N.C. 734, 736, 76 S.E.2d 159, 160 (1953). The error must be material and prejudicial, denying the appellant some substantial right. *Id.* "[A]n error cannot be regarded as prejudicial to a substantial right of a litigant unless

there is a reasonable probability that the result of the trial might have been materially more favorable to him if the error had not occurred." *Id.*

The trial court dismissed this case out of the hearing of the jury and proceeded with defendant's counterclaim evidence. When the court reinstated plaintiffs' case at the close of defendant's evidence, plaintiffs were given an opportunity to rebut defendant's evidence through recross-examination. The jury could not have been influenced by the trial court's dismissal of plaintiffs' case because it never knew the case had been dismissed, and plaintiffs were given an opportunity to rebut defendant's evidence. We do not find a reasonable probability that the jury's verdict would have differed if the error had not occurred.

[5] Plaintiffs next contend the trial court erred in refusing to allow plaintiffs to introduce into evidence exhibits which were not listed in plaintiffs' pretrial order. Whether to admit evidence not listed in a pretrial order is entrusted to the discretion of the trial court. *Pittman v. Barker*, 117 N.C. App. 580, 588, 452 S.E.2d 326, 331 (1995). The trial court's decision will not be reviewed unless an abuse of discretion is shown. *Id.* In *Pittman*, the trial court elected to admit deeds into evidence which were not listed in the pretrial order because the deeds were not discovered until the trial was underway. The plaintiffs in the case at hand sought to admit deeds into evidence which plaintiffs knew of before trial along with sketches of the disputed land made by plaintiffs' counsel. In addition, plaintiffs' counsel was able to refer to and use the deeds in question during his cross-examination of defendant's witnesses, thus eliminating the possibility of prejudice to plaintiffs by the exclusion of the deeds themselves as exhibits. We find the trial court did not abuse its discretion in refusing to admit this evidence.

Plaintiffs next contend the trial court committed reversible error by allowing defendant to introduce old maps into evidence and allowing defendant's witness to testify about conclusions drawn from the maps. The first map in question (defendant's exhibit 21) is a survey prepared in 1952 by a registered land surveyor and recorded in the office of the Register of Deeds for McDowell County in Map Book 2 at page 37. This map was listed in the pretrial order. Plaintiffs stipulated the exhibits listed by defendant in that order were genuine and, if relevant and material, would be received into evidence without further identification or proof. Plaintiffs objected to the maps on the

ground that private maps may be used only when a witness testifies to their correctness from first-hand knowledge. *See Cutts v. Casey*, 278 N.C. 390, 413, 180 S.E.2d 297, 308 (1971). Plaintiffs contended exhibit 21 was hearsay since it had not been "proven by someone, a surveyor or someone connected with the survey." In ruling the survey admissible, the trial court found the relevancy and materiality of the exhibit supported by previous testimony not objected to by plaintiffs. Since the parties had already agreed the exhibit was genuine, the trial court found no basis to refuse to admit the map into evidence. Plaintiffs objected on the same ground to exhibit 22, a 1953 survey of property adjoining the disputed land and prepared by the same surveyor. We find, for the same reasons, the trial court did not err in admitting this map into evidence. N.C. Gen. Stat. § 1A-1, Rule 16 (1990) provides that a pretrial order controls the subsequent course of the action unless it is modified at trial to prevent manifest injustice. Plaintiffs could have raised the issue of the maps as hearsay evidence before they signed the pretrial order. In fact, plaintiffs did object in the order to exhibits 1, 5, and 6 and did not stipulate these exhibits were genuine.

Plaintiffs further contend it was reversible error to permit defendant's surveyor to testify about conclusions he drew from the 1952 survey. We disagree. The trial court permitted the surveyor to testify about these conclusions after the defendant presented him as an expert witness. An expert witness is a witness whose study or experience, or both, makes the witness better qualified than the jury to form an opinion on a particular subject. *Federal Paper Board Co. v. Kamyr, Inc.*, 101 N.C. App. 329, 334, 399 S.E.2d 411, 415, *disc. review denied*, 328 N.C. 570, 403 S.E.2d 510 (1991). According to Rule 702 of the Evidence Code, N.C. Gen. Stat. § 8C-1 (1992), an expert may testify in the form of an opinion if the testimony will help the trier of fact understand the evidence. Furthermore, testimony in the form of an opinion is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. *In re Wheeler*, 87 N.C. App. 189, 196, 360 S.E.2d 458, 462 (1987); N.C. Gen. Stat. § 8C-1, Rule 704 (1992). Since the surveyor was an expert in land survey and his testimony may have helped the jury understand conclusions which could be drawn from the survey maps, his testimony was properly admitted.

Plaintiffs next contend it was reversible error for the trial court to permit defendant to testify he had been "in possession" of the disputed land. We find no error. A witness is permitted to tell what use

has been made of or what acts of ownership have been exercised over property. *Memory v. Wells*, 242 N.C. 277, 280, 87 S.E.2d 497, 501 (1955). It is for the jury to say, under proper instructions, whether such use or acts constitute open, notorious and adverse possession. *Id.* While a witness may not testify as to who *owns* the land, it is permissible for the witness to testify as to who has been in *possession* of the land for the described period. *See Mallett v. Huske*, 262 N.C. 177, 185, 136 S.E.2d 553, 558 (1964). Rule 701 of the Evidence Code, N.C. Gen. Stat. § 8C-1, limits lay witness's testimony in the form of opinions or inferences to matters that are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of this testimony or the determination of a fact in issue. Since the defendant, as his own witness, testified he was in *possession* of the property (not that he *owned* it or had acquired *title* by adverse possession), and this testimony was based on his experiences on the land and was critical to the determination of the controversy before the trier of fact, such testimony was properly admitted.

Plaintiffs next argue the trial court committed reversible error in refusing to allow plaintiffs to introduce into evidence sketches made by plaintiffs' counsel. The trial court informed plaintiffs' counsel during trial that he could introduce the sketches only if he planned to testify. Rule 5.2 of the Rules of Professional Conduct of the North Carolina State Bar (1995) provides that a lawyer should not serve as both counsel and witness, except in very limited circumstances. Counsel may testify "as to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his or her firm as counsel in the particular case." This situation did not occur in the case at hand. Had plaintiffs thought it critical to their case to introduce similar sketches into evidence, such sketches could have been performed by a registered land surveyor. The trial court did not abuse its discretion in refusing to admit this evidence.

Plaintiffs last assign as error the trial court's refusal to grant plaintiffs' motion for a new trial and the court's signing of the judgment. The standard of review for a motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (1990), is whether the trial court abused its discretion in granting or denying the motion. *Corwin v. Dickey*, 91 N.C. App. 725, 729, 373 S.E.2d 149, 151 (1988), *disc. review denied*, 324 N.C. 112, 377 S.E.2d 231 (1989). Since there was competent evidence to support each element of defendant's claim to title

under the Marketable Title Act and by adverse possession, we find no error. For the same reasons, the trial court did not err in signing the judgment. Furthermore, we have reviewed plaintiffs' remaining assignments of error and find no prejudicial error.

No error.

Judges JOHN and WALKER concur.

STATE OF NORTH CAROLINA, EX REL EMPLOYMENT SECURITY COMMISSION v. J. WALTER HUCKABEE T/A RED CARTAGE

No. COA94-1051

(Filed 19 September 1995)

Labor and Employment § 142 (NCI4th)— loaders as employees and not independent contractors—sufficiency of evidence

The Employment Security Commission's findings were supported by competent evidence and those findings supported the Commission's conclusion that "loaders" who worked for defendant loading tires onto the trailers of various trucking companies at the Kelly Springfield Tire plant were employees for which defendant owed unemployment taxes where the evidence tended to show that defendant's company maintained control over the manner and method of the loaders' work; the loaders did not retain that degree of independence necessary to require their classification as independent contractors; the loaders had no investment in the business and could not hire assistants; the loaders could and did refuse loads and were not prohibited from working for other cartage companies, but the Commission found an unspecified number of loaders worked on a regular basis for defendant's company and found no evidence that loaders worked for other cartage companies; it was immaterial whether defendant's company supervised and controlled the activities of the loaders or whether the right to supervise and control was delegated to the manufacturer of the tires which were loaded; the parties did not negotiate the terms of the employment contracts which stated that the loaders were independent contractors; and defendant told investigators that the loaders were employees. N.C.G.S. § 96-8(6)a.

Am Jur 2d, Unemployment Compensation §§ 43 et seq., 54.

Judge COZORT dissenting.

Appeal by Employment Security Commission from judgment entered 30 June 1994 by Judge Coy E. Brewer, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 6 June 1995.

T. S. Whitaker, Chief Counsel, and C. Coleman Billingsley, Jr., Staff Attorney, for plaintiff-appellant Employment Security Commission.

Singleton, Murray, Craven & Inman, by Richard T. Craven, for defendant-appellee.

WALKER, Judge.

This is the second appeal brought by the Employment Security Commission (the Commission) from a superior court's reversal of the Commission's decision that "loaders" engaged by appellee J. Walter Huckabee T/A Red Cartage (Red Cartage) to load trailers were employees for which Red Cartage owed unemployment taxes, penalties, and interest. The Commission assessed the unemployment taxes in September 1989 after it determined, pursuant to an investigation and audit, that the loaders were employees instead of independent contractors. Red Cartage protested the Commission's assessment and demand for payment of unemployment taxes owed on wages paid to the loaders, contending that the loaders were independent contractors. Pursuant to the protest, a hearing was held before a Deputy Commissioner, who concluded that the loaders were employees of Red Cartage. After the Commission affirmed this decision, Red Cartage appealed to the superior court, which reversed. The Commission then appealed to this Court. In a decision entered 5 January 1993 pursuant to Rule 30(e), we vacated the superior court's decision on the grounds that it impermissibly made findings of fact and remanded the case to superior court for remand to the Commission. On remand, the Commission affirmed its prior findings, made additional findings of fact, and held that, based on these findings, the loaders were employees. From that opinion, Red Cartage appealed to the superior court. By judgment entered 30 June 1994, Judge Coy E. Brewer, Jr. held that, based on the Commission's findings of fact, the loaders were independent contractors instead of employees and thus reversed the Commission's decision.

The Commission argues that the superior court erred in holding that, based on the Commission's findings of fact, the loaders were independent contractors. The judicial standard of review of decisions made by the Commission is as follows: "In any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." N.C. Gen. Stat. § 96-15 (i)(1993). Our review is thus limited to determining whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law. *Reco Transportation, Inc. v. Employment Security Comm.*, 81 N.C. App. 415, 418, 344 S.E.2d 294, 296, *disc. rev. denied*, 318 N.C. 509, 349 S.E.2d 865 (1986). After careful review, we conclude that the Commission's findings of fact are supported by competent evidence. We hold that those findings support the Commission's conclusion that the loaders were employees, and we thus reverse.

N.C. Gen. Stat. § 96-8(6)a (1994) of the Employment Security Act provides, in pertinent part:

> "Employment" means service performed . . . for wage or under any contract of hire . . . in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. . . . [T]he term "employee" . . . does not include (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor. . . .

In determining whether someone is an independent contractor or an employee, the decisive test is "the retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses. . . ." *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 139-40 (1944). The following factors should be considered along with other circumstances:

> [Whether] [t]he person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the

> work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Hayes, 224 N.C. at 16, 29 S.E.2d at 140. These factors, if found, point towards a worker's being considered an independent contractor. *Spencer v. Johnson & Johnson Seafood*, 99 N.C. App. 510, 514-15, 393 S.E.2d 291, 293-94 (1990). The presence of no particular one of these factors is controlling and the presence of all is not required. *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140.

The Commission based its decision that the loaders were employees on the following findings of fact:

> 3. Red Cartage has a contract with various trucking companies to load tires onto their trailers at the Kelly Springfield Tire Manufacturing Plant. The trucking companies bring empty trailers to the Red Cartage lot and pick up loaded trailers for delivery. Red Cartage takes the empty trailers to Kelly Springfield to be loaded with tires [and then] brings the loaded trailers [back] to Red Cartage for the trailers to be picked up by the various trucking companies.
>
> . . .
>
> 6. Tires may be loaded five days a week at Kelly Springfield beginning at 7:30 a.m., 1:30 p.m., 7:30 p.m., or 1:30 a.m. Coy Thomas Stewart and Dennis K. Crumpler are both loaders. Crumpler has worked for Red Cartage since 1987 and Stewart since 1988. Crumpler works at 1:30 p.m. and is the number one loader on that shift. Stewart works at 7:30 a.m. and is the number five loader on that shift. Red Cartage . . . obtains the services of various individuals to load the trailers . . .[at] Kelly Springfield. . . .
>
> 7. The employer obtains the services of loaders and, in some cases, trains them. The employer apparently stopped training loaders in 1988. It takes approximately one or two days to train a loader. They train with other loaders. Crumpler has trained loaders at the request of . . . the employer's bookkeeper, or . . . the employer's office manager. The employer and Kelly will only allow an individual to be trained one or two days. If an individual is not able to learn the work in [that time], he is not retained.

8. The employer maintains a list of loaders by shift. The employer telephones loaders to report to Kelly when needed. Stewart, who is number five on the 7:30 a.m. shift, will be the fifth loader called. If there are not five loads available on that shift, he may be called for another shift. Loaders are called at approximately 6:00 a.m. for the 7:30 a.m. shift.

. . .

10. Loaders are paid by trailer size and weight. . . .

11. Stewart and Crumpler normally work five days per week . . . [and] . . . normally take the jobs assigned. If they do not take a job, the employer calls the next loader.

12. While there is a turn-over in loaders, some unspecified number of loaders work on a regular basis for the employer and have done so for a period of time.

13. The only equipment involved in loading a truck is a hand-truck [which] belongs to Kelly. When the loader reports to Kelly, he had [sic] to go through the gate guard. He then reports to Kelly personnel at the loading dock. Only one individual is permitted to load a truck. If the Kelly personnel do not recognize or know the loader, they will verify the loader's identity with Red Cartage. The only time more than one loader is allowed is when a loader is training another individual.

14. The loader knows from the telephone call which truck he is to load and what he is to load. He will load the tires provided by Kelly personnel onto the trailer. He will keep a record of the tires loaded and verify the number loaded with Kelly personnel. When the Kelly tally and the loader tally match . . . , the loader is given a pass to leave the Kelly property. . . .

15. The employer had the loader sign a contract that stated that they were contractors. The contract provided for the method of pay. The loaders did not negotiate the contract and had no input into the amount of money to be paid. Loaders had to sign the contract in order to work.

16. . . . J. Walter Huckabee told [Commission investigators] that the loaders were employees.

17. The employer could terminate the services of the loaders at any time without incurring any penalty or financial obligation to

the loaders other than for work already performed. The loaders could cease doing work for Red Cartage at any time without incurring any liability to Red Cartage.

18. . . . Loaders were apparently not prohibited from working for other cartage companies though there is no evidence that any of them did so. . . .

19. . . . Workers were not scheduled in advance but were telephoned prior to the beginning of the shift in an order set forth on a list maintained by the employer. There was no requirement that workers inform Red Cartage of their whereabouts, but those that worked on a regular basis for Red Cartage apparently contacted Red Cartage if they were not at home to be telephoned.

20. . . . Red Cartage did not control and supervise how the trucks were loaded, Kelly Springfield did so.

21. . . . Loaders could refuse loads and did refuse loads. . . .

22. Under the written contracts, . . . the loaders [were] liable for their own negligence. . . .

23. . . . Red Cartage furnished no equipment . . . .

24. . . . Loaders were paid by weight of tire loaded. A special order called for a specific load, and the loader got paid for the weight of that specific load. A full trailer called for the loader to fill the trailer and Kelly required that the loader completely fill the trailer. An experienced loader might be able to get more weight in a trailer . . . . Also, weight varied by the type of tire. A special load might weigh more than the full load due to the type of tire. The loader does not have control over the length of the trailer . . . and loads the trailer to which he has been assigned by Red Cartage when he arrives at Kelly Springfield. The first-called loader or loaders might get a choice of loads, but eventually there would be no choice.

25. . . . There is no indication that any of the loaders carried liability insurance.

26. . . . Loaders had no benefits, were potentially personally liable for any damage, and had no protection from Red Cartage or Kelly Springfield for any at-work injury or death.

In applying the *Hayes* test, the Commission made the following findings (observations) in its order:

> (a) The individuals involved loaded trucks. That loading required one or two days' training and would not be classified as an independent business, calling, or occupation. The loaders . . . did not hold themselves out to be in business;
>
> (b) The loaders loaded trucks, which requires one or two days training and does not involve special skill, knowledge, or training to execute the work;
>
> (c) Workers are paid based on the weight of tires and the size of the trailer loaded based on a formula established by the employer;
>
> (d) Workers can be separated for any reason;
>
> (e) Many of the loaders work for Red Cartage five days per week on a regular and ongoing basis;
>
> (f) Workers cannot use assistants;
>
> (g) Not applicable;
>
> (h) Workers worked specific shifts when work was available. A worker could request a shift but work had to be performed during the specified shift.

Respondent relies on *Reco Transportation, Inc. v. Employment Security Comm.*, 81 N.C. App. 415, 344 S.E.2d 294, *disc. rev. denied,* 318 N.C. 509, 349 S.E.2d 865 (1986). In *Reco Transportation, Inc.*, this Court held that evidence was insufficient to support the Commission's findings of fact and that the findings were thus insufficient to support the Commission's conclusion that certain truck drivers were employees. *Id.* at 420, 344 S.E.2d at 297. The Commission's conclusion that the drivers were employees was based on its findings that the employer owned the company which owned the trucks, that the drivers had no investment in the cargo or trucks, that the drivers were expected to call the employer each week day, that the employer was responsible for maintenance of the truck and operating costs, and that all drivers and assistants were hired by the employer. *Id.* at 419, 344 S.E.2d at 296. The Court stated that these findings "do not sufficiently reflect RECO's right or lack thereof to 'control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results con-

forming to the contract.' " *Id.* at 420, 344 S.E.2d at 297 (citation omitted). Moreover, the Court noted that the evidence tended to show, among other things, that: "[t]here was no contract between those drivers who operated RECO owned vehicles [with investments up to $3,000.00 in equipment for the vehicles] and billed RECO for services rendered. [The] [d]rivers could refuse requests by RECO to haul loads of freight and instead [could arrange their own]. . . . [Also, the] [d]rivers could and did haul freight for other transportation companies [and] were personally liable for damage to RECO owned trucks or the freight being hauled [which] was attributable to the driver's negligence . . . ." *Id.* at 420, 344 S.E.2d at 297. The Court reasoned that these circumstances required the conclusion that the parties intended that RECO have no right to control or direct the details of the work or what the truck drivers should do as the work progressed. *Id.* at 420-21, 344 S.E.2d at 297.

The Commission argues that the facts in the instant case are distinguishable from *Reco Transportation, Inc.* and are more analogous to those in *State ex rel. Employment Security Comm. v. Faulk*, 88 N.C. App. 369, 363 S.E.2d 225, *disc. rev. denied*, 321 N.C. 480, 364 S.E.2d 917 (1988). We agree. In *Faulk*, this Court held that the Commission's findings supported its conclusion that taxicab drivers were employees. *Id.* at 376, 363 S.E.2d at 229. The respondent in *Faulk* owned, maintained, stored, and insured all of the cabs, set work shifts within which the drivers must operate, and set the rates the drivers could charge to customers. The drivers did not lease the cabs from respondent, had no investment in the cabs or the business, and did not have the power to hire assistants. *Id.* at 374, 363 S.E.2d at 228. The Court distinguished *Reco Transportation, Inc.* on the grounds that there, the drivers secured contracts from other companies to haul freight, selected their own routes, and had the power to hire assistants; and further that (1) the employer did not control the destination, date, and time of delivery for the freight, (2) the drivers were not required to notify the employer as to their whereabouts at any time, and (3) the drivers had an investment in some of the equipment on the vehicle. *Id.* at 374-75, 363 S.E.2d at 228. The Court stated that the Commission's findings clearly showed on balance "that respondent maintained control over the manner and method of the drivers' work and that the drivers did not retain 'that degree of independence necessary to require [their] classification as independent contractor[s] rather than employee[s].' " *Id.* at 374, 363 S.E.2d at 228 (citation omitted).

In this case, as in *Faulk*, the Commission's findings clearly show on balance that Red Cartage maintained control over the manner and method of the loaders' work and that the loaders did not retain " 'that degree of independence necessary to require [their] classification as independent contractor[s] rather than employee[s].' " Like the taxicab drivers in *Faulk*, the loaders had no investment in the business and could not hire assistants. Although the Commission found that the loaders could and did refuse loads and were not prohibited from working for other cartage companies, it also found that an unspecified number of loaders worked on a regular basis for Red Cartage for a period of time and found no evidence that the loaders worked for other cartage companies. Moreover, while the *Reco Transportation, Inc.* drivers could determine the details such as when and where to haul freight and what route to follow, Red Cartage's loaders had to load the trucks at Kelly Springfield within four set shifts and did so under the direction and supervision of Kelly Springfield. The only discretion the loaders appear to have had was in choosing a load.

Respondent argues that the loaders were not employees because Kelly Springfield, not Red Cartage, had the right to control and direct the manner in which the details of the work were to be executed. We agree with the Commission's conclusion that it was immaterial whether Red Cartage supervised and controlled the activities of the loaders or whether the right to supervise and control was delegated to Kelly Springfield. Control can be implicit if the nature of the business is such that all the control needed can be effected by establishing a certain pattern of operations and engaging persons who, if they respond normally, will conform to the established pattern. *Foster v. Michigan Employment Security Comm.*, 166 N.W.2d 316, 321 (Mich. Ct. App. 1968).

Finally, respondent argues that where, as here, the facts indicate both an employee relationship and an independent contractor relationship, the decision should be based on the clear intention of the parties. Respondent argues that the fact the loaders signed contracts stating they were to be independent contractors clearly indicates the parties' intent to establish an independent contractor relationship. For support, respondent cites *State ex rel. Employment Security Comm. v. Paris*, 101 N.C. App. 469, 400 S.E.2d 76, *affirmed*, 330 N.C. 114, 408 S.E.2d 852 (1991).

In *Paris*, this Court affirmed the trial court's conclusion that a private nurse's assistant was an independent contractor based on its

consideration of the *Hayes* factors and the parties' clear intent to establish an independent contractor relationship. *Id.* at 473, 400 S.E.2d at 78-79. Although the facts indicated both an employer/employee relationship and an employer/independent contractor relationship, the evidence showed that the parties discussed the terms of their agreement and the nurse's assistant understood that she would have the benefit of a higher salary with no deductions and thus no unemployment benefits. *Id.* at 472, 400 S.E.2d at 78. We stated that "[w]hile . . . the parties' intent may not always be so readily apparent as to be a criteria for the determination of whether an individual is an independent contractor, we find that in the case at bar it is helpful to consider the intent of the parties." *Id.* In this case, the parties did not negotiate the terms of the employment contracts but, as the Commission found, the loaders "had to sign the contract in order to work." Further, Mr. Huckabee told investigators that the loaders were employees. We do not find it helpful to consider the intent of the parties under these circumstances.

Reversed.

Judge COZORT dissents.

Judge JOHN concurs.

Judge COZORT dissenting.

I disagree with the majority's conclusion that the loaders were employees, and I respectfully dissent.

I agree with the majority's analysis that, under N.C. Gen. Stat. § 96-15(h) and (i) (1993), the Commission's findings are supported by evidence in the record and are thus conclusive for the reviewing court. I find, however, that when those findings are reviewed under the criteria set forth in *Hayes v. Elon College*, 224 N.C. 11, 15-16, 29 S.E.2d 137, 139-40 (1944), the trial court correctly concluded that the loaders were independent contractors. I thus vote to affirm the trial court's judgment.

BRANCH BANKING AND TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF ABBIE P. CARR, DECEASED, AND AS TRUSTEE UNDER THE WILL OF A. B. CARR FOR THE ABBIE P. CARR TRUST, PLAINTIFF v. JOSEPH A. STAPLES, III, MATTHEW L. CARR, AND JOY H. CARR AS ADMINISTRATRIX OF THE ESTATE OF A. B. CARR, JR., DECEASED, DEFENDANTS

No. COA94-991

(Filed 19 September 1995)

1. Declaratory Judgment Actions § 8 (NCI4th)— conflicting positions as to source of funds to pay taxes—declaratory judgment proper

An actual controversy existed so as to confer jurisdiction under the Declaratory Judgment Act where defendants maintained conflicting positions as to the proper source of funds necessary to pay additional North Carolina estate tax due as a result of the inclusion of the value of a QTIP trust in testator's gross estate for federal estate tax purposes, and plaintiff, as executor of the estate, had a duty to obtain the funds and administer their payment.

Am Jur 2d, Declaratory Judgments § 71.

2. Taxation § 160 (NCI4th)— additional North Carolina estate taxes—source of funds

A QTIP trust was the proper source of funds for payment of the additional North Carolina estate tax due by reason of inclusion of the value of the QTIP trust in decedent's federal taxable estate.

Am Jur 2d, Inheritance, Estate and Gift Taxes §§ 318, 341.

Appeal by defendants Carr from judgment entered 6 June 1994 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 23 May 1995.

Poyner & Spruill, L.L.P., by Curtis A. Twiddy and Thomas H. Davis, Jr., for plaintiff-appellee BB&T.

Connor, Bunn, Rogerson & Woodard, P.A., by David W. Woodard, Julie M. Watson, C. Timothy Williford and David M. Connor, for defendant-appellants Matthew L. Carr and Joy H. Carr.

Colombo, Kitchin & Johnson, by Michael A. Colombo and Thomas H. Johnson, Jr., for defendant-appellee Joseph A. Staples, III.

MARTIN, John C., Judge.

The facts giving rise to this declaratory judgment action have been stipulated and may be briefly summarized as follows: A.B. Carr and Abbie P. Carr married in 1970. Pursuant to the terms of a prenuptial agreement, A.B. Carr executed a will in which he bequeathed $40,000.00 to Abbie Carr and left his residuary estate in trust. Abbie Carr was to receive seventy-five percent of the net income of the trust for her lifetime; A.B. Carr's two sons by a prior marriage, A.B. Carr, Jr., and Matthew L. Carr, were to receive the remaining twenty-five percent of the net income. Upon Abbie Carr's death, the trust was to terminate and all of its assets were to be delivered over, in equal shares, to the two sons in fee simple.

A.B. Carr died on 7 July 1985 survived by his wife and by his two sons. Plaintiff, Branch Banking and Trust Company ("BB&T"), qualified as his executor. On the North Carolina inheritance and estate tax return, the full value of the residuary estate was included in A.B. Carr's taxable estate. On the federal estate tax return, seventy-five percent of the residuary estate was treated as "qualified terminable interest property" ("QTIP"), as part of the marital deduction under I.R.C. § 2056(b)(7), resulting in a deduction of $2,504,627.50 for federal estate tax purposes, and a reduction of $1,534,546.00 in federal estate taxes and $18,951.00 in North Carolina estate taxes.

Thereafter, BB&T as executor of A.B. Carr's estate transferred seventy-five percent of the A.B. Carr residuary estate to BB&T as trustee under the will of A.B. Carr for the use and benefit of Abbie Carr (hereinafter referred to as the "QTIP trust") and the remaining twenty-five percent of the A.B. Carr residuary estate to BB&T as trustee under the will of A.B. Carr for the use and benefit of A.B. Carr, Jr., and Matthew Carr. Following establishment of the two trusts, A.B. Carr, Jr., died and Joy H. Carr was qualified as Administratrix of his estate.

Abbie Carr died 12 December 1992, leaving a will which named her son, Joseph A. Staples, III, as her sole residuary legatee. BB&T qualified as executor of her estate. The value of Abbie Carr's net taxable estate for federal estate tax purposes was $985,902.00. However, the inclusion of the value of the QTIP trust ($4,145,874.00) increased her taxable estate to $5,131,776.00 for federal estate tax purposes, increasing the federal tax due by $1,748,773.00. For North Carolina inheritance tax purposes, the value of the QTIP trust was not included in her estate. However, because the value of the QTIP trust

was included in Abbie Carr's federal taxable estate, the state death tax credit under I.R.C. § 2011 increased by $374,202.00, causing an additional estate tax to be due the State of North Carolina, pursuant to G.S. § 105-7, in that amount.

BB&T, in its capacities as executor of the estate of Abbie Carr and as trustee under the will of A.B. Carr for the QTIP trust, brought this declaratory judgment action seeking a judicial determination as to whether the additional North Carolina estate tax should be paid by the estate or by the trust. The Carr defendants, Matthew Carr and Joy Carr, as Administratrix for the estate of A.B. Carr, Jr., moved to dismiss the action pursuant to G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6), on the grounds that there was no actual controversy between the parties to confer jurisdiction upon the trial court under G.S. § 1-253 *et seq*. Alternatively, the Carr defendants sought a declaration that the taxes should be paid from Abbie Carr's estate. Defendant Joseph Staples sought a declaration that the taxes should be paid from the assets of the QTIP trust. The trial court denied the Carr defendants' motions to dismiss and ordered that the additional North Carolina estate tax attributable to the inclusion of the assets of the QTIP trust in Abbie Carr's federal taxable estate be paid by the QTIP trust. The Carr defendants appeal.

I.

[1] Preliminarily, we must determine whether an actual controversy exists so as to confer jurisdiction under the Declaratory Judgment Act, G.S. § 1-253 *et seq*. An actual controversy is a " 'jurisdictional prerequisite' for a proceeding under the Declaratory Judgment Act . . . ." *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984). (Citations omitted.) Where there is no actual existing controversy, the action should be dismissed pursuant to G.S. § 1A-1, Rule 12(b)(6). *Id.* at 234-35, 316 S.E.2d at 62. Whether an actual controversy exists depends on the facts of each case; " 'a mere difference of opinion between the parties' " does not suffice, but neither is it required that one party have an actual right of action against the other. *Id.* at 234, 316 S.E.2d at 61. (Citation omitted.) The Declaratory Judgment Act is liberally construed and administered to accomplish its purpose of affording " 'relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . . .' " *Insurance Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964). (Citations omitted.)

G.S. § 1-255 provides, in pertinent part:

> Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary . . . in the administration of a trust, or of the estate of a decedent . . . may have a declaration of rights or legal relations in respect thereto:
>
> . . .
>
> (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Our Supreme Court has held that an executor of an estate may properly maintain an action under the Declaratory Judgment Act to obtain the advice of the court as to the source of payment of inheritance taxes. *Trust Co. v. Lambeth*, 213 N.C. 576, 197 S.E. 179 (1938).

An actual controversy exists here. The Carr defendants and defendant Staples maintain conflicting positions as to the proper source of the funds necessary to pay the additional North Carolina estate tax due as a result of the inclusion of the value of the QTIP trust in Abbie Carr's gross estate for federal estate tax purposes. BB&T, as executor of Abbie Carr's estate and as trustee of the QTIP trust, takes no position as to which of the competing sources should provide the funds for the payment of that tax, but has a duty to obtain the funds and administer their payment. The controversy between defendants necessitates an interpretation of their rights, status and legal relations under the applicable documents and tax laws, and instruction from the court as to the proper source of funds for the payment of the tax. Thus, jurisdiction exists under the Declaratory Judgment Act and the Carr defendants' motions to dismiss were properly denied.

II.

[2] The substantive issue is whether the QTIP trust is the proper source of funds for payment of the additional North Carolina estate tax due by reason of inclusion of the value of the QTIP trust in Abbie Carr's federal taxable estate. We answer the issue affirmatively and affirm the judgment of the trial court.

A.

Initially, the Carr defendants attempt to argue that there is no additional North Carolina estate tax due from the estate of Abbie Carr because the value of the QTIP trust should not have been included in her estate for federal tax purposes. We decline to consider their argu-

ment. The parties entered into an "Agreed Statement of Facts" in which they stipulated that the value of the QTIP trust was included in Abbie Carr's federal taxable estate as required by I.R.C. § 2044 and, by reason thereof, an additional estate tax is due the State of North Carolina pursuant to G.S. § 105-7. Parties are bound by their stipulations at both the trial and appellate levels. *Baxley v. Nationwide Mutual Ins. Co.*, 104 N.C. App. 419, 410 S.E.2d 12 (1991), *affirmed*, 334 N.C. 1, 430 S.E.2d 895 (1993). Moreover, the issue of whether an additional North Carolina estate tax is due is not raised by the assignments of error contained in the record on appeal. A party may not present for the first time in an appellate brief a question raising issues of law not set out in the assignments of error contained in the record on appeal. N.C.R. App. P. 10(a); *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397 (1985), *reversed on other grounds*, 476 U.S. 953, 90 L.Ed.2d 943 (1986).

B.

Resolution of the issue before us requires an understanding of the North Carolina estate tax imposed by G.S. § 105-7 and its relationship to the federal estate tax. G.S. § 105-7 provides, in pertinent part:

> (a) A tax in addition to the inheritance tax imposed by this schedule is hereby imposed upon the transfer of the net estate of every decedent . . . where the inheritance tax imposed by this schedule is less than the maximum state death tax credit allowed by the Federal Estate Tax Act as contained in the Code because of said tax herein imposed. In such case, the inheritance tax provided for by this schedule shall be increased by an estate tax on the net estate so that the aggregate amount of tax due this State shall be the maximum amount of credit allowed under said Federal Estate Tax Act. Said additional tax shall be paid out of the same funds as any other tax against the estate.
>
> (c) . . . The amount of the tax as imposed by subsection (a) of this section shall be computed in full accordance with the Federal Estate Tax Act as contained in the [Internal Revenue] Code.

The estate tax imposed by G.S. § 105-7 is essentially a portion of the federal estate tax that has been allocated to our State through the state death tax credit under I.R.C. § 2011.

> [I]t has been declared that there is only one tax involved, namely, the federal estate tax, but Congress has permitted the several states to claim part of it if they want to. A taxpayer does not pay

> two taxes; he pays one tax, part of it to the Federal Government and part of it to his own state. The states severally share in one "estate tax," and their legislation on the subject merely enables them to avail themselves of the bounty of the Federal Government in handing to them a portion of that tax, levied and assessed not by virtue of state law but of an act of Congress.

Maurice T. Brunner, Annotation, *Ultimate Burden of Estate Tax in Absence of Statute, Will, or Other Provision*, 68 A.L.R.3d 714, 749 (1976). *See also* 5 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* § 132.4, at 123-14 (2d.Ed. 1993) (stating that "[t]he credit can . . . be viewed as a rudimentary revenue-sharing device, by which the federal government diverts funds to the states"). This relationship between the federal estate tax and the North Carolina estate tax is evident from the requirements of G.S. § 105-7 that the latter tax be computed in accordance with the Internal Revenue Code and paid out of the same funds as other estate taxes.

G.S. § 28A-27-2 governs apportionment of the federal estate tax, and, in the absence of a separate statutory provision, we believe applies to the apportionment of the North Carolina estate tax as well. Under G.S. § 28A-27-2(b), apportionment of the tax is controlled by the method prescribed in the decedent's will. In Item Six of Abbie Carr's will, she directed her "Executor . . . to make such claim . . . and recover from the trust established under my husband's Will such amount as may be due my estate by reason of the inclusion in my estate of this qualified terminable interest property . . . ." Her will also explicitly provided that federal estate and state inheritance taxes levied against her estate or the individual beneficiaries thereof "shall not be charged against the share of anyone taking under this Will." Thus, based on these express directions and applicable state law, the trial court correctly determined that the additional North Carolina estate tax due under G.S. § 105-7 should be paid from the assets of the QTIP trust.

Equity also requires that the QTIP trust provide the funds necessary to pay the additional North Carolina estate tax. In *Cornwell v. Huffman*, 258 N.C. 363, 128 S.E.2d 798 (1963), the testatrix, Mrs. Cornwell, had transferred property to a trustee with directions that the income therefrom should be paid to herself and her mother and that the trust should terminate upon her mother's death, or alternatively, that if she predeceased her mother, the trust property should

be divided upon termination of the trust among her descendants *per stirpes*. Mrs. Cornwell's will provided that in the event she predeceased her mother, the property passing under her will should be liable for estate and inheritance taxes as though the testamentary property comprised the entire estate for tax purposes, and that the remainder of such taxes should be paid out of the principal of the trust.

Mrs. Cornwell predeceased her mother. The value of the property passing under her will was much less than the value of Mrs. Cornwell's proportionate share of the trust estate includable in her taxable estate. Consequently, the executors of Mrs. Cornwell's estate brought an action to determine how the inheritance and estate tax liability created by her death should be apportioned. The guardian *ad litem* on behalf of the minor beneficiary of the trust argued that since Mrs. Cornwell "had no interest [in the trust] extending beyond her death, the direction given in her will with respect to the payment of death taxes imposed no obligation on the trust . . . ." *Id.* at 368, 128 S.E.2d at 801. The trial court disagreed and ordered an apportionment of the taxes and directed payment in accordance with Mrs. Cornwell's intention as expressed in her will and in accordance with the equity of the factual situation. *Id.*

The Supreme Court affirmed, noting that because there was no controlling statute, it was appropriate to look at the equity of the situation, and based upon Mrs. Cornwell's express direction in her will with respect to payment of taxes, the executors of her estate had the right to ask the court to apply the rules of equitable contribution. *Id.* at 370, 128 S.E.2d at 802. In affirming, the Court quoted with approval from a portion of the trial court's findings:

> The apportionment and contribution approved and directed by this judgment is in the interest of all the parties including those represented by the guardian ad litem, and such apportionment and contribution are fair, just and equitable and in accordance with the laws of this state.

Id. at 370, 128 S.E.2d at 803.

The present case is analogous to *Cornwell, supra.* The inclusion of the value of the QTIP trust in Abbie Carr's federal taxable estate is the sole reason for the imposition of the additional North Carolina estate tax pursuant to G.S. § 105-7. Had BB&T, as executor of A.B. Carr's estate, not made the QTIP election, his estate would have been

liable for an additional $1,534,546.00 in federal estate taxes and $18,951.00 in North Carolina estate taxes, and consequently, the additional North Carolina estate tax that is the subject of this appeal would not now be due. However, BB&T made the QTIP election, and as a result, pursuant to I.R.C. § 2044, had to include the value of the QTIP trust in Abbie Carr's federal taxable estate. The federal estate tax in the amount of $1,748,773.00, attributable to the inclusion of the value of the QTIP trust in Abbie Carr's federal taxable estate was paid from the assets of the QTIP trust. As in *Cornwell, supra*, Abbie Carr's will contains a clear statement of intent that taxes resulting from the inclusion of the value of the QTIP trust in her taxable estate should be collected from the assets of the trust and not from her probate estate. It is only "fair, just and equitable" that the additional North Carolina estate tax due under G.S. § 105-7 should be paid from the assets of the QTIP trust.

C.

We find no merit in the argument by the Carr defendants that the provisions of the prenuptial agreement between A.B. Carr and Abbie Carr bar BB&T, as executor of the estate of Abbie Carr, from asserting a claim against the QTIP trust for payment of the additional estate tax due the State of North Carolina. The premarital agreement contained reciprocal releases of each party's rights in the property of the other acquired by virtue of their marriage, with the exception of certain property specified in Paragraphs 1, 2 and 3 of the agreement. Paragraph 3 of the prenuptial agreement required that A.B. Carr establish a trust from which Abbie Carr would be paid seventy-five percent of the income for her life. The QTIP trust was established in satisfaction of this requirement. Thus, Abbie Carr's rights in the QTIP trust are specifically excepted from her release of rights in A.B. Carr's property, and the release does not bar a recovery by her estate from the trust of the additional North Carolina estate tax due.

The judgment of the trial court is affirmed.

Affirmed.

Judges JOHNSON and GREENE concur.

LISA LEONARD ROSE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF VIRGIL LEE ROSE, PLAINTIFF, v. ISENHOUR BRICK & TILE CO., INC., DEFENDANT

No. COA94-1118

(Filed 19 September 1995)

1. Workers' Compensation § 62 (NCI4th)— employer engaged in misconduct knowing it was substantially certain to cause injury or death—insufficiency of evidence

Plaintiff's forecast of evidence was insufficient to show the existence of a genuine issue of material fact regarding whether defendant employer engaged in misconduct knowing it was substantially certain to cause serious injury or death where defendant left a brick setting machine in the automatic rather than the manual mode while decedent was cleaning the spreader table; the carriage head of the setting machine descended and crushed decedent's head and shoulders; defendant had never been cited for a violation relating to the carriage head on this machine or for its use of weights and wires to hold down the switches controlling the carriage head and spreader table when employees needed to clean the table; no employees had previously been injured by the carriage head; no regulations required defendant to equip the carriage head with safety guards; and there was no showing that safety guards for this type of machine were utilized by other brick manufacturers in the industry.

Am Jur 2d, Workers' Compensation §§ 75-87.

2. Discovery and Depositions § 67 (NCI4th)— failure to impose discovery sanctions—no abuse of discretion

In an action to recover for the death of plaintiff's husband who was killed while working on defendant's brick production line, defendant's failure to disclose all prior injuries on brick setting machines in response to plaintiff's interrogatories and defendant's failure to produce loss prevention documents which outlined safety recommendations of defendant's insurer based on inspections of the premises were abuses of discovery which would support the imposition of sanctions; however, the trial court did not abuse its discretion in declining to impose sanctions but instead ordering defendant to produce documents responsive to plaintiff's discovery requests for an *in camera* inspection.

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

Judge WYNN dissenting.

Appeal by plaintiff from order entered 23 May 1994 by Judge William H. Helms in Rowan County Superior Court. Heard in the Court of Appeals 7 June 1995.

Defendant is a Rowan County corporation which operates a brick production facility. On 22 March 1990, Virgil Lee Rose, an employee of defendant, was operating brick setting machine number three. His head and shoulders were caught between the carriage "head" of the machine and the spreader table and crushed. On the following day, Mr. Rose (hereinafter decedent) died as a result of his injuries.

Defendant has three setting machines manufactured by Pearne & Lacey, which are referred to in the industry as "dinosaurs." Brick setting machine number three was manufactured by Auto Systems and is smaller than the "dinosaurs." A brick setting machine moves green uncured brick, known as "slugs," from a spreader table and transfers the slugs to a kiln car. The slugs are picked up from the spreader table by a carriage head which weighs from 2000 to 3000 pounds. The head descends onto the spreader table by gravity and ascends by power. The setting machine has automatic and manual operational modes. The automatic mode is designed for use when the machine is in continuous operation without any employees within the operational area. The manual mode is utilized when it is necessary to stop any component of the machine, such as when an employee needs to remove excess clay from the spreader table.

Although the manufacturer designed the manual mode as a safety feature, defendant taught its employees to leave the machine in the automatic mode and to use weights attached to wires to hold down the spring loaded switches controlling the carriage head and the spreader table when employees needed to clean the spreader table. By leaving the machine in the automatic mode and using weights and wires, it was not necessary to interrupt the entire brick making process every time an employee needed to clean the spreader table. However, the weights and wires were known to occasionally slip off of the switches.

The North Carolina Department of Labor, Division of Occupational Safety and Health (hereinafter OSHA), investigated the 22 March 1990 accident. The investigator's report indicated that dece-

dent was cleaning the spreader table when the head of the setting machine descended and crushed his head and shoulders. The report also stated that the machine was in the automatic mode at the time of the accident. Since the accident, there have been conflicting statements as to whether or not there was a weighted wire on the spring loaded switch controlling the head at the time of the accident and, if there was a weight on the switch just prior to the accident, whether it fell off and caused the head to descend onto the spreader table. The investigator concluded that the causal factors leading to the accident included "improper use of machine controls (not operating machine according to manufacturers design) and lack of machine guards or guarding devices."

Decedent's wife, Lisa Leonard Rose (hereinafter plaintiff), individually and as administratrix of decedent's estate, sued defendant for compensatory and punitive damages. Plaintiff voluntarily dismissed her individual claim on 13 July 1993. Defendant filed its first motion for summary judgment on 24 September 1993, but it withdrew the motion on 3 December 1993. Defendant made a second motion for summary judgment on 7 April 1994 which Judge William H. Helms denied on 19 April 1994. Defendant subsequently filed a motion for reconsideration which Judge Helms granted, entering summary judgment for defendant on 23 May 1994.

Plaintiff appeals.

Wallace & Whitley, by Mona Lisa Wallace, for plaintiff-appellant.

Dean & Gibson, by Rodney A. Dean and Brien D. Stockman, and by Harrell Powell, Jr., for defendant-appellee.

EAGLES, Judge.

I.

[1] Plaintiff argues that the trial court erred in granting defendant's motion for summary judgment. Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992)

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, 330, 454 S.E.2d 849, 851, *review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995); *Mickles v. Duke Power Co.*, 115 N.C. App. 624, 627, 446 S.E.2d 369, 371, *review allowed*, 338 N.C. 311, 450 S.E.2d 488 (1994). However, in *Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991) (emphasis added), 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.

Here, the trial court indicated in its order that it based its decision to grant summary judgment in part on our decision in *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 442 S.E.2d 143, review denied on additional issues, 338 N.C. 520, 452 S.E.2d 815 (1994). There, an employee caught his foot under the wheel of a moving crane and died after the crane traveled the length of his body and crushed him. *Powell*, 114 N.C. App. at 322, 442 S.E.2d at 145. In *Powell*, the court provided an example of the type of misconduct which satisfies the substantial certainty standard:

> 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, *citing* Restatement (Second) of Torts § 8A illus. 1 (1965). We stated that "[s]ubstantial certainty requires more than a mere possibility or substantial probability of serious injury or death." *Powell*, 114 N.C. App. at 325, 442 S.E.2d at 147.

Applying that standard in *Powell*, we noted that there was no specific requirement for tire guards on cranes used by the employer. *Powell*, 114 N.C. App. at 326, 442 S.E.2d at 147. While the Department of Labor had cited the employer for previous crane violations, none

of the violations concerned the hazard of operating a crane in close proximity to employees and none of the employer's workers had been struck by a crane in the past. *Id.* Accordingly, we concluded that the plaintiff failed to present sufficient evidence to survive summary judgment.

We are bound by *Powell*'s articulation of the substantial certainty standard. *Matter Of Appeal From Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating that a panel of the Court of Appeals is bound by a prior panel). After carefully reviewing the record, we conclude that plaintiff's case cannot withstand scrutiny under the *Powell* standard. Like the employer in *Powell* that had never been cited for a violation relating to the operation of a crane in close proximity to workers, defendant here had never been cited for a violation relating to the carriage head on machine number three or for its use of weights and wires. Furthermore, before this accident, no employees of defendant had been injured by the carriage head on machine number three and there were no specific regulations that required defendant to equip the carriage head on machine number three with safety guards. Plaintiff's forecast of evidence failed to establish that safety guards for this type of machine were utilized by other brick manufacturers in the industry. Similarly, nothing of record indicates that before the accident defendant *knew or should have known* of plaintiff's expert witness's estimate of statistical probabilities of death or serious injury in an accident involving machine number three. Accordingly, applying the *Powell* standard, we conclude that plaintiff's forecast of evidence is not sufficient to show the existence of a genuine issue of material fact regarding whether defendant engaged in misconduct *knowing* it was substantially certain to cause serious injury or death.

II.

[2] Plaintiff also argues that the trial court erred in denying plaintiff's motions for discovery sanctions. Plaintiff's original motion and two supplemental motions allege numerous discovery abuses. There are two primary areas of dispute. First, plaintiff asserts that defendant failed to disclose all prior injuries on brick setting machines in response to plaintiff's interrogatories. In defendant's answer to plaintiff's interrogatories concerning prior injuries, defendant responded that it knew of no prior injuries other than those contained in the OSHA materials which defendant had already supplied to plaintiff. Plaintiff later discovered through depositions the prior occurrence of injuries similar to decedent's injury detailed in several Industrial

Commission Form 19s. Defendant did not mention the Form 19s in its response to the interrogatories. Plaintiff argues that defendant's failure to produce the Form 19s detailing prior injuries is an abuse of the discovery process. Defendant argues that one reason it did not produce the Form 19s was its concern for the privacy rights of its employees. Defendant maintains that "*every single injury* that the Plaintiff claims to have been withheld from her is listed on the OSHA 200 logs that were provided to the Plaintiff."

Second, plaintiff alleges that defendant's failure to produce loss prevention documents, which outline safety recommendations of its insurer based on inspections of the premises, was an abuse of discovery supporting the imposition of sanctions. In response to requests for accident reports and safety recommendations, defendant responded that "all non-privilege [sic] documents which are discoverable under the North Carolina Rules of Civil Procedure were contained in the OSHA exhibits, transcript, and other documents previously provided to the Plaintiff." Although defendant contends that plaintiff never served an interrogatory on defendant asking it to identify the privileged documents, the record on appeal contains defendant's response to plaintiff's 7 October 1992 letter requesting defendant to identify privileged documents.

Plaintiff filed a Motion for Discovery Sanctions followed by two supplemental motions for sanctions. Upon a hearing of these motions, the trial court in its discretion declined to impose sanctions, but instead ordered the defendant to produce "any Form 19 involving injury to any individual in the operation of any brick setting machine on defendant's premises from 1980 until 1992" as well as "any document responsive to the plaintiff's discovery requests and withheld on the basis of any privilege" for an *in camera* inspection.

Rule 37 of the North Carolina Rules of Civil Procedure grants the court discretionary power to impose sanctions for failure to comply with discovery requests. 1 G. Gray Wilson, *North Carolina Civil Procedure* § 37-1 (1989). Not every abuse of discovery merits imposition of punitive sanctions. It is well-settled that "Rule 37 allowing the trial court to impose sanctions is flexible, and a 'broad discretion must be given to the trial judge with regard to sanctions.' " *Am. Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 727, 251 S.E.2d 885, 888, *review denied*, 297 N.C. 304, 254 S.E.2d 921 (1979), *quoting* 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2284 (1970). Our Supreme Court has stated that "[a] ruling committed to a

trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). While the abuse of discovery rules here would support the imposition of sanctions, we hold that on this record the trial court did not abuse its discretion in declining to impose sanctions.

Affirmed.

Judge MARTIN, MARK D., concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

The majority correctly recognizes that this case is before this Court following a grant of summary judgment in favor of defendant, and thus all inferences of fact must be drawn against the movant, and in favor of the nonmovant. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). The majority also correctly states that our Supreme Court in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) held that a plaintiff may maintain a civil action in addition to a Worker's Compensation claim when an employer intentionally engages in misconduct knowing it is *substantially certain* to cause serious injury or death to employees, and an employee is in fact injured or killed. *Id.*

As in *Woodson*, the question before this Court is: whether the forecast of evidence is sufficient to show that defendant intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death. *Woodson*, 329 N.C. at 340, 407 S.E.2d 222, 228 (1991). With the above in mind, I turn to the facts of the case *sub judice*.

On 22 March 1990, Virgil Lee Rose, an employee of defendant, was killed when his head and shoulders were caught between the carriage head of the brick setting machine he was operating, and the spreader table. The machine crushed his head.

The brick setting machine has automatic and manual operation modes. The automatic mode is designed for use when the machine is being used without any employees in the operational area. The manual mode was designed to be used when it is necessary to stop part of

the machine from operating, such as when an employee needs to remove excess clay from the spreader. The decedent was attempting to remove excess clay out of the spreader table when he was killed.

Instead of allowing employees to set the machine in manual mode while an employee cleans the table, as contemplated by the manufacturer, defendant taught its employees to leave the machine in automatic mode, and thus continuously running. Weights and wires were used to hold down the spring loaded switches to keep the machine running. These weights and wires had fallen off of the switches on prior occasions, and the defendant used duct tape in an attempt to prevent the wires and weights from slipping. There is a dispute in the record as to whether there was a weighted wire on the switch which controlled the head of the machine at the time of the accident, and if there was a weight on the switch, whether it fell off and caused the head of the machine to descend on the spreader table.

The North Carolina Department of Labor, Division of Occupational Safety and Health (OSHA) investigated the 22 March 1990 death of Virgil Lee Rose. The investigator's report stated that the machine was in automatic mode at the time of the accident, contrary to the manufacturer's instructions on how to use the machine, but consistent with the defendant's instructions. The investigator cited a failure to operate the machine according to the manufacturer's design as a causal factor leading to the decedent's death.

In addition, plaintiff's expert, Dr. George W. Pearsall, stated in his deposition that given the manner in which the machine was being operated, the number of times that the employees were exposed to the hazards per day, and the time that the defendant had operated the machine under the conditions present, the probability of death or serious injury was between 77.3 and 93.1 percent.

Reviewing the above facts in the light most favorable to the plaintiff, I conclude that the plaintiff's forecast of the evidence sufficiently raises an issue of fact as to whether the defendant knew that it was substantially certain that death or serious injury would result from the manner in which the defendant ordered the machine to be operated.

For the foregoing reasons, I respectfully dissent. *See also*, *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 442 S.E.2d 143 (1994) (Wynn, J., *dissenting*).

JERRY HOWARD, ADMINISTRATOR OF THE ESTATE OF CARMELA HOWARD, DECEASED, AND JERRY HOWARD, IND., APPELLANTS-PLAINTIFFS, v. ROBERT JACKSON, PATSY JACKSON AND BARBARA SKUSA, J&S, APPELLEES-DEFENDANTS

No. COA94-1027

(Filed 19 September 1995)

1. Negligence § 101 (NCI4th)— death by drowning—no willful or wanton misconduct by pool owners

In an action to recover for the wrongful death of plaintiff's daughter who drowned in defendants' pool, none of defendants' acts or omissions rose to the level of willful or wanton misconduct where defendants had no duty to keep their swimming pool safe for use by plaintiff's daughter or to protect her from the injuries caused by the condition of the pool; as a licensee who was old enough to know she was a poor swimmer, decedent entered the swimming pool at her own risk and assumed the dangers of the pool with no ladder at the deep end, no underwater lighting, and no trained lifeguard; failure to employ such safeguards evidenced only passive negligence, if any, or passive omissions on defendants' part; and defendant grandmother's failed attempt to rescue decedent did not increase her injuries or cause her death.

Am Jur 2d, Negligence §§ 307 et seq.

2. Negligence § 106 (NCI4th)— duty owed to licensee—no higher duty owed to child

Defendants did not owe decedent who drowned in their pool a higher standard of care than that generally afforded a licensee because she was a child, since defendant grandmother, who was supervising her grandchild and a friend in the shallow end of the pool, engaged in no active conduct to increase the risk to plaintiff's daughter before she jumped in the pool, and a reasonable person would assume a swimming pool posed no great danger to a child as old as the decedent who did not hesitate to jump into the deep end.

Am Jur 2d, Premises Liability § 29.

3. Trial § 64 (NCI4th)— summary judgment granted prior to completion of discovery—no error

The trial court did not err in granting defendants' motion for summary judgment before plaintiff completed discovery since the hearing on the motion took place nearly a year after plaintiff filed his complaint and nearly two months after defendants filed the motion; the trial court could reasonably have concluded that plaintiff had ample time before the hearing to depose any additional material witnesses; plaintiff did not request to continue discovery until the day of the hearing and did not file a motion to continue summary judgment until after the judge announced his decision to grant summary judgment; and plaintiff argued that testimony from witnesses he had not yet deposed would establish decedent was a licensee, but, even if decedent were a licensee, plaintiff presented no evidence that defendants acted with active, affirmative, willful, or wanton negligence.

Am Jur 2d, Summary Judgment § 12.

Appeal by plaintiff from order entered 19 May 1994 by Judge Robert L. Farmer in Cumberland County Superior Court. Heard in the Court of Appeals 24 May 1995.

Ronald R. Gilbert, P.C.; and Jerry D. Parker, Jr., for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Robert W. Sumner and Kari Lynn Russwurm, for defendant appellees.

COZORT, Judge.

Plaintiff filed this action to recover damages from defendants for the alleged wrongful drowning of his eleven-year-old daughter. Plaintiff's daughter jumped into the deep end of a swimming pool belonging to defendants, Robert and Patsy Jackson, while defendant Barbara Skusa was watching her granddaughter and another child play in the shallow end of the pool. Plaintiff contends defendants' negligence in maintaining, operating and supervising the pool caused his daughter's death. The trial court granted summary judgment for defendants.

On appeal, plaintiff contends the trial court committed reversible error in (1) finding there was no genuine issue of material fact as to whether the decedent was a trespasser; (2) finding there was no genuine issue of material fact that defendants breached the standard of

care they owed the decedent if the court determined she was a licensee; (3) disregarding the opinions plaintiff's expert expressed in his affidavit; and (4) ruling on summary judgment issues when discovery had not been completed.

We affirm. The facts and procedural history follow.

Plaintiff's eleven-year-old daughter, Carmela Howard, drowned in Robert and Patsy Jackson's swimming pool on 19 July 1991. The Jacksons were out of town the weekend of the drowning, and defendant Barbara Skusa and her granddaughter, Kristin, were staying at the Jacksons' home. On the evening plaintiff's daughter drowned, Kristin and a friend were playing in the shallow end of the pool. Defendant Barbara Skusa, who was partially disabled from three minor strokes, was watching them. At about 9:00 p.m., Carmela walked into the pool area wearing a bathing suit, picked up a ball, walked to the deep end of the swimming pool, stepped on the diving board and jumped in the pool. Skusa testified she had never seen the girl before that night. Skusa saw that Carmela was struggling after she jumped in. She saw Carmela go under the water twice. Skusa then jumped in the pool to try to save the girl from drowning. Skusa testified that the decedent kept grabbing her and pulling her under the water. Skusa broke away and yelled for Kristin to call 911. Carmela was lying still at the bottom of the pool when Skusa got out. A rescue team and the county sheriff arrived moments later and removed the girl from the pool. Despite their attempts to resuscitate her, plaintiff's daughter died.

Plaintiff filed this action on 15 July 1993, alleging defendants were negligent and that their negligence caused the wrongful death of his daughter.

Defendants Robert and Patsy Jackson answered on 20 September 1993 and moved to dismiss the case for failure to state a claim upon which relief could be granted. Defendant Barbara Skusa answered and moved to dismiss the complaint on 17 March 1994.

Defendants moved for summary judgment on 24 March 1994, and the motion was heard on 16 May 1994. The parties agreed the motion could be ruled on out of term and session. Judge Robert L. Farmer determined on 16 May that defendants' motion for summary judgment should be granted and directed defendants' counsel to prepare a summary judgment order.

Plaintiff moved to amend his complaint 17 May 1994 to allege defendants' conduct was "willful and wanton, and/or active and affir-

mative negligence." Plaintiff objected to the proposed summary judgment order he received on 17 May 1994 and moved to continue summary judgment and discovery. Plaintiff averred he had not had sixty days to complete discovery because Skusa did not answer the complaint until 17 March 1994. Plaintiff's counsel stated he thought the court was not going to reach its decision on the motion until later in the week of 16 May. Judge Farmer entered the summary judgment order on 19 May 1994 and dismissed plaintiff's case with prejudice.

The court held a hearing on 6 June 1994 to consider plaintiff's motions. The court allowed plaintiff's motion to amend the complaint on 8 June 1994. The court denied plaintiff's motions to continue summary judgment and discovery. Plaintiff appeals.

Summary judgment is the device used to render judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995); N.C. Gen. Stat. § 1A-1, Rule 56 (1990). Summary judgment is properly granted when it appears that even if the facts as claimed by the non-movant are taken as true, there can be no recovery. *Hudson v. All Star Mills*, 68 N.C. App. 447, 450, 315 S.E.2d 514, 516, *disc. review denied*, 311 N.C. 755, 321 S.E.2d 134 (1984). In ruling on a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party. *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 276, 432 S.E.2d 428, 433 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 517, *motion to dismiss appeal denied*, 335 N.C. 770, 442 S.E.2d 517 (1994), *aff'd*, 339 N.C. 602, 453 S.E.2d 146 (1995).

In order to recover from defendants for the death of his daughter Carmela, plaintiff must show defendants breached the standard of care owed to her. The standard of care of defendants depends upon the status of the decedent, whether she was an invitee, a licensee or a trespasser. *See Hoots v. Pryor*, 106 N.C. App. 397, 406, 417 S.E.2d 269, 275, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992). In the original complaint, plaintiff alleged his daughter was a guest of defendants, and in the amended complaint plaintiff alleged she was a licensee. Plaintiff has never contended Carmela was an invitee. Defendants contend plaintiff's daughter was a trespasser.

A licensee is one who enters the premises with the possessor's permission, express or implied, solely for her own purposes rather than for the possessor's benefit. *Hoots*, 106 N.C. App. at 406, 417 S.E.2d at 275. A social guest in a person's home is considered a licensee. *Crane v. Caldwell*, 113 N.C. App. 362, 366, 438 S.E.2d 449, 452 (1994). A trespasser, on the other hand, is a person who enters another's land without permission. *Hoots*, 106 N.C. App. at 407, 417 S.E.2d at 276.

The property owner or possessor of the premises owes a licensee the duty to refrain from doing her willful injury and from wantonly and recklessly exposing her to danger. *Crane v. Caldwell*, 113 N.C. App. at 365-66, 438 S.E.2d at 451. If the owner is actively negligent in managing the property while the licensee is exercising due care on the premises and subjects the licensee to increased danger, the owner will be liable for injuries sustained as a result of such *active* conduct or *affirmative* negligence. *DeHaven v. Hoskins*, 95 N.C. App. 397, 400, 382 S.E.2d 856, 858, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989).

The property owner has *no* duty, however, to keep the premises safe for the licensee's use, protect her from injuries caused by the condition of the property, or protect her from damages caused by ordinary use of the premises. *Pafford v. Construction Co.*, 217 N.C. 730, 736, 9 S.E.2d 408, 412 (1940). The general rule is that a landowner is not liable for injuries due to the condition of the property or due to passive negligence or acts of omission. *DeHaven*, 95 N.C. App. at 400, 382 S.E.2d at 858. A licensee enters the premises by permission but goes there at her own risk to enjoy the license subject to its accompanying perils. *Pafford*, 217 N.C. at 737, 9 S.E.2d at 412.

If the injured party is a trespasser, the landowner has a duty not to willfully or wantonly injure her. *McLamb v. Jones*, 23 N.C. App. 670, 672, 209 S.E.2d 854, 856 (1974). Willful injury is actual knowledge of the danger combined with a design, purpose, or intent to do wrong and inflict injury. *Hoots*, 106 N.C. App. at 407, 417 S.E.2d at 276. A wanton act is performed intentionally with a reckless indifference to the injuries likely to result. *Id.* "Willful or intentional negligence is something distinct from mere carelessness and inattention, however gross." *Wagoner v. R.R.*, 238 N.C. 162, 168, 77 S.E.2d 701, 706 (1953) (quoting *Bailey v. R.R.*, 149 N.C. 169, 62 S.E. 912 (1908)).

[1] Plaintiff argues that Skusa's failure to ask the decedent to stop or leave the premises before she jumped into the pool implied the girl

had a license to use the pool. Assuming plaintiff is correct and his daughter had implied permission to use the pool, plaintiff must nonetheless establish that defendants willfully or wantonly injured the decedent or wantonly or recklessly exposed her to danger.

Plaintiff argues defendants exercised willful and wanton misconduct by not having proper lifesaving equipment by the pool, not having a ladder in the deep end of the pool, not installing underwater lighting in the pool, allowing Skusa to serve as lifeguard for children swimming in the pool, and allowing children to swim in the pool under these conditions. Plaintiff also argues Skusa's failure to attempt to rescue the decedent after she sank to the bottom of the pool was willful and wanton misconduct.

We find none of these acts or omissions rise to the level of willful or wanton misconduct. Defendants had no duty to keep their swimming pool safe for use by plaintiff's daughter or to protect her from the injuries caused by the condition of the pool. The girl entered the swimming pool at her own risk and assumed the dangers of a pool with no ladder at the deep end, no underwater lighting, and no trained lifeguard. Failure to employ such safeguards evidences only passive negligence, if any, or passive omissions on defendants' part. Defendants engaged in no affirmative acts of negligence to put Carmela at greater risk of injury after she arrived on the premises. As a licensee who was old enough to know she was a poor swimmer, the decedent assumed the risk of jumping into a pool not equipped with certain safety devices. Furthermore, Skusa's failed attempt to rescue the decedent did not increase her injuries or cause her death.

[2] Plaintiff argues defendants owed decedent a higher standard of care than that generally afforded to a licensee because she was a child. Plaintiff cites *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974), in support of this argument. In *Anderson*, a forklift driven by an eleven-year-old boy struck and injured a nine-year-old boy who fell off the forklift. The injured boy and his parents sought to recover damages from the eleven-year-old boy's father, who had given his son permission to drive the forklift. The *Anderson* court held:

> " '[C]ommon experience tells us that a child may be too young and immature to observe the care necessary to his own preservation, and therefore, when a person comes in contact with such a child, if its youth and immaturity are obvious, he is chargeable with knowledge of that fact and he cannot indulge the presumption that the child will do what is necessary to avoid an impend-

> ing danger. Therefore, one seeing such a child in such a position is guilty of negligence if he does not take into account the fact that it is a child, and regulate his own conduct accordingly . . . .' "

Id. at 729, 202 S.E.2d at 589 (quoting *Greer v. Lumber Co.*, 161 N.C. 144, 76 S.E. 725 (1912)). The court stated a higher measure of care was required when a duty was owed to young children.

The facts in the instant case distinguish it from *Anderson*. The injured boy in *Anderson* testified the defendant father had seen him riding the forklift. Furthermore, defendant's son was actively driving the forklift and asked the nine-year-old to get on board to hold a rug. In the case at hand, Barbara Skusa engaged in no active conduct to increase the risk to plaintiff's daughter before she jumped in the pool. Skusa testified that no more than thirty seconds elapsed between the time the decedent entered the pool area and the time she jumped into the pool. Skusa had little or no opportunity to intervene. A reasonable person would assume a swimming pool posed no great danger to a child as old as the decedent who did not hesitate in jumping into the deep end. Even considering the higher standard of care imposed by *Anderson*, we find the death of plaintiff's daughter is not attributable to defendants' negligence.

Plaintiff offered no evidence of active conduct or affirmative negligence by defendants. The only support plaintiff provides for allegations of willful or wanton negligence are conclusory statements made by Martin Greenlaw, an expert in aquatic safety. For a witness to be competent as an expert he must have skill or experience in the subject he testifies about. *Yates v. J.W. Campbell Electrical Corp.*, 95 N.C. App. 354, 360, 382 S.E.2d 860, 864 (1989). When the expert provides opinion testimony on matters about which he has no special knowledge, skill or experience, the evidence is of no help to the trier of fact and should be excluded. *State v. Baldwin*, 330 N.C. 446, 458, 412 S.E.2d 31, 38 (1992). Since Greenlaw was not a legal expert, his *legal* characterization of defendants' acts did not create a genuine issue of material fact. We find the trial court properly granted defendants' motion for summary judgment.

[3] Finally, plaintiff contends the trial court erred in granting defendants' motion for summary judgment before plaintiff completed discovery. A trial court's decision to rule on a summary judgment motion before discovery is complete is within the discretion of the court, and its decision will not be reversed absent a manifest abuse of discre-

tion. *Evans v. Appert*, 91 N.C. App. 362, 368, 372 S.E.2d 94, 97, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988).

The hearing on defendants' motion for summary judgment took place nearly a year after plaintiff filed his complaint and nearly two months after defendants filed the motion. The trial court could reasonably have concluded that plaintiff had ample time before the hearing to depose any additional material witnesses. Furthermore, plaintiff did not request to continue discovery until the day of the hearing, and did not file a motion to continue summary judgment and discovery until *after* Judge Farmer announced his decision to grant summary judgment.

In addition, plaintiff's counsel argued at the summary judgment hearing that witnesses he had not yet deposed would provide evidence as to the status of the decedent. Plaintiff argued that testimony from these witnesses would establish decedent was a licensee. However, as we stated above, even if decedent was a licensee, plaintiff presented no evidence that defendants acted with active, affirmative, willful or wanton negligence. Therefore, we find the trial court did not abuse its discretion in granting summary judgment before plaintiff completed discovery.

The trial court's entry of summary judgment for defendants is

Affirmed.

Judges JOHN and WALKER concur.

RALPH HOWARD LEE, PLAINTIFF v. ELIZABETH C. LYERLY AND NORTH CAROLINA VETERINARY MEDICAL ASSOCIATION, DEFENDANTS

No. COA94-1163

(Filed 19 September 1995)

Libel and Slander § 43 (NCI4th)— accusation of stealing—privileged statement—sufficiency of evidence

The trial court properly granted summary judgment for defendants in plaintiff's action for slander where the individual defendant, who was president of defendant association, conducted a private telephone conversation with the chairman of the association's audit committee during which she questioned

expenditures by plaintiff, who provided administrative management services for the association, and accused him of stealing, since the individual defendant's conversation was privileged in that she had a legitimate interest in the financial condition of the business; her telephone conversation was limited in scope to this purpose; the conversation was private; the chairman of the audit committee was a proper person for the president to talk to about financial affairs; and during the time the statements were allegedly made, an investigation was made by the treasurer which uncovered matters that would legitimately concern the individual defendant.

Am Jur 2d, Libel and Slander §§ 273 et seq.

Judge John C. MARTIN dissenting.

Appeal by plaintiff from judgment entered 1 August 1994 by Judge G.K. Butterfield, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals on 22 August 1995.

Wooten & Coley, by William C. Coley III, for plaintiff-appellant.

Cunningham, Dedmond, Petersen & Smith, by Bruce T. Cunningham, Jr., for defendant-appellees.

WYNN, Judge.

Plaintiff appeals from an order granting defendants' motion for summary judgment. We affirm.

Plaintiff filed this action 5 March 1993 against defendants Elizabeth C. Lyerly and the North Carolina Veterinary Medical Association seeking compensatory and punitive damages for defamatory statements allegedly made by defendant Elizabeth C. Lyerly. Defendants answered denying the allegations and asserting the affirmative defense of privilege.

A motion to dismiss made by defendants pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure was denied on 30 August 1993. On 6 April 1994, defendants filed a motion for summary judgment. On 1 August 1994, the trial court granted defendants' motion for summary judgment and found that the conversation at issue was privileged and that plaintiff failed to present any evidence of actual malice.

LEE v. LYERLY

[120 N.C. App. 250 (1995)]

Plaintiff Ralph Howard Lee, the president and sole shareholder of Veterinary Association Management, Inc., contracted to provide to defendant, the North Carolina Veterinary Medical Association (hereinafter NCVMA), administrative management services. Mr. Lee also agreed to serve as executive director of the NCVMA.

In 1992, defendant Dr. Lyerly, the president of the NCVMA, became concerned about certain checks, credit card charges, and business trip expenses made by Mr. Lee. It is alleged that Dr. Lyerly told Dr. Thomas C. Needham, the chairman of the audit committee, that she thought "Ralph Lee was stealing monies from the Association." In addition, Dr. Lyerly allegedly said that if "she did not get rid of Ralph Lee, nobody would," and that "Ralph Lee was too redneck to represent the NCVMA."

Summary judgment requires that we view the evidence in the light most favorable to the non-moving party. *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986). If "the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits" show that there is no genuine issue of material fact, summary judgment will be rendered. N.C.R. Civ.P. 56(c)(1990). With the above in mind, the issue is whether the evidence taken in a light most favorable to plaintiffs was sufficient to establish any genuine issue of material fact. We hold as a matter of law, it was not.

Slander is defined as 'the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood.' *Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 601, 439 S.E.2d 797, 800 (1994). Slander may be actionable *per se* or *per quod. Id.* Slander *per se* arises when the false remarks in themselves may form the basis of an action for damage in which both malice and damage are presumed as a matter of law. *Id.* In an action for slander *per quod*, the false statements may "be such as to sustain an action only when causing some special damage . . ., in which case both the malice and the special damage must be alleged and proved." *Id.*

Plaintiff contends that the statements made by Dr. Lyerly were slander *per se*. Among statements which are slanderous *per se* are accusation of crimes or offenses involving moral turpitude, defamatory statements about a person with respect to his trade or profession, and imputation that a person has a loathsome disease. *Gibby v. Murphy*, 73 N.C. App. 128, 131, 325 S.E.2d 673, 675 (1985). In order to come within the category of slander *per se* with respect to a trade or

profession, the false statement must do more than merely harm a person in his business. The false statement '(1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business.' *Tallent v. Blake*, 57 N.C. App. 249, 253, 291 S.E.2d 336, 339 (1982). Further, in order to be actionable, the defamatory statement must be false. *Long v. Vertical Technologies, Inc.*, 113 N.C. App. at 602-03, 439 S.E.2d at 801.

Even if a statement is deemed slanderous, certain communications may be recognized as privileged. *Id.* Privilege is a defense and does not destroy the actionable nature of defamatory communications. *Id.* To show that a qualified privilege exists, the essential elements are "good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and publication in a proper manner and the proper parties only." *Id.* at 602, 439 S.E.2d at 800. In addition, the qualified privilege may be lost by proof of actual malice on the part of the defendant. *Id.* Actual malice may be established by evidence of ill-will or personal hostility on the part of the declarant. *Clark v. Brown*, 99 N.C. App. 255, 263, 393 S.E.2d 134, 138, *cert. denied*, 395 S.E.2d 675 (1990). Actual malice may also be proven "by a showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity . . . ." *Id.* If the plaintiff cannot meet his burden of showing actual malice, the qualified privilege operates as an absolute bar to any recovery for the communication, even if the communication is false. *Id.*

The trial court determined, and we agree, that defendants' statements were entitled to a qualified privilege.

As president of the NCVMA, Dr. Lyerly had a legitimate interest in the financial condition of the business. Ultimately, it is the president who is charged with the responsibility of monitoring the financial soundness of any organization. Dr. Lyerly admitted that she had a telephone conversation with Dr. Needham about the finances of the organization. The statement was limited in its scope to this purpose. Additionally, the conversation at issue was a private conversation between Drs. Lyerly and Needham. Plaintiff admitted that he was not aware of Dr. Lyerly saying anything slanderous to any other person or in any context other than a private telephone conversation. Also, as chairman of the audit committee, Dr. Needham was a proper person for the president to talk to about financial affairs. An auditor is a person whose primary responsibility is to determine whether the organi-

zation's financial books are balanced. Moreover, if an audit was requested by Dr. Lyerly, then Dr. Needham would be the one to perform this duty. Therefore, Dr. Lyerly's statements are "presumed to be made in good faith and without malice, cancelling plaintiff's presumption of actual malice arising on statements defamatory *per se.*" *Clark v. Brown*, 99 N.C. App. at 263, 393 S.E.2d at 138.

When defendant's presumption of good faith rebuts plaintiff's presumption of actual malice, plaintiff assumes the burden of showing actual malice. *Id.* Our review of the evidence in the light most favorable to plaintiff shows no genuine issue of material fact as to the existence of actual malice. The evidence in the record indicates that Dr. Lyerly's primary concern was for the financial well-being of the organization. Indeed, plaintiff admitted that he could not point to any other reason why Dr. Lyerly investigated his expenses other than for financial considerations. Furthermore, during the time the statements were allegedly made, an investigation was made by the treasurer which uncovered matters that would legitimately concern Dr. Lyerly. The investigation revealed that Mr. Lee had taken a personal trip to England and charged it to the NCVMA Mastercard without the president's knowledge. Dr. Lyerly had also asked for an investigation into a large number of checks being written to cash without adequate explanation. The fact that an investigation occurred supports defendants' contention that no actual malice existed on the part of Dr. Lyerly.

For the foregoing reasons, we affirm entry of summary judgment.

Judge GREENE concurs.

Judge MARTIN, John C. dissents.

Judge MARTIN, John C. dissenting.

I respectfully dissent. Actual malice is not generally susceptible of direct proof; in cases such as this one involving alleged defamation, actual malice may be proven by evidence of ill-will or personal hostility on the part of the declarant. *You v. Roe*, 97 N.C. App 1, 387 S.E.2d 188 (1990). When considered in the light most favorable to plaintiff, Dr. Lyerly's statements that if she "did not get rid of Ralph Lee, nobody would" and "Ralph Lee was too redneck to represent the NCVMA" are sufficient evidence of ill-will and personal hostility to create a genuine issue of material fact as to whether her statement

accusing plaintiff of "stealing monies from the Association" was made with actual malice so as to overcome the defense of qualified privilege. Therefore, I believe summary judgment was inappropriate and I vote to reverse and remand this case for trial.

KATHLEEN VICTORIA JOHNSON, PLAINTIFF v. FRIENDS OF WEYMOUTH, INC., DEFENDANT

No. 9420SC383

(Filed 19 September 1995)

1. Pleadings § 401 (NCI4th)— issue not raised in pleadings— trial by consent

Where a substantial portion of plaintiff's pleadings was devoted to the issue of whether she was fired for financial reasons, defendant averred in its answer that plaintiff was fired for financial reasons, both parties introduced a considerable amount of evidence regarding the financial condition of defendant and its relation to the termination of plaintiff's employment, and plaintiff did not object to defendant's introduction of evidence regarding the financial hardship issue, that issue was tried by the implied consent of the parties and should be treated as if it were raised in the pleadings. N.C.G.S. § 1A-1, Rule 15(b).

Am Jur 2d, Pleading § 25.

2. Labor and Employment § 71 (NCI4th)— wrongful termination—inconsistent verdict—jury instructions improper

The trial court in a wrongful termination case erred in instructing the jury in such a manner that an affirmative answer to both questions submitted to it would require a finding that an employee was wrongfully terminated and that the employer would have terminated the employee in any event, and these answers were inherently inconsistent and not an accurate representation of the standard established by *Brooks v. Stroh Brewery Co.*, 95 N.C. 226, that, once the plaintiff has shown that the employee's activities were protected and were a substantial factor in the employee's decision, the burden then shifts to defendant to show that the same decision would have been made if the employee had not engaged in the protected activity.

Am Jur 2d, Master and Servant §§ 43 et seq.

Appeal by plaintiff from orders entered on 9 December and 6 January 1994 by Judge James M. Long in Moore County Superior Court. Heard in the Court of Appeals 12 January 1995.

Marvin Schiller; and Bass, Bryant & Moore, by William E. Moore, Jr., for plaintiff appellant.

Cunningham, Dedmond, Petersen & Smith, by Bruce T. Cunningham, Jr., and Ann C. Petersen, for defendant appellee.

COZORT, Judge.

In this wrongful termination case, the trial court submitted two issues to the jury. First, the jury found that defendant wrongfully terminated plaintiff's employment in retaliation for plaintiff's suggestion that defendant return money to an insurance company. However, in their answer to the second issue, the jury also found that defendant would have terminated plaintiff notwithstanding the insurance incident. As a result, the trial court entered judgment in favor of defendant. The trial court denied plaintiff's motions to set aside the verdict, to amend the judgment, and for a new trial. We find that the two issues submitted to the jury allowed for inconsistent answers and remand the case for a new trial. The facts and procedural history follow.

Defendant, a non-profit corporation which operates the Weymouth Center, employed plaintiff as its administrative secretary from 4 October 1982 until her discharge on 28 May 1992. In October 1991, defendant conducted an art auction fundraiser at which six celluloids ("cels") from Disney cartoons were offered for sale. Defendant purchased an insurance policy to protect against any loss of these donated items. Two of the cels were not sold at the auction and were later discovered to be missing. Defendant submitted a claim to the insurance company for these lost cels and the insurance company paid defendant $950.00 under the policy.

In January 1992, plaintiff discovered the missing cels in a closet and notified defendant's president. Plaintiff testified that she encouraged officers of defendant to return the proceeds to the insurance company. Plaintiff presented evidence that two of defendant's officers sold the two cels outside the state without reporting the sale to the insurance company. Defendant did not return the proceeds received from the insurance company until plaintiff's counsel notified defendant that the money had not been returned.

Defendant informed plaintiff by letter on 28 May 1992 that the position of administrative secretary was abolished and that she would receive one month's severance pay. Plaintiff filed a complaint alleging that her termination constituted wrongful discharge because it was in retaliation for "her refusal to cooperate and participate in Defendants [*sic*] . . . unlawful . . . conversion of the insurance proceeds." The complaint also made reference to a claim by defendant that plaintiff was terminated for financial reasons. In its answer, defendant admitted plaintiff had been fired for financial reasons, but defendant did not plead that reason for firing plaintiff as an affirmative defense.

During the course of the trial, both plaintiff and defendant offered evidence regarding whether plaintiff was fired because of the insurance incident or due to defendant's financial hardship. During the charge conference the trial judge proposed to submit to the jury a question regarding financial hardship, in addition to the issue regarding wrongful termination agreed upon by the parties. The court allowed defendant to amend its pleadings to conform to the evidence which supported the second issue of financial hardship, an affirmative defense not previously pled by defendant. Plaintiff objected to the submission of the second issue. Overruling plaintiff's objection, the court submitted two questions to the jury:

1. Did the Defendant, Friends of Weymouth, Inc., wrongfully terminate the employment of the Plaintiff, Kathleen Victoria Johnson, because she suggested that insurance proceeds be returned to the insurance company?

2. If so, would the Defendant have terminated the Plaintiff's employment even if she had not suggested that insurance proceeds be returned to the insurance company?

The jury answered "yes" to both questions, and the court entered judgment in favor of defendant.

Plaintiff contends that the second question should not have been submitted to the jury. According to plaintiff, submission of this issue amounted to "prejudicial surprise" because defendant did not plead financial hardship as an affirmative defense.

While failure to plead an affirmative defense normally results in waiver, the parties may still try the issue by express or implied consent. *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984). N.C.R. Civ. P. 15(b) provides: "When issues not

raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15(b) (1990).

[1] A substantial portion of plaintiff's pleadings are devoted to the issue of whether she was fired for financial reasons. Defendant averred in its answer that plaintiff was fired for financial reasons. Both parties introduced a considerable amount of evidence regarding the financial condition of defendant and its relation to the termination of plaintiff's employment. Plaintiff did not object to defendant's introduction of evidence regarding the financial hardship issue. Therefore, the financial hardship issue was tried by the implied consent of the parties and should be treated as if it was raised in the pleadings.

Even if the parties had not tried the financial hardship defense by implied consent, it was still properly before the jury. The trial court allowed defendant to amend its pleadings to include financial hardship as a defense. Rule 15(b) authorizes the trial court to allow a party to amend its pleadings, so long as it does not permit judgment by ambush. *Smith v. Childs*, 112 N.C. App. 672, 677, 437 S.E.2d 500, 504 (1993). This particular defense could not have been a surprise to plaintiff because she referred to it in her pleadings and produced evidence regarding defendant's financial status during the presentation of her case. The proper standard for review of such action is whether the trial court abused its discretion. *Id.* at 678, 437 S.E.2d at 504. We find no abuse of discretion.

[2] Plaintiff next contends that the jury instructions were erroneous. The North Carolina Pattern Jury Instructions provide issues for the jury regarding wrongful termination and the employer's defense to such a claim. The first question asks:

> Did the defendant wrongfully terminate the employment of the plaintiff?

N.C.P.I., Civ. 640.20. If the jury answers "yes" to that question, they are presented with an issue regarding an affirmative defense for the employer which states:

> Would the defendant have terminated the plaintiff even if the plaintiff had not [engaged in conduct protected by law] [refused to engage in unlawful conduct] [refused to engage in conduct which violates public policy]?

N.C.P.I., Civ. 640.22.

The pattern instructions rely on *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 382 S.E.2d 874, *disc. review denied*, 325 N.C. 704, 388 S.E.2d 449 (1989), as a basis for submitting both of these questions. *Brooks* stands for the proposition that once the plaintiff has shown that the employee's activities were protected and were a substantial factor in the employer's decision, the burden shifts to defendant to show that the same decision would have been made if the employee had not engaged in the protected activity. *Id.* at 230, 382 S.E.2d at 878.

Due to the manner in which the pattern jury instructions are worded, an affirmative answer to both requires a finding that an employee was wrongfully terminated *and* that the employer would have terminated the employee in any event. These answers are inherently inconsistent and are not an accurate representation of the standard established by *Brooks*. In the present case, the following issues should have been submitted to the jury:

> 1. Was plaintiff's suggestion that insurance proceeds be returned to the insurance company a substantial factor in defendant's decision to terminate her employment?
>
> 2. If so, would defendant have terminated plaintiff's employment even if she had not suggested that insurance proceeds be returned to the insurance company?

With the issues worded in this fashion, the termination becomes wrongful only when both issues are answered favorably to the employee. This more accurately reflects the standard established by *Brooks*.

Defendant brings forth several assignments of error as a cross-appeal. Defendant contends that the trial court erred in denying defendant's motion for a directed verdict at the close of plaintiff's evidence. The trial court should deny a motion for directed verdict when it finds there is any evidence more than a scintilla to support plaintiff's *prima facie* case in all its constituent elements. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580-81 (1983). The evidence in the present case, taken in the light most favorable to plaintiff, established her *prima facie* case and warranted the issue going to the jury. Therefore, the trial court properly denied defendant's motion for a directed verdict. We have reviewed defendant's remaining assignments of error and find them to be unpersuasive.

In sum, we hold the jury instructions submitted to the jury improperly allowed for inconsistent answers, and we remand this case for a new trial.

New trial.

Judges MARTIN, John C., and JOHN concur.

GUILFORD COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY *EX REL.* TIMOTHY RANDOLPH EASTER v. BETSY JILL DAVIS EASTER (McALPIN)

No. 9418DC682

(Filed 19 September 1995)

Divorce and Separation § 385 (NCI4th); Parent and Child § 29 (NCI4th)— mother's support obligation—reduction by grandparents' contribution—error

The trial court erred in reducing defendant mother's child support obligation because of her parents' contribution to the support of the minor children living with the father, since defendant could not transfer her support responsibilities to her parents; the grandparents were under no legal obligation to offer support to the children, and their gratuitous contribution did not diminish the reasonable needs of the children or reduce the parent's obligation; the court made no findings on the reasonable needs of the children; and while the court concluded that application of the guidelines would be unjust and inappropriate, it failed to indicate how and to whom it would be unjust.

Am Jur 2d, Divorce and Separation § 1078.

Income of child from other source as excusing parent's compliance with support provisions of divorce decree. 39 ALR3d 1292.

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

Appeal by plaintiff from an order entered 28 January 1994 by Judge Donald L. Boone in Guilford County District Court. Heard in the Court of Appeals 2 March 1995.

Guilford County Attorney's Office, by Assistant County Attorney Joyce L. Terres, for plaintiff appellant.

Wyatt Early Harris Wheeler & Hauser, L.L.P., by Lee M. Cecil, for defendant appellee.

COZORT, Judge.

The issue presented in this case is whether the mother's child support obligation should be reduced when her parents contribute to the support of the minor children living with the father. The trial court concluded that the needs of the children were met by the combined support of the grandparents and the plaintiff father, thereby reducing the child support obligation of the defendant mother. We reverse and remand, holding the trial court's order was based on an erroneous application of the law. The facts and procedural history follow.

Timothy R. Easter and Betsy Jill Davis (now McAlpin) were married on 3 February 1983, separated in 1989, and divorced on 16 September 1991. They had two children who are in the primary custody of plaintiff Timothy Easter. Plaintiff father contracted with the Guilford County Child Support Enforcement Agency which filed a motion to establish child support on behalf of the children on 23 November 1993. Defendant mother filed a Request for Deviation from the Child Support Guidelines on 19 January 1994.

Defendant's request for a deviation from the guidelines was based on the support that her parents provide plaintiff father and the children. Plaintiff and the children reside in a house that is owned by the maternal grandparents and located in close proximity to them. The grandparents pay the water bill and do not charge plaintiff rent. The children spend a great deal of time at their grandparent's home, and plaintiff and the children frequently eat meals there. The grandparents also provide for other needs of the children such as clothing, haircuts, and medical bills. The grandparents provide these and other expenses voluntarily.

Plaintiff earns a gross income of $1,300.00 per month and defendant earns a gross income of $1,392.00 per month. Application of the North Carolina Child Support Guidelines indicates that defendant's child support obligation would be $255.00 per month. This figure takes into consideration medical insurance premiums paid by defendant and a credit for another child living with her not born to the marriage of the parties.

Judge Donald L. Boone heard defendant's motion on 28 January 1994. In an order dated 5 April 1994, Judge Boone found that the "application of the guidelines would exceed the reasonable needs of the children and would be otherwise unjust and inappropriate" due to

the contributions of the maternal grandparents. Among its conclusions of law, the trial court held:

> 3. Based on the foregoing Findings of Fact, the Court concludes that in order to meet the reasonable needs of the children for health, education, and maintenance, having due regard to the estates, earnings, conditions, a custom [*sic*] standard of living of the children and the parties, the child care and homemaker contributions of each party, and other facts of the particular case, defendant should pay to the plaintiff for the support of the minor children the sum of $75.00 twice monthly.

Plaintiff appeals. We reverse the order and remand the case for entry of support according to the guidelines.

N.C. Gen. Stat. § 50-13.4(c) (1994 Cum. Supp.) provides:

> [U]pon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the *application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate* the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Id. (emphasis added). According to the statute, the trial court has the discretion to deviate from the presumptive guidelines in only two situations: (1) when application does not meet or exceeds the reasonable needs of the child; or (2) when application would be unjust or inappropriate.

The standard by which we review a deviation from the guidelines is abuse of discretion. *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993). Upon a timely request to deviate from the guidelines, the trial court is required to make findings of fact and enter conclusions of law relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. *Browne v. Browne*, 101 N.C. App. 617, 623, 400 S.E.2d 736, 740 (1991). If the trial court deviates from the guidelines, the findings of fact

must justify both the deviation and the basis for the amount ordered. *Gowing*, 111 N.C. App. at 618-19, 432 S.E.2d at 914. Absent evidence compelling a different award, the trial court's weighing of its findings giving basis for its award will be respected so long as the record contains evidence sufficient to allow those findings. *Id.* In the present case, the record does not contain evidence sufficient to establish that an application of the guidelines would exceed the reasonable needs of the children or would be unjust or inappropriate.

A father cannot contract away or transfer to another his responsibility to support his children. *Alamance County Hosp., Inc. v. Neighbors*, 315 N.C. 362, 365, 338 S.E.2d 87, 89 (1986). This rule applies to a mother due to the 1981 amendment to N.C. Gen. Stat. § 50-13.4(b) that made both parents primarily liable for support. Consequently, in the present case, defendant cannot transfer her support responsibilities to her parents.

The maternal grandparents are under no legal obligation to offer support to the children, and their contributions should not be taken into consideration when determining whether to deviate from the guidelines. While the contributions of the grandparents have been gracious, they cannot be relied upon as a permanent source of support. A gratuitous contribution from another party does not diminish the reasonable needs of the children nor does it reduce a parent's obligation for support.

The trial court concluded that the children's needs would be exceeded under the guidelines; however, it made no findings on the reasonable needs of the children. Without such a demonstration, it is impossible to determine whether those needs would be exceeded. And, while the trial court also decided that the application of the guidelines would be unjust or inappropriate, it failed to indicate how and to whom it would be unjust. There is no evidence in the record to show that defendant is unable to meet the level of presumptive support or that it would be unjust to order her to meet her obligation. Without these findings or any evidence to support its conclusion, the trial court abused its discretion in deviating from the guidelines.

The support of her parents was the only evidence offered by defendant that the application of the guidelines would exceed the reasonable needs of the children or that it would be unjust or inappropriate. Because this evidence does not support a deviation, defendant failed to offer any evidence justifying a deviation from the guidelines. The trial court's findings were insufficient to justify both a variance

from the guidelines and the basis of the amount ordered. Therefore, we reverse the order of the trial court and remand this case for an entry of support according to the North Carolina Child Support Guidelines.

Reversed and remanded.

Judges GREENE and LEWIS *concur*.

MILES KATH, T/D/B/A KATH & ASSOCIATES, PLAINTIFF, v. H.D.A. ENTERTAINMENT, INC., JOEL KATZ AND NATIONAL MARKETING GROUP, DEFENDANTS

No. COA94-1219

(Filed 19 September 1995)

Courts § 16 (NCI4th)— nonresident defendants—contract performed in North Carolina—exercise of in personam jurisdiction—no violation of due process

The trial court's exercise of *in personam* jurisdiction over the nonresident defendants did not violate due process where there was evidence that defendants sought out plaintiff to perform work for them; plaintiff performed the work in North Carolina; defendants knew the work would be performed in North Carolina; and defendants made numerous trips to North Carolina to check on plaintiff's progress.

Am Jur 2d, Courts §§ 106-109.

Appeal by defendants from order entered 11 August 1994 by Judge James C. Davis in Pender County Superior Court. Heard in the Court of Appeals 23 August 1995.

In March 1992, plaintiff entered into an oral contract with the defendants, two Maryland corporations and one Maryland resident, to provide consulting services and perform, *inter alia*, design work on circuit boards. Defendants paid plaintiff for the work he did through December 1992. Although plaintiff continued to do work for defendants in his shop in Wilmington, North Carolina after December 1992, plaintiff alleges that defendants failed to pay him for his work except for sporadic payments in 1993. In May 1994, plaintiff sued alleging breach of contract, interference with contract, and unfair or decep-

tive trade practices. Defendants moved to remove the case to federal district court in Maryland and to dismiss the case pursuant to G.S. 1A-1, Rule 12(b)(2), alleging that the trial court lacked personal jurisdiction over the Maryland defendants. The trial court denied defendants' motions on 11 August 1994.

Defendants appeal the trial court's denial of their motion to dismiss for lack of personal jurisdiction.

Ray C. Blackburn, Jr. for plaintiff-appellee.

Harry H. Harkins, Jr. for defendant-appellants.

EAGLES, Judge.

We first note that G.S. 1-277(b) provides in part that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant." Accordingly, while the trial court's order is interlocutory, this appeal is properly before us.

Our courts employ a two-step analysis to determine whether a non-resident defendant is subject to personal jurisdiction in North Carolina. "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986). Defendants do not address the first prong of the test, but instead argue only that the exercise of jurisdiction here violates the due process clause of the fourteenth amendment. Accordingly, we address only the issue of whether the trial court's exercise of *in personam* jurisdiction over the non-resident defendants comports with due process.

There are two types of long-arm jurisdiction: "specific" jurisdiction and "general" jurisdiction. *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786. When the controversy arises out of defendants' contacts with the forum state, as is the situation here, the issue is one of "specific" jurisdiction. *ETR Corp. v. Wilson Welding Service, Inc.*, 96 N.C. App. 666, 669, 386 S.E.2d 766, 768 (1990); *Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989). With specific jurisdiction, the court must analyze the relationship among the defendant, the forum state, and the cause of action. *Buck v. Heavner*, 93 N.C. App. 142, 145, 377 S.E.2d 75, 77 (1989). The defendant's minimum con-

tacts with our State must satisfy " 'traditional notions of fair play and substantial justice.' " *ETR Corp.*, 96 N.C. App. at 669, 386 S.E.2d at 768, *quoting International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945).

Here, plaintiff submitted his own affidavit and the affidavits of three people who were familiar with the transactions between plaintiff and defendants. The affidavits provided the following information: Defendants "request[ed]" plaintiff to perform work for them and plaintiff and defendants entered into the contract in North Carolina. When plaintiff and defendants entered into the contract, "[d]efendants knew that all work would be performed within the State of North Carolina and that [plaintiff's] only office or shop was within the State of North Carolina." While plaintiff made "a few trips to Maryland in connection with [the] contract," all the work was performed in North Carolina and defendants' agents made numerous trips to plaintiff's shop in Wilmington to monitor the work.

Defendant Katz submitted an affidavit in which he denied ever entering into a contract in North Carolina. He stated that he first met plaintiff at defendant HDA's offices in Maryland and that plaintiff and defendants entered into the contract at that meeting. Defendant Katz further stated that there was no requirement that plaintiff perform any services in North Carolina. Defendant Katz insisted that defendant HDA had never done business in North Carolina and had never attempted to do business in North Carolina.

North Carolina has a " 'manifest interest' in providing its residents with a convenient forum for addressing injuries inflicted by out-of-state actions." *ETR Corp.*, 96 N.C. App. at 669, 386 S.E.2d at 768. Defendants deny attempting to benefit from North Carolina law by entering the market here. However, there is evidence that defendants sought out plaintiff to perform work for them, plaintiff performed the work in North Carolina, defendants knew the work would be performed in North Carolina, and defendants made numerous trips to North Carolina to check on plaintiff's progress. Accordingly, we conclude that it will not violate "traditional notions of fair play and substantial justice" to require defendants to return to North Carolina courts to resolve this dispute. *See Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 287, 350 S.E.2d 111, 115 (1986) (finding that the "most significant[]" factor in determining the proper forum is who initiated the relationship between the parties). *See also Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E.2d 859 (where we found that

North Carolina lacked jurisdiction over a party that performed all of its services in another state), *review denied*, 300 N.C. 373, 267 S.E.2d 677 (1980).

Affirmed.

Judges LEWIS and JOHN concur.

JACQUELINE BREWER LONG v. THE UNIVERSITY OF NORTH CAROLINA AT WILMINGTON

No. COA94-1279

(Filed 19 September 1995)

1. Colleges and Universities § 13 (NCI4th)— no implied contract for admission to nursing school—alleged promises from faculty—no actual or apparent authority

The evidence was insufficient to raise a genuine issue of fact as to whether there existed an implied contract between defendant university and plaintiff pre-nursing student that she would be admitted into the school of nursing upon her successful completion of the minimum requirements for admission, even if faculty members assured her that she would be admitted, since there was no evidence that those faculty members acted with the actual or apparent authority of the university; the handbook was unambiguous in stating that there was an application process and that admission depended upon recommendation by the committee for student affairs of the school and approval of the nursing faculty; and the university made no false representation to plaintiff.

Am Jur 2d, Colleges and Universities § 17.

2. Estoppel § 18 (NCI4th)— denial of admission to nursing school—representations of faculty advisors—university not estopped

Defendant university was not estopped to deny plaintiff student admission into its school of nursing upon her completion of the minimum requirements for admission, even if her faculty advisors assured her she would be admitted upon her completion of those requirements, where plaintiff's forecast of evidence showed that the school of nursing had an application process separate

from that of the university and thus revealed that plaintiff was misled through her own want of reasonable care and circumspection.

Am Jur 2d, Estoppel and Waiver §§ 26 et seq.

Appeal by plaintiff from judgment entered 2 September 1994 in New Hanover Superior Court by Judge Ernest B. Fullwood. Heard in the Court of Appeals 24 August 1995.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellant.

Attorney General Michael F. Easley, by Associate Attorney General Thomas O. Lawton III, for defendant-appellee.

GREENE, Judge.

Jacqueline Brewer Long (plaintiff) appeals from the trial court's order entering summary judgment in favor of The University of North Carolina at Wilmington (the University).

The record shows that plaintiff attended the University as a pre-nursing student from the fall of 1990 until the spring of 1993, and sought admission into the defendant's School of Nursing—Bachelor of Science Degree Program (the School) in 1993. On 26 March 1993, plaintiff was denied admission to the School, and she brought this suit against the University, a corporate entity, on 21 May 1993, alleging breach of contract, created by representations made by the University and the School that her admission to the School was guaranteed if she completed published minimum requirements and, alleging that the School was estopped to deny her admission.

The evidence included the University's handbook which states that "Admission to the Bachelor of Science degree programs in Nursing . . . requires application to and acceptance by the School of Nursing . . . in addition to acceptance by the university." The handbook also sets forth the minimum requirements for admission to the School, including a "[m]inimum overall cumulative GPA of 2.5" and a "[m]inimum grade of 'C' " in certain required courses. The handbook further states "[a]dmission to the School of Nursing is dependent on university admission, recommendation of the Committee for Student Affairs of the School of Nursing, approval of the nursing faculty and meeting admission criteria, including the completion of required prerequisite courses." The student handbook for the School provides "[a]dmission to the School of Nursing is competitive. Enrolling stu-

dents will be selected from all applicants meeting the following minimum requirements." The minimum requirements set forth in the handbook for the School are the same as those in the University's handbook. There is no dispute that the School of Nursing Faculty Bylaws, which appear in the record, do not grant any member of the faculty the authority to make promises to students concerning admission to the School.

The record further reveals, however, that from 1990 through 1993, plaintiff was "repeatedly assured [by three of her faculty advisors] that [her] performance was such that [she] would be accepted into [the School] without any complications." Furthermore, although the minimum grade point average set forth in the undergraduate catalogue is a 2.5, one of plaintiff's advisors suggested that plaintiff raise her grade point average to a 2.6 or 2.7 to be "quite assured" of admission to the School. Although plaintiff states that she was never told that she may have difficulty gaining admission to the School, Marlene Rosenkoetter, professor and Dean of the School, stated that in January 1993, she informed all pre-nursing students that only "40, 50, or 60 of the approximately 120 students in the class . . . would be admitted" to the School and she advised that the "applicants should consider their options."

There is no dispute that plaintiff fulfilled all of the minimum requirements for admission into the School, including achieving a cumulative grade point average of 2.873. After the School's Committee for Student Affairs evaluated the applications to the School, however, it found that there were "77 qualified applicants for the maximum of 60 positions available in the junior class whose cumulative grade point averages (GPAs) were higher than Ms. Long's." Accordingly, plaintiff was not recommended by the Committee for admission to the School.

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[1] The dispositive issue is whether plaintiff's faculty advisors had either actual or apparent authority to guarantee admission to the School.

The plaintiff contends that the evidence, considered in the light most favorable to her, raises a genuine issue of fact as to whether there existed an implied contract between the University and the plaintiff that she would be admitted into the School upon her successful completion of the minimum requirements for admission. Assuming that the relationship between a student and a university

can be contractual in nature, *see Elliott v. Duke University*, 66 N.C. App. 590, 595-96, 311 S.E.2d 632, 636, *disc. rev. denied*, 311 N.C. 754, 321 S.E.2d 132 (1984) (using contract analysis in suit by student not admitted to university program); *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1977), *cert. denied*, 435 U.S. 971, 56 L. Ed. 2d 62 (1978); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 577 (1988), *cert. denied*, 493 U.S. 810, 107 L. Ed. 2d 22 (1989), the evidence in this case does not support a finding that there was a contract between the parties that insured the plaintiff's admission into the School upon successful completion of the minimum requirements. Even assuming that the faculty members assured the plaintiff that she would be admitted upon successful completion of the minimum requirements, there is no evidence in this record that those faculty members acted with the actual or apparent authority of the University. *Elliott*, 66 N.C. App. at 598-99, 311 S.E.2d at 637-38 (principal not bound by agent unless agent acts with apparent or actual authority). The handbook is unambiguous in stating that there is an application process and that admission to the School depends upon recommendation by the committee for student affairs of the School and approval of the nursing faculty. There is no evidence contradicting the handbook. Thus, any argument that the plaintiff could reasonably have believed that the faculty members with whom she spoke had apparent authority to guarantee her admission is simply not supported in this record.

[2] Similarly, because plaintiff's forecast of the evidence does not reveal that the University made any false representation and because plaintiff's own evidence, that the School had an application process separate from that of the University which all those wishing to attend the School must complete and pass, reveals that plaintiff was misled "through [her] own want of reasonable care and circumspection," estoppel does not apply. *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 11-12, 86 S.E.2d 745, 753 (1955).

Affirmed.

Judges WYNN and MARTIN, John C., concur.

84 LUMBER COMPANY, PLAINTIFF v. CHARLES A. BARKLEY AND JOEL D. CARPENTER, D/B/A PARADIGM BUILDERS, DEFENDANTS

No. COA94-1133

(Filed 19 September 1995)

Limitations, Repose, and Laches § 139 (NCI4th)— involuntary dismissal without prejudice—appropriate time for refiling action

Where plaintiff's action was involuntarily dismissed without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(b), plaintiff's second action was not barred because it was not filed within one year of dismissal; rather, if the action was filed within the applicable statute of limitations, then it was timely filed.

Am Jur 2d, Limitation of Actions §§ 301-318.

Appeal by plaintiff from order entered 10 August 1994 by Judge Joyce A. Brown in Gaston County District Court. Heard in the Court of Appeals 29 August 1995.

On 18 February 1992, plaintiff filed an action in the Gaston County District Court seeking recovery of an alleged debt. Defendant failed to file an answer, and plaintiff took no further action before the court to prosecute its claim. On 29 June 1992, Judge Daniel J. Walton entered an order dismissing the action because "[t]he plaintiff elected not to prosecute this action, and [because] [d]efendant has not filed [an] Answer." In his order, Judge Walton expressly noted that the dismissal was without prejudice.

On 2 May 1994, plaintiff filed a second substantially identical action seeking collection of the same debt. Defendant filed an answer and counterclaim on 27 June 1994. Defendant's answer alleged that Judge Walton's order of 29 June 1992 was an involuntary dismissal under Rule 41(b) of the North Carolina Rules of Civil Procedure, and that because plaintiff had not refiled within one year of the dismissal, plaintiff's claim was barred. After hearing, the trial court dismissed plaintiff's action.

Plaintiff appeals.

Harry Pavilack & Associates, by David C. Haar, for plaintiff-appellant.

Henry L. Fowler, III, for defendant-appellee.

EAGLES, Judge.

In granting dismissal of the second action, the trial court ruled that plaintiff's action was barred because plaintiff failed to refile within one year after plaintiff's previous action had been involuntarily dismissed without prejudice pursuant to Rule 41(b). Plaintiff argues that the second action was timely filed because it was filed within the applicable statute of limitations period. After careful review, we reverse and remand.

Under Rule 41(b), a dismissal operates as an adjudication on the merits, unless the judge specifies that the dismissal is without prejudice. G.S. § 1A-1, Rule 41(b) (1977). Here, the order expressly stated that the 29 June 1992 dismissal was without prejudice. Rule 41(b) states in pertinent part that:

> If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

G.S. § 1A-1, Rule 41(b) (1977). The unambiguous language of Rule 41(b) permits the trial court to affirmatively specify in its order that the action be refiled within a year or less. *Clark v. Velsicol Chemical Corp.*, 110 N.C. App. 803, 809, 431 S.E.2d 227, 230 (1993), *aff'd*, 336 N.C. 599, 444 S.E.2d 233 (1994). The 29 June 1992 order contains no specification whatsoever with regard to the time in which plaintiff may commence a new action based on the same claim. Accordingly, the applicable statute of limitations is controlling with regard to the time in which plaintiff was allowed to refile.

Even if the order had included language purporting to limit the time in which plaintiff could commence a new action to one year or less, defendant's argument would fail. The Rule 41(b) language by which the judge may, in his discretion, grant plaintiff an additional one year or less to refile is often referred to as the "savings provision" of Rule 41(b). *Clark*, 110 N.C. App. at 809, 431 S.E.2d at 230. Although the savings provision of Rule 41(b) is triggered differently than the

savings provision of Rule 41(a) in that Rule 41(b) requires the judge to affirmatively grant extra time, the effect of each savings provision once triggered is the same. With respect to Rule 41(a)(1), the extra time granted:

> [I]s an extension of time beyond the general statute of limitation rather than a restriction upon the general statute of limitation. In other words, a party always has the time limit prescribed by the general statute of limitation and in addition thereto they get the one year provided in Rule 41(a)(1). But Rule 41(a)(1) shall not be used to limit the time to one year if the general statute of limitation has not expired.

Whitehurst v. Virginia Dare Transportation Co., 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973). This same rationale applies to any savings period granted by the judge under Rule 41(b). Accordingly, plaintiff here could refile its action at any time until the expiration of the applicable statute of limitations. The record before us is ambiguous as to the appropriate statute of limitations. Whether plaintiff properly refiled within the time allotted by the applicable statute of limitations is not now before us.

We do not reach the issue of what time for refiling, if any, is available to a plaintiff whose case has been dismissed under Rule 41(b) without prejudice and without a specifically granted savings period, but after the applicable statute of limitations has run. We note, however, that generally if a plaintiff wishes to take advantage of the savings provision under Rule 41(b), it is plaintiff's "responsibility to convince [the court] to include in the order or opinion a statement specifying that plaintiff had [additional time] to refile." *Clark*, 110 N.C. App. at 809, 431 S.E.2d at 230.

Reversed and remanded.

Judges LEWIS and JOHN concur.

IN THE MATTER OF: RONALD DOUGLAS COWLEY

No. COA94-770

(Filed 19 September 1995)

Weapons and Firearms § 16 (NCI4th)— student with gun on school property—gun not operable—adjudication of delinquency proper

A gun need not be operable in order for a student to be adjudicated delinquent under N.C.G.S. § 14-269.2(b) which prohibits the possession of "any gun" on educational property.

Am Jur 2d, Weapons and Firearms § 26, 27.

Appeal by respondent from order entered 26 April 1994 by Judge Sarah F. Patterson in Nash County District Juvenile Court. Heard in the Court of Appeals 21 March 1995.

Attorney General Michael F. Easley, by Associate Attorney General Elizabeth R. Bare and Investigative Law Clerk/Attorney Sondra C. Panico, for the State.

Terry W. Alford for respondent appellant.

COZORT, Judge.

The issue in this appeal is whether a gun must be operable in order for a student to be adjudicated delinquent under the statute prohibiting the possession of "any gun" on educational property. We hold the gun does not have to be operable, and we affirm the trial court's order.

On 7 December 1993, respondent, a fifteen-year-old student at Nash Central Junior High School, admitted to the school's principal that he was in possession of a handgun he had purchased from another student. Respondent showed the gun, a .38 caliber Iver Johnson, to the principal, Robert Spencer. Mr. Spencer testified that the gun was unloaded and that he found no bullets in the possession of respondent. Detective James Resh of the Nash County Sheriff's Department met with Mr. Spencer and respondent and testified that the gun was inoperable because the hammer had been filed down and would not strike the firing pin.

Respondent was charged with a violation of N.C. Gen. Stat. § 14-269.2(b) which makes it a felony to carry a firearm on educa-

tional property. Judge Sarah F. Patterson conducted the hearing in Juvenile Court. At the close of the State's evidence, respondent moved to dismiss on the ground that the gun was inoperable. The trial court denied respondent's motion, and respondent presented no evidence. The court adjudicated respondent delinquent and placed him on intensive probation for twelve months. Respondent appealed.

Respondent contends that N.C. Gen. Stat. § 14-269.2(b) requires that a gun be operable in order to constitute a violation of the statute. We disagree. The statute provides:

> (b) It shall be a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine, or powerful explosive as defined in G.S. 14-284.1, on educational property. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

N.C. Gen. Stat. § 14-269.2(b) (Cum. Supp. 1994). Respondent argues that the North Carolina courts have interpreted three other criminal firearm statutes as requiring operable weapons in order to constitute a violation. We find § 14-269.2(b) is distinguishable from these statutes and does not require that a gun be operable in order to establish a violation of the statute.

The three statutes respondent asks us to compare to § 14-269.2(b) are N.C. Gen. Stat. §§ 14-87, 14-288.8, and 14-415.1. The armed robbery statute, § 14-87, makes it a crime to commit robbery with the use of a weapon "whereby the life of a person is endangered or threatened." N.C. Gen. Stat. § 14-87(a) (1993). That statute is distinguishable because the only way a person's life would be threatened is with the use of an operable gun. The armed robbery statute necessarily implies that the gun be operable. To the contrary, § 14-269.2(b) states it is illegal to carry *any gun* on school property. N.C. Gen. Stat. § 14-288.8(c) is markedly different because it deals with "weapon[s] of mass death and destruction," going into great detail to define these weapons. N.C. Gen. Stat. § 14-288.8 (1993). The focus of § 14-288.8 is considerably different from the concept of *any gun* used in § 14-269.2(b). Finally, § 14-415.1(a) prevents a convicted felon from purchasing, owning, or possessing "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 . . . ." N.C. Gen. Stat. § 14-415.1(a) (1993). We also find this statute encompasses a narrow range of guns, while § 14-269.2(b) prohibits *any gun*,

excluding only "a BB gun, stun gun, air rifle, or air pistol." N.C. Gen. Stat. § 14-269.2(b).

Public policy favors that § 14-269.2(b) be treated differently from the other firearm statutes. The other statutes are concerned with the increased risk of endangerment, while the purpose of § 14-269.2(b) is to deter students and others from bringing any type of gun onto school grounds. The question of operability is not relevant because the focus of the statute is the increased necessity for safety in our schools. The General Assembly has already established the types of guns not encompassed by the statute. It is unnecessary for the courts to add to that list.

The trial court properly adjudicated the respondent delinquent. The order of the trial court is

Affirmed.

Judges JOHNSON and McGEE concur.

STATE OF NORTH CAROLINA v. TONYA BROWN

No. 9319SC968

(Filed 19 September 1995)

Evidence and Witnesses § 285 (NCI4th)— victim's past violence—no showing that defendant knew about violence—no apprehension of bodily harm—evidence properly excluded

In a prosecution of defendant for the murder of her husband, the trial court did not err in excluding testimony by the husband's ex-girlfriend concerning his violent and abusive behavior which occurred six years before defendant shot her husband, since such testimony failed to establish that defendant knew of her husband's abusive behavior toward his ex-girlfriend and that his past violence put her in reasonable apprehension of bodily harm.

Am Jur 2d, Evidence §§ 335 et seq.

Appeal by defendant from judgment entered 2 April 1993 by Judge Russell G. Walker, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 7 June 1994.

Attorney General Michael F. Easley, by Special Deputy Attorneys General Daniel F. McLawhorn and Thomas F. Moffitt, for the State.

Davis Law Firm, by Robert M. Davis, for defendant appellant.

COZORT, Judge.

Defendant Tonya Brown appeals from a judgment imposing a sentence of life imprisonment for the second degree murder of her husband. On 20 September 1994, we remanded the case to the trial court for an evidentiary hearing on the testimony of Gina Russell, an ex-girlfriend of the victim. Defendant contends the trial court erred in excluding Russell's testimony about her abusive relationship with defendant's husband. Defendant contends the evidence would have been relevant to her knowledge of her husband's history of violence and to her fear of him. After reviewing Russell's testimony, we find the trial court did not err in refusing to allow Russell to testify before the jury.

The facts of this case are set forth in *State v. Brown*, 116 N.C. App. 445, 448 S.E.2d 131 (1994).

At the evidentiary hearing before the trial court on 12 December 1994, Russell testified that she began dating defendant's husband in 1983 when she was fifteen years old, before he married defendant. Their relationship ended three years later, in 1986, six years before defendant shot her husband. Russell testified that defendant's husband was "very violent." She recounted episodes where he threatened her at knife point, pushed and kicked her, and engaged in other violent behavior. Russell testified she told a friend to "warn" the defendant about this abuse; however, she did not know whether this friend ever conveyed the message to defendant.

A defendant claiming self-defense may present evidence of the victim's character which tends to show (1) the victim was the aggressor, or (2) the defendant had a reasonable apprehension of death or bodily harm, or both. *State v. Corn*, 307 N.C. 79, 85, 296 S.E.2d 261, 266 (1982).

N.C. Gen. Stat. § 8C-1, Rule 405(b) (1992) provides that specific instances of conduct may be presented as proof of character in cases where a person's character is an essential element of a charge or defense. In self-defense cases, the victim's violent character is relevant only as it relates to the reasonableness of defendant's apprehen-

sion and use of force, which are essential elements of self-defense. *State v. Shoemaker*, 80 N.C. App. 95, 101, 341 S.E.2d 603, 607, *motion to dismiss allowed and disc. review denied*, 317 N.C. 340, 346 S.E.2d 145 (1986). Thus, the victim's conduct in his relationship with Russell becomes relevant only if defendant knew about it at the time of the shooting. *Id.*

Since Russell's testimony failed to establish that defendant knew of her husband's abusive behavior toward his ex-girlfriend, it provides no evidence that the victim's past violence put the defendant in reasonable apprehension of bodily harm. The trial court was correct in excluding Russell's testimony.

Defendant has brought forward several other assignments of error, most of which deal with rulings of the trial court on various evidentiary issues. We have reviewed all assignments of error brought forward, and we find the trial court committed no prejudicial errors.

No error.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. DALLAS HILTON RHOME

No. 942SC27

(Filed 3 October 1995)

1. Constitutional Law § 342 (NCI4th)— defendant excluded from in camera hearing—new trial granted on other grounds

Assuming error by the trial court in conducting an *in camera* proceeding outside the presence of defendant, since the *ex parte* hearing pertained to witnesses against defendant as to only one charge, and defendant was granted a new trial on that charge on other grounds, it was therefore unnecessary to consider whether the State demonstrated the error was harmless beyond a reasonable doubt.

Am Jur 2d, Criminal Law §§ 692 et seq., 910, 911, 916.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 ALR4th 955.

2. Evidence and Witnesses § 977 (NCI4th)— witnesses' hearsay statement—trial court's reliance on race of defendant and witness—prejudicial error

Reliance by the court, however minimal, upon the racial identity of defendant and a witness in admitting into evidence the witness's hearsay statement to an SBI agent under the "catch-all" hearsay exception constituted error, and such error was prejudicial where the objectionable hearsay constituted the prosecution's case against defendant on two charges. N.C.G.S. § 8C-1, Rule 803(24).

Am Jur 2d, Evidence §§ 683 et seq.

Uniform Evidence Rule 803(24): the residual hearsay exception. 51 ALR4th 999.

Admissibility of statement under Rule 804(24) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness. 36 ALR Fed. 742.

3. Embezzlement § 24 (NCI4th)— magistrate charged with embezzling employer's funds—funds actually belonging to someone else—failure to dismiss embezzlement charge—error

The trial court erred in denying defendant magistrate's motion to dismiss the charge of embezzlement where defendant was charged with embezzling "$9.59 in U.S. Currency belonging to [t]he State of North Carolina," but the money actually belonged to the person who had overpaid it and never "belonged," N.C.G.S. § 14-90, to the State as defendant's principal, thereby rendering nonexistent an essential element of the crime charged.

Am Jur 2d, Embezzlement §§ 8, 36 et seq.

4. Judges, Justices, and Magistrates § 49 (NCI4th)— refusal to discharge duties of a magistrate—failure to instruct on duty which was violated—plain error

Defendant is entitled to new trials on the charges of refusal to discharge the duties of a magistrate where the jury, in spite of its request for an instruction as to "what the magistrate's sworn duties are," was never instructed either upon the duties of a magistrate or, more importantly, upon the specific duty alleged in the indict-

ments to have been violated, and the court's omission could properly be characterized as plain error. N.C.G.S. § 14-230.

Am Jur 2d, Judges § 3.

5. False Pretenses, Cheats, and Related Offenses § 7 (NCI4th)— attempt to obtain money by false pretense—no fatal variance between indictment and proof

There was no fatal variance between the indictment and the evidence concerning a charge against a magistrate of obtaining property by false pretense in naming the wrong bank upon which the check in question was drawn since the name of the bank was surplusage not requiring proof; nor was there a fatal variance where the indictment charged defendant with an attempt to obtain money from a named victim but also alleged that funds paid in satisfaction of a worthless check came from the victim's mother, since the elements of the offense were satisfied by evidence tending to establish defendant's attempt to obtain money by false pretense from the person named in the indictment.

Am Jur 2d, False Pretenses § 68; Indictments and Informations §§ 257 et seq.

Appeal by defendant from judgments entered 2 July 1993 by Judge Robert M. Burroughs in Beaufort County Superior Court. Heard in the Court of Appeals 19 October 1994.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Isham B. Hudson, Jr., for the State.

Thomasin Elizabeth Hughes for defendant-appellant.

JOHN, Judge.

Defendant appeals convictions of three counts of obtaining property by false pretense (Count I, Case Nos. 93 CRS 1394-1396), five counts of refusing to discharge the duties of a magistrate (Count II, Case Nos. 93 CRS 1394-1397 and Count II, Case No. 92 CRS 5863), and one count of embezzlement (Case No. 93 CRS 1398). He contends the trial court erred by: (1) holding an *in camera* hearing during trial from which defendant was excluded; (2) admitting certain hearsay testimony; (3) failing to dismiss the charges of embezzlement and of failure to discharge the duties of a magistrate for insufficiency of the evidence; (4) failing to dismiss the charges of failure to discharge the duties of a magistrate on grounds the indictments did not sufficiently

charge a crime; (5) improperly instructing the jury on failure to discharge the duties of a magistrate; (6) failing to dismiss the two counts in Case No. 93 CRS 1395 for fatal variances in the indictment and the evidence presented; and (7) entering judgment on one count of obtaining property by false pretense which the court had dismissed at the close of the evidence. As set out hereinbelow, we find certain of defendant's arguments persuasive.

The State's evidence at trial tended to show the following: At the time of instant charges, Dallas Rhome (defendant) had served as a magistrate in Beaufort County for seven years, having been appointed to the position in January 1985.

Mary Peele (Peele) testified defendant telephoned at her place of employment in June 1992 and reported a $74.00 check she had written to Lowe's had been received by the magistrate's office as a worthless check. Upon Peele's assurances the check would be reclaimed later in the week, defendant indicated he would retain it until she arrived. Peele subsequently paid defendant a total sum equivalent to the amount of the check plus a $20.00 service charge and $55.00 for costs of court although she had never been served with a warrant. Defendant informed Peele he would pay Lowe's and give her a receipt at another time, but she never received a receipt. Peele further declared that when paying worthless checks in the past, she had always received receipts at the magistrate's office.

According to Deborah Johnson (Ms. Johnson), a friend of defendant, she and her mother had dealt with defendant on numerous occasions concerning worthless checks. In October 1991, defendant contacted Ms. Johnson at work and informed her a check payable to Radio Shack in the amount of $211.00 had been delivered to the magistrate's office as a result of insufficient funds. Defendant later arrived at the Johnson's family-owned business and was paid $272.00 by Ms. Johnson's mother who also received no receipt. Defendant told Ms. Johnson he would take the money to Radio Shack and pay the check for her. No warrant was ever served. Ms. Johnson further related she had paid defendant directly for worthless checks on two previous occasions without warrants being issued, stating she had given him the amount of the check and "[a]bout thirty or forty dollars" above the amount without receiving a receipt.

Essie Mae McCarter, Ms. Johnson's mother, testified she had paid defendant for certain of her daughter's worthless checks, but could

not remember the particular incident regarding the check issued to Radio Shack.

Valerie Johnson-Tevaris (Johnson-Tevaris) narrated a circumstance involving a check written to Belk's of Washington that had been returned for insufficient funds. Defendant telephoned at her place of business and informed her she "needed to take care of the check." She thereafter gave money to her mother for payment of the amount of the check plus court costs. No warrant was ever issued.

Evelyn Johnson, Johnson-Tevaris' mother, testified she had "taken money to [the] courthouse and paid it to magistrates" on behalf of her daughter for worthless checks, but that she was unable to recall any amounts or when she had paid them. She remembered speaking to two officers on 30 September 1992, but could not recount any details of the conversation. After being handed a copy of her alleged statement for purposes of refreshing her recollection, she stated, "I don't remember. I just don't remember."

Regina Fisher (Fisher) stated a check she had issued to Multimedia Cable had been returned as a worthless check in July 1992. The company informed her the check had been transmitted to the magistrate's office. When Fisher phoned that office, defendant told her she "could come down there and pay the check off." Defendant directed Fisher to bring the amount of the check and "either $20 or a $50 fee." When she arrived, Fisher paid the requested sum to defendant, but was unable to recall the precise amount. No warrant was ever issued, nor was Fisher given a receipt.

Diane Mumford (Mumford), an employee of Multimedia Cable, related that she had submitted Fisher's check to defendant, who had later telephoned and inquired "Can you come back down here and pick up the money for Regina?" Mumford replied she had never done that before, and defendant commented, "What difference does it make where you get it as long as you get it or how you get it as long as you get it?" Mumford turned the matter over to her supervisor, Marsha Brown (Brown), and had no further contact with defendant.

Brown confirmed defendant had arrived at Multimedia Cable and presented the amount of Fisher's check. She further stated no other magistrate had ever come personally on such an errand, and that "[i]t was something out of the ordinary. We always went through the process of getting it done through the courts."

Other managers and employees of businesses to which the prior witnesses had written checks recounted similar experiences with defendant whereby he compensated them directly for the amount of checks without warrants being issued. They also declared no other magistrate followed this procedure.

Lee Vann Crawford (Crawford) revealed that in 1992 he had paid defendant for two worthless checks in cash by "just paying what he told me how much I had to pay" and that he "knew there was cost of court being involved . . . ." However, when he received a receipt, the total indicated paid was $9.59 greater than the sum of amounts reflected on the receipt for the checks and the costs.

Jerry Ratley (Ratley), Special Agent with the North Carolina State Bureau of Investigation, reported he and another agent had interviewed Evelyn Johnson. Ratley stated Evelyn Johnson recounted she had taken money received from her daughter to the magistrate's office and handed the envelope to defendant. Defendant checked the money and told her the amount was correct, but she was unable to recall exactly how much the envelope contained. Evelyn Johnson was not given a receipt by defendant.

In addition, Ratley indicated he and another agent had questioned defendant 2 October 1992 in the Clerk of Court's office. Defendant acknowledged that since 1991 "he let a lot of people come in and pay off checks before he issued warrants on them." Moreover, "he would call the business and find out what their service fee was on returned checks and he would make people pay that when they came in to pay off the checks." According to Ratley, "Mr. Rhome said that he knew it was wrong for him not to issue warrants against these people but instead to let them come into the magistrate's office and pay the checks off. He said that he was trying to help them." However, defendant denied ever collecting court costs from these individuals.

At the close of State's evidence, the parties entered into certain stipulations for the record. It was agreed that worthless check warrants were never issued by defendant for Regina Fisher, Deborah Johnson, Mary Peele, or Valerie Johnson-Tevaris, and that no money was ever received by the Beaufort County Clerk's Office in payment of those checks.

Following defendant's motion to dismiss all charges, the trial court dismissed the second count in Case No. 93 CRS 1397, obtaining

property by false pretense from Deborah Johnson involving a check issued to Belk's.

Defendant offered no evidence and the court denied his renewed motion to dismiss. Upon the jury's verdicts of guilty, defendant was sentenced to consecutive terms of imprisonment as follows: three years for embezzlement, three years for obtaining property by false pretense, and two years for failing to discharge the duties of a magistrate.

I.

[1] Defendant first argues his exclusion from an *in camera* hearing violated his right to be present at every court proceeding and requires a new trial on all charges.

Article I, Section 23 of the North Carolina Constitution provides that "[i]n all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony . . . ." Under the section, " '[t]he appropriate question is whether there has been any interference with defendant's opportunity for effective cross-examination.' " *State v. Seaberry*, 97 N.C. App. 203, 211, 388 S.E.2d 184, 189 (1990) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, n.17, 96 L. Ed. 2d 631, 647, n.17 (1987)).

Further, "[a] defendant's right to be present at every stage of trial also has a due process component." *Id.* (citation omitted). "[T]his right is not restricted to situations where defendant is actually confronting witnesses or evidence against him, but encompasses all trial-related proceedings at which defendant's presence 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' " *Id.* (quoting 3 W. LaFave & J. Israel, *Criminal Procedure* § 23.2(c) (Supp. 1989)). Under due process analysis, " 'the question is not simply whether "but for" the outcome of the proceeding, the defendant would have avoided conviction, but whether the defendant's presence at the proceeding would have contributed to the defendant's opportunity to defend himself against the charges.' " *Id.* (citation omitted).

Moreover, "[i]f the defendant's absence from [the] proceeding constitutes error, a new trial is required unless the State demonstrates the error was harmless beyond a reasonable doubt." *State v. Daniels*, 337 N.C. 243, 257, 446 S.E.2d 298, 307 (1994), *cert. denied*, 130 L. Ed. 2d 895 (1995) (citation omitted).

In the case *sub judice*, the Assistant District Attorney in open court during trial requested a meeting with the trial judge to discuss a matter "not about this case." The court in chambers stated for the record that the "hearing [was] being held *in camera* with neither the defendant nor his counsel [] present. The District Attorney asked that I address this matter without them being present because of the nature of the situation."

It is undisputed that neither defendant nor his counsel were present in the court's chambers. There is also no disagreement that the *ex parte* conference involved the trial judge, the Assistant District Attorney and two law-enforcement officers, Ratley and S.B.I. Agent Inscoe. The court was informed that two witnesses under subpoena, Valerie Johnson-Tevaris and Evelyn Johnson, had failed to appear in court that morning, and that Evelyn Johnson had stated she did not wish to testify because "she didn't remember anything" about the matters at issue. Agent Ratley reported that Evelyn Johnson had given a long and detailed statement of events the previous year. The court observed that perhaps she was having a "case of convenient amnesia," and thereafter ordered that Evelyn Johnson and Johnson-Tevaris be placed under arrest as material witnesses until called by the State to testify. *See* N.C. Gen. Stat. § 15A-803 (1988).

The prosecutor's conduct in affirmatively misleading defendant cannot be condoned, and we perceive nothing in "the nature of the situation" which would necessitate or excuse conducting the proceeding at issue in the absence of defendant. However, Evelyn Johnson and Valerie Johnson-Tevaris were potential witnesses against defendant only as to the offenses set out in Counts I and II of Case No. 93 CRS 1394. Contrary to defendant's assertion, the instant assignment of error thus affects only Case No. 93 CRS 1394. We grant defendant a new trial on other grounds as discussed hereinbelow on both counts of that case. Therefore, assuming *arguendo* error by the trial court in conducting the *in camera* proceeding outside the presence of defendant, it is unnecessary for us to consider whether the State has "demonstrate[d] the error was harmless beyond a reasonable doubt," *Daniels*, 337 N.C. at 257, 446 S.E.2d at 307, so as to avoid the grant of a new trial in Case No. 93 CRS 1394.

II.

Defendant next contends the trial court erred in Case No. 93 CRS 1394 by admitting under the "catch-all" hearsay exception, Rule 803(24), testimony by Ratley as to the statement given him by Evelyn

Johnson. We agree and award a new trial as to both charges in that case.

We first consider the State's claim that defendant's contention is not properly before us. "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citing N.C.R. App. P. 10(b)(1)).

During the direct examination of Ratley regarding the statement made by Evelyn Johnson, defendant objected, stating:

> Judge, for purposes of the record, I need to interpose an objection although I've done so already.

While arguably this comment standing alone leaves unclear the basis for defendant's objection, we note defendant similarly objected earlier during Evelyn Johnson's testimony. At that point the court conducted an extensive *voir dire* hearing regarding the admissibility of her previous statement under various exceptions to the rule prohibiting hearsay. Based upon numerous findings of fact and conclusions of law, the court admitted the evidence under Rule 803(24). Thus, the grounds of defendant's objection are apparent from the record, and the question is properly preserved for our review.

Evidence presented under the "catch-all" provision of Rule 803(24) is admissible only if that evidence is found by the trial court to have indicia of reliability equivalent to those upon which other recognized hearsay exceptions are based. *See State v. Smith*, 315 N.C. 76, 91-92, 337 S.E.2d 833, 844 (1985). Specifically, the trial court must resolve in favor of the hearsay proponent the following issues: (1) whether proper notice was given under Rule 803(24); (2) whether the evidence is specifically covered by any other hearsay exception; (3) whether the evidence possesses certain circumstantial guarantees of trustworthiness, (4) is material to the case at bar and (5) is more probative on an issue than any other evidence procurable through reasonable efforts; and (6) whether the admission of such evidence will best serve the interests of justice. *State v. Agubata*, 92 N.C. App. 651, 656, 375 S.E.2d 702, 705 (1989) (citing *State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986)).

Defendant initially challenges the court's refusal to rule upon the matter of notice. However, the record reveals the prosecution gave

written notice of its intent to offer testimony under the catch-all exception. *See Agubata*, 92 N.C. App. at 657, 375 S.E.2d at 705-06 (letter written to prosecutor advising her of defendant's plan to introduce evidence under 803(24) sufficient notice). Therefore, defendant's assertion of lack of notice is unavailing. *Cf. In re Hayden*, 96 N.C. App. 77, 82, 384 S.E.2d 558, 561 (1989) (testimony properly excluded where record discloses notice requirement not satisfied) (citation omitted).

[2] Defendant further objects to the "court's overt consideration of race" in its determination of whether the statement by Evelyn Johnson to Agent Ratley was trustworthy. Defendant argues this factor had no bearing on the court's analysis and was "not only irrelevant, but highly improper, and standing alone should be deemed sufficient to require a reversal of the court's ruling."

In the process of setting out its findings regarding the admissibility of Ratley's recitation of his pre-trial interview with Evelyn Johnson, the trial court stated:

> As I noted earlier, the defendant was a black magistrate here in Beaufort County at the time and these cases up to this point have involved witnesses who were black and who had paid off checks that the magistrate had received for processing.

The State argues the circumstances noted by the court

> were not relied upon to support the trial judge's conclusion concerning the reliability of the prior statement, but rather were made to support his conclusion that the witness's [sic] prior statement was more probative on the point for which it was offered than any other evidence which the proponent could now procure through reasonable efforts.

The State's contention is belied by the record. The following appears in the trial transcript beginning on the page immediately preceding that containing the court's statement noted above:

> THE COURT: I'm going to have to make some findings. . . . The most significant requirement [under Rule 803(24)] is that the statement possess circumstantial guarantees of trustworthiness . . . . And in evaluating the reliability of the statement, I will look at the criteria which would include an evaluation of credibility of an in-court witness. The in-court witness was served with a subpoena and failed to honor the subpoena. An in-court witness had

> an order of arrest issued for her to bring her to court today. The in-court witness could not remember events that took place. The in-court witness was given the statement taken by SBI agent on September 30, 1992 and could not remember the content of that statement.
>
> . . . .
>
> Statement contains material which is detrimental to the defense and conversely it contains material which is advantageous to the prosecution of the State.

The challenged portion of the court's findings immediately follows.

It is well-established that certain factors may properly be relied upon in deciding whether hearsay evidence under Rule 803(24) possesses the requisite "circumstantial guarantees of trustworthiness," *Agubata*, 92 N.C. App. at 656, 375 S.E.2d at 705: (1) assurance of personal knowledge of the underlying event by declarant; (2) declarant's motivation to be truthful or untruthful; (3) whether declarant ever recanted the statement; and (4) the practical availability of declarant at trial for meaningful cross-examination. *Smith*, 315 N.C. at 93-94, 337 S.E.2d at 844 (citations omitted).

While the trial court may have intended otherwise, the unavoidable implication of its finding is that because both defendant and the witness were members of the black race, the witness thereby possessed some type of motivation to protect defendant from prosecution by offering untruthful testimony at trial. Any judicial suggestion that racial correlation between defendants and witnesses constitutes an important factor in determining the reliability of a witness' testimony is at best inappropriate. *See Batson v. Kentucky*, 476 U.S. 79, 87-88, 90 L. Ed. 2d 69, 81-82 (1986) ("Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.' ") (citation omitted); *see also State v. Cofield*, 320 N.C. 297, 303, 357 S.E.2d 622, 625 (1987) ("[e]xclusion of a racial group from jury service . . . entangles the courts in a web of prejudice and stigmatization"; selection of grand jury foreperson therefore must be based on racially neutral criteria.).

Moreover, the trial court's finding was irrelevant to the matter under consideration, i.e., the trustworthiness of Evelyn Johnson's *original* report to Ratley.

> The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed *at the time the statement was made, and do not include those that may be added by using hindsight.*"

Huff v. White Motor Corp., 609 F.2d 286, 292 (7th Cir. 1979) (emphasis added). The racial identity of the witness and defendant had no bearing on the reliability of comments made by Evelyn Johnson when first interviewed by SBI agents. *See also Idaho v. Wright*, 497 U.S. 805, 820, 111 L. Ed. 2d 638, 655-56 (1990) ("particularized guarantees of trustworthiness" must be drawn from the totality of the circumstances surrounding declarant at time of statement which render declarant worthy of belief).

While other findings of the court directed to the circumstances of Evelyn Johnson's original statement arguably furnish sufficient indicia of reliability to support admission of Ratley's hearsay account under Rule 803(24), we are unable to determine from the record the weight accorded the factor of race. However, entry by the court of its finding in the record indisputably indicates the factor was considered by the court in its decision. Because of the "pernicious," *Batson*, 476 U.S. at 88, 90 L. Ed. 2d at 81, nature of the inappropriate and irrelevant finding, we conclude that reliance by the court, however minimal, upon the racial identity of defendant and the witness in admitting the latter's hearsay statement into evidence constituted error.

"It is well established that the erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986). " '[T]he appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued.' " *State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981) (quoting *State v. Cross*, 284 N.C. 174, 200 S.E.2d 27 (1973)); N.C. Gen. Stat. § 15A-1443 (1988). The issue of whether error is reversible must be resolved in light of all surrounding circumstances. *State v. Heath*, 77 N.C. App. 264, 271, 335 S.E.2d 350, 355 (1985), *rev'd on other grounds*, 316 N.C. 337, 341 S.E.2d 565 (1986) (citation omitted).

Ratley recited Evelyn Johnson's hearsay account in pertinent part as follows:

> Ms. Johnson said that she is Valerie Johnson's mother. Ms. Johnson said that she took some money to the magistrate's office

> for Valerie, to pay off a check. . . . She said that she took the money in the envelope to the magistrate, Dallas Rhome. She said that she did not count the money. . . . She said that she asked Mr. Rhome if the amount was right. She said that he counted it and told her it was. Ms. Johnson said that she did not know how much money was in the envelope, but when Mr. Rhome counted it she saw the denominations of some of the bills. She said that there was at least one $100 bill, one $10 bill and one or more $20 bills. . . . Ms. Johnson said that when she gave the money to the magistrate, he stacked it by the telephone. She said that the magistrate told her the money was all right. Ms. Johnson said that Mr. Rhome did not give her a receipt.

This testimony comprised the only evidence tending to show misconduct by defendant with respect to the charges involving Valerie Johnson-Tevaris. When Johnson-Tevaris testified, she was unable to remember the specific amounts of any checks turned into the magistrate's office. Moreover, Johnson-Tevaris herself did not go to that office and couldn't "say what [her mother] did with the money." Evelyn Johnson did not recall at trial any of the events in question. Thus, Ratley's hearsay account of Evelyn Johnson's statement in essence constituted the prosecution's case against defendant on the two charges involving the check issued by Johnson-Tevaris. The trial court committed reversible error by admitting that statement into evidence based in part on the court's consideration of the racial identity of defendant and Mrs. Johnson. Accordingly, we grant defendant a new trial with respect to both counts in case 93-CRS-1394. (As to Count II, a new trial is granted upon independent grounds as indicated in paragraph V below.)

III.

[3] Defendant's next assignment of error asserts the trial court improperly denied his motion to dismiss the charge of embezzlement, Case No. 93 CRS 1398. We agree.

The State argues defendant has failed to comply with Rule 10(b)(3) of the Rules of Appellate Procedure which requires a motion to dismiss to be made at the close of the evidence in order to preserve for our review the question of sufficiency of the evidence. Our examination of the record reflects defendant proffered such a motion in the trial court, and we therefore reject the State's contention.

In ruling upon a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, which is entitled to every reasonable inference to be drawn therefrom. *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985) (citations omitted). If there is "substantial evidence" of each element of the charged offense and of defendant being the perpetrator of the offense, the motion should be denied, *State v. Riddick*, 315 N.C. 749, 759, 340 S.E.2d 55, 61 (1986) (citing *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982)). "Substantial evidence is that amount of evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citing *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981)).

In order to convict a defendant of embezzlement, the State must prove three distinct elements: (1) defendant, being more than sixteen years of age, acted as an agent or fiduciary for his principal; (2) defendant received money or valuable property of his principal in the course of his employment and by virtue of the fiduciary relationship; and (3) defendant fraudulently or knowingly and willfully misapplied or converted to his own use such money or valuable property. *State v. Melvin*, 86 N.C. App. 291, 298, 357 S.E.2d 379, 383 (1987) (citation omitted).

Defendant was charged with embezzling "$9.59 in U.S. Currency belonging to [t]he State of North Carolina." He contests the sufficiency of the evidence regarding the second element of embezzlement. Specifically he maintains his principal, the State of North Carolina, possessed no property interest in the $9.59 he allegedly received from Lee Vann Crawford.

The evidence tended to show Crawford paid defendant the sum of $363.00 while the amount due was actually $353.41, a difference of $9.59. In his capacity of magistrate, defendant was statutorily permitted only to collect the amount of the worthless check, and any related fees or court costs. N.C. Gen. Stat. § 14-107; N.C. Gen. Stat. §7A-273(6). Any amount overpaid by Crawford rightfully remained his property and subject to return upon being claimed. Thus, the $9.59 never "belonged," G.S. § 14-90, to the State as defendant's principal, thereby rendering nonexistent an essential element of the crime charged. The trial court therefore erred by denying defendant's motion to dismiss the charge of embezzlement. Accordingly, the judgment in Case No. 93 CRS 1398 is reversed.

IV.

Defendant next argues the indictments alleging defendant's failure to discharge the duties of a magistrate did not sufficiently charge a crime. However, the State correctly points out that no assignment of error appears in the record relating to this issue.

Defendant moved to amend the record on appeal 16 February 1994. He sought to add "Assignment of Error No. 44" asserting the indictments as to each charge of failing to discharge the duties of a magistrate "failed to sufficiently allege a crime." Defendant's motion was denied by this Court. Therefore, this argument of defendant must fail as there appears no assignment of error upon which he can base his argument. *See* N.C.R. App. P. 10(a).

V.

[4] Defendant further questions whether there existed sufficient evidence to support submission to the jury of the charges of refusing to discharge the duties of a magistrate, Case Nos. 93 CRS 1394, 1395, 1396, 1397, and 92 CRS 5863. He contends no evidence was presented at trial that issuance of warrants is a required duty of a magistrate. Whether or not this argument has merit, we nonetheless must allow new trials in these cases on the basis of defendant's corresponding contention that the jury was improperly instructed regarding his alleged failure to discharge the duties of a magistrate. As we have previously awarded defendant a new trial in Case No. 93 CRS 1394, we note the reasoning herein provides an additional basis for awarding a new trial in Count II of that case.

The State insists the assignment of error upon which defendant's latter argument is based "is an egregious violation of N.C. R. App. P. 10(c)(1) because of the innumerable distinct errors of law it purports to assign." Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure states in pertinent part:

> Each 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.

"An assignment of error which 'attempts to present several different questions of law in one assignment [is] . . . broadside and ineffective.' " *State v. McCoy*, 303 N.C. 1, 19, 277 S.E.2d 515, 529 (1981) (citations omitted).

The assignment of error challenged by the State reads:

> The trial court's instructions to the jury on the elements of the offenses of obtaining property by false pretense, embezzlement, and refusing to discharge the duties of a magistrate, on the grounds that the instructions misstated the law, were too vague to sufficiently guide the jury, permitted the return of guilty verdicts without a finding of all the elements of the offenses, and on the grounds that the court's action was in violation of the Fifth, Sixth, and Fourteenth Amendments and Article I, §§ 18, 19, and 23 of the North Carolina Constitution, and was otherwise contrary to North Carolina statutory and common law.

Defendant's argument not only challenges the court's instructions misstated the law and were too vague, but further alleges numerous constitutional violations. While this indeed may amount to a violation of the appellate rules, *see Fine v. Fine*, 103 N.C. App. 642, 644-45, 406 S.E.2d 631, 633 (1991), neither the alleged constitutional violations nor the court's instructions on the offenses of false pretense and embezzlement (Count I, Case Nos. 93 CRS 1395, 93 CRS 1396, and 93 CRS 1397, and Case No. 93 CRS 1398) were ever discussed in defendant's brief. These arguments are thus in any event deemed abandoned. N.C.R. App. P. 28(a). We elect in our discretion to consider defendant's argument concerning the charges of failing to discharge the duties of a magistrate. *See* N.C.R. App. P. 2.

Defendant failed to object to the trial court's instructions as to those charges or request a specific instruction. On appeal, he concedes this question consequently has not been properly preserved for our review. *See* N.C.R. App. P. 10(b)(2). Notwithstanding, defendant urges this Court to apply the "plain error" rule. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "In order to obtain relief under this doctrine, defendant must establish . . . error, and that, in light of the record as a whole, the error had a probable impact on the verdict." *State v. Bell*, 87 N.C. App. 626, 635, 362 S.E.2d 288, 293 (1987) (citation omitted).

N.C. Gen. Stat. § 14-230 (1993) states in pertinent part:

> If any . . . magistrate . . . shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor.

The essential elements of the offense therefore include: (1) the willful omission, neglect or refusal to discharge the duties of the office of

magistrate by (2) a magistrate, an official of a state institution rather than a state employee. *State v. Eastman*, 113 N.C. App. 347, 350, 438 S.E.2d 460, 462 (1994). Further, injury to the public must occur as a consequence of the omission, neglect or refusal. *State v. Anderson*, 196 N.C. 771, 773, 147 S.E. 305, 306 (1929).

It is well established that

> [t]he defendant in a criminal action has a right to a full statement of the law from the court. Failure to specifically charge the jury on every element of each crime with which the defendant is charged is not error per se, requiring reversal, but reversal is mandated in such a case if the jury consequently falls into error.

75A Am. Jur. 2d *Trial* § 1124, at 642 (1991) (emphasis added). Thus, in instructing the jury, the trial court must "*correctly* declare and explain the law as it relates to the evidence." *State v. Watson*, 80 N.C. App. 103, 106, 341 S.E.2d 366, 369 (1986); *see also Bird v. United States*, 180 U.S. 356, 361, 45 L. Ed. 570, 573 (1901) ("The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other . . . .").

Moreover,

> [t]he rule that instructions are to be confined to the issues applies in criminal cases. *Instructions must be tailored to the charge and the indictment, and adjusted to the evidence.*

75A Am. Jur. 2d *Trial* § 1178, at 677 (1991) (emphasis added). Accordingly, the jury charge must relate each and every essential element as alleged in the indictment.

In *State v. Davis*, 253 N.C. 86, 116 S.E.2d 365 (1960), *cert. denied*, 365 U.S. 855, 5 L. Ed. 2d 819 (1961), the indictment alleged defendant "unlawfully, willfully, feloniously while perpetrating felony, to-wit; rape, kill and murder Foy Bell Cooper . . . ." *Id.* at 88, 116 S.E.2d at 366. On appeal following conviction of first degree murder, defendant challenged the trial court's jury instructions. Our Supreme Court held:

> The bill of indictment as drawn required the State to satisfy the jury by the evidence beyond a reasonable doubt that the prisoner murdered Foy Bell Cooper in the perpetration or attempt to perpetrate the crime of rape in order to justify a verdict guilty of murder in the first degree.
>
> . . . .

> *By specifically alleging the offense was committed in the perpetration of rape the State confines itself to that allegation in order to show murder in the first degree.* Without a specific allegation, the State may show murder by any of the means embraced in the statute.

Id. at 98-99, 116 S.E.2d at 373 (emphasis added).

In *State v. Wynne*, 246 N.C. 686, 99 S.E.2d 923 (1957), Desmo Wynne (Wynne), Bryant Moran, E.C. Brown, and Mary Hanson were charged with "having engaged in a riot in the town of Williamston." *Id.* at 686, 99 S.E.2d at 923. Following their convictions, Wynne challenged on appeal the sufficiency of the jury charge which read as follows:

> If you find from the evidence in this case and beyond a reasonable doubt that Desmo Wynne assembled together with two or more other persons of his own authority and they all had an intent mutually to assist each other in [precipitating the riot], then you should return a verdict of guilty as to the defendant Desmo Wynne.

Id. at 687, 99 S.E.2d at 924.

Our Supreme Court reasoned:

> The bill of indictment charged that the three appellants and Mary Hanson committed the offense. Therefore, *in order to convict any defendant, it was necessary for the State to prove that he participated with at least two of the three others charged.* Nevertheless, the court instructed the jury it might convict any defendant if it be found he participated with *two or more other persons.* To have justified this instruction the indictment should have charged the named defendants *and others* committed the acts constituting the offense.

Id. at 688, 99 S.E.2d at 924 (partial emphasis added). The Court held that since it was "impossible to tell whether the jury found each appellant engaged in a riotous assembly with as many as two of the other three named [in the indictment] or whether he so engaged with any two or more of the assembled multitude," Wynne was entitled to a new trial. *Id.*

In *State v. Mickey*, 207 N.C. 608, 178 S.E. 220 (1935), the bill of indictment read in pertinent part as follows:

> That Harrison Mickey . . . unlawfully, wilfully, maliciously, and feloniously did secretly conspire and confederate with Robert H. Murphy and Howard Griffin to kill and murder one W. W. Dick . . . .

Id. at 608-09, 178 S.E. at 220-21. Defendant excepted to the following instruction to the jury:

> The burden is on the State to satisfy you beyond a reasonable doubt that this defendant is guilty of agreeing together with Griffin or Murphy, or both of them, or others to do an unlawful thing, to wit, kill W. W. Dick, before this defendant would be guilty of violating the law.

Id. at 609, 178 S.E. at 221.

On appeal, the Court held the instruction which allowed the jury to convict defendant if they found he conspired with "others" to kill W. W. Dick was prejudicial error requiring a new trial. *Id.*

> The bill of indictment nowhere contains the words "others" or "another," or any other word or phrase indicating a charge against the defendant of conspiring with any other person or persons than Murphy and Griffin. The charge of his Honor virtually puts the defendant upon trial for an additional offense to that named in the bill, namely, conspiring with others than Murphy and Griffin.

Id.

Bearing the foregoing authorities in mind, we examine the pertinent indictments in the case *sub judice* which read:

> And the jurors for the State upon their oath present that on or about the ___ day of __________, 19__, in the county named above the defendant named above unlawfully, willfully and corruptly while engaged in the performance of his duties as a magistrate, did omit, neglect, or refuse to discharge a duty of his office *by failing to issue a warrant* . . . .

(emphasis added). Thus, as in *Davis*, the indictments alleged a specific act as constituting violation of the statute.

However, the trial court herein instructed the jury:

> The defendant has been accused of failing to discharge the duties of magistrate. In order for you to find the defendant guilty, the

> State must prove beyond a reasonable doubt, one, that the defendant was an official of the [S]tate of North Carolina. A Beaufort County, North Carolina Magistrate is an official of North Carolina.
>
> And secondly, that he willfully failed to discharge the duties of his office. Willful means intentionally and without justification or excuse.
>
> Thirdly, that there was injury to the public.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged dates the defendant was an official of the [S]tate of North Carolina and that he willfully failed to discharge the duties of his office and that there was an injury to the public, it would be your duty to return a verdict of guilty.

In addition, shortly after beginning deliberations, the jury re-entered the courtroom with certain inquiries, including "what the magistrate's sworn duties are." The jurors were permitted to examine a copy of defendant's oath of office (State's Exhibit 17) pledging, *inter alia*, that defendant would:

> faithfully and impartially discharge all the duties of Magistrate of the District Court Division of the General Court of Justice . . . .

The jury therefore was never instructed either upon the duties of a magistrate or, more importantly, upon the specific duty alleged in the indictments to have been violated. While the State concededly was not required to allege any specific act, *see State v. Kennedy*, 320 N.C. 20, 25, 357 S.E.2d 359, 363 (1987) (citation omitted), having done so, it was confined to the particular act specified. *Davis*, 253 N.C. at 99, 116 S.E.2d at 373. Moreover, the trial court was required to issue instructions "tailored to the charge and the indictment." *See* 75A Am. Jur. 2d *Trial* § 1178, at 677 (1991). We therefore hold the court's failure to include in its charge the underlying "duty" of a magistrate set out in the indictments was error.

In addition, we believe the court's omission may properly be characterized as "plain error." Assuming *arguendo* without deciding that the warrant-issuing "power" of a magistrate, *see* N.C. Gen. Stat. § 7A-273 (1989 & Cum. Supp. 1994), constitutes a "duty" to issue a warrant, it appears the jury below was permitted to reach its verdicts in the affected cases solely upon its own speculation and without

guidance from the trial court regarding the duties of a magistrate generally, much less the specific "duty" alleged to have been neglected. *See Mickey*, 207 N.C. at 610-11, 178 S.E. at 220-21 and *Wynne*, 246 N.C. at 688, 99 S.E.2d at 924; *cf. Kennedy*, 320 N.C. at 25, 357 S.E.2d at 363 (defendant's argument his right to unanimous jury verdict violated where indictments charging him with sexual offense did not allege specific act rejected where bills of particular specified act in each case and trial court in its instructions "assigned correlating specific alleged acts of sexual offense to each indictment"); *cf. also State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990) (crime of indecent liberties a "single offense which may be proved by evidence of the commission of any one of a number of acts," and trial court properly instructed jury in the alternative).

The absence of definition in the court's instructions as to the duties of a magistrate is further highlighted by the jury inquiry on this precise point following completion of the court's charge. We therefore hold " 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty,' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)), and thus constituted "plain error."

Consequently, we award defendant a new trial in Count II of Case Nos. 93 CRS 1394, 1395, 1396, 1397, and Count II of Case No. 92 CRS 5863 on the charge of failing to discharge the duties of a magistrate.

VI.

[5] Defendant also claims there existed a fatal variance between the indictment and the evidence concerning the charge of obtaining property by false pretense contained in Count I of Case No. 93 CRS 1395. We disagree.

The State reasserts its objection that this argument appears in violation of Appellate Rule 10(c)(1). Without commenting further on the State's claim, we elect to address defendant's contention. *See* N.C.R. App. P. 2.

"It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegations and the proof must correspond." *State v. Muskelly*, 6 N.C. App. 174, 176, 169 S.E.2d 530, 532 (1969) (citations omitted).

The challenged portions of the indictment in question read as follows:

> [T]he defendant named above unlawfully, willfully and feloniously did with intent to cheat and defraud obtaining and *attempt to obtain money in the amount of $55.00 from Deborah Johnson* by means of a false pretense.
>
> . . . .
>
> [D]efendant . . . did collect a total of $260.00-270.00 in U. S. Currency from Essie Mae McCotter to be used as payment for a worthless check *drawn on a Cooperative Savings and Loan account* and issued by Deborah Johnson to Radio Shack . . . .

(emphasis added).

Defendant maintains first that the evidence at trial indicated the check at issue was drawn on Wachovia Bank and not Cooperative Savings and Loan, and second that the money used to pay the check came from Essie Mae McCarter not Ms. Johnson, the alleged victim. Defendant argues each comprises a fatal variance.

As to defendant's first contention, the prosecutor below conceded that the evidence reflected the Deborah Johnson Radio Shack check was drawn on Wachovia Bank. He argued, however, that "whether or not Cooperative Savings and Loan is the right bank does not go to the issue of whether or not he accepted money for payment of the check and the court cost. The offense is accepting the court cost and not remitting it to the clerk's office."

We agree the variance between the bank name set out in the indictment and that reflected in the evidence is not fatal. "Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677 680 (1972); *see also State v. Kornegay*, 313 N.C. 1, 31, 326 S.E.2d 881, 902 (1985) (in prosecution of attorney for obtaining $21,000 by false pretense by telling client he had settled a case against her for $125,000 when case had been settled for $104,000, State need only prove defendant settled on or before 27 April 1982, date on which defendant allegedly told client case was settled for $125,000, and allegation in indictment that settlement was completed 14 April 1982 was mere surplusage and did not have to be proven). The name of the bank on which the Deborah Johnson Radio Shack check was drawn did not comprise an element of the crime of obtain-

ing property by false pretense and was therefore surplusage not requiring proof.

We next address defendant's assertion there is a fatal variance within the indictment which charged defendant with an "attempt to obtain money . . . from Deborah Johnson by means of a false pretense," yet also alleged the funds paid in satisfaction of Ms. Johnson's Radio Shack check actually came from her mother, "Essie Mae McCotter."

The evidence at trial tended to show that defendant contacted Ms. Johnson at work for the purpose of informing her a check payable to Radio Shack had been presented to the magistrate's office as a worthless check and that she "needed to take care of it." The gist of the offense alleged in the indictment is the attempt to "obtain[] something of value from the owner thereof by false pretense." *State v. Wilson*, 34 N.C. App. 474, 476, 238 S.E.2d 632, 634, *disc. review denied* and *appeal dismissed*, 294 N.C. 188, 241 S.E.2d 72 (1977). Although the evidence indicated defendant actually obtained payment for the check from Essie Mae McCarter, Ms. Johnson's mother, neither this evidence nor the allegation thereof constituted a fatal variance. The elements of the offense were satisfied by evidence tending to establish defendant's *attempt* to obtain money by means of false pretense from Ms. Johnson. Therefore, the trial court did not err by denying defendant's motion to dismiss Count I of Case No. 93 CRS 1395.

VII.

Defendant's final assignment of error is directed at the trial court's entry of judgment in Count I of Case No. 93 CRS 1397, which had previously been dismissed. This contention is valid.

At the close of all the evidence, the trial court stated "[t]he only thing that I don't think [the prosecution] made out on was that Deborah Johnson false pretense of the November, 1991 check to Belks of Washington." The court accordingly ordered the first count in Case No. 93 CRS 1397 dismissed. However, the record reflects judgment was subsequently issued therein. This was clear error, and we vacate that judgment of the trial court.

In sum:

Case No. 92 CRS 5863, Count II: New trial.

Case No. 93 CRS 1394, Counts I & II: New trial.

Case No. 93 CRS 1395, Count I: No error; Count II: New trial.

Case No. 93 CRS 1396, Count I: No error; Count II: New trial.

Case No. 93 CRS 1397, Count I: Vacated; Count II: New trial.

Case No. 93 CRS 1398: Reversed.

Judges GREENE and WYNN concur.

CHARLENE D. JONES, PLAINTIFF v. PENNY L. KEARNS AND CITY OF WINSTON-SALEM, DEFENDANTS

No. COA94-1012

(Filed 3 October 1995)

1. **Municipal Corporations § 459 (NCI4th)— defendant officer employed by city—officer engaged in governmental function—applicability of governmental immunity**

Defendant city and defendant police officer, in her official capacity, were immune from suit under the doctrine of governmental immunity for damages of $250,000 or less since, at the time of the incident giving rise to plaintiff's alleged injury, the city did not have liability insurance for damages of $250,000 or less; defendant was employed as a police officer by defendant city and assigned to patrol the Dixie Classic Fair in her capacity as a member of the Special Operations Division, Mounted Patrol Unit; she was responding to a fellow officer's radio called for assistance because of a fight and resulting medical emergency when her horse stepped on plaintiff's foot; and it was clear that defendant was performing a governmental function.

Am Jur 2d, Municipal, County, School and State Tort Liability § 104.

2. **Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th)— crowd control at fair—no malice of defendant officer—no special duty owed to plaintiff—officer immune from suit in individual capacity**

The evidence was insufficient to establish a genuine issue as to whether defendant police officer acted with malice in performing her duties or owed a special duty to plaintiff, and defend-

ant therefore was immune from suit in her individual capacity for injuries sustained by plaintiff when a horse ridden by defendant stepped on plaintiff's foot, where the officer was engaged in an attempt to control a large and unruly crowd during a medical emergency at a fair when the alleged incident occurred; nowhere in plaintiff's complaint or deposition did she allege or forecast evidence of malicious or corrupt conduct on the part of defendant officer; and defendant did not know plaintiff and did not undertake any special obligation to protect or perform a service for plaintiff individually.

Am Jur 2d, Sheriffs, Police and Constables § 159.

Judge WYNN concurring in the result only.

Appeal by defendants from order signed 7 July 1994 by Judge Russell G. Walker, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 23 May 1995.

Wood & Bynum, by B. Jeffrey Wood and Robert G. Spaugh, for plaintiff-appellee.

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

MARTIN, MARK D., Judge.

Defendants appeal from a denial of their motion for summary judgment. We affirm in part, reverse in part, and remand.

Plaintiff filed this action 5 October 1993 against defendants Penny L. Kearns (Officer Kearns) and the City of Winston-Salem (the City) seeking money damages for injuries she sustained to her right foot on 6 October 1990 while a patron at the Dixie Classic Fair. The incident occurred when a horse ridden by Officer Kearns, an employee of the Winston-Salem Police Department assigned to the Special Operations Division, Mounted Patrol Unit, allegedly stepped on plaintiff's foot. The defendants denied the material allegations of plaintiff's complaint and pled the affirmative defenses of governmental immunity, public officers' immunity, and contributory negligence.

On 15 April 1994 defendants filed a motion for summary judgment or, in the alternative, partial summary judgment, for damages of $250,000.00 or less on the ground of governmental immunity. On 7

July 1994 the trial court entered an order denying defendants' motion for summary judgment.

At the outset we note the trial court's denial of defendants' motion for summary judgment on the issue of governmental immunity is immediately appealable. *Corum v. University of North Carolina*, 97 N.C. App. 527, 531-532, 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).

On appeal defendants contend the City of Winston-Salem is immune from suit in its governmental capacity for damages of $250,000.00 or less because the City is not indemnified by a contract of insurance for damages of $250,000.00 or less and is not a member of a local government risk pool.

A city may waive immunity in its governmental capacity through 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). However, a city generally retains immunity from civil liability in its governmental capacity to the extent it does not purchase liability insurance or participate in a local government risk pool pursuant to Article 23 of Chapter 58 of the General Statutes. N.C. Gen. Stat. § 160A-485.

At the time of the alleged incident, 6 October 1990, the City did not have liability insurance for damages of $250,000 or less. Although the City did have excess insurance, it was subject to a $250,000.00 retention per incident. Moreover, at the time of the alleged incident, the City was not participating in a local government risk pool pursuant to Article 39 of Chapter 58 of the General Statutes. Because immunity from suit for damages of $250,000.00 or less had not been waived at the time of the alleged incident, the City is entitled to partial summary judgment in its governmental capacity for damages of $250,000.00 or less.

[1] Plaintiff contends the City is not entitled to governmental immunity because the Dixie Classic Fair is a proprietary function. Specifically, plaintiff contends the proprietary nature of the fair converts the provision of municipal law enforcement into a proprietary function and deprives the City of asserting the defense of governmental immunity.

Assuming the application of governmental immunity under the present circumstances were a question of first impression, we believe plaintiff's arguments would carry great force. However, the clear and unambiguous precedent of our Supreme Court mandates that the question of whether the City is entitled to governmental immunity depends upon the mission or purpose of the municipal employee and whether the employee was acting in her official capacity at the time of the alleged negligence. We are bound by this precedent of the Supreme Court in our disposition of this case.

In the absence of governmental immunity, municipal tort liability is generally premised on the doctrine of *respondeat superior*. *See Edwards v. Akion*, 52 N.C. App 688, 279 S.E.2d 894 (1981) (applying *respondeat superior* principles in determining municipal tort liability for conduct of refuse collector), *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981). As a corollary to this principle, our Supreme Court has squarely held that the key inquiry in determining whether a City retains immunity is the mission or purpose of the City's employee at the time of the alleged negligence. *Beach v. Tarboro*, 225 N.C. 26, 28, 33 S.E.2d 64, 65-66 (1945). *See also Rich v. City of Goldsboro*, 282 N.C. 383, 386, 192 S.E.2d 824, 826 (1972) (focus on agent's function allegedly causing injury); *Clark v. Scheld*, 253 N.C. 732, 737, 117 S.E.2d 838, 842 (1961) (focus on employee's duty at the time of the injury); *Hodges v. Charlotte*, 214 N.C. 737, 741, 200 S.E. 889, 891 (1939) (focus on whether employee was performing duties incidental to a governmental function).

If at the time of the alleged negligence, the City's officer or employee is performing a governmental function, 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 and employees sued in their official capacity. *Slade v. Vernon*, 110 N.C. App. 422, 426, 429 S.E.2d 744, 746 (1993). In determining whether an activity is governmental, our Supreme Court in *Beach* explained the court must focus on the mission of the city's employee who allegedly caused injury:

> The mission of the town's employee, out of which the alleged injury to the plaintiff arose, is the determining factor . . . not what such employee was called upon to do at other times and places, but what he was engaged in doing at the particular time and place alleged.

Beach v. Tarboro, 225 N.C. at 28, 33 S.E.2d at 65-66. 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).

At the time of the alleged incident, Officer Kearns was assigned to patrol the Dixie Classic Fair in her capacity as a member of the Special Operations Division, Mounted Patrol Unit. More particularly, Officer Kearns was responding to a fellow officer's radio call for assistance at the Midway because of a fight and resulting medical emergency. Plaintiff concedes that Officer Kearns was employed as a police officer of the City of Winston-Salem at the time of the alleged accident. Plaintiff also concedes that, at the time of the alleged accident, Officer Kearns was assigned by the police department to the Dixie Classic Fair. Therefore, after careful examination of Officer Kearns' mission at the time of the alleged negligence, it is clear she was performing a governmental function. Accordingly, the City of Winston-Salem and Officer Kearns, in her official capacity, are immune from suit under the doctrine of governmental immunity for damages of $250,000 or less.

[2] Finally, defendants contend Officer Kearns is immune from suit in her 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. at 428, 429 S.E.2d at 747. 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 absent a showing of malice or corruption. *Piggott v. City of Wilmington*, 50 N.C. App. 401, 402-403, 273 S.E.2d 752, 753-754 (*quoting Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)), *cert. denied*, 303 N.C. 181, 280 S.E.2d 453 (1981).

Plaintiff contends the evidence establishes a genuine issue of whether Officer Kearns acted with malice in performing her duties. Plaintiff also contends Officer Kearns owed a special duty to plaintiff, and therefore may be held liable even if she was engaged in governmental duties.

First, we examine plaintiff's contention the evidence establishes there is a genuine issue of whether Officer Kearns acted with malice in performing her duties.

Plaintiff must allege and prove corruption or malice when the defendant is in the performance of official or governmental duties involving the exercise of discretion. *Wilkins v. Burton*, 220 N.C. 13, 15, 16 S.E.2d 406, 407 (1941). *See also Hare v. Butler*, 99 N.C. App. at 700-701, 394 S.E.2d at 237 (plaintiff must allege and show a forecast of bad faith or malicious intent in order to raise an issue of fact with regard to public officer's immunity); *Jacobs v. Sherard*, 36 N.C. App. 60, 66, 243 S.E.2d 184, 189, *disc. review denied*, 295 N.C. 466, 246 S.E.2d 12 (1978) (where complaint does not allege that law enforcement officers exceeded their authority or acted outside the scope of the duty imposed upon them, dismissal of the officers under Rule 12(b)(6) is appropriate). 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. Allegations of "reckless indifference" are not sufficient to satisfy plaintiff's burden to allege and forecast evidence of corruption or malice. *See Robinette v. Barriger*, 116 N.C. App. 197, 203, 447 S.E.2d 498, 502 (1994), *disc. review denied in part*, 339 N.C. 615, 454 S.E.2d 257 (1995).

Officer Kearns was on duty as a police officer when she responded to a fellow officer's radio call for assistance at the Midway, and therefore was a public official executing a governmental function at the time of the accident. Her decisions in controlling and in dispersing the large and unruly crowd to respond to the medical emergency all constitute discretionary decisions made within the course of her official duties. To survive a motion for summary judgment on the issue of whether Officer Kearns was liable in her individual capacity, therefore, plaintiff must allege and forecast evidence demonstrating Officer Kearns acted corruptly or with malice.

In her complaint plaintiff alleges Officer Kearns was negligent in failing to control her horse while attempting to control a large and unruly crowd during a medical emergency. Nowhere in her complaint or deposition does plaintiff allege or forecast evidence of malicious or corrupt conduct on the part of Officer Kearns. Although plaintiff alleges in her brief on appeal that Officer Kearns displayed a "reckless indifference" to the people in the crowd, this allegation, standing alone, does not satisfy plaintiff's burden, and we hold Officer Kearns is entitled to public officers' immunity.

We next address plaintiff's contention that Officer Kearns owed a special duty to plaintiff, and therefore may be held liable even if Officer Kearns was engaged in a governmental function.

Plaintiff relies on our Supreme Court's decision in *Hipp v. Ferrall*, 173 N.C. 167, 91 S.E. 831 (1917), to support her contention Officer Kearns owed a special duty to plaintiff. In that case the Supreme Court articulated the rule of public officers' immunity:

> It is held in this State that public officers, in the performance of their official and governmental duties involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty unless they act corruptly and of malice.

Id. at 169, 91 S.E. at 832. The Court noted an exception, however, where a public officer undertakes to perform a "special duty" for an individual, such as a clerk who negligently fails to index a docketed judgment. The Court reasoned that, although these duties are in some respects public in their nature, they also involve a duty special to the person injured, and in such case individual liability will attach. *Id.* at 171, 91 S.E. at 833.

We note that more recent decisions cast doubt on the continued vitality of *Hipp* to claims against clerks in their individual capacity who negligently, but in good faith, perform official duties absent specific statutory authorization. *See, e.g., Whitaker v. Clark*, 109 N.C. App 379, 427 S.E.2d 142 (1993) (plaintiff fails to state a claim against Department of Social Services social workers individually for negligence in failing to remove child from father's custody and thus preventing child's death; absent allegations in the complaint separate and apart from official duties, the complaint does not state a claim against the defendants individually); *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993) (plaintiff fails to state a claim against a fire fighter, individually, where fire truck defendant was driving collided with plaintiff's car while fire fighter was responding to the call); *Robinette v. Barriger*, 116 N.C. App. 197, 447 S.E.2d 498 (1994) (no claim stated individually against county environmental health supervisor who allegedly issued permit to plaintiff with false soil data); *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 451 S.E.2d 358 (1994) (where plaintiff alleges city attorney negligently misrepresented the legality of an agreement, the complaint fails to state a claim against city attorney in his individual capacity), *disc. review denied*, 340 N.C. 110, 456 S.E.2d 311, *disc. review denied*, 340 N.C. 260, 456 S.E.2d 519 (1995).

In any event, the facts of this case nevertheless reveal that Officer Kearns undertook no special duty with respect to plaintiff. It is indisputable that Officer Kearns did not know plaintiff and did not undertake any special obligation to protect or perform a service for plaintiff individually. Rather, Officer Kearns had a duty to the general public to keep order at the fair and prevent crime. *See, e.g.*, *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991) (as a general rule police officers act for the public and therefore there is no liability for the failure to furnish police protection to specific individuals), *reh'g denied*, 330 N.C. 854, 412 S.E.2d 550 (1992). Therefore, Officer Kearns is entitled to the defense of public officers' immunity in her individual capacity.

In summary, we reverse in part, having concluded the City and Officer Kearns, in her official capacity, are entitled to partial summary judgment based on governmental immunity for any damages of $250,000.00 or less and, in addition, that Officer Kearns, in her individual capacity, is entitled to summary judgment based on public officers' immunity.

To the extent plaintiff's claim exceeds $250,000.00, the City and Officer Kearns, in her official capacity, are not entitled to the defense of governmental immunity. We therefore affirm the trial court's denial of the City's motion for summary judgment for damages in excess of $250,000.00, and remand to the trial court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judge EAGLES concurs.

Judge WYNN concurs in the result only with separate opinion.

Judge WYNN concurring in the result only.

Because the majority's opinion is based on controlling precedent, I concur with the majority's determination that the City of Winston-Salem and Officer Kearns, in her official capacity, are entitled to partial summary judgment based on governmental immunity for any damages up to and including $250,000.00. I concur in this result only because of constraints of the doctrine of sovereign immunity adopted by our Supreme Court and resulting interpretations. I write separately to emphasize the unfairness of this outcome and to reiterate a view voiced many years ago by then Judge (later Chief Judge) Naomi

Morris that although extensive reasons exist for the abolition of sovereign immunity in tort, "until the Supreme Court or the General Assembly finds these reasons to be persuasive" we are bound by the doctrine of sovereign immunity. *Vaughn v. County of Durham*, 34 N.C. App. 416, 421, 240 S.E.2d 456 (1977); *Steelman v. New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971); *See also, Smith v. State*, 289 N.C. 303, 322, 222 S.E.2d 412, 424-425 (1976).

Summary judgment requires that we view the facts in a light most favorable to the nonmoving party. *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1968). From the plaintiff's perspective, the record establishes that Ms. Jones attended the fair with her two daughters, ages six and eight. They stood in line for one of the rides at the fair, called the "Himalaya" when Officer Kearns entered the area on horseback. In an apparent attempt to disperse people that had assembled in the "Midway" area of the fairgrounds a few feet away from Ms. Jones and her children, Officer Kearns rode her horse directly into the gathering using profanity and shouting to the crowd of people to "move out of the way." The horse became very excited; then lunged sideways and backward into the line of people at the "Himalaya" and stepped on Ms. Jones' foot. The horse remained on her foot for several seconds until another fair patron moved the horse.

The record further indicates that this was not the first time Officer Kearns had been involved in an incident while riding her police horse. Plaintiff's evidence showed that prior to Ms. Jones' injury, Officer Kearns had engaged in a race with a middle-school child, while playing "Cops and Robbers." While chasing the child, the child fell in the path of the horse and the horse kicked the child. The child later received treatment at a local hospital and Officer Kearns' supervisor told her not to race children on the school grounds anymore.

If the issue before us today was whether the facts in the instant case are sufficient to withstand a claim of negligence, there is little doubt that we would find for Ms. Jones and award a trial on the merits. However, because the offending party is a governmental entity and its employee, she gets virtually nothing because our State continues to employ a doctrine of questionable validity—sovereign immunity.

The doctrine of sovereign immunity, or governmental immunity, shields a municipality and its officers or employees sued in their offi-

cial capacity from suit for torts committed while the officers or employees are performing a governmental function. *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). Sovereign immunity is absolute unless the municipality consents to be sued or waives its immunity through the purchase of liability insurance. N.C. Gen. Stat. § 160A-485(a) (1994); *See EEE-ZZZ Lay Drain*, 108 N.C. App. 24, 27, 422 S.E.2d 338, 340 (1992).

The doctrine of sovereign immunity was first adopted by our Supreme Court in 1889 in *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695 (1889). *Steelman v. City of New Bern*, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971). Earlier North Carolina cases had expressly rejected the doctrine. *See, e.g., Smith v. State*, 289 N.C. at 312, 222 S.E.2d at 418 (citing cases that had rejected the doctrine of sovereign immunity prior to *Moffitt)*. The origins of this 'judge-made' doctrine derived from feudal England where " 'the king could do no wrong.' " *Steelman v. City of New Bern*, 279 N.C. at 592, 184 S.E.2d at 241. Following this rationale, the monarchy was sovereign and could not be liable for damage to its subjects. *Id.* at 592, 184 S.E.2d at 241. Accordingly, when a city or town acts in its governmental capacity, the municipality incurs no liability for the negligence of its officers.

It is well established that the doctrine of sovereign immunity has been under vigorous attack for many years. *See, e.g.*, Comment, *Waiving Local Governmental Immunity in North Carolina: Risk Management Programs Are Insurance*, 27 Wake Forest L. Rev. 709 (1992); Norman W. Shearin, Jr., *Municipal Immunity From Tort Liability: Judicial Abrogation*, 5 Wake Forest Intra. L. Rev. 383 (1969); Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 Duke L.J. 888 (1964); James M. Talley, Jr., *Judicial Abrogation of the Doctrine of Municipal Immunity to Tort Liability*, 41 N.C.L. Rev. 290 (1963). As early as 1957, in *Hargrove v. Town of Cocoa Beach*, the Supreme Court of Florida retreated from its previously announced position on sovereign immunity. 96 So.2d 130 (Fla. 1957); Annot., 60 A.L.R.2d 1193; *See Steelman v. New Bern*, 279 N.C. at 593, 184 S.E.2d at 242. In abolishing this doctrine, the Court in *Hargrove* recognized that sovereign immunity "had been erroneously transposed into our democratic system and that the time had arrived to declare this doctrine anachronistic not only to our system of justice, but to our traditional concepts of democratic government." 96 So.2d at 132; Annot., 60 A.L.R.2d at 1195. That Court then held that an individual who suffers a direct per-

sonal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment is entitled to redress for the wrong done. *Id.* at 593, 184 S.E.2d at 242.

When *Steelman* was decided, fifteen jurisdictions, in addition to Florida, had already overruled or greatly modified the doctrine of sovereign immunity in tort actions. 279 N.C. at 593, 184 S.E.2d at 242.[1]

In *Steelman v. New Bern*, our Supreme Court suggested: "It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted." 279 N.C. at 595, 184 S.E.2d at 243. The Court, however, declined to abolish a municipality's sovereign immunity from tort liability for the negligence of its agents acting in the scope of their employment. It reasoned that, although the doctrine was 'judge-made,' the General Assembly had recognized it as the public policy of the State by enacting legislation which permitted municipalities to purchase liability insurance and thereby waive their immunity to the extent of the amount of insurance obtained. *Id.* at 594, 184 S.E.2d at 242-243. The Court further recognized that "despite our sympathy for the plaintiff in this case, we feel that any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court." *Id.* at 595, 184 S.E.2d at 243. Subsequent case law regarding the abolition of the doctrine of sovereign immunity restated the same view expressed in *Steelman* that any changes in the doctrine should come from the General Assembly, not the Court. *See, e.g.*, *Orange Co. v. Heath*, 282 N.C. 292, 192 S.E.2d 308 (1972).

Then, in 1976, in *Smith v. State*, 289 N.C. at 313, 222 S.E.2d at 419, our Supreme Court chose not to defer to the Legislature, but instead, under its own authority abolished sovereign immunity in contract actions. The Court held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." 289 N.C. at 320, 222 S.E.2d at 423-424. In so doing the Court recognized the prevailing consideration that "[a] citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party, . . . [and that] courts are a

1. At the time of *Smith v. State*, 289 N.C. at 313, 222 S.E.2d at 419, an opinion that I later point out, abolished sovereign immunity with regard to contract actions, twenty-four states had judicially abrogated or otherwise modified the doctrine of sovereign immunity as it relates to tort actions against the state.

proper forum in which claims against the state may be presented and decided upon known principles." *Id.* at 320, 222 S.E.2d 423.

Interestingly, in dissent to the majority's view in *Smith*, Justice I. Beverly Lake, Sr., although vigorously arguing that the Court had exceeded its authority in abolishing sovereign immunity in contract actions, astutely pointed out that since the Court had done so, it was error to limit the abrogation to contract actions only:

> Another relatively minor error in the decision is the limitation of the demise of sovereign immunity to actions on contracts. If the courts of North Carolina have jurisdiction to hear and determine Dr. Smith's suit for alleged wrongful discharge from employment, why not Joe Jones' suit for trespass, negligent injury to person or property, or malicious prosecution?

Smith, 289 N.C. at 339, 222 S.E.2d at 412 (Lake, J., dissenting).

The answer to Justice Lake's question is the same now as it was then—our Supreme Court should likewise consider the abolition of sovereign immunity in tort actions. Individuals subjected to injury or death proximately caused by the negligent acts of agents or employees of a municipality who have acted within the scope of their authority are entitled to redress for the wrong done. Reflecting this sentiment, the General Assembly enacted G.S. § 160A-485(a) which provides that a municipality is empowered, *but not required*, to waive governmental immunity by securing liability insurance. Such immunity is waived only to the extent of insurance so secured. Some municipalities have voluntarily relinquished the shield of sovereign immunity by obtaining liability insurance.[2] Given the fact that municipalities are not required to take such action, what would motivate a municipality to purchase insurance and waive its inherent authority to refuse to pay claims for damages? When a city obtains liability insurance, this action reflects a moral response by the city to provide its citizens relief for injuries sustained at the hands of its city's negligent agents or employees. Although it is admirable for some cities to waive sovereign immunity when not required to do so, such responsibility should be a requirement for all. The doctrine of sovereign immunity shields this responsibility.

The unjust and unfair result rendered in the instant case by the application of the doctrine of sovereign immunity compels a reexam-

2. As noted previously, the City of Winston-Salem has waived its sovereign immunity for damages exceeding $250,000.00.

ination of this common law doctrine. Ms. Jones received a 35% permanent partial disability rating for her right foot and a 10% permanent partial disability rating for her right leg as a direct result of the incident at the fair. Additionally, she incurred medical bills in excess of $37,000.00. Yet, Ms. Jones may be left without any remedy if her damages do not exceed $250,000.00. This result can no longer be justified in our modern democratic society. Indeed, over forty years ago, our Supreme Court acknowledged that " 'the current trend of legislative policy and of judicial thought is toward the abandonment of the monarchistic doctrine of governmental immunity.' " *Lyon & Sons, Inc. v. Board of Education*, 238 N.C. 24, 27, 76 S.E.2d 553, 555 (1953). The eighteenth century logic that " 'the king could do no wrong,' " *Steelman v. City of New Bern*, 279 N.C. at 592, 184 S.E.2d at 241, has outlived its time.

STATE OF NORTH CAROLINA v. JAMES HOWARD HENSLEY

NO. 9430SC256

(Filed 3 October 1995)

1. Evidence and Witnesses § 2327 (NCI4th)— alleged sexual abuse—expert's testimony as to cause of post-traumatic stress syndrome—admissibility as substantive evidence prejudicial error

In a prosecution of defendant for first-degree sexual offense, the trial court erred in allowing an expert in the field of clinical psychology to make a statement which did not name defendant specifically but which intimated without question that the cause of the alleged victim's post-traumatic stress syndrome was the sexual abuse inflicted by defendant, since this evidence was erroneously admitted as substantive evidence to prove that the victim suffered a sexual assault by anal penetration and that defendant committed the offense; furthermore, such error was prejudicial where the victim presented diverse versions of the date of the incident and indicated that he sought assistance during the alleged assault from a person who testified that she witnessed no impropriety; no physical evidence supported occurrence of the assault; and the State relied heavily on the medical testimony of the expert as to the victim's mental state following the alleged attack.

Am Jur 2d, Expert and Opinion Evidence § 197.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 ALR4th 879.

2. Evidence and Witnesses § 2545 (NCI4th)— competency of child to testify—inquiry before jury—no plain error

The trial court did not commit plain error in making an unrequested inquiry before the jury into the competency of an eleven-year-old alleged sexual abuse victim to testify.

Am Jur 2d, Witnesses § 213.

Witnesses: child competency statutes. 60 ALR4th 369.

3. Criminal Law § 390 (NCI4th)— court's questions to victim—court's assisting victim down from stand—no expression of opinion

The trial court's actions in asking the victim of alleged sexual abuse if he were doing all right and in assisting the eleven-year-old down from the stand so he would not stumble did not amount to an improper expression of opinion by the court on the credibility of the victim.

Am Jur 2d, Trial §§ 299, 300.

4. Criminal Law § 375 (NCI4th)— denial of jury request to rehear alleged victim's testimony—trial court's improper expression of opinion

Where defendant was accused of sexually abusing an eleven-year-old, and the jury indicated a desire to rehear the alleged victim's testimony, the trial court's denial of the jury's request because requiring the child to recount the testimony would be "very traumatic" and "injurious" to the child clearly indicated that the trial judge believed the minor child to have been a victim of sexual assault, and the trial court thus violated N.C.G.S. § 15A-1232.

Am Jur 2d, Trial 280.

5. Rape and Allied Offenses § 73 (NCI4th)— alleged sexual assault—date of offense—no fatal variance between indictment and proof

No fatal variance existed between the indictment and proof with regard to the date of the offense in a prosecution of defendant for sexual assault on a child where the indictment alleged that the offenses occurred on or about November 23, 1990; both the

victim and the investigating officer testified the offense took place at or around the date indicated; and though defendant brought out some inconsistencies regarding the date of the offense on cross-examination of the victim, a child's uncertainty as to time or date the offense was committed goes to the weight rather than the admissibility of the evidence.

Am Jur 2d, Indictments and Informations § 67; Rape §§ 43, 52.

Appeal by defendant from judgment entered 6 March 1992 by Judge Marvin K. Gray in Haywood County Superior Court. Heard in the Court of Appeals 10 January 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Frank G. Queen for defendant-appellant.

JOHN, Judge.

Defendant was sentenced to a term of life imprisonment upon conviction of first degree sexual offense in violation of N.C. Gen. Stat. §14-27.4 (1993). He contends the trial court erred by: (1) allowing a psychologist to testify as to the cause of the alleged victim's post-traumatic stress disorder; (2) expressing an opinion on the credibility of the alleged victim; and (3) denying his motion to dismiss. We find certain of defendant's arguments to be valid and award a new trial.

The State's evidence tended to show the following: At the time of trial, the alleged victim (hereinafter "J.C.") was an eleven (11) year old male fourth grader. J.C. testified he knew defendant who lived with Barbara Franklin (Franklin) and her young son and teen-age daughter. Franklin was a friend of J.C's mother.

Sometime between 20 and 25 November 1990, J.C. spent the night at the Franklin home. At bedtime, defendant directed J.C. to sleep in the daughter's bedroom. J.C. stated he had gone to bed alone with his clothes off when defendant entered the room and told J.C. to roll over on his stomach. J.C. indicated he did as defendant requested, and then defendant "got on top of me" and "stuck his penis in my butt." J.C. told defendant "get off of me," but defendant replied "[n]o." J.C. called out to Franklin who came into the room and ordered defendant to "go to bed." Defendant commanded J.C. "not to tell anybody" and threatened "[i]f you tell anyone I did this to you, I'll whip you."

On cross-examination, J.C. was unsure about the time the incident allegedly occurred. Defendant elicited testimony to the effect that J.C.'s sister furnished him the dates "of November 20th through the 25th." In addition, J.C. revealed he may have told his mother the incident happened the previous summer, and then subsequently testified November was "wrong" and the events he recounted occurred "last summer."

Following a *voir dire* examination, the trial court determined Dr. Jay Fine would be permitted to testify as an expert in the field of clinical psychology, and further would be allowed to present his diagnosis that the alleged victim suffered from post-traumatic stress disorder. The court also ruled Dr. Fine might relate his opinion as to the cause of that condition, stating "[t]hat's going to be for the jury to evaluate."

Dr. Fine thereafter testified he first examined J.C. on 1 March 1991 at the recommendation of the Haywood County Department of Social Services. He saw J.C. on several occasions following the initial interview. Dr. Fine's "clinical opinion and . . . clinical diagnosis" of J.C. consisted of "three diagnoses": sexual abuse by history, adjustment disorder with mixed disturbance of emotions and conduct, and post-traumatic stress disorder. When questioned about the possible cause of J.C.'s post-traumatic stress disorder, Dr. Fine replied the cause "would be the sexual abuse that he received, was the victim of, specifically anal penetration."

Kenneth Moore, Chief of Police of Hazelwood, North Carolina, reported he received a statement from J.C. on 13 February 1991. Pertinent details included J.C.'s account that the alleged assault occurred between 20 November and 25 November 1990, and that defendant "got on top of me and stuck his privates in my butt hole and it hurt real bad."

At the close of the State's evidence, defendant moved to dismiss on grounds of a fatal variance between the date alleged on the indictment and the proof exhibited at trial. The trial court denied defendant's motion.

J.C's mother was called as a witness by defendant. She testified she first learned of the allegations from J.C. in "October or November" of 1990 and consequently notified Social Services. J.C. told her the incident had occurred the previous summer.

Katherine Scott, Child Protective Services Investigator with the Haywood County Department of Social Services, related she commenced her investigation on 11 February 1991 by interviewing J.C. at his home. J.C. indicated defendant woke him up by getting on top of him, told J.C. to be quiet and "felt his privates." Defendant then turned him over and "stuck it in him."

Barbara Franklin testified defendant never slept in her daughter's room and denied finding defendant "at any time" in the bedroom with J.C. She further maintained she had never witnessed any improper behavior between defendant and J.C.

At the close of all of the evidence, the trial court denied defendant's renewed motion to dismiss. Following conviction and sentence, defendant appealed to this Court.

I.

[1] Defendant first contends the trial court committed reversible error by allowing Dr. Fine to testify J.C.'s post-traumatic stress disorder was caused by "sexual abuse that he received, was the victim of, specifically anal penetration." Defendant specifically maintains this evidence was not allowed as corroborative of J.C.'s testimony, but was received as substantive evidence. In any event, defendant continues, no limiting instruction was given by the trial court. Defendant's argument has merit.

In *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), our Supreme Court resolved the issue surrounding testimony that a prosecuting witness in a sexual assault trial is suffering from post-traumatic stress syndrome. The Court held such evidence may be admitted for certain corroborative purposes. *Id.* at 821, 412 S.E.2d at 890. In reaching this conclusion, the Court reasoned:

> When the complainant testifies at trial that [he or] she has been sexually assaulted, the jury is given the unique and exclusive opportunity to access the credibility of [the] story, both on direct and cross examination. This is accomplished in a manner which is not usually available to the treating physician who generally assumes the veracity of the patient's account in formulating a diagnosis and treatment. The jury is also able to evaluate [the] story in light of other evidence adduced at trial. These factors ameliorate the lack of critical inquiry by therapists and may put the jury in an improved position to determine the complainant's credibility. However, jurors may not completely understand cer-

> tain post-assault behavior patterns of a sexual assault victim and . . . may entertain other misconceptions about the often bewildering nature of the crime of rape. Testimony that the complainant suffers from post-traumatic stress disorder may therefore cast light onto the victim's version of events and other, critical issues at trial. For example, testimony on post-traumatic stress syndrome may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent.

Id. at 822, 412 S.E.2d at 890-91.

The court cautioned, however, that the trial court should always balance the probative value of such evidence against its prejudicial impact under Rule 403 of the Rules of Evidence, and also determine whether it would assist the trier of fact under Rule 702. *Id.* at 822, 412 S.E.2d 891. Finally, the court admonished that this evidence may "[i]n no case . . . be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred." *Id.*

In *State v. Huang*, 99 N.C. App. 658, 394 S.E.2d 279, *disc. review denied*, 327 N.C. 639, 399 S.E.2d 127 (1990), the defendant was charged with attempted second degree rape and assault on a female. *Id.* at 659, 394 S.E.2d at 280. The prosecution presented expert testimony from Dr. Susan Roth, Ph.D., who treated the victim after the alleged attack. *Id.* at 661, 394 S.E.2d at 282. Dr. Roth defined post-traumatic stress disorder and testified in detail as to the symptoms exhibited by the victim. *Id.* at 661-62, 394 S.E.2d at 282. Dr. Roth went on to explain to the jury the trauma as felt by the victim:

> In [the victim's] case in particular, she became very fearful both of *Mr. Huang* and also just more generally, she felt very vulnerable in the world. She also had a sense of real loss about the relationship with *Mr. Huang's* wife. . . . One does not expect a *friend* to attack you, to violate your integrity, to violate your space. . . . So, when it happens at the hands of a *friend*, it violates the sense of trust even more. I think *in terms of justice* what is very important to understand is that [the victim] spent a lot a[sic] time trying to understand how could this have happened, *how could something this unjust* have happened and this again is all part of the psychological process you see in response to a traumatic event.

Id. at 662, 394 S.E.2d at 282.

The dispositive issue on appeal was whether Dr. Roth's testimony regarding post-traumatic stress disorder was admissible. This Court held "that Dr. Roth was qualified [as an expert], that her testimony was helpful to the jury, that it was based on a reliable scientific method, that it was relevant, and that it did not violate the rule prohibiting expert testimony on a witness's credibility." *Id.* at 665, 394 S.E.2d at 284.

However, we concluded that "[t]he probative value of Dr. Roth's testimony was outweighed by the danger of unfair prejudice and therefore its admission violated Rule 403." *Id.* We held "Dr. Roth explicitly implicated defendant in her testimony regarding the effects of the alleged sexual assault on [the victim]," *id.* at 666, 394 S.E.2d at 284, and noted the implication outraged the jurors "about the injustice of defendant's alleged act." *Id.* As such, the testimony was erroneously admitted and was clearly prejudicial to defendant requiring he be given a new trial. *Id.; see also State v. Wilkerson*, 295 N.C. 559, 570, 247 S.E.2d 905, 911 (1978) (physicians should not be permitted to testify battered child syndrome suffered by victim "was in fact caused by any particular person or class of person" since witnesses are in no better position to have such opinion than the jury).

In the case *sub judice*, Dr. Fine's statement, while not mentioning defendant's name specifically, without question intimates the cause of the alleged victim's post-traumatic stress syndrome was the sexual abuse inflicted by *defendant*. This testimony was thus erroneously admitted as substantive evidence to prove J.C. suffered a sexual assault by anal penetration and that defendant committed the offense. *See Hall*, 330 N.C. at 822, 412 S.E.2d at 891.

However, not every error committed by the trial court requires a new trial. "The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983) (citation omitted), and the burden of showing prejudice is on the defendant. *Id.* Defendant must demonstrate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (1988).

The evidence presented at trial somewhat conflicted. J.C. presented diverse versions of the date of the incident. He also indicated seeking assistance from Franklin during the alleged assault, while Franklin insisted she witnessed no impropriety. Moreover, no physi-

cal evidence supported occurrence of the assault. The State relied heavily on the medical testimony of Dr. Fine as to J.C.'s mental state following the alleged attack. On these facts, we believe defendant has demonstrated the reasonable possibility of a different result at trial absent admission of Dr. Fine's opinion as to the cause of J.C.'s post-traumatic stress disorder. *See State v. Jones*, 105 N.C. App. 576, 581, 414 S.E.2d 360, 363 (1992) (defendant entitled to new trial where evidence conflicted and substantive evidence of post-traumatic stress disorder erroneously admitted).

Moreover, assuming *arguendo* that defendant failed to meet his burden of showing prejudice, we nevertheless find further error committed by the trial court which, combined with that set out above, mandates a new trial.

II.

Defendant next maintains the trial judge's statements and conduct towards the victim during trial "constituted an expression of opinion about the credibility of the complaining witness, to the defendant's prejudice." We find one of defendant's arguments persuasive.

N.C. Gen. Stat. § 15A-1222 (1988) provides:

> The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.

Thus, trial judges

> must be careful in what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion. It does not matter whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury.

State v. Sidbury, 64 N.C. App. 177, 178-79, 306 S.E.2d 844, 845 (1983) (citing *State v. Whitted*, 38 N.C. App. 603, 248 S.E.2d 442 (1978)). "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that

the trial judge's action[s] intimated an opinion as to . . . a witness's credibility that prejudicial error results." *Id.* (citation omitted).

[2] Defendant first challenges the court's "*ad hoc* and unrequested inquiry" into the victim's competency to testify:

> THE COURT: [J.C.], how old are you?
>
> THE WITNESS: Eleven.
>
> . . . .
>
> THE COURT: And, what grade are you in in school?
>
> THE WITNESS:: Fourth.
>
> THE COURT: Has anybody ever talked to you about telling the truth?
>
> THE WITNESS: Yes.
>
> THE COURT: Do you know what happens to you when you don't tell the truth?
>
> THE WITNESS: Yes.
>
> THE COURT: What is it?
>
> THE WITNESS: You get punished.
>
> THE COURT: The Court's going to find this witness competent to testify.

Rule 104(c) of the North Carolina Rules of Evidence requires *voir dire* inquiry into the competency of a witness to be conducted outside the presence of the jury only "when the interests of justice require." In the case *sub judice*, defendant interposed no objection to the court's examination before the jury, and the questions in no way constitute plain error. N.C.R. App. P. 10(b)(1) and 10(c)(4); *see also State v. Baker*, 320 N.C. 104, 112, 357 S.E.2d 340, 344 (1987) (court's *voir dire* examination before jury of nine-year-old victim's understanding of duty to tell the truth not error particularly when defendant made no request that hearing be held outside presence of jury). Defendant's first argument is baseless.

[3] Next, defendant cites the following portions of the trial proceedings as error:

> THE COURT: [J.C.], now it comes time for the lawyer over here, named Mr. Patton, to ask you some questions. Will you listen very closely to his questions and answer his questions, if you can?

THE WITNESS: Yes.

THE COURT: And if you don't know the answer, just tell him you don't know.

THE WITNESS: Yes.

THE COURT: Will you do that?

THE WITNESS: (MOVED HEAD UP AND DOWN.)

THE COURT: Thank you. All right, Mr. Patton.

Near the close of counsel's cross-examination, the court made the following inquiry:

THE COURT: How are you coming along over there, [J.C.]? Are you doing all right?

THE WITNESS: (NODDED HEAD UP AND DOWN.)

THE COURT: Okay.

Further, upon conclusion of the witness' testimony, the trial judge observed J.C. had wrapped his foot around the leg of the witness chair and that it appeared he was going to stumble. The judge stood from his seat, took J.C. by the hand, and assisted him from the stand.

Defendant failed to object to any of the foregoing actions or statements of the trial court. N.C.R. App. P. 10(b)(1). In addition, he has failed to demonstrate how he was prejudiced thereby. Given the strained circumstance of a young child appearing as the prosecuting witness in a sexual assault case, we cannot characterize the above-described conduct as anything more than the court's effort to assist J.C. in being at ease, thereby promoting the latter's ability to recount the facts and testify truthfully. *See State v. Reeves*, 337 N.C. 700, 727, 448 S.E.2d 802, 814 (1994) (allowing five-year-old to sit in step-mother's lap while testifying not error); *State v. Cook*, 280 N.C. 642, 648, 187 S.E.2d 104, 108-09 (1972) (no error in permitting victim's mother to remain in courtroom while child testified in order to give comfort "in strange and, at best, frightening circumstances to a little girl testifying" in rape case).

[4] However, defendant also assigns error to certain of the trial court's instructions to the jury. After the jury retired to begin deliberations, it indicated a desire to re-hear J.C.'s testimony. The jury was returned to the courtroom and received the following response from the court:

> You will recall, members of the jury, that when I gave you instructions before you went to the jury room that one of the things that I told was that you had to remember, remember and consider and weigh, all of the evidence. That's your duty, collectively, as a jury, to remember and consider and weigh all of the evidence, including that of the victim.
>
> In addition to that, members of the jury, as you know from being here two or three days, the victim is a young person. And it could be very traumatic to him and injurious to him for him to have to recite that again. It would take some time for the court reporter to recount all of his testimony verbatim for you, or type it up.
>
> And, so, in my discretion, I'm not going to honor your request. I'm simply going to instruct you again that you must remember and weigh and consider all of the evidence that you've heard in this case.

Defendant maintains this instruction "gives the unmistakable impression that Judge Gray himself believed the testimony of the complaining witness, and that Judge Gray himself believed that the complaining witness was a victim of this sexual assault." We are compelled to agree.

N.C. Gen. Stat. § 15A-1232 (1988) states:

> In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.

The slightest intimation from a judge as to the strength of the evidence or as to the credibility of the witness "will always have great weight with the jury, and great care must be exercised to insure that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial." *State v. Grogan*, 40 N.C. App. 371, 374, 253 S.E.2d 20, 22 (1979) (citation omitted).

While undoubtedly unintended, the inescapable implication of the court's reply to the jury's request is that the trial judge believed the minor child to have been a victim of sexual assault. This arises from the court's suggestion that recounting his testimony would be "very traumatic" and "injurious" to J.C. The court therefore violated G.S. § 15A-1232.

Although the court's statement standing alone arguably might not constitute prejudicial error, see *State v. Holden*, 280 N.C. 426, 430, 185 S.E.2d 889, 892 (1972) (not every improper remark by a trial judge is of such harmful effect as to require a new trial), viewing it in light of the error allowing Dr. Fine's testimony leaves no option but to award a new trial. *See State v. White*, 331 N.C. 604, 616, 419 S.E.2d 557, 564 (1992) (while defendant failed to show either of court's rulings, considered individually, were sufficiently prejudicial to require new trial, cumulative effect may have deprived defendant of his fundamental right to a fair trial).

III.

[5] Although we grant defendant a new trial, it remains necessary to address his contention the trial court erred by failing to allow his motion to dismiss at the close of all the evidence. *See* N.C.R. App. P. 10(b)(3) ("If a defendant's motion to dismiss . . . shall be sustained on appeal, it shall have the force and effect of a verdict of 'not guilty' as to such defendant."). Defendant asserts the presence of a fatal variance between the indictment and the proof offered at trial with respect to the date of the alleged offense. This argument cannot be sustained.

In *State v. Everett*, 328 N.C. 72, 399 S.E.2d 305 (1991), our Supreme Court reviewed the rules regarding proof of temporal specificity:

> Generally, an indictment must include a designated date or period within which the offense occurred. N.C.G.S. § 15A-924(a)(4) (1990). However, the statute expressly provides that "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." *Id.* Also, "[n]o judgment upon any indictment . . . shall be stayed or reversed for . . . omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly." N.C.G.S. § 15-155 (1990).

Id. at 75, 399 S.E.2d at 306.

In cases of sexual assaults on children, the requirements are even less severe:

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact

> regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

State v. Wood, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (citations omitted). "Unless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs." *Everett*, 328 N.C. at 75, 399 S.E.2d at 306 (citations omitted).

The indictment herein alleged the offenses transpired "[o]n or about November 23, 1990." The State's evidence comported with this allegation since both J.C. and Chief Moore testified the offense took place at or around the date indicated. While defendant during cross-examination of J.C. brought out some inconsistencies regarding when the assault actually took place, "a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence." *Wood*, 311 N.C. at 742, 319 S.E.2d at 249 (citations omitted). Based on the foregoing and in light of the lenient policy towards temporal discrepancies in child sexual assault cases, we hold no fatal variance existed between the indictment and the proof presented at trial. In any event, we note defendant suffered no prejudice as his defense was based upon complete denial of the charge rather than upon alibi for the date set out in the indictment. *See State v. Effler*, 309 N.C. 742, 750, 309 S.E.2d 203, 208 (1983).

New trial.

Judges COZORT and MARTIN, JOHN C. concur.

JERRY H. BARGER, H. WAYNE KENNERLY, AND HARRY G. YOUNG, JR., PLAINTIFFS v. McCOY HILLARD & PARKS, A NORTH CAROLINA GENERAL PARTNERSHIP, DAVID R. McCOY, MICHAEL W. HILLARD, BRENT H. PARKS AND SHEILA LEE, DEFENDANTS

No. COA94-876

(Filed 3 October 1995)

1. Corporations § 146 (NCI4th)— alleged malfeasance of corporation's accountants—action improperly brought by shareholders in individual capacities

Plaintiff shareholders were not entitled to bring an action in their personal capacities against the accounting firm used by their corporation where they alleged that defendants' malfeasance directly and proximately resulted in the bankruptcy of their corporation and the loss of all present and future value in their shares of stock, since the evidence did not support plaintiffs' allegations that the corporation's contracts with defendants were for plaintiffs' direct benefit; the evidence showed that the alleged contracts were entered into at periodic shareholder/director meetings for the sole benefit of the corporation; such contracts would have benefited plaintiffs only indirectly; any loss in the value of plaintiffs' shares as a result of defendants' breach of these alleged contracts was not a loss peculiar to each individual plaintiff, but rather caused loss to stockholders and creditors generally; and these claims therefore could only be asserted by the corporation or by plaintiffs in a derivative suit on behalf of the corporation.

Am Jur 2d, Corporations §§ 2243-2246, 2249, 2400.

Account's malpractice liability to client. 92 ALR3d 396.

Liability of independent accountant to investors or shareholders. 35 ALR4th 225.

2. Corporations § 146 (NCI4th)— corporation's accountants—no breach of contract claims of individual plaintiffs

Plaintiffs had no breach of contract claim arising from their personal guarantees of loans made to their corporation based on defendant accountants' representations as to the corporation's financial viability, since one who pays a personally guaranteed corporate debt has not suffered an injury separate and distinct from that of the corporation.

Am Jur 2d, Contracts § 451; Corporations §§ 2243-46, 2249, 2400.

3. Accountants § 20 (NCI4th); Limitations, Repose, and Laches §§ 26, 37 (NCI4th)— action against accountants—negligent misrepresentation claim barred by statute of limitations—constructive fraud claim not barred

Plaintiffs' negligent misrepresentation and constructive fraud claims against defendant accountants arising from plaintiff shareholders' personal guarantees of corporate loans reflected a genuine issue of material fact, since it was possible to infer that one defendant was aware plaintiffs would rely on his opinion in personally guaranteeing loans for the corporation and that the parties may have had a relationship of trust which defendants breached to the detriment of plaintiffs. The negligent misrepresentation claim was barred by the three-year statute of limitations, but the constructive fraud claim based upon a breach of fiduciary duty was governed by the ten-year statute of limitations and was not barred.

Am Jur 2d, Accountants §§ 19, 21; Corporations § 2268; Limitation of Actions § 147.

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

Appeal by plaintiffs from order entered 27 April 1994 by Judge William H. Helms in Rowan County Superior Court. Heard in the Court of Appeals 9 May 1995.

Plaintiffs, the sole shareholders and directors of The Furniture House of North Carolina, Inc. ("TFH"), filed this action alleging that defendants, TFH's accountants, negligently misrepresented the financial condition of TFH, breached several contracts for accounting services, and made negligent and constructively fraudulent misrepresentations. These actions allegedly forced plaintiffs to liquidate TFH in a Chapter 7 bankruptcy, and to pay personally guaranteed corporate debts out of private funds. Plaintiffs sought to recover compensatory and punitive damages.

Defendants answered, denying the material allegations of the complaint and asserting several affirmative defenses including, *inter alia*, the statute of limitations. After discovery, defendants moved for summary judgment.

Plaintiffs' evidence tends to show the following: TFH was a North Carolina corporation engaged in the catalog and retail sale of furniture and accessories. Since 1986, plaintiffs were the sole shareholders and directors of TFH. Corporate action was usually conducted in an informal manner, often at periodic breakfast meetings of the shareholders/directors.

After the death of the company's previous accountant and financial advisor in 1986, plaintiffs employed defendant McCoy's firm to provide accounting services and financial advice. Among its services, defendants were to prepare and issue statements showing the financial health of TFH. In late 1987, an independent computer contractor and defendant McCoy allegedly were engaged to create a computer program to format data from TFH computers into a report for defendants so that defendants could produce financial statements on a more regular and timely basis. Plaintiffs term this a "Computer Contract." Defendants subsequently began producing statements based on information in the computer report. However, a misapplication of data from the report resulted in an error that overstated TFH's sales and understated its liabilities in one of the financial statements. The error was not discovered and was carried over in succeeding statements.

Thereafter, defendants continued to provide accounting services for TFH, and defendant McCoy met periodically with the general manager of TFH and plaintiffs to explain the financial statements and to advise them on financial matters. At a breakfast meeting in early 1988, plaintiffs asked McCoy to evaluate whether TFH could amortize the debt necessary for a considered expansion of TFH while continuing to pay its operating costs. Defendant McCoy was allegedly informed that the debt for the expansion would have to be personally guaranteed by plaintiffs. McCoy assured plaintiffs that the necessary debt could be amortized if projected sales targets were reached. Plaintiffs term this a "Feasibility Contract." TFH then took out loans to expand its operations with plaintiffs signing personal guarantees to repay the loans in the event of default. However, the error in the financial statements hid the fact that the debt could not be so amortized.

Sales following TFH's expansion actually exceeded defendant McCoy's projected requirements for amortization of the debt. Nevertheless, TFH experienced a serious cash flow shortage. McCoy explained that the cash flow shortage was temporary and was due to the rapid increase in sales and cash being tied up in inventory and

accounts receivable. McCoy advised that when sales leveled off, the temporary cash flow shortage would be resolved. However, the cash flow shortage continued, and plaintiffs again consulted with defendant McCoy for an explanation and for advice about whether to take personally guaranteed loans to cover the shortage. McCoy restated that the cash flow shortage was temporary. Plaintiffs term this a "Cash Flow Contract." TFH then obtained a line of credit personally guaranteed by plaintiffs, and received advances against it to sustain the company during the shortage.

In late 1989, a prospective buyer approached plaintiffs about purchasing TFH. Plaintiffs asked defendant McCoy for an estimate of the value of TFH at an informal meeting at plaintiff Barger's home. McCoy valued plaintiffs' shares at $800,000. Plaintiffs term this a "Sales Contract." After further discussions, plaintiffs eventually signed a letter of intent to sell TFH for $504,000 and the assumption of plaintiffs' personal guarantees for the company's debts. However, an independent audit of TFH on behalf of the potential buyer revealed the accounting errors. The audit showed that TFH's liabilities greatly exceeded its assets, and that plaintiffs' shares were actually worthless. Consequently, the potential buyer backed out of the deal, and TFH entered Chapter 7 bankruptcy in 1990.

Defendants' evidence indicates that defendant McCoy Hillard & Parks, a North Carolina general partnership, was actually McCoy & Hillard, another general partnership, at the time of the alleged malpractice. Defendants McCoy and Hillard were the sole partners until defendant Parks became a partner in 1991.

Under a compilation agreement between defendants and TFH beginning in 1987, defendants were to issue monthly financial statements based on information supplied by TFH, but stated they would not audit or review such statements, nor express an opinion or other form of assurance on them. Defendants' evidence further indicates that defendant McCoy did not assist in creating the computer report, but merely relied on data in it. Defendants' financial statements overstated the financial health of TFH solely because of the erroneous data provided to defendants by plaintiffs, and could not have been discovered until the independent audit.

Defendant McCoy did irregularly encounter plaintiffs at the local hotel where they all often ate breakfast. At these times, plaintiffs and defendant McCoy had general discussions about business at TFH, including discussions about whether TFH would be able to afford to

expand and reasons why cash flow shortage might be experienced. However, defendants never contracted to provide this information to plaintiffs individually or for plaintiffs' direct benefit. Rather, defendant McCoy understood that plaintiffs were meeting as the board of TFH, and the accounting advice was for the sole benefit of the corporation. Defendant McCoy alleges he did not know plaintiffs were going to personally guarantee loans made to TFH. In addition, defendants contend plaintiffs suffered no damage from defendant McCoy's representation as to the value of their shares, because his representation did not lower the value of the shares, but merely overstated their worth.

After hearing arguments and reviewing the record, the trial court granted defendants' motion for summary judgment, finding there was no genuine issue of material fact, and that defendants were entitled to judgment as a matter of law. Plaintiffs appeal.

Caudle & Spears, P.A., by Thad A. Throneburg and Jeffrey L. Helms, for plaintiff-appellants.

Hedrick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe and L. Kristin King, for defendant-appellees.

MARTIN, John C., Judge.

Plaintiffs' sole assignment of error is that the trial court erred in granting defendants' motion for summary judgment. Plaintiffs argue that there are genuine issues of material fact and that defendants were not entitled to judgment as a matter of law. We affirm the order of the trial court, except as to plaintiffs' claim of constructive fraudulent misrepresentation. As to that claim, we reverse summary judgment and remand to the trial court.

Our analysis in this case turns on the nature of plaintiffs' claimed injuries. Because of defendants' alleged breach of contract and negligent and fraudulent misrepresentations, plaintiffs have sought recovery for: (1) the loss of the value of their stock in TFH, and (2) their personal obligations to lenders on individually guaranteed debts of TFH. We address these two claims separately.

I.

[1] Contending that defendants' alleged malfeasance directly and proximately resulted in the bankruptcy of TFH, and the loss of all present and future value in their shares of TFH stock, plaintiffs argue

that they are entitled to bring this action in a personal capacity, despite the fact that TFH may also have a cause of action against defendants. We do not agree.

In general, shareholders do not have individual causes of action against third persons for wrongs or injuries to the corporation that result in depreciation or destruction of the value of their stock. *Process Components, Inc. v. Baltimore Aircoil*, 89 N.C. App. 649, 366 S.E.2d 907 (1988). "The only exception is where the injury to individual stockholders results from a special duty [which is] owed to the stockholder by the wrongdoer and [has] an origin independent of plaintiff's status as stockholder." *Id.* at 655-56, 366 S.E.2d at 912, *citing Howell v. Fisher*, 49 N.C. App. 488, 272 S.E.2d 19 (1980), *disc. review denied*, 302 N.C. 218, 277 S.E.2d 69 (1981). *See Smith Setzer v. S.C. Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994).

This Court recognized in *Howell, supra*, that shareholders may maintain individual claims when they are able to allege a loss peculiar to themselves by reason of some special circumstances or special relationship to the wrongdoers. In such a case, "the corporation is not a necessary party . . . since any damages recovered do not pass to the corporation or indirectly to its creditors." *Howell*, 49 N.C. App. at 492, 272 S.E.2d at 23.

In *Howell*, the plaintiff stockholders' suit was dismissed for failure to join the corporation as a necessary party. In that case we determined that the plaintiffs' claims for breach of contract were properly dismissed as there were no allegations that the plaintiffs were intended third party beneficiaries of the contract. Nevertheless, we reversed the trial court and held that the plaintiffs had a personal cause of action "for negligent misrepresentations made to them before they were stockholders for the purpose of inducing their investment." *Id.* at 498, 272 S.E.2d at 26.

Relying on *Howell*, plaintiffs contend they were intended third party beneficiaries of the contracts between TFH and defendants, and, therefore, the loss of the value of their shares is injury "peculiar and personal" to them. Plaintiffs likewise claim personal injury for this loss due to defendants' alleged negligent and fraudulent misrepresentations. However, plaintiffs' reliance on *Howell* is misplaced.

In order for shareholders to bring a personal action against a party contracting with their corporation, " '[t]he real test is . . . whether the contracting parties intended that a third person

should receive a benefit which might be enforced in the courts.' " *Howell*, 49 N.C. App. at 493, 272 S.E.2d at 23, *quoting Vogel v. Supply Co.*, 277 N.C. 119, 128, 177 S.E.2d 273, 279 (1970). The contract must have been entered into for plaintiffs' direct benefit. *Id.*

In ruling on a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party, who is entitled to the benefit of all favorable inferences that may reasonably be drawn from the facts proffered. *Averitt v. Rozier*, 119 N.C. App. 216, 458 S.E.2d 26 (1995). Though plaintiffs have alleged that TFH's contracts with defendants were for plaintiffs' direct benefit, the evidentiary materials in the record before the court, viewed in the light most favorable to plaintiffs, do not support such allegations. Indeed, the evidence shows the alleged contracts were entered into at periodic shareholder/director meetings for the sole benefit of TFH. Such contracts would have benefitted plaintiffs only indirectly. Any loss in the value of plaintiffs' shares as a result of defendants' breach of these alleged contracts was not a loss peculiar to each individual plaintiff, but rather "caused loss to stockholders and creditors generally." *Jordan v. Hartness*, 230 N.C. 718, 719, 55 S.E.2d 484, 485 (1949). Therefore, these claims must be asserted by TFH or by plaintiffs in a derivative suit on behalf of TFH. The trial court properly granted summary judgment in favor of defendants as to plaintiffs' personal third party beneficiary claims.

As to the claims that defendants' alleged misrepresentations caused the loss in the value of plaintiffs' shares, a loss "peculiar or personal" to the stockholders is still required for an action without the corporation as a necessary party. It is clear in North Carolina that a plaintiff shareholder must suffer damage distinct and independent from that suffered by the corporation and shareholders generally. *McPhail v. Wilson*, 733 F.Supp. 1011 (W.D.N.C. 1990); *Howell*, 49 N.C. App. at 498, 272 S.E.2d at 26. As seen in *Howell*, this has been limited to actions wherein the plaintiffs were induced to purchase their initial shares in the corporation based on the misrepresentations of the defendant. In the present case, however, plaintiffs were already shareholders at the time of any alleged negligent or fraudulent misrepresentations. In addition, damages suffered due to any such misrepresentations were damages to the corporation generally, i.e., bankruptcy and the ensuing destruction of the value of their stock.

Thus, plaintiffs' claims for relief for the loss in the value of their shares as a result of defendants' breach of contract and misrepresen-

tations are actionable only on behalf of TFH, and may not be brought personally by plaintiffs. The trial court properly granted summary judgment for defendants on these issues.

II.

[2] Plaintiffs also contend they personally guaranteed loans made to TFH based on defendants' representations as to TFH's financial viability. Plaintiffs maintain that a fiduciary relationship existed creating a special duty owed by defendants to plaintiffs individually. Plaintiffs argue they are entitled to recover personal damages for defendants' alleged breach of contract and negligent and fraudulent misrepresentations, as a result of which plaintiffs contend they were required to pay the personally guaranteed corporate debt.

Whether an injury to a corporation can also be a separate and distinct injury to a personal guarantor of corporate debt is apparently an issue of first impression in North Carolina. Nevertheless, a consensus on this question has emerged from the decisions of many courts.

> [I]t is also generally accepted that guarantors of a corporation's debt, even if those guarantors are also stockholders, do not have standing to bring an action if the only harm suffered is derivative of the harm the corporation suffered. (Citations omitted.)
>
> These general principles, however, are not without certain exceptions. One such exception exists where there is a special duty such as a contractual duty or fiduciary relationship between the wrongdoer and the shareholder. (Citations omitted.) Similarly, an individual shareholder or officer may bring an action directly against a third party where he has pled an injury separate and distinct from that incurred by the corporation.

Chrysler Credit Corp. v. B.J.M., Jr., Inc., 834 F.Supp. 813, 838-39 (E.D. Pa. 1993). *Accord*: *Hengel, Inc. v. Hot 'N Now, Inc.*, 825 F.Supp. 1311 (N.D. Ill. 1993); *Taha v. Engstrand*, 987 F.2d 505 (8th Cir. 1993); *Hershman's, Inc. v. Sachs-Dolmar Div.*, 89 Ohio App. 3d 74, 623 N.E.2d 617 (1993); *Pepe v. GMAC*, 254 N.J. Super. 662, 604 A.2d 194, *cert. denied*, 130 N.J. 11, 611 A.2d 650 (1992); *Around the World Importing, Inc. v. Mercantile*, 795 S.W.2d 85 (Mo. App. 1990); *Walstad v. Norwest Bank of Great Falls*, 240 Mont. 322, 783 P.2d 1325 (1989); *Wells Fargo AG Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988); *United States v. Palmer*, 578 F.2d 144 (5th Cir. 1978); *Sacks v. American Fletcher Nat. Bank & Trust Co.*, 258 Ind.

189, 279 N.E.2d 807 (1972); *Buschmann v. Professional Men's Association*, 405 F.2d 659 (7th Cir. 1969).

This general rule corresponds with North Carolina's present law governing shareholders' individual actions arising from corporate injuries. *See Outen v. Mical*, 118 N.C. App. 263, 454 S.E.2d 883 (1995). We have no difficulty in extending this rule to personal guarantors of corporate debt. Absent some special duty between the wrongdoer and the guarantor, or some injury separate and distinct from that of the corporation, the injury suffered by a guarantor is derivative of the corporation and does not give rise to an individual cause of action personal to the guarantor.

Plaintiffs here claim both an injury separate and distinct from that of TFH and a special duty between themselves and defendants. However, as we have noted above, one who pays a personally guaranteed corporate debt has not suffered an injury separate and distinct from that of the corporation because he is "made whole if the corporation recovers; and so the rule has the salutary effect of preventing the double counting of damages." *Taha*, 987 F.2d at 507. *See also Hershman's, Inc., supra*; *Pepe, supra*; *Bohm v. Commerce Union Bank of Tennessee*, 794 F.Supp 158 (W.D. Pa. 1992); *Walstad, supra*; *Wells Fargo, supra*. Therefore, to assert this cause of action plaintiffs must show that defendants owed them a special duty.

As we noted above, there is no contractual duty between plaintiffs and defendants. The evidence shows the alleged contracts were entered into for the sole benefit of TFH, not for plaintiffs. Plaintiffs thus have no breach of contract claim arising from the personal guarantees. The trial court properly granted summary judgment as to this issue.

[3] As to plaintiffs' negligent misrepresentation claim, the North Carolina Supreme Court has adopted the *Restatement (Second) of Torts* § 552 (1977) standard for accountants' liability for negligent misrepresentation. *See Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988). This standard "recognizes 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.

For a constructive fraud claim, plaintiffs must "allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950). *See also Terry v. Terry*, 302 N.C. 77, 273 S.E.2d 674 (1981). The fact that a defendant did not benefit from a fiduciary breach is not a barrier to a constructive fraud claim. *See Bumgarner v. Tomblin*, 63 N.C. App. 636, 306 S.E.2d 178 (1983).

Unlike plaintiffs' claims to recover damages for the loss in the value of their shares, the record as to plaintiffs' negligent misrepresentation and constructive fraud claims arising from the personal guarantees does reflect a genuine issue of material fact when considered in the light most favorable to plaintiffs. It is possible to infer that defendant McCoy was aware plaintiffs would rely on his opinion in personally guaranteeing loans for TFH, and that the parties may have had a relationship of trust which defendants breached to the detriment of plaintiffs.

A question remains, however, as to whether plaintiffs filed these two remaining claims within the applicable statute of limitations. The last personal guarantees were entered into no later than the end of 1988. Plaintiffs filed this action in July 1992, more than three years from the time of the last alleged act by defendants giving rise to this action.

In their negligent misrepresentation claim, plaintiffs have essentially alleged accounting malpractice by defendants. G.S. § 1-15(c) establishes a three-year statute of limitations for professional malpractice claims, including negligence, *Sharp v. Teague*, 113 N.C. App. 589, 439 S.E.2d 792 (1994), and is applicable to accountants in the rendering of their professional services. *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657, *disc. review denied*, 312 N.C. 85, 321 S.E.2d 899 (1984). As plaintiffs' suit was filed more than three years after the accrual of their action for negligent misrepresentation, this claim is barred by G.S. § 1-15(c). The trial court properly granted summary judgment as to this issue.

Fraud, however, "is not within the scope of 'professional services' as that term is used in N.C. Gen. Stat. § 1-15(c), and thus cannot be 'malpractice' within the meaning of that statute." *Sharp*, 113 N.C. App. at 592, 439 S.E.2d at 794. Though the fraud in *Sharp* referred to

alleged fraud by an attorney, the same rule applies to accountants. *See AICPA Professional Standards BL* § 921. Similarly, the claim is not barred by the three-year statue of limitations in G.S. § 1-52(9), "as the ten-year statute of limitations contained in G.S. 1-56 applies to *constructive* fraud claims based upon a breach of fiduciary duty." *Adams v. Moore*, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 (1989), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 83 (1990).

The record, when taken in the light most favorable to plaintiffs, suggests their claim for constructive fraudulent misrepresentation is a constructive fraud claim based upon a breach of fiduciary duty. "Whether such a [fiduciary] relationship exists in any instance is determined by the specific circumstances of the case. When, as here, the circumstances governing the alleged relationship are in dispute, the issue is one of fact for the jury, rather than one of law for the court." *Speck v. N.C. Dairy Foundation*, 64 N.C. App. 419, 423, 307 S.E.2d 785, 789 (1983), *reversed on other grounds*, 311 N.C. 679, 319 S.E.2d 139 (1984). Thus, plaintiffs were entitled to reach the jury on this issue, and the trial court erred in granting summary judgment as to this one claim.

Affirmed in part, reversed in part, and remanded.

Judges JOHNSON and GREENE concur.

CARTERET COUNTY v. UNITED CONTRACTORS OF KINSTON, INC.

No. 943SC396

(Filed 3 October 1995)

1. Arbitration and Award § 23 (NCI4th); Counties § 52 (NCI4th)— power of county to enter into arbitration agreement

Though counties have not been given the express power to enter into arbitration agreements, they do have the power to enter into contracts, and, since the General Assembly has recognized the validity of contractual arbitration agreements, it is therefore necessarily or fairly implied under Dillon's Rule that counties may enter into arbitration agreements incident to their

power to contract. Furthermore, our courts have upheld the validity of arbitration agreements in controversies involving counties. N.C.G.S. § 1-567.2.

Am Jur 2d, Alternative Dispute Resolution §§ 8, 9, 70, 101, 106; Municipal Corporations, Counties, and Other Political Subdivisions §§ 118, 196, 493-504.

2. Arbitration and Award § 4 (NCI4th)— arbitration clause— no conflict with right to jury trial

The arbitration clause in question was not invalid on the ground it conflicted with plaintiff's constitutional right to a jury trial, since an agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury; there is no constitutional impediment to arbitration agreements; and plaintiff never demanded a jury trial and did not assign this as error.

Am Jur 2d, Alternative Dispute Resolution §§ 25, 65.

Constitutionality of arbitration statutes. 55ALR2d 432.

3. Arbitration and Award § 2 (NCI4th)—language clear and unambiguous—document signed by both parties—arbitration provision valid

There was no merit to plaintiff's contention that an arbitration provision in the parties' contract was void because it was not independently negotiated, since the contract language was clear and unambiguous, both parties properly signed the document, and the parties thereby reached a valid agreement to arbitrate.

Am Jur 2d, Alternative Dispute Resolution §§ 70-74.

4. Arbitration and Award § 19 (NCI4th)— timeliness of filing arbitration claims—no prejudice to plaintiff—no waiver of contractual right to arbitrate

Regardless of whether defendant's claims for arbitration were timely filed, because of this state's strong public policy in favor of arbitration and because no prejudice to plaintiff was shown, defendant did not waive its contractual right to arbitration.

Am Jur 2d, Alternative Dispute Resolution §§ 117, 119, 131.

5. Arbitration and Award § 10 (NCI4th)— arbitrators with same occupation as defendant—no fundamental unfairness—specific allegations of partiality not proved

There was no merit to plaintiff's contention that an arbitration award should be vacated because an arbitration panel consisting of three contractors was fundamentally unfair, since the only link between the arbitrators and defendant was that they had the same occupation, and partiality was not shown by the panel's failure to take an oath before the proceedings began, by its award of $700,000 in damages, by the arbitrators' refusal to clarify their award or by the dissent of one of the arbitrators from the award. Furthermore, plaintiff failed to show bias on the part of the chairman of the arbitration panel because of his prior business relationship with one of defendant's witnesses where the relationship was disclosed and no one objected.

Am Jur 2d, Alternative Dispute Resolution §§ 157-161.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion, or fraud of arbitrators. 65 ALR2d 755.

Setting aside arbitration award on ground of interest or bias of arbitrators. 56 ALR3d 697.

6. Arbitration and Award § 23 (NCI4th)— increased overhead expenses—issue arising out of contract—power of arbitrators to rule on question

Whether plaintiff would be entitled to increased overhead expenses due to extension of the contract completion date was an issue arising out of the contract and fell within the scope of the arbitration agreement; therefore, since the arbitrators had the power to rule on the issue, even if they erroneously considered evidence of increased overhead expenses it would not be ground to vacate the award.

Am Jur 2d, Alternative Dispute Resolution §§ 163-166, 169.

7. Arbitration and Award § 33 (NCI4th)— inclusion of improper damages in award—speculation

Because the arbitrators did not clarify their award, plaintiff's contention that the award impermissibly included consequential

and punitive damages was speculation, but even if the award did contain such damages, it would not provide grounds for vacating the award.

Am Jur 2d, Alternative Dispute Resolution §§ 193, 205, 256.

Arbitrator's power to award punitive damages. 83 ALR3d 1037.

Sufficiency of showing of actual damages to support award of punitive damages—modern cases. 40 ALR4th 11.

Appeal by plaintiff from judgment entered 9 December 1993 by Judge James R. Strickland in Carteret County Superior Court. Heard in the Court of Appeals 13 January 1995.

Plaintiff Carteret County and defendant United Contractors of Kinston, Inc. entered into a contract in June 1991 whereby defendant agreed to construct a new Department of Social Services (DDS) building and renovate the old DSS building in Beaufort, North Carolina. Problems arose over various change orders issued by plaintiff during the construction. In response, defendant delivered its own change order on 24 August 1992 demanding an extension of the completion date and an increase in the contract price. Plaintiff refused to honor the change order and defendant filed for arbitration under the contract on 4 September 1992. Plaintiff filed an answer and a counterclaim against defendant.

Plaintiff formally terminated defendant from the project on 4 November 1992, and defendant amended its arbitration claim to include damages for wrongful termination. Plaintiff filed this suit against defendant on 21 April 1993 seeking to stay the arbitration proceedings. A temporary restraining order granting the stay was issued that day in an *ex parte* proceeding. The order was dissolved on 26 April 1993 and the arbitration hearings began the next day.

A panel of three arbitrators heard the case, and in June 1993 issued a decision in favor of the defendant in the amount of $700,000 plus a share of the costs, with one arbitrator dissenting as to the amount of damages. Defendant moved for entry of judgment in Carteret County Superior Court on 12 August 1993. Plaintiff moved to vacate, modify, and clarify the award on 9 September 1993. After a hearing on 14 September 1993, the trial court deferred a ruling on confirmation of the award pending a clarification by the arbitrators.

The arbitrators refused to clarify their decision. The court then entered judgment confirming the award for defendant on 10 December 1993. From this judgment, plaintiff appeals.

Wheatly, Wheatly, Nobles & Weeks, P.A., by Stephen M. Valentine, and Poyner & Spruill, by Donald R. Teeter, for plaintiff-appellant.

Erwin & Bernhardt, by Fenton T. Erwin, Jr., for defendant-appellee.

McGEE, Judge.

Plaintiff brings forth eighteen assignments of error, which it groups into six questions presented. These questions can be divided into three areas: 1) whether defendant had a right to arbitrate its claims against plaintiff; 2) whether the arbitration award should be vacated because of the alleged partiality of the arbitrators; and 3) whether the arbitrators' alleged consideration of improper issues is grounds for vacating the award. For the reasons stated below, we affirm the judgment of the trial court confirming the arbitration award in favor of defendant.

I. Right to Arbitrate

Plaintiff argues the trial court should have vacated the arbitration award because defendant was not entitled to arbitration of its claims against plaintiff. We disagree.

A. Validity

[1] Plaintiff first alleges the arbitration clause is invalid because a county does not have the power to enter into a binding arbitration agreement. The well-settled rule in this State governing the permissible scope of municipal or county actions, commonly called Dillon's Rule, is set out in *White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989). The rule states:

> "[A] municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation . . . ."

White, 93 N.C. App. at 151, 377 S.E.2d at 95 (quoting *Greene v. City of Winston-Salem*, 287 N.C. 66, 72, 213 S.E.2d 231, 235 (1975). Counties have been given the express power to enter into contracts with private entities under N.C. Gen. Stat. § 153A-449 (1991). Further, our General Assembly has recognized and authorized contractual provisions providing for arbitration of controversies arising under a contract. N.C. Gen. Stat. § 1-567.2 (1983).

While it is true counties have not been given the express power to enter into arbitration agreements, they do have the power to enter into contracts. Since the General Assembly has recognized the validity of contractual arbitration agreements, it is therefore "necessarily or fairly implied" under Dillon's Rule that counties may enter into arbitration agreements incident to their power to contract.

Our courts have also upheld the validity of arbitration agreements in controversies involving counties. In *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30 (1992), our Supreme Court held a consent to jurisdiction clause requiring the parties to submit to the jurisdiction of North Carolina courts did not conflict with a general arbitration clause, and therefore the county was bound to arbitrate the dispute. This Court upheld an arbitration award in favor of a county where the county had sought arbitration under the terms of its contract with plaintiff in *Ruffin Woody and Associates v. Person County*, 92 N.C. App. 129, 374 S.E.2d 165 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). As these cases demonstrate, North Carolina counties have the power to enter into contractual arbitration agreements.

[2] Plaintiff next argues the arbitration clause is invalid because it conflicts with plaintiff's constitutional right to a jury trial. This argument is without merit. "An agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury . . . ," *Miller v. Two State Construction Co.*, 118 N.C. App. 412, 416, 455 S.E.2d 678, 681 (1995), and there is no constitutional impediment to arbitration agreements. *Id.* at 417, 455 S.E.2d at 681. Also, plaintiff never demanded a jury trial and did not assign this as error. Participation in arbitration proceedings without making any protest or demand for a jury trial waives any right to later object to the arbitration award on these grounds. *McNeal v. Black*, 61 N.C. App. 305, 307, 300 S.E.2d 575, 577 (1983). Therefore, this argument fails.

[3] Plaintiff next contends the arbitration provision is void because it was not independently negotiated, and cites *Routh v. Snap-On*

Tools Corp., 108 N.C. App. 268, 423 S.E.2d 791 (1992) for this proposition. However, plaintiff's reliance on *Routh* is misplaced.

In *Red Springs Presbyterian Church v. Terminix Co.*, 119 N.C. App. 299, 458 S.E.2d 270 (1995), the plaintiff also argued an arbitration agreement was void because it was not independently negotiated. This Court distinguished *Routh*, holding that the basis of the *Routh* decision was the lack of a valid agreement as evidenced by the failure of the plaintiff to properly sign the contract, and therefore the *Routh* language was not controlling. *Red Springs*, 119 N.C. App. at 301-302, 458 S.E.2d at 272-73. The *Red Springs* decision held that where the contract language is clear and unambiguous, and the parties by evidence of their proper signing of the contract have agreed to the arbitration provision, then a valid agreement to arbitrate exists. *Red Springs*, 119 N.C. App. at 302, 458 S.E.2d at 273.

In this case, the arbitration language contained in the contract is clear and unambiguous. The arbitration provision itself contains seven sections and comprises almost a full page of the contract document. We find no merit to plaintiff's argument that "there is no indication the parties to the contract even knew [the arbitration provision] was in the contract." It is reasonable to expect that a building contractor and a body politic frequently involved in capital construction know the contents of a standard AIA construction contract. Because the contract language is clear and both parties properly signed the document, the parties reached a valid agreement to arbitrate. The arbitration provision is valid and enforceable by the defendant.

B. Waiver of Right to Arbitrate

[4] Plaintiff argues defendant waived the right to arbitration by failing to fulfill certain contractual conditions precedent to filing an arbitration demand. Specifically, plaintiff contends defendant failed to file its claims within twenty-one days after the events giving rise to the claims as called for by the contract. However, even if defendant did not timely file its claims, under the facts of this case defendant was still entitled to arbitration.

North Carolina has a strong public policy in favor of arbitration, and any allegation of waiver of such a favored right will be closely scrutinized. *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the

problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* (quoting *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d. 765, 785 (1983)). Before a party will be found to have impliedly waived a contractual right to arbitration, that party must have, by its delay or actions inconsistent with arbitration, caused another party to be prejudiced by an order compelling arbitration. *Cyclone Roofing*, 312 N.C. at 229, 321 S.E.2d at 876.

In this case, nothing in the record indicates plaintiff was prejudiced by defendant's alleged delay in filing its claims, and plaintiff makes no such argument. We also note the trial court found the claims were timely filed. Regardless of whether the claims were timely filed, because of the strong public policy in favor of arbitration and because no prejudice to plaintiff has been shown, we find defendant did not waive its contractual right to arbitration.

II. Alleged Partiality of Arbitrators

[5] Plaintiff argues the arbitration award should be vacated because an arbitration panel consisting of three contractors was "fundamentally unfair" and because the chairman of the panel was "biased" against the plaintiff. We find no merit to these contentions.

The court shall vacate an arbitration award upon application of a party if "[t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." N.C. Gen Stat. § 1-567.13(a)(2) (1983). Other grounds for vacating an award under N.C. Gen. Stat. § 1-567.13(a) include:

> (1) The award was procured by corruption, fraud or other undue means; . . .
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary [to statute] as to prejudice substantially the rights of a party; or
>
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under G.S. 1-567.3 and the party did not participate in the arbitration hearing without raising the objection . . . .

G.S. 1-567.13(a)(1), (3)-(5). A party seeking to set aside an arbitration award has the burden of demonstrating an objective basis to support its allegations of an arbitrator's improper conduct. *Thomas v. Howard*, 51 N.C. App. 350, 353, 276 S.E.2d 743, 745 (1981). Plaintiff did not meet this burden.

Plaintiff first contends an arbitration panel consisting unanimously of contractors is inherently unfair, and cites *Bennish v. N.C. Dance Theater*, 108 N.C. App. 42, 422 S.E.2d 335 (1992). In *Bennish*, this Court held an arbitration panel where two of the three arbitrators were directly tied to the defendant was inherently unfair. *Bennish*, 108 N.C. App. at 45-46, 422 S.E.2d at 337. *Bennish* is distinguishable from this case in that there are no direct ties between the arbitrators and the defendant. In *Bennish*, the two arbitrators in question were a staff member and a trustee of the defendant corporation. Here, the only link between the arbitrators and the defendant is that they have the same occupation. To accept plaintiff's argument that this is inherently unfair would be like accepting an argument that three judges cannot impartially decide a matter involving an attorney because they are members of the same profession. Plaintiff's "inherent unfairness" argument fails.

As specific evidence of impartiality, plaintiff cites the following: 1) the panel's failure to take an oath before the proceedings; 2) the panel's award of damages "far in excess of the damages the defendant was able to establish"; 3) the arbitrators refusal to clarify their award even after the trial court ordered them to do so; 4) the chairman of the arbitration panel's prior business relationship with one of the defendant's witnesses; and 5) one of the arbitrators' dissent from the award. These allegations do not amount to an objective basis for showing evident partiality as required under G.S. 1-567.13 and by the *Thomas* decision.

As plaintiff admits in its brief, the arbitrators were under no duty to take an oath. The arbitrators requested the administration of an oath be dispensed with unless either party objected, and there was no objection. As to the excessive damages claim, defendant presented evidence alleging more than $1.3 million in damages. Whether or not defendant was able to establish such damages was for the arbitration panel to decide. Plaintiff's dissatisfaction with the amount awarded is not objective evidence pointing to partiality by the arbitrators. Also, plaintiff's argument that the arbitrators did not clarify their award has no merit. "Arbitrators have no obligation to the court to give their rea-

sons for an award." *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 598, 4 L. Ed. 2d 1424, 1428 (1960). Our Supreme Court has said:

> Arbitrators are no more bound to go into particulars and assign reasons for their award than a jury is for its verdict. The duty is best discharged by a simple announcement of the result of their investigation.
>
> They are not bound to decide according to law when acting within the scope of their authority, being the chosen judges of the parties and a law unto themselves, but may award according to their notion of justice and without assigning any reason.

Bryson v. Higdon, 222 N.C. 17, 19-20, 21 S.E.2d 836, 837 (1942).

We also find no merit to plaintiff's contention the award should be vacated because of an alleged bias on the part of Cleve Paul, the chairman of the arbitration panel. Plaintiff bases its argument on the fact the chairman admitted having a prior business relationship with one of the defendant's witnesses. However, this alone does not show bias. Further, even if the chairman was biased, plaintiff waived its right to object on this ground.

The chairman fully informed both parties of his prior relationship with the witness. After stating that he would give no more credibility to that witness' testimony than any other witness, the transcript shows the following exchange:

> [Mr. Paul]: We discussed this in the back, and I just wanted to make that known for the record. I think both parties have agreed that they don't see a problem with that. Is that correct?
>
> [Plaintiff's Attorney]: Yes. I believe you indicated to us that your association with those people would not affect how you evaluated this case or how you evaluated their testimony?
>
> [Mr. Paul]: No.
>
> [Plaintiff's Attorney]: That's good enough for us. We talked to our client.

There is no indication in the record that the chairman was biased in any way by his prior association with the witness. Further, the chairman also indicated he had prior business relationships with several of

plaintiff's witnesses. Finally, even if the chairman's relationship with the witness prevented him from being impartial, in light of the above exchange plaintiff cannot be heard to complain. "[T]he disability of an arbitrator is waived if the complaining party had prior knowledge of it." *Thomas v. Howard*, 51 N.C. App. 350, 354, 276 S.E.2d 743, 746 (1981). Not only did plaintiff have knowledge of the alleged disability, its counsel for the arbitration proceedings also acknowledged plaintiff believed the chairman could be impartial.

We fail to see how the fact that one of the arbitrators dissented from the award shows plaintiff did not receive a fair, impartial hearing. Plaintiff seems to argue that because of the dissent, but for the alleged bias of the chairman, it would have won at arbitration. However, as stated above, plaintiff presents no objective evidence of partiality by the chairman, and even if it had, it waived its right to object on this ground. Therefore, plaintiff is not entitled to have the award vacated because of partiality.

We note that plaintiff also asked this Court to modify the award based on the "fundamental unfairness" of the panel's makeup. As stated above, a panel consisting of three contractors was not fundamentally unfair. Further, such allegations are not proper grounds for modification under N.C. Gen. Stat. § 1-567.14 (1983).

III. Consideration of Improper Issues

[6] Plaintiff argues the arbitrators erred by considering improper issues and testimony and by awarding consequential and punitive damages, and therefore the award should be vacated. Again, we find no merit to these arguments.

Plaintiff contends the arbitrators improperly considered evidence of defendant's increased overhead due to the project's extension of time. Plaintiff argues the contract did not allow recovery for increased overhead and that it was error to hear evidence and consider this issue and therefore the award should be vacated. However, errors of law or fact or erroneous decisions of matters submitted to arbitration are not sufficient to invalidate an arbitration award fairly and honestly made. *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 411, 255 S.E.2d 414, 417-18 (1979). If the dispute is within the scope of the arbitration agreement, then the court must confirm the award unless one of the statutory grounds for vacating or modifying the award exists. *FCR Greensboro, Inc. v. C & M Investments*, 119 N.C App. 575, 577, 459 S.E.2d 292, 294 (1995).

In this case, the arbitration agreement reads: "Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration . . . ." This Court, in *Rogers Builders v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), held a similar arbitration provision to be sufficiently broad to include all claims arising out of or related to the contract or its breach. Here, whether defendant would be entitled to increased overhead expenses due to the extension of the contract completion date is an issue arising out of the contract and falls within the scope of the arbitration agreement. Since the arbitrators had the power to rule on the issue, even if they erroneously considered evidence of increased overhead expenses it would not be ground to vacate the award.

[7] Lastly, plaintiff argues the arbitration award impermissibly included consequential and punitive damages, which it contends are not recoverable. However, we need not determine whether such damages would be recoverable in this case. Because the arbitrators did not clarify their award, plaintiff's contention that the award contains impermissible consequential and punitive damages is speculation. Even if the award did contain such damages, it would not provide grounds for vacating the award. "[T]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." N.C. Gen. Stat. § 1-567.13(a)(5) (1983). *accord*, *Turner v. Nicholson Properties, Inc.*, 80 N.C. App. 208, 341 S.E.2d 42, *disc. review denied*, 317 N.C. 714, 347 S.E.2d 457 (1986). If the courts were to invalidate awards based upon errors of law, it would "[open the] door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration, instead of ending would tend to increase litigation." *Fashion Exhibiters*, 41 N.C. App. at 415, 255 S.E.2d at 420 (quoting *Poe & Sons, Inc. v. University*, 248 N.C. 617, 625, 104 S.E.2d 189, 195 (1958)).

Plaintiff has failed to produce objective evidence that the arbitrators were partial, or any other grounds to vacate the arbitration award. Plaintiff argues it would be unfair to the county and its residents to allow a large damage award to stand under these circumstances. However, arbitration is intended to be a final settlement of disputes without litigation. Parties agreeing to abide by a decision of a panel of arbitrators will not be heard to attack the fairness of such an award. *Thomas*, 51 N.C. App. at 352, 276 S.E.2d at 745.

The defendant did not brief or argue its two assignments of error and its third and fourth cross assignments of error. Therefore, these are deemed abandoned pursuant to N.C.R. App. P. 28(a). Because of our holding, we need not discuss defendant's remaining cross assignments of error. For the reasons stated above, we affirm the judgment confirming the arbitration award.

Affirmed.

Judges LEWIS and WYNN concur.

HARRY HUBERTH, SANDY HUBERTH, AND ANNE M. HUBERTH v. JERRY L. HOLLY AND SALLY DOHNER

No. COA94-1162

(Filed 3 October 1995)

1. Easements § 59 (NCI4th)— finding that no easement existed proper

The trial court properly determined that no easement existed over the portion of plaintiff's property on which the "Old Yadkin Road" lay, since plaintiff's offer to sign an easement was conditioned on defendant's not removing any trees within the right of way, a condition which was not accepted; even if the language in plaintiff's 1964 deed was an offer of dedication of the "Old Yadkin Road," there was no evidence that any public authority of Moore County accepted the dedication; plaintiffs were not parties in a declaratory judgment action establishing defendant's easement in the "Old Yadkin Road" across a neighboring landowner's property and so were not bound by that judgment; and there was no evidence that plaintiffs led defendants to believe that plaintiffs had granted them an easement.

Am Jur 2d, Easements and Licenses § 17.

2. Environmental Protection, Regulation, and Conservation § 124 (NCI4th)— violation of Sedimentation Pollution Control Act—nominal damages proper

The trial court properly awarded only nominal damages for violations of the Sedimentation Pollution Control Act where there

was no evidence that the violations of the Act caused the loss of plaintiff's trees and groundcover plants.

Am Jur 2d, Pollution Control § 552.

3. Damages § 35 (NCI4th)— negligent damage to realty — destruction of trees and groundcover—measure of damages

The trial court erred by assessing damages on the basis of replacement cost of trees and groundcover in plaintiffs' action for negligent damage to real property where the injury to plaintiffs' property was "completed," there was no evidence that the property was used for a purpose that was personal to plaintiffs, and the proper measure of damages was the difference in market value before and after the negligent injury.

Am Jur 2d, Damages §§ 401, 402.

Measure of damages for wrongful removal of earth, sand, or gravel from land. 1 ALR3d 801.

Measure of damages for injury to or destruction of shade or ornamental tree or shrub. 95 ALR3d 508.

4. Damages § 66 (NCI4th)— property damage claim—award of punitive damages proper

Though plaintiffs were not entitled to punitive damages under the Sedimentation Pollution Control Act, they were entitled to punitive damages on their property damage claim where there was ample evidence that defendants knew that plaintiffs did not want them to install an access road over the disputed area and defendants pushed over plaintiffs' "No Trespassing" sign, thereby acting wilfully, wantonly, and in disregard of plaintiffs' rights.

Am Jur 2d, Damages § 764.

Appeal by defendants from judgment entered 9 June 1994 in Moore County Superior Court by Judge Howard R. Greeson, Jr. Heard in the Court of Appeals 22 August 1995.

Cunningham, Dedmond, Petersen & Smith, by Marsh Smith, for plaintiff-appellees.

Brown & Robbins, L.L.P., by P. Wayne Robbins and Carol M. White, for defendant-appellants.

GREENE, Judge.

Jerry L. Holly and Sally Dohner (defendants) appeal from a judgment of the trial court, entered by the court without a jury, awarding compensatory and punitive damages to Harry Huberth, Sandy Huberth and Anne M. Huberth (plaintiffs) and awarding costs of litigation, including attorney fees, to plaintiffs.

On 17 September 1990, plaintiffs sued defendants for damages as a result of defendants' violation of N.C. Gen. Stat. § 113A-52(6), the Sedimentation Pollution Control Act (the Act), and for property damage resulting from the negligent removal of several trees from plaintiffs' property as the result of defendants' road construction on plaintiffs' property. Defendants "raised the existence of [an] easement as an affirmative defense to" plaintiffs' property damage claim.

The undisputed facts are that in 1964, Anne Huberth purchased approximately seventy-two acres of property (Huberth tract) in Moore County from the Moore County Company, Incorporated, subject to an "easement of right-of-way of Yadkin Road lying within the boundaries of afore-described premises." Subsequently she transferred ten acres to her son and daughter-in-law, Harry and Sandy Huberth, on which they built their home. Along the southwest boundary of the Huberth tract, lies the "Old Yadkin Road," which served as a public right-of-way until 1919. The "Old Yadkin Road" is no longer in use by any vehicular traffic.

On 2 May 1990, Anne Huberth agreed to sign an "Agreement and Easement" which would grant Haskell A. Duncan (Duncan), an adjoining landowner, an easement over a portion of her property. Anne Huberth's agreement to sign the "Agreement and Easement" was subject, however, to the condition that the easement should not be greater than sixteen feet wide and that Duncan should not remove any trees within the "right-of-way." Other adjacent land owners signed this "Agreement and Easement," which was dated 26 February 1990 and recorded in the Moore County Register of Deeds Office. Although this instrument restricted the width of the "right-of-way" to sixteen feet, it did not contain any language which would prohibit the removal of trees. Furthermore, Anne Huberth did not sign this instrument.

In an earlier Declaratory Judgment action, the Moore County Superior Court determined that an easement, in favor of Duncan,

existed over a portion of another landowner's (Oakwin, Inc.) property, which is adjacent to the Huberth tract and is within the boundaries of the "Old Yadkin Road."

On 23 March 1990, and by deed recorded 4 September 1990, Duncan conveyed his interest in the land (Holly tract) adjoining the Huberth tract to defendant, Jerry Holly. Defendants then agreed to work together to develop the Holly tract into ten separate lots, and it is undisputed that they were partners in the development of the Holly tract. In their effort to develop the Holly tract, defendants began clearing the "Old Yadkin Road" to create an access road to the property. It is also not disputed that defendant Holly destroyed a "No Trespassing" sign, which plaintiffs had erected on the Huberth tract in the course of working on the access road. In their effort to create the access road, defendants also removed ten large loblolly pine trees, a large number of smaller trees and a larger number of groundcover plants. Prior to beginning their work on the access road, defendants did not seek or receive an erosion control plan from the State, as required by the Act, and failed to install erosion control devices.

The trial court made, among other findings, the undisputed finding of fact that "[d]efendants knew that [p]laintiffs did not want them to install an access road across the Huberth Tract." The trial court then concluded that no easement existed over the Huberth tract. The trial court then, based on replacement cost (the only evidence offered by the plaintiffs), awarded plaintiffs $14,590 in compensation for the damage to the trees and groundcover.

The plaintiffs' attorney submitted an affidavit, in support of his request for attorney fees, showing that he spent 190 hours on plaintiffs' case. The affidavit, however, did not distinguish between time spent on the portion of plaintiffs' claim under the Act and the portion of plaintiffs' claim for negligent property damage. In addition to the compensatory award the trial court ordered that defendants pay jointly and severally $5,000 in punitive damages, and pursuant to the Act, $24,524.16 for the cost of the litigation, including an attorney fee of $19,000. The trial court further awarded nominal damages as a result of defendants' admitted violation of the Act.

Defendants appealed to this Court and, in response to defendants' appeal, plaintiffs submitted a forty-five page brief, in violation of

Appellate Rule 28(j). N.C. R. App. P. 28(j) (imposing a thirty-five page limit on all briefs filed in this Court).

The issues are (I) whether an easement existed over the portion of Anne Huberth's property known as the "Old Yadkin Road" in favor of defendants or in favor of the public; (II) if an easement did not exist, whether the trial court applied the correct measure of damages; (III) whether the trial court erred in awarding $19,000 in attorney fees; and (IV) whether the trial court erred in its award of punitive damages.

I

[1] Defendants argue that they are not responsible for any damage to the plaintiffs' property because they have an easement across the property in question. The easement, defendants contend, arises by virtue of any of the following: (a) Anne Huberth's agreement with Duncan to sign an "Agreement and Easement," (b) the deed by which Anne Huberth took her property contained language of dedication, (c) collateral estoppel, in that Anne Huberth is bound by an earlier Declaratory Judgment action against Oakwin, Inc., or (d) estoppel, because Anne Huberth failed to act before defendants expended money and effort on developing the "Old Yadkin Road."

The evidence does not support an easement on either of the bases asserted by the defendants. The offer, in the letter, to sign an easement was conditioned on Duncan not removing any trees within the right-of-way. This condition was not accepted and thus no agreement was entered. *Normile v. Miller and Segal v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) (a valid contract cannot exist until both parties' minds meet as to all terms). Assuming that the language in Anne Huberth's 1964 deed was an offer of dedication of the "Old Yadkin Road," *Cavin v. Ostwalt*, 76 N.C. App. 309, 311, 332 S.E.2d 509, 511 (1985), there is no evidence that any public authority of Moore County accepted the dedication. *Id.* at 312, 332 S.E.2d at 511 (offer of dedication must be accepted "in some recognized legal manner by the proper public authorities"). The plaintiffs were not parties in the declaratory judgment action nor is there any evidence that they were in privity with the parties to that action. Thus that judgment is not binding on the plaintiffs. *State v. Lewis*, 311 N.C. 727, 731, 319 S.E.2d 145, 148 (1984) (collateral estoppel requires that parties to prior action are identical or in privity with the parties in the present case). Finally, there is no evidence in this record that plaintiffs led the defendants to believe that plaintiffs had granted them an easement. In fact, Anne Huberth placed a "No Trespassing" sign on the property, prior to the date the defendants began their land clearing, and the

defendants destroyed and ignored the sign. Thus, the plaintiffs are not estopped to assert this claim. *Carroll v. Daniels and Daniels Constr. Co.*, 327 N.C. 616, 621, 398 S.E.2d 325, 328 (1990) (easement by estoppel created only where "the party to be estopped . . . misled the party asserting the estoppel either by some words or action or by silence").

Accordingly, the trial court correctly determined that no easement existed over the portion of Anne Huberth's property on which the "Old Yadkin Road" lies.

II

[2] In the alternative, the defendants argue that the trial court incorrectly determined damages in that it based its award on the replacement cost of the trees and the groundcover plants. We agree.

We first note that the plaintiffs were not entitled to recover any damages for the loss of trees and groundcover as a result of the violations of the Act. The Act authorizes "[a]ny person injured by [its] violation . . . [to] bring a civil action [seeking damages] against the person alleged to be in violation." N.C.G.S. § 113A-66(a) (1994). To be recoverable, the damages sought by the plaintiffs must be "caused by the violation." *Id.* In this case, there is no evidence that the violations of the Act caused the loss of the trees and/or the groundcover and indeed the trial court awarded only nominal damages for these violations.

[3] With regard to the plaintiffs' claim for negligent damage to real property, the general rule is that where the injury is completed (as opposed to a continuing wrong) the measure of damages "is the difference between the market value of the property before and after the injury." *Huff v. Thornton*, 23 N.C. App. 388, 393-94, 209 S.E.2d 401, 405 (1974) (improper to instruct that replacement cost is measure of damages), *aff'd*, 287 N.C. 1, 213 S.E.2d 198 (1975). Nonetheless, replacement and repair costs are relevant on the question of diminution in value and when there is evidence of both diminution in value and replacement cost, the trial court must instruct the jury to consider the replacement cost in assessing the diminution in value. *Id.* at 395, 209 S.E.2d at 405; *Lee v. Bir*, 116 N.C. App. 584, 590-91, 449 S.E.2d 34, 38-39 (1994) (in trespass case, where plaintiff presented evidence of both replacement cost and diminution in value, the replacement cost was relevant to determine reasonable market value of property), *cert. denied*, 340 N.C. 113, 454 S.E.2d 652 (1995); Dan B. Dobbs, *Dobbs Law of Remedies* § 5.2(2) (2d ed. 1993) (allowing evidence of

both measures of damages prevents "windfalls and economic waste"). When, however, the land is used for a purpose that is personal to the owner, the replacement cost is an acceptable measure of damages. *Plow v. Bug Man Exterminators, Inc.*, 57 N.C. App. 159, 162-63, 290 S.E.2d 787, 789 (termite damage to personal residence), *disc. rev. denied*, 306 N.C. 558, 294 S.E.2d 224 (1982); *Dobbs* at § 5.2(2), 718; Restatement (Second) of Torts § 929 cmt. b (1979); *see also Trinity Church v. John Hancock Mut. Life Ins. Co.*, 502 N.E.2d 532, 535-36 (Mass. 1987) (personal purpose doctrine applied to prevent "miscarriage of justice").

In this case, the record reveals that the injury to the plaintiffs' property was "completed" and there is no evidence that the property was used for a purpose that was personal to the plaintiffs. Thus, the proper measure of damages was the difference in the fair market value of the property before and after the negligent injury and the trial court erred in assessing damages on the basis of the replacement cost of the trees and groundcover. Furthermore, because the plaintiffs presented no evidence of diminution in value it is unnecessary to remand to the trial court for the setting of a new damage award.

III

Defendants next argue that the award of attorney fees pursuant to the Act was improper, because plaintiffs' attorney did not distinguish between fees earned pursuing plaintiffs' claims under the Act and those earned pursuing the common law claim.

The defendants correctly state the law that attorney fees are recoverable pursuant to the Act as a cost of litigation, N.C.G.S. § 113A-73(c) (1994), and are not recoverable under plaintiffs' common law negligent injury to property claim. *Bowman v. Comfort Chair Co., Inc.*, 271 N.C. 702, 704, 157 S.E.2d 378, 379 (1967) (attorney fees only allowed as costs pursuant to express statutory authority). We need not, however, reach the issue raised by the defendants because they failed to raise this issue before the trial court. N.C. R. App. P. 10(b)(1) ("[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion").

IV

[4] The defendants finally argue that the punitive damage award must be reversed because it cannot be supported by either the property damage claim or the Act.

The Act only provides for the recovery of "damages caused by the violation," N.C.G.S. § 113A-66(a)(3), and because punitive damages are designed to punish a party and are not awarded as compensation, they are not recoverable under the Act. *See Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964). Furthermore, had the legislature intended to permit punitive damages it could have specifically provided and it did not do so in this statute. *Compare* N.C.G.S. § 20-308.1(b) (1993) (specifically providing for the recovery of punitive damages for violation of statute).

With regard to the property damage claim, the defendants argue "[t]he act of pushing a sign over which is in the right-of-way or easement one believes he is authorized to use does not amount to an act sufficient to justify the award of $5,000 in punitive damages." We disagree. Punitive damages are in the discretion of the fact finder and may be awarded "where the wrong is done wilfully or under circumstances of rudeness, oppression or in a manner which evinces a reckless and wanton disregard of the litigant's rights." *Van Leuven v. Akers Motor Lines, Inc.*, 261 N.C. 539, 546, 135 S.E.2d 640, 645 (1964); *Hinson v. Dawson*, 244 N.C. 23, 26, 92 S.E.2d 393, 396 (1956). The trial court found as fact that the defendants "acted wilfully, wantonly and in disregard of plaintiffs' rights" and there is ample competent evidence in this record to support that finding. Not only did the defendants push over the "No Trespassing" sign but they did so after Anne Huberth refused to execute an easement and with knowledge that the plaintiffs did not want them to install an access road over the disputed area. Furthermore, the trial court did not err in ordering that the award be entered against the defendants "jointly and severally." The defendants argue that Sally Dohner "would only be liable for Mr. Holly's acts, as his partner, if the act[s] occurred in the course of the partnership employment." There is no dispute that the defendants were partners in the development of the Holly tract and that the building of the access road was in furtherance of that development.[1]

1. We do not address, because it is not raised, the issue of whether plaintiffs are entitled to punitive damages even though we have held that they are not entitled to any compensatory damage award. *See Title Ins. Co. of Minnesota v. Smith, Debnam, Hibbert and Pahl*, 119 N.C. App. 608, 611, 459 S.E.2d 801, 804 (1995) (nominal damage award proper even though no showing of actual damage); *but see id.* (Greene, J. dissenting) (nominal damage award not proper unless showing of actual loss); *Hawkins v. Hawkins*, 331 N.C. 743, 417 S.E.2d 447 (1992) (award of nominal damages supports award of punitive damages).

In summary, we affirm the trial court's determination that no easement exists, affirm the award of nominal damages under the Act, affirm the award of punitive damages under the property damage claim and affirm the award of attorney fees and costs. We reverse the award of compensatory damages under the property damage claim. Because of the violation of Rule 28(j), in our discretion and pursuant to Rule 35 of the Appellate Rules, the cost of printing plaintiffs' brief is assessed personally to Marsh Smith, attorney for the plaintiffs. *See State v. Patton*, 119 N.C. App. 229, 230, 458 S.E.2d 230, 232 (1995); *North Buncombe Assn. of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 33, 394 S.E.2d 462, 467-68, *disc. rev. denied*, 327 N.C. 484, 397 S.E.2d 215 (1990); N.C. R. App. P. 35(a) (cost of appeal to be assessed in the discretion of the appellate court). All other costs are to be divided between the parties, equally. N.C. R. App. P. 35(a).

Affirmed in part, reversed in part.

Judges WYNN and MARTIN, John C., concur.

MICHAEL LEWIS WILLIAMS v. NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 9410IC633

(Filed 3 October 1995)

1. Discovery and Depositions § 62 (NCI4th)— motion for sanctions denied—improper factors considered

In denying plaintiff's motion for sanctions, the Industrial Commission erred in considering as factors that representation for both parties was publicly funded; plaintiff did not personally incur any additional expense associated with his motion to compel discovery; and such "tactics" were remarkably out of character for the office of defendant's counsel.

Am Jur 2d, Depositions and Discovery §§ 357, 359, 365, 366, 369, 395.

2. Discovery and Depositions § 62 (NCI4th)— compliance with discovery order—remand for determination

The record did not present sufficient evidence to conclude with certainty that defendant failed to provide plaintiff with the specific documents required by the deputy commissioner's dis-

covery order. Should the Commission determine upon further proceedings that defendant failed to comply with the order, N.C.G.S. § 1A-1, Rule 37(b)(2) requires that defendant be ordered to pay plaintiff's reasonable expenses, including attorney's fees, unless the Commission finds the failure was substantially justified or that other circumstances make an award of expenses unjust.

Am Jur 2d, Depositions and Discovery §§ 361, 365, 376-378.

3. Discovery and Depositions § 64 (NCI4th)— counsel's certification of interrogatories—violation of Rule 26(g)—remand for determination

This case is remanded for a determination as to whether defense counsel's certification of responses to interrogatories violated N.C.G.S. § 1A-1, Rule 26(g), and, if so, for the imposition of appropriate sanctions.

Am Jur 2d, Depositions and Discovery §§ 376-378, 386.

Appeal by plaintiff from the decision and order of the Industrial Commission entered 17 March 1994. Heard in the Court of Appeals 2 March 1995.

N.C. Prisoner Legal Services, Inc., by Richard E. Giroux, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General E. H. Bunting, Jr., for defendant-appellee.

McGEE, Judge.

On 12 March 1991 plaintiff Michael Williams, an inmate in Central Prison, was stabbed multiple times by another inmate, Curtis Webber. Plaintiff filed a claim for damages pursuant to N. C. Gen. Stat. § 143-291 Tort Claims Act against defendant Department of Correction (hereinafter DOC) alleging negligence and claiming that the DOC employee on duty that day did not follow policy and procedure in maintaining a segregated cellblock to prevent inmates from coming into contact with each other. Plaintiff alleged that after being released from his cell for recreation, he was attacked by Webber who had been hiding in the shower area. Defendant answered denying negligence and alleging contributory negligence on plaintiff's part in

that the plaintiff was informed in advance by another inmate that Webber was waiting to attack him.

During the discovery process, plaintiff served defendant with interrogatories, requests for admissions and requests for production of documents related to DOC's standard practice or policy of allowing only one inmate at a time out of his cell for recreation. Defendant denied the existence of such a policy and failed to produce the requested documents. Plaintiff moved to compel discovery, and the deputy commissioner ordered defendant to provide plaintiff with certain documents.

During the hearing before the deputy commissioner on 15 June 1992, plaintiff's counsel learned of the existence of an office memorandum from Lt. F. S. Walker regarding his investigation of the 12 March 1991 incident which contained the statement, "[B]oth inmates are Maximum Custody and they are not allowed to come in contact with each other." On cross-examination, Lt. Walker admitted that the practice on that particular cellblock was to keep the inmates separated. Plaintiff moved for sanctions pursuant to North Carolina Rules of Civil Procedure 37(a)(4), 37(b)(2), 37(c) and 26(g). The deputy commissioner's decision and order denied plaintiff's motions for sanctions and his claim for damages under the Tort Claims Act, and concluded that plaintiff proved negligence on the part of the defendant but was barred from recovering damages because of his own contributory negligence.

Plaintiff made application for review to the Full Commission which adopted the decision and order of the deputy commissioner with slight modification. In denying plaintiff's motions for discovery sanctions, the Full Commission noted:

> Plaintiff moves the Commission to strike the contributory negligence defense and award attorneys [sic] fees to him because of defendant's "obstructive and deceptive discovery tactics." *While there appears to be a disturbing degree of justification for that accusation*, substantial justice would not be accomplished by striking the defense, and other circumstances would make an award of fees of [sic] unjust, including that representation for both parties is publicly funded, plaintiff did not personally incur any additional expense due to the omissions of which he complains, and that such "tactics" are remarkably out of character for the office of defendant's counsel in our experience. (emphasis added).

Plaintiff appeals from the decision and order of the Full Commission, and asks this Court to determine whether the Industrial Commission erred in denying plaintiff's motions for discovery sanctions.

The discovery rules should be liberally construed in order to accomplish the important goal of "facilitat[ing] the disclosure *prior to trial* of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial." *Telegraph Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888, *disc. review denied*, 297 N.C. 304, 254 S.E.2d 921 (1979) (emphasis added). The administration of these rules, in particular the imposition of sanctions, is within the broad discretion of the trial court. *Id.* at 727, 251 S.E.2d at 888. The trial court's decision regarding sanctions will only be overturned on appeal upon showing an abuse of that discretion. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 36, 392 S.E.2d 663, 667 (1990), *disc. review denied*, 328 N.C. 93, 402 S.E.2d 418 (1991). In the case before us, plaintiff moved for and was denied sanctions under Rules 37(a)(4), 37(b)(2), 37(c), and 26(g).

I.

[1] Plaintiff first contends sanctions were warranted under Rule 37(a)(4), which provides:

> If the motion [to compel] is granted, the court *shall*, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, *unless* the court finds that the opposition to the motion was substantially justified or that *other circumstances make an award of expenses unjust.* (emphasis added).

Plaintiff's motion to compel discovery was granted. Therefore, pursuant to Rule 37(a)(4), the Full Commission was required to award reasonable expenses including attorney's fees, unless it found that other circumstances would make such an award unjust. In denying plaintiff's motion, the Full Commission reasoned that "representation for both parties is publicly funded, plaintiff did not personally incur any additional expense due to the omissions of which he complains, and that such 'tactics' are remarkably out of character for the office of defendant's counsel in our experience." We find none of these cir-

cumstances are sufficient to warrant denial of plaintiff's motion for Rule 37(a)(4) sanctions.

This Court has affirmed the award of attorney's fees where both parties were represented by publicly funded agencies. In *Tay v. Flaherty*, 100 N.C. App. 51, 394 S.E.2d 217, *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990), our Court affirmed an award of attorney's fees to a woman whose food stamps were terminated wrongfully by the local department of social services, a division of the N.C. Department of Human Resources. The state agency was represented by an assistant attorney general and the plaintiff was represented by a legal services organization, just as in this case.

Other courts have similarly upheld the award of attorney's fees to attorneys employed by public interest law firms or organizations. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70, 64 L. Ed. 2d 723, 738 (1980); *Torres v. Sachs*, 538 F.2d 10, 13 (2nd Cir. 1976). Although plaintiff may not have personally incurred any expense associated with the motion to compel, the organization representing him surely did. Moreover, "[t]he statutory policies underlying the award of fees justify such shifting without regard to whether the individual plaintiff initially assumed the financial burdens of representation." *Rodriguez v. Taylor, 569 F.2d* 1231, 1245 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913, 56 L. Ed. 2d 414 (1978). Our Supreme Court noted, "[e]mphasis in the new rules is not on gamesmanship, but on expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that evidence at trial may flow smoothly and objections and other interruptions be minimized." *Willis v. Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976). The Full Commission found a "disturbing degree of justification" for the accusation that defendant employed "obstructive and deceptive discovery tactics." The policy expressed by the Supreme Court would certainly be undermined by allowing this conduct to go unsanctioned merely because both parties are represented by publicly funded agencies.

Finally, the Full Commission's observation that "such 'tactics' are remarkably out of character for the office of defendant's counsel" is irrelevant to the question of whether to impose sanctions. The primary consideration must be the advancement of the underlying policy to facilitate the identification of issues and encourage the smooth flow of evidence at trial. Conduct which would serve to defeat this

policy should be carefully scrutinized regardless of whether or not it is typical conduct. We find none of the circumstances emphasized by the Full Commission sufficient to justify its failure to impose sanctions under Rule 37(a)(4). Therefore, the consideration of those factors was an abuse of discretion.

II.

[2] Plaintiff next argues sanctions should have been imposed under Rule 37(b)(2) which states:

> If a party . . . fails to obey an order to provide or permit discovery, . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just . . . . In lieu of any of the foregoing orders or in addition thereto, the court *shall* require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, *unless* the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. (emphasis added).

Plaintiff argues the defendant's failure to turn over Lt. F. S. Walker's office memorandum violated the "spirit of the Deputy Commissioner's order." However, the order identified the following specific documents that defendant must provide to the plaintiff:

> [T]he incident report produced in connection with the March 12, 1991 incident, the statement by Michael Williams . . . the witness statement of Michael Wheeler dated March 3, 1991 . . . the written statement of Michael Williams dated March 12, 1991 . . . [and] a copy of any report contained in Officer Wheeler's personnel record regarding a reprimand or disciplinary action against Officer Wheeler arising out of the incident of March 12, 1991.

The order then denied the motion for any additional discovery. The record does not present sufficient evidence to conclude with certainty that defendant failed to provide plaintiff with the specific documents required by the deputy commissioner's order.

Assuming, *arguendo*, that defendant did provide the specified documents, then Rule 37(b)(2) would be inapplicable and no sanctions under this rule would be required. However, should the Full Commission determine upon further proceedings that defendant failed to comply with the order, Rule 37(b)(2) requires that defendant be ordered to pay plaintiff's reasonable expenses, including attor-

ney's fees, unless the Commission finds "the failure was substantially justified or that other circumstances make an award of expenses unjust." As we previously discussed, the circumstances emphasized in the Full Commission's decision and order do not provide sufficient justification for failing to impose sanctions under Rule 37(b)(2).

III.

Plaintiff next argues Rule 37(c) requires the imposition of sanctions. Rule 37(c) provides:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court *shall* make the order *unless* it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit. (emphasis added).

During discovery, plaintiff made several requests for admissions pursuant to Rule 36 regarding the policy or standard procedure in plaintiff's cellblock of locking one inmate back in his cell before allowing another out of his cell in order to prevent inmates from coming into contact with each other. Although defendant denied each request for admission, an office memorandum regarding the investigation of the 12 March 1991 incident and Lt. F. S. Walker's admission on cross-examination that the practice on that particular cellblock was to keep the inmates separated "thereafter prove[d] the . . . truth of the matter." The Full Commission was required to impose sanctions unless it found one of the four exceptions provided in Rule 37(c). The Full Commission made none of the four required findings before denying sanctions, and thereby abused its discretion.

IV.

[3] Finally, plaintiff contends sanctions were warranted under Rule 26(g), which provides:

> Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at

> least one attorney of record in his individual name . . . . The signature of the attorney or party constitutes a certification that he has read the request, response, or objection and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with the rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose . . . ; and (3) not unreasonable or unduly burdensome or expensive . . . . If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. (emphasis added).

In Interrogatory No. 15, plaintiff asked defendant to "[d]escribe Department of Correction policy or standard procedure in regard to contact between maximum custody inmates during exercise periods, including inmates exercising indoors on the disciplinary segregation block at Central Prison on March 12, 1991." Defendant responded, "[m]aximum [c]ustody inmates at Central Prison recreate alone whenever possible to prevent potential confrontations among the inmates. Central Prison policy does not specify that maximum custody inmates recreate alone. Departmental policy does not specify that maximum custody inmates recreate alone." Plaintiff contends defendant's response was "incorrect and misleading and was contradicted by Lt. Walker's office memorandum and his hearing testimony," and therefore defendant should be sanctioned. The record before us is insufficient to determine whether certification was made in violation of this rule. If the Full Commission finds that Rule 26(g) was violated, it must impose an appropriate sanction as directed by the statute.

For the foregoing reasons we reverse the Full Commission's denial of discovery sanctions. We remand for further proceedings to determine: (1) the appropriate sanctions that shall be imposed under Rule 37(a)(4) and Rule 37(c); (2) whether defendant complied with the deputy commissioner's order to compel discovery and if not, then the appropriate sanctions that shall be imposed under Rule 37(b)(2); and (3) whether counsel's certification violated Rule 26(g) and if so, then the appropriate sanctions that shall be imposed. The Full

Commission, in its discretion, is authorized to hear further evidence to make the above determinations.

Reversed and remanded.

Judges EAGLES and WALKER concur.

STATE OF NORTH CAROLINA v. WAYNE MATTHEW JORDAN

No. COA94-1180

(Filed 3 October 1995)

1. Searches and Seizures § 77 (NCI4th)— evidence seized at time of arrest—articulable suspicion to justify stop of car—denial of motion to suppress proper

There was no merit to defendant's contention that the trial court erred in denying his motion to suppress evidence seized at the time of his arrest because the arresting officer was without a sufficient reasonable articulable suspicion to justify an investigatory stop of the car in which defendant was a passenger, where a fourteen-year veteran of the police department received a call by a dispatcher indicating that an armed robbery had been committed by two black males, one of whom was wearing a green jacket, at a shoe store and that they had left on foot; the officer observed a car coming from a vehicular area near the crime scene where there were no marked spaces; there were three black males in the car and no other blacks in the area; the officer followed the car during which time the passengers watched him and exhibited what he believed to be suspicious activity in the back seat; the officer witnessed someone discarding two card-like objects from the passenger window; when he turned on his lights, the car did not pull over immediately; upon stopping the vehicle, the officer ordered defendant out of the car and frisked and handcuffed him; during this time the officer saw a green jacket in the car; and thereafter officers searched the blue car and found a .25 caliber handgun under the seat.

Am Jur 2d, Searches and Seizures § 75.

Validity, under Federal Constitution, of warrantless search of motor vehicle—Supreme Court cases. 89 L. Ed. 2d 939.

2. Criminal Law § 796 (NCI4th)— mere presence at the crime scene—requested instruction not given—no error

The trial court did not err in failing to give defendant's proposed instruction on mere presence at the scene of the crime where defendant declined the trial court's offer to give the requested instruction in significant substance; and there was substantially more evidence against defendant than his mere presence at the scene so that the trial judge presumably determined that the mere presence instruction, as requested, was irrelevant to this case.

Am Jur 2d, Trial § 1400.

3. Criminal Law § 830 (NCI4th)— accomplice testimony instruction proper

The trial court did not err in finding that two defense witnesses in an armed robbery trial were interested witnesses and in instructing the jury on accomplice testimony even though one witness had already been sentenced for the armed robbery and charges against the second witness had been dropped but could have been reinstated.

Am Jur 2d, Trial § 821.

4. Criminal Law § 1183 (NCI4th)— faxed police record—admissibility for sentencing purposes

The trial court did not err in admitting a faxed copy of a Connecticut police record check into evidence for sentencing purposes, since the enumerated methods of proof in N.C.G.S. § 15A-1340.4(e) are permissive rather than mandatory; the Connecticut police record appeared to be a reliable source of defendant's prior convictions; and defendant did not deny that the record was complete and accurate or make a motion to suppress the record.

Am Jur 2d, Evidence § 1316.

Appeal by defendant from judgment entered 9 February 1994 by Judge Ronald L. Stephens in Robeson County Superior Court. Heard in the Court of Appeals 29 August 1995.

Attorney General Michael F. Easley, by Assistant Attorney General W. Richard Moore, for the State.

Weber and Shatz, P.A., by Daniel Shatz, for defendant appellant.

COZORT, Judge.

In this case the defendant contends that physical evidence obtained from the defendant's vehicle should have been suppressed at trial on the ground that the police officers who stopped the defendant did not have a sufficient reasonable articulable suspicion to justify an investigative stop. We find no error.

The State's evidence tended to show that on 21 May 1993, Officer Walter McNeill of the Lumberton Police Department received a call that two black males, one wearing dark clothing and the other wearing a green jacket, had just left Pic-N-Pay shoe store after committing an armed robbery. Officer McNeill, less than a mile away from the shopping center at the time of the call, saw a small blue car come from behind Revco Drugs in the shopping center as he proceeded towards the shoe store. The area from which the car came was not used for public parking. The blue car, which McNeill had never seen in Lumberton, contained three black males. Officer McNeill followed the car. The back seat passenger kept looking back at the police vehicle. McNeill radioed other officers to inform them that he believed he had the suspects in sight. When he saw an arm reach out of the passenger window and drop two small card-like objects, Officer McNeill turned on his blue lights and stopped the car. McNeill approached the passenger side of the car and told an individual, later identified as defendant Wayne Matthew Jordan, to put his hands out of the window where they could be seen. The officer then saw a green jacket inside the vehicle, at which time he ordered the defendant out of the vehicle and frisked him. After detaining the occupants of the blue car in the police vehicle, Officer McNeill and other officers who had arrived searched the car and found a gun under the driver's seat, a clip with eight bullets, money crumpled in the back floorboard and a green jacket. The officers also retrieved the card-like objects thrown from the car, which were two pairs of ladies' earrings.

Defendant was arrested and charged with robbery with a dangerous weapon. After a verdict of guilty and imposition of a prison sentence of 25 years, defendant appeals.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his motion to suppress evidence seized at the time of his arrest. The defendant argues that Officer McNeill was without a sufficient reasonable articulable suspicion to justify a stop of the car in which defendant was a passenger; therefore, he main-

tains, the evidence obtained as a result of the search is inadmissible. We disagree.

An officer may conduct a brief investigatory stop and limited search of a vehicle or an individual, without probable cause, if the officer is justified by specific, articulable facts which would lead a police officer "reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30, 20 L.Ed.2d 889, 911 (1968); *see State v. Thompson*, 296 N.C. 703, 252 S.E.2d 776, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143 (1979). "[T]he 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." *Terry*, 392 U.S. at 21, 20 L.Ed.2d at 906. The court must view the totality of the circumstances from the perspective of a reasonable and cautious police officer. *State v. Battle*, 109 N.C. App. 367, 370, 427 S.E.2d 156, 158 (1993).

In this case, in ruling upon defendant's motion to suppress, the trial court found that there were specific, articulable facts sufficient to justify Officer McNeill in stopping the car for an investigatory search and frisking the defendant. Included in those findings were the facts that Officer McNeill, a fourteen-year veteran of the Lumberton Police Department, received a call by the dispatcher indicating that an armed robbery had been committed by two black males at the Pic-N-Pay shoe store and that they had left on foot. The dispatcher gave a general description of them, including what they were wearing. Officer McNeill witnessed a blue car coming from behind Revco Drugs, near Pic-N-Pay, from a vehicular area in which there are no marked spaces. There were three black males in the car; Officer McNeill saw no other black individuals in the area. He had never seen the vehicle before. He followed the blue car, during which time the passengers were watching him and exhibited what he believed to be suspicious activity in the back seat. Officer McNeill witnessed someone discarding two card-like objects from the passenger side window. When he turned on his lights, the blue car did not pull over immediately. Upon stopping the vehicle, Officer McNeill ordered defendant Jordan out of the car and frisked and handcuffed him. During this time he saw a green jacket in the car. Thereafter, the officers searched the blue car and found a .25 caliber handgun under the seat.

N.C. Gen. Stat. § 15A-977(f) (1988) requires that the trial court make findings of fact and conclusions of law when ruling upon a

motion to suppress. The findings of fact made by the trial court are conclusive and binding upon appellate courts if supported by competent evidence. *State v. Barfield*, 298 N.C. 306, 339, 259 S.E.2d 510, 535 (1979), *reh'g denied*, 448 U.S. 907, 65 L.Ed.2d 1181 (1980). The trial court's findings of fact in this case are supported by competent evidence and are a sufficient basis for its conclusion that the search conducted by Officer McNeill and other officers without a warrant was lawful and that Officer McNeill had a sufficient reasonable suspicion for an investigative stop of the blue 1979 Chevy Citation. This assignment of error is overruled.

[2] By his next assignment of error, the defendant contends that the trial court erred in failing to give the defendant's proposed instruction on mere presence at the scene of the crime. Prior to the court's charge to the jury, the defendant requested in writing that the trial judge charge the jury as follows:

> Mere presence at the scene of a crime is insufficient to convict a person of a crime.

The trial judge at the charge conference stated that he would give the instruction with the additional sentence:

> However, it may be considered by the jury with all other evidence in arriving at a decision as to the defendant's guilt.

The defendant took exception to the ruling and requested that the instruction on mere presence not be given in the modified form.

If a requested instruction is a correct statement of the law and supported by the evidence, the court must give the instruction at least in substance. *State v. Rose*, 323 N.C. 455, 457, 373 S.E.2d 426, 428 (1988). If, however, the instruction is irrelevant to the case, based upon the evidence, the judge is not obliged to give it. *State v. Chambers*, 52 N.C. App. 713, 724, 280 S.E.2d 175, 181 (1981).

In this case, the court agreed to give the requested mere presence instruction in significant substance; however, the defendant declined the court's offer. Furthermore, there is substantially more evidence in this case against the defendant than his mere presence at the scene. The testimony of Nancy Campbell, an employee of Pic-N-Pay present at the store at the time of the robbery, was that the defendant closely followed Ms. Campbell to the cash register of the store and told her to open it. She took the money from the register and handed it to the defendant. She then witnessed the defendant and the other man

involved in the robbery leave the store together. Based upon the evidence presented at trial, the trial judge presumably determined that the mere presence instruction, as requested, was irrelevant to this case.

To determine whether a jury could be misled or misinformed by a certain jury instruction, the charge must be examined contextually as a whole. *State v. Watson*, 294 N.C. 159, 168-69, 240 S.E.2d 440, 447 (1978). In this case, the trial court correctly charged the jury regarding the defendant's presumption of innocence and the State's burden to prove guilt beyond a reasonable doubt. Furthermore, the court accurately charged the jury as to the weight to be given any evidence and its role as sole judge of the credibility of witnesses. Based upon its guilty verdict, the jury apparently found Ms. Campbell's testimony more credible than testimony offered by defense witnesses. Taken as a whole, the jury charge given was sufficient, and there is no reason to believe that the jury was misled or misinformed on the applicable law in this case. Defendant's assignment of error is overruled.

[3] In his third assignment of error the defendant contends that the trial court erred in instructing the jury on accomplice testimony. We find no error. This court has upheld an accomplice instruction regarding defense witnesses when the instruction was applicable, so long as the instruction was accompanied by an admonition to the jury that, if the testimony of the alleged accomplice is believed, it should be given the same weight as any other credible evidence. *State v. Diaz*, 88 N.C. App. 699, 704, 365 S.E.2d 7, 10 (1988), *cert. denied*, 322 N.C. 327, 368 S.E.2d 870 (1988); *see State v. Pryor*, 59 N.C. App. 1, 295 S.E.2d 610 (1982). In this case, the trial judge specifically gave the additional qualification after the interested witness charge that the jury should, if it believed such testimony, give it as much weight as it would a disinterested witness.

William McCormick, one of the defense witnesses, had already been sentenced for armed robbery prior to the defendant's trial. Charges against Steven Jones, the driver of the vehicle in which the defendant was stopped following the robbery, had also been dropped prior to trial. However, the status of these two witnesses with regard to this case does not mean that they were no longer "interested witnesses" such that the accomplice instruction was no longer necessary. William McCormick was a friend of the defendant. He lived in the same trailer park where the defendant stayed, occasionally came to the defendant's home to change clothes, and kept some of his

clothes and a gun in the defendant's bedroom. Steven Jones, driver of the vehicle from which the defendant was apprehended, was also a friend of the defendant's. Furthermore, while the charges against Jones had been dismissed, they could have been reinstated. However, if the defendant was acquitted of robbery, it would be less likely that the State would have reinstated the charges against Jones. " 'The relationships which might cause bias are legion. . . . The law recognizes relationships far beyond blood and marriage. "Although relationship to a party should not discredit the witness, still this is a circumstance which may be weighed by the jury." ' " *State v. Morgan*, 263 N.C. 400, 404, 139 S.E.2d 708, 710 (1965) (citations omitted). In this case, the trial court found that these two defense witnesses were interested witnesses. There was no error in so charging the jury, and this assignment of error is overruled.

[4] In his fourth assignment of error the defendant contends that the trial court committed error in admitting a faxed copy of a Connecticut police record check into evidence for sentencing purposes. N.C. Gen. Stat. § 15A-1340.4(e) (1988) provides:

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction.

The enumerated methods of proof in this statutory section are permissive rather than mandatory. *State v. Strickland*, 318 N.C. 653, 660, 351 S.E.2d 281, 284 (1987). In *Strickland*, the Court allowed proof of a prior criminal record through the testimony of a police officer based upon his personal knowledge. As demonstrated in *Strickland*, the reliability of the method of proof is the important inquiry to be made in determining its admissibility. In this case, the defendant did not deny that the Connecticut police record was complete and accurate. Nor did the defendant make a motion to suppress the evidence of the prior conviction or request a continuance in order to obtain the original copy of the defendant's record. The defendant merely contends that the formalities of N.C. Gen. Stat. § 15A-1340.4(e) were not strictly followed. The defendant does not argue, and we find no evidence from the record, that the Connecticut police record was unreliable, incomplete or inaccurate. N.C. Gen. Stat. § 15A-1340.4(e) allows means of proof other than those enumerated in the statute so long as those means are reliable. As a faxed, certified copy, the Connecticut police record appears to be a reliable source of the defendant's prior convictions. The defendant's assignment of error regarding this record is overruled.

In sum, we find that the trial court's denial of the defendant's motion to suppress was supported by competent evidence. We also find that the requested jury instruction on mere presence was properly excluded and that the instruction on accomplice testimony was properly included. Finally, we find no error in the admission of the Connecticut police record check because in this particular case the requirements of the reliability of the method of proof have been met in accordance with N.C. Gen. Stat. § 15A-1340.4(e).

No error.

Judges WALKER and McGEE concur.

JIM D. CHAPMAN, PLAINTIFF v. JANKO, U.S.A., INC., DEFENDANT

No. COA94-1242

(Filed 3 October 1995)

Courts § 16 (NCI4th)— personal jurisdiction over nonresident defendant—appropriate subject matter—sufficient minimum contacts

The trial court had personal jurisdiction over the nonresident defendant where the complaint alleged that one of defendant's representatives agreed to reimburse plaintiff for his consultation services as well as his expenses in the event that an eventual agreement was not reached regarding plaintiff's representation of defendant; plaintiff, a North Carolina resident, provided such services, but defendant refused to compensate him, and N.C.G.S. § 1-75.4(5)(a) gives North Carolina courts personal jurisdiction over any action which arises out of a promise made anywhere to plaintiff by defendant to perform services within this state or to pay for services to be performed in this state by plaintiff. Furthermore, defendant had sufficient minimum contacts with North Carolina to permit the exercise of personal jurisdiction where plaintiff, at defendant's request, met with and consulted with defendant on several occasions; supplies were shipped from plaintiff's office in North Carolina; plaintiff spent considerable time and energy in North Carolina engineering and designing a computer system; plaintiff's representatives and plaintiff went to defendant's offices in South Carolina; phone calls and orders to

plaintiff from defendant in South Carolina were made; and plaintiff was listed as a USA sales representative on defendant's letterhead.

Am Jur 2d, Courts § 75.

Appeal by defendant from order entered 15 August 1994 at the 8 August 1994 term by Judge Marilyn R. Bissell in Mecklenburg County District Court. Heard in the Court of Appeals 21 August 1995.

Poyner & Spruill, L.L.P., by P. Marshall Yoder, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Richard B. Fennell, for defendant-appellant.

JOHNSON, Judge.

Plaintiff Jim D. Chapman, a citizen of Mecklenburg County, North Carolina filed an action against defendant Janko, U.S.A., Inc., a South Carolina corporation. The evidence reveals that the parties entered into negotiations in August of 1992 concerning the provision of consultation services by plaintiff Chapman to defendant Janko. These consultation services consisted of developing marketing programs as well as a sales network for a product known as "Cycle Buddy."

The parties had intended to enter into a service agreement for plaintiff's services and were negotiating to such an end. Defendant Janko, through its president, C.C. "Skip" Hoagland, agreed to reimburse Mr. Chapman for his consultation and efforts at the rate of $150.00 per hour, plus reimburse his expenses in the event that a final agreement was not eventually reached as to plaintiff's representation. Plaintiff alleged that defendant unreasonably delayed furnishing plaintiff with its proposed contract for his services, during which time he continued to furnish the services to defendant. Eventually, defendant ended negotiations after receiving plaintiff's first requested revisions to the contract sent to him by defendant.

During the negotiations, on behalf of defendant, plaintiff developed a master rep network, a marketing strategy, and designed certain marketing and administrative tools including a product fact sheet for use and marketing of the "Cycle Buddy." In addition, plaintiff developed a domestic price list program, a POE program, letters of credit instructions, a revision of the product brochure, and aided defendant in completing a vendor product information package for a

major retailer. Plaintiff traveled to South Carolina in connection with some of these services.

Defendant admits that it did have contacts by letter and telephone with plaintiff in North Carolina involving these negotiations. Furthermore, Mr. Chapman is listed as the "U.S.A. sales rep" for defendant on its own letterhead. Plaintiff also alleged that defendant requested that plaintiff meet with its representatives on numerous occasions concerning the sales and marketing of the "Cycle Buddy." However, defendant refused to honor its obligations to this North Carolina resident for services that were provided by plaintiff out of his North Carolina office. Defendant submitted an affidavit of Jan Barry Thomas in support of its motion to dismiss which denied that plaintiff had performed any services for defendant, or that defendant had ever agreed to pay him anything. The affidavit also stated that defendant was a South Carolina corporation with its only office in South Carolina. The affidavit further showed that defendant was not domesticated in North Carolina, and had no officers, directors or employees which resided in North Carolina. Defendant alleges that its only contacts with plaintiff have been by telephone or letter, or within the State of South Carolina. These "contacts" involved negotiations only. To this allegation, plaintiff filed a facsimile document listing Jim Chapman of Chapman-Scott & Associates as defendant's sales representative. Plaintiff contends that this document indicates that defendant submitted itself to the jurisdiction of North Carolina's courts.

Defendant's sole assignment of error is that the trial court's denial of its motion to dismiss for lack of personal jurisdiction is contrary to law and unsupported by any evidence in the Record. A determination as to whether a foreign defendant may be subjected to *in personam* jurisdiction in North Carolina requires application of a two-prong test. "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Dataflow Companies v. Hutto*, 114 N.C. App. 209, 211, 441 S.E.2d 580, 581 (1994) (*quoting Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)).

Jurisdictional authority is established in North Carolina's "long-arm" statute, North Carolina General Statutes § 1-75.4 (1983), which provides:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to

> Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . .
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
>
> b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
>
> c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
>
> d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or
>
> . . . .

This statute should be liberally construed in favor of finding that personal jurisdiction exists. *Dataflow*, 114 N.C. App. 209, 441 S.E.2d 580. Plaintiff has the burden of establishing prima facie evidence that one of the statutory grounds applies. *Id.*

In the case *sub judice*, defendant's activities fall within North Carolina General Statutes § 1-75.4(5). The complaint alleges that one of defendant's representatives agreed to reimburse plaintiff for his consultation services as well as his expenses in the event that an eventual agreement was not reached regarding plaintiff's representation of defendant. Plaintiff, a North Carolina resident, provided such services, but defendant refused to compensate plaintiff for his services. North Carolina General Statutes § 1-75.4(5)(a) gives North Carolina courts personal jurisdiction over any action which "[a]rises out of a promise, made anywhere to the plaintiff . . . by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff[.]" Additionally, North Carolina General Statutes § 1-75.4(5)(b) applies to "services actually per-

formed for the defendant by the plaintiff within this State if such performance . . . was authorized or ratified by the defendant[.]" Accordingly, North Carolina General Statutes § 1-75.4(5)(a) clearly provides statutory authority to this State in its exercise of personal jurisdiction over the non-resident defendant Janko. However, that is not the end of the inquiry.

The next prong in the two-step inquiry is whether the exercise of jurisdiction meets constitutional due process requirements. These due process requirements asks that "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " exist. *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786 (*quoting International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945); *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 283 (1940). A determination of minimum contacts is not made by applying a mechanical formula; instead, each individual case is decided on the particular facts in that case. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985). The factors used in determining whether minimum contacts exist include: (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties. *See Sola Basic Industries v. Electric Membership Corp.*, 70 N.C. App. 737, 321 S.E.2d 28 (1984).

Defendant cites *Taurus Textiles, Inc. v. John M. Fulmer Co.*, 91 N.C. App. 553, 372 S.E.2d 735 (1988) and *Marion v. Long*, 72 N.C. App. 585, 325 S.E.2d 300, *disc. review denied*, 313 N.C. 604, 330 S.E.2d 612 (1985), in support of its position that plaintiff does not have sufficient minimum contacts to be subject to personal jurisdiction in North Carolina. *Taurus* involved a plaintiff that was a North Carolina corporation which submitted affidavits which showed that it had manufactured and shipped textiles to defendant, and that plaintiff and its agent negotiated with defendant regarding their ongoing business relationship. *Taurus*, 91 N.C. App. 553, 372 S.E.2d 735. The plaintiff in *Taurus* alleged that it had performed services for defendant in North Carolina. The contract entered into between the parties showed that defendant had agreed to be subject to personal jurisdiction in North Carolina. This Court held that defendant's motion to dismiss was properly granted. Similarly, this Court in *Marion* held that services performed in North Carolina were merely incidental and jurisdiction was not proper. *Marion*, 72 N.C. App. 585, 325 S.E.2d 300. In *Marion*, the plaintiff contracted with defendant, a

Georgia resident, to repair his car. Defendant had placed an advertisement in a magazine which was distributed in North Carolina. Plaintiff also alleged that defendant came to North Carolina, finalized the contract, picked up the car, and towed it back to Georgia. This Court held that although the actions fell within the long-arm statute, that jurisdiction could not constitutionally be exercised.

In support of its position that the minimum contacts are sufficient, plaintiff cites *Dataflow*, 114 N.C. App. 209, 441 S.E.2d 580 and *Brickman v. Codella*, 83 N.C. App. 377, 350 S.E.2d 164 (1986). In *Dataflow*, the plaintiff, a North Carolina corporation, agreed to sell and service certain computer equipment and software to a South Carolina defendant. Subsequent to the installation of the computer system, plaintiff's employees made regular visits to South Carolina and provided defendants with a toll-free number to contact them. After the original installation, defendants also placed orders for forms and computer supplies to plaintiff in North Carolina. Upon defendant's failure to pay plaintiff for the services and supplies provided, plaintiff filed an action in North Carolina. This Court held that personal jurisdiction over defendants was proper. Our Court emphasized that the supplies were shipped from plaintiff's office in North Carolina and plaintiff spent considerable time and energy in North Carolina engineering and designing the computer system. Plaintiff also sent representatives to defendant's offices. In *Brickman*, this Court found jurisdiction proper where the defendant sent plaintiff a contract of purchase and signed a guaranty of certain lease payments. Because defendant had solicited the plaintiff and was seeking assistance in beginning a new business venture, this Court held that there were sufficient minimum contacts.

Evidence of the contacts in the instant case consist of the following: that the complaint alleges that plaintiff, at defendant's request, met with and consulted with defendant on several occasions; that the supplies were shipped from plaintiff's office in North Carolina; that plaintiff spent considerable time and energy in North Carolina engineering and designing the computer system; that plaintiff's representatives and plaintiff went to defendant's offices in South Carolina; that phone calls and orders to plaintiff from defendant in South Carolina were made; and that plaintiff is listed as a U.S.A. sales representative on defendant's letterhead. Thus, upon its failure to compensate plaintiff for services provided, defendant should not be surprised with being haled into a North Carolina court. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490 (1980).

Accordingly, the trial court did not err in denying defendant's motions to dismiss. *In personam* jurisdiction over this defendant is constitutional. Therefore, the order of the trial court denying defendant's motion to dismiss for lack of personal jurisdiction is affirmed.

Affirmed.

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

STATE OF NORTH CAROLINA v. CHRIS CLYBURN

No. COA94-1182

(Filed 3 October 1995)

1. Searches and Seizures § 77 (NCI4th)— observation of suspected drug transaction—investigatory stop permissible

The investigatory stop of defendant's vehicle was permissible where police officers, who were conducting surveillance in a drug trafficking area, observed what they believed to be a drug transaction and radioed for backup; another police vehicle came up behind defendant's vehicle which was stopped; and the officers requested defendant and his passenger to exit the vehicle.

Am Jur 2d, Searches and Seizures § 75.

2. Searches and Seizures § 82 (NCI4th)— warrantless search of vehicle—protective frisk—admissibility of handgun

The search of the glove compartment of defendant's car was justified as a protective frisk, and the seizure of a .357 Magnum handgun found in the glove compartment was lawful, where officers made an investigatory stop of defendant's car; after officers frisked defendant and a female passenger, defendant became belligerent; and the officers reasonably believed that defendant might be armed because of his suspected involvement in drug trafficking.

Am Jur 2d, Searches and Seizures § 187.

Validity, under Federal Constitution, of warrantless search of motor vehicle—Supreme Cour cases. 89 L. Ed. 2d 939.

3. Searches and Seizures § 49 (NCI4th)— search of vehicle incident to arrest—admissibility of drugs found in ashtray

Incident to an arrest for possession of a concealed weapon, officers were justified in searching the passenger area of defendant's vehicle, including receptacles such as an ashtray, and drugs found in the ashtray were admissible.

Am Jur 2d, Searches and Seizures § 176.

Appeal by defendant from judgments entered 23 March 1994 by Judge Robert D. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 August 1995.

On the evening of 9 November 1993, Officers R. A. McManus and C. R. Selvey of the Charlotte-Mecklenburg Police Department conducted surveillance in the 1600 block of Remount Road. Both officers were aware of the area's reputation for drug activity and had previously made drug arrests in the vicinity. While positioned in an unmarked car, the officers observed three black males standing in front of a vacant duplex across the street. Officer McManus testified that he observed several "meetings" whereby the three men were approached by individuals on foot who would speak briefly to one of the black males. During each "meeting," the individual would disappear behind the duplex with the same black male, later identified as the defendant. The other two males remained in front of the duplex as if acting as lookouts. Each time the defendant reappeared, the other two men conferred with him. Officers McManus and Selvey had observed similar "meetings" during their years on the police force. Based on their training and experience, both officers testified that in their opinions the "meetings" were drug transactions.

Later during the surveillance, the police observed a female approach the three men. Like previous "meetings," the female spoke momentarily with the men and then disappeared behind the duplex with the defendant. After a couple of minutes, Officer McManus saw the defendant and the female cross the street toward a fast food restaurant. They both got into a red Nissan station wagon which was parked in back of the restaurant.

The defendant's car proceeded from the parking lot, across the intersection, and into the lot at 1601 Remount Road. About this time, Officer McManus radioed for the assistance of a marked car. He informed them that he had observed what appeared to be a drug transaction between the defendant and the female passenger and

requested the marked car to conduct an investigative stop of the vehicle. Responding to the call, Officer Thornton pulled his vehicle behind the defendant's car which was already stopped. Officer Thornton asked the defendant and passenger to step out of the car where he frisked the defendant.

Officers Brown and Rutledge also responded to the call. Officer Rutledge frisked the female passenger. At trial, Rutledge testified that the frisks were conducted for the safety of the officers.

Officer Brown conducted a search of the passenger area of the car and found a .357 Magnum handgun in the glove compartment. Defendant was then placed under arrest for carrying a concealed weapon. Following defendant's arrest, a search of the vehicle was conducted and a bag containing thirty-three rocks of crack cocaine was found in the ashtray between the driver and passenger seats. Defendant was then charged with possession with intent to sell and deliver cocaine.

At trial, defendant made a motion to suppress the evidence, which was denied. Defendant then entered a plea of guilty to all charges. Judgments were entered thereon and from the denial of the motion to suppress, defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Simone E. Frier and Special Deputy Attorney General Ellen B. Scouten, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Kevin P. Tully, for defendant-appellant.

WALKER, Judge.

Defendant's sole assignment of error is that the trial court erred by denying his motion to suppress. Defendant argues that such evidence was obtained as a result of an unlawful search and seizure conducted in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 20 of the North Carolina Constitution. We disagree.

The scope of appellate review of a denial of a motion to suppress is limited to determining whether the trial court's findings of fact are supported by competent evidence and whether those findings of fact in turn support the conclusions of law which are reviewable on appeal. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982). *See State*

v. Simpson, 320 N.C. 313, 357 S.E.2d 332, *cert. denied*, 485 U.S. 963, 108 S. Ct. 1230, 99 L. Ed. 2d 430 (1988).

[1] The threshold question this Court must decide is whether the investigatory stop of defendant's car was permissible. Police may conduct a brief investigatory stop of an individual or vehicle without probable cause if such stop is based on a reasonable suspicion, supported by specific, articulable facts, that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968). To determine if the *Terry* standard has been met, the court must examine the totality of the circumstances. *State v. Rinck*, 303 N.C. 551, 559, 280 S.E.2d 912, 919 (1981). Here, the trial court made the following findings of fact:

> (1) At approximately 7:30 to 8:00 P.M. on the 9th day of November, 1993, Officer McManus of the Charlotte Mecklenburg Police Department was conducting surveillance on Remount Road in a known drug activity area. . . .
>
> (2) [D]uring his surveillance of this area of over thirty minutes or more, he observed three black males standing in front of 1633 Remount Road, a vacant duplex.
>
> On three separate occasions one of the black males would go behind the vacant duplex, come back, and have some interaction with another person who arrived on foot. The two black males looked as thought [sic] they were keeping a lookout.
>
> Officer McManus testified from a distance of 150 yards he was able to identify the Defendant as the individual black male who went behind the building on these occasions.
>
> (3) Presently a female came up and approached the three black males. The Defendant went behind the building. Then the female and the Defendant left and entered a vehicle. The Defendant was the driver.
>
> (4) They stopped after traveling some distance and Officer McManus was in pursuit. Meantime he had radioed for backup and had communicated his surveillance information via radio that he, Officer McManus, was of the opinion that he had observed a hand-to-hand drug transaction.

Defendant argues that these findings do not support the trial court's conclusion that "[a]t the time of the search, the officers had an articulable suspicion communicated to them by Officer McManus that

this vehicle might contain, this vehicle or these occupants, might contain contraband materials."

While no one of these circumstances alone necessarily satisfies constitutional requirements, when considered in their totality, the officers had reasonable suspicion to make an investigatory stop of defendant's vehicle. Our Supreme Court has held that articulable facts known to the officers at the inception of the investigatory stop together with any rational inferences that may be drawn from those facts must be considered when determining whether the *Terry* standard has been met. *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).

> Reasonable suspicion is a commonsensical proposition. Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street. . . . While the defendant's mere presence in a high crime area is not by itself enough to raise reasonable suspicion, an area's propensity toward criminal activity is something that an officer may consider.

U.S. v. Lender, 985 F.2d 151, 154 (4th Cir. 1993). Therefore, we find that the officers' stop of the defendant's vehicle was supported by reasonable suspicion.

[2] Defendant objects to the admission of the .357 Magnum handgun found in the glove compartment contending that such evidence was the fruit of an unlawful warrantless search of his vehicle. To the contrary, the search of defendant's automobile was justified under the United States Supreme Court decision *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201 (1983). The standard articulated by the Supreme Court in *Long* states:

> the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons.

Long, 463 U.S. at 1049-1050, 77 L. Ed. 2d at 1220 (citations omitted). Here, the officers frisked the defendant and the female passenger. Thereafter, the defendant grew belligerent and was placed in the rear seat of the vehicle. From the defendant's behavior, the officers could reasonably assume that defendant was potentially dangerous. The officers also reasonably believed that the defendant may be armed

because of his suspected involvement in drug trafficking. In determining whether the suspect may be armed, an officer is entitled to formulate "common-sense conclusions about the modes or patterns of operation of certain kinds of lawbreakers." *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981). In a similar case, our Supreme Court upheld a limited search of defendant where officers suspected that defendant was involved in drug trafficking and may be armed. *State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992). *See also U.S. v. Rodriquez*, 750 F. Supp. 1272, *aff'd., subnom., U.S. v. Rodriquez-Morales*, 972 F.2d 343 (4th Cir. 1992) (holding that the officer had reasonable belief that the occupants of the vehicle were armed, where the officer knew that drug dealers are frequently armed, and therefore, frisk of the vehicle was permissible). Accordingly, the search of defendant's car was justified as a protective frisk.

[3] Defendant also objects to the introduction of drugs found in an ashtray between the driver and passenger seats during the second search of the vehicle. An officer who lawfully arrests the occupant of a vehicle may search the passenger area of the vehicle, including consoles and other receptacles, incident to arrest. *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981). Following the discovery of a .357 Magnum handgun, the officers placed the defendant under arrest for possession of a concealed weapon. Incident to the arrest, the officers were justified in searching the passenger area of the vehicle, including receptacles such as an ashtray.

In sum, the trial court's findings are based on competent evidence. Therefore, the trial court properly concluded that defendant's motion to suppress should be denied.

Affirmed.

Judges COZORT and McGEE concur

SHIRLEY A. MORICLE, PLAINTIFF-APPELLANT v. RAYMOND C. PILKINGTON, CHARLES B. BROOKS, AND JOHNNY R. BROOKS, D/B/A JOHNNY'S PLUMBING REPAIR SERVICE, DEFENDANTS-APPELLEES

No. COA94-1291

(Filed 3 October 1995)

Labor and Employment § 189 (NCI4th)— negligent hiring, supervision, retention—summary judgment for employer proper

The trial court properly entered summary judgment for defendant on plaintiff's claims for negligent hiring, supervision, and retention where the evidence tended to show that defendant's employees stole a bracelet from plaintiff's home while performing plumbing repairs; defendant followed hiring practices which were customary among other plumbing companies; one of defendant's employees was his nephew whom he had known since birth; defendant had no reason to believe his nephew was unfit or incompetent to work for him; defendant conducted a personal interview with his other employee during which he inquired about the employee's criminal record; the employee assured defendant he had no record; defendant did a reference check on the employee with a licensed plumber whom defendant had known personally for years; defendant was under no duty to conduct a criminal background check when hiring employees; and there was nothing in the background of either man which should have put defendant on notice that either was unfit for the job.

Am Jur 2d, Master and Servant § 165.

Appeal by plaintiff from order entered 8 September 1994 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 30 August 1995.

James F. Walker, P.A., by Daniel S. Bullard, for plaintiff-appellant.

Latham, Wood, Hawkins, Whited & Dorrestein, by Ronald Dorrestein, for defendant-appellee Johnny R. Brooks, d/b/a Johnny's Plumbing Repair Service.

JOHNSON, Judge.

In January of 1992, plaintiff Shirley A. Moricle and her husband William F. Moricle contracted with defendant Johnny's Plumbing

Repair Service for the performance of maintenance work at their residence in Gibsonville, North Carolina. Raymond C. Pilkington and Charles B. Brooks were employed by defendant Johnny's Plumbing Repair Service. On the 15th and 16th of January 1992, Raymond C. Pilkington and Charles B. Brooks were granted access to plaintiff's residence to perform maintenance work. Plaintiff informed defendant that she would not be in her residence at the time that the work was to be performed. While at the premises of plaintiff, Raymond C. Pilkington and Charles B. Brooks stole a fourteen carat gold diamond tennis bracelet belonging to plaintiff and converted the bracelet to their own use.

On 28 January 1992, defendant Raymond Pilkington was interviewed by Officer Gary L. Felts and Chief Morris D. McPherson, Chief of Police of Gibsonville, North Carolina. During the course of the interview, defendant Raymond Pilkington stated that on numerous occasions, he would stand watch while defendant Charles Brooks stole items from the residence in which they were working. Defendant Raymond Pilkington further stated that defendant Charles Brooks "got some stuff off the truck from Johnny's."

On 29 January 1992, defendant Charles Brooks was interviewed by Officer G. L. Felts, at which time Charles Brooks stated that defendant Raymond Pilkington used crack cocaine and had a drug problem. He stated that one could look at Raymond Pilkington's appearance and tell that he had "gone down hill." Defendant Charles Brooks further stated that defendant Raymond Pilkington owed Gordan Oliver a large amount of money for rent and that defendant Raymond Pilkington also owed Johnny Brooks for a truck payment. Defendant Charles Brooks further stated that, "I would think he [defendant Pilkington] has probably got (sic) a crack bill somewhere."

On 12 February 1992, defendant Raymond C. Pilkington was interviewed by Officer Gary L. Felts of the Gibsonville Police Department and Chief Dan Ingle of the Elon College Police Department. Raymond Pilkington admitted that he, along with Charles Brooks, had stolen a gold bracelet from the home of plaintiff. Raymond Pilkington further stated that during the six (6) months in which defendant Pilkington worked for Johnny's Plumbing Repair Service, Charles Brooks had been stealing items from the homes in which he worked for the entirety of the six (6) months in which they worked.

Defendant Raymond Pilkington subsequently pled guilty to the crime of misdemeanor larceny and received a two-year sentence, suspended for five years. The charges against defendant Charles Brooks were subsequently dismissed. The Assistant District Attorney stated that the charges were dismissed because the only evidence against defendant Charles Brooks was "testimony of [a] co-defendant who pled guilty to larceny from [the] same victim" and she further stated that co-defendant Raymond Pilkington, was in jail in another state at that time. Defendant Charles Brooks was subsequently charged with first degree burglary in an unrelated offense and pled guilty to the lesser included offense of misdemeanor breaking and entering.

Defendant Johnny R. Brooks, the owner and operator of Johnny's Plumbing Repair Service, stated in an affidavit that he employed Charles B. Brooks from 25 July 1989 until 9 October 1992. Defendant Johnny Brooks stated that Charles B. Brooks is his nephew and defendant Johnny Brooks did not check his criminal record prior to the larceny from plaintiff on 15 January 1992. He stated that he had lived in the same general area as Charles Brooks and he had known him "since his birth." Defendant Johnny Brooks also did not conduct a criminal record check for Raymond Pilkington. He did, however, submit an affidavit showing that he had called a former employer of Raymond Pilkington to inquire about his work record. Charles Brooks did, in fact, have a criminal record and had been convicted of assault and battery in 1989. Defendant Raymond Pilkington had prior convictions for harassing telephone calls, possession of an unsealed container of alcohol and traffic offenses. Johnny Brooks further stated in the affidavit that he had no knowledge "of any wrong-doing on the part of Charles Brooks and Raymond Pilkington during the time they were employed by [his] firm until after January 15, 1992."

Plaintiff filed this action alleging that defendant Raymond C. Pilkington and defendant Charles B. Brooks had removed a fourteen carat gold diamond tennis bracelet from her home. Additional claims of negligent retention and supervision and negligent hiring were alleged against the employer, defendant Johnny R. Brooks d/b/a Johnny's Plumbing Repair Service. On 26 August 1994, defendant Johnny's Plumbing Repair Service filed a motion for summary judgment which was granted. Plaintiff appeals.

Plaintiff submits one assignment of error. She alleges that the trial court committed reversible error in granting defendant's motion for summary judgment, on the ground that there was no genuine issue

of material fact, and defendant was entitled to judgment as a matter of law.

Summary judgment should be 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. Rule 56(c). "[I]ts purpose is to eliminate formal trials where only questions of law are involved." *Medlin v. Bass*, 327 N.C. 587, 590, 398 S.E.2d 460, 462 (1990) (*quoting Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)).

Plaintiff argues that a genuine issue of material fact exists with respect to the negligent hiring, supervision and retention in the instant case. A claim for negligent hiring, supervision and retention is recognized in North Carolina when plaintiff proves:

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in "oversight and supervision,"* . . .; and (4) that the injury complained of resulted from the incompetency proved.

Medlin, 327 N.C. at 591, 398 S.E.2d at 462 (*quoting Walters v. Lumber Co.*, 163 N.C. 536, 541, 80 S.E. 49, 51 (1913) (*quoting* Shearman & Redfield on Negligence § 190 (6th ed. 1913)).

The evidence presented before the trial court showed: that defendant followed hiring practices that are customary among other plumbing companies; that Brooks is defendant's nephew and defendant has known Brooks since Brooks was a child, and defendant had no reason to believe Brooks was unfit or incompetent to work for defendant; that defendant conducted a personal interview with Pilkington during which he inquired into Pilkington's criminal record; that Pilkington assured defendant that he did not have a record; that defendant did a reference check on Pilkington with W. P. Rose of W. P. Rose Plumbing, a licensed plumber whom defendant personally had known for years and knows to be a reputable plumber; and that W. P. Rose informed defendant that during the two years Pilkington worked for him, he did not receive any complaints concerning Pilkington's work or conduct.

This forecast of evidence does not show that defendant knew or reasonably could have known that Brooks or Pilkington was dishonest. Thus, an essential element of the claim for negligent hiring or retention is absent. *See Medlin*, 327 N.C. 587, 398 S.E.2d 460. Therefore, summary judgment was proper.

There is nothing in the background of either man which should have put defendant on notice that either of them were unfit for the job. Further, even though Brooks and Pilkington had criminal records, neither record is indicative that Brooks and Pilkington would engage in larceny.

Defendant was under no duty to do a criminal background check when hiring his employees. *Stanley v. Brooks*, 112 N.C. App. 609, 436 S.E.2d 272 (1993), *disc. review denied*, 335 N.C. 772, 442 S.E.2d 521 (1994). Further, there is a presumption which exists that an employer uses due care in hiring its employees. *Id.*; *Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627 (1942). In addition, plaintiff has the burden of showing that the employer did not use due care or that the employer had actual or constructive knowledge of the employee's unfitness for the job. *Id.* Plaintiff argues that defendant should have been able to tell from defendant Pilkington's appearance that Pilkington was in debt and in need of money, in that Pilkington owed defendant for a truck payment and rent. This argument is without merit and does not involve a genuine issue of material fact which would warrant disturbing the trial court's grant of summary judgment for defendant.

For all of the foregoing reasons, the decision of the trial court granting summary judgment for defendant is affirmed.

Affirmed.

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

IN RE APPEAL OF MOUNT SHEPHERD METHODIST CAMP

[120 N.C. App. 388 (1995)]

IN THE MATTER OF: THE APPEAL OF MOUNT SHEPHERD METHODIST CAMP FROM THE DENIAL OF AN APPLICATION FOR EXEMPTION BY THE RANDOLPH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1993

No. COA94-1329

(Filed 3 October 1995)

1. Taxation § 66 (NCI4th)— camp operated for religious purposes—sufficiency of evidence

The evidence was sufficient to support the Property Tax Commission's findings that a camp operated by taxpayer was "religious" and that its operation demonstrated and furthered the beliefs and objectives of the Methodist Church where there was substantial evidence that the primary purpose of the camp was to serve the religious and spiritual needs of the members of the Methodist Church; the fact that others were permitted to use the camp and that some were charged a fee was not determinative, as the fee was small and there was no evidence that there was any effort by the camp to make a profit; and the sale of timber on a portion of the larger tract was not a basis for converting the entire tract into a commercial venture. N.C.G.S. § 105-278.3.

2. Taxation § 66 (NCI4th)— unimproved part of camp—use to further religious practices—unimproved land properly exempted

The Property Tax Commission did not err as a matter of law in refusing to conclude that only land where improvements were located, approximately twenty-three acres, was entitled to exemption under N.C.G.S. § 105-278.3 and in concluding that most of the 532-acre contiguous tract was exempt where there was substantial competent evidence that the property exempted by the Commission, where there were no improvements, was an integral part of taxpayer's religious camp and provided campers opportunities to further their religious practice.

Am Jur 2d, State and Local Taxation § 381.

What constitutes church, religious society, or institution exempt from property tax under state constitutional or statutory provisions. 28 ALR4th 344.

Appeal by Randolph County from Final Decision entered by the Property Tax Commission on 17 June 1994. Heard in the Court of Appeals 1 September 1995.

Morgan, Herring, Morgan, Green, Rosenblutt & Gill, by James F. Morgan and David K. Rosenblutt, for appellee Mount Shepherd Methodist Camp.

Gavin, Cox, Pugh, Gavin & Gavin, by Richard L. Cox and Alan V. Pugh, for appellant Randolph County.

GREENE, Judge.

Randolph County (the County), appeals from an order entered 17 June 1994 by the Property Tax Commission (the Commission), which modified the decision of the Randolph County Board of Equalization and Review (the Board). The order of the Commission permitted the High Point District of the United Methodist Church (Taxpayer), who owns and operates a camp known as the Mount Shepherd Methodist Camp (Camp), to claim an ad valorem tax exemption larger than that permitted by the County.

The undisputed facts reveal that the Taxpayer owns a contiguous tract of land in Randolph County containing approximately 532 acres. Located on 23.1 acres of this land are a number of structures and other real property improvements, including cabins, bathhouses, recreational vehicle sites, camping areas, a petting zoo, ballfields, picnic shelters, parking lots, a chapel and a lodge. There are approximately seven miles of trails passing throughout the property. One acre of the land is leased to the State of North Carolina. The timber on twenty-four acres of the land was recently cut and sold. The structures, property improvements and trails are used by the Taxpayer in connection with the operation of the Camp. The Camp is open to different groups (adult and child) including the Methodist Church, public schools, scouts and other churches. In some instances there is a small fee ($5.00 per person per night or $1.50 per person per day) charged for the use of the facilities. The activities conducted at the Camp vary depending on the group but include religious worship, meditation, camping, hiking, swimming, fishing, pond studies, counseling, canoeing, pottery classes, baseball/softball, environmental studies and picnicking.

The Taxpayer claimed that all 532 acres were exempt under N.C. Gen. Stat. § 105-278.4. The Board found that only 21.1 acres was exempt property. Pursuant to N.C. Gen. Stat. § 105-290, Taxpayer appealed the Board's decision, filing its notice of appeal and application for hearing before the full Commission. The Commission found as a fact that "[t]he Camp is a religious camp" and its operation "is an

activity that demonstrates and furthers the beliefs and objectives of the Methodist Church." The Commission then concluded that all the property was used for "religious purposes" except "the one acre and improvements . . . leased to the State of North Carolina," "[t]he twenty-four (24) acres used by the Taxpayer for the commercial production of timber," and "[t]he northeast portion of the subject property, which contains no structures or improvements, and no trails except a seldom used perimeter trail . . . ."

The issues are whether the order of the Commission is (I) supported "by competent, material and substantial evidence in view of the entire record," and (II) affected by an error of law.

This Court's review of the Commission is governed by N.C. Gen. Stat. § 105-345.2(b) which provides in pertinent part that we may affirm, reverse, modify, remand or declare null and void the order of the Commission

> if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (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.

N.C.G.S. § 105-345.2 (1992). Review is further limited to the exceptions and assignments of error set forth to the order of the Commission and arguments presented in the briefs to this Court. N.C. R. App. P. 10(a) ("review . . . is confined to a consideration of those assignments of error set out in the record on appeal"); N.C. R. App. P. 28(a) ("[r]eview is limited to questions so presented in the several briefs"); *cf. Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296, (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). In this case the County questions the sufficiency of the evidence to support several of the Commission's findings and argues

that the Commission erred in its application of the law. We therefore address only those issues.

I

[1] The County argues that the evidence does not support the findings that the Camp is "religious" and that its operation "demonstrates and furthers the beliefs and objectives of the Methodist Church." In reviewing these findings we must look to the whole record, N.C.G.S. § 105-345.2(c) (1992), and determine "whether there was substantial evidence in view of the entire record as submitted" to support the findings. *See Lackey v. Dept. of Human Resources*, 306 N.C. 231, 237-38, 293 S.E.2d 171, 176 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 238, 293 S.E.2d at 176.

The County argues the evidence that the Camp charges some of the campers a fee, sold some timber off a portion of the property, and allows the facilities to be used by non-church groups precludes a finding that it is a "religious camp" operated to "further the beliefs . . . of the Methodist Church." We disagree. There is substantial evidence in this record that the primary purpose of the Camp was to serve the religious and spiritual needs of the members of the Methodist Church. The fact that others were permitted to use the Camp and that some were charged a fee is not determinative. *See In re Appeal of Worley*, 93 N.C. App. 191, 196, 377 S.E.2d 270, 273-74 (1989) (exemption allowed where church allowed the community to use the property for recreational purposes). The fee was small and there is no evidence that there was any effort by the Camp to make a profit. Furthermore, the sale of the timber on a portion of the larger tract is not a basis for converting the entire tract into a commercial venture. The Commission correctly refused to exempt the twenty-four acres from which the timber was sold.

II

[2] The County next argues that the Commission erred as a matter of law in refusing to conclude that only the land where the improvements are located (approximately twenty-three acres) is entitled to exemption. We disagree.

Exempt property pursuant to N.C. Gen. Stat. § 105-278.3 includes not only buildings and the land the buildings occupy, but also any "adjacent land reasonably necessary for the convenient use of any such building[s]." N.C.G.S. § 105-278.3(a) (1992). The Commission therefore did not err as a matter of law in concluding that the natural

areas of the Camp, where no improvements were located, were properly within the scope of section 105-278.3.

Our review of the record also reveals that there was substantial competent evidence that the property exempted by the Commission, where there were no improvements, was an integral part of the Camp and provided campers opportunities to further their religious practice. N.C.G.S. § 105-278.3(d)(1) (1992) ("religious purpose includes any activity "that demonstrate[s] and further[s] the beliefs and objectives of a given church"). Worship, meditation and Bible studies are conducted throughout the camp. Environmental classes teaching Christian stewardship of the outdoors are taught in wilderness areas. Adults and supervised children are allowed to travel throughout the camp uninhibited to learn about the outdoors and undergo self-discovery. Furthermore, the undeveloped natural areas of the property serve as a buffer zone to screen the Camp from surrounding development, contributing to the sanctity and serenity of the Camp and thus qualifying its use for a "religious purpose." *See Worley* at 197, 377 S.E.2d at 274.

The County also argues that it was prejudiced by the lack of the Taxpayer's pre-hearing order, as required by 17 NCAC 11 .0214 (1984), and therefore, the Commission should have dismissed the Taxpayer's appeal. We fail to see how the County was prejudiced. The County had ample opportunity to cross-examine Taxpayer's key and only witness, as well as examine and use any and all of Taxpayer's exhibits put before the Commission. This assignment of error is overruled. Finally we do not address the County's argument that the Commission erred in denying its motion to dismiss made at the close of the Taxpayer's evidence. The County fails to cite any authority in support of this argument and therefore this assignment of error is deemed abandoned. *Byrne v. Bordeaux*, 85 N.C. App. 262, 265, 354 S.E.2d 277, 279 (1987); N.C. R. App. P. 28(b)(5).

Affirmed.

Judges WYNN and MARTIN, John C., concur.

LUDY MARIE STROTHER v. JAMES EDWARDS STROTHER, JR., GEORGE T. ELDRIDGE, AND SAMUEL PINDER (A/K/A SAMUEL PINER)

No. COA94-812

(Filed 3 October 1995)

1. Courts § 15 (NCI4th)— nonresident defendant—sufficient minimum contacts with North Carolina—exercise of in personam jurisdiction proper

The trial court properly exercised *in personam* jurisdiction over one nonresident defendant where he flew to North Carolina and stayed for several days at the home of plaintiff and defendant husband to discuss and finalize the establishment of a business relationship with the Strothers; defendant subsequently received substantial fees for his services as financial, investment, and tax adviser to the Strothers who were North Carolina residents; defendant prepared monthly financial statements for Strother business entities in North Carolina which he regularly mailed to the Strothers in North Carolina; he was the incorporator of and claimed to own two-thirds of the stock of two North Carolina corporations which plaintiff asserted were marital assets; and defendant thus established sufficient minimum contacts with North Carolina to satisfy due process concerns.

Am Jur 2d, Courts §§ 80, 81, 87, 88, 106, 107.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 ALR3d 551.

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.

2. Courts § 15 (NCI4th)— nonresident defendant—resident plaintiff injured by actions outside North Carolina—business activities carried on in North Carolina—sufficient minimum contacts—due process satisfied

The trial court properly exercised personal jurisdiction over one defendant who performed actions outside North Carolina which injured plaintiff in this state at the time business activities

were being carried on in North Carolina by a corporation of which defendant was a purported director, officer, and controlling shareholder; furthermore, defendant, in his capacity as majority stockholder and director of the corporation, caused a lawsuit to be filed in this state against plaintiff, filed an affidavit in support of the action, and thereby purposefully availed himself of the benefits and protections of the laws of this state so that exercise of personal jurisdiction over him by the North Carolina court satisfied due process.

Am Jur 2d, Courts §§ 80, 81, 87, 88, 106, 107.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 ALR3d 551.

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 defendants George T. Eldridge and Samuel Pinder from order entered 2 May 1994 by Judge William B. Reingold in Forsyth County District Court. Heard in the Court of Appeals 19 April 1995.

Davis & Harwell, P.A., by Joslin Davis and John A. Keiger, for plaintiff-appellee.

Robinson Maready Lawing & Comerford, L.L.P., by W. Thompson Comerford, Jr. and John N. Taylor, Jr., for defendant-appellants.

McGEE, Judge.

In September 1993, plaintiff brought an action against defendant James Edward Strother, Jr., seeking divorce from bed and board, temporary and permanent custody of the parties' minor children, child support, temporary and permanent alimony, equitable distribution and attorney's fees. Plaintiff filed an amended complaint on 17 December 1993 adding claims under N.C. Gen. Stat. § 50-20 against George T. Eldridge (hereinafter Eldridge), a resident of Florida, and Samuel Pinder (a/k/a Samuel Piner) (hereinafter Pinder), a resident of the Bahamas, on the ground they "asserted an interest" in the marital

property of plaintiff-appellee and defendant Strother. Defendants Eldridge and Pinder moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of service of process, and failure to state a claim. The trial court denied the motion to dismiss and from that denial, defendants appeal.

The sole issue brought forward on appeal is whether the trial court erred in denying defendants' motion to dismiss for lack of personal jurisdiction. We hold the court properly asserted personal jurisdiction.

To determine whether the trial court acquired *in personam* jurisdiction over defendants, two questions must be answered: 1) do the North Carolina General Statutes permit the extension of jurisdiction over the defendants; and 2) if so, is this exercise of power consistent with due process of law? *Dillon v. Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977).

North Carolina's "long-arm" statute, N.C. Gen. Stat. § 1-75.4 (1983), answers the first question. In determining whether the "long-arm" statute permits our courts to entertain an action against a particular defendant, the statute should be liberally construed in favor of finding jurisdiction. *Marion v. Long*, 72 N.C. App. 585, 586, 325 S.E.2d 300, 302, *disc. review denied and appeal dismissed*, 313 N.C. 604, 330 S.E.2d 612 (1985).

Once it has been determined that G.S. § 1-75.4 permits the extension of personal jurisdiction, "[d]ue process demands that the maintenance of a lawsuit against a nonresident not offend 'traditional notions of fair play and substantial justice.' " *Buck v. Heavner*, 93 N.C. App. 142, 145, 377 S.E.2d 75, 77 (1989) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)). We must ascertain "whether the defendant has purposefully established minimum contacts with the forum state so that he should reasonably anticipate being haled into court in that forum." *Id.* With regard to the "minimum contacts" test, the United States Supreme Court has held that "where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this . . . requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 540-41 (1985)(citations omitted). Further, "parties who 'reach out beyond one state and create continuing relationships and

obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Id.* at 473, 85 L. Ed. 2d at 541 (citation omitted).

I. Defendant Eldridge

[1] The "long-arm" statute in this state provides for *in personam* jurisdiction over parties against whom a claim is asserted if they are "engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." G.S. § 1-75.4(1)(d). In 1987, Eldridge flew to North Carolina and stayed for several days at the Strothers' home to discuss and finalize the establishment of a business relationship with the Strothers. Since then Eldridge has received substantial fees for his services as financial, investment and tax advisor to the Strothers who are North Carolina residents. Eldridge prepared monthly financial statements for Strother business entities in North Carolina which he regularly mailed to the Strothers in North Carolina. He prepared the Strothers' joint tax returns for 1990, 1991, and 1992. Eldridge was the incorporator of and claims to own two-thirds of the stock of two North Carolina corporations which plaintiff asserts are marital assets. Until recently Eldridge was the trustee of the Ludy M. Strother Pension Plan and, in that capacity, owns several parcels of real property in North Carolina. We find that these activities constitute "substantial activity" within the meaning of G.S. § 1-75.4(1)(d).

Since statutory authority for *in personam* jurisdiction over defendant Eldridge exists, we next determine whether due process has been satisfied. The facts as previously summarized indicate that Eldridge has purposefully directed his business activities toward the Strothers in North Carolina and, therefore, "should reasonably anticipate being haled into court" in this state. *Buck*, 93 N.C. App. at 145, 377 S.E.2d at 77. Moreover, Eldridge has reached out beyond Florida and created continuing relationships and obligations with citizens of North Carolina, and as such is subject to regulation and sanctions in North Carolina for the consequences of his activities. *See Burger King Corp.*, 471 U.S. at 473, 85 L. Ed. 2d at 541. Eldridge has established sufficient minimum contacts with North Carolina to satisfy due process concerns.

Since the exercise of personal jurisdiction over Eldridge fulfills both the statutory requirement and the constitutional due process requirement, the trial court correctly denied Eldridge's motion to dismiss for lack of personal jurisdiction.

II. Defendant Pinder

[2] North Carolina courts may exercise personal jurisdiction under G.S. § 1-75.4(4) in any action claiming injury to person or property within North Carolina which arises out of an act or omission outside the state by the defendant, if at or about the time of the injury "[s]olicitation or services activities were carried on within this State by or on behalf of the defendant." G.S. § 1-75.4(4)(a).

In 1983, plaintiff and defendant Strother incorporated United Anesthesia Associates, Inc. (North Carolina) (hereinafter UAA(NC)). Plaintiff owns forty-nine percent of the UAA(NC) stock while defendant Strother owns fifty-one percent. In 1990 United Anesthesia Associates, Inc. (Nevada) (hereinafter UAA(NV)) was incorporated. At that time, the business operations of UAA(NC) outside of North Carolina were transferred to UAA(NV), although all business of both corporations was conducted at the Kernersville, North Carolina office. Defendant Pinder, a resident of the Bahamas, purports to be a director, officer, and controlling shareholder of UAA(NV), a corporation which plaintiff alleges is a marital asset owned entirely by her and defendant Strother. In November and December 1993, Pinder participated in meetings during which plaintiff was removed as an employee of UAA(NV) and her authority to conduct banking transactions for UAA(NV) was revoked. These actions by Pinder outside of North Carolina injured plaintiff in this state at the time business activities were being carried on by UAA(NV) in North Carolina, and thus, personal jurisdiction is appropriately extended under G.S. § 1-75.4(4)(a).

An exercise of power by the North Carolina court as authorized by the statute is consistent with due process when the "defendant engaged in some act or conduct by which it may be said to have invoked the benefits and protections of the law of the forum." *Dillon*, 291 N.C. at 679, 231 S.E.2d at 632. In 1993, Pinder, in his capacity as majority stockholder and director of UAA(NV), caused a lawsuit to be filed in this state against plaintiff in Forsyth County Superior Court and he filed an affidavit in support of the action. Pinder thereby purposefully availed himself of the benefits and protections of the law of this state. The exercise of personal jurisdiction over Pinder by the North Carolina court satisfies due process.

Since our statute permits the extension of jurisdiction over the defendant and with due process having been satisfied, the

trial court properly denied Pinder's motion to dismiss for lack of personal jurisdiction.

The trial court's order denying defendants' motion to dismiss for lack of personal jurisdiction is affirmed.

Affirmed.

Judges JOHNSON and COZORT concur.

BEAMAN WALTERS, EMPLOYEE, PLAINTIFF; v. ALGERNON BLAIR, EMPLOYER; UNITED STATES FIDELITY AND GUARANTY COMPANY, CARRIER, DEFENDANTS

No. COA94-1239

(Filed 3 October 1995)

Workers' Compensation § 200 (NCI4th)— asbestosis—two-year exposure in North Carolina required—violation of equal protection—statute unconstitutional

N.C.G.S. § 97-63, which provides that compensation shall not be payable for disability or death due to silicosis or asbestosis unless the employee was exposed in employment for not less than two years in North Carolina during the ten years prior to his last exposure, denies plaintiff equal protection of the law under both the North Carolina and United States Constitutions in that it treats persons with asbestosis differently than persons with other occupational diseases and does so without any valid reason; therefore, the statute is unconstitutional.

Am Jur 2d, Workers' Compensation § 326.

Appeal by plaintiff from Opinion and Award For the Full Commission entered 28 June 1994. Heard in the Court of Appeals 30 August 1995.

The Law Offices of Robin E. Hudson, by Robin E. Hudson and Faith Herndon, for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by Jack S. Holmes and John D. Elvers, for defendant-appellees.

GREENE, Judge.

Pursuant to N.C. Gen. Stat. § 97-86, Beaman Walters (plaintiff) appeals from an Opinion and Award of the Industrial Commission (Commission) entered 28 June 1994, which adopted the Deputy Commissioner's findings and conclusions contained in its Opinion and Award entered 3 November 1993, and denied plaintiff's claim for worker's compensation benefits.

Plaintiff has worked as a welder and pipe fitter most of his life until he retired in 1985. As a welder and pipe fitter, plaintiff worked for multiple employers and was exposed to asbestos throughout his career. As a result of this exposure, plaintiff has been diagnosed as having asbestosis. Plaintiff's last exposure to asbestos was while he was employed by Algernon Blair (defendant). Plaintiff worked for defendant thirty-five days, from 17 November 1980 to 21 December 1980, at which time he was exposed to asbestos on a daily basis.

The Commission found as a fact that the plaintiff "has not been exposed to the hazards of inhalation of asbestos dust for a period of not less than two years in the State of North Carolina during the ten years prior to his last exposure to the hazards of the same disease while working for defendant-employer in December of 1980." The Commission concluded that the plaintiff had "developed asbestosis" "[a]s a result of exposure to asbestos dust during his many years of work in the construction trade as a pipe welder." The Commission, however, denied plaintiff's claim because he was not exposed, as required by N.C. Gen. Stat. § 97-63, to asbestos dust for a period of at least two years "in North Carolina during the ten years prior to his last exposure." The plaintiff argued before the Commission that N.C. Gen. Stat. § 97-63 was unconstitutional and therefore could not be used to deny him compensation.The dispositive issue is whether N.C. Gen. Stat. § 97-63 is constitutional.

The dispositive issue is whether N.C. Stat. § 97-63 is constitutional.

N.C. Gen. Stat. § 97-63 provides:

> Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State, provided no part of such period of two years shall have been more than 10 years prior to the last exposure.

N.C.G.S. § 97-63 (1991). The plaintiff argues that this statute denies him equal protection of the law under both the North Carolina Constitution and the United States Constitution in that it treats persons with asbestosis differently than persons with other occupational diseases and does so without any valid reason. We agree.

The principle of equal protection of the law is explicit in both the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the Constitution of North Carolina, *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971), and requires that all persons similarly situated be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 798, *reh'g denied*, 458 U.S. 1131, 73 L. Ed. 2d 1401 (1982). In evaluating the constitutionality of challenged classifications under the federal and state constitutions, our courts have used the same test. *Duggins v. Board of Examiners*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978). If the statute impacts upon a suspect class or a fundamental right, the government must "demonstrate that the classification is necessary to promote a compelling governmental interest" (strict scrutiny). *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). If the statute does not impact upon a suspect class or a fundamental right, it is only necessary to show that the classification created by the statute bears a rational relationship to or furthers some legitimate state interest (minimum scrutiny). *State Util. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994).

Although the plaintiff contends the statute should be subject to strict scrutiny, he alternatively argues that it cannot survive even minimum scrutiny. We agree.

We first determine that the Equal Protection Clause is implicated in this case. The plaintiff suffers from asbestosis, a specifically enumerated occupational disease, N.C.G.S. § 97-53(24) (1991), and is therefore situated similarly to all other persons with occupational diseases. The question is whether N.C. Gen. Stat. § 97-63, which treats employees with asbestosis and silicosis differently from employees with other occupational diseases, furthers some legitimate state interest.

The defendants argue that the "governmental interests that are served by G.S. § 97-63 include the prevention of forum shopping and the economic interest served by ensuring that North Carolina employers are not burdened with having to pay workers' compensation claims for which they are not responsible." The statute, they contend,

"operates to ensure that employees claiming benefits will have had some rational relationship to the employers ultimately being held responsible for any such claims." Although the prevention of forum shopping and the protection against claims for which the employer is not responsible are legitimate state interests and are served by N.C. Gen. Stat. § 97-63, the statute is grossly underinclusive in that it does not include all who are similarly situated. *See* Lawrence Tribe, *American Constitutional Law* § 16-4 (2d ed. 1988) (underinclusive classification burdens "less than would be logical to achieve the intended governmental end"); *see also Zablocki v. Redhail*, 434 U.S. 374, 390, 54 L. Ed. 2d 618, 633 (1978) (finding statute underinclusive and therefore unconstitutional); *Bernal v. Fainter*, 467 U.S. 216, 221, 81 L. Ed. 2d 175, 181 (1984) (a classification that is substantially underinclusive undercuts the governmental claim that the classification serves state interests). There are, as noted by the plaintiff, "many other serious diseases, such as byssinosis, that develop over time and to which N.C. Gen. Stat. § 97-63 does not apply" and the defendants have not asserted any justification for treating asbestosis and silicosis differently from these other serious diseases. Accordingly, the constitutionality of N.C. Gen. Stat. § 97-63 cannot be sustained and this case must be remanded to the Commission.

Reversed and remanded.

Judges WYNN and MARTIN, John C., concur.

VANCE CONSTRUCTION COMPANY, INC., PLAINTIFF v. DUANE WHITE LAND CORPORATION, DEFENDANT AND EATON FERRY MARINA, INC., INTERVENOR

No. COA94-1250

(Filed 3 October 1995)

1. Appeal and Error § 118 (NCI4th)— denial of summary judgment—no review on appeal from trial on merits

The denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

Am Jur 2d, Appellate Review § 170.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

2. Contracts § 144 (NCI4th)— counterclaim for defective construction—claim not dismissed—no error

The trial court did not err in denying plaintiff's motion to dismiss defendant's counterclaim at the close of defendant's evidence where defendant presented evidence that the construction completed by plaintiff was defective in several respects, that defendant was damaged as a result, and that a letter signed by the parties was merely a stage in the negotiations between the parties and not a final settlement.

Am Jur 2d, Building and Constructions Contracts § 129.

3. Appeal and Error § 486 (NCI4th)— trial by court without jury—competent evidence in record

Where a trial court sitting without a jury makes findings of fact, the sufficiency of those facts to support the judgment may be raised on appeal, and the standard of review on appeal is whether there is any competent evidence in the record to support the findings. In this case, there was competent evidence to support the trial court's findings with regard to the parties' contract to repair a building, the date that last work was performed, and the amount of damages.

Am Jur 2d, Appellate Review § 663.

Appeal by plaintiff and defendant/intervenor from judgment entered 3 June 1994 by Judge Frank R. Brown in Warren County Superior Court. Heard in the Court of Appeals 24 August 1995.

Zollicoffer & Long, by Nicholas Long, Jr., for plaintiff-appellant-appellee.

Banzet, Banzet & Thompson, by Lewis A. Thompson, III, for defendant/intervenor-appellee-appellant.

WALKER, Judge.

On 16 February 1990, plaintiff and defendant executed a written contract whereby plaintiff agreed to construct a boat storage building on defendant's property. Plaintiff commenced construction of the building on 16 March 1990. Thereafter, the parties entered into an oral

agreement for the renovation of a sales and service building also located on defendant's property.

Construction of the boat storage building was substantially completed on 29 June 1990 as evidenced by the issuance of a temporary occupancy certificate. The sales and service building was completed on 25 May 1990 as evidenced by an occupancy certificate. In January 1991, plaintiff performed additional work on the boat storage building.

During April 1991, the parties met to negotiate the payment of monies which plaintiff contended were due for the construction work and to address certain alleged defects in the construction. On 29 April 1991, plaintiff and defendant signed a letter to their attorneys outlining the results of the negotiations. The purpose and effect of this letter is disputed by the parties.

On 17 May 1991, plaintiff filed a notice of claim of lien pursuant to N.C. Gen. Stat. § 44A-12. On 18 July 1991, plaintiff brought suit to enforce its lien. Defendant counterclaimed for damages due to alleged defects in the construction of the buildings. In January 1992 defendant conveyed the property to its parent corporation, Eaton Ferry Marina, Inc., which intervened seeking damages for plaintiff's alleged defective construction.

Plaintiff subsequently filed a motion for summary judgment on all claims. The trial court entered an order finding no genuine issue of material fact as to the existence and terms of the written contract for construction of the boat storage building and defendant's breach of that contract by its failure to pay the sum due. The court found that a genuine issue did exist regarding the terms of the oral agreement for renovation of the sales and storage building and denied plaintiff's summary judgment motion as to claims stemming from the oral agreement.

On 5 January 1993, plaintiff amended its complaint to allege that in the 29 April 1991 letter, defendant agreed to pay plaintiff the amount of $71,943.00 plus interest and that defendant breached the agreement. Plaintiff then moved for summary judgment on this claim, which motion was denied.

After a bench trial, the court entered judgment and concluded that (1) the total sum due plaintiff under the written contract was $41,863.67; (2) defendant/intervenor was entitled to receive $12,238.00 from plaintiff for defects in construction; (3) the reason-

able cost of renovating the sales and service building was $40,000.00, with a balance of $15,839.05 owed to plaintiff; and (4) plaintiff had a valid lien on the property in the amount of the judgment against defendant/intervenor. The court ordered the sale of defendant/intervenor's property to satisfy the judgment.

[1] In its first assignment of error plaintiff argues that the trial court erred by denying plaintiff's motion for summary judgment on its claim that defendant breached the "agreement" contained in the 29 April 1991 letter. However, in *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985), our Supreme Court held that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits. *Id.* at 286, 333 S.E.2d at 256. We therefore decline to address this assignment of error.

[2] Plaintiff next assigns as error the trial court's denial of plaintiff's motion to dismiss defendant's counterclaim at the close of defendant's evidence. Plaintiff argues that the 29 April 1991 "letter agreement" settled all claims between the parties and the court was therefore required to dismiss defendant's claim for damages due to defective construction.

The question raised by plaintiff's motion to dismiss is whether defendant's evidence, taken as true, supported findings of fact upon which the trial court as factfinder could have properly based a judgment for defendant. *Woodlief v. Johnson*, 75 N.C. App. 49, 53, 330 S.E.2d 265, 268 (1985). If so, the court was required to deny plaintiff's motion. *Neasham v. Day*, 34 N.C. App. 53, 55, 237 S.E.2d 287, 289 (1977). Defendant presented evidence that the construction completed by plaintiff was defective in several respects and that defendant was damaged as a result. Defendant also presented evidence that the 29 April 1991 letter was merely a stage in the negotiations between the parties and not a final settlement of all claims. This evidence, taken as true, supported a finding and conclusion that defendant was entitled to judgment on its counterclaim. Thus, the trial court did not err in denying plaintiff's motion to dismiss.

[3] We now turn to defendant/intervenor's assignments of error challenging various findings and conclusions contained in the trial court's final judgment. Defendant/intervenor claims the court erred (1) "in finding as fact that the parties' contract for the repair of the sales [and] service center was to be for time and materials, that the value of the plaintiff's time and materials was $40,000.00 and concluding as a matter of law that $15,839.05 is due the plaintiff for work done on

the sales [and] service building;" (2) "in finding as fact that the last work performed by the plaintiff on the boat storage building was on January 18, 1992, and concluding as a matter of law that this work provided a basis for the lien filed by the plaintiff;" and (3) "in finding as fact that the defendant was damaged in the amount of $12,238.00 as a result of the boat storage building and concluding as a matter of law that the reasonable cost of repairing and correcting the defects is $12,238.00."

Where a trial court sitting without a jury makes findings of fact, the sufficiency of those facts to support the judgment may be raised on appeal. *Little v. Little*, 9 N.C. App. 361, 365, 176 S.E.2d 521, 523 (1970). "The standard by which [the Court of Appeals] review[s] the findings is whether any competent evidence exists in the record to support them." *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988). We have carefully reviewed the evidence in the record and the arguments of the parties, and we conclude that the challenged findings and conclusions are supported by competent evidence. We find no error in the trial court's judgment.

Affirmed.

Judges COZORT and McGEE concur.

STATE OF NORTH CAROLINA v. COYE HAVEN KIRKPATRICK

No. COA94-1322

(Filed 3 October 1995)

Criminal Law § 1043 (NCI4th); Indictment, Information, and Criminal Pleadings § 57 (NCI4th)— defendant convicted of greater offense than that charged—judgment void

Because defendant was convicted of the substantive crime of uttering an instrument bearing a forged signature and was only charged with the attempt to commit that crime, the conviction is insufficient to support the judgment and the judgment is void.

Am Jur 2d, Criminal Law § 525; Indictments and Informations §§ 257 et seq.

Appeal by defendant from judgment entered 21 April 1994 in Alamance County Superior Court by Judge J. B. Allen, Jr. Heard in the Court of Appeals 12 September 1995.

Attorney General Michael F. Easley, by Assistant Attorney General J. Mark Payne, for the State.

Robert H. Hood III for defendant-appellant.

GREENE, Judge.

Coye Haven Kirkpatrick (defendant) appeals from a judgment and commitment, entered after a jury verdict, sentencing him to forty-six years in prison for uttering an instrument bearing a forged endorsement, a Class I felony in violation of N.C. Gen. Stat. § 14-120, enhanced by the finding that defendant is an habitual felon, pursuant to N.C. Gen. Stat. § 14-7.1.

Defendant was indicted for attempting to utter an instrument bearing a forged signature. The jury returned a verdict of uttering an instrument bearing a forged signature.

The dispositive issue is whether defendant's conviction is supported by the indictment with which he was charged.

Although it is permissible to convict a defendant of a crime which is of a less degree than the crime with which he is charged or being tried, when there is evidence to support the conviction, our courts are not permitted "to try a defendant for one offense and to convict him of another and greater offense, even though the conviction be of a higher degree of the same offense for which he is being tried." *State v. Hare*, 243 N.C. 262, 264, 90 S.E.2d 550, 551-52 (1955) (addressing question in context of N.C. Gen. Stat. § 14-87); *compare* N.C.G.S. § 14-120 (1993) *with* N.C.G.S. § 14-87 (1993) (both providing that an attempt is of the same degree as the substantive offense). Because defendant was convicted of the substantive crime of uttering an instrument bearing a forged signature and was only charged with the attempt to commit that crime, the conviction is insufficient to support the judgment and the judgment is void. *Hare*, 243 N.C. at 264, 90 S.E.2d at 552. This is so, even though the substantive crime and attempt to commit the crime of uttering an instrument bearing a forged signature are both included in N.C. Gen. Stat. § 14-120. *Hare*, 243 N.C. at 265, 90 S.E.2d at 552.

Vacated.

Judges WYNN and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 SEPTEMBER 1995

Case	County	Disposition
BAILEY v. KIDD No. 94-1202	Cumberland (94CVD3358)	Appeal Dismissed
BRANTLEY v. PHILLIPS No. 94-747	Wake (90CVS937)	Affirmed in Part, Reversed in Part and Remanded
CAROLINA IMPRINTS, INC. v. UNITED BRANDS INTERNATIONAL No. 94-1271	Pitt (93CVS1387)	Affirmed
CITY OF DURHAM v. LODAL, INC. No. 95-43	Durham (91CVS00729)	Dismissed
CORN v. BUCKEYE CONSTRUCTION CO. No. 94-1409	Ind. Comm. (140992)	Appeal Dismissed
CROCKETT v. ALLSTATE INS. CO. No. 94-1270	Forsyth (93CVS7543)	Affirmed
GUINN v. ALLEN No. 94-1403	Pitt (93CVS1012)	Dismissed
HAMMONDS v. HAMMONDS No. 94-1427	Gaston (93CVD1093)	Affirmed
HARDIN v. DON LOVE, INC. No. 94-307	Ind. Comm. (553290)	Affirmed
HARRELL v. KENTUCKY DERBY HOSIERY No. 94-1442	Ind. Comm. (051405)	Affirmed
HEWETT v. WILSON TREE CO. No. 94-973	Ind. Comm. (633925)	Affirmed & Remanded
IN RE JUDD No. 94-1452	Durham (94J189)	Affirmed
IN RE FORECLOSURE OF TAYLOR No. 95-5	Lincoln (94SP13)	Dismissed
JONES v. ELASTIC FABRICS OF AMERICA No. 95-8	Ind. Comm. (023840)	Affirmed

MOORE v. BEAUFORT COUNTY BD. OF ED. No. 94-1417	Ind. Comm. (957838)	Dismissed
N.C. DEPT. OF CORRECTION v. PATTERSON No. 94-1286	Wake (93CVS9545)	Affirmed
REED v. TOWN OF LONGVIEW No. 94-1301	Catawba (92CVD1502)	Affirmed
SHEPPARD v. CRESCENT INKS, INC. No. 94-138	Forsyth (92CVS0628)	Defendant's Appeal—Reversed & Remanded Plaintiff's Appeal—No Error
SMITH v. WISCASSETT MILLS CO. No. 94-751	Ind. Comm. (143308)	Affirmed
STATE v. BIVENS No. 95-46	Bladen (94CRS333) (94CRS334)	No Error
STATE v. BROWN No. 95-107	Lee (94CRS1544)	Vacated & Remanded
STATE v. FIELDS No. 95-21	Pitt (94CRS419)	No Error
STATE v. GWYN No. 94-1456	Forsyth (94CRS08889)	No Error
STATE v. HARDESTY No. 95-199	Craven (94CRS7102)	No Error
STATE v. HINTON No. 95-24	Wake (93CRS14490)	Dismissed
STATE v. HOLLY No. 94-1318	Alamance (93CRS23684) (93CRS23685)	No Error
STATE v. HONABLEW No 94-1407	Washington (94CRS252)	Dismissed
STATE v. JOHNSON No. 94-1236	Halifax (94CRS1729)	No Error
STATE v. LAWSON No. 94-1388	Orange (94CRS3517)	No Error

STATE v. LEDFORD No. 94-1461	Gaston (93CRS19912) (93CRS11914) (93CRS20157)	No Error
STATE v. LENOIR No. 95-138	Buncombe (94CRS3868) (94CRS53189)	No Error
STATE v. McMANUS No. 95-80	Guilford (94CRS23692)	No Error
STATE v. McNAIR No. 95-102	Guilford (93CRS59098) (93CRS59099) (93CRS59100)	Remanded for Resentencing
STATE v. ROBERTS No. 94-892	Burke (93CRS1253)	No Error
STATE v. RORIE No. 94-1379	Guilford (93CRS70237)	No Error
STATE v. SOUTHERLAND No. 95-18	Guilford (94CRS1239)	No Error
STATE v. WHITFIELD No. 94-1367	Forsyth (94CRS10857) (94CRS10859) (94CRS12112) (94CRS12113) (94CRS12114) (94CRS12127) (94CRS12128) (94CRS12129)	No Error
STATE v. YANCEY No. 95-6	Granville (93CRS5984) (94CRS1436) (94CRS1437) (94CRS1438) (94CRS2957)	No Error
STREET v. PARKER No. 94-1211	Nash (94CVS1031)	Dismissed

FILED 3 OCTOBER 1995

AETNA CASUALTY & SURETY CO. v. McSWAIN No. 94-1275	Mecklenburg (93CVS9931)	Affirmed
APO v. MacDONALD No. 94-518	Buncombe (93CVS755)	Affirmed

Case	County	Disposition
BEALL v. EASTWOOD No. 94-1269	Mecklenburg (94CVS432)	Affirmed
BURNETTE v. MacDONALD No. 94-519	Buncombe (93CVS650)	Appeal Dismissed
CAROWAY v. COATS AMERICAN, INC. No. 94-1155	Ind. Comm. (203479)	Affirmed
CITY OF GREENSBORO v. KIRKMAN No. 94-717-2	Guilford (93CVS3701)	Reversed & Remanded
CRAWFORD v. LLOYD TABLE CO. No. 94-1238	Guilford (93CVS107052)	Affirmed
EDMONDSON v. JONES No. 94-1183	Edgecombe (93CVS87)	Affirmed
ENGEL v. HOFFSTEDDER No. 94-1265	Pender (93CV000630)	Dismissed
GILBERT v. BILLINGS FREIGHT SYSTEMS No. 94-719	Ind. Comm. (843837)	Affirmed
HEDRICK v. ATLANTIC AERO, INC. No. 94-895	Ind. Comm. (136311) (086848)	Affirmed
MILLER v. EVANS No. 94-690	Davidson (92CVS1872)	New Trial
O'BRIEN v. TERRELL GEAR DRIVES No. 94-922	Mecklenburg (91CVS11055)	Affirmed
RICHARDSON v. FRITO-LAY, INC. No. 94-1324	Ind. Comm. (146542)	Affirmed; Remanded to the Industrial Commission for determination of Attorneys fees
STATE v. CARTER No. 94-1114	Pitt (93CRS19637)	No Error
STATE v. HARPER No. 94-5	Wayne (92CRS3024)	No Error
STATE v. HOME LOAN MORTGAGE ASSISTANCE No. 94-566-2	Wake (92CVS6063)	Affirmed

STATE v. SANCHEZ No. 94-1147	Wilson (92CRS4496)	Affirmed
STATE v. WELCH No. 94-1221	Watauga (92CRS5105) (92CRS5106)	No Error
STAVEREN v. STAVEREN No. 93-1125	Alamance (92CVD1480)	Affirmed
VAUGHN & MELTON v. CARRIAGE PARK DEV. CORP. No. 94-1274	Henderson (92CVS293)	Affirmed
VILLAGE OF RAINTREE HOMEOWNERS v. RAINTREE COUNTRY CLUB No. 94-786	Mecklenburg (92CVS11282)	Affirmed
WAGER v. NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS No. 94-1321	Ind. Comm. (817102)	Affirmed

FINK v. FINK

[120 N.C. App. 412 (1995)]

ROBBIE C. FINK, PLAINTIFF/APPELLEE v. CALVIN L. FINK, DEFENDANT/APPELLANT

No. 9426DC242

(Filed 17 October 1995)

1. Divorce and Separation § 201 (NCI4th)— alimony—custodial parent—determination of dependency—consideration of child care expenses

Child care expenses incurred by a custodial parent constitute a "condition" to be considered by the trial court in determining whether the custodial parent is dependent and thus entitled to alimony.

Am Jur 2d, Divorce and Separation § 569.

2. Divorce and Separation § 201 (NCI4th)— alimony—consideration of financial and caregiving obligations of custodial spouse—consideration of other spouse's obligations required

The noncustodial spouse's child support contributions must also be considered in determining whether the custodial parent is dependent and thus entitled to alimony.

Am Jur 2d, Divorce and Separation § 569.

3. Divorce and Separation § 201 (NCI4th)— child support—defendant's obligation figured according to guidelines—plaintiff's obligation figured differently—error

Where the consent order executed by the parties reflected defendant's child support obligation by application of the current child support guidelines to the stated respective gross incomes of plaintiff and defendant and without additional findings, it was reversible error for the trial court to make its own calculations, based upon plaintiff's testimony and financial affidavit, regarding the actual reasonable needs of the parties' child and plaintiff's contribution thereto. Therefore, having employed defendant's child support obligation under the guidelines, the trial court was correspondingly required to calculate plaintiff's obligation thereunder and utilize that figure in its dependency determination.

Am Jur 2d, Divorce and Separation § 569.

4. Divorce and Separation § 279 (NCI4th)— alimony—consideration of health insurance premium

The trial court, in an alimony action, did not err in removing from its calculation of defendant husband's reasonable needs and expenses the $119 for health insurance for the minor child of the parties claimed on his affidavit, since the court credited defendant with $119 per month to compensate for the amount withheld from his wages for medical insurance for the minor child.

Am Jur 2d, Divorce and Separation § 713.

5. Divorce and Separation § 220 (NCI4th)— alimony action—exclusion of gift from income—inclusion of debt to father—no error

The trial court in an alimony action did not err in failing to include in plaintiff's income the sum of $2,000 received annually as a Christmas gift from plaintiff's father, nor did the court err in including in plaintiff's expenses payments on a loan made to her by her father.

Am Jur 2d, Divorce and Separation §§ 576-583, 653-669.

Judge WYNN dissenting.

Appeal by defendant from judgment filed 24 August 1993 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 21 October 1994.

Horack, Talley, Pharr & Lowndes, P.A., by Tate K. Sterrett, for plaintiff-appellee.

Knox, Knox, Freeman & Brotherton, by Bobby L. Bollinger, Jr., for defendant-appellant.

JOHN, Judge.

Calvin Fink (defendant) appeals the trial court's award of permanent alimony to Robbie Fink (plaintiff) and brings forward sixteen (16) assignments of error. For the reasons set forth herein, we reverse the decision of the trial court.

Relevant procedural and factual information is as follows: The parties were married 22 July 1973 and separated 23 July 1989. One child was born of the marriage, Jennifer Lee Fink.

On 1 October 1991, plaintiff filed a complaint seeking absolute divorce, temporary and permanent alimony, attorneys' fees, custody and child support of the minor child, and equitable distribution.

On 18 November 1991, a consent order was entered vesting custody of the minor child with plaintiff and providing for liberal visitation by defendant. Child support was set in the amount of $425.00 per month and defendant was further directed to maintain an insurance policy covering the child's medical needs and to defray certain orthodontic expenses of the child. Plaintiff's monthly gross income was specified as $1,426.00 and defendant's as $3,179.00. The order also provided:

> The application of the current child support guidelines to the facts of this case would result in a child support award from defendant to plaintiff of approximately $425.00 per month, together with an additional sum for expenses in connection with orthodontic appliances for the child. There is no reason which justifies deviation from the child support guidelines at this time.

On 6 January 1992, defendant answered plaintiff's complaint, and on 4 June 1993, the parties entered into a consent judgment regarding equitable distribution. By stipulation, defendant conceded he had committed acts constituting "grounds for alimony within the meaning of N.C.G.S. § 50-16.2," and the subsequent alimony hearing was limited to the issues of dependency and "whether Plaintiff has committed acts which would be grounds for alimony if she were the supporting spouse" so as to disallow alimony or reduce the amount of alimony otherwise payable.

The trial court's judgment included the following pertinent findings of fact:

> C.
>
> <u>Income and Earning Capacity</u>
>
> . . . .
>
> 17. Defendant has various sums withheld from his wages for income taxes and social security. He also has withheld from his wages the sum of $119.00 per month, to pay for medical insurance coverage for the Child. . . .
>
> 18. Taking into account defendant's actual income tax liability, rather than the sums withheld from his wages, and also taking

into account the cost of medical insurance coverage which defendant provides for the Child and the sums contributed to defendant's retirement plan, defendant has net income of approximately $2,099.00 per month.

. . . .

D.

ESTATES

. . . .

26. Since the date of separation, plaintiff has acquired a 1992 Chevrolet Lumina automobile, which was purchased for her by her father. Plaintiff has made a number of payments to her father and is attempting to pay him $200.00 per month to repay the purchase price of this automobile.

. . . .

G.

DEFENDANT'S NEEDS

. . . .

35. Defendant has reasonable needs of $504.00 per month for food, clothing, personal care, entertainment, uninsured medical, gifts, travel and vacation and other items; and, defendant has reasonable expenses of $584.00 per month for rent, household maintenance and repair, utilities, cable, gas for auto, auto maintenance and repair, car insurance, and other items. His total reasonable needs for his own support and maintenance is $1,088.00 per month.

H.

CHILD'S NEEDS

36. In addition to medical insurance coverage and the other needs which defendant directly provides for the parties' child, Jennifer Lee Fink, the Child has other reasonable needs for her support and maintenance of $1,192.00 per month, ...

. . . .

J.

DEPENDENCY

. . . .

42. As set out above, in addition to the medical insurance coverage and other needs which defendant provides directly for the Child, the Child has reasonable needs for her support and maintenance of $1,192.00 per month.

43. Defendant contributes $425.00 per month in child support to defray the Child's needs of $1,192.00 per month. The plaintiff provides the remaining $767.00 per month of the Child's needs.

44. As set out above, in computing the amount of defendant's net income at $2,099.00 per month, the Court took into account and gave defendant credit for $119.00 per month which was withheld from his wages to provide medical insurance coverage for the Child. After considering the amount of child support paid by defendant and after also considering the additional $177.00 per month expended by defendant in directly providing certain needs for the Child, defendant has available $1,497.00 per month to meet his own needs of $1,088.00 per month ($2,099.00 net income, minus $425.00 child support, and minus $177.00 other expenses provided directly for Child).

45. After subtracting from [plaintiff's] net income of $1,260.00 per month the $767.00 per month which she contributes towards the Child's needs, plaintiff has available $493.00 per month to contribute towards her own needs of $1,055.00 per month. Thus, she has a shortfall of $562.00 per month in meeting her own needs.

46. Plaintiff is unable to meet her living expenses and needs and is unable to maintain her accustomed standard of living without financial contribution from defendant.

47. Plaintiff is in need of support and maintenance from defendant in order to meet her living expenses and needs.

. . . .

L.

AMOUNT OF ALIMONY

51. Considering all of the foregoing facts and circumstances, the amount of alimony which is necessary for defendant to pay to

plaintiff in order to enable plaintiff to meet her living expenses and needs, in accordance with her accustomed standard of living, is $562.00 per month.

52. Taking into account the foregoing facts and circumstances, and also considering defendant's ability to contribute towards plaintiff's needs and expenses, the amount of alimony which defendant is able to afford to contribute, at the present time, is $409.00 per month.

Based on its findings, the court ordered defendant to pay $409.00 per month in permanent alimony and $6,000.00 in attorneys' fees. Defendant gave notice of appeal to this Court 20 September 1993.

I.

[1] Defendant first contends the trial court committed reversible error by including in plaintiff's "needs a sum for the support of the minor child," particularly under circumstances "when a Guideline child support consent order had previously been entered and the amount so included exceeded her presumed child support obligations under the Guidelines." We find defendant's argument persuasive in part.

"Alimony" is defined as "payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce . . . ." N.C. Gen. Stat. § 50-16.1(1) (1987). Only a dependent spouse, that is, one "who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse," N.C. Gen. Stat. § 50-16.1(3) (1987), is entitled to alimony in North Carolina. N.C. Gen. Stat. § 50-16.2 (1987).

"Actually substantially dependent" means "the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980). " 'Substantially in need of' [support]" means that the dependent spouse "would be unable to maintain his or her accustomed standard of living (established prior to separation) without financial contribution from the other." *Id.* at 181-82, 261 S.E.2d at 855. From Finding of Fact No. 46, it appears the trial court based its determination of dependency upon plaintiff's being substantially in need of defendant's support.

Whether a spouse is "substantially in need of maintenance and support" as defined by G.S. § 50-16.1(3) "is determined by construing this statute *in pari materia* with the terms of N.C. Gen. Stat. § 50-16.5" which prescribes factors for the trial court to consider in determining the amount of alimony. *Lamb v. Lamb*, 103 N.C. App. 541, 548, 406 S.E.2d 622, 626 (1991) (citing *Williams*, 299 N.C. at 182, 261 S.E.2d at 855). Thus, "[i]n determining the needs of a dependent spouse, all of the circumstances of the parties should be taken into consideration including the property, earnings, earning capacity, condition and accustomed standard of living of the parties." *Peeler v. Peeler*, 7 N.C. App. 456, 461, 172 S.E.2d 915, 918 (1970); *accord Sprinkle v. Sprinkle*, 17 N.C. App. 175, 182, 193 S.E.2d 468, 474 (1972). As stated more specifically in *Williams:*

> Applying the factors of G.S. 50-16.5, we think the legislature intended trial courts to determine dependency under G.S. 50-16.1(3) bearing in mind these propositions:
>
> . . . .
>
> A. The trial court must determine the standard of living socially and economically, to which the parties *as a family unit* had become accustomed during the several years prior to their separation.
>
> B. It must also determine the present earnings and prospective earning capacity and any other *"condition"* (such as health *and child custody*) of each spouse at the time of hearing.
>
> C. After making these determinations, the trial court must then determine whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed during the last several years prior to separation. This would entail considering what reasonable expenses the party seeking alimony has, *bearing in mind the family unit's accustomed standard of living.*

Williams, 299 N.C. at 182-83, 261 S.E.2d at 855-56 (emphasis added). The list of factors shall not be construed as exhaustive since "the 'overriding principle' in cases determining the correctness of alimony is 'fairness to all parties.' " *Marks v. Marks*, 316 N.C. 447, 460, 342 S.E.2d 859, 867 (1986) (quoting *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E.2d 407, 413 (1976)).

In Finding No. 45 of its order, within the section entitled "DEPENDENCY," the trial court stated plaintiff "has a shortfall of $562.00 per month in meeting her own needs" after contributing $767.00 towards the child's needs. The question becomes, therefore, whether child care expenses incurred by a custodial spouse should be taken into account in a finding of dependency, i.e., whether the expenses incurred as a caregiver is one of the factors contemplated in *Williams* and by our alimony statutes. We believe consideration of the practical realities confronting divorced parents as well as the purposes of our domestic relations law require an affirmative response.

One commentator has noted that "[t]he first and most important of the functions of alimony relates to the care of children." Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 17.5, at 253 (2d ed. 1987). The author explains that even if a divorced custodial parent works outside the home and receives child support, it remains likely that the custodial spouse's income will be insufficient to support himself or herself as well as the parties' children. *Id.* at 253-54 (citing Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A.L.Rev. 1181 (1981)). "In this situation [he or] she should be entitled to alimony as a way of providing for the care of the children in a family setting." *Id.* at 254.

Our Supreme Court, which in *Williams* cited child custody as a "condition" affecting the dependency decision, *Williams*, 299 N.C. at 183, 261 S.E.2d at 856, noted therein that "maintenance and support" under our alimony statute "means more than a level of mere economic survival." *Id.* at 181, 261 S.E.2d at 855. The phrase "contemplates the economic standard [of living] established by the marital partnership *for the family unit* during the years the martial contract was intact." *Id.* (emphasis added).

Thus, if the trial court must consider child custody as a "condition" which influences the dependency decision, it logically follows that the accompanying obligations—not only "the responsibility of providing for the spiritual, intellectual, and emotional development of the child" pointed out by the dissent—but also financial responsibilities must be weighed by the court in that determination. The "accustomed" economic standard of living of "the family unit," *id.*, can only be interpreted to encompass that maintained by the parents as well as any minor children born of the marriage. *See Talent v. Talent*, 76 N.C. App. 545, 548, 334 S.E. 2d 256, 258 (1985) (to "determine whether . . .

actual dependence exists, the trial court must evaluate the parties' incomes and expenses measured by the standard of living of the family as a unit"). Moreover, it would in actual terms be difficult, if not impossible, to differentiate between the standard maintained by parents on the one hand and their minor children on the other.

In addition, the trial court is accorded substantial discretion to deal with the unique circumstances of each individual and family pursuant to N.C. Gen. Stat. § 50-16.5(b) (1987). This provision, read *in pari materia* with G.S. § 50-16.1(3), allows the trial court in determining dependency to take into account " 'other facts of the particular case.' " *See Lamb*, 103 N.C. App. at 548, 406 S.E.2d at 626. "Other facts" which have been recognized by our appellate courts include length of the marriage and contributions "to the financial status of the family over the years," *Williams*, 299 N.C. at 185, 261 S.E.2d at 857, marital fault, *id.* at 187-188, 261 S.E.2d at 858, income tax consequences, *Perkins v. Perkins*, 85 N.C. App. 660, 667, 355 S.E.2d 848, 852, *disc. review denied*, 320 N.C. 633, 360 S.E.2d 92 (1987), and the effects of inflation, *see Roberts v. Roberts*, 38 N.C. App. 295, 302-03, 248 S.E.2d 85, 89 (1978). We believe recognition by the trial court of the custodial parent's attendant caregiving and monetary obligations to the minor child is consistent with such previously approved examples.

Defendant nonetheless argues the court's order intertwined alimony and child support and has the effect of increasing the amount of child support even though it is denominated "alimony." We recognize that

> [a]limony is payment for support of a former spouse and child support is payment for support of a minor child[,] . . .[and] the two must be kept separate when the court determines the appropriate awards as to each[,] the distinction between the two kinds of payments is easily blurred, particularly when the child for whom the support is needed resides primarily with the recipient of the alimony.

Wolfburg v. Wolfburg, 27 Conn. App. 396, 402, 606 A.2d 48, 52 (1992) (citation omitted).

However, where family dissolution occurs, one of the policies of domestic relations law is "to make as easy and as equitable an adjustment as possible with due regard to the interests of the parties, society and the state." 3A Norman J. Singer, *Sutherland Statutory*

Construction, § 68.01, at 92 (5th ed. 1992). Children, as part of "the family unit," *Williams*, 299 N.C. at 181, 261 S.E.2d at 855, are no less affected by divorce than separating spouses, society or the state. We therefore hold that custodial responsibilities constitute a "condition" to be considered by the trial court in its determination of dependency so as to effect as equitable an adjustment as possible, with due regard to all affected interests.

Our holding finds support in other jurisdictions which allow consideration of such obligations in the dependency decision as well as in determining the amount of support awarded. In *McNally v. McNally*, 516 So.2d 499 (Miss. 1987), the Supreme Court of Mississippi noted:

> Incident to a judgment for divorce, a chancery court has authority to award alimony after considering, weighing and balancing familiar factors: (1) the health and earning capacity of the husband, (2) the health and earning capacity of the wife, (3) the entire sources of income of both parties, . . . (5) *the reasonable needs of the child*, . . . and (9) such other facts and circumstances bearing on the subject that might be shown on the evidence.

Id. at 501 (emphasis added) (citing *Brabham v. Brabham*, 226 Miss. 165, 84 So.2d 147 (1955)). In *Hammonds v. Hammonds*, 597 So.2d 653, 655 (Miss. 1992) (citations omitted), the court held the trial court should take into account as a qualifying factor for alimony "[t]he presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care." *See also Wolfburg*, 27 Conn. App. at 401-02, 606 A.2d at 51-52 (trial court may consider provision of primary care for minor child in determining term of alimony); *Fields v. Fields*, 343 S.W.2d 168, 170 (Mo. App. 1960) (factor which properly may affect amount of award is "whether there are minor children and their ages") (citations omitted); *Barber v. Barber*, 257 Ga. 488, 490, 360 S.E.2d 574, 576 (1987) (one of many circumstances for court to take into account in setting amount of alimony is expense custodial spouse incurs in support of minor children).

Numerous other states have enacted statutes which include custodial obligations among the factors pertinent to a determination of spousal maintenance awards. *See, e.g.*, Iowa Code Ann. § 598.21(3)(e) (West 1995) and Wis. Stat. Ann. § 767.26(5) (West 1993) (factors to consider include custodial "responsibilities for children"); La. Civ. Code Ann. art. 112(A)(2)(f) (West 1993) (court should consider "[t]he

health and age of the parties and their obligations to support or care for dependent children"); N.Y. Dom. Rel. Law § 236[B][6][a][6] (McKinney 1986) ("the court shall consider . . . the presence of children of the marriage in the respective homes of the parties"); Or. Rev. Stat. § 107.105(1)(d)(G) (1993) (factors include "[t]he number, ages, health and conditions of dependents of the parties or either of them and provisions of the decree relating to the custody of the children, including the length of time child support obligations will be in effect"); 23 Pa. Cons. Stat. Ann. § 3701(b)(7) (1991) (factors include "[t]he extent to which the earning power, expenses or financial obligations of a party will be affected by reason of serving as the custodian of a minor child"); W. Va. Code § 48-2-16(b)(15) (1995) (court should take into account "[t]he legal obligations of each party to support himself or herself and to support any other person").

While North Carolina's alimony statute, unlike the foregoing, does not contain express language which specifically allows consideration of the custodial spouse's caregiving obligations to the minor children, our holding is nonetheless consistent with the " 'overriding principle' " of " 'fairness' " which guides the determination of alimony, *Marks*, 316 N.C. at 460, 342 S.E.2d at 867 (citation omitted), as well the statutory provision contemplating regard of "other facts of the particular case." G.S. § 50-16.5(a).

[2] There remains the question of methodology. If the trial court is to take into account the custodial spouse's financial and caregiving obligations in determining dependency, "fairness" unquestionably requires that the noncustodial spouse's contributions in this area also be considered. In the "DEPENDENCY" section of its order, the trial court properly accorded defendant the benefit of the $425.00 in child support paid monthly. It is less clear whether the $177.00 per month (as insurance and orthodontic payments) directly contributed to the child's needs was fully considered.

Also in the "DEPENDENCY" section, the court's order recites that "the Child has reasonable needs for her support and maintenance of $1,192.00 per month." By subtracting defendant's Guideline child support contribution of $425.00 per month, the court therein calculated that "plaintiff provides the remaining $767.00 per month of the Child's needs." In the same section, the court subtracted the $767.00 figure from plaintiff's net income of $1,260.00 per month, and concluded "plaintiff [thus] has a shortfall of $562.00 per month in meeting her own needs."

We initially note that since a previous order was in effect establishing defendant's child support obligation under the Guidelines, the parties are collaterally estopped, absent a motion for modification, *see* N.C. Gen. Stat. § 50-13.7 (1987), from asserting amounts different from those set out in the previous order relating to the child's needs and the parties' obligations arising therefrom. *See Burton v. City of Durham*, 118 N.C. App. 676, 680, 457 S.E.2d 329, 331-32, *disc. review denied and cert. denied*, No. 254P95, (N.C. Sept. 7) (1995) ("Collateral estoppel precludes relitigation of an identical issue actually litigated and necessary to the outcome in a prior action that resulted in a final judgment on the merits.") (citations omitted). Thus, absent a request for modification based upon a substantial change in circumstances, the trial court lacks jurisdiction to alter previous child support determinations. *Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (trial court may not *sua sponte* enter an order modifying a previously entered custody decree). This would hold true whether the previous order utilized Guideline amounts or deviated therefrom and recorded the court's own calculations.

[3] The consent order executed by the parties on 18 November 1991 reflected defendant's child support obligation by "application of the current child support guidelines" to the stated respective gross incomes of plaintiff and defendant and without additional findings. *See Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991) (under the Guidelines and absent request, trial court is not required to make findings of fact or enter conclusions of law " 'relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support.' ") (quoting N.C. Gen. Stat. § 50-13.4(c) (Cum. Supp. 1990)). In *Browne*, we explained that "support set consistent with the guidelines is *conclusively presumed* to be in such amount as to meet the reasonable needs of the child for health, education and maintenance." *Id.* (emphasis added).

Because defendant's child support obligation had been determined under the Guidelines, defendant argues it was reversible error for the trial court to make its own calculations, based upon plaintiff's testimony and financial affidavit, regarding the actual reasonable needs of the parties' child and plaintiff's contribution thereto. The court, defendant continues, "should have referred to the presumptive guideline child support schedule to determine the amount of Robbie Fink's income from her own employment attributable to her *pro rata* share of the child support." We agree.

> The North Carolina Child Support Guidelines are based on the Income Shares model, which . . . is based on the concept that child support is a shared parental obligation and that a child should receive the same proportion of parental income he or she would have received if the parents lived together.

Commentary, 1995 North Carolina Child Support Guidelines. Thus, the basic child support obligation is computed using the combined adjusted gross income of both parents.

As child support under the Guidelines is conceived as a "shared parental obligation" and defendant's contribution was established by application of those Guidelines, the trial court erred by not utilizing the same methodology in its calculation of plaintiff's contribution. Having employed defendant's child support obligation under the Guidelines, the trial court was correspondingly required to calculate plaintiff's obligation thereunder and utilize that figure in its dependency determination. To hold otherwise would credit plaintiff with more than her proportionate parental share, a concept not contemplated under the Income Shares model of our child support guidelines scheme. *See Kennedy*, 107 N.C. App. at 698, 421 S.E.2d at 796-97 (father's share, based on gross monthly income of $2,500.00, calculated at 58.5% of presumptive guideline amount; mother's share, based on gross monthly income of $1,744.00, calculated at 41.5% of presumptive amount). In other words, plaintiff may not receive the benefit of a finding of dependency based in part upon her *actual* child support expenditures where defendant is credited only with his Guideline *proportionate share.*

We therefore reverse the award of permanent alimony to plaintiff and remand for a determination of dependency consistent with this opinion and entry of a new order. The trial court should rely on the existing record (since a full-blown re-trial is unnecessary) and receive additional evidence and entertain argument only as necessary to correct the error identified above. *See Fox v. Fox*, 114 N.C. App. 125, 138, 441 S.E.2d 613, 621 (1994) (citation omitted).

Because the trial court's award to plaintiff of counsel fees was based upon its conclusion she was a dependent spouse, we must vacate that award as well. Should the court on remand again determine plaintiff to be entitled to counsel fees, *see Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981), it may enter a new award, N.C. Gen. Stat. § 50-16.4 (1987), in such reasonable amount as it in its discretion deems appropriate. *See Rickert v.*

Rickert, 282 N.C. 373, 379, 193 S.E.2d 79, 83 (1972) (citations omitted).

In view of the foregoing, it is unnecessary to address further defendant's assignments of error addressed to the amount of alimony set by the trial court or its award of attorneys' fees to plaintiff. As defendant's remaining arguments address matters unaffected by our holding, however, we will consider those contentions briefly.

II.

[4] Defendant maintains the trial court erred in its calculation of his reasonable needs and expenses, particularly in deducting $119.00 for health insurance. We disagree.

"The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982) (citation omitted).

In calculating defendant's net income, the trial court credited him $119.00 per month to compensate for the amount withheld from his wages to defray the cost of medical insurance for the minor child. However, defendant also included $119.25 on the affidavit outlining his individual needs. Certainly, defendant cannot expect to receive the benefit of that expense twice in the court's calculations, once as a reduction in income and once as a personal expense. The trial court did not abuse its discretion in removing from its calculation of defendant's reasonable needs the $119.25 claimed on his affidavit.

III.

[5] Defendant also argues the trial court erred by not including "certain third party payments" as part of plaintiff's income and by "excluding certain non-binding debts as expenses for the purposes of determining dependency and alimony." We find these assertions unpersuasive.

A.

Defendant first assigns error to the trial court's failure to include in plaintiff's income the sum of $2,000.00 per year received annually as a Christmas gift from her father. The amount should be included, defendant insists, "because these payments from her father have

habitually occurred and customarily would continue" in the future. This contention is unfounded.

Evidence presented revealed that plaintiff and her siblings have received gifts of money from their father each Christmas since the death of their mother. The amounts have varied, but in recent years single children have been given $2,000.00 and married children $1,000.00. On the Christmas following her divorce, plaintiff received a $2,000.00 credit towards the debt owed her father for her automobile. Plaintiff testified she had no way of knowing whether her father planned to continue his monetary gifts, and that she felt "sure that if he would have a medical problem, something that money was needed for something else, [the payments] could easily [be] stopped . . . ." At the time of hearing, plaintiff's father was 78 years old and in fair health, having undergone open heart surgery. No evidence indicated either that the payments to plaintiff from her father would continue or that the amount would necessarily remain constant. We therefore discern no error in the trial court's refusal to include the monetary Christmas gifts from plaintiff's father in calculating her income.

B.

Defendant next asserts the court erred by including in plaintiff's expenses payments on a loan made to her by her father because "it was unfair to include this 'moral obligation' as part of Robbie Fink's 'reasonable needs' for alimony." We discern no such error.

The evidence reflected plaintiff's father purchased an automobile for her and that the two had agreed plaintiff would reimburse him. Plaintiff testified that although she had signed no papers upon purchase of the vehicle, she was "trying [her] best to pay him a couple hundred dollars a month." Evidence further revealed plaintiff had indeed made payments to her father in the amount of $200.00 per month towards the loan. While plaintiff conceded she was under no legal duty to repay the loan, she testified she considered it a "responsibility" and felt obligated to reimburse her father.

We note defendant stipulated "that there is sufficient competent evidence to support the findings of the trial court with respect to the types and amounts of the needs and expenses of the parties and the child, which are set forth in Finding of Fact Nos. 33, 35, and 36 of the Judgment." Included in Finding of Fact Nos. 33 and 36 is plaintiff's $200.00 payment on her automobile, $100.00 being allocated to plaintiff's needs and expenses and $100.00 being allocated to the minor

child's needs. Therefore, defendant may not now be heard to complain before this Court about those amounts. *See Sloop v. Friberg*, 70 N.C. App. 690, 694, 320 S.E.2d 921, 924 (1984) (courts look with favor on stipulations between parties in domestic cases and therefore consider them binding) (citation omitted).

Reversed in part; vacated in part; remanded with instructions.

Judge GREENE concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

The majority concludes today that child care expenses incurred by a custodial spouse should be taken into account in a finding of dependency in the determination of alimony. I disagree.

In the fifteen years since the Supreme Court in *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1979), parenthetically indicated that "child custody" may be an "other condition" that the trial court may consider at the time of hearing on an alimony claim, no court in this state has ever interpreted that to mean "child support expenses." Today, the majority takes that novel step and in doing so inextricably intertwines the determination of alimony dependency with the determination of child support.

In *Williams*, the Supreme Court listed certain propositions to be considered in the determination of dependency. Among these propositions, the Court stated that trial courts *may* consider "any other 'condition' (such as health and child custody) of each spouse at the time of hearing." *Id.* at 183, 261 S.E.2d at 856. Based on this language alone, the majority now concludes that child care expenses must be a factor for the trial court to consider in determining the amount of alimony.

In my opinion the language in *Williams* should not be confined to equate "child custody" with "child support expenses." The legislature has enacted separate statutes to govern child support and child custody and in doing so it has attached two different meanings to the terms. *See* N. C. Gen. Stat. § 50-13.4 and N.C. Gen. Stat. § 50-13.1. Child support involves providing for the financial well-being of the child. In a determination of child support, the court must calculate the expenses incurred for rearing the child.

See N.C. Gen. Stat. § 50-13.4. Child custody, on the other hand, involves more than financial responsibility. A parent with physical custody of a child has the responsibility of providing for the spiritual, intellectual, and emotional development of the child. Therefore, in a custody hearing, a court must evaluate several factors in its determination of what is in the best interests of the child. *See* N.C. Gen. Stat. § 50-13.2.

Moreover, I disagree with the majority's statement that "if the trial court *must* consider child custody as a 'condition' which influences the dependency decision . . . financial responsibilities must be weighed . . . ." (emphasis added). First, *Williams* states only in dicta that the trial court *may* consider factors such as child custody. Second, the financial responsibilities for child custody is handled by the determination of child support. Third, the award of child custody may be more of a benefit than a detriment for indeed, many parents vigorously seek custody for the benefits of having their child(ren) which means constant companionship and the love and joy that flows from being a parent and having your child with you. In contrast, the noncustodial parents may be deprived of these benefits and often find themselves relegated to the role of a secondary parent with defined visits. That is why child support and child custody are two separate determinations, for while the former is a quantitative financial detriment, the latter is and should be a qualitative benefit to the custodial parent.

While the majority correctly notes that children are a part of "the family unit," *See Williams*, 299 N.C. at 183, 261 S.E.2d at 856, the majority also concedes that North Carolina's alimony statute *does not contain express language which specifically allows consideration of the custodial spouse's caregiving obligations to the minor children.* The majority justifies its holding by stating that it is consistent with the "overriding principle" of "fairness" which guides the determination of alimony. However, the result reached today requires the payment of child support expenses under *both* the child support and alimony orders. This is an unfair result.

Moreover, the result reached in this case today will have monumental implications in the area of family law. The minor child in this case will reach age 18 in 1996. At that point, absent any special exceptions, Mr. Fink's child support obligation will end. *See* N. C. Gen. Stat. § 50-13.4(c). However, his alimony obligation will continue until Mrs. Fink remarries or dies; thus, Mr. Fink could potentially pay alimony

under this order based on an improper deviation from the Child Support Guidelines for a time period long after his child support obligation has terminated. Accordingly, if child expenses are considered for purposes of determining permanent alimony, then such a consideration necessitates a redetermination of alimony when each child reaches the age of majority. No such result was ever contemplated by our legislature.

Furthermore, when the trial court included the minor child's "needs" of $767.00 in its alimony order, this determination had the effect of rendering two child support orders. A child support consent order had already been entered in accordance with the child support guidelines. That order contained a finding that no deviation from the child support guidelines was justified. Increasing Mrs. Fink's claimed personal needs and expenses by including non-guideline expenses of the minor child resulted in an increase in the amount of child support that Mr. Fink was ordered to pay, although it was denominated "alimony." As such, it is tantamount to modifying the child support order without a motion to modify having been filed and without any evidence or the required findings to justify a deviation from the guidelines.

Our well settled law requires that a motion be filed and a change of circumstances found before a child support order can be modified. N.C. Gen. Stat. § 50-13.7(a) (1987); *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536 (1995); *Davis v. Risley*, 104 N.C. App. 798, 800, 411 S.E.2d 171, 172 (1991); *Greer v. Greer*, 101 N.C. App. 351, 354, 399 S.E.2d 399, 401 (1991). The changed circumstances must relate to "child-oriented expenses." *Gilmore v. Gilmore*, 42 N.C. App. 560, 563, 257 S.E.2d 116, 118 (1979). No such motion was pending. Indeed, the issue had already been resolved with a court order. It is reversible error for the court to deviate from the presumptive child support guidelines without making the required findings. *Hall v. Hall*, 107 N.C. App. 298, 299-300, 419 S.E.2d 371, 372 (1992). The trial judge must follow the respective applicable statutes in determining alimony and child support. N.C Gen. Stat. §§ 50-16.5(a) and 50-13.4(c); *Beall v. Beall*, 290 N.C. 669, 673, 228 S.E.2d 407, 410 (1976). In this case, the inclusion of the minor child's needs in the alimony determination constitutes an abuse of discretion and reversible error.

For the foregoing reasons, I respectfully dissent from Part I of the majority's opinion.

KIRK C. AUNE v. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DR. STUART BONDURANT, WILLIAM D. MATTERN, AND EDWIN CAPEL

No. COA94-1350

(Filed 17 October 1995)

1. Public Officers and Employees § 58 (NCI4th)— whistle-blowing claim—nonreappointment unrelated to whistle-blowing—summary judgment for defendants proper

The evidence was sufficient to support summary judgment for defendants on plaintiff's whistleblower claim where plaintiff was not reappointed as an associate dean at a state university; defendants presented undisputed evidence that plaintiff's performance was scrutinized in compliance with university policy; defendants' evidence specifically revealed that the final committee review, which recommended that plaintiff not be reappointed, was conducted fairly and without bias; the evidence was that there were questions regarding the adequacy of plaintiff's performance, of which plaintiff had knowledge, even before his whistleblowing to defendants; defendants' evidence revealed that plaintiff's nonappointment was based on his inability to collaborate with others; and plaintiff failed to show that his reports of conflicts of interest and possible misappropriation of state resources were a substantial factor in the nonrenewal of his appointment N.C.G.S. § 126-85.

Am Jur 2d, Public Officers and Employees §§ 236-239, 261, 262, 288.

Pre-emption by workers' compensation statute of employee's remedy under state "whistleblower" statute. 20 ALR5th 677.

Pre-emption of wrongful discharge cause of action by civil rights laws. 21 ALR5th 1.

2. State § 23 (NCI4th)— emotional distress and misrepresentation—claims barred by sovereign immunity

Summary judgment for defendant state university administrators on plaintiff's emotional distress and misrepresentation claims was appropriate based on defendants' claims of sovereign immunity, since allegations in the complaint involved acts of defendants performed within the bounds of their official duties and in their capacities as representatives of the state.

Am Jur 2d, Damages §§ 41, 251-262; Municipal, County, School and State Tort Liability § 70; States, Territories and Dependencies §§ 104-111.

Appeal by plaintiff from order entered 26 September 1994 in Orange County Superior Court by Judge Anthony M. Brannon. Heard in the Court of Appeals 12 September 1995.

McSurely & Dorosin, by Mark Dorosin and Alan McSurely, and Levine Stewart & Davis, by John T. Stewart, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas J. Ziko, for defendant-appellees.

GREENE, Judge.

Kirk C. Aune (plaintiff) appeals from the trial court's entry of summary judgment in favor of the University of North Carolina at Chapel Hill (University), Dr. Stuart Bondurant (Bondurant), William D. Mattern (Mattern), and Edwin Capel (Capel) (collectively defendants) on plaintiff's "Whistleblower," intentional and/or negligent infliction of emotional distress and misrepresentation claims.

On 7 July 1993, plaintiff filed this action against defendants, alleging that in 1991, while he was employed by the University School of Medicine as the Associate Dean for Information Systems and Director of the Office of Information Systems (OIS), he reported to Mattern (Associate Dean of Academic Affairs) and Bondurant (Dean of the School of Medicine) "the existence of an apparent conflict of interest among some employees of the School of Medicine." In 1992 he reported the "potential conflicts of interest as well as the possible appropriation of state resources by some employees of the School of Medicine for their own private commercial gain" to Capel (University's internal auditor). He further alleges that "the decision to terminate [his] employment . . . was made in retaliation for the aforesaid reports" and in violation of N.C. Gen. Stat. §§ 126-84, -85. Plaintiff also alleged that the defendants "acted willfully, wantonly and intentionally and/or were negligent in their handling of the performance review and [his] attempt to report suspected misbehavior and conflicts of interest" and that he suffered severe emotional distress as a consequence. The plaintiff finally alleged that the University misrepresented "the fairness with which decisions about his continued employment would be made," that Capel and the University misrep-

resented that "an appropriate investigation would be conducted" into his 18 June 1992 report and that Bondurant misrepresented "that there would be no negative repercussions from making a report of suspected misappropriation of state resources." Plaintiff's suit is captioned against Bondurant, Mattern and Capel in both their official and individual capacities.

In support of the defendants' motion for summary judgment they presented an affidavit by Bondurant in which he recalled only one time, "in early 1992, or possibly 1991," that plaintiff asserted the possibility of a conflict of interest among employees of the School of Medicine. After Bondurant had Mattern conduct an investigation, which revealed no conflict, Bondurant told plaintiff, who was not satisfied with the outcome, that he could report his concerns to Capel. Bondurant heard nothing else of plaintiff's complaints and therefore "considered the matter to be resolved." Furthermore, Bondurant did not know of plaintiff's reports to Capel until after the nonrenewal of plaintiff's appointment. In 1992, Bondurant appointed a committee to review plaintiff's performance. Bondurant further states, in his affidavit, that he did not ask Mattern to influence the 1992 review committee's decision, although he did request that Mattern discuss candidates to serve as committee members. Dr. David Ontjes (Ontjes), who served as chair of the 1992 review committee, and another committee member interviewed Mattern, as a witness, before the committee formally convened to hear from witnesses and write its report. During his interview, Mattern expressed his opinion that plaintiff should not be reappointed. Although Ontjes questioned Bondurant regarding the necessity of a review after hearing Mattern's opinion, Bondurant "assured [Ontjes] that a review was quite necessary, and that [he] wanted the committee to conduct an impartial and thorough examination of [plaintiff's] leadership of OIS, on the basis of which [Bondurant] would then make a decision." Bondurant stressed that Mattern's opinion was just one person's and that the committee should consider all sources before making a recommendation. Bondurant gave no indications of his personal views regarding plaintiff to the committee and asked for a thorough and objective review. The 1992 review committee issued a report on 22 April 1993 and "strongly advise[d] that [plaintiff] not be reappointed." In support of its recommendation it determined that plaintiff's style of interaction had decreased his effectiveness, citing specifically the perception that he was rigid and uncompromising and his failure to provide a functional long-term plan or to address the microcomputer evolution.

Bondurant "decided to accept the [c]ommitte's recommendation" and not reappoint the plaintiff.

In Mattern's affidavit in support of the motion, he stated that he only remembers a general statement by plaintiff regarding the conflict of interest charge in the fall of 1991. After plaintiff's mention of a potential problem, Mattern carefully questioned the faculty member involved and was satisfied by the faculty member's explanation that there was no conflict of interest. Mattern reported his satisfaction to plaintiff. Plaintiff never mentioned that conflict issue again. Plaintiff also brought forth a potential conflict of interest held by a programmer, regarding a previous dual employment contract held by the programmer. When Mattern investigated, he determined that the programmer was no longer working on the project which would have given rise to the conflict of interest. Furthermore, Mattern was only limitedly involved in plaintiff's 1992 review. Mattern worked to appoint the committee members, but members to whom plaintiff objected were removed from the committee and the final committee contained no member to which plaintiff did not agree. Mattern also submitted a list of names to the committee of people they might contact, "specifically omitt[ing] . . . people whose views [he] thought were uniformly negative." The undisputed evidence also reveals that the committee had numerous sources from which to collect witnesses, including an open request to anyone interested in the hearing to testify either for or against plaintiff's reappointment. Mattern's only other involvement with the review was his testimony as a witness. Furthermore, Mattern did not know of plaintiff's reports to Capel.

Defendants also presented affidavits from members of the 1992 review committee. Each member gave specific facts establishing the unbiased nature of plaintiff's 1992 review. All stated their opinion that the committee conducted a fair, unbiased review of plaintiff's performance and none had any preconceived notions regarding plaintiff's reappointment. Additionally, the administrative assistant who staffed the 1992 review committee submitted an affidavit stating that the review was ordinary and conducted as others at the University had been conducted.

In response to defendants' evidence, plaintiff presented an affidavit containing the specific facts relating to his reports to Bondurant, Mattern and Capel. Plaintiff had earlier stated in his complaint his own belief that his appointment was not renewed because

of his reports. The plaintiff also presented an affidavit by John Gullo (Gullo), a former OIS employee, which included his statements that Dr. James Wrenn "told top level computer people in the Hospital that [plaintiff] was 'going to be cut down to size' and they didn't have to worry about [plaintiff's] OIS." Gullo also saw a budget request by plaintiff, on which Bondurant's "main administrator" had commented "I don't think its going to help."

The issues are whether (I) the evidence supports summary judgment for the defendants on the "Whistleblower" claim; and (II) Bondurant, Mattern and Capel have been sued only in their official capacity, rendering them immune from plaintiff's claims for emotional distress and misrepresentation.

I

[1] North Carolina General Statute § 126-85, known as the "Whistleblower" Act (the Act) protects State employees who make reports of certain activities described in section 126-84 from retaliation by heads of "any State department, agency, or institution" or retaliation by any other State employee "exercising supervisory authority" over the employee. N.C.G.S. § 126-85 (1993). The Act is violated if the report is a substantial causative factor in any "discharge," threat or discrimination "regarding the State employee's compensation, terms, conditions, location, or privileges of employment." *Id.*; *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 584, 448 S.E.2d 280, 282 (1994); *see Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 230, 382 S.E.2d 874, 878 (applying substantial factor test to retaliatory discharge claim under Occupational Safety and Health Act), *disc. rev. denied*, 325 N.C. 704, 388 S.E.2d 449 (1989); *see also Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 484 (1977) (retaliation claim based on first and fourteenth amendments requires proof that protected conduct was a "substantial or motivating factor" in adverse action). Upon a showing of retaliation the employee is entitled to "damages, an injunction, or other remedies." N.C.G.S. § 126-86 (1993); *Minneman v. Martin*, 114 N.C. App. 616, 618-19, 442 S.E.2d 564, 566 (1994).

In the context of summary judgment in this type of action, once a defendant, moving for summary judgment, presents evidence that the adverse employment action is based on a legitimate non-retaliatory motive, the burden shifts to the plaintiff to present evidence, raising a genuine issue of fact, that his actions under the Act were a sub-

stantial causative factor in the adverse employment action, *see Taylor v. Taylor Prods., Inc.*, 105 N.C. App. 620, 625, 414 S.E.2d 568, 572-73 (1992) (discussing burdens of parties in summary judgment hearing), or provide an excuse for not doing so. N.C.G.S. § 1A-1, Rule 56(f) (1990). In determining whether there are any genuine issues of material fact, the trial court must view the evidence in the light most favorable to the plaintiff and resolve all conflicts in plaintiff's favor, giving plaintiff all reasonable inferences. *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 389, 402 S.E.2d 167, 172, *disc. rev. denied*, 329 N.C. 266, 407 S.E.2d 831 (1991). A genuine issue of material fact exists if plaintiff's evidence is substantial. *Martin v. Ray Lackey Enters.*, 100 N.C. App. 349, 353, 396 S.E.2d 327, 330 (1990).

In support of their motion for summary judgment, defendants argue that the nonrenewal of plaintiff's appointment was not a result of his reports regarding any conflicts of interest or the possible misappropriation of State resources and instead was based on legitimate non-retaliatory reasons. We agree that the defendants' evidence supports their argument. In support of their argument, defendants presented the undisputed evidence that plaintiff's performance was scrutinized in compliance with University policy. Defendant's evidence also specifically reveals that the final committee review, which recommended that plaintiff not be reappointed, was conducted fairly and without bias. Moreover, the evidence is that there were questions regarding the adequacy of plaintiff's performance, of which plaintiff had knowledge, even before his reports to Bondurant and Mattern. Finally, the evidence reveals the nonappointment was based on the plaintiff's inability to "collaborate with others."

In response to defendants' motion, plaintiff argues that the 1992 review committee was biased by Bondurant and Mattern and that the reasons cited by defendants for the nonrenewal of plaintiff's appointment are pretextual. Plaintiff's complaint contains his own belief that his appointment was not renewed because of his reports. Other than the facts relating to the reports made by plaintiff to Bondurant, Mattern and Capel, which are set forth in his affidavit, plaintiff brings forward an affidavit containing a statement by Gullo that a former student stated that plaintiff would "be cut down to size" and that hospital computer employees "didn't have to worry about [plaintiff's] OIS," and that Bondurant's administrator commented that plaintiff's budget request would not help. Even assuming that these statements would be admissible at trial, *Taylor*, 105 N.C. App. at 625, 414 S.E.2d at 572-73 (evidence used to meet a party's burden at summary judg-

ment must be admissible at trial), these statements do not raise a genuine issue of material fact with regard to whether the plaintiff's reports were a substantial factor in the nonrenewal of his contract, even viewing all the other evidence in plaintiff's favor and giving him all reasonable inferences. The evidence is simply too speculative to support a finding that the plaintiff's nonrenewal was in any way related to the report.

Plaintiff also argues that even if the reasons that defendants give for not renewing his appointment are legitimate, the defendants also retaliated against plaintiff by "undercutting" his authority, "stonewalling" the promised investigation, "setting up oppositional centers of power," and "creating a self-fulfilling review process." Without determining whether these acts "otherwise discriminate" against plaintiff within the meaning of the statute, we reject this argument because these acts of retaliation were not alleged in plaintiff's complaint. *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 190, 371 S.E.2d 503, 506 (1988) (plaintiff's case at summary judgment must be based on allegations in complaint), *disc. rev. denied*, 323 N.C. 706, 377 S.E.2d 229, *cert. denied*, 493 U.S. 808, 107 L. Ed. 2d 19 (1989).

For an additional reason, summary judgment for Capel was correct. This record reveals that he had no supervisory authority over plaintiff and was not the head of any State department, agency or institution. *See* N.C.G.S. § 126-85(a); *Taylor*, 105 N.C. App. at 625, 414 S.E.2d at 572 (summary judgment appropriate where an essential element of plaintiff's case is lacking).

II

[2] Defendants argue that summary judgment for them on the emotional distress and misrepresentation claims was also appropriate because they are protected from these claims by sovereign immunity. We agree.

A governmental entity and its officers or employees when sued in their official capacity are immune from suits based on tort claims, unless there has been some waiver. *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278-79 (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 Shepard's Editorial

Staff, *Civil Actions Against State and Local Government, Its Divisions, Agencies and Officers* § 1.16 (2d ed. 1992) [hereinafter *Civil Actions*]; see *Taylor*, 112 N.C. App. at 607-08, 436 S.E.2d at 279. The nature of the conduct determines in what capacity one can be sued, *General Elec. Co. v. Turner*, 275 N.C. 493, 498, 168 S.E.2d 385, 389 (1969), and the nature of the relief sought reveals how a defendant has been sued. *Civil Actions* §§ 1.17-.18. The designations made in the caption of the complaint are not determinative. *Taylor*, 112 N.C. App. at 607, 436 S.E.2d at 279.

In this case the allegations in the complaint with respect to the tort claims involve acts of the defendants performed within the bounds of their official duties and in their capacities as representatives of the State. Therefore the individual defendants can only be sued in their official capacity and as such share the governmental immunity enjoyed by the University, an agency of the State. *See Jones v. Pitt County Memorial Hosp.*, 104 N.C. App. 613, 617, 410 S.E.2d 513, 515 (1991) (all tort claims against UNC and its constituent institutions must be brought before the Industrial Commission). This immunity supports the summary judgment on these claims. *See Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981) (summary judgment appropriate where plaintiff cannot surmount defendant's affirmative defense).

Affirmed.

Judges JOHNSON and SMITH concur.

NORTH CAROLINA DEPARTMENT OF CORRECTION, PETITIONER v. GLENN E. MYERS, RESPONDENT

No. COA95-135

(Filed 17 October 1995)

1. Public Officers and Employees § 67 (NCI4th)— demotion of correctional officer—standard of review—absence of just cause

The trial court properly applied the whole record test and properly concluded that there was no just cause for the demotion of respondent correctional supervisor where the court found and the record indicated that there was insufficient evidence to show

that respondent "breached confidentiality" or that he "failed to provide complete responses to questions" causing the "omission of important facts" at a probation officer's disciplinary hearing where none of respondent's comments revealed anything of a confidential nature about the probation officer herself but instead amounted to criticism of the manner and method of conducting pre-disciplinary hearings.

Am Jur 2d, Civil Service § 63.

Libel and slander: Public officer's privilege as to statements made in connection with hiring and discharge. 26 ALR3d 492.

2. Costs § 37 (NCI4th)— award of attorney fee—no basis for hourly amount

The trial court erred in ordering the Department of Correction to pay attorney's fees to respondent's attorney at the "judicially recognized lodestar fee" of $160.00 per hour, where the court made no findings of fact as to the time and labor expended, the skill required, the customary fee for like work, or the experience or ability of the attorney. N.C.G.S. § 6-19.1.

Am Jur 2d, Costs §§ 79-86.

3. Public Officers and Employees § 66 (NCI4th)— correctional officer—improper demotion—reinstatement—same pay but different location

A correctional officer who was demoted without just cause was properly reinstated where he was returned to the same pay grade and step as before his demotion even though he now works in a different position and location.

Am Jur 2d, Civil Service §§ 52 et seq.

What constitutes unfair labor practice under state public employee relations acts. 9 ALR4th 20.

Judge GREENE concurring.

Appeal by the North Carolina Department of Correction from judgment entered 25 October 1994 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 24 August 1995.

Michael F. Easley, Attorney General, by Paula D. Oguah, Assistant Attorney General, for the petitioner-appellant/appellee.

Marvin Schiller, for respondent-appellee/appellant.

WYNN, Judge.

We note initially that our inquiry is limited to the evidence available through the record on appeal as settled by the trial court. *See*, *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986).

Our examination of the record indicates that respondent, Glenn E. Myers, worked as a unit supervisor for the North Carolina Department of Correction (hereinafter DOC) in Davidson County. His duties included supervising five probation officers. On or about 11 June 1991, one of the probation officers, Ms. Maxine Nicholson, had been disciplined for personal misconduct. Mr. Myers was present at Ms. Nicholson's pre-disciplinary conference. Subsequently, Ms. Nicholson was disciplined and later appealed her disciplinary action to the Employee Relations Committee. After a hearing before the Committee, Ms. Nicholson's attorney wrote to the North Carolina Attorney General's Office complaining about statements allegedly made by Mr. Myers which indicated that Ms. Nicholson's disciplinary hearing was not impartial. DOC investigated this matter, and as a result, Mr. Myers received a letter of demotion dated 16 January 1992.

The letter, in relevant part, alleged that Mr. Myers' demotion and transfer were based upon the following:

(1) breach of confidentiality by discussing private personnel matters;

(2) failure to provide complete responses to questions before the Employee Relations Committee which resulted in the omission of important facts and circumstances germane to the disciplinary action taken against Officer Maxine Nicholson.

Based upon these reasons, Mr. Myers was demoted by DOC from Unit Supervisor to Adult Probation/Parole Officer, effective 16 January 1992. On 28 February 1992, Mr. Myers filed a petition for a contested case hearing in the Office of Administrative Hearings alleging he was demoted and transferred without just cause and that the demotion letter lacked the specificity required by law. The

Administrative Law Judge (hereinafter ALJ) filed a recommended decision on 14 September 1992, and concluded that DOC did not have just cause to demote and transfer Mr. Myers. On or about 1 November 1992, Mr. Myers was reinstated to Supervisor III in Davie County with back pay.

On 23 February 1993, the State Personnel Commission issued a final decision and order which rejected the ALJ's decision and held that DOC had just cause to dismiss Mr. Myers. Mr. Myers appealed to the Superior Court on 25 March 1993. On 25 October 1994, the trial court reversed the Commission's order, except that Mr. Myers was denied a re-transfer to his former position and location. The trial court further ordered that DOC pay attorney's fees to Mr. Myers' attorney at his "judicially recognized lodestar rate of $160.00 per hour." DOC gave notice of appeal on 9 November 1994. Mr. Myers also appeals from the portion of the judgment denying a re-transfer to his former position. We affirm in part and reverse in part.

I.

[1] Our review of the case *sub judice* is limited to two issues: (1) whether the trial court applied the appropriate scope of review and, (2) if so, whether the court did so properly. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994).

N.C. Gen. Stat. § 150B-51(b) (1991) governs both trial and appellate court review of administrative agency decisions. The trial court reviewing a final decision may affirm the agency's decision or remand the case for further proceedings. *Id.* Additionally, the court may reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced by the agency's findings or conclusions. *Id.*

In any case, the proper manner of review depends upon the particular issues presented on appeal. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. at 674, 443 S.E.2d at 118. If petitioner argues that the agency's decision was based on an error of law, then *de novo* review is required. *Id. De novo* review requires a court to consider a question anew, or as if it had not been considered or decided by the agency. *Id.* If, on the other hand, petitioner questions "(1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). The "whole record" test

requires the reviewing court to examine all competent evidence to determine whether the agency decision is supported by substantial evidence. *Id.*

In the subject case, DOC contends that the trial court did not properly apply the scope of review under N.C. Gen. Stat. § 150B-51 and erred when it found that the ALJ's legal conclusions, rather than the Commission's conclusions, were supported by the evidence, the factual findings, and the whole record. Inasmuch as the record on appeal indicates that the trial court applied the appropriate scope of review—the "whole record" test—our only remaining question is whether the court did so properly.

DOC contends that the trial court did not properly apply the "whole record" test because all the evidence in the record, including testimony and exhibits, shows that there was a rational basis for the Commission's order finding that there was just cause for Mr. Myers' demotion. Although the "whole record" test gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence, *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979), the test also requires the reviewing court to examine all competent evidence to determine whether the agency decision is supported by *substantial evidence*. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889-90 (1988). Moreover, the reviewing court must take into account both the evidence which supports the agency's decision and any contradictory evidence which would support a different result. *Lackey v. N.C. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982).

In the case at hand, the trial court found and the record indicates there was insufficient evidence to show that Mr. Myers "breached confidentiality" or that he "failed to provide complete responses to questions" causing the "omission of important facts" at Officer Nicholson's disciplinary hearing. DOC argues that Mr. Myers' comments were made in violation of N.C. Gen. Stat. § 126-22 (1993) which prohibits a state employee from making confidential personnel data open to inspection and examination. However, none of Mr. Myers' comments revealed anything of a confidential nature about Officer Nicholson herself. The record shows that his comments were directed towards the handling of Ms. Nicholson's pre-disciplinary conference for not being conducted behind closed doors and for

being conducted rudely and loudly. These comments are not breaches of confidentiality, but rather criticisms of the manner and method of conducting pre-disciplinary hearings.

In addition, the trial court found and the record indicates that there was insufficient evidence to support the conclusion that Mr. Myers failed to provide complete responses to questions and that he omitted important facts. No evidence was presented regarding any specific question asked of Mr. Myers during Ms. Nicholson's disciplinary hearing, what Mr. Myers' answers were or which answers of Mr. Myers purportedly caused "omissions of important facts," or what "important facts" were "omitted." Based on this evidence, we find that the trial court did not err in concluding that all of the findings of fact and conclusions of law made by the ALJ, including those adopted by the Commission, were based upon competent evidence contained in the whole record.

Because we agree that the trial court did not err in concluding that Mr. Myers was demoted and reduced in pay and grade without just cause in contravention of N.C. Gen. Stat. § 126-35 (1993), we do not address petitioner's arguments that the demotion letter met the specificity requirement of N.C.G.S. § 126-35, and that the ALJ's decision was based on an incomplete record.

II.

[2] DOC next contends that the trial court erred when it ordered it to pay attorney's fees to Mr. Myers' attorney at the "judicially recognized lodestar fee" of $160.00 per hour. We agree.

Although the award of attorney's fees is within the discretion of the trial judge under N.C. Gen. Stat. § 6-19.1 (1986), the trial court must make findings of fact " 'as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " *United Laboratories v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381 (1993). We note parenthetically that while our record does not indicate that the trial court made findings to establish the basis for attorney fees under N.C.G.S. § 6-19.1, DOC does not challenge this lack of findings on appeal to this court. Rather, DOC argues only that the trial court did not make any of the findings necessary to arrive at the hourly attorney fee. We agree.

We therefore reverse the trial court's award of attorney fees at the hourly rate of $160.00 and remand for findings on the proper hourly rate that should be allowed in this case. We note that our decision to

remand to the trial court for a determination of the hourly rate for attorney's fees earned on judicial review under N.C.G.S. § 6-19.1 is made without prejudice to the plaintiff to seek complementary attorney's fees from the Commission under its discretionary authority under N.C. Gen. Stat. § 126.4 (11) (1993). *See*, *N.C. Dept. of Correction v. Harding*, 120 N.C. App. 451, 462 S.E.2d 671 (1995).

III.

[3] Respondent Myers also appeals and contends that the trial court erred by not ordering DOC to re-transfer him to his former position and location. We disagree.

Although N.C. Gen. Stat. § 126-37 (1993) authorizes the Commission to reinstate an employee to the position from which he is removed and to order the transfer of an employee to whom it has been wrongfully denied, that authority is discretionary. The trial court is not compelled to order Mr. Myers' reinstatement to his former position and location.

Furthermore, reinstatement as used in the North Carolina Administrative Code denotes the following:

> Reinstatement means the return to employment of a dismissed employee, in the same or similar position, at the same pay grade and step which the employee enjoyed prior to dismissal. Reinstatement may also refer to the promotion of a demoted employee to the same pay grade and step as the employee was demoted from.

25 N.C.A.C. 1B.0428.

Mr. Myers was returned to the same pay grade and step as before his demotion even though he works at a different location. Accordingly, he was properly reinstated and the trial court's decision must be affirmed.

For the foregoing reasons, we affirm the trial court's decision in part, and reverse and remand on the issue of attorney's fees.

Judge GREENE concurs with a separate opinion.

Judge MARTIN, JOHN C. concurs.

Judge GREENE concurring.

I fully concur with Part II of the majority opinion. With regard to Parts I and III, I disagree with the analysis but concur with the result.

Demotion

The Department of Correction (DOC) argues that the findings entered by the State Personnel Commission (Commission) support its conclusions with regard to the demotion and therefore the trial court erred in reversing this portion of the Order of the Commission. This raises the issue of whether the Commission's Order is affected by an error of law, and this Court is required to review the Order of the Commission *de novo*. *See Brooks v. Ansco & Assocs.*, 114 N.C. App. 711, 716-17, 443 S.E.2d 89, 92 (1994) ("error of law . . . exists if a conclusion of law . . . is not supported by the findings of fact"). Thus, the question is whether the findings entered by the Commission support its conclusion that there existed "just cause for Petitioner's demotion." I agree with the majority that the findings do not support this conclusion.

Transfer

Glenn E. Myers (Myers) argues that if the order of demotion is rescinded then it follows that the order of transfer must be rescinded and the trial court erred in not doing so. I disagree. The transfer of Myers is not a matter within the subject matter jurisdiction of the Commission or the trial court. N.C.G.S. § 126-35(a) (1993) (providing for appeal to Commission by State employee "discharged, suspended, or demoted"); *cf.* N.C.G.S. § 126-36 (1993) (State employee entitled to appeal to Commission where request for transfer denied because of discrimination). Therefore, the transfer directed by the DOC remains in full force and effect and language in the judgment of the trial court relating to the transfer is mere surplusage.

HOSPITAL CORPORATION OF NORTH CAROLINA, INC. D/B/A DAVIS COMMUNITY HOSPITAL v. IREDELL COUNTY

No. COA94-1390

(Filed 17 October 1995)

1. Hospitals and Medical Facilities or Institutions § 1 (NCI4th)— home health agency as "hospital facility"

Defendant county's home health agency was a "hospital facility" as defined by N.C.G.S. § 131E-6(4) since it was an agency of defendant; it had a license, equipment, and office space; and the entire Health Care Facilities and Services Act treats home health agencies as facilities requiring licensure.

Am Jur 2d, Hospitals and Asylums §§ 1-4.

2. Hospitals and Medical Facilities or Institutions § 2 (NCI4th)— transfer of home health agency—compliance with statutory notice requirements

There was no merit to defendant's contention that its contract to transfer "management" of a home health agency was not a "lease, sale, or conveyance" requiring compliance with the notice provisions of N.C.G.S. § 131E-13(d) because the transfer only related to "management" of the agency, since defendant transferred the right to operate the agency and in so doing made a conveyance within the meaning of the statute, and the lease of office space, which was an integral part of the contract, qualified the transfer as a lease within the meaning of the statute.

Am Jur 2d, Hospitals and Asylums §§ 1-4.

Judge WYNN concurring.

Appeal by defendant from judgment entered 30 August 1994 in Iredell County Superior Court by Judge W. Steven Allen, Sr. Heard in the Court of Appeals 14 September 1995.

Homesley, Jones, Gaines & Fields, by T.C. Homesley, Jr., and Ragan Dudley, for plaintiff-appellee.

Pope, McMillan, Gourley, Kutteh & Simon, P.A., by William P. Pope and Anthony J. Baker, for defendant-appellant.

GREENE, Judge.

Iredell County (defendant) appeals from the trial court's order entering summary judgment in favor of Hospital Corporation of North Carolina, Inc. d/b/a Davis Community Hospital (plaintiff) which restrained defendant from transferring the management of its home health agency until defendant complied with certain notice requirements.

The evidence shows that defendant owns and operates the Iredell County Home Health Agency (Home Health), which provides "home health care for persons needing medical assistance in their homes and hospitals." Defendant's organizational chart places Home Health under the Board of Health within the Iredell County Health Department. It is undisputed that Home Health operates pursuant to a license issued by the North Carolina Department of Human Resources, and that Home Health is not required to have a Certificate of Need, pursuant to Article 9 of Chapter 131E of the North Carolina General Statutes.

On 7 June 1994, the "Iredell County Board of Commissioners voted to transfer the management of the Iredell Home Health Agency to Iredell Memorial Hospital, Inc.," (Iredell) which is a non-profit hospital where a "majority of the voting members of the Board of Directors . . . are not appointed by" defendant. Thereafter, on 10 June 1994, plaintiffs, a for-profit hospital in competition with Iredell, sued defendants, seeking a temporary restraining order and a permanent restraining order, until defendants comply with notice requirements set forth in N.C. Gen. Stat. § 131E-13(d), the Municipal Hospital Act (the Act). The trial court entered a temporary restraining order on 10 June 1994, which the parties agreed by consent order should remain in effect until the matter could be heard. On 19 July 1994, the Board of Commissioners "adopted a resolution approving the transfer of the management of [Home Health] and lease of space and equipment to Iredell Memorial Hospital, Inc., subject to dissolution of the Restraining Order pending in this matter." The agreement which the Board of Commissioners approved provides that Iredell, as consideration for the contract, will eliminate a county subsidy to Home Health, pay $200,000, and lease the office space, within which Home Health currently operates, as well as all of the personal property of Home Health, from defendant in exchange "for the Transfer of operating rights and responsibilities." This transfer includes Home Health's license and provider number. Upon Iredell's breach of any

terms of the contract, including requirements that Iredell provide indiscriminate care to all members of the County and provide indigent care, defendant may resume operation of the management of Home Health.

On 22 August 1994, the trial court entered summary judgment in favor of plaintiffs, and ordered that the transfer of the management of Home Health should be permanently restrained until defendant complies with the notice provisions in N.C. Gen. Stat. § 131E-13(d).

The issues are whether (I) a home health agency is a "hospital facility" as defined by N.C. Gen. Stat. § 131E-6(4) and if so, whether (II) the transfer of Home Health's management in this case was a lease, sale or conveyance, requiring defendant's compliance with the notice requirements of N.C. Gen. Stat. § 131E-13(d), prior to the transfer.

I

[1] Prior to "leasing, selling, or conveying a hospital facility" to either a "for profit corporation" or a "nonprofit corporation" meeting the requirements of section 131E-14, a county which owns the facility must first comply with the requirements of section 131E-13(d). N.C.G.S. § 131E-13(d) (1994). In this case it is not disputed that Iredell is a section 131E-14 "nonprofit corporation." The defendant argues that Home Health is not a "hospital facility" within the meaning of the statute. We disagree.

A "hospital facility" is defined as

> any type of hospital; facility operated in connection with a hospital such as a clinic, including mental health clinics; nursing, convalescent, or rehabilitative facility; public health center; *or any facility of a local health department.* The term "hospital facility" *also includes* related facilities such as laboratories, outpatient departments, housing and training facilities for nurses and other health care professionals, central service facilities operated in connection with hospitals, and all equipment necessary for its operation.

N.C.G.S. § 131E-6(4) (1994) (emphasis added). In this case, it is not disputed and, in fact, the record reveals that Home Health is a part of defendant's local health department. The question, therefore, is whether Home Health is "a facility" of defendant's local health department.

A facility is defined to include not only structures designed "to facilitate some particular end" but anything that "promotes the ease of any action, operation, transaction, or course of conduct." *Webster's Third New International Dictionary* 812 (1968); *Black's Law Dictionary* 591 (6th ed. 1990). In this case, the defendant agreed to transfer Home Health's license to Iredell as well as the office space and equipment. The transfer of the license vested Iredell with the "operating rights and responsibilities" and thus promoted or made it possible for it to provide the home health service to the people of Iredell County. It follows therefore that Home Health, consisting of a license, equipment and office space, is a hospital facility within the meaning of section 131E-13(d).

Furthermore, the entire "Health Care Facilities and Services Act," codified as Chapter 131E, treats home health agencies as facilities. Article 6, which is the "Facility Licensure Act" includes home health care agencies as facilities requiring licensure. N.C.G.S. § 131E-135 (1994). Article 9, which sets forth certificate of need requirements, also specifically lists home health agencies as a "health service facility." N.C.G.S. § 131E-176(9b) (1994).

Finally, the legislature obviously intended to foster competition with its adoption of section 131E-13(d) and we are not prepared to exclude home health agencies from its provisions in the absence of clear legislative language.

II

[2] In the alternative, the defendant argues that its contract with Iredell to transfer "management" of Home Health is not a "lease, sale or conveyance" requiring compliance with the notice provisions of N.C. Gen. Stat. § 131E-13(d) because the transfer only relates to the "management" of Home Health. We disagree.

A conveyance is "one by which the right . . . in a thing is transferred." *Black's Law Dictionary* 333 (6th ed. 1990). In this case the defendant transferred the right to operate Home Health to Iredell and in so doing made a conveyance within the meaning of the statute. The fact that the contract contained provisions relating to the operation of Home Health and permitted the defendant to terminate the contract upon noncompliance is not material to the issue presented. The controls retained by defendant are required by law, N.C.G.S. §§ 131E-8(a), -13(a). In any event, in this case the lease of the office

space, which was an integral part of the contract, qualifies the transfer as a lease within the meaning of section 131E-13(d).

Accordingly, summary judgment in favor of plaintiffs was appropriate.

Affirmed.

Judge McGEE concurs.

Judge WYNN concurs with separate opinion.

Judge WYNN concurring with separate opinion.

I agree with the majority that the home health agency in this case is a hospital facility within the meaning of N.C.G.S. § 131E-6(4) and further that the transfer of the agency was lease, sale or conveyance requiring notice requirements under N.C.G.S. § 131E-13(d). I write separately to address defendant's additional contentions in this case.

N.C.G.S. § 131E-8(c) provides that a municipality may convey to a nonprofit corporation any rights of ownership that the municipality has in a hospital facility. In addition, this section requires that any such conveyance be approved on 10 days' public notice. N.C.G.S. § 131E-8(c).

Likewise, N.C.G.S. § 131E-13(d) provides that a "municipality . . . may lease, sell, or convey any hospital facility" to a for-profit corporation. This section also requires that any such lease, sale, or conveyance follow certain procedures including notice and a public hearing.

N.C.G.S. § 131E-14 provides that "[i]f a municipality or hospital authority leases, sells, or conveys a hospital facility, or part, to a nonprofit corporation of which a majority of voting members of its governing body is not appointed or controlled by the municipality or hospital authority, the procedural requirements set forth in N.C.G.S. § 131E-13(d) shall apply."

Defendant contends that N.C.G.S. § 131E-7(b) is controlling and thus, he does not have to comply with the notice requirements of N.C.G.S. § 131E-13(d). N.C.G.S. § 131E-7(b) authorizes a county to "contract with . . . any person, . . . or nonprofit corporation or association for the provision of health care . . ." without complying with the notice provisions of N.C.G.S. § 131E-13(d).

Defendant's contention is erroneous. Based on the facts in this case, N.C.G.S. § § 131E-8 and 131E-14 are directly on point. Iredell County proposes to convey and lease the Home Health Agency to Iredell Memorial. In consideration for the sum of $200,000 and the elimination of the county subsidy, Iredell Memorial would control the management, operations, and financial affairs of Home Health. Iredell Memorial would also lease the space used by the current Home Health Agency. This is both a lease and a conveyance. Furthermore, defendant does not point to any facts or cases which would support the contention that N.C.G.S. § 131E-7(e) regarding contracts rather than leases and conveyances should control.

Second, defendant maintains that Iredell County Home Health Agency is not a hospital facility because it has no particular physical location for providing clinical treatment to patients. Again, I find this argument to be without merit. N.C.G.S. § 131E-6(4) provides a very broad definition of hospital facility. The definition includes, "any facility of a local health department . . . [and] includes related facilities such as laboratories, outpatient departments, housing and training facilities for nurses and other health care professionals, central service facilities operated in connection with hospitals, and all equipment necessary for its operation." Iredell Home Health has a facility mailing address, a facility site and is licensed by the Department of Human Resources, Division of Facility Services.

Third, defendant contends that Iredell County proposes to transfer only the management and operation of the Home Health Agency and not "sell, lease, or convey" the Home Health Agency. This is a distinction without substance. A transfer and a conveyance are synonymous in this case. For consideration of $200,000, Iredell County is proposing to transfer the management and operations of Iredell Health. In addition, they plan to lease its space, medical inventory, and office equipment. Under this proposal, Iredell Memorial would also assume all risks of financial loss from the operation of the Home Health Agency. Therefore, Iredell County is conveying a right and interest in property to Iredell Memorial.

In sum, under N.C.G.S. §§ 131E-8 and 131E-14, the proposal at issue constituted a conveyance and lease of a hospital facility. Based on the foregoing reasons, the trial court did not commit reversible error by permanently restraining Iredell County Commissioners from conveying the county's home health agency without complying with the notice requirements of N.C.G.S. § 131E-13(d).

NORTH CAROLINA DEPARTMENT OF CORRECTION DEFENDANT/APPELLANT v.
JANICE HARDING, PLAINTIFF/APPELLEE

No. COA95-125

(Filed 17 October 1995)

1. Administrative Law & Procedure § 69 (NCI4th)— award of back pay—insufficiency of record—no authority of Personnel Commission to find facts

The Personnel Commission, upon remand by the Supreme Court, was without authority to find facts on the issue of an employee's back pay, since the basis upon which it did so, an internal memo, was not a part of the official record, and the superior court erred in failing to remand the case to the OAH to take evidence and make findings of fact.

Am Jur 2d, Administrative Law §§ 304, 379.

2. Costs § 37 (NCI4th)— attorney fees—insufficient findings

The trial court erred in failing to make any of the findings necessary to arrive at an hourly attorney fee, and the case is remanded to the trial court for a determination of how many attorney hours were spent in the first judicial review of the case and the appropriate hourly rate for plaintiff's attorney. N.C.G.S. § 6-19.1.

Am Jur 2d, Costs §§ 57 et seq.

Appeal by defendant-appellant from judgment entered 25 October 1994 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 24 August 1995.

Marvin Schiller for plaintiff-appellee.

Michael F. Easley, Attorney General, by Valerie L. Bateman and Paula D. Oguah, Assistant Attorneys General, for defendant-appellant.

WYNN, Judge.

This is the third appeal to the appellate division involving this case. In *Harding I*, this Court affirmed the review of the Superior Court which had rejected the State Personnel Commission's review and upheld the Administrative Law Judge's (ALJ) recommendation

that Janice Harding be reinstated to her position with the North Carolina Department of Correction (DOC) with back pay. No amount of back pay was specified at that time. *Harding v. N.C. Dep't. of Correction*, 106 N.C. App. 350, 416 S.E.2d 587, *disc. rev. denied*, 332 N.C. 147, 419 S.E.2d 567 (1992).

Afterwards the parties were unable to agree on the amount of back pay and as a result, Ms. Harding filed a motion in superior court seeking enforcement of the *Harding I* judgment. The superior court, in an order signed 16 October 1992, directed DOC to pay Ms. Harding $86,806.01 in back pay and her attorney's fees.

Harding II followed when our Supreme Court allowed DOC to by-pass this Court, granted DOC's petition for discretionary review, and vacated the order of the trial court. *Harding v. N.C. Dep't. of Correction*, 334 N.C. 414, 432 S.E.2d 298 (1993). *Harding II* held that the trial court lacked authority to enter findings of fact regarding the amount of back pay owed to Ms. Harding. The Court stated:

> The record before this Court does not include any back pay findings by the Commission. Given the authority of the Commission over back pay, the absence of record findings, and the superior court's lack of fact-finding authority in appeals from employee grievances, the superior court in the instant case could not enter an order awarding back pay in a specific amount . . . . In light of the Commission's authority over back pay, that tribunal is the proper forum for resolution of the issues raised by petitioner's motion.

Id. at 420, 432 S.E.2d at 302. The Supreme Court then remanded to the *Commission* to enter findings of fact regarding the amount owed to Ms. Harding.

On remand, DOC argued before the Commission that it should remand the case to the Office of Administrative Hearings (OAH) for development of a record including evidence on whether Ms. Harding attempted to mitigate her damages by making an effort to find other employment, and evidence regarding the amount of back pay owed to Ms. Harding. The Commission declined to remand to the OAH stating that it was:

> . . . sympathetic to the [DOC's] position that they [sic] have not had the opportunity to litigate the issues regarding [Ms. Harding's] duty to mitigate and her ability or inability to work. However, based on the [Supreme] Court's mandate [in *Harding*

> *II*], this Commission is bound to determine the amount of back pay. This Commission further determines that it would be contrary to the [Supreme] Court's mandate to attempt to remand this matter to the [OAH].

The Commission then found for Ms. Harding, ordering DOC to pay back pay in the amount of $86,806.01, the amount taken from a DOC internal memo regarding the amount of back pay owed Ms. Harding. The memo was not in the official record before the Commission and the amount was not stipulated to by DOC. On review by the Superior Court, the Commission's award was affirmed and the Court awarded Ms. Harding's attorney fees "at his judicially recognized 'lodestar' fee of $160.00 per hour." *Harding III* is DOC's present appeal from this judgment.

On appeal, DOC contends I) that the Commission lacked the statutory authority to find facts on remand in the manner in which it did, and that the superior court erred in failing to remand the case to the OAH to take evidence and make findings of fact, and II) that the award of attorney's fees by the superior court was improper. We agree on both issues and therefore, reverse and remand.

I.

[1] DOC first complains that the Commission was without authority to find facts on the issue of back pay since the basis upon which it did so, the internal memo, was not a part of the official record. An agency's, in this case the Commission's, reviewing authority is statutorily set forth in N.C.G.S. § 150B-36(b).

> A final decision or order in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37 (a) and shall include findings of fact and conclusions of law. If the agency does not adopt the administrative law judge's recommended decision as its final decision, the agency shall state in its decision or order the specific reasons why it did not adopt the administrative law judge's recommended decision. *The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision or order*, and the final decision or order shall be supported by substantial evidence
> . . . .

(emphasis supplied). N.C. Gen. Stat. § 150B-37(a) states that the OAH "shall prepare an official record of the case that includes . . . [e]vidence presented . . . ."

These sections establish that the Commission may only render a final decision or order in a contested case after review of the official record as defined in N.C.G.S. § 150B-37(a); and further, that the official record on which an agency may base its decision must be prepared by OAH.

In the case *sub judice*, the Commission stated that "the only information available to the Commission regarding any calculation of back pay based upon [Ms. Harding's] salary is [DOC's] memorandum of 14 August, 1992." This memo regarding the amount of back pay owed to Ms. Harding did not exist at the first hearing and was not a part of the first official record. Because the Commission did not remand to OAH, a second official record was not prepared. Therefore, the memo was not in the official record before the Commission following the *Harding II* remand.

Our Supreme Court's remand to the Commission did not empower it to exceed its statutory authority by taking new evidence. Rather, it is implicit in the Supreme Court's remand that if the official record did not contain sufficient evidence to make proper findings on the issue of back pay, the Commission should remand to OAH for further development of the record. Thus, the trial court erred when it failed to reverse the Commission's decision and direct a remand of the matter to the OAH in order to obtain the necessary evidence to complete the official record for the Commission's review. N.C. Gen. Stat. § 150B-51(a) (If the agency hears new evidence after receiving the ALJ's recommended decision, the Court is to reverse the decision, or remand to the agency to enter a decision in accord with the official record). We, therefore, reverse the order of the trial court and remand to the Commission with instructions to remand to the OAH for a full hearing on all evidentiary matters regarding the amount of back pay accruing after 28 December 1988 that should be awarded to Ms. Harding.

II.

[2] DOC next contends that the trial court erred when it ordered it to pay attorney's fees to Ms. Harding's attorney at the "judicially recognized 'lodestar' fee" of $160.00 per hour. We agree.

The award of attorney fees in back pay matters involving the State Personnel Commission is covered by two complementary statutory sections. N.C. Gen. Stat. § 126-4(11) allows the *Commission* to

award attorney fees for services rendered up to the Commission's final decision. That section states the following:

> [The Commission shall establish policies and rules] [i]n cases where the Commission finds discrimination or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level, the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved.

For attorney services rendered on judicial review of the Commission's decision, the threshold requirements for awarding attorney's fees are higher. N.C. Gen. Stat. § 6-19.1 grants a *trial court* discretionary authority to award attorney fees to a prevailing party, in a Section 150B-43 appeal, if:

> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

N.C.G.S. § 6-19.1 (1986); *See S.E.T.A. v. Huffines*, 107 N.C. App. 440, 443, 420 S.E.2d 674, 676 (1992).

Since the Commission in this case had not entered an award of attorney's fees pursuant to its discretionary powers under N.C.G.S. § 126-4(11), it follows that the trial court in setting the hourly rate was not reviewing an award of the Commission. Rather, it acted under authority granted to it under N.C.G.S. § 6-19.1.

We note that while our record does not indicate that the trial court made findings to establish the basis for attorney fees under N.C.G.S. § 6-19.1, DOC does not challenge this lack of findings on appeal to this court. Rather, DOC argues only that the trial court did not make any of the findings necessary to arrive at the hourly attorney fee. We agree. Although the award of attorney's fees is within the discretion of the trial judge under N.C.G.S. § 6-19.1, the trial court must make findings of fact "as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *United Laboratories v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381 (1993). This record reflects no such findings.

We therefore reverse the trial court's award of attorney fees at the hourly rate of $160.00; however, we do not remand to the trial court

for a redetermination of the hourly rate because the plaintiff is no longer a N.C.G.S. § 6-19.1 prevailing party on the matter that gave rise to this appeal.

However, in *Harding I*, this Court affirmed the trial court's award of attorney's fees to Ms. Harding. As in the instant appeal, that award was made pursuant to N.C.G.S. § 6-19.1. The decision of this Court in *Harding I* is final. Accordingly, we remand to the trial court for a determination of: 1) how many hours were spent in the judicial review portion of *Harding I* through 8 July 1992, when the Supreme Court denied the DOC's petition for discretionary review, and 2) the appropriate hourly rate for Ms. Harding's attorney.

Finally, since plaintiff did not prevail on judicial review in either *Harding II or III*, she is not entitled to N.C.G.S. § 6-19.1 attorney's fees for services rendered on judicial review after the denial of discretionary review by the Supreme Court on 8 July 1992.

Our decision today is made without prejudice to the plaintiff to seek complementary attorney's fees under N.C.G.S. § 126-4(11) for services rendered before the Commission throughout this entire proceeding. The award of such fees, if any, would be within the discretion of the Commission.

Vacated and remanded with instructions.

Judges GREENE and MARTIN, JOHN C. concur.

STATE OF NORTH CAROLINA v. ROBERT EDWARD YOUNG, DEFENDANT

No COA94-1317

(Filed 17 October 1995)

1. Robbery § 55 (NCI4th)— common law robbery—sufficiency of evidence

The trial court properly submitted the charge of common law robbery to the jury where it tended to show that defendant, acting in concert with another and through forcible means—shoving a partially paralyzed man back down on a couch every time he tried to stand up—took the victim's property from his presence and without his consent; the fact that the victim testified on cross-examination that he was not in fear of defendant was of no

consequence, since any inconsistencies and contradictions in the evidence are to be disregarded and resolved in favor of the State for purposes of a motion to dismiss.

Am Jur 2d, Robbery §§ 24, 62 et seq.

2. **Criminal Law § 1283 (NCI4th)— habitual felon status—underlying felony—two charges in same indictment—separate counts—no error**

Pursuant to N.C.G.S. § 14-7.3, it makes no difference whether defendant is charged with the underlying felony and with habitual felon status in separate bills of indictment or in separate counts of the same bill of indictment, since either method is sufficient to notify defendant of the charges against him, to enable the court to pronounce judgment in the event defendant is convicted, and to allow defendant to be tried first for the principal felony without it being revealed to the jury that he is also charged with having attained habitual felon status.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1196.

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 1 March 1994 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 12 September 1995.

Defendant was charged in Count I of the bill of indictment with common law robbery and in Count II with being an habitual felon as defined in G.S. § 14-7.1. A jury found defendant guilty of common law robbery; he subsequently pled guilty to being an habitual felon. He was sentenced as a Class C felon pursuant to G.S. § 14-7.6 and received a sentence of life imprisonment. Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Douglas A. Johnston, for the State.

John T. Hall for defendant-appellant.

MARTIN, John C., Judge.

I.

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss the charge of common law robbery. Common law robbery is defined as the "felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L.Ed.2d 622 (1982). The use of violence or fear "must be such as to induce the victim to part with his or her property." *State v. Richardson*, 308 N.C. 470, 477, 302 S.E.2d 799, 803 (1983). Defendant contends that the State's evidence in the present case was insufficient to show that the alleged victim was placed in fear or that he was subjected to any "violence."

In ruling on a defendant's motion to dismiss criminal charges, the trial court is required to consider the evidence in the light most favorable to the State, allowing the State every reasonable inference to be drawn therefrom. *State v. Styles*, 93 N.C. App. 596, 379 S.E.2d 255 (1989). The question for the court is whether there is substantial evidence of each essential element of the crime charged, or of a lesser offense included therein, and that the defendant was the perpetrator of the offense. *Richardson, supra.* If so, the court must overrule the motion and submit the case to the jury. *Id.* " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion . . . ." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981) (citations omitted).

In the present case, the evidence tended to show that defendant, accompanied by someone named "Mike," went to the home of the alleged victim, Adaron Lofton, a sixty-one year old partially paralyzed man, between 1:00 a.m. and 2:00 a.m. on 1 December 1993. Defendant knew Mr. Lofton and had some discussion with him about repairing an automobile. Defendant then went to the back of the house to use the bathroom and called for Mr. Lofton to come back there. When Mr. Lofton refused defendant's request, defendant returned, grabbed Mr. Lofton and shoved him onto the couch. Each time Mr. Lofton would try to get up, defendant would push him back down on the couch. Meanwhile, "Mike" unhooked Mr. Lofton's stereo and left the house, followed by defendant.

This evidence, considered in the light most favorable to the State, is sufficient to give rise to a reasonable inference that defendant, act-

ing in concert with "Mike" and through forcible means, took Mr. Lofton's property from his presence and without his consent. *See State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981) (evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if it gives rise to a reasonable inference of defendant's guilt based on the circumstances). That Mr. Lofton testified on cross-examination he was not in fear of defendant is of no consequence; any inconsistencies and contradictions in the evidence are to be disregarded and resolved in favor of the State for purposes of a motion to dismiss. *Styles*, *supra*. Accordingly, the trial court properly submitted the charge of common law robbery to the jury.

II.

[2] Prior to his plea of guilty to the charge of being an habitual felon, defendant moved to dismiss the charge on the grounds, *inter alia*, that the charge was contained as an additional count in the same bill of indictment in which he was charged with common law robbery, and was contrary to the provisions of G.S. § 14-7.3. His motion was denied and he has assigned error. Having pleaded guilty to being an habitual felon, and not having moved in the trial court to withdraw his guilty plea, defendant is not entitled to an appeal of right from the trial court's ruling. *See* N.C. Gen. Stat. § 15A-1444(e) (1988). However, we treat the assignment of error as a petition for writ of certiorari and elect to grant review of the issue.

G.S. § 14-7.3 provides, in pertinent part:

> 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 . . . .

The statute contains "obvious internal inconsistencies." *State v. Smith*, 112 N.C. App. 512, 515, 436 S.E.2d 160, 161 (1993). In *State v. Hodge*, 112 N.C. App. 462, 436 S.E.2d 251 (1993), the defendant challenged the habitual felon indictment on the grounds that it was a separate bill of indictment from that charging him with the underlying felony. We rejected his appeal, citing *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985), and *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585

(1977), in which our Supreme Court stated that an habitual felon charge could be made by a separate bill of indictment.

> Properly construed this act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person *may* then be also indicted *in a separate bill* as being an habitual felon.

Allen, 292 N.C. at 433, 233 S.E.2d at 587 (emphasis added). In *Smith*, *supra*, defendant claimed that the indictment charging him with being an habitual felon was violative of the statute because it was not separate from the indictment charging him with the underlying felony. Our examination of the record disclosed, however, that the charges were in fact contained in separate bills of indictment, though they bore the same administrative file number, distinguished only by the use of the designations (A) and (B), and we rejected his appeal. Contrary to defendant's assertion in his brief, our decisions in *Hodge* and *Smith* were entirely consistent with each other and with the statutory construction stated in *Allen*, *supra*.

The present case, however, presents a different issue. Unlike *Hodge* and *Smith*, defendant was charged with the underlying felony, common law robbery, and with being an habitual felon, in separate counts of the same bill of indictment rather than in separate bills of indictment. Defendant argues that this procedure violates both G.S. § 14-7.3 and the rule set forth in *Allen*. We disagree.

G.S. § 14-7.3 provides that the indictment charging a defendant with habitual felon status "shall be separate from" the indictment for the principal felony. Contrary to defendant's argument, however, the statute does not require that it be contained in a separate bill of indictment. "Separate" is defined by Black's Law Dictionary, Sixth Edition (1990), as "individual; distinct; particular; disconnected," and by Webster's New Collegiate Dictionary (1977), as "set or kept apart." Thus, we interpret the statute as requiring merely that the indictment charging a defendant with habitual felon status be distinct, or set apart, from the charge of the underlying felony. The reason for such requirement is obvious, so that the underlying felony may be presented to the jury without the risk of prejudice to the defendant which would most certainly result from mention of defendant's having attained the alleged status as an habitual felon as a result of previous convictions.

Moreover, while the Supreme Court stated in *Allen, supra*, that the habitual felon charge *may* be contained in a bill of indictment separate from the bill of indictment alleging the underlying felony, the Court did not state that the two charges *must* be charged in separate bills of indictment. The Court described the proceeding contemplated by the Habitual Felon Act, G.S. § 14-7.1 *et seq.*, as requiring "the indictment or information charging the defendant to be *separated into two parts*, the first alleging the present, or substantive crime, and the second alleging defendant's recidivist status." *Allen*, 292 N.C. at 434, 233 S.E.2d at 587 (emphasis added).

In our view, then, it makes no difference whether defendant is charged with the underlying felony and with habitual felon status in separate bills of indictment, or in separate counts of the same bill of indictment. Either method accomplishes the purpose of an indictment, i.e., to notify the defendant of the charges against him so that he may prepare his defense, and to enable the court to pronounce judgment in the event he is convicted. *State v. Russell*, 282 N.C. 240, 192 S.E.2d 294 (1972). Either method also enables the trial court to proceed as prescribed by G.S. § 14-7.5, i.e., that the defendant is tried first for the principal felony without it being revealed to the jury that he is also charged with having attained habitual felon status, and, if he is convicted of the underlying principal felony, that the ancillary habitual felon charge may then proceed to trial before the same jury.

Even if we agreed with defendant that the indictment should have been dismissed because both charges were contained in a single bill of indictment, he has demonstrated no prejudice by reason thereof. The two counts of the bill of indictment were sufficient to give defendant notice of the charges against him so that he could prepare his defense, and to enable the court to pronounce judgment. *See Russell, supra.* The bill of indictment may not be read to the jury or to the prospective jurors, G.S. § 15A-1221(b), and there is no suggestion in this case that the jurors were apprised of the habitual felon charge at any time before or during defendant's trial for common law robbery. The burden is upon the defendant to show not only error, but also prejudice. *State v. McLaurin*, 33 N.C. App. 589, 235 S.E.2d 871 (1977). A bill of indictment will not be dismissed for minor defects which neither mislead the defendant nor affect the merits of the case. *Russell, supra; State v. Brady*, 237 N.C. 675, 75 S.E.2d 791 (1953).

Defendant also asks that we review the denial of his motion to dismiss the habitual felon charge on constitutional grounds. His con-

stitutional arguments have been considered and decided adversely to him by our Supreme Court in *Todd, supra; see also Smith, supra; Hodge, supra.*

Finally, defendant's arguments with respect to the failure of the habitual felon indictment to adequately allege "the name of the state or other sovereign against whom said [prior] felony offenses were committed . . ." have been considered by this Court on virtually identical facts and found to be without merit. *See Hodge, supra.* Accordingly, we hold the trial court correctly denied defendant's motion to dismiss the habitual felon charge contained in the second count of the bill of indictment in this case.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. ROBERT LEE POPE, DEFENDANT

No. COA94-968

(Filed 17 October 1995)

Searches and Seizures § 62 (NCI4th)— defendant approached by officers at airport—consensual search—no unconstitutional search and seizure

The trial court properly denied defendant's motion to suppress evidence obtained during an allegedly unconstitutional search and seizure which preceded defendant's arrest at an airport, since defendant's Fourth Amendment rights were not implicated when a detective approached him and asked to see his ticket and identification; defendant consented to accompany officers and to allow the search in the airport authority room; the entire consensual nature of the encounter between defendant and the officers was strengthened by the fact that the officers were not in uniform, did not display weapons, requested, without demand, that defendant cooperate with them, and returned defendant's ticket and identification prior to asking him to accompany them to the airport authority room; and defendant did not withdraw his consent at any time.

Am Jur 2d, Searches and Seizures §§ 83 et seq.

Appeal by defendant from judgment entered 31 May 1994 by Judge Orlando Hudson in Wake County Superior Court. Heard in the Court of Appeals 28 August 1995.

On 19 April 1994 a grand jury indicted defendant on two counts of trafficking in cocaine. On 6 May 1994 he filed a motion to suppress evidence obtained during the allegedly unconstitutional search and seizure that preceded his arrest. The trial court denied the motion. Thereafter, defendant entered into a plea arrangement, pursuant to which the trial court sentenced him to fourteen years imprisonment.

Both parties presented evidence at the suppression hearing. Wake County Sheriff's Department Detective J. Graves and State Bureau of Investigation Agent W. E. Weiss testified that they received information from a confidential source that an individual named Robert Pope was traveling from New York City to Raleigh-Durham International Airport. Pope, who had paid cash for his ticket shortly before departure, would be arriving on an American Airlines' flight with one checked bag.

The officers arrived to watch passengers deplane from Pope's scheduled flight. Detective Graves testified that as defendant deplaned, defendant made eye contact with him, immediately turned ninety degrees, and headed against the flow of traffic. As Detective Graves watched him, defendant looked over his shoulder and picked up a pay phone. Although he held the receiver, Detective Graves noticed that defendant did not move his mouth or appear to talk. Detective Graves testified that drug couriers frequently do this "because they want to see who's watching them and following them."

After all passengers had deplaned, the officers, not realizing that the man on the pay phone was Robert Pope, proceeded to the baggage claim area to locate Robert Pope's bag. Detective Graves noticed defendant exiting the airport with a carry-on bag, followed him, and identified himself. Defendant agreed to speak to Detective Graves and, upon request, produced his airline ticket and identification, at which time Detective Graves discovered he was Robert Pope. Detective Graves returned his ticket and identification and asked him to accompany him to a more private area. Defendant agreed and carried his bag to the airport authority room.

Once inside, Detective Graves explained that he and Agent Weiss were looking for hard drugs, weapons, and large amounts of money. Defendant denied having any, but produced approximately $200.00 in

cash from his pocket. When asked if they could search his bag, defendant replied, "Sure, go ahead." Inside Agent Weiss found dirty clothes, but noticed an absence of toiletries and personal items. Agent Weiss testified that couriers typically toss dirty clothes into a bag so they do not appear to be carrying an empty bag.

At Detective Grave's request, defendant consented to a pat down search and raised his arms to facilitate the search. As he conducted the pat down, Detective Graves noticed a bulge "which felt to be a plastic bag." Acting on the knowledge that cocaine is packaged in plastic bags over ninety percent of the time, Detective Graves reached in and pulled out the bag. When they discovered that the bag contained a white powdery substance, the officers arrested defendant.

Defendant testified that he was unfamiliar with the airport and did not know where to go once he deplaned. After deplaning he proceeded to the pay phone to make hotel reservations. He then left the airport to look for a taxi-cab, but realized he had exited at the wrong level to do so. As he entered the airport, Detective Graves stopped him and asked to see his ticket and identification. They were not returned. Detective Graves then asked him to accompany him to another room. With Detective Graves lightly touching him, they proceeded to the airport authority room. Agent Weiss picked up defendant's bag, squeezed it, and, once inside the room, opened it. Only then did the officers seek his consent to search the bag. Defendant replied that since Agent Weiss had already opened it he might as well go ahead. Afterwards, Detective Graves searched defendant without his consent and found the cocaine.

The trial court found that "none of the constitutional or the statutory rights of the defendant were violated in any manner during the sequence of events" and denied defendant's motion. It concluded that "once the defendant produced an airline ticket with the name Robert Pope, that in conjunction with the earlier activity . . ., reasonable suspicion existed for the officers to make a limited detainment." In addition, "[o]nce the officer recognized immediately the substance in the plastic bag as being a, or in his opinion being a plastic bag, containing the controlled substance cocaine, that probable cause existed to arrest the defendant . . . [and] make a search incident to such arrest."

Defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General William B. Crumpler, for the State.

Law Offices of George W. Hughes, by George W. Hughes and John F. Oates, Jr., for defendant appellant.

ARNOLD, Chief Judge.

Defendant contends that the trial court erred in denying his motion to suppress. He argues that the officers did not have reasonable and articulable suspicion to make the investigative stop, and that the stop implicated his fourth amendment rights. He also argues that the trial court erred in finding that he consented to the search of his person, "as a mere submission to authority does not constitute a valid consent to search."

Three levels of analysis apply to airport interdiction encounters. *State v. Allen*, 90 N.C. App. 15, 367 S.E.2d 684 (1988). They are:

> "1. Communications between police and citizens involving no coercion or detention are outside the scope of the fourth amendment;
>
> 2. Brief seizures must be supported by reasonable suspicion; and
>
> 3. Full-scale arrests must be supported by probable cause."

State v. Thomas, 81 N.C. App. 200, 205, 343 S.E.2d 588, 591, *disc. review denied*, 318 N.C. 287, 347 S.E.2d 469 (1986) (quoting *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)). Fourth amendment rights are not implicated when an individual is merely approached by law enforcement officers who request to see an airline ticket and identification. *Allen*, 90 N.C. App. 15, 367 S.E.2d 684.

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.

Florida v. Royer, 460 U.S. 491, 497, 75 L. Ed. 2d 229, 236 (1983) (citations omitted). "[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatsoever for invoking constitutional safeguards." *United States v. Mendenhall*, 446 U.S. 544, 553, 64 L. Ed. 2d 497, 509 (1980).

Under the authority cited above, defendant's fourth amendment rights were not implicated when Detective Graves approached him and asked to see his ticket and identification. Moreover, assuming, *arguendo*, that the officers lacked reasonable suspicion to detain defendant further, defendant's consent to accompany the officers and to allow the search in the airport authority room justifies the search. *See State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982) (stating that subsequent search was not tainted by an unlawful seizure where defendant consented to accompany officers to airport room); *State v. Grimmett*, 54 N.C. App. 494, 284 S.E.2d 144 (1981), *disc. review denied and appeal dismissed*, 305 N.C. 304, 290 S.E.2d 706 (1982) (concluding that officers lacked reasonable suspicion, but that search was valid based on consent).

The trial court found that the entire encounter between defendant and the officers was consensual, and that defendant did not withdraw his consent at any time. The officers' testimony fully supports this finding. *See Grimmett*, 54 N.C. App. 494, 284 S.E.2d 144. The consensual nature of the encounter is strengthened by the fact that the officers were not in uniform, did not display weapons, and requested, without demand, that defendant cooperate with them. *See Mendenhall*, 446 U.S. 544, 64 L. Ed. 2d 497. In addition, the fact that the officers returned defendant's ticket and identification prior to asking him to accompany them to the airport authority room supports the trial court's finding. *See Royer*, 460 U.S. 491, 75 L. Ed. 2d 229 (indicating that retention of ticket and identification evaporates the consensual nature of the encounter).

For these reasons, the trial court's denial of defendant's motion to suppress is

Affirmed.

Judges Johnson and Martin, Mark D., concur.

JACKIE L. BIVENS, MARY E. BIVENS AND ELLIS M. COTTLE, PLAINTIFFS/APPELLANTS v. DEBORAH LYNN COTTLE (WESTLAKE), DEFENDANT/APPELLEE

No. COA95-72

(Filed 17 October 1995)

Parent and Child § 19 (NCI4th); Divorce and Separation § 359 (NCI4th)— custody initially placed with maternal grandparents—custody changed to mother—no finding of changed circumstances—error

In an initial custody proceeding, a fit natural parent not found to have neglected the child has a right to custody superior to third persons. That rule enunciated in *Petersen v. Rogers*, 337 N.C. 397, was inapplicable in this case since the custody of the children was initially placed with the maternal grandparents in lieu of the natural mother who had been found to be a fit and proper parent, and the trial court therefore erred in awarding custody to defendant mother without conducting a hearing to determine if there were sufficient changed circumstances to merit the change in custody.

Am Jur 2d, Divorce and Separation §§ 1003 et seq.; Parent and Child §§ 23 et seq., 119.

Opening or modification of divorce decree as to custody or support of child not provided for in the decree. 71 ALR2d 1370.

Child custody provisions of divorce or separation decree as subject to modification on habeas corpus. 4 ALR3d 1277.

Judge GREENE concurring in the result.

Appeal by plaintiff from order entered 10 October 1994 by Judge Russell J. Lanier in Duplin County District Court. Heard in the Court of Appeals 1 September 1995.

Gailor & Associates, P.L.L.C., by Carole S. Gailor; Ingram & Ingram, by Carolyn B. Ingram; and Wells & Blossom, by William C. Blossom, for plaintiffs-appellants Bivens.

Shipman & Lea, by J. Albert Clyburn and James W. Lea, III for defendant/appellee.

WYNN, Judge.

Plaintiff Ellis M. Cottle and defendant Deborah Lynn Cottle (now Westlake) married in 1979 and divorced in 1990. Two children were born of the marriage, Angel Marie now 13 and Mary Beth now 11. In a custody order dated 7 April 1992, Judge Leonard W. Thaggard awarded custody to the children's maternal grandparents, Jackie and Mary Bivens, although he found as a fact that the children's natural mother Deborah Westlake was a fit and proper person to have the primary custody, care and control of the minor children.

Following our Supreme Court's holding in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), Mrs. Westlake filed a Motion in the Cause to modify the order of 7 April 1992 to have custody of the children transferred to her. She contended that *Petersen* required the trial court to award her custody without a showing of changed circumstances. She argued that since *Petersen* required a natural parent found fit and proper be awarded custody as against a third person without conducting the best interests of the child analysis, *Petersen* also required that a natural parent found fit and proper who files a motion to have custody changed should prevail without the trial court applying the changed circumstances analysis. The trial court agreed, and awarded custody to the defendant without conducting a hearing to determine if there were sufficient changed circumstances to merit the change in custody. We reverse.

The original award of custody in this case to the maternal grandparents in lieu of the natural mother who had been found to be a fit and proper parent occurred prior to our Supreme Court's decision in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). *Petersen* clarified the law of North Carolina by holding that in a custody dispute between a natural parent and a party other than a natural parent, "absent a finding that [natural] parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 403-404, 445 S.E.2d at 905. Therefore, in a custody dispute between a natural parent found to be a fit and proper parent who did not neglect the welfare of their child, and any third party excepting only the other natural parent, the natural parent must prevail in an initial determination of child custody. *See, Lambert v. Riddick*, 120 N.C. App. 480, 462 S.E.2d 835 (1995).

But the case at hand is not an initial custody proceeding and, in fact, the defendant did not appeal from nor does she challenge here the 1992 initial custody order entered by Judge Thaggard. Rather, she seeks to apply the *Petersen* standard to a modification of custody proceeding. She is mistaken.

N.C. Gen. Stat. § 50-13.7(a) sets forth the criteria necessary to modify a custody order. It states in pertinent part:

> (a) An order of a court of this state for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested . . .

N.C. Gen. Stat. § 50-13.7(a) (1987).

Thus, "once the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Dobos v. Dobos*, 111 N.C. App. 222, 226, 431 S.E.2d 861, 863 (1993) (quoting *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992)). Since, there is a statutory procedure for modifying a custody determination, a party seeking modification of a custody decree must comply with its provisions. There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified.

Finally, we specifically reject the "family unit" limitation on *Petersen* suggested by the concurring in the result opinion. In *Petersen*, the natural parents had never lived with their child in "an intact family unit." In that case, the natural mother, discontent with her relationship with her unborn child's putative father, decided to give her child up for adoption through a religious organization. That organization contacted the adoptive parents who arranged for the pregnant mother to come to North Carolina to have the child. The adoptive parents provided maintance and care for the mother until the child was born. After the birth, the mother stated that she spent "two minutes" with the child and then signed a release form and the child was given to the adoptive parents. Immediatedly thereafter, on 12 September 1988, the mother returned to Michigan and later on 27 December 1988, she filed a motion for relief from the interlocutory decree of adoption. These facts inescapably establish that there was no intact family unit under the facts of *Petersen*. Rather, *Petersen's*

directive is simple and clear: In an initial custody proceeding, a fit natural parent not found to have neglected the child, has a right to custody superior to third persons. Thus, the constitutionally based paramount right to custody of the natural parent is not dependent on the existence of a "family unit." For that reason alone, the narrow limitation suggested by the separate concurring opinion must fail.

The judgment of the trial court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Judge GREENE concurs in the result with a separate opinion.

Judge MARTIN, JOHN C. concurs.

Judge GREENE concurring in the result.

As I noted in my dissent in *Lambert v. Riddick*, 120 N.C. App. 480, 462 S.E.2d 835 (1995), I believe the holding of *Petersen v. Rogers* is more limited than that suggested by the language of the majority. Because I believe a parent not living with her child in an intact family unit is not entitled to the benefit of the *Petersen* parental preference rule and because the mother was not living with her children at the time of the modification request, I reject the argument that the trial court, in the modification hearing, was required to award the mother custody in the absence of a finding of her unfitness. In any event, without regard to the construction placed on *Petersen*, I agree that any movant (including a natural parent) in a section 50-13.7(a) child custody modification hearing is required to first show a substantial change in circumstances affecting the welfare of the child (since the prior order of custody). *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992). If this showing is made, the trial court is required to enter an order of custody that is in the best interest of the child. *Id.* In making this best interest determination, is the natural parent entitled to a custody order unless the nonmovant shows that the parent is unfit? Under my construction of *Petersen* the answer would be no because she was not living with the child in an intact family and therefore would be entitled nothing more than a best interest inquiry. Under the majority's construction of *Petersen* the answer is less clear and indeed the majority does not reach that issue.

RICHARD THOMPSON, LARRY COOPER, CORA HILL, HENRY BYRD, CLARA MATTHEWS AND LOUETTA B. FORD, PLAINTIFFS v. TOWN OF WARSAW, DEFENDANT, EDWARD WILKINS, INTERVENOR DEFENDANT

No. COA94-1166

(Filed 17 October 1995)

1. Zoning § 119 (NCI4th)— zoning ordinance amended—challenge to amendment barred by nine-month statute of limitations

Plaintiffs' action challenging defendant's amendment to its zoning ordinance is barred by the statute of limitations where N.C.G.S. § 1-54.1 established a nine-month statute of limitations for any challenge to the validity of an amendment to a zoning ordinance which is adopted under N.C.G.S. Chapter 160A or other applicable law; even where an amendment is adopted inconsistent with the notice requirements of Chapter 160A, an action which attacks the validity of the amendment commenced more than nine months from the adoption of the amendment is barred; and in this case the amendment was made on 8 August 1988, while plaintiffs did not file their claim until 4 May 1993, almost five years after the amendment.

Am Jur 2d, Zoning and Planning §§ 1046-1062.

Construction and application of statute or ordinance requiring notice as prerequisite to granting variance or exception to zoning requirement. 38 ALR3d 167.

Zoning: construction and effect of statute requiring that zoning application be treated as approved if not acted on within specified period of time. 66 ALR4th 1012.

2. Appeal and Error § 538 (NCI4th)— transcript request not timely—costs assessed against attorney

The cost of this appeal will be assessed against appellants' attorney personally where no timely written request was made for production of the transcript. N.C. R. App. P. 7 and 35(a).

Am Jur 2d, Appellate Review §§ 909-935.

Judge WYNN concurring in part, dissenting in part.

Appeal by plaintiffs from order entered 1 July 1994 in Duplin County Superior Court by Judge Craig Ellis. Heard in the Court of Appeals 22 August 1995.

S. Reginald Kenan for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by Tyrus V. Dahl, Jr. and Ursula M. Henninger, for defendant-appellee Town of Warsaw.

GREENE, Judge.

Richard Thompson, Larry Cooper, Cora Hill, Henry Byrd, Clara Matthews and Louetta B. Ford (plaintiffs) appeal from an order of the trial court granting the motion of the Town of Warsaw (defendant) for judgment on the pleadings, pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure.

On 8 August 1988, Edward Wilkins (Wilkins) received permission from the town board members of the Town of Warsaw to construct an industrial garage and maintenance building in a residential neighborhood. Although the Town's ordinance states that only the Board of Adjustments shall issue variances from local zoning, the town board used the term "variance" when granting Wilkins permission to construct his garage. There was no public notice prior or subsequent to the 8 August meeting. Some years later, though the exact date is not clear from the record, Wilkins began constructing his garage and maintenance building, at which point plaintiffs discovered that the variance had been granted.

On 4 May 1993, plaintiffs sued defendant, requesting that the court enjoin the operation of the amendment and thus the garage, alleging that "the town board's actions rezoned [Wilkins'] property under the guise of a 'variance' " and that the 8 August 1988 action by the board "amended the original ordinance." In its answer, defendant pled, as an affirmative defense, that plaintiffs' action was barred by the statute of limitations. At some point after plaintiffs' complaint, though it is not clear exactly when from the record, Wilkins was allowed to intervene in this matter.

On 7 July 1994, the trial court granted defendant's motion for judgment on the pleadings, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c). Plaintiffs filed their notice of appeal on 13 July 1994 and received an extension of time within which to serve their record on appeal. On 5 January 1995, defendant filed a motion to dismiss plaintiffs' appeal on the grounds that plaintiffs did not enter into a written contract with the court reporter for a copy of the transcript until 6 September 1994, in violation of N.C. R. App. P. 7(a)(1), that plaintiffs failed to serve defendant with a copy of the record on appeal, in vio-

lation of N.C. R. App. P. 26(b) and that plaintiffs failed to include a statement of questions for review in their brief as required by N.C. R. App. P. 28(b)(2). The record reveals that plaintiffs orally requested a copy of the transcript from the court reporter on 17 August 1994 and that a written contract for the transcript was entered and signed on 6 September 1994.

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[1] The dispositive issue is whether plaintiffs' action challenging the defendant's amendment to their zoning ordinance is barred by the statute of limitations.

For purposes of defendant's motion for judgment on the pleadings, we must accept the allegations in plaintiffs' complaint as true. *Gammon v. Clark*, 25 N.C. App. 670, 671, 214 S.E.2d 250, 251 (1975) (movant admits truth of facts in nonmovant's pleadings for purposes of motion for judgment on pleadings). If the pleadings present any issues of fact, then judgment on the pleadings is not appropriate. *Id.*

North Carolina General Statute § 1-54.1 establishes a nine-month statute of limitations for any challenge to the validity of an amendment to a zoning ordinance which is adopted "by a city under Chapter 160A of the General Statutes or other applicable law." N.C.G.S. § 1-54.1 (Supp. 1994). Plaintiffs argue that the nine-month statute does not apply in this case because the defendant adopted the amendment without complying with any of the notice provisions required "under Chapter 160A." Although it does appear that Section 1-54.1 applies only in those situations where an amendment is adopted pursuant to Chapter 160A (which contains notice requirements), this Court has previously held that even where an amendment is adopted inconsistent with the notice requirements of Chapter 160A, an action which attacks the validity of the amendment commenced more than nine months from the adoption of the amendment is barred. *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 100 N.C. App. 77, 80, 394 S.E.2d 251, 253 (1990), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 417, *cert. denied*, 501 U.S. 1251, 115 L. Ed. 2d 1055 (1991). We are bound by this Court's holding in *Pinehurst. In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (subsequent panel bound by previous panel's decision on the same issue).

In this case, the pleadings establish that the amendment was made on 8 August 1988 and plaintiffs did not file their claim until 4 May 1993, almost five years after the amendment. These pleadings

present no issue of fact that plaintiffs' action, which was commenced more than nine months after defendant's amendment, is barred by the statute of limitations. Because we are bound by this Court's precedent, the trial court correctly entered judgment on the pleadings, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), for defendant.

[2] Because Rule 7 of the Rules of Appellate Procedure has been violated, in that a timely written request for the transcript was not made, *Anuforo v. Dennie*, 119 N.C. App. 359, 362-63, 458 S.E.2d 523, 526 (1995) (written request for transcript must be made within 10 days after giving notice of appeal), we assess the cost of this appeal upon plaintiffs' attorney, S. Reginald Kenan, personally, pursuant to Rule 35. N.C. R. App. P. 35(a); *Huberth v. Holly*, 120 N.C. App. 348, 356, 462 S.E.2d 239, 244 (1995).

Affirmed.

Judge MARTIN, John C., concurs.

Judge WYNN concurs in part and dissents in part.

Judge WYNNE concurring in part, dissenting in part.

Because a transcript is not needed to review the subject appeal, I concur with the majority opinion except that part which assesses costs against appellant's attorney for violating Rule 7.

Rule 7(a)(1) of the Rules of Appellate Procedure provides in pertinent part:

> 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. *If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall file with the record a transcript of all evidence relevant to such finding or conclusion.* Unless the entire transcript is to be filed, an appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to file with the record and a statement of the issues he intends to present on the appeal. (emphasis added).

Thus, except where the appellant intends to challenge the evidentiary basis for a finding or conclusion, there is no requirement in the Rules of Appellate Procedure that a transcript be a part of a Record on Appeal. The appellant's appeal is from a dismissal based on a Rule 12(c) motion on the pleadings. In short, there is no evidence from the trial below to be review by this court. It follows that the mere failure to contract for a transcript is of no consequence in the outcome of this appeal.[1]

KIM WATKINS, PLAINTIFF-APPELLANT v. DAVID WATKINS, DEFENDANT-APPELLEE

No. COA94-1220

(Filed 17 October 1995)

1. Divorce and Separation § 340 (NCI4th)— child custody— parties ordered to refrain from making negative comments—no error

Where there were allegations as to what their child was being told by the parties regarding his mother and step-mother, the trial court properly included reciprocal provisions ordering both parties to refrain from making any degrading or negative comments about the other or interfering with the other party's relationship with the child.

Am Jur 2d, Divorce and Separation §§ 963 et seq.

2. Divorce and Separation § 499 (NCI4th)— child custody— jurisdiction relinquished upon insufficient evidence

Where there is evidence that the parties in a child custody proceeding are uncooperative, as in this case, courts, in determining whether to relinquish jurisdiction to the courts of another state pursuant to the Uniform Child Custody Jurisdiction Act, should look beyond such factors as the child's "home state," particularly in cases with joint custody arrangements such as this; rather, the court should consider the noncustodial parent's ability to take full advantage of custody and visitation privileges, residence of the child's extended family, availability of information with regard to the child in the foreign jurisdiction and in this

1. At most, failing to comply with Rule 7 should result in excluding the transcript from the record. The effect of this exclusion may in many cases have the outcome of a dismissal in that the transcript may be needed to supply the necessary evidentiary support for the appeal.

state, and any other circumstances bearing on the child's best interest. The trial court in this case erred in relinquishing to Texas courts jurisdiction over child custody and visitation issues without first determining, upon sufficient evidence, that it was in the child's best interest to have another state assume jurisdiction. N.C.G.S. § 50A-7.

Am Jur 2d, Divorce and Separation §§ 963-965, 988, 989, 1004 et seq.

Jurisdiction to award custody of child having legal domicil in another state. 4 ALR2d 7.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances. 35 ALR3d 520.

What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA). 78 ALR4th 1028.

Appeal by plaintiff from order entered 28 April 1994 by Judge Andrew R. Dempster in Cumberland County District Court. Heard in the Court of Appeals 29 August 1995.

Kim U. Kim, plaintiff-appellant, pro se.

Hedahl & Radtke, by Joan E. Hedahl, for defendant-appellee.

WALKER, Judge.

Two issues were presented on appeal to this Court: (1) Did the trial court err by addressing issues concerning the conduct of the parties in the 28 April 1994 Order and (2) Did the trial court properly relinquish jurisdiction over child custody and visitation issues according to the Uniform Child Custody Jurisdiction Act? We affirm the trial court's order concerning the conduct of the parties. However, we reverse and remand this case for further proceedings on the issue of whether jurisdiction should be relinquished.

The parties were awarded joint custody of their minor son, David Young Watkins, born 29 December 1985, in an order entered 1 June 1991 by the Cumberland County District Court. At the time of the original order, both parties resided in North Carolina. In the summer of 1991, the defendant moved to Texas with the child. Due to the

change of defendant's residence, the parties agreed to modify the original custody order. These modifications were incorporated in an order which provided that the plaintiff be awarded primary physical custody during two summer months with additional provisions allowing visitation and telephone contact. The defendant was awarded primary physical custody during the balance of the year.

On 30 November 1993, defendant made a motion for child support which the court reserved for later hearing. On 1 March 1994, defendant then moved the court to transfer jurisdiction to Texas, which motion was granted on 28 April 1994. From this order, plaintiff appeals.

[1] Plaintiff argues that the court erred by including provisions in the order which address the conduct of the parties. Specifically, plaintiff objects to the portion of the Order that enjoins plaintiff from "attempting to come between" her son and his "step-mother." Plaintiff argues that no request was made for this relief and that the order constitutes a prior restraint of speech. We reject both arguments.

It is well established that the trial court has broad discretion in matters of child custody and visitation. *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551, *cert. denied*, 304 N.C. 390, 285 S.E.2d 831 (1981). By statute the court may include provisions beyond mere custody determinations which serve the best interest of the child. N.C. Gen. Stat. 50-13.2(b) (1987) provides "[a]ny order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child." Provisions directing the parties to cooperate with one another and to refrain from conduct that will be detrimental to the child are commonly included in custody orders.

Here, there were allegations as to what the child was being told by the parties, regarding his "mother" and "step-mother." Therefore, the trial court properly included reciprocal provisions ordering both parties to refrain from making any degrading or negative comments about the other or interfering with the other party's relationship with the child.

[2] The second issue on appeal is whether the trial court properly relinquished jurisdiction over child custody and visitation issues pursuant to the Uniform Child Custody Jurisdiction Act [hereinafter UCCJA]. North Carolina General Statute 50A-7 provides in part:

> (a) A court which has jurisdiction under this Chapter to make an initial or modification decree may decline to exercise its jurisdic-

tion any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(c) In determining if it is an inconvenient forum, **the court shall consider if it is in the interest of the child that another state assume jurisdiction**. For this purpose it may take into account the following factors, among others:

(1) if another state is or recently was the child's home state;

(2) If another state has a closer connection with the child and the child's family or with the child and one or more of the contestants;

(3) If substantial evidence relevant to the child's present or future care, protection, training, and personal relationships is more readily available in another state. . . .

N.C. Gen. Stat. 50A-7 (1984) (emphasis added).

In custody matters the best interest of the child is the polar star by which the court must be guided. *In re DiMatteo*, 62 N.C. App. 571, 572, 303 S.E.2d 84, 85 (1983). In exercising jurisdiction over child custody matters, the trial court is required to make specific findings of fact to support its actions. *Brewington v. Serrato*, 77 N.C. App. 726, 729, 336 S.E.2d 444, 447 (1985). In this case, the evidence was insufficient to determine that it was in the child's best interest to have another state assume jurisdiction.

The trial court made the following finding:

(2) The Defendant is a resident of the State of Texas. Defendant has resided continuously in the state of Texas since approximately June of 1991. The minor child has also resided continuously in the State of Texas since the summer of 1991, with the exception of short periods of time spent with the Plaintiff.

Admittedly, this evidence is relevant in determining the child's home state and whether the child has a closer connection with that state. However, this finding ignores the evidence in the record that plaintiff was unable to take full advantage of her custody and visita-

tion privileges allowed under the Order because of her financial limitations and differences with the defendant over matters involving the child. Further, there is no evidence regarding the residence of the child's "family." The residence of grandparents and other relatives of the child is an important factor under the statute when determining jurisdiction. Such information should have been considered in determining whether it was in the child's best interest to have another state assume jurisdiction.

The court made further findings as to allegations by the plaintiff that defendant has inappropriately disciplined the child, that defendant has a drinking problem, and that the child has seen a counselor in Texas for a stress-related disorder. Defendant alleged that plaintiff was pressuring the child to say he wanted to live with the plaintiff.

Again, although these "findings" may be relevant in determining that some evidence is available in Texas, they are not sufficient to determine that it is in the child's best interest to have another state assume jurisdiction. The court should also consider whether any evidence regarding these allegations would be available in North Carolina and the county where plaintiff resides.

Findings 10 and 11 deal most directly with the issue of jurisdiction. Here the court found:

> (9) The Plaintiff has not exercised her time with the minor child in Cumberland County, North Carolina, and no pertinent information concerning the minor child exists in this county.
>
> (10) All relevant information and witnesses pertinent to the minor child, including his school, friends, environment, medical and counseling information, as well as whether or not Defendant has a drinking problem or uses excessive discipline exists in the State of Texas.

At the time of the hearing plaintiff no longer resided in Cumberland County. This explains the absence of information about the child in that county. However, it does not follow that no evidence concerning the child existed in North Carolina or in the county where plaintiff resides. On remand, the court should inquire about any relevant information or witnesses pertinent to the child's present or future care, protection, training, and personal relationships available in this State and the county where plaintiff resides.

The paramount purpose of the UCCJA is to prevent "forum shopping for the convenience of competing parents to the detriment of the real interest of the child." *Holland v. Holland*, 56 N.C. App. 96, 100, 286 S.E.2d 895, 898 (1982). In determining if it is in the child's best interest to relinquish jurisdiction, the UCCJA provides that courts "may take into account the following [enumerated] factors, among others." The plain language of this statute illustrates that the factors enumerated in the UCCJA were intended to provide guidance and were not intended to be exhaustive. Where there is evidence that the parties are uncooperative, as shown by the conduct of the parties in this case, courts should look beyond such factors as the child's "home state," particularly in cases with joint custody arrangements such as this. Therefore, while the UCCJA grants the trial court discretion in relinquishing jurisdiction, such decisions must rest upon careful and deliberate inquiry regarding the totality of the circumstances in each case.

Accordingly, we reverse and remand the case to the Cumberland County District Court with instructions that the case be transferred to the district court in the county where plaintiff resides.Upon remand, the trial court should receive such evidence from the parties so as to enable the court to determine whether it is in the child's best interest to relinquish jurisdiction pursuant to the provisions of the UCCJA.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Judges COZORT and McGEE concur.

EDGAR LEE LAMBERT, JR., PLAINTIFF v. LORI NATASHA RIDDICK AND ANNETTE UTLEY, DEFENDANTS

No. COA94-1285

(Filed 17 October 1995)

Parent and Child § 25 (NCI4th)— initial custody determination between third person and natural parent—findings required

In an initial custody dispute between a third person and the natural parent, the trial court erred in awarding custody to the third person based solely on a "best interest and welfare" analysis without making findings, as required by *Petersen v. Rogers*,

337 N.C. 397, with respect to plaintiff father's fitness to have custody of his minor child or as to whether he had neglected her welfare.

Am Jur 2d, Parent and Child §§ 23-31.

Award of custody of child where contest is between child's father and grandparent. 25 ALR3d 7.

Award of custody of child where contest is between natural parent and stepparent. 10 ALR4th 767.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 23 June 1994 by Judge Jerry Leonard in Wake County District Court. Heard in the Court of Appeals 24 August 1995.

James F. Lovett, Jr., and John B. Gupton for plaintiff-appellant.

Byrd & Meares, by Kevin Leon Byrd, for defendant-appellees.

MARTIN, John C., Judge.

Plaintiff and defendant Lori Riddick are the biological parents of Bianca Chantise Lambert. The child was born out of wedlock on 29 August 1991, when defendant Riddick was a student at St. Augustine's College and plaintiff was a student at North Carolina State University. Although there has never been, prior to this proceeding, an action to determine custody of the child, she has lived primarily with defendant Annette Utley, a friend of defendant Riddick's, since shortly after her birth because Riddick was not in a position to care for her. Defendant Utley, who has two grown children and now lives in Michigan, has provided the daily care and nurture for the child and the child has apparently thrived.

Plaintiff brought this action on 17 May 1993 alleging that he had been denied reasonable visitation with his daughter. Defendants filed a joint answer in which they asserted that plaintiff had been permitted visitation with the child and, by counterclaim, requested that custody of the child be awarded to defendant Utley. Plaintiff filed a reply in which he sought custody.

After hearing evidence, the trial court found that defendant Utley was a fit and proper person to have custody of the minor child and that it was in the child's best interest for her primary custody to be

placed with defendant Utley. Plaintiff and defendant Riddick were each found to be fit and proper to have visitation with the child, and a visitation schedule was prescribed. Plaintiff appeals. We reverse and remand to the trial court for further proceedings.

This case involves the tension between a biological parent's right to custody of his or her child and the rights of the child to be placed in the custody of the person or entity which will meet the child's best interests. G.S. § 50-13.2(a) provides, in pertinent part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.

Relying on the often cited principle that the welfare of the child is the "polar star" by which courts are to be guided in custody disputes, *see Wilson v. Wilson*, 269 N.C. 676, 153 S.E.2d 349 (1967) (best interest of child is paramount consideration, to which even parental love must yield), *Griffith v. Griffith*, 240 N.C. 271, 81 S.E.2d 918 (1954), this Court has previously interpreted the statute as requiring the trial court to conduct a "best interest and welfare" analysis, even in custody disputes between a natural parent and a third party. *Black v. Glawson*, 114 N.C. App. 442, 442 S.E.2d 79 (1994); *Best v. Best*, 81 N.C. App. 337, 344 S.E.2d 363 (1986). These cases recognized a rebuttable presumption in favor of awarding custody to the natural parent, but held it unnecessary to prove the natural parent unfit in order to rebut the presumption and find that the best interest of the child would be served by awarding custody to the third party. *Id.*

In *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), however, our Supreme Court expressly disavowed this "best interest and welfare" analysis in custody disputes between natural parents and third parties. The Court squarely held "that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 403-04, 445 S.E.2d at 905. Contrary to the position taken in the dissent, *Petersen* did not limit its holding to custody determinations where the child had previously been in an "intact family unit." See *Bivins v. Cottle*, 120 N.C. App. 467, 462 S.E.2d 829 (1995). In *Bivins*, however, we have interpreted *Petersen* as applying only to an initial custody determina-

tion, and not to motions for change of custody based on changed circumstances.

In the present case, an initial custody determination, the trial court conducted the "best interest and welfare" analysis, and based solely on that analysis, awarded custody of the minor child to defendant Utley rather than plaintiff, the child's natural parent. Under *Petersen*, the award of custody on this basis was error and must be reversed. However, the trial court made no findings with respect to the plaintiff father's fitness to have custody of his minor child or as to whether he had neglected her welfare, findings which *Petersen* instructs are necessary to an initial adjudication of custody in a dispute between a biological parent and a third party. Therefore, we must remand this case for such findings and a proper determination of custody in light thereof.

Reversed and remanded.

Judge GREENE dissents.

Judge WYNN concurs.

Judge GREENE dissenting.

I disagree with the majority that *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), must be read as holding that whenever there is a child custody dispute between a natural parent and some third party, custody must be placed with the parent unless there is a showing that the parent is unfit or has neglected the welfare of the child. I do not believe the holding of *Petersen* is this broad.

There is no question that *Petersen* uses broad language in relating the "constitutionally-protected paramount right of parents to custody, care, and control of their children." *Petersen* at 403-04, 445 S.E.2d at 905. The Court, however, is specific in noting that it is "the family unit" that finds protection in the constitution. *Petersen* at 400, 445 S.E.2d at 903. In other words, the forced "breakup of a natural family" can constitutionally occur only upon a showing of parental unfitness. *Quilloin v. Walcott*, 434 U.S. 246, 254, 54 L. Ed. 2d 511, 520, *reh'g denied*, 435 U.S. 246, 54 L. Ed. 2d 511 (1978); *Reno v. Flores*, 507 U.S. 292, 304, 123 L. Ed. 2d 1, 18 (1993) (a child should "*not be removed from the custody of its parents*" absent a finding of parental unfitness). As most recently reiterated by our Supreme Court, it is parents

living as an intact family with their children who are to be given additional protection from custody and visitation claims by third parties. *McIntyre v. McIntyre*, 341 N.C. 629, 461, S.E.2d 745 (1995) (unfitness of parents must be shown by grandparents who seek visitation of children living as intact family with parents); *see Petersen* at 405-06, 445 S.E.2d at 905 (parents *who have lawful custody* of their children are to be protected from custody and visitation claims from strangers).

Thus when the parents have custody[1] of their children and are living with them as an intact family[2] or have lost custody as a result of some unlawful action by a third party (as was the situation in *Petersen*), a third party is not entitled to a custody decree without first showing that the parents are unfit or have neglected the children *and* that it would be in the best interest of the children to be with the third party. *See Brake v. Mills*, 270 N.C. 441, 443, 154 S.E.2d 526, 528 (1967) ("taking children from a parent's custody" cannot be based on best interest). In those situations, however, where the parents do not have custody of the children and are seeking custody from a third party who has lawful custody (but no custody decree) of the children, an order must be entered awarding custody to such persons "as will best promote the interest and welfare of the child." N.C.G.S. § 50-13.2(a) (1987).

In this case it is not disputed that the child was born out of wedlock on 29 August 1991; the child has resided with Annette Utley (Utley) since birth; Edgar Lee Lambert, Jr. (father) had very minimal contact with the minor child during the first eight months of the child's life and has since visited some with the child; the father and Lori Natasha Riddick (mother) agreed at the birth of the child that Utley would become the guardian of the child; Utley is a fit and proper person to be awarded custody of the child; and the father is a fit and proper person to have visitation with the child.

There is no evidence that the father was living together with the child in an intact family unit at the time of this custody trial or that the child had been removed from him unlawfully. Indeed the father had consented to the placement of the child with Utley and the child had lived in that home for approximately two years at the time the

1. Custody in this context has reference to actual possession of the children. It does not have reference to a custody decree from a court.

2. It would appear that an intact family should include a single parent living with his or her child.

complaint for custody was filed. Thus the custody dispute between the father and Utley was properly resolved by the trial court using the best interest test of section 50-13.2(a). I would affirm the order of the trial court.

DOVIE BASS, LOVIE TRICE, AND JANE NICHOLS, PLAINTIFFS v. R. MARIE SIDES, DEFENDANT

No. COA94-808

(Filed 17 October 1995)

Pleadings § 63 (NCI4th)— removal of sealed records from clerk's office—imposition of sanctions against attorneys proper

The trial court did not err in imposing sanctions on plaintiffs' attorneys because they violated the "improper purpose" prong of Rule 11(a) by signing a subpoena to a hospital to obtain confidential medical records of a nonparty and by signing a receipt to remove the sealed medical records from the clerk of court's office without the court's permission. N.C.G.S. § 1A-1, Rule 11(a).

Am Jur 2d, Pleading § 339.

Comment Note—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed. 107.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed. 556.

Appeal by plaintiffs' attorneys from order entered 21 March 1994 by Judge Anthony M. Brannon in Durham County Superior Court. Heard in the Court of Appeals 19 April 1995.

Constantinou Law Group, P.A., by John M. Constantinou and Fred Moutos, for plaintiff appellants.

Martin & Martin, P.A., by J. Matthew Martin, for defendant appellee.

COZORT, Judge.

This case originated from defendant's contract with plaintiffs to provide nursing services for defendant's brother. Plaintiffs contend that defendant breached the contract and that she demanded services beyond normal nursing duties. In connection with this action, counsel for plaintiffs, John M. Constantinou, signed and issued subpoenas to North Carolina Memorial Hospital and Duke University Medical Center to obtain medical records of defendant's brother who was deceased.

Both hospitals delivered copies of defendant's brother's medical records to the Clerk of Superior Court in Durham County. These records were delivered under seal and marked to be opened by the presiding judge. Two employees of the Constantinou Law Group, attorney Fred Moutos and Catherine Constantinou, removed the records from the clerk's office and delivered them to the offices of the Constantinou Law Group. Mr. Moutos signed a receipt for the records. An employee of the Clerk of Court's office stated in an affidavit that she released the records to Mr. Moutos on the assumption that a judge had granted permission for their transfer. The record reflects that no judge ever granted permission for the records to be removed from the clerk's office. The plaintiffs viewed the records and employees of the firm made copies of selected portions. Because the records were not kept under seal, anyone having access to Mr. Constantinou's office could view the records.

John Stevenson, a reporter for the *Durham Herald Sun*, visited the offices of the Constantinou Law Group on more than one occasion and discussed the plaintiffs' lawsuit with Mr. Constantinou. An unidentified person gave Mr. Stevenson confidential portions of the medical records which Stevenson used in a *Durham Herald Sun* article published on 12 April 1993. Following a conversation with the Clerk of Court, Judge J. Milton Read, Jr., ordered plaintiffs' counsel to return the records to the court. Mr. Constantinou and Mr. Moutos returned the original records; however, they kept copies of selected portions in their office.

On 20 October 1993, defendant made a motion for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. Mr. Stevenson received a subpoena to testify at this proceeding. Judge Brannon conducted a hearing on Mr. Stevenson's motion to quash his subpoena and defendant's motion for Rule 11 sanctions against plaintiffs' attorneys on 22-23 November 1993. The trial court did not

require Mr. Stevenson to divulge the source of the records, and every witness who testified at the hearing denied having provided the records to Mr. Stevenson. Mr. Stevenson's motion to quash is not a part of this appeal.

In regard to the Rule 11 motion, the trial court made the following conclusions of law:

1. The signing and issuance of the Subpoena *Duces Tecum* to University of North Carolina Memorial Hospital by John Constantinou to obtain confidential, privileged personal hospital records of a non-party was improper, was done for an improper purpose and constitutes a violation of Rule 11 and Rule 45 of the North Carolina Rules of Civil Procedure.
2. Fred Moutos violated Rule 11 and Rule 45 of the North Carolina Rules of Civil Procedure by signing a receipt to remove the medical records from the Clerk of Court's Office, by removing the records without the Court's permission and by opening the sealed packages containing the records.
3. The disclosure, copying and failure to return the copies of the medical records was improper.
4. The imposition of sanctions is appropriate.

On 21 March 1994, the trial court ordered attorneys Constantinou and Moutos to pay defendant's attorney fees in the amount of $6,821.59. The order also prohibited the use of the records in the civil action. Plaintiffs' attorneys appeal from the order imposing sanctions.

Whether a paper was filed for an improper purpose must be reviewed under an objective standard. *Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992). The standard of review for the imposition of Rule 11 sanctions is *de novo*. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), *disc. review denied*, 329 N.C. 505, 407 S.E.2d 552 (1991). The appellate court must make the following determinations on review: (1) whether the trial court's conclusions of law support its judgment or determination; (2) whether the trial court's conclusions of law are supported by its findings of fact; and (3) whether the findings of fact are supported by a sufficiency of the evidence. *Id.*

The trial court imposed sanctions on attorneys Constantinou and Moutos because it found that they violated the "improper purpose" prong of Rule 11. Rule 11(a) provides that an attorney's signature on

a paper signifies that the paper "is not interposed for any improper purpose." N.C. Gen. Stat. § 1A-1, Rule 11(a) (1990). The relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992). There must be a strong inference of improper purpose to support imposition of sanctions. *Id.* at 93-94, 418 S.E.2d at 689.

Attorneys Constantinou and Moutos have argued five assignments of error, all alleging the trial court abused its discretion by imposing sanctions. The first three assignments of error relate to the trial court's findings of fact. The attorneys contend the trial court erred by considering evidence not formally presented at the sanctions hearing. We have conducted a *de novo* review of this hearing, as prescribed by *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706, and we find no reversible error. Any extraneous evidence referred to by the trial court was, at most, *de minimus*. The evidence from the hearing is overwhelmingly in support of sanctions.

In their fourth assignment of error, attorneys Moutos and Constantinou contend the trial court erred by failing to find the attorneys' actions were in good faith. Our *de novo* review of the record leads us to a contrary conclusion: the evidence overwhelmingly supports the trial court's finding that the attorneys' actions were improper and the trial court's conclusion of law that the imposition of sanctions was appropriate.

In their fifth assignment of error, attorneys Constantinou and Moutos contend the trial court made personal comments during the hearing and that the comments were such as to deprive them of a fair and impartial hearing. We disagree. Our review of the record shows that the trial court did make some comments on some of the testimony at the hearing. Reviewing these comments in light of the entire hearing and record leads us to the conclusion that the trial court was likely motivated by two sentiments: (1) an attempt at humor in a very difficult situation, and (2) frustration at what appear to be less than forthcoming answers, especially from attorneys Moutos and Constantinou, in the course of the hearing. Reviewing the entire record *de novo*, we are unpersuaded that the court's comments had any effect on the fairness of the hearing. We also note that attorneys Constantinou and Moutos were offered an opportunity to present evidence at the sanctions hearing and declined to do so.

The sanctions imposed by the trial court are affirmed, and a copy of the complete record in this case shall be forwarded to the North Carolina State Bar for further proceedings, under Article IX of the Rules of the State Bar, as deemed appropriate by that body.

Affirmed.

Judges JOHNSON and McGEE concur.

CASWELL COUNTY, PLAINTIFF-APPELLEE v. JAMES AND RAMONA HANKS, DEFENDANT-APPELLANTS

No. COA94-802

(Filed 17 October 1995)

1. Animals, Livestock, or Poultry § 9 (NCI4th)— potentially dangerous dog—de novo hearing required in superior court

In an action to declare a dog as potentially dangerous pursuant to N.C.G.S. § 67-4.1, the trial court erred by conducting only a *de novo* review of the existing record rather than a *de novo* hearing.

Am Jur 2d, Animals §§ 96-99, 107-112.

2. Animals, Livestock, or Poultry § 9 (NCI4th)— potentially dangerous dog—statute not unconstitutionally vague and overbroad

The definition of "potentially dangerous dog" in N.C.G.S. § 67-4.1(a)(2)c as a dog which has "approached a person when not on the owner's property in a vicious or terrorizing manner in an apparent attitude of attack" is not unconstitutionally vague and overbroad, since the statute does not attempt to regulate activity that the State is constitutionally forbidden to regulate, and the statute provides sufficient notice for defendants and others to determine what conduct is proscribed.

Am Jur 2d, Animals §§ 96-99, 107-112.

Appeal by defendants from order entered 25 February 1994 by Judge Anthony M. Brannon in Caswell County Superior Court. Heard in the Court of Appeals 28 August 1995.

On 24 November 1992, the health director of the Caswell County Health Department sent a notice to defendants that their dog, Ginger, a boxer, had been defined as "vicious" under Public Health Law Section 130A-200. The notice was based on three animal bite reports filed on behalf of three neighborhood children whom had either been scratched or pinched by Ginger on 15 July 1992, 16 July 1992, and 20 July 1992.

Defendants appealed the health director's determination to the Caswell County Animal Control Appellate Board (hereinafter "the Board"), which heard the appeal on 18 May 1993. The Board, consisting of the chairperson for the Caswell County Public Health Department and two members of the Board of Health, declared Ginger a "potentially dangerous dog" as defined in Chapter 67, Article 1A of the North Carolina General Statutes.

Pursuant to N.C. Gen. Stat. § 67-4.1(c), defendants appealed the Board's ruling to the Superior Court of Caswell County, stating as grounds for review the constitutionality of the statutes' definition of "potentially dangerous dog" and the denial of an opportunity to present certain evidence. Based on "an appeal *de novo* as provided in Chapter 67, Article 1A," the trial court made findings of fact and concluded that the statutory definition was constitutional and that the actions of defendants' dog arose to the level of a "legally apparent attitude of attack" under N.C. Gen. Stat. § 67-4.1(a)(2)c. Defendants appeal.

No brief for plaintiff appellee.

Marianna R. Burt and Aida Fayar Doss for defendant appellants.

ARNOLD, Chief Judge.

[1] Defendants contend that the trial court erred by conducting only a *de novo* review of the existing record rather than a *de novo* hearing. We agree.

N.C. Gen. Stat. § 67-4.1 provides the following procedures for determining whether a dog is potentially dangerous:

> The county or municipal authority responsible for animal control shall designate a person or a Board to be responsible for determining when a dog is a "potentially dangerous dog" and shall designate a separate Board to hear any appeal. The person or

> Board making the determination that a dog is a "potentially dangerous dog" must notify the owner in writing, giving the reasons for the determination, before the dog may be considered potentially dangerous under this Article. The owner may appeal the determination by filing written objections with the appellate Board within three days. The appellate Board shall schedule a hearing within 10 days of the filing of the objections. Any appeal from the final decision of such appellate Board shall be taken to the superior court by filing notice of appeal and a petition for review within 10 days of the final decision of the appellate Board. Appeals from rulings of the appellate Board shall be heard in the superior court division. *The appeal shall be heard de novo before a superior court judge sitting in the county in which the appellate Board whose ruling is being appealed is located.*

N.C. Gen. Stat. § 67-4.1(c) (1994) (emphasis added). In inquiring as to how to handle this *de novo* appeal, the trial judge indicated that "it look[ed] to [him] to be analogous to a *de novo* appeal from the District Court to the Superior Court in a criminal case," i.e., a completely new hearing on the matter. The judge, however, treated the appeal as one for *de novo* review of the existing record only, stating that the statute "[d]oes not say that the case has to be heard *de novo* before a Superior Court Judge."

The language of the statute in this case is mandatory, providing that the appeal to superior court "shall be heard de novo[.]" N.C. Gen. Stat. § 67-4.1(c). " 'The word "*de novo*" means fresh or anew; for a second time; and a *de novo* trial in appellate court is a trial had as if no action whatever had been instituted in the court below.' " *In Re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964) (quoting *In Re Farlin*, 112 N.E.2d 736 (Ill. App. 1953)). A court empowered to hear a case *de novo* is vested with " 'full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.' " *Id.* (quoting *Lone Star Gas Co. v. State*, 153 S.W.2d 681, 692 (Tex. 1941)). The plain language of N.C. Gen. Stat. § 67-4.1(c) therefore requires that the superior court must hear the case on its merits from beginning to end as if no hearing had been held by the Board and without any presumption in favor of the Board's decision. *See id.*

Rather than hearing the matter *de novo*, as prescribed in the statute, the trial court instead relied upon the evidence in the record compiled from the hearing before the Board without making inde-

pendent findings of fact. This evidence included a partially inaudible audio taped recording of the Board hearing, affidavits, and a videotape that was not given to the Board at the original hearing, but was apparently reviewed by the Board upon defendants' request for reconsideration. We hold that the court erred by failing to hear the matter pursuant to the statute and the principles set forth in this opinion.

[2] Defendants' second assignment of error is that the definition of "potentially dangerous dog" as set forth in N.C. Gen. Stat. § 67-4.1(a)(2)c. is unconstitutionally vague and overbroad. We disagree.

First, the overbreadth doctrine is not applicable because it was designed only to strike down statutes attempting to regulate activity that the State is constitutionally forbidden to regulate. *State v. Banks*, 295 N.C. 399, 245 S.E.2d 743 (1978). The definition at issue in this case states that a potentially dangerous dog is one which has "[a]pproached a person when not on the owner's property in a vicious or terrorizing manner in an apparent attitude of attack." N.C. Gen. Stat. § 67-4.1(a)(2)c. (1994). Defendants do not suggest that the State is constitutionally forbidden from regulating such activity. This simply is not an area where the State seeks to regulate activities "which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307, 12 L.Ed.2d 325, 338 (1964).

Furthermore, we find no merit in defendants' argument that the statute is unconstitutionally vague. Our Supreme Court has enunciated the principles of the vagueness doctrine as follows:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.

In Re Burrus, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969), *aff'd by McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed.2d 647 (1971) (citations omitted). Furthermore, the statute must be examined in light of the circumstances in each case, and defendants have the burden of

showing either that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration. *State v. Covington*, 34 N.C. App. 457, 238 S.E.2d 794 (1977), *disc. review denied*, 294 N.C. 184, 241 S.E.2d 519 (1978). After carefully examining the language of N.C. Gen. Stat. § 67-4.1(a)(2)c. in light of the facts of the instant case, we conclude that defendants have not met their burden, and the statute provides sufficient notice for defendants and others to determine what conduct is proscribed. *See In Re Burrus*, 275 N.C. 517, 169 S.E.2d 879.

Defendants' final assignment of error concerns the trial court's failure to remedy the refusal of the Board to permit certain evidence at the Board's hearing. In light of our decision to remand this case to the superior court for a *de novo* hearing, it is unnecessary to address defendants' argument.

In sum, we hold that the trial court erred by failing to conduct a *de novo* hearing pursuant to N.C. Gen. Stat. § 67-4.1(c), and therefore remand to the Superior Court of Caswell County with instructions to conduct a *de novo* hearing to determine whether defendants' dog is potentially dangerous as defined in the statute. Furthermore, the court is not confined to the evidence which was presented to the Board, but may hear any additional evidence.

Remanded.

Judges JOHNSON and MARTIN, Mark D., concur.

SOLOANA B. INGRAM, ADMINISTRATRIX OF THE ESTATE OF IVAN L. INGRAM, APPELLANT v. VINCENT KERR, INDIVIDUALLY AND AS A POLICE OFFICER OF THE CITY OF RALEIGH, APPELLEE

No. COA94-715

(Filed 17 October 1995)

Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th)— bystander shot by police—official capacity claim properly dismissed—individual capacity claim improperly dismissed

In plaintiff's wrongful death action against defendant police officer in his official and individual capacities, the trial court properly dismissed the official capacity claim, since plaintiff did

not allege a waiver of immunity by the purchase of insurance; however, the trial court erred in dismissing plaintiff's claim against defendant in his individual capacity where plaintiff alleged that defendant's actions in shooting an innocent bystander at a drug bust before determining whether the victim was armed or a threat were intentional and reckless and outside the scope of his duties.

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

Appeal by plaintiff from order entered 16 May 1994 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 22 March 1995.

Geoffrey H. Simmons for plaintiff appellant.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Patricia P. Kerner, for defendant appellee.

COZORT, Judge.

Ivan Ingram was shot and killed during a drug bust in the City of Raleigh on 8 November 1991. His estate sued the officer who fired the fatal shot, alleging that the officer intentionally and recklessly shot Ingram, an unarmed and innocent bystander, in a willful, wanton and grossly negligent fashion, inconsistent with his training, by shooting Ingram before ascertaining whether he was armed. The trial court granted the defendant officer's motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiff appeals. We affirm the trial court's dismissal of the complaint against the officer in his official capacity. We hold the complaint alleged facts sufficient to withstand dismissal for failure to state a claim as to the officer's individual capacity. We reverse and remand for further proceedings on that claim.

This action began on 6 November 1992 when plaintiff Soloana B. Ingram, Administratrix of the Estate of Ivan L. Ingram, commenced a wrongful death action against Officer Vincent Kerr, Chief of Police Frederick K. Heineman, and the City of Raleigh. On 11 January 1993, the City of Raleigh and Chief Heineman filed a motion to dismiss for failure to state a claim upon which relief could be granted. Plaintiff filed a voluntary dismissal without prejudice of her claims against the City of Raleigh and Chief Heineman on 24 March 1993 and against defendant on 29 March 1993.

Plaintiff commenced the present wrongful death action against Vincent Kerr in his official and individual capacities on 4 February 1994 seeking compensatory and punitive damages. Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted. Judge Orlando F. Hudson heard this motion in Wake County Superior Court on 16 May 1994. Judge Hudson granted defendant's motion to dismiss. Plaintiff appealed.

Our standard of review is:

> In North Carolina a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim, or in the disclosure of some fact which will necessarily defeat the claim. But a complaint should not be dismissed for insufficiency 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. Pleadings are to be liberally construed. Mere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement. *Sutton v. Duke*, 277 N.C. 94, 102-103, 176 S.E.2d 161, 166-67 (1970); *Caldwell v. Deese*, 26 N.C. App. 435, 216 S.E.2d 452 (1975).

Gallimore v. Sink, 27 N.C. App. 65, 66-67, 218 S.E.2d 181, 182-83 (1975).

Plaintiff contends the complaint adequately stated a claim against defendant Kerr in both his official capacity and his individual capacity. We shall address the official capacity claim first.

> Under the doctrine of governmental immunity, 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. A police officer in the performance of his duties is engaged in a governmental function. A city can waive its immunity, however, by purchasing liability insurance. Immunity is waived only to the extent that the city is indemnified by the insurance contract from liability for the acts alleged. If the plaintiff does not allege a waiver of immunity

> by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit or the officer or employee.

Mullins v. Friend, 116 N.C. App. 676, 680-81, 449 S.E.2d 227, 230 (1994) (citations omitted).

In the case below, plaintiff did not allege a waiver of immunity by the purchase of insurance. Plaintiff has thus failed to state a claim against the officer in his official capacity, and the trial court correctly dismissed the official capacity claim.

We now turn to the plaintiff's argument that the complaint adequately alleged a cause of action against Officer Kerr in his individual capacity. Plaintiff alleged, among other things:

> 6. Officer Kerr, who was on the right side of the house with a 12 gauge shotgun while covering the perimeter, arrived at the house between 6:30 and 6:31 p.m. Officer Kerr shot Ivan Ingram within one second or less after getting out of his car. He then proceeded to radio EMS at 6:31 p.m.
>
> 7. Ivan Ingram never had a chance to explain why he was on Carver Street and that he had no knowledge of what was taking place or why the police were present. Officer Kerr ordered Ivan Ingram to show him his hands and when Ivan Ingram displayed his hands, Vincent Kerr intentionally and recklessly shot him to death.
>
> 8. Officer Kerr never saw Ivan Ingram with a weapon, never saw him committing any criminal violations, never saw him threatening the life of another officer.
>
> 9. Officer Kerr stated he shot Ivan Ingram because Ivan would not show him his hands when Kerr made that command. Ivan Ingram displayed his hands as quickly as he could before he was shot.
>
> 10. Officer Kerr shot Ivan Ingram at the front right side of the 314 Carver Street house. There was a porch light on as well as a street light across from the 314 Carver Street address. Officer Kerr saw Ingram, a black man who had on a dark leather coat and dark baseball cap, the same as Christopher Davis. Officer Kerr had received information prior to the police drive-by raid that drug dealers would be armed.

11. Officer Kerr intentionally shot and killed Ivan Ingram with reckless disregard for Ivan Ingram's life, assuming that Ivan Ingram was a dealer with a weapon, and in a willful and wanton manner and in a grossly negligent fashion. His actions were unreasonable and inconsistent with his training.

12. Officer Kerr acted maliciously and arbitrarily and used unnecessary force to discharge his duties.

13. Ivan Ingram was unarmed and was not involved in any criminal activity.

Plaintiff contends these allegations are sufficient to withstand defendant's motion to dismiss because they show more than mere negligence by defendant Kerr. Plaintiff contends these allegations show a malicious and intentional shooting of an unarmed innocent bystander which constitutes behavior outside the scope of the officer's official duties. Defendant contends these allegations show no more than a negligent mistake in judgment by an officer confronting a dangerous situation. At this stage of the pleadings, on a motion to dismiss wherein we are to liberally construe all allegations of plaintiff's complaint as true, we find plaintiff's argument more persuasive.

In *Gallimore v. Sink*, we held that "[p]ublic officials enjoy no special immunity for unauthorized acts, or acts outside their official duty. *Whether the acts of the defendants in the case were consistent with their authority as defendants contend is an affirmative defense.*" *Gallimore*, 27 N.C. App. at 68, 218 S.E.2d at 183 (citations omitted) (emphasis added).

Our reasoning in *Gallimore* applies here. The allegations of plaintiff below do not lead to only one conclusion, as defendant contends, that defendant merely made an error in judgment in shooting Ivan Ingram. Rather, taken in the light most favorable to plaintiff, the plaintiff's allegations contend defendant shot Ingram without ascertaining whether he was armed or a threat. Defendant's argument that an officer will now be subject to suit for every mistake in judgment is unfounded. We create no new cause of action in that regard. If discovery leads to uncontroverted evidence that Officer Kerr's actions were a mere mistake or a negligent mistake in the exercise of his judgment, then defendant Kerr will be entitled to judgment at that point. At this stage of the pleadings, however, where plaintiff has alleged that Officer Kerr's actions were intentional and reckless before ascertaining whether Ivan Ingram was armed, and outside the

scope of his duties, we cannot say that plaintiff has not stated a cause of action.

In sum, we affirm the dismissal of the official capacity claim. The trial court's dismissal of plaintiff's claim against defendant in his individual capacity is reversed, and the cause is remanded to superior court for further proceedings.

Affirmed in part, reversed in part, and remanded.

Judges JOHNSON and McGEE concur.

BETTER BUSINESS FORMS, INC., D/B/A WESLEY BUSINESS FORMS, PLAINTIFF v. DOUG DAVIS AND JOHN F. WOODS, DEFENDANTS

No. COA94-1381

(Filed 17 October 1995)

Courts § 15 (NCI4th)— nonresident defendants—purchase of North Carolina company—sufficient minimum contacts for exercise of in personam jurisdiction

Sufficient minimum contacts with North Carolina existed as to both defendants so as to permit the exercise of *in personam* jurisdiction over both of them where the evidence tended to show that defendants, who were officers, directors, and shareholders of a Virginia corporation, negotiated the purchase of a North Carolina company on behalf of their corporation; these active negotiations, some of which were conducted in North Carolina, demonstrated a purposeful attempt by defendants to avail themselves of the privilege of conducting business in North Carolina; through the resulting agreement, defendants became officers, directors, and shareholders of a North Carolina company; defendant benefitted financially from the operations of the North Carolina company; and there was no reason to differentiate between the defendants simply because one took a more active role in the management of the North Carolina company by traveling periodically to meet with customers and observe the office.

Am Jur 2d, Courts § 118.

In personam jurisdiction over nonresident director of forum corporation under long-arm statutes. 100 ALR3d 1108.

Long-arm statutes: in personam jurisdiction over non-resident based on ownership, use, possession, or sale of real property. 4 ALR4th 955.

Execution, outside of forum, of guaranty of obligations under contract to be performed within forum state as conferring jurisdiction over non-resident guarantors under "long-arm" statute or rule of forum. 28 ALR5th 664.

Appeal by plaintiff and defendant John F. Woods from order entered 11 October 1994 by Judge Howard R. Greeson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 19 September 1995.

Petree Stockton, L.L.P., by R. Rand Tucker and B. Gordon Watkins, III, for plaintiff-appellee/cross-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mack Sperling, for defendant-appellee/cross-appellee Doug Davis and defendant-appellant John F. Woods.

WALKER, Judge.

Plaintiff is a Florida corporation with an office and place of business in Forsyth County, North Carolina. Plaintiff owned an operating division known as Graphics Supply Company (Graphics Supply), a Winston-Salem, North Carolina business that had sales offices in Winston-Salem and Roanoke, Virginia. In August 1992, plaintiff sold Graphics Supply to the Davis-Woods Group, Inc., a Virginia corporation owned by defendants. At the closing of the sale, each defendant executed a personal guaranty for one-half of the purchase price. Beginning on 1 April 1994, the Davis-Woods Group, Inc. failed to make payment on the note to plaintiff and eventually filed for bankruptcy.

Plaintiff instituted this action on 6 May 1994 to recover from defendants on their guaranties. Both defendants moved to dismiss plaintiff's claim, asserting lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. The trial court denied the motion as to defendant Woods and granted it as to defendant Davis.

Plaintiff assigns as error the trial court's granting of defendant Davis' motion to dismiss. Defendant Woods assigns as error the

denial of his motion to dismiss. Since both assignments require the same analysis, we will address them together.

The determination of personal jurisdiction is a two-part inquiry. The trial court first must examine whether the exercise of jurisdiction over the defendant falls within North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, and then must determine whether the defendant has sufficient minimum contacts with North Carolina such that the exercise of jurisdiction is consistent with the due process clause of the Fourteenth Amendment to the United States Constitution. *Murphy v. Glafenheim*, 110 N.C. App. 830, 833-35, 431 S.E.2d 241, 243-44, *review denied*, 335 N.C. 176, 436 S.E.2d 382 (1993). The standard of review of an order determining personal jurisdiction is whether the findings are supported by competent evidence in the record; if so, this Court must affirm the order. *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986).

Neither defendant in his brief appears to contest that North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4 (1983), confers jurisdiction on our courts in this case. Rather, the central claim of both defendants is that they lack sufficient minimum contacts with North Carolina to satisfy due process. Whether minimum contacts are present is determined not by using a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable under the circumstances. *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 531, 265 S.E.2d 476, 479 (1980). However, "[i]n each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. . . ." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (*citing Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d. 1283, 1298 (1958)).

The evidence here shows that defendants, who were officers, directors, and shareholders of the Davis-Woods Group, Inc., negotiated the purchase of Graphics Supply on behalf of their corporation. These active negotiations to purchase a North Carolina business, some of which were conducted in North Carolina, demonstrate a purposeful attempt by defendants to avail themselves of the privilege of conducting business in this State.

Through the resulting agreement, defendants became officers, directors, and shareholders of Graphics Supply, a North Carolina company. After the purchase, Graphics Supply's Winston-Salem office

continued to do all of the administrative work necessary to service the Winston-Salem operation, including purchasing, shipping, book-keeping, accounting, and accounts receivable. The Winston-Salem office accounted for over half of Graphics Supply's sales from early 1993 until March 1994, when the office closed. Beginning in the fall of 1993, telephone calls to the Roanoke office were forwarded to the Winston-Salem office, so that the Winston-Salem office took virtually all of the orders for the company. Thus, the evidence indicates that defendants benefitted financially from the operations of the Winston-Salem office.

Defendant Davis points out that there is no evidence he "personally conducted any activities in this State either on behalf of the Davis-Woods Group or otherwise." However, we see no reason to differentiate between defendant Woods and defendant Davis simply because defendant Woods took a more active role in the management of Graphics Supply by traveling to Winston-Salem periodically to meet with customers and observe the office. It is well settled that a defendant need not physically enter North Carolina in order for personal jurisdiction to arise. *Tom Togs, Inc.*, 318 N.C. at 368, 348 S.E.2d at 787 (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 543 (1985)). Rather, there may be personal jurisdiction where "the record is clear that defendant voluntarily entered into a contract with a substantial connection with this State." *Id.* at 369, 348 S.E.2d at 788. As we have stated, jurisdiction here is based on the benefits received by defendants from the underlying contract which has a substantial connection with North Carolina. When the Davis-Woods Group, Inc. defaulted on the underlying contract to purchase Graphics Supply, both defendants became equally obligated through their personal guaranties to pay the remaining debt. Having reaped the benefits of the underlying contract, defendants cannot now claim that it offends due process to require them to appear in North Carolina to defend an action based on their personal guaranties of that contract. Under these circumstances, we find sufficient minimum contacts exist as to both defendants; therefore, we affirm the trial court's denial of defendant Woods' motion to dismiss for lack of personal jurisdiction, and we reverse the trial court's granting of defendant Davis' motion to dismiss.

Only defendant Woods has brought forward on appeal the issue of insufficient service of process. We have carefully examined the record, and we conclude that defendant Woods was properly served in accordance with the requirements of N.C. Gen. Stat. § 1A-1, Rule

4(j)(1)c (1990). Thus, the trial court properly denied defendant Woods' motion to dismiss on this ground.

Affirmed in part, reversed in part, and remanded for further proceedings.

Judges MARTIN, JOHN C. and SMITH concur.

HERITAGE POINTE BUILDERS, INC., AND PATRICK E. HANNON, JR. v. NORTH CAROLINA LICENSING BOARD OF GENERAL CONTRACTORS

No. COA94-816

(Filed 17 October 1995)

Appeal and Error § 87 (NCI4th)— interlocutory order not appealable

Where the trial court vacated a decision of the Licensing Board of General Contractors and remanded the case for a rehearing based on the court's findings that the Board's refusal to allow plaintiff to question the Board members as to their bias was arbitrary and capricious and a violation of due process and on its finding that the Board did not comply with the North Carolina Rules of Evidence, the order required further action to settle the controversy, was interlocutory, and was therefore not appealable.

Am Jur 2d, Appellate Review §§ 84-88, 117.

Appeal by respondent from order entered 2 May 1994 in Wake County Superior Court by Judge Narley L. Cashwell. Heard in the Court of Appeals 25 September 1995.

M. Jackson Nichols for petitioner-appellees.

Bailey & Dixon, L.L.P., by Carson Carmichael, III and Denise Stanford Haskell, for respondent-appellant.

GREENE, Judge.

North Carolina Licensing Board of General Contractors (the Board) appeals from an Order of Remand entered 2 May 1994 in Wake County Superior Court vacating the Board's decision in the matter of Carolina Cape Fear Builders, Inc. (Cape Fear) and Heritage Pointe

Builders, Inc. (Heritage Pointe) and granting petitioners, Heritage Pointe and Patrick E. Hannon, Jr. (Hannon), attorney fees.

Cape Fear was licensed to practice general contracting on 17 July 1985, with Hannon as the qualifying party. The license expired in December 1991. On 17 September 1992, Heritage Pointe filed an application with the Board for licensure as a limited residential contractor, requesting that Hannon serve as its qualifying party, and his examination be transferred from Cape Fear. On 17 May 1993, Heritage Pointe amended its application, requesting an unlimited residential license. On 30 July 1993, Heritage Pointe filed a second application for a limited residential license and requested that Michael Hannon serve as qualifier.

Prior to a hearing before the Board, Heritage Pointe filed an Affidavit of Disqualification & Motion for Hearing or Referral to OAH seeking to disqualify members of the Board pursuant to N.C. Gen. Stat. § 150B-40 and 21 NCAC 12 .0825. The affidavit claimed that certain unnamed Board members had received information about Hannon's criminal history that would prejudice those members against Hannon and Heritage Pointe. At the hearing the Board denied Heritage Pointe's request to question Board members as to any possible bias. In closed chambers, Chairman Richard T. Howard appointed a Board member to poll all the members as to whether they would be able to render an impartial decision. All agreed they would be able to give an impartial decision. The Board found that due to Hannon's pleading guilty to second degree rape in 1981, and pleading no contest to misdemeanor assault and battery in 1992, the applicant Heritage Pointe, with Hannon serving as qualifying party, is not of "good character" and "integrity," and therefore the application was denied. The Board granted the application of Heritage Pointe with Michael Hannon serving as the qualifying party. The Board took no action with regard to the expired license of Cape Fear. Heritage Pointe and Hannon appealed to the superior court.

On review to Wake County Superior Court, Judge Cashwell found that the Board's refusal to allow Heritage Pointe to question the Board members was "arbitrary and capricious" and a violation of due process. Judge Cashwell also found that the Board did not comply with the North Carolina Rules of Evidence, and awarded attorney fees to Heritage Pointe and Hannon. The case was remanded for rehearing by the Licensing Board in accordance with these findings.

The issue is whether this Court has jurisdiction to hear this appeal.

The trial court vacated the Board's decision and remanded the case for a rehearing, consistent with its order. Because the order requires further action to settle the controversy, it is interlocutory, *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950), and this Court has jurisdiction only if "the order affects some substantial right and [the loss of that right] will work injury to appellant if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990); *see also J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E.2d 812, 815 (1987); N.C.G.S. § 7A-27(b) (1989) (only final orders of administrative agency appealable). Assuming the existence of a substantial right in this case, the record does not support a determination that the Board's right to pursue the contentions made in this appeal would be impaired or prejudiced if it were forced to delay presentation of these contentions until entry of a final order in the trial court. *See Jennewein v. City Council of Wilmington*, 46 N.C. App. 324, 326, 264 S.E.2d 802, 803 (1980) (appeal from trial court remanding to city council for hearing de novo dismissed as premature); *see also Edwards v. Raleigh*, 240 N.C. 137, 139, 81 S.E.2d 273, 275 (1954) (appeal does not lie from order of trial court remanding to Industrial Commission because not a final judgment); *but see Tastee Freez Cafeteria v. Watson*, 64 N.C. App. 562, 564, 307 S.E.2d 800, 801 (1983) (appeal allowed from order of superior court remanding case to Employment Security Commission for a new hearing). The appeal must therefore be dismissed.

We note that although the interlocutory nature of this appeal was not properly raised by the parties, because it is jurisdictional in nature we have an obligation to address the issue and do so *sua sponte*. *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980).

Dismissed.

Chief Judge ARNOLD and Judge SMITH concur.

STATE OF NORTH CAROLINA v. CALVIN WAYNE BARBER

No. COA94-872

(Filed 7 November 1995)

1. Evidence and Witnesses § 649 (NCI4th)— motion to suppress evidence of underlying facts of prior convictions—failure to rule on motion—right to testify on own behalf not affected

The trial court did not impermissibly chill defendant's right to testify on his own behalf when it declined to rule on his motion *in limine* to suppress Rule 404(b) evidence of the underlying facts of prior convictions, since the trial court did not issue a bold denial of defendant's motion but instead deferred his decision on the matter until such time as the facts and context would allow him to make a well reasoned decision; it did not appear that defendant's decision to testify hinged on the court's ruling; and even if the court did err, such error would not be fatal, as there was other competent evidence of his guilt.

Am Jur 2d, Motions, Rules and Orders § 26.

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters. 63 ALR3d 311.

2. Evidence and Witnesses § 765 (NCI4th)— rape victim's memory problems—defense opened door to evidence—admissibility to reestablish officer's credibility

The trial court in a rape case did not err when it allowed the investigating officer to testify on redirect that the victim's inconsistent statements were only memory problems common to victims of sex crimes, since this evidence was not inadmissible expert opinion testimony of the victim's credibility but was instead admissible to reestablish the officer's credibility after the defense opened the door by calling into question the thoroughness of her investigative report.

Am Jur 2d, Appellate Review § 753.

Appeal by defendant from judgments entered 10 March 1994 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 4 April 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Office of Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender J. Michael Smith, for defendant appellant.

McGEE, Judge.

Defendant, Calvin Wayne Barber, was indicted on 19 April 1993 on four counts of first degree sexual offense, one count of first degree rape, and one count of first degree kidnapping. The cases were joined for trial and were heard before a jury at the 7 March 1994 Criminal Session of Cumberland County Superior Court with Judge B. Craig Ellis presiding. Defendant was convicted of one count of first degree rape, four counts of first degree sexual offense and one count of first degree kidnapping. Judge Ellis vacated the conviction for first degree kidnapping and entered conviction for second degree kidnapping. Defendant was sentenced to three consecutive terms of life in prison. From these judgments, defendant appeals.

The State's evidence tended to show the following. The victim was an eighteen-year-old high school senior. On the evening of 4 March 1993 at approximately 10:30 p.m., she had finished work at a Cumberland County bingo parlor and was waiting at a nearby restaurant for her mother to pick her up. Initially, the victim stood in front of the bingo parlor, but a security guard instructed her to wait in front of a nearby restaurant because he felt it would be safer.

As the victim waited for her mother, defendant approached her and engaged her in conversation. The victim described defendant as a very dirty, heavy-set man in need of a shave who had long, greasy, curly hair. Defendant grabbed her hair, jerked her head back, stuck a knife to her neck, and pinned her arms up against the wall. He led her to a dumpster at the side of the building where she thought he was going to take her pocketbook. Defendant said that was not what he wanted and led her into a wooded area and made her sit down. Defendant kept trying to touch her and asked if she had ever been raped by her father.

Defendant told the victim to take off her glove and he laid his knife in her hand. Defendant said something about wanting her to trust him. On his knees in front of her, defendant searched her purse

and asked her questions. The victim did not put her glove back on after defendant took back his knife. Defendant threatened to slice her throat and leave her in the woods where no one would find her. The victim told defendant she did not want to die.

Defendant took the victim towards a trailer park, holding her with his left hand and keeping the knife in his right hand. The victim was scared and told defendant that she wanted to go home. As they walked past the trailer park, she saw two men walk by, but defendant told her not to call out. About fifteen minutes after leaving the wooded area, they arrived at a green-colored duplex later identified as defendant's residence. Defendant locked the door behind them, reminding the victim he still had the knife and that he would use it. Defendant led her to his bedroom and told her to undress and get on the bed. The victim told defendant that she "didn't want to do nothing" and "wanted to go home," but defendant threatened to get the knife. Defendant took off his clothes. He put his fingers inside the victim's vagina. She was crying and defendant repeatedly told her to shut up. Defendant inserted his tongue into her vagina and then forced the victim to perform oral sex on him. Defendant raped the victim. She felt a sharp pain when it seemed defendant attempted to put his penis in her rectum. Later the victim got up and went to the bathroom. When she returned, defendant grabbed her and forced her to have oral sex again. Later the victim saw defendant's eyes were closed and believing he might have passed out, she waited in the bed for fifteen minutes. When he did not move, she dressed, left the house and went down the street to a store and called her mother.

Cross-examination revealed minor inconsistencies between the victim's testimony and her statements to various people that evening. The victim's mother testified that when she arrived to pick up her daughter after work, she did not see her and could not find her anywhere. She called the police and reported her daughter missing, then returned home to wait by the phone. About two and one-half hours later, her daughter called, screaming "Mama, please come and get me. Mama, he's hurt me. Please." The mother called the police and told them her daughter had called from a convenience store near where she worked, and the mother went there immediately. She found her daughter on the ground, in a fetal position, surrounded by law enforcement officials. She testified she had never seen her daughter so upset before. The victim was transported by ambulance to the Cape Fear Hospital emergency room.

Sergeant Terri Putnam of the Cumberland County Sheriff's Department Sex Crimes Unit testified she was dispatched to the store where the victim was located and was briefed at the scene. She drove around the area and then went to the hospital to interview the victim. Sergeant Putnam found the victim in an examination room crying. She explained to the victim that it was important to understand what had happened, and she then conducted a "substance of oral interview" which does not involve taking a person's statement word-for-word but involves listening for key comments. Sergeant Putnam did not deem a word-for-word statement necessary because the incident was a recent one and identifying the perpetrator and obtaining fresh untainted evidence were her key concerns.

Sergeant Putnam took the victim back to the neighborhood where the crimes occurred and she identified the residence where she was raped. Sergeant Putnam returned the victim to her parents and drew up a search warrant, listing personal items the victim had been wearing that evening. During the search of the house, a water bill, power bill, and a social security card, all in defendant's name, were found. None of the victim's personal items were found. Sergeant Putnam searched the woods for the victim's glove but it was not located.

After defendant was arrested, he made two separate statements to Sergeant Putnam. First, he stated that he met a girl, with the same name as the victim, on the street who agreed to perform sexual acts with him for fifty dollars. They went to his home and performed those acts. However, he refused to pay her because she was "lousy." In his second statement he said he made no attempt to remove or hide anything from his residence and that the knife he had was used as a tool, not as a weapon.

Detective Nancy Cressler of the Cumberland County Sheriff's Department testified she assisted Sergeant Putnam in the search of defendant's residence and in the search for the missing glove. When she arrested defendant, she found a knife in the pocket of defendant's trousers which the victim identified as the knife defendant used on her.

Dr. Darryl Simpkins was the emergency room physician on duty at the hospital on 5 March 1993 when the victim arrived. Because she was brought in with a complaint of sexual assault, Dr. Simpkins performed an examination, and he observed a tearing of the skin near the victim's rectum. Dr. Simpkins testified it takes tremendous force to tear the skin similar to the tear he observed on the victim's body. He

stated the tear could have been caused by an attempted penile insertion. Defendant presented no evidence.

I.

[1] Defendant argues he is entitled to a new trial because before defendant decided to testify, the trial court impermissibly chilled his right to testify on his own behalf when it declined to rule on his motion *in limine* to suppress 404(b) evidence of the underlying facts of prior convictions. In support of his position, defendant cites *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988). We find *Lamb* distinguishable.

In *Lamb*, the defendant was indicted for the first-degree murder of her husband but due to the lack of evidence against her, the charges were dismissed "[w]ith [l]eave [p]ending the completion of the investigation." *Lamb*, 321 N.C. at 635, 365 S.E.2d at 601. A year later, several of defendant's relatives came forward with information implicating defendant in her husband's murder and she was reindicted.

The case against the defendant was based largely on the testimony of defendant's relatives who initially denied knowing anything about the murder. Later, they all stated the defendant had admitted to the crime and had also admitted to being involved in other murders. Defendant had never been indicted for these other killings and she filed a pre-trial motion *in limine* to have any evidence of these alleged killings excluded. *Id.* at 636, 365 S.E.2d at 601. Even though it was clear that defendant's decision to testify depended upon the court's ruling on the motion, *Id.* at 648, 365 S.E.2d at 608, the court delayed its decision until just before "the close of defendant's evidence, but before she had rested or taken the stand" when it denied the motion. *Id.* at 636, 365 S.E.2d at 601-02. Based on this denial, defendant declined to take the stand and she was convicted of second-degree murder.

The Court of Appeals in *Lamb* ruled that the denial of the motion was prejudicial error because the evidence in question was inadmissible under any of the evidentiary rules and the trial court's failure to exclude the evidence by granting the motion prevented defendant from testifying, thereby prejudicing her. *Id.* at 636, 365 S.E.2d at 602. In affirming the Court of Appeals, the Supreme Court noted that "[n]ot every denial of a defendant's motion *in limine* results in a chilling of defendant's right to testify. Whether this result occurs depends

on the peculiar facts of each case." *Lamb*, 321 N.C. at 648, 365 S.E.2d at 608.

From the record before us, we find the trial court did not abuse its discretion in deferring a ruling on the motion *in limine*. While it may have been preferable for the court to have ruled on this motion earlier, the court's handling of the matter and its basis for deferred ruling were reasonable and did not constitute an abuse of discretion. Unlike *Lamb*, this judge did not erroneously issue a "bald denial" of defendant's motion; rather, he deferred his decision on the matter until such time as the facts and context would allow him to make a well-reasoned decision.

It is not clear that defendant's decision to testify rested solely on the trial court's decision on the motion *in limine*. Defendant's attorney stated the ruling would be a factor, but did not say the decision to have defendant testify hinged on the ruling.

In *Lamb*, the State's case "rested so completely" on the testimony of defendant's relatives (the subject of the motion *in limine*) that the court prejudiced defendant when it denied the motion, thereby discouraging defendant from exercising her right to take the stand to refute her relatives' testimony. *Id.* at 649, 365 S.E.2d at 608. Here there was strong evidence to support defendant's conviction without the use of the evidence of prior convictions which defendant sought to exclude in the motion *in limine* (there was no question of identity and the case was essentially reduced to the issue of consent).

Finally, we note the defendant in *Lamb* was never given the assurance that if she decided to testify, the court would protect her from impermissible evidence being used to impeach her. *Id.* at 649, 365 S.E.2d at 609. When the motion was renewed near the close of defendant's evidence, the judge stated "I'm not going to put the muzzle on on [sic] cross-examination, if that is what the question is." *Id.* at 646, 365 S.E.2d at 607. In this case, the trial court used a fair and balanced approach to the issue. At the beginning of the trial the court stated:

> It's difficult for me to rule on what the evidence is going to be until I've heard what the evidence is. I don't know what the evidence in this case is . . . [s]o at this point I don't think I'm in any position to rule whether or not it's admissible . . . . So we'll defer it until a later session. We can bring it up, either side may bring it up at a later time out of the presence of the jury. And we'll discuss it further when we get further along in the case.

At the conclusion of the State's evidence, the motion *in limine* was renewed and the court further explained:

> Well, sir, the rules permit 404(b) type information be received if it meet [sic] certain criteria. But until it is asked, I don't see how I can rule one way or the other. If it's admissible then I would admit it. And if it is not admissible, then I will not allow it to be admitted.
>
> The State at this point has not tried to introduce it in its case in chief. So the issue as anticipated at the beginning of the trial, or the motions in limine, have not arisen. But at this point I don't feel that I can give you a definitive ruling as to whether or not questions about those cases would be permitted. But we would certainly hear it out of the presence of the jury first if it should be elicited.

"The Rules of Evidence are not to be applied in a vacuum; they are to be applied in a factual context. A trial court makes its decisions as that factual context unfolds and as the circumstances warrant." *Lamb*, 321 N.C. at 648, 365 S.E.2d at 608. We find *Lamb* distinguishable and overrule defendant's assignment of error.

Even if the trial court had committed error in its ruling on the motion *in limine*, the error would not be fatal in this case under the holding of *State v. Norris*, 101 N.C. App. 144, 398 S.E.2d 652 (1990), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991). In *Norris*, the Court cited *Lamb* but held that "while it does appear from the record that the defendant chose not to testify at least in part because he feared being impeached with his 1975 conviction, there was such overwhelming evidence of his guilt that his failure to take the stand did not rise to the level of prejudicial error." *Id.* at 148, 398 S.E.2d at 655.

Under the facts of this case, there was no question of identity of the perpetrator because defendant admitted having engaged in intercourse with a woman with the same name as the victim whom he met that night on the street. Therefore, the jury was left with the question of whether to believe defendant's story that the victim, an eighteen-year-old high school student, was in fact a prostitute who was extracting revenge from defendant because he had refused to pay her $50 fee, or the victim's story that she was abducted and raped by defendant.

II.

[2] Defendant's second argument is that the trial court committed reversible error when it allowed Sergeant Putnam to testify that the victim's inconsistent statements were only memory problems common to victims of sex crimes, on the ground that this evidence was inadmissible expert opinion testimony of a witness' credibility. We disagree.

The testimony at issue included the following exchange:

Q. Sergeant Putnam, in your one and a half years in the Sex Crimes Unit and through all the schools that you've gone to and the training that you've gone to in the Sex Crimes Unit, was it significant that Ms. Chandler left out some details regarding what had happened?

A. No, ma'am.

Mr. Broun: Objection, your Honor. That's opinion evidence.

The Court: Overruled.

Ms. Cox: Thank you.

A. That is something that I have learned through training which is quite common in these type cases. Through training I have been instructed that a lot of times in this type of a situation a victim wants to forget what has happened. And therefore, immediate recall is not always what we might think it ought to be.

Q. Sergeant Putnam, was it your intention to go back and do a more detailed report?

A. Yes, ma'am, it was.

Q. But you didn't do it?

A. No, ma'am, I did not.

This testimony was not expert opinion testimony, but even if it were, it was admissible under these facts. As the State points out, the questionable testimony came during redirect by the State after defense counsel had asked Sergeant Putnam numerous questions implying that Sergeant Putnam had prepared an inadequate investigative report of her oral interview with the victim. The defense "opened the door" by suggesting poor investigative work, and Sergeant Putnam was simply attempting to reestablish her credibility by explaining why some details were left out of her report.

In *State v. Baymon*, the Supreme Court stated that although an expert witness may not testify that a particular prosecution witness is believable or is not lying, otherwise inadmissible evidence is admissible if the door has been opened by defendant's cross-examination of the expert. *See State v. Baymon*, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994). "Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901, *cert. denied*, 115 S.Ct. 525, 130 L. Ed. 2d. 429 (1994).

In this case, the defense's cross-examination of Sergeant Putnam attempted to undermine her credibility by calling into question the thoroughness of her investigative report. It opened the door for the State on redirect to reestablish Putnam's reliability. "The purpose of redirect examination is to clarify any questions raised on cross-examination concerning the subject matter of direct examination and to confront any new matters which arose during cross-examination." *Baymon*, 336 N.C. at 754, 446 S.E.2d at 4. Defendant's cross-examination of Putnam rendered the challenged testimony admissible on redirect examination.

The defendant received a fair trial, free from prejudicial error.

No error.

Judges JOHNSON and COZORT concur.

MINNIE A. CARRIER, PLAINTIFF v. CLYDE DARRICK STARNES, DEFENDANT

No. COA94-1361

(Filed 7 November 1995)

Evidence and Witnesses § 148 (NCI4th)— automobile personal injury action—investigator hired by insurance company—evidence of insurance admitted to show bias

In an action to recover for personal injuries sustained in an automobile accident, the trial court did not err in allowing plaintiff to cross-examine a witness about defendant's insurer's hiring him to make a secret videotape of plaintiff, though evidence that

a person possesses liability insurance generally is not admissible to show that a person acted negligently or otherwise wrongfully, since the trial court in this case allowed the insurance evidence under a bias theory which was proper because the witness's testimony went beyond the bare particulars necessary to lay a proper foundation for admission of the videotape evidence, but was in the nature of eyewitness observation, and became substantive evidence on the ultimate issue of negligence. N.C.G.S. § 8C-1, Rule 411.

Am Jur 2d, Evidence § 495.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death actions carries liability insurance. 4 ALR2d 761.

Appeal by defendant from judgment entered 16 June 1994 by Judge Charles Lamm in Burke County Superior Court. Heard in the Court of Appeals 22 August 1995.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Robert B. Byrd, Lawrence D. McMahon, Jr., and Sam J. Ervin, IV, for plaintiff appellee.

Patrick, Harper & Dixon, by Gary F. Young, for defendant appellant.

COZORT, Judge.

Plaintiff filed suit to recover damages allegedly caused when defendant's automobile hit the automobile in which plaintiff was riding. Defendant offered into evidence a videotape of plaintiff taken by an investigator hired by defendant's insurance carrier. The trial court permitted plaintiff to cross-examine the investigator as to his employment by the insurance carrier. Defendant argues on appeal that this cross-examination was improper. We find the cross-examination by plaintiff was directed at the issue of witness bias, not the independent fact of liability insurance, and we find no error. The facts and procedural history follow.

The plaintiff, Minnie A. Carrier, accepted a ride home from work in a car driven by Wanda Tuttle on 14 August 1991. During the ride, rain was falling and the roads were wet. Ms. Tuttle arrived at an intersection, slowed down, and began to turn right. Almost simultane-

ously, defendant Clyde Darrick Starnes rounded a slight curve in the road and saw Ms. Tuttle's stationary car. He could not stop to avoid a collision. Ms. Carrier sued Mr. Starnes in tort, seeking damages for personal injuries sustained in the accident. Ms. Carrier alleged injuries to her back, neck and particularly her right arm and hand. Integon General Insurance Corporation (Integon), provider of underinsured motorist coverage to Ms. Carrier, participated in the case as an unnamed defendant pursuant to N.C. Gen. Stat. § 20-279.21(b)(4) (1993). Nationwide Insurance Company (Nationwide) was Mr. Starnes' primary liability insurance carrier.

At trial, Mr. Starnes and Integon filed motions *in limine*, requesting "that all witnesses in this action be ordered not to disclose that [a] videotape [of Ms. Carrier] was taken by an individual hired by the insurance carrier" and "that plaintiff's attorney be ordered not to ask any witness to divulge who hired the individual that took the videotape." Plaintiff argued at trial that such questions were relevant to show the bias of the witness and financial interest between the maker of the tape, a private investigator, and Nationwide. The trial court allowed the motion in part, informing plaintiff that he could inquire of the witness who hired him. The trial court instructed plaintiff to apply to the court before making inquiries regarding insurance.

The defendant introduced a videotape of the plaintiff taken by a private investigator, Mr. Kenneth Holmes. Mr. Holmes had been hired by Nationwide for the express purpose of assisting the defendant's case. Mr. Holmes' duties were to watch the plaintiff and videotape her actions. Mr. Holmes was paid $40.00 per hour for his surveillance, and was paid at the same rate for his services at trial.

In his testimony on direct examination, Mr. Holmes described his personal observations of plaintiff's activities, such as mowing the lawn, pulling weeds, and opening an automobile door. Mr. Holmes stated that he paid "particular attention to those areas" of Ms. Carrier's body that were the subject of plaintiff's complaint. After Mr. Holmes' testimony on direct examination, the videotape was received into evidence. The videotape was silent, with no conversation.

During cross-examination, Mr. Holmes stated: "[T]here are things of course that I observed that aren't depicted on the videotape . . . ." Later during cross-examination, the plaintiff broached the subject of insurance with Mr. Holmes, inquiring about his financial relationship with Nationwide. The defense objected, and there was a colloquy at the bench. The trial court permitted the plaintiff to elicit evidence

concerning private investigator Holmes' financial arrangement with Nationwide. Specifically, plaintiff was allowed to question Mr. Holmes' past and future involvement with Nationwide, the surveillance instructions given Mr. Holmes by the company, and Mr. Holmes' compensation for testifying on Nationwide's behalf. Defendant objected to this line of questioning. The trial court overruled the objections. The defendant then moved for a mistrial on grounds that "incompetent and prejudicial insurance information had been admitted." The court denied the motion for mistrial. In its charge, the court instructed the jury to consider insurance only as it related to the bias or prejudice of Mr. Holmes and his financial arrangement with Nationwide. The jury returned a verdict for plaintiff for $50,000.00 as compensatory damages. Defendant appeals to this Court.

Defendant first argues the trial court erred by allowing plaintiff to cross-examine Mr. Holmes about Nationwide's hiring Mr. Holmes to do the videotape. We disagree. Generally, evidence that a person possesses liability insurance is not admissible to show that a person "acted negligently or otherwise wrongfully." N.C. Gen. Stat. § 8C-1, Rule 411 (1992); *see Smith v. Starnes*, 88 N.C. App. 609, 610, 364 S.E.2d 442, 443 (1988). However, Rule 411 is not an absolute bar to the admission of liability insurance as competent evidence. Instead, Rule 411 provides for the admission of evidence concerning insurance when "offered for another purpose, such as proof of agency, ownership, control, or *bias* or *prejudice* of a witness." N.C. Gen. Stat. § 8C-1, Rule 411 (emphasis added).

The enumerated list of exceptions to Rule 411 is non-exclusive, as Rule 411 merely bars admission of insurance evidence as an independent fact, i.e., solely on the issue of negligent or wrongful conduct. *Id.*; 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 88 (3d ed. 1988). The Rule 411 bar against insurance evidence does not come into play if the evidence is offered to achieve a collateral purpose. *Smith*, 88 N.C. App. at 610, 364 S.E.2d at 443. So long as the proponent of the insurance evidence acts in good faith, she may raise the issue of liability coverage on bias or prejudice grounds, "if it reasonably appears that a witness has such an interest that it would legally affect the value of his testimony." *Bryant v. Welch Furniture Co.*, 186 N.C. 441, 445, 119 S.E. 823, 825 (1923); *see also Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 379-80, 301 S.E.2d 439, 448 (1983), *disc. review denied*, 308 N.C. 678, 304 S.E.2d 759 (1983), where we held that evidence of liability insurance is admissible to show bias or financial interest of witness.

In *Johnson v. Skinner*, 99 N.C. App. 1, 14, 392 S.E.2d 634, 641, *disc. review denied*, 327 N.C. 429, 395 S.E.2d 680 (1990), evidence of insurance coverage was allowed under a "motive" exception to Rule 411. There, an automobile dealership had permitted an employee to operate a car with dealer license tags, because the employee's liability insurance had lapsed. By using an automobile dealer tag, the employee defendant attempted to gain coverage under the dealer's liability insurance. The employee negligently collided with another car, causing injury. *Id.* at 13-14, 392 S.E.2d at 635.

At trial, the *Johnson* plaintiff raised "specific questions relating to insurance in general and whether a particular vehicle was insured." *Id.* at 14, 392 S.E.2d at 641. The trial court allowed the insurance questions, over defendant's objection, holding the evidence was "not offered to demonstrate the cause of the accident or to suggest the relative wealth of the defendants." *Id.* Rather, the insurance evidence was allowed, because it illuminated the motive behind the defendant's improper use of an automobile dealer's tag. *Id.* In addition to motive, the trial court also found that insurance coverage was admissible to demonstrate the car dealership's knowledge of the employee's motive in using the tag, and to assess the foreseeability of an accident arising out of the employee's use of the tag. *Id.* at 14, 392 S.E.2d at 641-42. On appeal, this Court found no error in the trial court's decision to allow insurance questions pursuant to Rule 411. *Id.* at 15, 392 S.E.2d at 642.

The *Johnson* Court's analysis is applicable to the case at bar. Factually, both cases concern automobile-related negligence. More importantly, both involve the proper application of the Rule 411 exceptions concerning admission of insurance coverage as evidence. Where the *Johnson* Court's analysis turns on motive as the means for admission under Rule 411, the trial court in the instant case allowed the insurance evidence under a bias theory. In both instances, evidence of insurance coverage was not used as an independent fact.

Defendant argues there is no proper purpose by which insurance evidence should have gained admission in the instant matter. He contends plaintiff's cross-examination was nothing but a manipulation of Rule 411 designed to put the existence of insurance coverage before the jury. We do not agree.

Defendant's argument is premised upon a theory that bias is not a legitimate issue with regard to private investigator Holmes' testimony. Defendant describes the purpose of Mr. Holmes' testimony as

"merely to authenticate and identify the videotape of the Plaintiff." Moreover, defendant asserts Mr. Holmes did not testify substantively on contents of the videotape, or his personal observations of plaintiff's activities. Defendant's argument is not supported by the record. In this case Mr. Holmes did much more than merely authenticate a videotape of the plaintiff. As the record demonstrates, Mr. Holmes' testimony went beyond the bare particulars necessary to lay a proper foundation for admission of the videotape evidence. Much of Mr. Holmes' testimony was in the nature of eyewitness observation. For example, Mr. Holmes testified on direct examination that he had paid particular attention to plaintiff's use of her right hand, "to see if there was any hindrance in movement or impairment or avoidance of using" the hand. Mr. Holmes noted on direct examination that he observed the plaintiff using "her right hand to pull [the lawnmower] backwards." Mr. Holmes also responded negatively to the question of whether the plaintiff had "any difficulty in using the right hand."

Mr. Holmes' statements have the character of substantive testimony. Mr. Holmes described the actions of plaintiff he personally observed. His testimony took on the role defendant claimed the videotape was to perform. Defendant cannot contend the information conveyed by Mr. Holmes is purely foundational. To the contrary, Mr. Holmes' testimony adds to the information purportedly on the videotape. Mr. Holmes' testimony was not limited to those facts necessary for authentication. Instead, his testimony became substantive evidence on the ultimate issue of negligence, evidence the plaintiff could rightfully challenge through cross-examination.

It is settled law that a party may address the bias of a witness offering substantive testimony. *State v. Wilson*, 269 N.C. 297, 299, 152 S.E.2d 223, 224-25 (1967); *State v. Rowell*, 244 N.C. 280, 281, 93 S.E.2d 201-02 (1956). The act of giving substantive testimony renders that testimony susceptible to cross-examination, as credibility is then at issue. N.C. Gen. Stat. § 8C-1, Rule 611; *See also Star Mfg. Co. v. R.R.*, 222 N.C. 330, 332, 23 S.E.2d 32, 35-36 (1942).

Once Mr. Holmes rendered substantive testimony, he placed his own credibility at issue. Plaintiff had the right to inquire into Mr. Holmes' financial relationship with the insurance company as its paid investigator. A financial interest in the outcome of a case is a form of bias and a proper topic for cross-examination. "The fact of insurance can be relevant in a number of ways. For example, the witness may be an investigator or other hired individual employed by the insur-

ance company. Cross-examination affords the usual means of revealing the relationship between the company and the witness." 1 E. Cleary, *McCormick on Evidence*, § 201 (4th ed. 1992).

Even if Mr. Holmes' testimony had been limited to the facts necessary to authenticate the video, he would still be subject to cross-examination for bias. As the person operating the video camera, Mr. Holmes made choices about what actions of the plaintiff he would film, and which ones he would not. Mr. Holmes noted on cross-examination: "[T]here are things of course that I observed that aren't depicted on the videotape, but the videotape is a fair and accurate reflection of most of what I observed." Such choices carry their own meaning. By consciously selecting what to film, Mr. Holmes implicitly made decisions as to which actions of the plaintiff were pertinent to the litigation. Nationwide informed Mr. Holmes as to the nature of plaintiff's injuries, and told him to "report what her activity was." Choosing what to film reflects the assignment given Mr. Holmes by the insurance company to surveil the plaintiff for purposes of gathering evidence against her at trial. Perspective is the key to bias, and Mr. Holmes' perspective was that of an insurance company's investigator seeking evidence contrary to the plaintiff's claim of injury.

We also note that the trial court specifically instructed the jury on the narrow scope of the insurance information:

> Now evidence has been received tending to show that an insurance company in some manner is involved in this case. This evidence was offered for the limited purpose of showing the source of the information the private investigator witness received before conducting his surveillance of the plaintiff, and for the limited purpose of showing the prejudice or bias this witness may have.

We find the trial court did not abuse its discretion in admitting evidence of liability insurance for the limited purpose of demonstrating bias. *Shields*, 61 N.C. App. at 380, 301 S.E.2d at 448.

As for defendant's claim of unfair prejudice, we do not find that either admission of the insurance evidence or the instructions of the trial court confused the issues and recapitulated irrelevant evidence. N.C. Gen. Stat. § 8C-1, Rule 403 (1992). Whether evidence should be excluded as unduly prejudicial or confusing rests within the sound discretion of the trial court. *Id.; Rowan Cty. Bd. of Educ. v. U.S.*

Gypsum Co., 103 N.C. App. 288, 307, 407 S.E.2d 860, 870 (1991); *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). The trial court's ruling in this regard may be reversed only for an abuse of discretion that "lacked any basis in reason," *Judkins v. Judkins*, 113 N.C. App. 734, 740, 441 S.E.2d 139, 142, *disc. review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994), or if it "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988). As the insurance evidence was proper under Rule 411, and an appropriate limiting instruction was granted, we find the trial court's rulings were neither capricious nor ill-considered.

In his second argument, defendant contends that admission of the insurance evidence required the court to grant defendant's motion for mistrial. Defendant cites *Fincher v. Rhyne*, 266 N.C. 64, 145 S.E.2d 316 (1965), for the proposition "evidence or mention of insurance is not to be permitted." *Id.* at 68-69, 145 S.E.2d at 320-21. Defendant's reliance on *Fincher* is misplaced. *Fincher* merely restates Rule 411's general prohibition: "Where testimony is given, or reference is made, indicating directly and as an independent fact that defendant has liability insurance, it is prejudicial, and the court should, upon motion therefor aptly made, withdraw a juror and order a mistrial." *Id.* at 69, 145 S.E.2d at 319 (citations omitted). In the instant case, the insurance evidence was not used as an independent fact, and therefore no consideration of a mistrial was needed.

In conclusion, we find no error in the trial court's decision to permit plaintiff to cross-examine defendant's videotape witness for the limited purpose of demonstrating bias.

No error.

Judges WALKER and McGEE concur.

IN RE APPEAL OF JAMES E. RAMSEUR AND R. GENE LENTZ FROM THE DECISION OF THE CABARRUS COUNTY BOARD OF ELECTIONS AND THE PROTEST OF THE CITY OF CONCORD MIXED BEVERAGE REFERENDUM CONDUCTED MAY 3, 1994

No. COA94-1349

(Filed 7 November 1995)

1. Elections § 105 (NCI4th)— ten ineligible voters—refusal to disclose vote—failure to show effect on outcome—referendum not invalidated

In an action to invalidate an election or referendum, the burden of proof is upon the unsuccessful party to show that the outcome of the election or referendum would have been different absent irregularities in the voting process. In this case, appellants were unable to meet their burden where a mixed beverage referendum passed by three votes; ten voters admitted their ineligibility but only five would disclose how they voted; and it was therefore impossible to determine whether those ten votes affected the outcome of the referendum.

Am Jur 2d, Elections §§ 342, 347, 349.

2. Elections § 93 (NCI4th)— voting irregularities alleged—failure to consider evidence on all irregularities—error

In failing to consider evidence with regard to other allegations of voting irregularities, including complaints regarding voting equipment and counting and recounting of votes, the State Board of Elections denied appellants the right to be heard on these issues and thus violated their right to procedural due process.

Am Jur 2d, Elections § 318.

3. Elections § 98 (NCI4th)— County Board of Elections' decision not adopted by State Board—failure to state reasons—error

The State Board of Elections erred in failing to state specific reasons why it did not adopt the County Board's recommended decision of a new referendum in accordance with N.C.G.S. § 150B-51(a).

Am Jur 2d, Elections §§ 318, 358.

Appeal by petitioners from an order entered 13 September 1994 by Judge George R. Greene in the Wake County Superior Court. Heard in the Court of Appeals 12 September 1995.

Johnson, Mercer, Hearn & Vinegar, P.L.L.C., by Charles H. Mercer, Jr., Shawn D. Mercer and Cecil R. Jenkins, Jr., for petitioner appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General Charles M. Hensey, for the State Board of Elections, appellee.

Everett Gaskins Hancock & Stevens, by Hugh Stevens, Paul C. Ridgeway and C. Todd Williford, for respondent appellees.

SMITH, Judge.

Appellants appeal a superior court order affirming a decision of the State Board of Elections which denied the Cabarrus County Board of Election's recommended decision that a new election be conducted with regard to the City of Concord Mixed Beverage Referendum.

The facts and procedural history of this case are as follows: A mixed beverage referendum was conducted in and for the City of Concord on 3 May 1994. Unofficial results showed 5,002 votes cast in favor of the sale of mixed beverages and 5,003 votes cast against the sale of mixed beverages. The Cabarrus County Board of Elections (County Board) conducted a recount on 5 May 1994, which showed 5,000 votes cast in favor of the sale of mixed beverages and 4,997 votes cast against.

As of 7 May 1994, 154 complaints had been filed regarding the referendum. The County Board held a preliminary hearing on 17 May 1994 and found probable cause as to 27 of those complaints. The complaints involved four areas of alleged election law irregularities and violations: (1) ineligible persons having voted in the referendum; (2) eligible voters having been denied the right to vote in the referendum; (3) violations or irregularities relating to voting equipment; and (4) violations or irregularities relating to the counting or recounting of ballots.

At a hearing concerning the referendum held on 13 June 1994, the County Board found that ten ineligible persons had voted in the referendum. Thus, there existed "substantial evidence to believe that

violations of the election law, other irregularities and/or misconduct did occur and were sufficiently serious to cast doubt upon the apparent results of the Referendum." When the ten ineligible voters were questioned as to how they voted, appellants objected. However, the County Board allowed each to confide *in camera* how they had voted. Five declined to say how they voted, three said they voted in favor of the proposition and two said they voted against it.

As to the alleged complaints that eligible voters had been denied the right to vote in the referendum, the County Board found there was not substantial evidence that any violations or irregularities had occurred, and dismissed those complaints. As to alleged complaints regarding voting equipment and counting and recounting ballots, the County Board concluded those issues were moot, in that violations or irregularities had been sufficiently shown with regard to ineligible voters to cast doubt upon the referendum results. Based upon its findings and pursuant to N.C. Admin. tit. 8, r. 2.0005(b)(2)(E) and (b)(3) (November 1984), the County Board sent its recommended decision that a new election be held to the State Board of Elections (State Board).

James E. Ramseur and R. Gene Lentz, proponents of the referendum and appellees herein, filed notice of appeal from the County Board's recommended decision to the State Board on 16 June 1994, pursuant to N.C. Admin. tit. 8, r. 2.0006(a) (November 1984). In its 22 June 1994 order, the State Board adopted the findings of the County Board, but denied the recommended decision for a new referendum. On 21 July 1994, J. Rodney Quesenberry and David S. Snyder, opponents of the referendum and appellants herein, appealed the State Board's decision to the superior court pursuant to N.C. Gen. Stat. § 150B-43 (1993). The superior court affirmed certification of the referendum results and dismissed appellants' appeal. From that decision, appellants appealed to this Court.

Appellate review of a final agency decision is governed by N.C. Gen. Stat. § 150B-51 (1993), which provides that an appellate court may

> reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1991). *See Brooks v. Ansco & Associates*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994). The proper manner of review by this Court depends upon the particular issues presented on appeal. *Id.* (citing *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991)). If it is alleged that the agency's decision was based on an error of law, then *de novo* review is required. If, however, it is alleged that the agency's decision was not supported by the evidence or that the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test. *Id.* (citing *O.S. Steel Erectors v. Brooks, Comm'r of Labor*, 84 N.C. App. 630, 634, 353 S.E.2d 869, 872 (1987)).

In their appeal to this Court, appellants allege that the State Board's decision is based upon unlawful procedure, which denies their right to procedural due process. Because appellants argue an error of law under N.C. Gen. Stat. § 150B-51(b)(3), we apply a *de novo* standard in reviewing this issue. *Brooks, Com'r. of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988).

[1] The referendum results, upon recount, were 5,000 votes in favor and 4,997 votes against liquor by the drink. The County Board determined in its findings, adopted by the State Board, that ten ineligible voters cast ballots in the referendum. Appellants argue that when the number of illegal votes in a referendum or election, in this case ten votes, exceeds the vote margin, in this case three votes, a new election is required. Appellants argue that the ten illegal votes constitute irregularities sufficient to alter the result of the referendum. They contend that, if the illegal votes *could* have altered the results of the referendum, a new election is required. In support of their argument, appellants assert that in this case there is no way to ascertain what the results of the referendum would have been absent the illegal votes, because five of the ten illegal voters refused to disclose their vote. Therefore, appellants argue, because there is no way to determine what the results of the referendum would have been absent the

irregularities, a new referendum should have been ordered by the State Board.

North Carolina law on this issue is well settled. An election or referendum result will not be disturbed for irregularities absent a showing that the irregularities are sufficient to alter the result. *Gardner v. Reidsville*, 269 N.C. 581, 585, 153 S.E.2d 139, 144 (1967); *In Re Clay County General Election*, 45 N.C. App. 556, 570, 264 S.E.2d 338, 346, *disc. review denied*, 299 N.C. 736, 267 S.E.2d 672 (1980). The burden of proof is upon the unsuccessful candidate or the opponents of a referendum to show that they *would* have been successful had the irregularities not occurred. *In Re Election of Commissioners*, 56 N.C. App. 187, 190, 287 S.E.2d 451, 454 (1982); *In Re Appeal of Harper*, 118 N.C. App. 698, 702, 456 S.E.2d 878, 880, *disc. review denied*, 340 N.C. 567, 460 S.E.2d 317 (1995). In this case, appellants have failed to meet their burden. There were 5,000 votes cast in favor of the referendum and 4,997 votes were cast against it. Three of the illegal voters said they had voted in favor of the referendum, two said they voted against it, and five declined to divulge their vote. In order to meet their burden of proof appellants must be able to show that the referendum would have failed if the voting irregularities had not occurred. Here, four out of the five illegal voters who refused to disclose their votes would have had to testify that they voted in favor of the referendum in order for appellants to prevail.

Appellants criticize this rule because it allows illegal voters to testify after an election providing the opportunity for fraud because " 'the corrupt voter might well identify the opposing candidate as his pick and, if believed, the victimized candidate would be victimized again—the illegal vote would be counted twice. For this reason, some commentators have argued that no voter should be allowed to testify about his vote.' " *In Re Appeal of Harper*, 118 N.C. App. at 702, 456 S.E.2d at 881 (quoting Gary R. Correll, *Elections—Election Contests in North Carolina*, 55 N.C.L. Rev. 1228, 1237 (1977) (citation omitted)). We are bound by the established case law of this state which requires the unsuccessful party show that the results of an election or referendum *would* have been different if the irregularities of which he complains had not occurred. In order to show that the illegal votes would have changed the result of the election, appellants in the instant case must show how four of the five remaining ineligible voters voted. Here, five of the ineligible voters refused to disclose their vote and appellants did not attempt to compel those voters to testify.

At this point, there is no way to determine whether, absent the ten illegal votes, the referendum would have failed.

The North Carolina Supreme Court has stated that:

> An honest elector who has observed the law enjoys the privilege, which is entirely a personal one, of refusing to disclose, even under oath as a witness, for whom he voted. . . . If an illegal voter can claim the privilege at all, it is because he finds shelter under the very different principle that he cannot be compelled to criminate himself.

Boyer v. Teague, 106 N.C. 576, 625, 11 S.E. 665, 679 (1890). In this case, all ten ineligible voters conceded that they voted illegally. However, appellants did not object to the five voters' failure to testify how they voted and did not attempt to compel such testimony. Thus, whether the five ineligible voters could have been compelled to reveal how they voted is not an issue before us. Appellants did not meet their burden under present law, therefore, this assignment of error is overruled.

[2] Appellants next assign as error the superior court's failure to overturn the State Board's decision on the ground that the State Board failed to consider evidence with regard to the other allegations of voting irregularities, including complaints regarding voting equipment and counting and recounting of votes. By failing to take evidence on these issues, the State Board based its decision upon improper procedure in violation of appellant's procedural due process rights. N.C. Gen. Stat. § 150B-51(b)(3). If petitioner argues that the agency's decision is in violation of a constitutional provision, *de novo* review by this Court is required. *Brooks*, 114 N.C. App. at 716, 443 S.E.2d at 92.

In its order, the State Board adopted the findings of the County Board, but failed to follow the County Board's recommended decision that a new referendum be conducted. The State Board did not request a supplement to the record, receive additional evidence, remand the matter to the County Board or hold its own hearing, with regard to the remaining complaints. In so doing, the State Board denied appellants the right to be heard on these issues and violated their right to procedural due process.

> " 'Due process' has a dual significance, as it pertains to procedure and substantive law. As to procedure it means 'notice and an opportunity to be heard and to defend in an orderly proceed-

> ing adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause.' 12 Am. Jur. 267, § 573; 16 C.J.S., Constitutional Law, § 569, p. 1156."

State v. Smith, 265 N.C. 173, 180, 143 S.E.2d 293, 299 (1965) (quoting *Skinner v. State*, 189 Okla. 235, 238, 115 P. 2d 123, 126, *reversed on other grounds*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655, conformed to 195 Okla. 106, 155 P. 2d 715.) In finding that irregularities with regard to the ineligible voters were sufficient to require a new election, the County Board did not hear testimony about the other irregularities and reserved comment on those issues. The County Board concluded that these issues were moot by virtue of the fact that it considered the voting of the 10 ineligible voters "sufficiently serious to cast doubt upon the result of the referendum" and recommended a new election be held. In addition the recommended decision of the County Board specifically ordered that no action be taken with regard to these complaints "pending final determination by the State Board on [the County Board's] determination and recommendation." Thus, appellants never had an opportunity to be heard with regard to these issues.

Appellees in this case argue that appellants should have appealed the County Board's failure to reach the other issues to the State Board. However, according to N.C. Admin. Code tit. 8, r. 2.0006 (a)(3) (November 1984), a county board of election decision may be appealed to the state board by a person participating in the hearing, who has been adversely affected by the county board's decision. In this case, a "decision" regarding the other irregularities had not been made by the County Board, and appellants were not "adversely affected" by the County Board's decision dealing with ineligible voters, as the Board recommended a new referendum. Appellants had no reason to appeal from the County Board's recommended decision because the result of that decision was favorable to them. When it denied a new referendum, the State Board should have either taken additional evidence, conducted its own hearing, or remanded the remaining issues to the County Board for further evidence and findings. The alleged irregularities relating to voting equipment, and counting and recounting of votes, which were not addressed by the Board, if proven, were sufficient to change the outcome of the referendum.

The State Board should have considered all alleged irregularities and their effect. This is the only manner in which a determination could be made that all alleged irregularities would or would not alter

the results of the referendum. Because appellants were denied a right to be heard on these issues, the State Board's decision was affected by error of law, and we must reverse and remand the case for hearings or further remand to the County Board on the remaining complaints of irregularities. The State Board may consider new evidence in accordance with the provisions of N.C. Admin. Code tit. 8, r. 2.0007 (a)(2-5) (November 1984).

[3] Appellants also assign as error the State Board's failure to state specific reasons why it did not adopt the County Board's recommended decision of a new referendum in accordance with N.C. Gen. Stat. § 150B-51(a). We note that the State Board of Elections is an independent state agency, N.C. Gen. Stat. § 163-28 (1991), and is therefore, subject to the Administrative Procedure Act, Chapter 150B. N.C. Gen. Stat. § 150B-51(a) provides in pertinent part:

> If the court determines that the agency did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the case to the agency to enter the specific reasons.

If, in the future, the State Board of Elections determines that it will not adopt the recommended decision of a County Board, it should include in its order specific reasons for such decision.

In sum, we conclude that in an action to invalidate an election or referendum, the burden of proof is upon the unsuccessful party to show that the outcome of the election or referendum would have been different absent irregularities in the voting process. We hold that in failing to reach other voting irregularity complaints made by appellants, the State Board of Elections denied appellants the right to be heard on these issues. The State Board should have taken evidence on those issues or remanded to the County Board and also should have stated specifically why it denied the County Board's recommended decision to conduct a new referendum. In failing to proceed as herein indicated, the State Board procedure encourages fragmentary appeals. Based upon the foregoing, we decline to address appellants' other assignments of error. We reverse the order of the trial court and remand for further proceedings in accordance with this opinion.

Reversed and remanded.

Judges JOHNSON and GREENE concur.

DAPHNE JOHNSON, PLAINTIFF-APPELLANT v. AMETHYST CORPORATION AND AMETHYST CHARLOTTE, INC., D/B/A AMETHYST HOSPITAL, AND JOHN JOSEPH BARTOLOTTA, DEFENDANT-APPELLEE

No. COA94-1334

(Filed 7 November 1995)

1. Attorneys at Law § 29 (NCI4th)— entry of default—motion to set aside by unauthorized attorney—error

In a medical malpractice action against a hospital and one of its employees, an attorney representing the hospital's insurer had no authority to move to set aside an entry of default against the employee where the employee was sued in his individual capacity; no contact had taken place between the attorney and the employee; counsel's motion was made without the employee's knowledge; and the employee thus did not consent to the attorney's representation of him.

Am Jur 2d, Attorneys at Law §§ 141-145.

2. Physicians, Surgeons, and Other Health Care Professionals § 127 (NCI4th)— sexual molestation of patient—sufficiency of evidence of medical malpractice

The trial court erred in dismissing plaintiff's claim of medical malpractice against the individual defendant where the evidence tended to show that defendant was a clinical assistant in the substance abuse hospital where plaintiff was a patient; defendant sexually molested plaintiff while she was lying in her hospital bed; a witness who was accepted as an expert in the field of clinical psychology testified that defendant's conduct violated the standard of care as it relates to clinical assistants in substance abuse hospitals in communities similar to Charlotte, North Carolina; and plaintiff suffered severe emotional distress as a result of defendant's sexual misconduct.

Am Jur 2d, Physicians, Surgeons and Other Healers §§ 357, 360.

Civil liability of doctor or psychologist for having sexual relationship with patient. 33 ALR3d 1393.

3. Physicians, Surgeons, and Other Health Care Professionals § 121 (NCI4th); Fraud, Deceit, and Misrepresentation § 38 (NCI4th)— representation in hospital brochure—no intent to deceive—insufficiency of evidence of fraud

The trial court did not err in refusing to submit plaintiff's claim for fraud against defendant substance abuse hospital to the jury where plaintiff claimed that the hospital's brochure falsely represented that the hospital "provides you with a very safe and secure facility. It is supervised at all times by reliable highly trained staff," while in fact she was sexually assaulted while a patient there, since the record was devoid of any evidence that the reference in the brochure to the hospital's safety was intended to deceive plaintiff.

Am Jur 2d, Fraud and Deceit §§ 477, 482; Physicians, Surgeons, and Other Healers § 158.

Medical malpractice: liability based on misrepresentation of the nature and hazards of treatment. 42 ALR4th 543.

Liability of hospital or clinic for sexual relationships with patients by staff physicians, psychologists, and other healers. 45 ALR4th 289.

4. Physicians, Surgeons, and Other Health Care Professionals § 110 (NCI4th)— medical malpractice—highly inappropriate closing argument—prejudicial error

In a medical malpractice claim arising from plaintiff's sexual molestation by defendant employee of defendant substance abuse hospital while plaintiff was a patient there, the closing argument of counsel for the individual defendant which referred to the sexual harassment allegations made by Anita Hill against Clarence Thomas, made allegations unsupported by the evidence in the record, and made disparaging remarks about a female judge's ability to be fair in sexual misconduct trials was so shockingly inappropriate and prejudicial as to entitled plaintiff to a new trial.

Am Jur 2d, Trial §§ 609, 648, 712.

5. Evidence and Witnesses §§ 192, 3052 (NCI4th)— plaintiff's prior drug use—evidence inadmissible

In a medical malpractice claim arising from plaintiff's sexual molestation by defendant employee of defendant substance

abuse hospital while plaintiff was a patient there, the trial court erred in allowing evidence of plaintiff's drug use twenty years prior to the cause of action, since defendants wanted to introduce the evidence "to develop the entire picture of a personality type" because it directly related to the issue of damages, but this reason was not one of the stated purposes allowing such evidence under North Carolina Rules of Evidence, Rule 404(b), and the evidence of prior drug use was irrelevant to plaintiff's credibility under Rule 608(b). N.C.G.S. § 8C-1, Rules 404(b), 608(b).

Am Jur 2d, Evidence §§ 371, 413, 559.

Appeal by plaintiff from judgments entered on 8 February 1994, and 15 February 1994, by Judge William Z. Wood, Jr. in Forsyth County Civil Superior Court. Heard in the Court of Appeals 1 September 1995.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harold L. Kennedy, III, Harvey L. Kennedy, Lauren M. Collins, and Annie Brown Kennedy, for plaintiff-appellant.

Kurdys & Lovejoy, P.A., by Jeffrey S. Bolster and Mark C. Kurdys, for defendant-appellee.

Golding, Meekins, Holden, Cosper & Stiles, by Harvey L. Cosper, Jr. and Betsy J. Jones, for defendant-appellant Amethyst Corporation and Amethyst Charlotte, Inc., d/b/a Amethyst Hospital.

WYNN, Judge.

Plaintiff, Daphne Johnson, appeals from the trial court's judgment in favor of defendants, Amethyst Corporation and Amethyst Charlotte, Inc., d/b/a Amethyst Hospital and John Joseph Bartolotta. We reverse and order a new trial.

In April 1991, Ms. Johnson was an in-patient at Amethyst Hospital, an alcohol and drug rehabilitation hospital that is owned and operated by defendants Amethyst Charlotte, Inc. and Amethyst Corporation (collectively referred to as "Amethyst"). During that time period, Mr. Bartolotta was employed by Amethyst as a clinical assistant.

On 8 April 1991, while Ms. Johnson was lying in her hospital bed, Mr. Bartolotta took her vital signs and allegedly molested her.

Inasmuch as the specific acts which form the basis of her allegation are not at issue, it is sufficient to indicate that the acts indicated in the record, if proved, would support her allegation.

On 19 April 1991, a counselor, Claire Parker, organized a meeting of all female patients at the hospital to inquire whether any female patients had been sexually assaulted at Amethyst. Four patients revealed that they had been sexually molested—all by Mr. Bartolotta. These allegations led to Mr. Bartolotta's plea of guilt and resulting convictions of assault on a female in each of the four cases.

On 8 June 1992, Ms. Johnson sued Mr. Bartolotta and Amethyst for medical malpractice, negligent misrepresentation, fraud, intentional infliction of mental and emotional distress, and negligent hiring and/or supervision of an employee.

When Mr. Bartolotta failed to file an Answer within the requisite time period, an entry of default was obtained from the Clerk of Superior Court of Forsyth County on 24 September 1992. However, when plaintiff moved for a Default Judgment, Attorney Mark C. Kurdys filed a motion to set aside the entry of default "in the absence and without the knowledge of John Joseph Bartolotta." On 12 October 1992, the plaintiff filed an objection to the appearance by Attorney Kurdys on behalf of Mr. Bartolotta without the knowledge of Mr. Bartolotta and in violation of Rule 5.6 of the N.C. Rules of Professional Conduct. On 2 November 1992, Judge Wood entered an Order setting aside the Entry of Default.

Following a jury verdict on 8 February 1994 in favor of defendants, plaintiff appealed.

I.

[1] The plaintiff first contends that the trial court erred by setting aside the Entry of Default. She argues that since Attorney Mark C. Kurdys had not established an attorney-client relationship with defendant Bartolotta, he had no authority to move to set aside default on behalf of Mr. Bartolotta. We agree.

No person has the right to appear as another's attorney without the authority to do so, granted by the party for which he is appearing. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319, 47 S.Ct. 361, 362, 71 L. Ed. 658 (1927). North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency. *See State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991). Two factors

are essential in establishing an agency relationship: (1) The agent must be authorized to act for the principal; and (2) The principal must exercise control over the agent. *Vaughn v. North Carolina Dep't of Human Resources*, 37 N.C. App. 86, 91, 245 S.E.2d 892, 895 (1978), *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1979).

The record on appeal indicates that Attorney Kurdys filed the Motion to Set Aside Default "in the absence and without the knowledge of John Joseph Bartolotta" and that he had been retained by insurer St. Paul Fire and Marine Insurance Company, Amethyst's insurance carrier, "to monitor the pending lawsuit with the understanding that defendant Bartolotta's whereabouts were unknown."

We find no merit in the contention that because counsel has been employed by St. Paul Fire and Marine Insurance Company, he therefore represents Mr. Bartolotta. Indeed, St. Paul Fire and Marine Insurance Company is not a party to this action. Mr. Bartolotta was sued in his individual capacity and did not consent to Attorney Kurdys' representation of him. The record indicates that no contact has taken place between Attorney Kurdys and Mr. Bartolotta, and thus, counsel's representation has been undertaken without Mr. Bartolotta's knowledge. As such, the two required factors—authority of the agent and control by the principal—cannot be shown to exist where no contact has been made whatsoever between Attorney Kurdys and Mr. Bartolotta.

We find that Attorney Kurdys had no authority to act on behalf of Mr. Bartolotta. It follows that the trial court erred by setting aside the entry of default based on the motion made by Attorney Kurdys.

II.

[2] The plaintiff also contends that the trial court committed prejudicial error by refusing to submit plaintiff's claim of medical malpractice against defendant Bartolotta. We agree.

Our Supreme Court has held that where a trial court refuses to instruct the jury with respect to an issue, its jury charge amounts to an implied directed verdict on that issue. *Akzona, Inc. v. Southern Ry. Co.*, 314 N.C. 488, 495, 334 S.E.2d 759, 763 (1985). In order to withstand a motion for a directed verdict, the evidence must be viewed in the light most favorable to the non-moving party. Additionally, the plaintiff must offer evidence of each of the following elements in her claim for relief: (1) The standard of care; (2) breach of the standard

of care; (3) proximate causation; and (4) damages. *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570 (1981).

Claims for medical malpractice in North Carolina are governed by N.C. Gen. Stat. § 90-21.12 (1993). N.C.G.S. § 90-21.12 provides that health care providers are held to the "standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." A cause of action for medical malpractice may be initiated based upon sexual advances made by a health care professional. *See MacClements v. Lafone*, 104 N.C. App. 179, 184, 408 S.E.2d 878, 880-81, *disc. rev. denied*, 412 S.E.2d 87 (1991); *Mazza v. Huffaker*, 61 N.C. App. 170, 178, 300 S.E.2d 833, 838, *disc. rev. denied*, 309 N.C. 192, 305 S.E.2d 734 (1983). As such, when a plaintiff alleges that he/she has been sexually assaulted by a health care professional, a cause of action may arise from the failure of a health care provider to meet the relevant standard of care.

The evidence when viewed in a light most favorable to the non-moving party indicates as follows: Dr. Jerry Noble, a clinical psychologist, was accepted as an expert in the field of clinical psychology without objection. Dr. Noble testified that the conduct of Mr. Bartolotta violated the standard of care as it relates to clinical assistants in substance abuse hospitals in communities similar to Charlotte, North Carolina. Dr. Noble further testified that Ms. Johnson suffered severe emotional distress as a result of Mr. Bartolotta's sexual misconduct.

We find that this evidence was sufficient to withstand a directed verdict. *See MacClements v. Lafone*, 104 N.C. App. at 184, 408 S.E.2d at 880-81. Accordingly, the trial court erred by dismissing plaintiff's claim of medical malpractice against defendant Bartolotta.

III.

[3] Plaintiff next argues that the trial court committed prejudicial error in refusing to submit plaintiff's claim for fraud against defendant Amethyst to the jury. We disagree.

To establish a *prima facie* fraud claim, the following elements must be present:

(1) False representation or concealment of a material fact,

(2) reasonably calculated to deceive,

(3) made with the intent to deceive,

(4) which does in fact deceive,

(5) resulting in damage to the injured party.

Carpenter v. Merrill Lynch, 108 N.C. App. 555, 558, 424 S.E.2d 178, 179 (1993).

In order to meet the first element, some type of representation must have been made. Plaintiff argues that the fraud issue should have been submitted to the jury because the hospital brochure falsely represented that, "Amethyst provides you with a very safe and secure facility. It is supervised at all times by reliable highly trained staff." We disagree.

The plaintiff must prove a misrepresentation of a material fact. *See Powell v. Wold*, 88 N.C. App. 61, 64, 362 S.E.2d 796, 797 (1987). One's opinion, and generally one's promise, are not material facts. *Myrtle Apt., Inc. v. Lumberman's Mut. Cas. Co.*, 258 N.C. 49, 52, 127 S.E.2d 759, 761 (1979). However, a promissory representation may be fraud if made with the intent to deceive. *See Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568-69, 374 S.E.2d 385, 392 (1988). In the case at hand, the record is devoid of any evidence that the reference in the brochure to Amethyst Hospital's safety was intended to deceive Ms. Johnson.

We therefore find no error with the trial court's refusal to submit a fraud issue as to defendant Amethyst.

IV.

[4] The plaintiff next argues that the closing argument of counsel for defendant Bartolotta contained highly inflammatory and prejudicial statements. We agree.

What is included in a closing argument must be supported by the evidence on the record. *See Waldron v. Waldron*, 156 U.S. 361, 379, 15 S.Ct. 383, 387, 39 L. Ed. 453 (1895); *Lamborn & Co. v. Hollingsworth*, 195 N.C. 350, 352, 142 S.E. 19, 21 (1928). Only the legitimate inferences that may be drawn from the evidence may be argued. *See, e.g., Wilson v. Commercial Finance Co.*, 239 N.C. 349, 359-60, 79 S.E.2d 908, 916 (1954). An attorney may not argue facts of his own knowledge, nor may he argue facts outside of the evidence. *Crutcher v. Noel*, 284 N.C. 568, 572, 201 S.E.2d 855, 857 (1974). Additionally, misstatements of the evidence on the record constitute reversible error. *See Berger v. United States*, 295 U.S. 78, 88-89, 55 S.Ct. 629, 633, 79 L. Ed. 1314 (1935).

In the instant case, Attorney Kurdys made the following statements during his closing argument:

> And about the same time in April of 1991 a law professor from Oklahoma State University accused a man who was nominated to be a Supreme Court Justice of the United States of sexual harassment and sexual impropriety. What was in it for her?
>
> . . .
>
> In a plea arrangement orchestrated by the attorneys for the four women who were making the charges . . . for the purpose of bringing legal claims within two days after they came forward with these allegations. How plausible is it that in response to these charges, descriptions of the conduct like Daphne Johnson has told you, that Judge Jane Harper—a female judge—would give John Bartolotta no active time if there was believable evidence that any of this were true?

Plaintiff's counsel objected to these statements, but his objections were overruled. We find these statements made during counsel's closing argument to be highly inflammatory, prejudicial, and not supported by the evidence.

First, counsel makes reference to the sexual harassment allegations made by Professor Anita Hill against then United States Supreme Court nominee Clarence Thomas by implying that Anita Hill had an ulterior motive in making her allegations. Whether she did or did not had no relevancy to the case at hand. The clear import of counsel's argument was to appeal to the passion and prejudice of the jurors that stem from that unrelated sexual harassment matter. We expressly reject the use of this type of inflammatory comparison which seeks only to incorporate and transfer the jurors' feelings from an unrelated matter to the case at hand. It is, in our opinion, prejudicially infirm to the sense of fairness and justice in our legal system.

Second, counsel's statement that the plea arrangement was "orchestrated by the attorneys for the four women who were making the charges," and that the women "had attorneys for the purpose of bringing legal claims within two days after they came forward with allegations," was unsupported by the evidence in the record. The record establishes only that after the women alleged that they were sexually molested, the four female patients at Amethyst Hospital talked with an attorney.

Finally and most egregious are counsel's disparaging statements that because District Court Judge Jane Harper is a female judge, she would not have accepted a plea bargain giving Bartolotta "no active time if there was believable evidence that any of the [allegations] were true." This argument is not only insulting to the judicial system as a whole, it further calls into question the fairness of female judges who preside over trials involving sexual misconduct. It is no more than a blatant attack on the integrity of judges who may share diverse qualities with a particular litigant. This court will neither condone nor permit practicing attorneys to take leave of their responsibilities to uphold the respectability of the judicial system. Finding counsel's argument to have been shockingly inappropriate, we conclude that plaintiff is entitled to a new trial free of these prejudicial statements by counsel in the closing argument.

V.

[5] The plaintiff's last contention is that the trial court erred in allowing the introduction of evidence of plaintiff's prior use of illegal drugs. She argues that such information was highly prejudicial to her and defendants proffered no permissible use of such information under N.C. Gen. Stat. § 8C-1, Rules 404 and 608(b) (1993). We agree.

The North Carolina Rules of Evidence forbid the use of specific instances of conduct for the purposes of proving the credibility of a witness or lack thereof. N.C.R. Evid. 608(b). Prior drug use is included among the types of conduct affected by this rule. *See State v. Clark*, 324 N.C. 146, 162, 377 S.E.2d 54, 64 (1989); *State v. Rowland*, 89 N.C. App. 372, 382, 366 S.E.2d 550, 555 (1988), *rev. dismissed*, 323 N.C. 619, 374 S.E.2d 116 (1988). Additionally, Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.R. Evid. 404.

The defendants argue that the purpose for which defendant intended the testimony concerning plaintiff's drug use twenty years prior to the cause of action was "to develop the entire picture of a personality type" because it directly related to the issue of damages. This reason is not one of the stated purposes allowing such evidence

under Rule 404(b). In addition, the evidence of prior drug use is irrelevant to plaintiff's credibility under 608(b). We, therefore, find that the evidence of prior drug use was erroneously allowed into evidence by the trial court.

For the foregoing reasons, we reverse the judgment of the trial court and order a new trial.

New trial.

Judges GREENE and MARTIN, John C. concur.

TIMOTHY S. PHILLIPS, Employee, Plaintiff-Appellant v. U.S. AIR, INCORPORATED, Employer, THE KEMPER GROUP, Carrier, Defendant-Appellees

No. COA94-1240

(Filed 7 November 1995)

1. **Workers' Compensation § 378 (NCI4th)— no improper standard of proof applied**

There was nothing in the record to suggest that the Industrial Commission applied an improper standard of proof to plaintiff's evidence in this worker's compensation action, and the Commission's rejection of certain evidence as not "convincing" and rejection of medical evidence as being insufficient "to any reasonable degree of medical certainty" did not suggest the use of an improper standard.

Am Jur 2d, Workers' Compensation §§ 566-580, 593, 594.

2. **Workers' Compensation § 187 (NCI4th)— salmonella from contaminated water in work place—insufficiency of evidence**

The evidence was insufficient to support a finding that plaintiff's salmonella infection was caused by contaminated water in the work place.

Am Jur 2d, Workers' Compensation §§ 322-325, 593, 594.

Judge WYNN dissenting.

Appeal by plaintiff from Opinion and Award for the Full Commission filed 7 July 1994. Heard in the Court of Appeals 30 August 1995.

C. Murphy Archibald for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Samuel H. Poole, Jr. and Nicholas P. Valaoras, for defendant-appellees.

GREENE, Judge.

Pursuant to N.C. Gen. Stat. § 97-86, Timothy S. Phillips (plaintiff) appeals from the Opinion and Award of the Industrial Commission (Commission) which denied plaintiff's claim for workers' compensation.

Plaintiff worked for U.S. Air from April 1986 until 30 June 1990. On 30 June, plaintiff left work for "a contemplated vacation," and on 3 July 1990 "developed the symptomatic onset of [a] . . . salmonella infection," which required his hospitalization. Plaintiff was later diagnosed with the chronic fatigue syndrome, which "continues to totally incapacitate him." Plaintiff gave notice of a claim for workers' compensation, pursuant to N.C. Gen. Stat. § 97-22, to U.S. Air, who in turn gave notice to its insurance carrier, The Kemper Group (Kemper) (collectively U.S. Air and Kemper are defendants), claiming that his salmonella infection was a result of plaintiff's drinking from a "thermos type" water cooler provided by U.S. Air on the work site and that his chronic fatigue syndrome was a result of the salmonella infection. Because defendants contested the compensability of plaintiff's claim, plaintiff requested a hearing pursuant to N.C. Gen. Stat. § 97-83.

The relevant evidence before the Commission consisted of testimony by Dr. Robert William Reindollar (Reindollar), plaintiff's treating physician, that plaintiff did not test positive for salmonella until 6 August 1990. Reindollar further testified a period of forty-eight hours would be an unusual incubation period for salmonella, which generally manifests itself within twenty-four hours, and he also stated that there are many causes of salmonella. Although Reindollar testified that he "would expect to have more than one person infected," there was no evidence that any other U.S. Air employees contracted salmonella. Indeed, Reindollar stated that he could not identify the cause of plaintiff's salmonella "with any reasonable degree of medical certainty." There were also two memos, issued to U.S. Air employees on

24 July 1990 and 6 August 1990, which directed the employees to stop putting their hands and other objects inside the coolers.

The Commission adopted the following pertinent findings of fact:

> 4. . . . Approximately 150 employees on each of the two shifts drank from the water coolers at the 10 locations in the premises' five zones.
>
> In obtaining water or ice from those coolers, these same employees would occasionally stick their hands or cups or even handkerchiefs down in the coolers themselves. As a result of these practices, the coolers did provide a possible source point for the salmonella infection giving rise to the instant claim.
>
> . . . .
>
> 6. Salmonella is a bacterial infection that is most commonly seen in fowl and most commonly transmitted by ingestion of uncooked poultry, including eggs. However, it can also be transmitted the fecal-oral route through contaminated food or water. Ordinarily, in a case where there is a potential single point source of salmonella infection [as is, or are alleged to be the Gott cooler(s) from which plaintiff drank] plaintiff's case of salmonella infection should not have been the only one in view of the fact that there were some 150 employees each shift in the airport's five zones drinking from these same Gott water coolers. However, there is no convincing evidence that anyone else on the premises also developed a salmonella infection from drinking from the same cooler(s).
>
> 7. Although, as indicated by [U.S. Air's] aforementioned answers to plaintiff's interrogatories, two other employees, . . . had stomach problems from apparent stomach viruses (resulting in the first being out of work for three days and the second for four) not only is there no convincing evidence that their involved stomach problems were due to a salmonella infection—much less any medical evidence as to the exact nature and cause of either's stomach problems; but there is no convincing evidence that either drank from the same Gott cooler(s) that plaintiff did—much less that they worked in the same zone as plaintiff or even when and where either worked at the airport.
>
> 8. There is no sufficient convincing medical evidence to any reasonable degree of medical certainty that plaintiff developed

his salmonella infection from drinking contaminated water at work as opposed to the same being from eating uncooked chicken or some other contaminated food or water source. Further there is no convincing evidence that the Gott cooler(s) from which he drank contained water contaminated with salmonella bacteria, and that causational factor cannot be reasonably inferred in view of the lack of convincing evidence that anyone else drinking from the same cooler(s) developed a salmonella infection. Thus, plaintiff has failed in his burden of establishing that he developed a salmonella infection from drinking contaminated water at work.

9. . . . The exact cause of . . . [chronic fatigue syndrome] remains unknown as does its manner of transmission.

Even assuming arguendo that plaintiff developed the involved salmonella infection from drinking contaminated water at work under the circumstances alleged; there is no convincing medical evidence to any reasonable degree of medical certainty that his salmonella infection triggered or otherwise caused him to develop disabling chronic fatigue syndrome . . . .

The issues are (I) whether the Commission held the plaintiff to a higher degree of proof than required by the law, and if not, (II) whether there is sufficient competent evidence in the record to support the findings of the Commission.

The defendants first contend that the plaintiff's chronic fatigue syndrome is not a compensable "injury" or "occupational disease," within the meaning of the Workers' Compensation Act (the Act) and that the Commission's Opinion and Award must be affirmed on this basis. Without deciding this issue, we assume for the purpose of this opinion that plaintiff's condition is compensable within the meaning of the Act.

I

[1] The plaintiff argues that the Commission, in assessing the evidence offered, held him to a "higher standard of proof" than required by the Act. More specifically, the plaintiff contends the Commission held him "to a standard of beyond a reasonable doubt or at least clear and convincing evidence." We disagree.

The degree of proof required of a party plaintiff under the Act is the "greater weight" of the evidence or "preponderance" of the evi-

dence. *See* 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 41 (4th ed. 1993) (hereinafter *Brandis and Broun*). In this record there is nothing to suggest that the Commission applied an improper test to assess the plaintiff's evidence. Although the Commission did on several occasions reject certain evidence as not "convincing," we do not read this as suggesting that the Commission applied a clear and convincing evidence standard. Indeed the Commission is required to evaluate the credibility of the evidence and reject any evidence it finds as not convincing. *Fowler v. B.E. & K. Constr., Inc.*, 92 N.C. App. 237, 239, 373 S.E.2d 878, 879 (1988).

Furthermore, the Commission's rejection of the medical evidence as being insufficient "to any reasonable degree of medical certainty" does not suggest the use of an improper standard. Indeed, in order to be sufficient to support a finding that a stated cause produced a stated result, evidence on causation "must indicate a reasonable scientific probability that the stated cause produced the stated result." *Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990). Evidence is insufficient on causation if it "raises a mere conjecture, surmise, and speculation." *Id.* Thus the Commission merely found as a fact that the medical evidence was insufficient to support a finding that plaintiff "developed a salmonella infection from drinking contaminated water at work." It was insufficient, in the words of the Commission, because it was not based on a "reasonable degree of medical certainty." In other words, the Commission simply determined that the evidence raised no more than a possibility that the infection came from the drinking water and it had every right, and indeed the obligation, to refuse to consider that evidence as sufficient to support an award.

II

[2] The plaintiff argues that even if the Commission used the proper degree of proof, the evidence supports a finding that plaintiff's salmonella infection was caused by contaminated water in the work place. We disagree.

Although there may be evidence in this record which supports the findings urged by the plaintiff, this Court is bound to affirm if there is sufficient competent evidence that supports the finding entered by the Commission. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993). The evidence is sufficient if it is such that a reasonable mind might accept it as adequate to support

the finding. 3 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 80.10(c) (1995); *Garrett 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); *Brandis and Brown* § 39.

The evidence in this record reveals that plaintiff was last at work on 30 June 1990 and became ill on 3 July, more than forty-eight hours, which is longer than the usual incubation period for salmonella, after he would have last been exposed to any contaminated water. There was no evidence that the water was contaminated. There was evidence that two other employees became ill, but there was not evidence that their illness was salmonella or resulted from the same water from which plaintiff would have been drinking. This evidence supports the Commission's findings at issue.

Affirmed.

Judge MARTIN, John C., concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

In this appeal, plaintiff contends that the Commission erred by requiring him to prove causation to a "reasonable degree of medical certainty," rather than the applicable preponderance of the evidence standard. I agree with the plaintiff's contention and therefore, dissent from the contrary holding of the majority.

In denying the plaintiff's claim, the Deputy Commissioner made and the full Commission adopted the following pertinent findings of fact and conclusions of law:

> 4. In obtaining water or ice from those coolers, these same employees would occasionally stick their hands or cups or even handkerchiefs down in the coolers themselves. As a result of these practices, the coolers did provide a possible source point for the salmonella infection giving rise to the instant claim.
>
> . . . .
>
> 8. There is no sufficient convincing medical evidence *to any reasonable degree of medical certainty* that plaintiff developed his salmonella infection from drinking contaminated water at work as opposed to the same being from eating uncooked chicken or

> some other contaminated food or water source (emphasis supplied). . . . Thus, plaintiff has failed in his burden of establishing that he developed a salmonella infection from drinking contaminated water at work.
>
> 9. Plaintiff further contends that as a result of his salmonella infection he developed the chronic fatigue syndrome that continues to totally incapacitate him . . . . The exact cause of the same disease remains unknown as does its manner of transmission.
>
> Even assuming *arguendo* that plaintiff developed the involved salmonella infection from drinking contaminated water at work under the circumstances alleged; there is *no convincing medical evidence to any reasonable degree of medical certainty* that his salmonella infection triggered or otherwise caused him to develop disabling chronic fatigue syndrome, whose exact cause and manner of transmission has not yet been scientifically established (emphasis supplied). The point is moot, however, in the case at hand due to the initial lack of causation for the salmonella infection.

The above emphasized findings are more aptly characterized as conclusions of law. This Court is not bound by a conclusion of law by the Commission simply because it is labeled a finding of fact. Rather, if a conclusion of law, or a mixed finding of fact and law is erroneously labeled a finding of fact, that finding is not binding upon this Court. *Cody v. Snider Lumber Co.*, 96 N.C. App. 293, 295, 385 S.E.2d 515, 517 (1989), *rev'd on other grounds*, 328 N.C. 67, 399 S.E.2d 104 (1991). Thus, this Court may examine on appeal a legal standard which is applied by the Commission to determine whether it was applied correctly, even though the legal standard is included in the section of the Commission's order labeled Findings of Fact. When the Commission applies an incorrect standard of law, the award must be set aside and the case remanded for a new determination using the correct legal standard. *Ballenger v. ITT Grinnell Industrial Piping, Inc.*, 320 N.C. 155, 357 S.E.2d 683, (1987); *Cauble v. Macke Co.*, 78 N.C. App. 793, 338 S.E.2d 320 (1986).

The Commission's finding of fact number 8 states: "There is *no sufficient convincing medical evidence to any reasonable degree of medical certainty* that plaintiff developed his salmonella infection from drinking contaminated water at work." (emphasis supplied). Finding of fact number 9 states: "[T]here is *no convincing medical evidence to any reasonable degree of medical certainty* that his sal-

monella infection triggered or otherwise caused him to develop disabling chronic fatigue syndrome." (emphasis supplied). These statements indicate that the Commission held the plaintiff to a standard of medical certainty for determining causation rather than the correct standard, which is a preponderance of the evidence. This was error. *Ballenger*, 320 N.C. at 158-159, 357 S.E.2d at 685. (The full Commission must make a complete redetermination as to whether the plaintiff has shown by a preponderance of the evidence that there was a causal link between the workplace accident and the disability/disease for which the plaintiff seeks compensation).

I find language from *Keel v. H & V Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992) instructive:

> Circumstantial evidence of the causal connection between the occupation and the disease is sufficient. . . . Medical opinions given may be based either on personal knowledge or observation or on information supplied [to the expert] by others, including the patient . . . . (citations omitted). Absolute medical certainty is not required.

Id. at 540, 421 S.E.2d at 366. Thus, causation need not be proven to a medical certainty in order for a plaintiff to recover in a workers' compensation case. Instead, the determination by the Commission is a preponderance of the evidence, i.e., whether it is more likely than not that the plaintiff did in fact contract the disease at work.

Accordingly, I would remand to the Commission for a determination as to whether plaintiff has met his burden of proving, by a preponderance of the evidence, a causal link between the water coolers and his contraction of salmonella, and if so whether plaintiff has met his burden of proving, by a preponderance of the evidence, a causal link between the salmonella infection and plaintiff's current chronic fatigue syndrome.

STATE OF NORTH CAROLINA v. WILLIE ROBERT BONDS, DEFENDANT

No. COA94-1397

(Filed 7 November 1995)

Narcotics, Controlled Substances, and Paraphernalia § 42 (NCI4th)— cash taken from defendant's residence—cash seized as evidence—no forfeiture case

The district attorney's failure to designate cash taken from a criminal defendant's home as needed evidence or to act in any way to deny release of the proceeds established conclusively that the district attorney permitted release of the proceeds to the Department of Revenue for payment of a controlled substance tax assessment under N.C.G.S. § 15-11.1(a) and that this was not a forfeiture case; therefore, the trial court was without authority to compel the Department of Revenue to remit these funds back to the sheriff's department.

Am Jur 2d, Drugs and Controlled Substances §§ 206, 212.

Judge EAGLES dissenting.

Appeal by the State of North Carolina from order entered 6 July 1994 by Judge G.K. Butterfield in Wayne County Superior Court. Heard in the Court of Appeals 27 September 1995.

Michael F. Easley, Attorney General, by Christopher E. Allen, Assistant Attorney General, for appellant North Carolina Department of Revenue.

Warren, Kerr, Walston, Hollowell and Taylor, by Richard J. Archie, for Wayne County Board of Education.

WYNN, Judge.

Plaintiff appeals an order by the trial court compelling the Department of Revenue to remit $1,646.60 that it previously garnished from the Wayne County Sheriff's Department. We reverse.

On 8 January 1993, law enforcement officers of the Wayne County Sheriff's Department arrested defendant Willie Ray Bonds for possession of crack cocaine. At the time of his arrest, the defendant was also in possession of $2,715.00 located in his residence. This currency

was seized by law enforcement as potential evidence, but defendant stated that it was money he had saved to repair two vehicles which were in the shop at the time. A Form BD-4 Report of Arrest and/or Seizure Involving Nontaxed (Unstamped) Controlled Substances was prepared by the Wayne County Sheriff's Department the day of the arrest and sent to the State Bureau of Investigation, who, pursuant to N.C. Gen. Stat. § 114-18.1 (1994), forwarded the report to the Department of Revenue.

A Notice of Controlled Substance Tax Assessment in the amount of $1,646.60 was issued by the Secretary of Revenue on 20 October 1993 to defendant and mailed to the last known address of the taxpayer pursuant to N.C. Gen. Stat. § 105-241.1 (1992). On that same date, Glenn Odom served a notice of garnishment issued by the Secretary of Revenue pursuant to N.C. Gen. Stat. § 105-242(b) (1992) upon the Wayne County Sheriff's Department who complied with the garnishment by remitting to the Department of Revenue $1,646.60, representing payment in full of the assessed tax, penalty, and interest. The taxpayer neither objected to the assessment nor demanded a refund of taxes paid.

On 31 May 1994, Mr. Bonds pled guilty to possession of cocaine and was sentenced to an active term of two years. The trial court further ordered that the $2,715.00 seized at the time of the arrest be forfeited to the Wayne County School fund. That same day, the trial court ordered that the Department of Revenue be made a party to the criminal action pursuant to N.C. Gen. Stat. § 15-11.1 (1983) and to show cause why the funds collected by the Department should not be ordered returned to the Wayne County Sheriff's Department. On 15 June 1994, notice of a hearing was issued to Janice H. Faulkner, Secretary of Revenue, and Glenn Odom, Revenue Enforcement Officer.

At the hearing on 6 July 1994, the trial court concluded that it had jurisdiction over the parties in the cause and that the currency seized by law enforcement officers from Mr. Bonds was defendant's property and was taken as potential evidence in the criminal prosecution. The court also concluded that as potential evidence, it was not subject to garnishment by the Department of Revenue for the controlled substance tax. The court then ordered that the Department of Revenue "remit the seized currency in the amount of $1,646.60 back to the Wayne County Sheriff's Department who shall then pay the same to the Clerk of Superior Court who shall then pay over the same

to the Finance Officer for Wayne County who shall then disburse the same to the local school administrative unit[s] in Wayne County entitled thereto." From this order, the Department of Revenue filed notice of appeal.

We note initially that the case *sub judice* is not a forfeiture case. There are several methods in which law enforcement officers can lawfully seize personal property, including currency. One such method is pursuant to the controlled substances forfeiture statute which provides in pertinent part:

> The following shall be subject to forfeiture: . . . [a]ll money, raw material, products, and equipment of any kind which are acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of this Article.

N.C. Gen. Stat. § 90-112(a)(1)(2) (1993). Such property must be held for safekeeping "until an order of disposition is properly entered by the judge." N.C.G.S. § 90-112(c).

Law enforcement officers may also, incident to a valid arrest, seize any property which the arrested person has on him which is potential evidence of a crime. *State v. Harris*, 279 N.C. 307, 310, 182 S.E.2d 364, 367 (1971). N.C.G.S. § 15-11.1 (1983) provides the following:

> If a law enforcement officer seizes the property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced and may be used as evidence in any trial.

Notwithstanding this general restriction, N.C.G.S. § 15-11.1(a) specifically authorizes the district attorney "upon his own determination, . . . [to] release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership."

We find N.C.G.S. § 15-11.1(a) to be dispositive. The trial court found that law enforcement seized the currency as potential evidence, rather than property subject to forfeiture pursuant to N.C.G.S. § 90-112(a)(2). Therefore, once the district attorney determined

under N.C.G.S. § 15-11.1(a) that the potential evidence was not needed at trial, he had complete control to release the property to the lawful owner or to another entitled to possession without a court order.

In this matter, the district attorney did not contest, either at the trial level or before this court, the seizure of the proceeds by the Department of Revenue. The district attorney's failure to designate the property as needed evidence or act in any way to deny release of the proceeds, establishes conclusively that the district attorney permitted release of the proceeds to the Department of Revenue under N.C.G.S. § 15-11.1(a). Therefore, the trial court was without authority to compel the Department to remit these funds. We also note that the taxpayer neither objected to the assessment nor demanded refund of the taxes paid. In fact, neither the defendant nor the school board contends before this court that they are entitled to the proceeds.

For the foregoing reasons, we reverse the trial court's order. Because we find the district attorney's release of the proceeds under N.C.G.S. § 15-11.1(a) to be controlling, we do not address the State's remaining arguments.

Judge JOHNSON concurs.

Judge EAGLES dissents with separate opinion.

Judge EAGLES dissenting.

The majority opinion states that this is not a forfeiture case. I disagree and respectfully dissent.

Article IX, section 7 of the North Carolina Constitution provides that:

> All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. Art. IX, § 7. Our Supreme Court has recognized the mandatory nature of this provision, holding that when penalties or fines are recovered by a public authority "the disposition of such recovered fines or penalties comes within the constitutional provi-

sion under consideration, and [the funds] may not be turned awry from the prescribed constitutional course." *Shore v. Edmisten, Atty. General*, 290 N.C. 628, 636, 227 S.E.2d 553, 560 (1976) (quoting *State ex rel. Rodes v. Warner*, 197 Mo. 650, 664, 94 S.W. 962, 966 (1906)). The same analysis must apply to monies collected by way of forfeiture. Accordingly, funds collected by way of forfeiture may "not be diverted awry from the prescribed constitutional course." *Id.*

The question then is whether the Department of Revenue ("DOR") or the District Attorney in this case may, by action or omission to act, defeat the mandate of Article IX, section 7. The majority opinion focuses on the fact that the money in question in this case was initially seized as evidence. Characterizing the money as potential evidence only, the majority asserts that G.S. 15-11.1(a) is dispositive in that it specifically authorizes the District Attorney to "release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership." G.S. 15-11.1(a) (1994). Following the majority's view, the District Attorney, in heeding the DOR's demand, could almost always circumvent forfeiture and effectively allocate the funds other than to the county school fund as is required by Article IX, section 7.

The majority's holding impermissibly elevates G.S. 15-11.1 (dealing with seizure and disposition of evidence generally) to a status greater than G.S. 90-112 which focuses on drug-related forfeitures. Under the majority opinion, when money or property is initially seized as evidence, the forfeiture provision could be utilized only in situations in which the District Attorney retains control of the money as evidence until judgment is entered by the court. This interpretation would artificially limit the application of Article IX, section 7 and of G.S. 90-112 to evidence that was actually necessary for trial and actually held by the District Attorney until judgement: Any monies not held as evidence for trial could be garnished by the DOR or released pursuant to G.S. 15-11.1 upon application of any party "entitled to possession." While I do not dispute that the DOR properly assessed the tax in this case and was accordingly entitled, as against defendant, to possession of the seized funds, I do not believe that the assessment and possession by the DOR ends the inquiry with regard to forfeiture and ultimate disposition of the seized funds.

Rather, I believe that the DOR properly can be characterized in this case as a "law-enforcement agency having custody of money . . . ."

G.S. 90-112(d1) (1989). As such, the DOR would lawfully retain custody of the seized funds pending the ultimate disposition of the case as to forfeiture or pending the outcome of any challenge by defendant to the DOR's assessment.

The majority here would allow the DOR to retain the seized funds, despite their being subject to court-ordered forfeiture and ultimately forfeited, because the funds were initially seized as evidence. Presumably, the majority might hold differently if the funds were seized initially pursuant to the forfeiture statute itself. I find this distinction untenable. The initial seizure is most often made by law enforcement officers in the field. Law enforcement officers should be concerned primarily with collecting and safeguarding all necessary evidence, rather than making on-site legal determinations as to whether particular property or money is subject to forfeiture pursuant to G.S. 90-112, as well subject to seizure as evidence of a crime. A constitutional mandate should not be defeated by virtue of a technical characterization made by the seizing officer or by the District Attorney.

The only characterization that is pertinent is whether, having satisfied the requirements of G.S. 90-112(a), the funds "shall be subject to forfeiture . . . ." G.S. 90-112(a) (1989). It is irrelevant under which authority the law enforcement officer initially seized the money. G.S. 90-112(b) merely provides additional authority to seize money or property subject to forfeiture that might not otherwise be subject to seizure under other statutes. The language of G.S. 90-112 clearly does not contemplate that the statute's application would be limited to situations where the initial seizure was made pursuant to G.S. 90-112(b). In fact, G.S. 90-112(c) specifically covers "property taken *or detained* under this section . . . ." G.S. 90-112(c) (1989) (emphasis added). The "or detained" language would not be necessary if the General Assembly had not intended G.S. 90-112 to apply to money or property initially seized under other authority but later recognized to fall within the purview of G.S. 90-112(a).

If the funds in question are found to be within the purview of G.S. 90-112(a) and are accordingly ordered forfeited, then G.S. 90-112(d1) and Article IX, section 7 of the Constitution are controlling. G.S. 90-112(d1) states that "the law-enforcement agency having custody of money that is forfeited pursuant to this section shall pay it to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of the county in which the money was

seized." G.S. 90-112(d1) (1989). This language when read in light of the constitutional mandate is controlling. These funds "may not be turned awry from the prescribed constitutional course." *Shore*, 290 N.C. at 636, 227 S.E.2d at 560 (1976) (quoting *State ex rel. Rodes v. Warner*, 197 Mo. 650, 664, 94 S.W. 962, 966 (1906)).

CHARLOTTE HOUSING AUTHORITY, PLAINTIFF v. ROXIEANNE PATTERSON, DEFENDANT

No. 9326DC1269

(Filed 7 November 1995)

Housing, and Housing Authorities and Projects § 23 (NCI4th)— public tenant—shooting by son—no personal fault of tenant—eviction improper

Under 42 U.S.C. § 1437d(1)(5), good cause for eviction does not exist when a public housing tenant is not personally at fault for a breach of the criminal activity termination provision of a public housing lease by a member of the tenant's household. Where the trial court found that defendant had no knowledge of a shooting by her son until after it occurred, that the gun used in the shooting was not kept in defendant's home and did not belong to anyone in her household, that defendant had no reason to know that her son might commit such an act, and that plaintiff itself investigated defendant's son's suitability before consenting to add him back to defendant's lease, then defendant was not personally at fault in the shooting, and her eviction based on the shooting would not be authorized by statute.

Am Jur 2d, Housing Laws and Urban Redevelopment §§ 33, 34.

Appeal by plaintiff from judgment entered 14 September 1993 by Judge Philip F. Howerton, Jr., in Mecklenberg County District Court. Heard in the Court of Appeals 26 September 1994.

This case arises from a summary ejectment action filed by plaintiff, Charlotte Housing Authority ("CHA"), against defendant, Roxieanne Patterson, who is a long-time resident of Fairview Homes, a public housing development managed by plaintiff. On 12 May 1992, defendant was notified that her lease was being terminated for breach of certain of its provisions. As required by the United States Housing

Act of 1937, 42 U.S.C. § 1437 *et seq.*, defendant's lease contained the following provisions:

> [16]F. I, all members of my household, our guests or visitors, and other persons under control of household members . . . shall not engage in criminal activity . . . including . . . firing a weapon . . . on CHA property . . ., and such activity shall be cause for termination of this lease.
>
> * * *
>
> [16]G. I, all members of my household, our guests or visitors, and other persons under control of household members . . . while on any CHA property, shall not without justification or recklessly or negligently: carry on or about their person a deadly weapon; shoot, fire, explode, throw or otherwise discharge a deadly weapon . . . or inflict injury to any person or damage to any property through use of a deadly weapon. A deadly weapon means any . . . gun . . . .
>
> * * *
>
> [20]B. The CHA can end my lease only for good cause (reason). Good cause can mean different things. It means breaking the rules of the lease . . . . The CHA may also evict me if I, members of my household, our guests or visitors, and other persons under our control . . . disturb, threaten, or cause harm to other residents . . . I also understand that if I, members of my household, our guests or visitors, and other persons under our control, engage in criminal activity . . . on or near CHA property, the CHA may end my lease.

As grounds for termination, plaintiff cited the following occurrences: (1) In July 1988, defendant's son, Anthony Givens, was arrested for larceny of an auto; (2) In March 1990, Anthony was arrested for breaking and entering and possession of stolen goods; (3) In May 1990, defendant's son, Jonathan Givens, was arrested for communicating threats; (4) In May 1991, Anthony was arrested for giving fictitious information to a police officer and having no operator's license; and (5) On 23 April 1992, Jonathan was charged with the murder of George Forte, assault with a deadly weapon on Barbara Forte, discharging a firearm into an occupied dwelling, and possession of a deadly weapon on plaintiff's property. At the time of termination, the lease listed defendant, defendant's two daughters, ages 16 and 18 at the time of trial, and defendant's son Jonathan, age 19 at the time of

trial, as members of defendant's household. Jonathan had been taken off the lease in 1988 and resided in group homes and with an aunt for a period of time. Plaintiff consented to add Jonathan back to the lease in August 1991 following an investigation of his suitability. Defendant had removed Anthony's name from her lease in 1989.

After defendant did not vacate the premises as demanded by plaintiff, plaintiff filed this summary ejectment action in small claims court alleging that defendant had refused to surrender the premises and was a hold over tenant, and that plaintiff was entitled to immediate possession. The magistrate dismissed the action. Plaintiff appealed to the District Court where, at trial, plaintiff's counsel conceded that termination of defendant's lease was based solely on Jonathan's actions on 23 April 1992. Plaintiff included the other allegations in the notice of termination and subsequent complaint in summary ejectment for the sole purpose of showing a history of misconduct, warnings, and counseling in anticipation of defendant's claim of a so-called "personal fault" defense.

The court heard testimony from defendant and three witnesses for plaintiff primarily concerning the shooting by Jonathan, his status as a member of defendant's household, certain provisions of defendant's lease with plaintiff, and prior communications between plaintiff and defendant relating to the behavior of defendant's sons and her duties pursuant to the lease. Plaintiff also introduced documentary evidence including the lease between plaintiff and defendant, the letter purporting to terminate defendant's lease, and a document noting a conference agreement between plaintiff and defendant. At the close of plaintiff's evidence, defendant moved to dismiss the complaint under Rule 41(b) of the N.C. Rules of Civil Procedure.

The trial court found as fact that defendant had no knowledge of the shooting until after the incident occurred. The trial court further found that the gun used in the shooting was not kept in defendant's home, did not belong to anyone in her household, that defendant had no reason to know that her son might commit such a violent act, and that defendant was not personally at fault for the shooting by her son. The trial court then ruled that under 42 U.S.C. § 1437 *et seq.* a public housing tenant may not be evicted and thereby deprived of her housing entitlement when she is not personally at fault for a breach of the lease by a member of her household. The trial court found that holding defendant strictly liable for unforeseeable criminal acts committed by her son outside her presence is contrary to the federal act. As

a result, the trial court held there was not good cause to terminate the lease, and granted defendant's motion to dismiss the complaint with prejudice. Plaintiff appeals.

Robinson, Bradshaw & Hinson, P.A., by Robert C. Sink and Edward F. Hennessey, IV, for plaintiff-appellant.

Legal Services of Southern Piedmont, Inc., by Theodore O. Fillette, III, Linda S. Johnson, and Cindy M. Patton, for defendant-appellee.

Constance A. Wynn for Department of Housing and Urban Development, amicus curiae.

MARTIN, John C., Judge.

The sole issue in this case is whether the trial court was correct in concluding that under 42 U.S.C. § 1437d(1)(5) a public housing tenant may not be evicted when she was not personally at fault for a breach of the lease by a member of her household. For reasons stated below, we affirm the decision of the trial court.

North Carolina law requires eviction of residential tenants to be accomplished through court action. N.C. Gen. Stat. § 42-25.6 (1994). In federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible. *Apartments, Inc. v. Williams*, 43 N.C. App. 648, 260 S.E.2d 146 (1979), *disc. review denied*, 299 N.C. 328, 265 S.E.2d 395 (1980).

The lease provisions at issue in this case were adopted pursuant to the United States Housing Act, 42 U.S.C. § 1437 *et seq.*, as amended by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, and the 1990 Cranston-Gonzalez Affordable Housing Act, Pub. L. 101-625. The statute requires that:

> Each public housing agency shall utilize leases which—
>
> * * *
>
> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .

42 U.S.C. § 1437d(1)(5).

The United States Supreme Court has stated "that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 64 L.Ed.2d 766, 772 (1980). Even if "the plain language of [the] statute appears to settle the question," a Court still looks "to the legislative history to determine . . . whether there is 'clearly expressed legislative intention' contrary to [the statutory] language which would require [the Court] to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12, 94 L.Ed.2d 434, 448 n.12 (1987).

Similarly, this Court has stated:

> When the language of a statute is clear and without ambiguity, "there is no room for judicial construction" and the statute must be given effect in accordance with its plain and definite meaning. When a literal interpretation of the statutory language yields absurd results, however, or contravenes clearly expressed legislative intent, "the reason and purpose of the law shall control and the strict letter thereof shall be disregarded."

Avco Financial Services v. Isbell, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 179-80, 261 S.E.2d 849, 853 (1980)). *See also Buck v. Guaranty Co.*, 265 N.C. 285, 290, 144 S.E.2d 34, 37 (1965) ("The 'primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and carry such intention into effect to the fullest degree.' ") (citation omitted).

In its report accompanying the Cranston-Gonzalez National Affordable Housing Act, the 1990 amendment to 42 U.S.C. § 1437d(1)(5), the congressional committee stated:

> The Committee bill would amend a provision of the U.S. Housing Act that was added by the Anti-Drug Abuse Act of 1988. This provision makes criminal activity grounds for eviction of public housing tenants *if that action is appropriate in light of all the facts and circumstances.* This language was limited to criminal activity on or near the public housing premises.
>
> This Section would make it clear that criminal activity, including drug related criminal activity, can be cause for eviction

> only if it adversely affects the health, safety, and quiet enjoyment of the premises. The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. *For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.*

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941 (emphasis added). The 1990 amendments also addressed criminal activity as cause for termination of a tenant's Section 8 assistance (a federal subsidy provided to tenants in private housing). 42 U.S.C. § 1437f(d)(1)(B)(iii) (Supp. 1993). The committee report similarly provided:

> Termination of tenancy.—The bill includes language to permit evictions from Section 8 Existing Housing for criminal activity, including drug related criminal activity. It is based on a similar provision contained in the Anti-Drug Abuse Act of 1988 governing public housing leases . . . . The Committee assumes that *if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exit* [sic].

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5889 (emphasis added).

With no mention of personal fault, the statute and lease at issue in this case provide that criminal activity by a member of a tenant's household is cause for ending a tenancy. However, as noted above, the legislative history reveals a clearly expressed legislative intent that eviction is appropriate only if the tenant is personally at fault for a breach of the lease, i.e., if the tenant had knowledge of the criminal activities, or if the tenant had taken no reasonable steps under the circumstances to prevent the activity. This intent is controlling. *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 312 S.E.2d 707 (1984). The legislative history makes clear that Congress did not intend the statute to impose a type of strict liability whereby the tenant is responsible for all criminal acts regardless of her knowledge or ability to control them. Accordingly, we hold that under 42 U.S.C. § 1437d(1)(5) good cause for eviction does not exist when a public housing tenant is not personally at fault for a breach of the criminal

activity termination provision of a public housing lease by a member of the tenant's household.

The decision of the North Carolina Supreme Court in *Maxton Housing Authority v. McLean*, 313 N.C. 277, 328 S.E.2d 290 (1985) supports our decision here. In *Maxton*, the Supreme Court held there was no "good cause" for terminating a public housing tenant's lease because the tenant was not personally at fault for the nonpayment of rent. The Court stated: "[t]here is no causal nexus between the eviction of [tenant] and her own conduct. . . . To eject [tenant] and her two children from their humble abode upon this evidence would indeed shock one's sense of fairness." *Id.* at 283, 328 S.E.2d at 294. Since the *Maxton* decision, the North Carolina Legislature has restricted the effect of *Maxton*, but not as it pertains to this case. The legislature limited the effect of *Maxton* only in cases of failure to make payments due under a rental agreement. Act of July 12, 1985, ch. 741, § 2, 1985 N.C. Sess. Laws 983, 984 (codified at N.C. Gen. Stat. § 157-29 (Supp. 1985)). Otherwise, the General Assembly affirmatively stated: "fault on the part of the tenant may be considered in determining whether good cause exists to terminate a rental agreement." *Id.*

The trial court found as fact that defendant had no knowledge of the shooting until after it occurred. The trial court further found that the gun used in the shooting was not kept in defendant's home, did not belong to anyone in her household, and that defendant had no reason to know that her son might commit such an act. In addition, the trial court found that CHA itself investigated Jonathan's suitability before consenting to add him back to defendant's lease. These findings are supported by the evidentiary record and are therefore conclusive. *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968). Defendant was not personally at fault in the shooting; to evict her and her daughters with no evidence of fault on their part for the shooting would be inconsistent with the federal statute, with North Carolina Supreme Court precedent, and would indeed shock our sense of fairness. Accordingly, the decision of the trial court is affirmed.

Affirmed.

Chief Judge ARNOLD and Judge WYNN concur.

JOHN F. MIESCH AND WIFE, LINDA T. MIESCH, PLAINTIFFS V OCEAN DUNES HOMEOWNERS ASSOCIATION, INC., DEFENDANT

No. COA94-1337

(Filed 7 November 1995)

Housing, and Housing Authorities and Projects § 54 (NCI4th)— user fee imposed on short term condominium renters—fee not authorized by document or statute

Neither the Declaration of Ownership in condominium property, the Articles of Incorporation of defendant homeowners association, the bylaws of the association, nor N.C.G.S. Ch. 47A or N.C.G.S. Ch. 47C authorized defendant association to require persons who rented units within the condominium on a short term basis to pay a fee to use common areas and recreational facilities to which the owners of the units, their guests, and invitees had been granted an easement.

Am Jur 2d, Condominiums and Cooperative Apartments §§ 32-37.

Expenses for which condominium association may assess unit owners. 77 ALR3d 1290.

Validity and construction of condominium bylaws or regulations placing special regulations, burdens, or restrictions on nonresident unit owners. 76 ALR4th 295.

Appeal by defendant from judgment entered 18 July 1994 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 1 September 1995.

Ward & Smith, P.A., by Anne D. Edwards and W. Daniel Martin, III, for plaintiff-appellees.

Murchison, Taylor, Kendrick, Gibson & Davenport, L.L.P., by Michael Murchison and Alan D. McInnes, for defendant-appellant.

MARTIN, John C., Judge.

Plaintiffs are the owners of a residential unit in Ocean Dunes Condominiums ("the Condominium"), a condominium development located at Kure Beach, North Carolina. The Condominium consists of approximately 196 individual units, together with swimming pools,

tennis courts and various other recreational facilities and common areas. A majority of the units within the Condominium are available for short-term rental, although some of the owners are permanent residents and do not rent their units.

Pursuant to the provisions of the Declaration Creating Unit Ownership of Property ("the Declaration"), the owner of a unit in the Condominium also owns, as an appurtenance to the ownership of each unit, an undivided proportional interest in the common areas and facilities of the Condominium. The Declaration provides:

> Common areas and facilities shall be, and the same are hereby declared to be subject to a perpetual non-exclusive easement in favor of all of the owners of units in OCEAN DUNES, for their use and the use of their immediate families, guests or invitees, for all proper and normal purposes . . . .

Defendant Ocean Dunes Association, Inc., ("the Association") is a non-profit corporation organized for the purpose of administering the operation and management of the Condominium as provided by the Declaration; it is the homeowners association for the Condominium. The Articles of Incorporation of the Association grant it "all of the powers and privileges granted to Non-Profit Corporations under the law pursuant to which this Corporation is chartered," and "powers reasonably necessary to implement and effectuate the purposes of the Corporation." These include the power to make reasonable rules and regulations governing the use of the common areas, and the power to levy and collect assessments against members of the Association to defray the common expenses of the Condominium. Membership in the Association is limited to owners of condominium units.

The By-Laws of the Association require that it exercise its powers and duties in accordance with the Articles of Incorporation, the By-Laws and the Declaration. The By-Laws include the power and duty: "To maintain, repair, replace, operate and manage the common areas and facilities . . . for the benefit of [the Association's] members." The By-Laws further provide:

> The cost and expenses of holding, owning, maintaining, managing, controlling, repairing, replacing, preserving, caring for and operating all common areas of the "OCEAN DUNES" Condominium shall be "common expenses" and included in the budget for each fiscal year for the Association . . . .

The Declaration states:

> The common expenses of the Association shall be shared by the unit owners in amounts determined by applying each unit owner's proportionate share of ownership in the common areas and facilities to the total common expenses of the Association, and as assessed against the unit owners, and their units as provided for hereinafter.

In October 1992, the Board of Directors of the Association adopted a policy to charge a "maintenance assessment fee," subsequently called a "user fee," to "short term renters" of units within the Condominium, i.e., persons leasing units for less than twenty-eight days. Payment of the fee is required in order for "short term renters" to use the Condominium's common areas and facilities, which include parking and drive areas, tennis courts, swimming pools, pool decks and recreational facilities. The fee is not charged to those renting units for twenty-eight days or more, to unit owners, or to nonpaying guests or invitees of unit owners.

The monies collected from the user fee are paid to the Association, and placed in a separate bank account referred to as the "Guest Services Division" account, which is maintained under the supervision, direction, and control of the Association's Board of Directors and is used to pay Association employees who perform various duties such as registering renters and guests, dispensing orientation packets and parking passes, informing renters about the facilities and area attractions, planning occasional recreational activities for renters, and providing security services to enforce the Association's rules and regulations regarding use of the common areas and facilities.

Plaintiffs rent their unit in the Condominium on a short term basis. Alleging that they have entered into numerous contracts to rent their unit, including use of the common areas and recreational facilities of the Condominium, for a fixed rate which does not include the user fee, plaintiffs brought this action seeking a declaratory judgment that the Association has no power to adopt and enforce the user fee policy to collect the fees from any persons other than all of the owners of units within the Condominium. Plaintiffs also sought injunctive relief.

Neither plaintiffs nor defendant requested a jury trial. The trial court proceeded to hear evidence and found that while the

Association was empowered to levy assessments against its members to defray the common expenses of the Condominium, there was no statutory authority and no provisions in the Declaration, Articles of Incorporation or By-Laws which authorized or permitted the Association to levy assessments against, or collect fees from, guests or invitees of owners of units within the Condominium or renters of those units. The court found and concluded that requiring short term renters to pay for use of the common areas infringed upon the perpetual non-exclusive easement in favor of all unit owners for their use and the use of their immediate families, guests and invitees. The trial court also found and concluded that by adopting the user fee, the Association had impermissibly created two different classes of unit owners: (1) owners who do not lease their units to short term renters, and (2) owners who do lease their units to short term renters. Thus, the trial court concluded that defendant's board of directors did not have the power to adopt and enforce the user fee, and declared that the user fee was invalid and unenforceable. Defendants appeal.

The numerous assignments of error, primarily directed to findings of fact made by the trial court and the legal conclusions which it drew, present to us essentially a single issue: whether the Declaration, Articles of Incorporation, or Bylaws authorize defendant Association to require persons who rent units within the Condominium on a short term basis to pay a fee to use common areas and recreational facilities to which the owners of the units, their guests and invitees, have been granted an easement. In our opinion, no such authority exists in the case before us here, and we affirm the judgment of the trial court.

The standard of review of a judgment rendered under the declaratory judgment act is the same as in other cases. N.C. Gen. Stat. § 1-258. Thus, where a declaratory judgment action is heard without a jury and the trial court resolves issues of fact, the court's findings of fact are conclusive on appeal if supported by competent evidence in the record, even if there exists evidence to the contrary, and a judgment supported by such findings will be affirmed. *Insurance Co. v. Allison*, 51 N.C. App. 654, 277 S.E.2d 473, *disc. review denied*, 303 N.C. 315, 281 S.E.2d 652 (1981).

The trial court found the funds generated by the user fees collected from short term renters were used to defray common expenses as they were used to pay employees, including security personnel, who perform duties benefitting all owners, guests and invitees. These

duties included monitoring and regulating the common areas and facilities and the persons who use them. There is competent evidence in the record, particularly the testimony of Warren Bascome, President of the Association's Board of Directors in 1992, to support the trial court's finding and it is therefore conclusive.

There is also evidence to support the trial court's finding that the user fee creates two classes of owners for purposes of collecting money for common expenses. As noted above, the evidentiary record shows that the fee is assessed only against short term renters, and is used to defray common expenses. The fee thus amounts to an additional assessment for common expenses against invitees of only certain unit owners—those who lease their units to short term renters.

Defendant also assigns error to the trial court's finding that no provisions in the Declaration, Articles of Incorporation or By-Laws authorizes or permits the Association to levy or collect any assessment or fee from guests, invitees or renters of owners of units within the Condominium and that the documents contain no provisions permitting the Association to create different classes of owners or members. The Association's documents contain no express authorization for these acts. However, defendant argues that the grant of "powers reasonably necessary to implement and effectuate the purposes of the Corporation," and "the exclusive right to establish . . . rules and regulations," give it ample authority for these acts. In addition, defendant contends it has statutory authority for imposing the user fee.

"An act by a private or municipal corporation is *ultra vires* if it is beyond the purposes or powers expressly or impliedly conferred upon the corporation by its charter and relevant statutes and ordinances." *Rowe v. Franklin County*, 318 N.C. 344, 348-49, 349 S.E.2d 65, 68-69 (1986). In *Property Owner's Assoc. v. Seifart*, 48 N.C. App. 286, 269 S.E.2d 178 (1980), this Court addressed the enforceability of a property owners' association's assessment covenants. We stated,

> [J]ust as covenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous, even more so should covenants purporting to impose affirmative obligations on the grantee be strictly construed and not enforced unless the obligation be imposed in clear and unambiguous language . . . .

Id. at 295, 269 S.E.2d at 183 (citations omitted).

It is undisputed in this case that all unit owners have the right to lease and/or permit the use of their units to third parties, and, through the perpetual non-exclusive easement, to permit the use of the common areas and facilities by their immediate family, guests and invitees, including short term renters. The user fee, however, selectively restricts the easement rights of those owners who lease to short term renters by charging the renters for use of the common areas and facilities.

Further, the Association documents provide that common expenses are to be assessed *against the unit owners* in proportion to their ownership interest. The user fee, however, attempts to defray common expenses by enforcing a fee for use of the common areas and facilities against short term renters, which is tantamount to an additional fee for common expenses being selectively and disproportionately enforced against invitees of only certain unit owners in violation of the Association's documents.

Moreover, the fee may result in an additional affirmative obligation on owners in situations like plaintiffs' where contracts allegedly have already been entered into for fixed rental amounts that do not include the user fee. In such a case, the renter would have to pay an amount greater than contracted for, or be denied use of the common areas and facilities, exposing the owner to liability for breach of contract. Alternatively, the unit owner who leases to short term renters would have to pay the user fee out of his or her own pocket, again abrogating the common area expense provisions of the Association documents.

Thus, while we recognize that the user fee is intended as an assessment against short term renters rather than unit owners, still the fee restricts the express rights of unit owners who lease to short-term renters, is contrary to provisions in the Association's documents, and may even impose an additional affirmative obligation on unit owners. As *Seifart* instructs, such an act must be clearly and unambiguously authorized. Strictly construed, the general powers granted by the Association documents are not sufficient to impose the user fee.

We also affirm the trial court's ruling that no statutory authority exists for defendant to charge the user fee. The Condominium was created pursuant to N.C. Gen. Stat. § 47A, the (old) condominium act. In 1986, the General Assembly adopted N.C. Gen. Stat. § 47C, a new condominium act. Some, but not all of the provisions of the new act

were made applicable to "old" associations. The "Official Comment" explains the reason for not applying all the new provisions to the old act:

> . . . to make all provisions of this Act automatically apply to "old" condominiums might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

N.C. Gen. Stat. § 47C-1-102 (1987).

The new act grants to condominium associations the power to "[i]mpose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than limited common elements described in subsections 47C-2-102(2) and (4) and for services provided to unit owners." N.C. Gen. Stat. § 47C-3-102(10) (1987). This provision, however, was not made applicable to existing condominium associations. Therefore, we need not decide whether it would authorize the user fee at issue here.

In *Westbridge Condominium Assoc. v. Lawrence*, 554 A.2d 1163 (1989), the District of Columbia Court of Appeals stated:

> While it is not possible to foresee all the needs and problems that will arise in the operation of condominium property, unit owners must be able to rely upon the Bylaws to inform them of what is contemplated, particularly with respect to an association's authority to hold them liable for the condominium's expenses.

Id. at 1167. If a "user fee" is necessary and desirable, the proper recourse is for the Association members to vote to amend the Declaration and Bylaws to permit such a fee. Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges GREENE and WYNN concur.

BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT, PLAINTIFF v. CAM R. SEAGLE, WIDOW; BENJAMIN F. SEAGLE, III AND WIFE, ANN SEAGLE; THOMAS CALDWELL SEAGLE AND WIFE, LINDA SEAGLE; CAMELLIA SEAGLE WEIR AND HUSBAND, WILLIAM C. WEIR, DEFENDANTS

No. COA94-969

(Filed 7 November 1995)

1. Appeal and Error § 118 (NCI4th)— condemnation case—all issues decided except just compensation—order immediately appealable

The trial court's order in a condemnation case granting summary judgment on all issues except just compensation was immediately appealable.

Am Jur 2d, Appellate Review § 169.

2. Schools § 90 (NCI4th)— requiring permit to begin construction—historical district—property as "suitable site"—no genuine issue of material fact

Defendants' evidence concerning whether plaintiff board of education must secure a permit before beginning work on a school site and the considerations plaintiff must give to the historical district location did not raise material issues of fact as to the property's status as a "suitable site" under N.C.G.S. § 115C-517 or to the issue of plaintiff's discretion in selecting this property.

Am Jur 2d, Schools § 79.

Appeal by defendants from order entered 27 June 1994 by Judge James U. Downs in Catawba County Superior Court. Heard in the Court of Appeals 12 May 1995.

Sigmon, Mackie & Hutton, P.A., by Jeffrey T. Mackie, for plaintiff appellee.

Patrick, Harper & Dixon, by Donald R. Fuller, Jr., and Kimberly A. Huffman, for defendant appellants.

COZORT, Judge.

Plaintiff Board of Education initiated legal proceedings to condemn a portion of defendants' property for the purpose of expanding the facilities of Oakwood Public Elementary School. Defendants con-

tested the taking of the property, contending ultimately that the land was not a "suitable site" because plaintiff had failed to obtain a permit from the United States Army Corps of Engineers and had failed to properly consider the expansion's effect on the Oakwood Historic District. The trial court granted summary judgment for plaintiff Board on all issues except the matter of just compensation. Defendants appeal. We affirm.

Defendants own a tract of land adjacent to and on the east side of Oakwood Elementary School in Hickory. Defendants' property is located at least partially within the Oakwood Historic District, which was entered on the National Register of Historic Places in 1986. Plaintiff, the Board of Education of the Hickory Administrative School Unit, seeks to take the back half, slightly greater than one-half of an acre, of defendants' lot. Plaintiff also seeks to condemn portions of the adjoining Latta property, Blickensderfer property, and Brittain property. Those tracts are the subject of separate appeals pending before this Court. Plaintiff produced an affidavit showing that only the front 129 feet of defendants' property is included within the National Register of Historic Places. Defendants contend that the front 129 feet is within the City of Hickory Historic District and that the entire tract falls within the Oakwood Historic District listed in the National Register of Historic Places.

Plaintiff commenced this action on 27 April 1993 to condemn the property sought for the purpose of enlarging the facilities at Oakwood School. Defendants' answer alleged that the plaintiff's decision to expand the school on such an inadequate site "is so clearly unreasonable as to amount to a manifest abuse of discretion."

On 31 March 1994, plaintiff filed a motion for summary judgment on all issues, except just compensation. Defendants amended their answers to allege an additional defense that their land was not a "suitable site" under N.C. Gen. Stat. § 115C-517 (1994). Defendants specifically contended that plaintiff's plans to install a culvert in a stream designated as "waters of the United States," as defined in the Clean Water Act, would require a permit from the United States Army Corps of Engineers (Corps of Engineers) before proceeding with the project. Also, defendants contended, pursuant to § 106 of the National Historic Preservation Act, 16 U.S.C.S. § 470f, that the Corps of Engineers had to take into account effects of the plaintiff's plans on defendants' land, which is within the historic district recognized by the National Register of Historic Places. Therefore, defendants

alleged, until the Corps of Engineers issues the required permits, defendants' land is not a "suitable site." Judge James U. Downs heard this matter and granted summary judgment for plaintiff on all issues except just compensation. Defendants appeal.

[1] We first address the issue of whether the trial court's order granting summary judgment on all issues except just compensation is immediately appealable. Citing *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967), defendants contend in their brief that this interlocutory order, leaving unresolved the issue of compensation, is immediately appealable. Plaintiff did not address this issue in its brief. We agree with defendants. In *Nuckles*, our Supreme Court held that a trial court order in a highway condemnation proceeding which resolves all questions except damages is immediately appealable. The court stated it would be an exercise in futility to assess damages if there was still a controversy over what land was being condemned. *Id.* at 14, 155 S.E.2d at 784. Similarly, in *City of Winston-Salem v. Ferrell*, this Court held that a city could immediately appeal a trial court's finding of inverse condemnation in an order which left unresolved the issue of damages. 79 N.C. App. 103, 107, 338 S.E.2d 794, 797 (1986). In a recent case in this Court, we considered on appeal, without discussing the interlocutory appeal issue, a trial court order finding a county had the authority to condemn certain property and reserving for later consideration the issue of compensation. *Dare County Board of Education v. Sakaria*, 118 N.C. App. 609, 613, 456 S.E.2d 842, 845 (1995). Following the precedent of *Sakaria*, *Ferrell* and *Nuckles*, we hold the trial court's order granting judgment for plaintiff on all issues except compensation is immediately appealable.

[2] The main question before us is whether defendants have raised a genuine issue of material fact as to whether the defendants' land constitutes a "suitable site" under N.C. Gen. Stat. § 115C-517. Defendants contend plaintiff's failure to obtain a permit from the United States Army Corps of Engineers creates a genuine issue of material fact with respect to a "suitable site." Defendants argue they are entitled to an evidentiary hearing pursuant to N.C. Gen. Stat. § 40A-47 (1984). We find no genuine issue of material fact and affirm the trial court.

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). A genuine issue is one which can be maintained by substantial evidence. *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974). A material fact is that which would constitute a legal defense preventing the non-moving party from prevailing. *Cheek v. Poole*, 98 N.C. App. 158, 161, 390 S.E.2d 455, 458 (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 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, Inc.*, 103 N.C. App. 774, 775, 407 S.E.2d 254, 256 (1991).

"Eminent domain is the 'power of the State or some agency authorized by it to take or damage private property for a public purpose upon payment of just compensation,' and the manner in which eminent domain may be exercised is prescribed by our General Assembly." *Sakaria*, 118 N.C. App. at 614, 456 S.E.2d at 845 (quoting *Highway Comm'n v. Matthis*, 2 N.C. App. 233, 238, 163 S.E.2d 35, 38 (1968)). Local boards of education may exercise the power of eminent domain "for purposes authorized by other statutes." N.C. Gen. Stat. § 40A-3(b) (Cum. Supp. 1994). One such statute is N.C. Gen. Stat. § 115C-517 (1994), which authorizes local boards of education to

> acquire suitable sites for schoolhouses or other school facilities . . . . Whenever any such board is unable to acquire or enlarge a suitable site or right-of-way for a school, school building, . . . or for other school facilities by gift or purchase, condemnation proceedings to acquire same may be instituted by such board under the provisions of Chapter 40A of the General Statutes, and *the determination of the local board of education of the land necessary for such purposes shall be conclusive* . . . .

(Emphasis added). Laws conferring the power of eminent domain must be strictly construed, and are limited to the express terms or clear implication of the act or acts in which the grant of the power of eminent domain is contained. *Sakaria*, 118 N.C. App. at 614, 456 S.E.2d at 845-46.

Defendants contend they offered affidavits which create a genuine issue of material fact concerning a "suitable site." Plaintiffs submitted an affidavit from Stephen D. Chapin, a Corps of Engineers biologist responsible for reviewing construction which may affect waters of the United States to determine whether permits would be required to satisfy Section 404 of the Clean Water Act. After reviewing plaintiff's revised construction plans, Mr. Chapin stated that no permit from the Corps of Engineers under Section 404 of the Clean Water Act would be required. Defendants submitted the affidavit of Guilford Eugene Smithson, a professional engineer with twenty-five years of practice. Mr. Smithson reviewed plaintiff's revised plans and concluded that plaintiff would be required to obtain a permit from the Corps of Engineers. Defendants contend this difference of opinion constitutes a genuine issue of material fact as to whether the land is a "suitable site." We disagree.

The conflicting affidavits of Mr. Chapin and Mr. Smithson raise an issue of fact concerning the need for the plaintiff to secure a permit before proceeding with its expansion. That issue has nothing to do with whether the plaintiff has found the land to be a "suitable site" for its needs, a question within the discretion of the school board. *Sakaria*, 118 N.C. App. at 614, 456 S.E.2d at 846. The courts are bound by this discretionary decision absent an " 'arbitrary abuse of discretion or disregard of law.' " *Id.* (quoting *Board of Educ. v. Allen*, 243 N.C. 520, 523, 91 S.E.2d 180, 183 (1956)). Defendants argue that the recent case of *Dare County Board of Education v. Sakaria*, stands for the proposition that plaintiff must obtain permits from the Corps of Engineers in order for the land to be found a "suitable site." We disagree. The decision in *Sakaria* focused on two specific questions: (1) whether N.C. Gen. Stat. § 115C-517 permits a local board of education to condemn land to be used solely as wetlands mitigation and a source of fill, and (2) whether plaintiff's action of condemning defendants' lots as necessary to build athletic facilities was an arbitrary abuse of discretion. *Id.* at 614, 456 S.E.2d at 846. We held that N.C. Gen. Stat. § 115C-517 gives the local board of education broad authority to condemn land, and that the Board has the discretion to determine what land constitutes a "suitable site" and what land is

"necessary" under N.C. Gen. Stat. § 115C-517. We further found no abuse of discretion even though the Board failed to consider other alternative sites. *Id.* The Board's having already obtained certain permits was not an issue in the appeal. Therefore, defendants' reliance on *Sakaria* is misplaced.

Finally, we find persuasive plaintiff's argument that a presumption exists " 'that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.' " *Leete v. County of Warren*, 114 N.C. App. 755, 757, 443 S.E.2d 98, 99-100 (1994) (quoting *Painter v. Board of Education*, 288 N.C. 165, 178, 217 S.E.2d 650, 658 (1975) (citations omitted)). Defendants have not overcome this presumption with competent and substantial evidence. *See Leete*, 114 N.C. App. at 757, 443 S.E.2d at 100. Thus, we must presume plaintiff will act in good faith and comply with all applicable state and federal regulations in its plans to enlarge the school facilities. We hold plaintiff was acting in good faith and in accord with the spirit and purpose of N.C. Gen. Stat. § 115C-517.

We therefore hold that defendants' evidence concerning whether plaintiff must secure a permit before beginning work, and the considerations plaintiff must give to the historical district location do not raise material issues of fact as to the property's status as a "suitable site" or to the issue of the Board's discretion in selecting this property.

The trial court's order of summary judgment for plaintiff is

Affirmed.

Judges JOHN and WALKER concur.

STATE OF NORTH CAROLINA v. JAN BRUNSON

No. COA95-166

(Filed 7 November 1995)

1. Criminal Law § 686 (NCI4th)— failure to hold recorded charge conference—no showing of material prejudice

When the court fails to hold a recorded charge conference and does not correct such failure prior to the end of the trial,

defendant must show how he was materially prejudiced, and defendant in this case failed to make such showing. N.C.G.S. § 15A-1231(b)

Am Jur 2d, Criminal Law § 916.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 ALR4th 955.

2. Criminal Law § 395 (NCI4th)— preliminary jury instruction—subsequent correction—no error

There was no merit to defendant's contention that the trial court's preliminary instructions did not comply with N.C.G.S. § 15A-1213 because the trial court erred as to the number of felonies required for habitual felon status, since the preliminary instruction satisfied the requirement of briefly informing the jury of the charges pending against defendant, and the trial court corrected its misstatement of habitual felon law during final instructions to the jury.

Am Jur 2d, Trial §§ 1077, 1120, 1121.

3. Criminal Law § 723 (NCI4th)— preliminary jury instructions—no expression of opinion

The trial court did not improperly express an opinion to the jury during the preliminary instructions in the habitual felon phase of the trial by its comment that "you have now convicted this defendant on these three cases" where the court was attempting to explain to the jury that in determining whether the defendant was a habitual felon, it would employ the same procedure that it had in the trial on the principal charges, and the court's remark was one of fact and not one of opinion.

Am Jur 2d, Trial §§ 272, 276, 277.

4. Criminal Law § 1288 (NCI4th)— habitual felon jury—no right to impanel new jury

Defendant's motion to continue the habitual felon phase of his trial in order to impanel a new jury was properly denied. N.C.G.S. § 14-7.5.

Am Jur 2d, Criminal Law §§ 600, 893.

5. Criminal Law § 118 (NCI4th)— no formal arraignment on habitual felon charge—no reversible error

Failure of the trial court to formally arraign defendant on a habitual felon charge did not amount to reversible error where defendant had filed a waiver of arraignment, and defendant at no time claimed or implied that he was unaware of the habitual felon charge against him.

Am Jur 2d, Criminal Law §§ 433 et seq.

Appeal by Defendant from judgment entered 6 October 1994 by Judge Henry L. Stevens, III in Sampson County Superior Court. Heard in the Court of Appeals 23 October 1995.

Defendant was charged by bill of indictment on 6 September 1994 of the following offenses: breaking and entering a motor vehicle, larceny, and possession of stolen property. All offenses were felonies and by separate bill of indictment, defendant was charged with being a habitual felon. This indictment recited that defendant had previously been convicted of the following felony offenses: 5 October 1977, assault with a deadly weapon; 5 October 1983, larceny of a firearm; 23 April 1985, possession of a firearm by a felon; and 4 April 1989, sale and delivery of marijuana. Defendant waived arraignment in both charges on 8 September 1994.

Defendant was arraigned 4 October 1994 on the principal charges and entered a plea of not guilty. On the same date defendant and his counsel executed a written waiver of arraignment with regard to the habitual felon charge and a plea of not guilty was entered. Defendant was tried and convicted on all charges on 6 October 1994 and was sentenced to life in prison. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Sueanna P. Sumpter, for the State.

John R. Parker for defendant appellant.

ARNOLD Chief, Judge.

I.

[1] Defendant first assigns error to the court's refusal to conduct a recorded charge conference. We disagree; the court's refusal to conduct a recorded charge conference did not amount to reversible error.

N.C. Gen. Stat. § 15A-1231(b) (1988) provides:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant. (Emphasis added).

When the court fails to hold a recorded charge conference and does not correct such failure prior to the end of the trial, the defendant must show how he was materially prejudiced. *State v. Pittman*, 332 N.C. 244,253, 420 S.E.2d 437, 441 (1992).

Upon the conclusion of the evidence, the trial court held an informal charge conference in the absence of the jury and off of the record. Counsel for the defendant and for the State were both present. Both agreed in substance to the court's proposed charge, and to the possible jury verdicts to be submitted. The court stated these matters for the record. Both counsel, when asked, indicated that the court's statements were correct. Thereafter, counsel for the defendant requested that the court specify on the record the specific proposed instructions to be given to the jury. The court refused. The court summarized the conference as follows:

> Let the record show that at the close of the evidence the Court conducted a conference on jury instructions in chambers in the absence of the jury for the purpose of discussing the proposed instructions to be given to the jury. Present were Mr. Greg Butler, [A]ssistant [D]istrict [A]ttorney representing the [S]tate of North Carolina and Mr. John Parker Attorney representing the defendant. That opportunity was given to counsel for the [S]tate and the defendant to request additional instructions or to object to any instructions proposed by the Court. Thereafter, all counsel agreed in substance to the charge to be given and to the possible jury verdicts to be submitted.

First, while defendant's request for the court to specify on the record what instructions were to be given to the jury was refused, defendant was also granted at the conclusion of the actual charge the opportunity to object and to request additional instructions. Defendant at that time requested a bench conference, and advised the court that it had erred at some point during the instruction, but made no other substantive objections to the charge as given. Defendant was given the opportunity to state, for the record, any *further* objections, disagreements or dissatisfactions he had with the court's summations. None were raised, and defendant has not shown how he was materially prejudiced by the failure of the trial court to record the charge conference.

II.

Defendant's second assignment of error relates to the trial court's preliminary remarks to the jury during the habitual felon phase of the trial. First, he argues that the trial court's preliminary instructions did not comply with N.C. Gen. Stat. § 15A-1213 (1988). Secondly, he argues that the trial judge improperly expressed his opinion to the jury during the preliminary instructions. We reject both arguments.

[2] As to defendant's first argument, G.S. § 15A-1213 provides:

> Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury.

This Court held in *State v. Styles* that G.S. § 15A-1213 does not require the judge to inform the jury of the elements of each crime at this stage of the trial. *State v. Styles*, 93 N.C. App. 596, 608, 379 S.E.2d 255, 263 (1989). Such instruction is required during the final jury instructions. *Id.* (citing R. Price, *North Carolina Criminal Trial Practice* Sec. 24-1, p. 504 (1985)). G.S. § 15A-1213 only requires the jury to be informed of the charges pending against the defendant, not the elements thereof. *Id.* at 608, 379 S.E.2d at 263. Moreover, "the purpose of G.S. 15A-1213 is to 'orient the prospective jurors as to the case' in such a way as to avoid giving jurors a 'distorted view of the case' through use of the 'stilted language of indictments and other pleadings.' "

State v. Long, 58 N.C. App. 467, 471, 294 S.E.2d 4, 8 (1982) (citing Official Commentary to N.C. Gen. Stat. § 1213)).

Upon receiving verdicts in the principal cases, the trial court's preliminary remarks to the jury were as follows:

> Now ladies and gentlemen, I'm going to ask you at this time and tell you that the defendant has also been accused as being a habitual felon. [sic] Habitual felon, ladies and gentlemen, is an individual who has been convicted or has pled guilty to five felony offenses of at least three separate occasions since July the 5th of 1976. Each of these crimes must have been committed after the plea of guilty or conviction to one before, before the one. (Emphasis added).

The trial court did initially, and incorrectly, instruct the jury that an habitual felon is one who has pled guilty to or been convicted of *five* felonies. An habitual felon, as defined by N.C. Gen. Stat. § 14-7.1 (1993), is "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." Defendant argues that the preliminary instructions do not comply with G.S. § 15A-1213 because the trial court erred as to the number of felonies required for habitual felon status. However, during final instructions to the jury the trial court corrected the misstatement. Upon the return of the jury the court made the following remarks:

> Now Mr. Foreman and ladies and gentlemen, as I told you, you will now determine whether or not the defendant is guilty or not guilty under the habitual felon statute and I told you briefly what habitual felon was and I'll tell you again so that you will know. A habitual felon is an individual who has been convicted or has pled guilty to felony offenses on at least *three* separate occasions since July the 5th of 1967. Each of the crimes must have been committed after the plea of guilty or conviction to the one before it. (Emphasis added).

The trial court's preliminary remarks to the jury satisfied the requirements of briefly informing the jury of the charges pending against the defendant. Moreover, the trial court corrected its misstatement of habitual felon law during final instructions to the jury. No reversible error was committed by the trial court.

[3] Next, defendant argues that the trial judge improperly expressed his opinion to the jury during the preliminary instructions. N.C. Gen.

Stat § 15A-1222 (1988) provides: "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." Further, "A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced defendant's case." *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984) (citing *State v. Green*, 268 N.C. 690, 693-694, 151 S.E.2d 606, 609 (1966)).

The trial court's final remarks to the jury during the habitual felon phase of the trial were as follows:

> Now this is just the same procedure gone over again so far, the format here that we used and you used in the trial of these cases from which the, *you have now convicted this defendant on these three cases*. The same basic procedure is in place. The same district attorney. Your same lawyer with the same defendant over here. That the defendant has entered a plea of not guilty to this charge of being a habitual offender. (Emphasis added).

Defendant argues that the court's comment "you have now convicted this defendant on these three cases," is an expression of opinion by the court which is prohibited by G.S. § 15A-1222. We find that the court's comment did not amount to an expression of opinion. The context of the court's comment reveals that the court was attempting to explain to the jury that in determining whether the defendant was an habitual felon it would employ the same procedure that it had in the trial on the principal charges. Further, the court's remark was one of fact and not one of opinion. The jury had in fact just convicted the defendant of three offenses. The statement was not one of opinion and it did not prejudice the defendant's case.

III.

[4] Defendant next assigns error to the denial of his motion to continue the habitual felon phase of the trial in order to impanel a new jury. We disagree. N.C. Gen. Stat. § 14-7.5 (1993) provides in relevant part: "If the jury finds the defendant guilty of a felony, the bill of indictment charging the defendant as an habitual felon may be presented to *the same jury*," (emphasis added). Moreover, the N.C. Supreme Court held that when, as contemplated by G.S. § 14-7.5, the same jury considers both the principal felony and the question of defendant's recidivism, it is not necessary to re-impanel a jury once that jury has been properly impaneled pursuant to N.C. Gen. Stat.

§ 15A-1216 (1988). *State v. Todd,* 313 N.C. 110, 120, 326 S.E.2d 249, 255 (1985). Defendant presents no evidence to show that the jury was improperly impaneled. Thus, defendant's motion to continue in order to re-impanel the jury was properly denied.

IV.

[5] Defendant's final assignment of error is the court's denial of his motion to conduct a formal arraignment on the charge of being an habitual felon. We disagree. The failure to conduct a formal arraignment itself is not reversible error. *State v. Smith,* 300 N.C. 71, 265 S.E.2d 164 (1980). The purpose of an arraignment is to allow a defendant to enter a plea and have the charges read or summarized to him and the failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges. *State v. Small,* 301 N.C. 407, 272 S.E.2d 128 (1980).

This matter came on for trial on 4 October 1994. At the previous term of court, 8 September 1994, the defendant filed a waiver of arraignment to the underlying charge of breaking or entering a motor vehicle, and to the ancillary charge of being an habitual felon. At no time did defendant claim or imply that he was unaware of the habitual felon charge against him. Defendant had notice of the habitual felon charge against him and failure of the court to formally arraign defendant did not amount to reversible error.

No error.

Judges EAGLES and MARTIN, John C., concur.

ALVIN LEE LUMLEY AND DOLLY LEE LUMLEY v. NANCY C. CAPOFERI AND DURHAM CARDIOVASCULAR HEALTH CENTER, P.A.

No. COA94-1171

(Filed 7 November 1995)

1. **Appeal and Error § 147 (NCI4th)— proximate cause instruction—failure to make timely objection**

   Plaintiffs' assignment of error to the trial court's special instruction on proximate cause is overruled where plaintiffs had several opportunities but failed to make a timely objection to the charge.

   Am Jur 2d, Appellate Review § 745; Trial §§ 1080-1084.

2. Negligence § 174 (NCI4th)— clarifying instruction on proximate cause refused—no error

The trial court did not abuse its discretion in denying plaintiffs' request for a clarifying instruction on the issue of proximate cause, since plaintiffs failed to make a timely objection to the special proximate cause instruction; they objected only after the jury had retired and asked to have the law relating to proximate cause read to them on two separate occasions; and any ambiguity in the special proximate cause instruction was harmless when considered in conjunction with the remainder of the proximate cause instruction and instructions on plaintiffs' burden of proof.

Am Jur 2d, Negligence §§ 449 et seq.

3. Trial § 372 (NCI4th)— deadlocked jury—Allen charge given—no error

The trial court did not err in denying plaintiffs' motion for mistrial where the jurors deliberated for five days and then sent the judge a note stating that they were deadlocked eleven to one, that it was an emotional problem for one juror to continue, and that they did not feel they could reach a verdict; the trial court proposed to give the jury the "Allen charge"; plaintiffs' counsel did not object to the instruction; the instruction was given; and the jury returned a verdict that day.

Am Jur 2d, Trial §§ 1592-1596.

Verdict-urging instructions in civil case stressing desirability and importance of agreement. 38 ALR3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise. 41 ALR3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence, or reflecting on integrity or intelligence of jurors. 41 ALR3d 1154.

4. Evidence and Witnesses § 1373 (NCI4th)— references to dismissed defendant—no error

Defense counsel's references to a former defendant's role in this medical malpractice case in questions to plaintiffs' expert witnesses were not unduly prejudicial to plaintiffs and were relevant to defendants' case so that the trial court did not err in permitting such references.

Am Jur 2d, Evidence §§ 813, 814; Trial §§ 554-556, 609-611, 615-617, 627.

Appeal by plaintiffs from judgment entered 25 April 1994 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 2 October 1995.

Law Office of Martin A. Rosenberg, by Martin A. Rosenberg, for plaintiff appellants.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay and Donna R. Rutala, for Nancy C. Capoferi, defendant appellee.

Petree Stockton, L.L.P., by James P. Cain and Robert H. Lesesne, for Durham Cardiovascular Health Center, defendant appellee.

SMITH, Judge.

This is a negligence action based upon alleged medical malpractice brought by plaintiffs Alvin Lee Lumley and Dolly Lee Lumley against Nancy C. Capoferi, Durham Cardiovascular Health Center, P.A., Khye Weng Ng, a/k/a Dr. Weng and Durham Clinic, P.A. On 12 August 1993 plaintiffs took a voluntary dismissal with prejudice of their claims against defendants Dr. Weng and the Durham Clinic. The trial against the remaining defendants commenced on 14 March 1994. On 6 April 1994 the jury returned a verdict in defendants' favor.

On 5 January 1990, Alvin Lee Lumley went to the Durham County General Hospital Emergency Room complaining of headache, nausea and dizziness. Dr. Capoferi, a cardiologist on call for her employer, Durham Cardiovascular Health Center, P.A., attended Mr. Lumley. After several tests, including a CT scan, Dr. Capoferi consulted with Dr. Weng and then discharged Mr. Lumley with instructions to return for a follow-up visit. He was also prescribed high blood pressure medication. During Mr. Lumley's follow-up visits, Dr. Weng established that Mr. Lumley's neurological examination was normal and concluded that his symptoms were likely caused by an acute inner ear infection.

On 5 October 1991, Mr. Lumley again went to the Durham County General Emergency Room where he was diagnosed as suffering a massive stroke. It was plaintiffs' contention at trial that defendants negligently failed to diagnose Mr. Lumley's 5 January 1990 symptoms as a stroke and because of that misdiagnosis, failed to prescribe aspirin therapy as a means of reducing the risk of a second stroke.

Prior to the trial of this matter, plaintiffs moved *in limine* to exclude evidence of Dr. Weng's prior involvement in the case. The trial judge granted the motion as to evidence of prior settlement, but reserved ruling on references to Dr. Weng's prior involvement.

The charge conference was held on 29 March 1994 and continued through the next morning. On the first day of the conference, defense counsel handed up a proposed special proximate cause instruction. Discussion regarding the instruction occurred the next day. The instruction was included in the jury charge and was heard by the jury on three separate occasions before plaintiffs' counsel objected to it. When plaintiffs objected to the instruction, they requested a clarifying instruction on the issue of proximate cause be given to the jury. Such motion was denied by the trial court.

The jury deliberated for approximately five days before sending a note to the judge indicating they were deadlocked eleven to one and suggesting they could not reach a verdict because deliberation had become an emotional problem for one juror. Plaintiffs moved for mistrial. After a brief recess, the trial judge suggested giving an "Allen Charge" to the jury. The charge reminded the jury that their verdict must be unanimous and that if they were unable to reach a unanimous verdict a new trial would be required at heavy expense to the court system in terms of time and money. Neither plaintiffs nor defendants objected to such charge. It was then given to the jury, who returned with a verdict in defendants' favor. From judgment entered in accordance with that verdict plaintiffs appeal.

[1] In their first assignment of error, plaintiffs contend that the trial court abused its discretion by instructing the jury with a special instruction on proximate cause which they allege was confusing, ambiguous and contrary to the law. The instruction of which plaintiffs complain was as follows:

> A person seeking damages as a result of negligence has the burden of persuading you by the greater weight of the evidence not only of the negligence of the defendant, Dr. Capoferi, but also that such negligence was a proximate cause of the claimed injury.
>
> Proof of proximate cause requires *more than a showing that a different treatment would have decreased the risk of harm* to Mr. Lumley. (Emphasis added.)

Initially, we find that plaintiffs' first assignment of error was not preserved and is not properly before this Court. Pursuant to Rule

10(b)(2) of the Rules of Appellate Procedure, in order to properly preserve questions for appellate review regarding jury instructions, a party must object to the instruction before the jury retires to consider its verdict. N.C.R. App. P. 10(b)(2). In this case, plaintiffs had several opportunities to object to the proposed special instruction before the jury retired, but failed to do so.

The trial judge addressed the requested special instruction both immediately after it was handed up by defense counsel and the next morning when the charge conference resumed. While dialogue regarding the instruction was brief, it is clear from the record that the instruction dealt with additional proximate cause language. Defense counsel suggested an appropriate place to insert the instruction during the discussion. At that time the court asked plaintiffs' counsel if he had any objections, to which he replied negatively. Following his charge to the jury, the judge asked both sides if there was anything further, pursuant to Rule 21 of the General Rules of Practice for Superior and District Courts, which like Rule 10(b)(2) of the Rules of Appellate Procedure, provides that objections to jury instructions should be made prior to jury deliberation. Again, plaintiffs' counsel answered negatively. Since plaintiffs failed to timely object to that portion of the proximate cause instruction which they contend is erroneous, that assignment of error is overruled.

[2] In their second assignment of error, plaintiffs maintain the trial court erred in denying their request for a clarifying instruction on the issue of proximate cause. We again note that plaintiffs in this case failed to timely object to the special proximate cause instruction of which they now complain. They objected only after the jury had retired and asked to have the law relating to proximate cause read to them on two separate occasions. However, according to the General Rules of Practice, the trial judge may, at his discretion

> recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions.

General R. Of Practice for Sup. & Dist. Cts., Rule 21 (1970). In this case, the judge denied plaintiffs' request to give a clarifying instruction pursuant to Rule 21. The trial judge did not abuse his discretion, thus, we find no error. In any event, any ambiguity in the special proximate cause instruction was harmless when considered in conjunction with the remainder of the proximate cause instruction and

instructions on plaintiffs' burden of proof. The judge instructed the jury that

> [p]roximate cause is a real cause, a cause without which the claimed injury would not have occurred, and one which under the same or similar circumstances a reasonably careful and prudent person could foresee would probably produce such injury . . . .

This instruction is a clear definition of proximate cause as defined by North Carolina case law. *Nance v. Parks*, 266 N.C. 206, 209, 146 S.E.2d 24, 27 (1966). Furthermore, the judge repeatedly emphasized that plaintiffs' burden was to prove only "by the greater weight of the evidence" that defendants' conduct was one of the proximate causes of Mr. Lumley's second stroke. Considered in conjunction, these two instructions clearly described the applicable law regarding proximate cause and the burden of proof in a medical malpractice action. *Wall v. Stout*, 310 N.C. 184, 202, 311 S.E.2d 571, 582 (1984). This assignment of error is overruled.

[3] In their third assignment of error, plaintiffs appeal the trial court's denial of their motion for mistrial. They contend that, after receiving a note from the jury on the fifth day of deliberation, the trial judge should have granted a mistrial. In the note, the jury stated they were deadlocked eleven to one, that it was an emotional problem for one juror to continue, and that they did not feel they could reach a verdict.

> The granting or denial of a motion for a new trial . . . is generally regarded as resting in the sound discretion of the trial judge, and his ruling will not be disturbed on appeal in the absence of a manifest abuse of such discretion, or as sometimes stated, unless it is clearly erroneous.

Stone v. Griffin Baking Co., 257 N.C. 103, 105, 125 S.E.2d 363, 365 (1962). In this case, the jury began their deliberation on the afternoon of 30 March 1994. They continued deliberating the next day, had a three-day weekend, and resumed deliberation on 4 April 1994. On that day, the jury sent a note to the judge requesting re-instruction on proximate cause, stating that they were divided eight to four. On 5 April 1994, the court again received a note from the jury indicating that they were divided ten to two and requested a ten minute break. On 6 April 1994, the jury sent a final note indicating they were deadlocked eleven to one. Plaintiffs then moved for a mistrial. The court, after brief discussion, proposed to give to the jury the "Allen Charge."

Out of the jury's presence, the judge read the proposed charge to respective counsel. Plaintiffs counsel did not object to the instruction.

It is evident the jury was making progress during its five-day deliberations. Originally, the jury was divided eight to four. By the last day, they were split eleven to one. Instead of declaring a mistrial, the judge, in his discretion, proposed the "Allen Charge" to which neither plaintiffs nor defendants objected. This was not a manifest abuse of discretion. This assignment of error is overruled.

[4] In their final assignment of error, plaintiffs contend the court erred in permitting defense counsel to make repeated references to a previously dismissed party's prior involvement in the case, on the grounds that such references were irrelevant and highly prejudicial. Prior to trial, plaintiffs moved *in limine*, to prohibit any mention of Dr. Weng's prior involvement in this case as a defendant. The court reserved ruling on the motion.

Plaintiffs properly preserved questions for appellate review in two instances when the defense mentioned Dr. Weng. In the first instance, counsel for the defense asked one of plaintiffs' expert witnesses whether he had testified against Dr. Weng, as well as other doctors, on previous occasions. The trial judge overruled plaintiffs' objection to this mention of Dr. Weng. Defendants' counsel was attempting to show possible bias on the part of plaintiffs' expert; no mention of settlement was made. The question was not prejudicial to plaintiffs. We find no error in the judge's ruling.

In the second instance, defense counsel asked another of plaintiffs' expert witnesses about an opinion the expert had previously expressed regarding Dr. Weng's standard of care. Again, this testimony was relevant to defendants' case and was not unduly prejudicial to plaintiffs. Under Rule 403 of the North Carolina Rules of Civil Procedure, this was admissible as relevant evidence. From such evidence, the jury could infer that Dr. Capoferi's conduct was not a proximate cause of Mr. Lumley's injury. The trial judge did not commit error. This assignment of error is overruled.

In sum, we find the special proximate cause instruction included in the jury charge was in accordance with North Carolina case law. The trial judge had no obligation to give a clarifying instruction with regard to proximate cause. References to a former defendant's role in this action made by defendants were not unduly prejudicial to plain-

tiffs and were relevant to defendants' case; therefore, objection to those references was properly overruled. Finally, the trial judge did not abuse his discretion in denying plaintiffs' motion for a mistrial when it is clear the jury was making progress during its deliberations. Neither side objected to the proposed "Allen Charge" which was given to the jury. Based upon the foregoing, we find

No error.

Chief Judge ARNOLD and Judge GREENE concur.

IN RE: ANGELA HAWKINS, A MINOR CHILD

No. COA94-1169

(Filed 7 November 1995)

1. Appeal and Error § 205 (NCI4th)— failure to give timely notice of appeal

Since entry of judgment occurred on 31 August 1994, the date the written judgment was filed, and no notice of appeal was taken within ten days after that date, by respondent's failure to either give proper oral notice of appeal or timely written notice of appeal, the Court of Appeals did not acquire jurisdiction and the appeal must be dismissed.

Am Jur 2d, Appellate Review § 291.

2. Infants or Minors § 120 (NCI4th)— abused and neglected child—sufficiency of evidence

The evidence was sufficient to support the trial court's conclusion that a minor was abused and neglected where it tended to show that respondent admitted that she was afraid she would hurt her baby and did not want her child, and a pediatric expert testified that injuries sustained by the child more than likely did not occur in the manner described by the mother.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 45, 104, 105.

On writ of certiorari to review order filed 31 August 1994 by Judge Russell G. Sherrill, III in Wake County District Court. Heard in the Court of Appeals 23 August 1995.

The following evidence was received at a hearing on a petition alleging abuse, neglect, and dependency of a minor child (hereinafter "the petition"). On 4 March 1994, respondent, Mary Crudup, contacted Myra Norwood, a Wake County Department of Social Services (hereinafter "DSS") employee, regarding placing her nineteen-day-old daughter for adoption. Respondent also had a one-year-old daughter living with her. Respondent told Norwood that she had no feelings for her infant baby, that she hit the baby to quiet her, and that the baby made her do "bad things."

Norwood referred the matter to Anthony Horton, an intake services employee with DSS. Respondent told Horton that she was afraid she was going to hurt the baby because of her bad nerves, and she wanted DSS to take the baby from her. Horton formulated a protective plan in which the baby would remain in respondent's home with the maternal grandmother assuming responsibility for the baby.

On the morning of 7 March 1994, respondent's infant daughter was admitted to Wake Medical Hospital for a second degree burn along her left forearm. Respondent stated that while she was in the kitchen her one-year-old child jumped onto a floor pallet upon which the infant was lying, thereby causing the infant to roll into a space heater. Dr. Jeffrey Tanaka, an expert in the field of pediatric medicine, testified that a twenty-two-day-old was not capable of rolling because of little tone. Furthermore, the child's neurological history revealed defects that contributed to developmental delay, which would further retard the child's ability to roll. Dr. Tanaka opined that the history was not consistent with the type of injury the infant sustained.

After the infant's hospitalization, respondent told Kelvin Crenshaw, another DSS employee, that she did not want the infant child. She also told Lee Cooley of the permanency planning unit of DSS that she wanted the baby's paternal aunt to take care of the infant until she was five or six years old, and that she could not handle the baby because she wanted to be "footloose and fancy-free."

Susan Steele, a child service coordinator for the Department of Health, testified that respondent had used cocaine four times during her pregnancy, and that respondent evidenced no bonding between herself and the infant. Respondent told Steele that her one-year-old daughter picked up the baby and dropped her on the space heater. She asked Steele if she should have beaten her older daughter.

Following a hearing on the petition, the trial court adjudicated the infant as abused, neglected, and dependent and ordered, *inter alia*, that the minor remain in the legal custody of DSS with placement authority in that agency. Respondent appeals.

Anne W. Brill for petitioner appellee.

Kelly & Kelly, by Frederick D. Kelly, for respondent appellant.

Lou A. Newman for Guardian Ad Litem appellee.

ARNOLD, Chief Judge.

[1] We initially note that upon review of the record, respondent has failed to give proper notice of appeal, thus subjecting her appeal to dismissal under Rule 3(b)(2) of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-666. N.C. Gen. Stat. § 7A-666, which governs the right to appeal juvenile matters, states in part

> Upon motion of a proper party as defined in G.S. 7A-667, review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals. Notice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order.

N.C. Gen. Stat. § 7A-666 (1989).

Respondent gave notice of appeal in open court at the time of the hearing on 10 May 1994. However, when the second sentence of N.C. Gen. Stat. § 7A-666 permitting oral notice of appeal at the hearing is read in conjunction with the first sentence providing for appellate review only upon any "final order," it appears that oral notice of appeal given at the time of the hearing must be from a final order. Here, the court had not rendered a final order at the time of the hearing because it had not ruled on all matters raised in the petition. Rather, the court stated at the hearing only that it found "that there is evidence that the child is abused and neglected," and made no reference to the dependency allegation raised in the petition. Therefore, respondent's oral notice of appeal was premature.

Respondent also gave written notice of appeal on 18 May 1994, but she failed to give it within ten days after "entry" of the final order. In this case, entry of judgment is determined under Rule 58 of the North Carolina Rules of Civil Procedure and the case law interpreting the rule. Rule 58 provides

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where the judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

N.C. Gen. Stat. § 1A-1, Rule 58 (1990).

This case does not fall under the first paragraph of Rule 58 because the action was tried by a judge without a jury. Neither does it fall within paragraph two because, as stated above, no judgment was "rendered" in open court since the trial judge's oral announcement was not issued in the form of a final order subject to appellate review. *See Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991) (holding that under Rule 58 there can be no valid entry of judgment absent necessary findings made pursuant to Rule 52). Nor do the facts of the instant case fall under paragraph three because "[t]he third paragraph of Rule 58 . . . applies to instances where the trial judge directs the clerk to prepare and file judgment. It is inapplicable when the trial judge prepares and signs the judgment." *Barringer & Gaither, Inc. v. Whittenton*, 22 N.C. App. 316, 317, 206 S.E.2d 301, 302 (1974). Nothing in the record indicates that the trial judge directed the clerk or anyone else to prepare and file the judgment, although a written judgment was filed 31 August 1994.

Therefore, when the circumstances are such that the trial court's procedures do not fit within the express provisions of Rule 58, we must look to the factors set forth in *Stachlowksi v. Stach*, 328 N.C. 276, 401 S.E.2d 638, to determine when entry of judgment took place for purposes of our review. *In re Hayes*, 106 N.C. App. 652, 418 S.E.2d 304 (1992). The relevant factors are: (1) an easily identifiable point at which entry of judgment occurred, so that (2) the parties have fair notice of the judgment, and (3) the matters for adjudication have been finally and completely resolved so that the case is appropriate for appellate review. *Stachlowski*, 328 N.C. 276, 401 S.E.2d 638.

First, the trial court's announcement in open court with findings yet to be made and disposition yet to be determined is not clearly identifiable as the time of entry of judgment. The court merely stated that the evidence supported findings of abuse and neglect and did not direct the clerk to enter judgment. On the other hand, the date of filing the judgment provided an easily identifiable point at which entry occurred. *See Reed v. Abrahamson*, 331 N.C. 249, 415 S.E.2d 549 (1992); *In re Hayes*, 106 N.C. App. 652, 418 S.E.2d 304. Furthermore, the trial court's announcement in open court was not yet final as to be suitable for appellate review. The findings of fact and conclusions of law were not set forth in final form, *see Hayes*, 106 N.C. App. 652, 418 S.E.2d 304; *Cobb v. Rocky Mount Board of Education*, 102 N.C. App. 681, 403 S.E.2d 538 (1991), *aff'd*, 331 N.C. 280, 415 S.E.2d 554 (1992), and the court did not rule on dependency until the written judgment was filed. Finally, it is evident from the record that the parties only had fair notice of the judgment at the time the written judgment was filed on 31 August 1994 because only after that date did the parties take action to settle the record on appeal. Therefore, we hold entry of judgment did not occur until 31 August 1994.

In sum, since entry of judgment occurred on 31 August 1994, and no notice of appeal was taken within ten days after that date, by respondent's failure to either give proper oral notice of appeal or timely written notice of appeal, this Court has not acquired jurisdiction and the appeal must be dismissed. *See Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 318 S.E.2d 348 (1984). However, under our general supervisory powers pursuant to Rules 2 and 21 of the Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-32(c) (1989), we treat respondent's appeal as a petition for writ of certiorari which is allowed.

Respondent contends that the trial court erred in failing to make findings of fact and conclusions of law to support its order where the

action was tried upon the facts without a jury. Respondent bases her argument on the trial court's oral announcement at the 10 May 1994 hearing, at which the court did not make findings of fact and conclusions of law as required under N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (1990). The court, however, was not required to make oral findings and conclusions regarding adjudication. *See* N.C. Gen. Stat. § 7A-637 (1989). Furthermore, we have determined, for purposes of appellate review, that the 31 August 1994 written order, which contains the trial court's findings of fact and conclusions of law, controls. This written order satisfies the requirements of Rule 52, thus respondent's argument is without merit.

[2] Respondent's second assignment of error is that the court's findings of abuse and neglect were not supported by the evidence. Specifically, she contends that there was no clear and convincing evidence to support a finding that respondent created a substantial risk of physical injury to the minor by other than accidental means. She maintains that there was no testimony on the causation of the child's injury. We disagree. To the contrary, the pediatric expert testified that based on respondent's explanation of the causation of the injury, and the infant's medical history, her history was not consistent with the type of injuries she sustained. Furthermore, her age and neurological defects made it "highly unlikely that the child was harmed in the way described by the mother." The doctor's testimony, along with the testimony of several DSS witnesses concerning respondent's admission that she was afraid she would hurt her baby, and did not want her child, were clear and convincing evidence to support the court's conclusion that the minor was abused and neglected. The written order of the trial court is

Affirmed.

Judges JOHNSON and MARTIN, Mark D., concur.

RACHEL JONES, ADMINISTRATOR OF THE ESTATE OF CARL LEE JONES, PLAINTIFF/APPELLANT v. WILLAMETTE INDUSTRIES, INC.; ALLEN CARTER, INDIVIDUALLY; JEDD LEWIS, INDIVIDUALLY; JIM MULLINS, INDIVIDUALLY; BILL WHITEMAN, INDIVIDUALLY; MIKE RAMSEY, INDIVIDUALLY; AND DOUG DUNN, INDIVIDUALLY, DEFENDANTS/APPELLEES

No. COA94-1448

(Filed 7 November 1995)

1. Workers' Compensation § 62 (NCI4th)— wrongful death claim—no evidence that employer knew misconduct was substantially certain to cause death or serious injury

In a wrongful death action against defendant employer where the evidence tended to show that the employee died while cleaning the inside of a boiler used for disposing of waste from manufacturing plywood sheeting, the trial court properly entered summary judgment for defendant where the evidence, though indicating that much more might have been done to ensure workers' safety, did not show that defendant engaged in misconduct knowing it was substantially certain to cause death or serious injury.

Am Jur 2d, Workers' Compensation § 79.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

2. Workers' Compensation § 69 (NCI4th)— intentional tort claim against co-employees—insufficiency of evidence

Plaintiff's claim against her husband's co-employees for intentional torts were properly dismissed where the evidence that defendants instructed the employee to clean the inside of a boiler without ensuring that adequate safety measures were in place and being used did not support inferences that they intended for the employee to be injured or that they were manifestly indifferent to the consequences.

Am Jur 2d, Workers' Compensation § 100.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

3. Labor and Employment § 192 (NCI4th)— cleaning boiler— no ultrahazardous activity

Cleaning a boiler was not an "ultrahazardous activity" for which defendant employer was strictly liable, since the risk of serious harm could be eliminated by taking appropriate safety measures.

Am Jur 2d, Negligence § 403.

Appeal by plaintiff from judgment entered 16 September 1994 by Judge James C. Spencer, Jr., in Chatham County Superior Court. Heard in the Court of Appeals 4 October 1995.

Defendant Willamette Industries, Incorporated, (Willamette) manufactures plywood sheeting. The manufacturing process operates on a boiler system, the heart of which is a fluid flame burner. The burner is an approximately fifty foot high by twenty-five foot wide cylindrical vessel. The bottom of the vessel is covered with nozzles that blow air and sand up into the vessel to mix with wood and other waste products that are put into the vessel. This process generates heat and steam for the plant, and the boiler system must be in operation during the manufacturing process.

In 1990 Willamette, which bought the plant in 1988, disposed of manufacturing waste by burning it in an open pit outside its facility. After receiving notification in 1990 from North Carolina's Department of Environment, Health and Natural Resources to discontinue that practice, Willamette began burning waste in the vessel.

Plaintiff alleges that Willamette burned waste glue and glue resin in the vessel, and that this allegedly improper practice contributed to the buildup of residue known as slag. At times the slag was soft and granular, while at others it was hard and glassy. When it built up the plant would have to shut down to allow the employees to clean the vessel. Willamette's predecessor in ownership scheduled three or four major cleanings per year in addition to unscheduled forty-eight hour cleanings as needed. Willamette reduced the scheduled cleanings to one or two per year, but conducted more frequent forty-eight hour cleanings.

During cleanings, Willamette's employees had to wait for the vessel to cool. Even then, temperatures inside the vessel hovered around one hundred degrees or more. The only entrance to the vessel was a

two foot manhole that the employees had to climb through. No official cleaning or safety policy existed for cleaning the vessel. Typically, two or three employees would enter the vessel at a time. Because the floor was covered with nozzles, the employees put plywood down so they could stand inside the vessel. While one employee held an extension ladder, another stood on it and began chipping away the slag built up on the walls. When the slag fell to the ground, a third employee broke up the pieces, known as "clinkers," into bits small enough to pass through the vessel floor.

Sometimes the slag was minimal, while other times it was several feet thick. In 1990, two Willamette employees were on a scaffold chipping off slag when a two foot thick, doughnut shaped piece broke free and fell to the ground. Although neither employee was injured, they were frightened. They did not report the incident to management, but evidence indicates that at least one supervisor became aware of it several months later. In discovery documents, the remaining supervisors denied knowledge of the 1990 incident.

In 1992 plaintiff's decedent Carl Jones, Willamette's lead boiler operator, and two others entered the vessel to clean it. The slag was the worst it had ever been and appeared to be approximately three feet thick. As one employee held the ladder, another began chipping the slag from the walls. Jones worked on the floor breaking up clinkers. Suddenly, a fifteen foot sheet of slag fell from the wall and landed on Jones, crushing him. He died six days later.

An Occupational Safety and Health Administration (OSHA) investigation following the accident found Willamette in "serious" violation. OSHA found that Willamette did not have a confined space program in place, and described Jones' death as a "preventable accident." OSHA also noted that Willamette had no prior citations against it.

Plaintiff filed this wrongful death action against Willamette and the individual defendants, alleging claims under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), and *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). Specifically, plaintiff alleged Willamette's willful, wanton, and gross negligence because of (1) a lack of training regarding the hazards involved, (2) an absence of safety or rescue equipment, (3) an absence of safety training, advice, or assistance, and (4) a failure to allow adequate maintenance. She alleged that Willamette and the individual defendants

were jointly and severally liable because they encouraged ignorance to save money, failed to supervise properly, and failed to take remedial actions.

Defendants moved for summary judgment. On 16 September 1994 the trial court allowed defendants' motion and dismissed plaintiff's claims. Plaintiff appeals.

Lewis & Daggett, P.A., by Michael Lewis, and Lore & McClearen, by R. James Lore, for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Robert W. Sumner, David H. Batten, and Edward C. LeCarpentier, III, for defendant appellees.

ARNOLD, Chief Judge.

[1] Plaintiff alleges the trial court erred in granting summary judgment for defendants. She first contends the trial court committed reversible error in granting summary judgment on the *Woodson* claim. We disagree.

In *Woodson*, the Court held that "when 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 . . . may pursue a civil action against the employer." *Woodson*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228. "The conduct must be so egregious as to be tantamount to an intentional tort." *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993) (affirming dismissal of *Woodson* claim where employer instructed employee to work at an unguarded machine in a textile factory). Intent may be actual or constructive. *Woodson*, 329 N.C. 330, 407 S.E.2d 222. For the latter, intent will extend to " 'those [consequences] which the actor believes are substantially certain to follow from what the actor does.' " *Id.* at 341, 407 S.E.2d at 229 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 8, at 35 (5th ed. 1984)).

Willamette had not been cited for any safety violations of this nature in the past. *See Vaughn v. J. P. Taylor Co.*, 114 N.C. App. 651, 442 S.E.2d 538, *disc. review denied,* 336 N.C. 615, 447 S.E.2d 413 (1994) (noting that plaintiff's employer had no prior OSHA citations for safety violations). In addition, evidence showed that after the 1990 incident, in the only other similar incident, the employees involved did not inform their supervisors. As noted above, however, defendant

Mullins did become aware of the incident several months later. One employee who was in the vessel when the slag collapsed stated that, "We just didn't figure—we just didn't figure the darn wall was going to let go because of being cooled down. It was just one of them things we just didn't figure." The cleaning procedure used by Jones and the other employees was the same procedure used, without incident, by Willamette's predecessor in ownership. Plaintiff has failed to show that Willamette engaged in misconduct *knowing* it was substantially certain to cause death or serious injury. *See Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 442 S.E.2d 143 (1994).

Plaintiff urges that summary judgment was improper because she presented affidavits from two experts who stated that there was a substantial certainty of death or serious injury under the conditions in place at the plant. We do not agree. A *Woodson* claim cannot be made out or saved from summary judgment simply because a nonlegal expert states that *Woodson's* test has been met. *See Yates v. J. W. Campbell Electrical Corp.*, 95 N.C. App. 354, 382 S.E.2d 860 (1989). While much more might have been done to ensure workers' safety, the evidence does not show that Willamette engaged in misconduct *knowing* it was substantially certain to cause death or serious injury. Summary judgment for defendant Willamette was not error.

[2] Next, plaintiff contends the trial court erred by dismissing her *Pleasant* claims brought against the individual defendants. Again, we disagree.

In *Pleasant*, the Court recognized that the Workers' Compensation Act does not bar suit against a co-employee for intentional torts, and stated that "injury to another resulting from willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers' Compensation Act." *Pleasant*, 312 N.C. 710, 715, 325 S.E.2d 244, 248. The Court then held that "the Workers' Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence." *Id.* at 716, 325 S.E.2d at 249. The willful, wanton and reckless negligence standard is less demanding than *Woodson's* substantial certainty, and a "constructive intent to injure may be inferred when the conduct of the defendant is manifestly indifferent to the consequences of the act." *Pendergrass*, 333 N.C. 233, 238, 424 S.E.2d 391, 394 (holding that co-employees who instructed employee to work at unguarded machine were not manifestly indifferent to the consequences of his doing so).

The individual defendants in this case comprise the supervisory hierarchy at Willamette and are properly classified as co-employees. *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 416 S.E.2d 193, *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992). The evidence showed that the cleaning procedures had been used by Willamette and its predecessor without, for the most part, injury or incident. It also showed that most of the supervisors were not aware of the 1990 incident, in part because the employees did not report it. Moreover, no one had been injured using these procedures. An OSHA report concluded that "[s]ince there had been no reportable illness or accident related to this process, management felt the process was safe." Therefore, although supervisory personnel at Willamette should have ensured that adequate and appropriate safety measures were in place, and being used, including a confined space program, this does not support an inference that they intended for Jones to be injured, nor does it support an inference that they were manifestly indifferent to the consequences. *See Pendergrass*, 333 N.C. 233, 424 S.E.2d 391.

[3] Finally, plaintiff contends that Willamette is strictly liable for this "ultrahazardous activity." She argues that "cleaning out the boiler under the conditions created by Willamette could not be done safely, and was therefore ultra-hazardous." We do not agree with plaintiff's characterization of this activity.

To date, blasting is the only activity recognized in North Carolina as ultrahazardous. *Woodson*, 329 N.C. 330, 407 S.E.2d 222. Consequently, those responsible are held strictly liable for damages, mainly because the risk of serious harm cannot be eliminated with reasonable care. *Id.* The evidence here shows that the risk of serious harm can be eliminated by, among other things, implementing a confined space program, increasing the number of major cleanings per year, adding safety harnesses and lifelines, and training employees responsible for cleaning on the hazards involved and the precautions to be taken. Therefore, this activity cannot be properly characterized as ultrahazardous, and the trial court did not err by granting summary judgment on this claim.

The trial court's order is

Affirmed.

Judges GREENE and SMITH concur.

[120 N.C. App. 597 (1995)]

STATE OF NORTH CAROLINA v. GREGORY J. SAMMARTINO AND TIMOTHY A. SAMMARTINO

No. COA95-294

(Filed 7 November 1995)

1. Criminal Law § 1681 (NCI4th)— judgment modified during term—no error

Because the original judgments and modified judgments in this case were entered during the week of court assigned to the trial court judge, and because there had been no adjournment *sine die*, the trial court had authority to modify the judgments increasing defendant's prison terms.

Am Jur 2d, Criminal Law §§ 580, 581.

Power of state court, during same term, to increase severity of lawful sentence—modern status. 26 ALR4th 905.

2. Criminal Law § 1172 (NCI4th)— grave desecration—aggravating factor—great monetary loss

The trial court did not err by finding as an aggravating factor for desecrating a gravesite that the offense involved damage causing great monetary loss in violation of N.C.G.S. § 14-149 where defendants stipulated that the damages to the monument amounted to $10,000, and the same evidence was not used to prove both an element of the offense and the aggravating factor because the statute requires a showing of damage of more than $1,000 but does not require an additional showing of great monetary loss.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1102 (NCI4th)— grave desecration—nonstatutory aggravating factor—disrespect to law enforcement—sufficient evidence

The evidence supported the trial court's finding as a nonstatutory aggravating factor for desecrating a gravesite that defendants' conduct was intended to show disrespect to law enforcement in a manner calculated to be highly publicized where the statements of defendants showed that they destroyed a monument erected to the memory of slain police officers during the trial of the slayer of two police officers in an effort to make the news.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendants from judgments entered 4 October 1994 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 September 1995.

Attorney General Michael F. Easley, by Associate Attorney General David L. Woodard, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Anne N. Hogewood, for defendant appellants.

COZORT, Judge.

Defendants were charged with desecrating a grave site in violation of N.C. Gen. Stat. § 14-149 (1993). On 21 September 1994, defendants pled guilty to the charges. Sentencing was continued until 4 October 1994. At the sentencing hearing, the prosecutor recited a factual basis for the pleas and read a statement made by a codefendant, Jason Torres, to a police officer. Torres said that on 26 July 1994 he and defendants were at his house drinking beer when defendant Gregory J. Sammartino decided that they should walk to Sharon Memorial Park. After walking around the cemetery, defendant Timothy A. Sammartino asked the others whether they wanted to "make the news." The three of them stood looking at a monument erected to police officers slain in the line of duty. Defendants, who are martial arts experts, took stances as did Torres. In unison they did jump kicks at the monument and knocked it over. The prosecutor also stated that defendants eventually gave statements to the effect that they used karate kicks to knock over the monument.

Defendants stipulated that the amount of damage to the monument was $10,000.00. Counsel for Jason Torres stated that the damage to the monument was done during a trial for the slayer of two police officers. Counsel for defendant Timothy A. Sammartino argued that the statements of defendants showed they were not motivated by a desire to show disrespect for authority. Counsel for defendant Gregory J. Sammartino added that defendants' case was highly publicized and that he did not believe defendants' acts were intended to reflect a general lack of respect for the police.

At the conclusion of the hearing, Judge Beverly T. Beal found as to each defendant aggravating factors that the offenses "involved damage causing great monetary loss" and that the "conduct was

intended to show disrespect to law enforcement [in a] manner calculated to be highly publicized." Judge Beal found as mitigating factors that defendants did not have prior criminal convictions and that they were honorably discharged from the United States Armed Services. Judge Beal found that the aggravating factors outweighed the mitigating factors. He sentenced each defendant to the presumptive prison term of two years, suspended on conditions that included each serving an active jail term of sixty days.

On 6 October 1994, the State requested that the judgments be modified. Judge Beal indicated that he would not grant the State's motion. On his own motion, however, he modified the judgments and sentenced each defendant to four years in prison, suspended upon the same conditions. Defendants appeal.

[1] Defendants first argue the trial court was without authority to modify the judgments. They contend that, although the trial court could modify judgments during the same session of court, "the session of court ended with the completion of the cases on the docket for October 4." We disagree.

"[D]uring a session of the court a judgment is *in fieri* and the court has authority in its sound discretion, prior to expiration of the session, to modify, amend or set aside the judgment." *State v. Edmonds*, 19 N.C. App. 105, 106, 198 S.E.2d 27, 27 (1973) (holding that the trial court properly modified a judgment two days after its entry to include an active term of imprisonment rather than a suspended sentence); *see also State v. Quick*, 106 N.C. App. 548, 561, 418 S.E.2d 291, 299, *disc. review denied*, 332 N.C. 670, 424 S.E.2d 415 (1992) (holding that the trial court properly modified a sentence the day after its entry). A "session" has been defined as the time during which a court sits for business and refers to a typical one-week assignment of court. *See Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 154 n.1-2, 446 S.E.2d 289, 291-92 n.1-2, *reh'g denied*, 337 N.C. 807, 449 S.E.2d 566 (1994). The point marking the expiration of a "session" has been further addressed by this Court:

> Clearly a trial session terminates or adjourns by expiration of the time set for the session by the Chief Justice, unless properly extended by order. In other instances our cases hold that when the judge finally leaves the bench at any session of court, the session terminates or adjourns whether the time originally set for the session has expired or not. In our opinion the orderly administration of justice requires that a trial session shall terminate or

> adjourn upon the announcement in open court that the court is adjourned *sine die* . . . .

State v. Jones, 27 N.C. App. 636, 638-39, 219 S.E.2d 793, 795 (1975) (citations omitted). *Sine die* means "without assigning a day for a further meeting or hearing." Black's Law Dictionary 1385 (6th ed. 1990). Because the original judgments and modified judgments in this case were entered during the week of court assigned to Judge Beal and because there had been no adjournment *sine die*, the trial court had authority to modify the judgments.

[2] Defendants also argue that there was no basis upon which the trial court could modify the judgments and impose sentences to prison terms in excess of the presumptive term. Specifically, they contend the trial court improperly found certain aggravating factors. We disagree.

The trial court found as one aggravating factor that the offense involved damage causing great monetary loss. Defendants contend evidence used to prove an element of the offense was also used to prove this aggravating factor, in violation of N.C. Gen. Stat. § 15A-1340.4(a) (1988). While desecrating grave sites in violation of N.C. Gen. Stat. § 14-149 requires a showing that damage of more than one thousand dollars resulted from the desecration, it does not require an additional showing of *great* monetary loss. Here, the damages were $10,000.00. Therefore, the same evidence was not used to prove both an element of the offense and the aggravating factor. *See State v. Thompson*, 309 N.C. 421, 422, 307 S.E.2d 156, 158 (1983) (stating that "the *additional* evidence necessary to prove a taking or attempted taking of property of *great* monetary value is not evidence necessary to prove an element of felonious larceny").

Defendants also contend no evidence was presented during the sentencing hearing to support the aggravating factor. Defendants stipulated during sentencing to damages in the amount of $10,000.00, a figure ten times that required to prove an element of the offense. Therefore, sufficient evidence was presented of damage causing great monetary loss, and the trial court did not err by finding the factor.

[3] The trial court also found as an aggravating factor that defendants' "conduct was intended to show disrespect to law enforcement [in a] manner calculated to be highly publicized." Defendants again contend the evidence needed to find the first portion of the factor is the same as evidence needed to prove an element of the offense—

disrespect for the dead. Assuming *arguendo* that disrespect for the dead is an element of the offense, the trial court found that defendants' conduct additionally was meant to show disrespect for *law enforcement* in general. Because evidence was necessary to prove this portion of the factor which was not necessary to prove an element of the offense, that portion of the factor is proper.

Defendants also contend the factor is not supported by evidence presented at the sentencing hearing. At the sentencing hearing in this case, the trial court asked the prosecutor to recite a factual basis for defendants' guilty pleas. The prosecutor read from a codefendant's statement that defendant Timothy A. Sammartino suggested destroying the monument to "make the news." He further stated that defendants eventually made statements similar to that of the codefendant. Defendants' attorneys did not rebut the factual basis recited by the prosecutor. Instead, counsel for defendant Timothy A. Sammartino attempted to use the statements of defendants to show that they were not motivated by a desire to show disrespect for authority. He argued that the destruction of the monument "was merely the actions of kids who were drinking," and that "it was stupidity, immaturity." Counsel for defendant Gregory J. Sammartino argued that defendants "were . . . young men doing a stupid thing," and stated that this "was a highly publicized case in the local media." From the comments of defendants' attorneys, we can infer that defendants consented to the prosecutor's recitation of the factual basis and the reading of the codefendant's statement. *See State v. Mullican*, 329 N.C. 683, 686, 406 S.E.2d 854, 855 (1991). Indeed, the comments of defendants' attorneys were entirely consistent with those of the prosecutor except for their argument that defendants did not intend any disrespect to law enforcement by their actions.

When a defendant pleads guilty, the trial court may rely upon the circumstances surrounding the offense, including factual allegations in the indictment, in determining whether aggravating factors exist. *State v. Flowe*, 107 N.C. App. 468, 472, 420 S.E.2d 475, 478, *disc. review denied*, 332 N.C. 669, 424 S.E.2d 412 (1992). The recitation of the factual basis and the statements of defendants show that defendants destroyed a monument erected to the memory of slain police officers during the trial of the slayer of two police officers in an effort to "make the news." We hold that there was sufficient evidence presented to support the nonstatutory aggravating factor that defendants' "conduct was intended to show disrespect to law enforcement [in a] manner calculated to be highly publicized."

Affirmed.

Chief Judge ARNOLD and Judge GREENE concur.

HENRY ANDREWS, EMPLOYEE, PLAINTIFF v. FULCHER TIRE SALES AND SERVICE, EMPLOYER; AND UNITED STATES FIDELITY AND GUARANTY COMPANY, CARRIER, DEFENDANTS

No. COA94-1416

(Filed 7 November 1995)

1. Workers' Compensation § 230 (NCI4th)— inability to work —evidence supporting finding

The Industrial Commission's finding that plaintiff was unable to "work at the same level as before the injury" was supported by a doctor's testimony that plaintiff was "unable to function."

Am Jur 2d, Workers' Compensation § 395.

2. Workers' Compensation § 416 (NCI4th)— Commission's refusal to consider new evidence

On appeal of a deputy commissioner's award of benefits, the Industrial Commission did not err by refusing to consider defendants' new evidence consisting of the testimony of a private investigator that he observed plaintiff "walking without a limp and in no apparent distress and driving automobiles" where this was the same type of evidence introduced by defendants at the first hearing.

Am Jur 2d, Workers' Compensation §§ 686, 687.

3. Workers' Compensation § 103 (NCI4th)— order of attorney fees entered after notice of appeal—no jurisdiction of Industrial Commission

Defendants' notice of appeal to the Court of Appeals divested the Industrial Commission of jurisdiction to enter its order granting plaintiff's request for attorney fees.

Am Jur 2d, Workers' Compensation §§ 56, 699, 724.

Appeal by defendants from Opinion and Award for the Full Commission entered 3 August 1994. Heard in the Court of Appeals 2 October 1995.

Kennedy W. Ward, P.A., by Kennedy W. Ward, for plaintiff-appellee.

Ward and Smith, P.A., by S. McKinley Gray, III and William Joseph Austin, Jr., for defendant-appellants.

GREENE, Judge.

Pursuant to N.C. Gen. Stat. § 97-86, Fulcher Tire Sales and Service and United States Fidelity and Guaranty Company (defendants) appeal from the Opinion and Award of the Industrial Commission (Commission), filed 3 August 1994, awarding Henry Andrews (plaintiff) $406 per week during the period of his disability, medical expenses and attorney fees.

Plaintiff was employed as a mechanic, by Fulcher Tire Sales and Service (Fulcher). Plaintiff alleges that he was injured at work on 13 September 1991 and, it is not disputed in this appeal that he reported this injury to Fulcher, pursuant to N.C. Gen. Stat. § 97-22. Because there was a dispute regarding compensation, United States Fidelity and Guaranty Company (Fidelity), Fulcher's insurance carrier, requested a hearing, pursuant to N.C. Gen. Stat. § 97-83. In its appeal from the deputy commissioner's award, defendants requested alternatively that the Commission consider new evidence. In support of their motion, defendants submitted an affidavit from Chris Baggett, a private investigator, which stated that on several occasions from 28 April 1993, through 3 June 1993, he observed plaintiff "walking without a limp and in no apparent distress" and driving automobiles and in one instance someone "who appeared to be" plaintiff underneath a car.

The Commission denied defendants' request to consider new evidence and filed its Opinion and Award. It concluded that "plaintiff [had] sustained an injury by accident arising out of and in the course of his employment" and that plaintiff is "entitled to compensation for temporary total disability" of $406 per week and payment of all his medical expenses arising out of the injury by accident. The Commission also approved "attorney's fee in the amount of twenty-five percent of the compensation awarded." This fee was to be deducted by the defendants "from the lump sum awarded to plaintiff." After the defendants filed notice of appeal, the Commission approved an additional award of attorney fees and costs pursuant to N.C. Gen. Stat. § 97-88 in a 9 November 1994 Order.

In support of its Opinion and Award, the Commission found as a fact that plaintiff sustained an injury by accident on 13 September 1991 and further found the following with regard to plaintiff's disability:

> 6. As a result of this injury by accident, plaintiff was unable to perform his work duties for defendant-employer from September 14, 1991 through at least the date of the hearing on August 26, 1992.
>
> 7. At the time of this injury, plaintiff operated a garage at his home. . . .
>
> 8. . . . Following his injury, plaintiff performed some work at his garage within limitations, but the nature and amount of the work cannot be determined. His testimony to the contrary was not accepted as credible by the deputy commissioner, and the Full Commission declines to overrule that assessment. In any event, plaintiff would not have been able to perform work at the same level as before the injury due to the impairment from the injury. Accordingly, it is presumed his earnings from his garage were reduced after his injury.

The evidence in this record, relevant to the above findings of fact, reveals a stipulation that the plaintiff "has a herniated disc at C4-5 and a bulging disc at 5-6." He was treated by Dr. Wilfong and Dr. Ballenger. Ballenger's notes, which are from the fall of 1991, indicate that plaintiff can sit down and stand up, but that plaintiff is in pain when he does so and that plaintiff was on complete bed rest for some time during the fall of 1991. Ballenger also prescribed many different pain medications for plaintiff during the fall of 1991. Wilfong's office notes indicate that plaintiff has a fairly significant disc bulging at 4-5 and is "beside himself in pain." In a 31 December 1991 letter to Ballenger, Wilfong states that plaintiff "is . . . not able to function" and that Wilfong has scheduled plaintiff for back surgery. Prior to the injury the plaintiff, in addition to his work with his employer worked part time in a garage behind his house. The plaintiff testified that since the injury he was unable to work. There was also testimony by private investigator Todd Goodson that, in August 1992, plaintiff was observed moving "in a fluid [and] natural motion," leaning under the hoods of vehicles on two separate occasions, and "squatting" on another occasion.

The issues are whether (I) the Commission's finding that "plaintiff sustained an injury by accident on 13 September 1991" is supported by the evidence; (II) the Commission's finding of fact that plaintiff has been unable to perform work "at the same level as before the injury" is supported by the evidence; (III) the Commission should have considered defendants' evidence regarding plaintiff's disability; and (IV) the Commission had jurisdiction to enter its 9 November award of attorney fees.

I

Defendant argues that the witnesses who testified that plaintiff sustained his injury while working at Fulcher on 13 September were "disgruntled ex-employees of" Fulcher who made a "suspicious cast of characters" and that their "testimony should be construed against [p]laintiff's credibility" rendering the finding without support. This argument questions entirely the credibility of the witnesses, however, and we are bound by the Commission's determination of their credibility and the weight to be afforded their testimony. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

II

This Court is also bound by the findings entered by the Commission if they are supported by sufficient competent evidence. *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); *Russell*, 108 N.C. App. at 765-66, 425 S.E.2d at 457. The evidence is sufficient if it is such that a reasonable mind might accept as adequate to support the finding. 3 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 80.10(c) (1995); *Garrett 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) (defining "sufficient"); *Aycock v. Cooper*, 202 N.C. 500, 504, 163 S.E. 569, 570 (1932).

[1] The defendants argue that there is not sufficient competent evidence in this record to support the findings of the Commission that the plaintiff was unable to work "at the same level as before the injury." We disagree.

The only evidence relevant to this finding is the plaintiff's own testimony that he was unable to work after the injury and the language from the notes of Wilfong that the plaintiff was "not able to function" after the injury. The testimony of the plaintiff with regard to his post-injury work ability was rejected by the Commission as not

credible and thus cannot support the finding. The testimony of Wilfong that the plaintiff was "unable to function," however, is such that a reasonable mind might accept as adequate to support a finding that the plaintiff was unable "to perform work at the same level as before the injury."

III

[2] We disagree with defendants' argument that the Commission erred in its final Opinion and Award because it did not consider defendants' new evidence, pursuant to N.C. Gen. Stat. § 97-85. Whether the Commission considers new evidence is a matter within its sound discretion. *Hall v. Chevrolet Co.*, 263 N.C. 569, 577, 139 S.E.2d 857, 862-63 (1965). In determining whether to accept new evidence, the Commission must consider the relative prejudices to the parties, the reasons for not producing the evidence at the first hearing, "the nature of the testimony, and its probable effect upon the conclusion reached." *Id.* In this case, the new evidence, testimony by a private investigator, was the same type of evidence that defendants introduced at the first hearing. The testimony did not provide any new revelations regarding plaintiff's disability and thus would "probably not affect the outcome." Defendants' suffered no prejudice by the Commission's denial of their motion to consider the new evidence and thus, the Commission did not abuse its discretion.

IV

[3] Defendants finally argue that its notice of appeal to this Court divested the Commission of jurisdiction to enter its 9 November 1994 Order which awarded plaintiff's request for attorney fees. We agree. Generally, an appeal suspends the lower tribunal's jurisdiction, pending the appeal. N.C.G.S. § 1-294 (1983); *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981); *see Hanks v. Southern Public Utils. Co.*, 210 N.C. 312, 319-20, 186 S.E. 252, 257 (1936) (Commission constitutes special tribunal in compensation case and must perform judicial functions). This general rule applies to an award of "fees and costs" which is entered subsequent to the appeal. *Lowder*, 301 N.C. at 581, 273 S.E.2d at 259. Once the appeal is complete, however, the Commission is again vested with the authority to determine an amount and to award attorney fees for work performed in furtherance of an appeal from a deputy commissioner to the Commission or an appeal from the Commission to this Court. N.C.G.S. § 97-88 (1991); *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 399, 298 S.E.2d 681, 685 (1983). Because the defendants' notice of appeal

was entered prior to the 9 November order, the Commission was without jurisdiction to enter that award and it is vacated. The issue of attorney fees is remanded to the Commission.

Affirmed in part, vacated in part and remanded.

Chief Judge ARNOLD and Judge SMITH concur.

DONNA MARIE ROSS, DAUGHTER, AND RICHARD LEE GODWIN, SON OF MAMIE PAULETTE BROCK, DECEASED EMPLOYEE-APPELLANTS v. MARK'S INC., D/B/A HARDEE'S OF GREENVILLE, EMPLOYER-APPELLEE

No. COA94-1383

(Filed 7 November 1995)

Workers' Compensation § 133 (NCI4th)— employee depositing employer's funds—murder by ex-husband—no injury arising out of employment

There was competent evidence to support the Industrial Commission's finding that the murder of the deceased employee was privately motivated by only one factor, the stormy domestic relationship between the employee and her ex-husband, and the Commission therefore did not err in concluding that the injury did not arise out of and in the course of the employee's employment, even if it did occur as she left work on her way to the bank to deposit the employer's funds.

Am Jur 2d, Workers' Compensation § 569.

Workers' compensation law as precluding employee's suit against employer for third person's criminal attack. 49 ALR4th 926.

Appeal by plaintiffs from an opinion and award of the North Carolina Industrial Commission entered 19 July 1994. Heard in the Court of Appeals 19 September 1995.

James Hite Avery Clark & Robinson, by Leslie S. Robinson, for plaintiff appellants.

Cranfill, Sumner & Hartzog, L.L.P., by C.D. Taylor Pace and W. Scott Fuller, for defendant appellee.

SMITH, Judge.

In this case, plaintiffs, children of deceased employee, attempted to recover workers' compensation benefits for the death of their mother resulting from an assault inflicted by her ex-husband. Deputy Commissioner Roger L. Dillard, Jr., found that the moving cause of the assault upon the employee was personal, did not arise out of her employment and, therefore, was not compensable under the Workers' Compensation Act. Plaintiffs appealed to the Full Commission, which adopted, with slight modification, the findings of fact and conclusions of law of the Deputy Commissioner and affirmed the denial of benefits. Plaintiffs appeal to this Court. We affirm.

In August of 1990, employee, Mamie Paulette Brock, was the assistant manager of Hardee's Fast Food Restaurant in Greenville. At that time she had been divorced from Larry Ray Godwin for seven years. Approximately six months prior to August of 1990, Brock and Godwin began living together again. The two had a tumultuous relationship because Brock continued to have boyfriends other than Godwin and Godwin became very jealous. Three months before Brock's death, Godwin discovered her having sex with another man in the back of a van. At that time Godwin held a gun to Brock's head and threatened to kill her. On several occasions, Godwin told co-workers that he was going to kill Brock. Several days before 13 August 1990, Godwin became so enraged with Brock that he asked her to move out of the mobile home in which the two lived.

On 13 August 1990, Godwin went to Hardee's and saw Brock having dinner with one of her boyfriends. Outraged, Godwin went out to the Hardee's parking lot and waited 20 or 30 minutes. Brock's boyfriend exited through the back door of Hardee's and did not confront Godwin. Godwin went home, where he explained to his roommate what had happened. His roommate told him he needed to "get her back." According to Godwin's later confession to police, he and his roommate then formulated a plan to punish and embarrass Brock. They decided to take defendant employer's money from employee Brock after she had closed the restaurant and was on her way to make the night deposit. They believed that by robbing the employee, they could embarrass her and make her think she would have to replace the money out of her own funds in order to prevent employer from absorbing a loss caused by her personal acquaintances. As a result, Godwin and his roommate believed this would be revenge upon Brock.

Later on the evening of 13 August 1990 Godwin and his roommate went back to Hardee's where Godwin hid in Brock's car, waiting for her until she finished work. When Brock got into her vehicle and was on her way to the bank, Godwin showed himself. At some point, Brock stopped the car and allowed Godwin to drive. The two became engaged in a fight and, after driving down the road for some distance, Godwin pulled the car to the side of the road where he and Brock continued a heated argument. Godwin grabbed a pistol, which was in Brock's car, and shot her at least twice. Godwin then told his roommate, who had been following them in another car, what had happened. The roommate then shot Brock again.

Godwin and his roommate took Brock's body to a remote site in Washington, North Carolina, where they disposed of Brock's body, her belongings and their own bloody clothes. During this time, the roommate said that they needed to make it look like a kidnapping, robbery, rape and murder. They divided the bank deposit of $293.61.

Based upon the foregoing facts, the Full Commission made the following conclusions of law:

> 1. There is no reasonable inference that can be drawn from the evidence presented that the decedent's employment created the risk of her attack. The actual cause of the assault on the deceased employee by her ex-husband was personal. The plaintiff's claim is not compensable.
>
> 2. Decedent's death did not arise out of her employment, although she was kidnapped and murdered as she was leaving her place of employment and was on the way to make defendant-employer's bank deposit. Even though there is evidence that would tend to indicate that robbing the employee was the method that the ex-husband and his roommate had schemed to have revenge on the employee, these actions were directed to the deceased employee personally and arose from a set of circumstances outside of her employment and, thus, did not arise within or out of the scope of her employment.

Plaintiffs contend that the Industrial Commission erred on the ground that there is a reasonable inference which can be drawn from the evidence that decedent Brock's employment created the risk of her attack and that the assault arose out of and in the course of her employment and was not personal in nature.

In an appeal from a decision by the Industrial Commission, this Court's standard of review is limited to a determination of whether the Commission's findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings. *Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 316, 283 S.E.2d 436, 438 (1981), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 806 (1982). This is so even if there is evidence which would support contrary findings. *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989).

Under the Workers' Compensation Act a compensable death is one which results from an injury by accident arising out of and in the course of employment. N.C. Gen. Stat. § 97-2(6) (1991); *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E.2d 350, 353 (1972); *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 377 S.E.2d 777, *aff'd*, 325 N.C. 702, 386 S.E.2d 174 (1989). This appeal presents only the question of whether decedent's injuries arose out of her employment with defendant employer. The parties have stipulated that decedent's death resulted from an accident within the meaning of the Workers' Compensation Act and that she died in the course of her employment.

In general, the term "arising out of" refers to the origin or causal connection of the accidental injury or death to the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). While assaults upon employees may be compensable if they arise out of and in the course of employment, privately motivated assaults which spring from disputes "that claimant, so to speak, brought with him to the employment premises from outside" are generally not compensable under the Workers' Compensation Act. A. Larson, *The Law of Workmen's Compensation*, § 11.31 (1992); *Gallimore*, 292 N.C. at 403-04, 233 S.E.2d at 532; *Robbins*, 281 N.C. at 240, 188 S.E.2d at 354. This is so because privately motivated assaults do not arise out of the employment relationship; they are foreign to it. The necessary connection between the injury and the employment does not exist.

Plaintiffs argue that Godwin's roommate was the impetus of the assault upon employee Brock and that his primary motivation was to rob her for personal financial gain. They contend that the nature of her employment increased the risk of such a robbery and that the assault upon Brock was an inherent risk of her employment. Plaintiffs argue that there was a dual motive for the robbery of and assault upon Brock: one was the personal relationship between Brock and

Godwin, the other was the roommate's desire for financial gain. They argue that, when such a dual motive exists, the resulting injury is compensable under the Act. However, the Full Commission found only one motivating force behind the assault of Brock and that was the personal relationship between her and Godwin. We are bound by the findings of the Industrial Commission if there is competent evidence in the record to support them. In this case, we find that there is competent evidence to support the Commission's finding that the assault was privately motivated by only one factor: the domestic relationship between the employee and her ex-husband.

Godwin and Brock had a stormy relationship, and only days before the assault Godwin had asked Brock to move out of the mobile home they occupied. He had threatened her life on at least one occasion and had told co-workers he was going to kill her. When Godwin told his roommate that he had seen Brock having dinner with another man, the roommate's immediate comment was that Godwin needed to "get her back." In Brock's car on the night of the assault, she and Godwin engaged in a bitter fight. It was not until after he shot Brock that Godwin and his roommate took money from her which belonged to defendant employer. At that point, the roommate told Godwin they needed to make it "look like" a robbery, kidnapping, rape and murder. This ample evidence supports the Commission's finding that the relationship between Brock and Godwin was the motivating force behind the assault. When the "circumstances surrounding the assault furnish no basis for a reasonable inference that the nature of the employment created the risk of such an attack, the injury is not compensable." *Robbins*, 281 N.C. at 240, 188 S.E.2d at 354.

The risk of assault and murder by a jealous ex-husband is not one which a rational mind would anticipate as an incident of the employment of an assistant manager of a fast food restaurant. The motivation behind the robbery and assault was unrelated to the employment of the deceased and likely to present itself at any time and in any place. Therefore, the resultant injury was not directly traceable to and connected with the employment. For these reasons, we conclude that the deceased employee did not sustain injury and death by accident arising out of the course of her employment. The opinion and award of the Industrial Commission is

Affirmed.

Judges MARTIN, John, and WALKER concur.

HAZARD CANNON, PLAINTIFF v. THE CITY OF DURHAM, DENNIS W. MCNAMES, NEW DURHAM CORPORATION, HARLAN E. BOYLES, STATE TREASURER AND LOCAL GOVERNMENT COMMISSION OF NORTH CAROLINA, DEFENDANTS

No. COA94-1167

(Filed 7 November 1995)

1. Limitations, Repose, and Laches § 160 (NCI4th)— challenge to financing of ballpark—applicability of doctrine of laches

The doctrine of laches applies to any challenge to an action by the State of North Carolina or any of its municipalities, and it is of no consequence whether the actions are *ultra vires* or *void ab initio*. Therefore, plaintiff's action challenging a city's financing and construction of a ballpark as *ultra vires* was barred by laches where it was instituted more than two years after the project was approved.

Am Jur 2d, Equity §§ 173-176.

What constitutes laches barring right to relief in taxpayers' action. 71 ALR2d 529.

2. Constitutional Law § 51 (NCI4th)— municipal financing of ballpark—no standing of taxpayer to challenge

Plaintiff taxpayer lacked standing to challenge the manner in which defendants financed the construction of a ballpark, since plaintiff had only a generalized objection to the allegedly improper financing techniques used by defendants.

Am Jur 2d, Constitutional Law § 202; Taxpayers' Actions §§ 13-27.

Appeal by Plaintiff from Order and Judgment entered 26 August 1994 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 22 August, 1995.

Randall, Jervis & Hill, by Robert B. Jervis, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker and John J. Butler, for defendant-appellee City of Durham.

Michael F. Easley, Attorney General, by Douglas A. Johnston, Assistant Attorney General, for defendants-appellees Harlan E. Boyles and Local Government Commission.

WYNN, Judge.

In this action, plaintiff seeks to enjoin defendant City of Durham from making any further installment payments to defendant New Durham Corporation on an installment purchase contract. Plaintiff also seeks an order declaring that the installment purchase contract, and a deed of trust executed on the new Durham Athletic Park by the City of Durham to secure financing for the project, are void.

On 21 May 1992, the Durham City Council approved resolution 7719, which, among other things, authorized the negotiation of an installment purchase contract, and the issuance of debt instruments known as Certificates of Participation, to finance the proposed construction of the new Durham Athletic Park (ballpark), and to finance ongoing water improvement projects. The resolution also ordered that public hearings be held at the next scheduled City Council meeting to assist the City Council in determining whether to go ahead with the planned construction of the ballpark. Following notice of publication in the Durham Herald Sun on 22 May 1992, a public hearing was held on 1 June 1992, during the regular meeting of the City Council. The City Council heard from several citizens and decided to proceed with the transaction outlined in the 21 May resolution. On 23 July 1992, the City Council of Durham adopted Resolution 7731 which formally authorized the City of Durham to participate in the construction of the new ballpark, along with the water treatment projects which were also outlined in the 21 May resolution.

The record indicates that extensive publicity surrounded the construction of the ballpark, as well as the transactions involved in financing it. Despite the publicity surrounding the construction of the ballpark, plaintiff waited until 16 June 1994, more than two years after the City of Durham approved the project, to file this action.

Thereafter, defendants filed a motion to dismiss plaintiff's complaint, alleging that plaintiff failed to state a claim upon which relief could be granted. At the hearing on defendants' motion to dismiss, evidence, in the form of affidavits and documents, was presented by both sides without objection. As a result, the trial court converted the motion to dismiss into a motion for summary judgment, and in an Order and Judgment dated 26 August 1994, granted summary judgment in favor of defendants on all claims. From this decision plaintiff appeals. Finding no error in the decision by the trial court, we affirm.

Defendants assert two principal arguments supporting the trial court's grant of summary judgment in their favor: (1) That plaintiff's claims are barred by laches, and (2) That plaintiff lacks standing to bring the action.

I.

[1] Summary judgment in favor of a defendant asserting the defense of laches is proper despite the fact that laches is an affirmative defense, and the burden of proof is on the defendant. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976), *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

In *Taylor*, the Supreme Court held that when the defense of laches is raised, "the plaintiff . . . is permitted to counter [the defense of laches] by showing a justification for the delay, and whenever this assertion raises triable issues, defendant's motion [for summary judgment] will not be granted." *Id.* at 622, 227 S.E.2d at 584. In addition, the defendants must show that the plaintiff's delay in bringing suit has prejudiced, disadvantaged, or injured the defendants. *Id.* at 624, 227 S.E.2d at 584-585.

Plaintiff does not argue on appeal that he is not guilty of laches; rather, he contends that the doctrine of laches does not apply when the actions of a municipality are asserted to be *ultra vires*. We disagree. In *Stutts v. Swaim*, 30 N.C. App. 611, 228 S.E.2d 750, *disc. rev. denied*, 291 N.C. 178, 229 S.E.2d 692 (1976) this Court held the doctrine of laches applicable when a rezoning ordinance was asserted to be invalid. The *Stutts* Court held that even if a rezoning ordinance was beyond the authority of the city, or *ultra vires*, the plaintiffs are "not entitled to relief if they are guilty of laches." *Id.* at 615, 228 S.E.2d at 752.

Plaintiff argues that for purposes of determining whether the doctrine of laches applies, there is a distinction between a case which involves an improper exercise of a municipality's otherwise lawful powers, such as in *Stutts*, and an act which is *ultra vires*, or completely beyond the authority of the municipality. Plaintiff contends that acts which fall into the latter category are "*void ab initio*," and that the doctrine of laches does not apply. We disagree.

In *Franklin County v. Burdick*, 103 N.C. App. 496, 405 S.E.2d 783 (1991), *cert. denied*, 332 N.C. 147, 419 S.E.2d 570 (1992) this Court addressed a claim by defendants, in an action by the county for collection of back taxes, that a 1970 North Carolina constitutional

amendment approved by a ballot measure violated the United States Constitution. This Court held the doctrine of laches applicable to the contention by the defendant that the ballot measure in question was unconstitutional. *Id.* No measure taken by a municipality could be more clearly *ultra vires*, or "*void ab initio*" than an action which violates the United States Constitution. Nevertheless, the *Franklin County* Court applied the doctrine of laches to a claim that North Carolina passed a constitutional amendment which violated the United States Constitution. The *Franklin County* Court found that the plaintiff was guilty of laches and denied plaintiff the possibility of relief.

Thus, the doctrine of laches applies to any challenge to an action by the State of North Carolina, or any of its municipalities. In determining that the doctrine of laches applies to the case at hand, we need not address the merits or validity of plaintiff's claims. The doctrine of laches does not serve to make an illegal action valid; instead, it serves to deny the guilty party the relief afforded by equity. *Taylor*, 290 N.C. 608, 227 S.E.2d 576. Having determined that laches is applicable, we affirm the ruling of the trial court.

II.

[2] Although we find the doctrine of laches dispositive of the subject case, we hold further that the decision of the trial court should be affirmed because the plaintiff lacks standing to challenge the manner in which the defendants financed the construction of the ballpark.

Our courts have consistently held that a taxpayer has no standing to challenge questions of general public interest that affect all taxpayers equally. *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E.2d 890, *disc. rev. denied*, 301 N.C. 94 (1980), *Green v. Eure*, 27 N.C. App. 605, 220 S.E.2d 102 (1975), *disc. rev. denied and appeal dismissed*, 289 N.C. 297, 222 S.E.2d 696 (1976), *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 261 S.E.2d 21 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980).

In this case, plaintiff has only a generalized objection to the allegedly improper financing techniques used by the defendants. Plaintiff does not have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of [difficult questions]." *Stanley v. Dep't of*

Conservation and Development, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973), [quoting from *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 961 (1968)].

For the foregoing reasons the judgment of the trial Court is

Affirmed.

Judges GREENE and JOHN concur.

METROMONT MATERIALS CORP., A SOUTH CAROLINA CORPORATION, PLAINTIFF v. R.B.R. & S.T., A NORTH CAROLINA LIMITED PARTNERSHIP, DEFENDANT

No. COA94-1366

(Filed 7 November 1995)

Interest and Usury § 5 (NCI4th)— breach—date properly determined by trial court

N.C.G.S. § 24-5(a) (1991) clearly provides for interest from the date of breach in breach of contract actions, and the trial court, rather than the jury, properly determined that the date plaintiff issued its Certificate of Substantial Completion, rather than the date individual breaches were discovered, was the date of breach.

Am Jur 2d, Interest and Usury § 87.

Comment Note.—Allowance of prejudgment interest on builder's recovery in action for breach of construction contract. 60 ALR3d 487.

Appeal by plaintiff from judgment entered 21 April 1994 by Judge Lacy H. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 29 September 1995.

On 1 March 1988 plaintiff and defendant entered into a contract in which plaintiff agreed to design, fabricate, and install a parking deck at The Asheville Mall. On 4 May 1989 plaintiff issued a Certificate of Substantial Completion signifying that defendant could "occupy or utilize the [deck] . . . for the use for which it is intended, as expressed in the Contract Documents." After discovering multiple leaks in the deck, which defendant had anticipated would be "water-tight," the parties entered into a change order to remedy the problem.

The change order provided that plaintiff would be entitled to the remainder of the contract balance upon completion of the remedial work. Upon completion, however, defendant remained unsatisfied and refused to pay the remainder of the contract balance. That refusal prompted plaintiff to file this action seeking $76,318.00 plus interest.

In March of 1992 defendant answered and counterclaimed, alleging that plaintiff breached the contract by failing, in many respects, to ensure adequate drainage. In June of 1993 defendant amended its counterclaim to allege additional flaws including (1) plaintiff's failure to use air-entrained concrete, as specified in the contract, (2) the improper installation of connection plates, leaving them exposed to the elements and susceptible to corrosion, and (3) the structural failure of at least three beams. In its reply plaintiff conceded some inadequacies were present, but denied many of defendant's allegations.

At the conclusion of the trial, the jury found that plaintiff had substantially performed the contract with defendant and awarded it $50,000.00 on its claim. In addition, it found that plaintiff breached the contract and awarded defendant $575,000.00 on its counterclaim. The trial judge entered judgment awarding plaintiff interest on the $50,000.00 award from 22 August 1991 and awarding defendant interest on its $575,000.00 award from 4 May 1989.

Plaintiff appeals.

Roberts Stevens & Cogburn, P.A., by Marjorie R. Mann and William Clarke, for plaintiff appellant.

Kelly & Rowe, P.A., by E. Glenn Kelly and James Gary Rowe, for defendant appellee.

ARNOLD, Chief Judge.

Plaintiff's sole assignment of error, under which it presents many contentions, is that the trial court erred in awarding prejudgment interest from 4 May 1989. It first argues that the trial court erred in awarding prejudgment interest because "[a]s a general rule the North Carolina Courts do not recognize the granting of prejudgment interest on unliquidated damages or those which are not readily ascertainable." We disagree.

Prejudgment interest on contracts is governed by N.C. Gen. Stat. § 24-5(a) (1991). Prior to its amendment in 1985, G.S. § 24-5(a) provided that "[a]ll sums of money due by contract of any kind . . . shall

bear interest." The statute did not address the date from which the courts were to apply interest. To fill this void, our appellate courts developed the rule that "[w]hen the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of breach." *General Metals v. Manufacturing Co.*, 259 N.C. 709, 713, 131 S.E.2d 360, 363 (1963); *see also Parker v. Lippard*, 87 N.C. App. 43, 359 S.E.2d 492 (1987) (noting that the rule is used to determine when interest commences on a judgment for breach of contract).

The legislature amended G.S. § 24-5(a) in 1985 to provide that "[i]n an action for breach of contract, . . . the amount awarded on the contract bears interest from the date of breach." Subsequently, in *Steelcase, Incorporated v. The Lilly Company*, this Court noted that, as amended, G.S. § 24-5(a) "clearly provides for interest from the date of breach in breach of contract actions." *Steelcase, Inc. v. The Lilly Co.*, 93 N.C. App. 697, 703, 379 S.E.2d 40, 44, *disc. review denied*, 325 N.C. 276, 384 S.E.2d 530 (1989).

Here, both parties tailor their arguments to the case law developed prior to the 1985 amendment and the rule quoted from *General Metals*. However, it is clear to this Court that resort to that rule, developed only to determine the date from which to apply interest, is no longer necessary. When the legislature amended the statute, and provided a time from which to apply interest, it obviated any need for the rule. In doing so, it removed the confusing questions of ascertainment and certainty that so often muddled the statute's application. Because this case falls under the amended version of the statute, plaintiff's arguments do not apply, and the trial court did not err in awarding prejudgment interest.

Plaintiff next argues the trial court erred by determining the date of breach, maintaining that the question is for the fact finder. Once the relevant facts have been established entitling the party to damages, interest is awarded as a matter of law. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986); *Sampson-Bladen Oil Co. v. Walters*, 86 N.C. App. 173, 356 S.E.2d 805, *disc. review denied*, 321 N.C. 121, 361 S.E.2d 597 (1987). The trial court did not err by determining the date of breach, particularly where neither party sought to have the issue determined by the jury.

Plaintiff also argues the trial court erred by selecting 4 May 1989 as the date of breach. It contends that although some breaches were discovered or occurred by 4 May 1989, many were not discovered for another two to three years, and that interest should be allocated to

each separate breach from the time each was discovered. Again, we disagree. The trial court did not err by selecting 4 May 1989, the date plaintiff issued its Certificate of Substantial Completion, as the date of breach. In fact, what plaintiff suggests as the correct approach cannot be done because the jury was not asked to differentiate its damage award, nor was it asked to determine the dates on which each breach occurred.

Plaintiff presents additional questions for review. In large part these arguments reiterate many of the arguments already discussed. To the extent they do not, we have reviewed them and do not agree with plaintiff's contentions.

The trial court's judgment is

Affirmed.

Judges GREENE and SMITH concur.

LINDA M. LEIGHOW, PLAINTIFF v. THOMAS M. LEIGHOW, DEFENDANT

No. COA95-89

(Filed 7 November 1995)

1. **Divorce and Separation § 145 (NCI4th)— equitable distribution—categorizing of mortgage notes—no error**

   The trial court did not err in categorizing mortgage notes as marital property, determining that the income on the notes accrued to defendant's benefit during separation, distributing the notes to defendant, considering as a distributional factor the fact that plaintiff should have been entitled to one-half of the post-separation interest income from the notes, and determining that an unequal distribution of the marital estate in favor of plaintiff would be equitable.

   Am Jur 2d, Divorce and Separation § 918.

2. **Divorce and Separation § 143 (NCI4th)— unequal distribution of property—award supported by three distributional factors**

   The trial court's finding of three distributional factors was sufficient to support its conclusion that an equal division would not be equitable.

Am Jur 2d, Divorce and Separation §§ 930 et seq.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

3. Divorce and Separation § 155 (NCI4th)— plaintiff's post-separation use of residence—repairs paid for by plaintiff—no credit given defendant

There was no merit to defendant's contention that the trial court erroneously failed to award defendant credit for plaintiff's exclusive post-separation use of the marital residence where the evidence showed that, although plaintiff did have exclusive use of the residence after separation, she also was forced to spend considerable sums to repair and maintain the home.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

4. Divorce and Separation § 136 (NCI4th)— valuation of marital residence—sufficiency of evidence to support

The trial court did not err in its valuation of the marital residence where there was plenary competent evidence to support the court's valuation of the residence, notwithstanding defendant's assertion that his expert witnesses were more "qualified and certified" than plaintiff's experts.

Am Jur 2d, Divorce and Separation §§ 937 et seq.

Necessity that divorce court value property before distributing it. 51 ALR4th 11.

5. Divorce and Separation § 174 (NCI4th)— authority to execute documents given to clerk of court—judgment not overturned

The judgment in this equitable distribution action was not required to be reversed because it placed in the clerk of court rather than the court itself the authority to execute documents to effectuate property transfers as specified in the judgment.

Am Jur 2d, Divorce and Separation §§ 950 et seq.

Appeal by defendant from judgment entered 13 June 1994 by Judge Earl J. Fowler, Jr. in Buncombe County District Court. Heard in the Court of Appeals 29 September 1995.

Robert E. Riddle, P.A., by Cecilia Johnson, for plaintiff-appellee.

Steven Andrew Jackson for defendant-appellant.

WALKER, Judge.

Plaintiff and defendant were married on 11 January 1969. They separated on 13 November 1992 and were divorced on 25 January 1994. On 13 June 1994, the trial court entered a judgment of equitable distribution valuing the marital estate at $408,423.81 and awarding 51% to plaintiff and 49% to defendant. Defendant appeals.

[1] In his first assignment of error, defendant argues that the trial court erred in its treatment of post-separation interest income from two mortgage notes acquired by the parties during their marriage. Defendant relies on *Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993) for the proposition that post-separation income derived from marital property does not meet the definition of marital property under N.C. Gen. Stat. § 50-20. While we agree with the holding in *Godley*, it is inapplicable to the present case. The trial court did not classify the post-separation interest on the notes as marital property. The amount of the interest income was not included in the trial court's calculation of the net marital estate nor did the court distribute the income as marital property. Rather, the court's judgment categorized the mortgage notes themselves as marital property, distributed them to defendant, and considered as a distributional factor the fact that "[p]laintiff should have been entitled to one half" of the post-separation interest income from the notes.

In *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992), this Court held that post-separation rental income received from marital property may not be added to the marital estate or distributed as marital property; rather, "the trial court must consider the existence of this income, determine to whose benefit the income has accrued, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable." *Id.* at 69, 422 S.E.2d at 590. Here, since defendant continued to receive the payments on the two notes after separation, the income from the notes accrued to his benefit. The trial court considered this benefit to defendant in determining that an unequal distribution of the marital estate in favor of plaintiff would be equitable. Because the judgment in the present case reflects that the trial court correctly followed the approach in *Chandler*, we find no abuse of discretion in this portion of the judgment.

[2] In his second assignment of error, defendant claims that the trial court erred by making an unequal division of the marital property. We disagree. It is entirely within the trial court's discretion, absent some

clear abuse, to determine whether or not to divide the marital estate equally or unequally. *Harris v. Harris*, 84 N.C. App. 353, 358, 352 S.E.2d 869, 872 (1987). Furthermore, this Court has specifically held that the finding of a single distributional factor may support an unequal division. *Judkins v. Judkins*, 113 N.C. App. 734, 741, 441 S.E.2d 139, 143, *review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994). Here, the trial court made findings to support three distributional factors favoring plaintiff: (1) defendant's post-separation use of marital funds, including approximately $97,000 in cash taken from a joint investment account without plaintiff's knowledge; (2) plaintiff's expenditures in maintaining the marital home; and (3) defendant's control of marital assets. The trial court has broad discretion in evaluating and applying the statutory distributional factors and cannot be reversed unless its decision is shown to be manifestly unsupported by reason. *Harris*, 84 N.C. App. at 358, 352 S.E.2d at 873. The factors enumerated by the trial court were sufficient to support its conclusion that "an equal division would not be equitable under the circumstances of this case."

[3] In his fourth assignment of error, defendant argues that the trial court erroneously failed to award defendant credit for plaintiff's exclusive post-separation use of the marital residence. The record shows that defendant requested the court to consider this as a distributional factor and gave his opinion of the fair rental value of the residence. The evidence showed that although plaintiff had exclusive use of the residence after separation, she was forced to expend considerable sums to repair and maintain the home. Thus, we cannot say that the trial court's refusal to consider plaintiff's post-separation occupation of the home as a factor in defendant's favor was unreasonable or arbitrary, and its decision may not be reversed. *Harris*, 84 N.C. App. at 358, 352 S.E.2d at 873.

[4] In his eighth assignment of error, defendant argues that the trial court erred in its valuation of certain items of marital property, the most significant item being the marital residence. In *Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385, *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988), this Court held that the trial court's valuation of marital property will not be second-guessed on appeal as long as its findings are supported by competent evidence. *Id.* at 74, 367 S.E.2d at 386. In the instant case, two expert witnesses testified that the marital residence was worth $167,000, and plaintiff testified that it was worth $155,000 to $160,000. The trial court valued the residence at $167,000. Thus, there was plenary competent evidence to

support the court's valuation of the residence, notwithstanding defendant's assertion that his expert witnesses (who valued the residence at $203,000 and $230,000) were "more qualified and certified" than plaintiff's experts. With respect to the other items of property mentioned by defendant, the values placed on them by the court were also supported by competent evidence, and we find no error.

[5] In his ninth assignment of error, defendant argues that the judgment erroneously gives the clerk of court the authority to execute documents to effectuate property transfers as specified in the judgment. It is well settled that the trial court "has the authority, within its power in equity, to compel one former spouse to convey title to property to the other former spouse when justice requires." *Geer v. Geer*, 84 N.C. App. 471, 481, 353 S.E.2d 427, 433 (1987); *see also* N.C. Gen. Stat. § 50-20(g) (1987 & Cum. Supp. 1994). We reject defendant's attempt to overturn the present judgment simply because it places this authority in the clerk of court rather than in the court itself. *See Mishler*, 90 N.C. App. at 74, 367 S.E.2d at 387 (in complex litigation involving equitable distribution, appellate court will not remand judgment for obviously insignificant errors).

We have carefully reviewed defendant's third, fifth, sixth, seventh, tenth, and eleventh assignments of error, and we find no abuse of discretion on the part of the trial court.

Affirmed.

Judges LEWIS and MARTIN, MARK D. concur.

STATE OF NORTH CAROLINA v. FRED DOUGLAS McBRIDE, DEFENDANT

No. COA94-1330

(Filed 7 November 1995)

Evidence and Witnesses § 627 (NCI4th)— motion to suppress—subsequent guilty plea—review on appeal—notice of intention to appeal denial of motion required

N.C.G.S. § 15A-979(b) (1988) allows review of an order finally denying a motion to suppress evidence on appeal from a judgment of conviction, including a judgment entered on a guilty plea; however, pursuant to this statute, a defendant bears the burden of

notifying the State and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after of plea of guilty.

Am Jur 2d, Appellate Review §§ 259, 614, 616, 621, 628.

Appealability of order entered in connection with pretrial conference. 95 ALR2d 1361.

Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial. 76 ALR Fed 619.

Appeal by defendant from judgments entered 1 June 1994 by Judge Cy A. Grant in New Hanover County Superior Court. Heard in the Court of Appeals 25 September 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Ellen B. Scouten and Simone E. Frier, for the State.

Judith T. Naef for defendant appellant.

SMITH, Judge.

The appeal before this Court concerns the constitutional propriety of a search without a warrant by the Wilmington Police Department. Defendant Fred Douglas McBride alleges insufficient exigent circumstances were present to justify application of a warrantless search exception in this case. However, we do not reach the merits, because defendant failed to comply with established case law mandating that notice of intent to appeal be given the trial court and prosecution, prior to entry of a plea of guilty following denial of a motion to suppress. We reaffirm our precedent on this issue and dismiss defendant's appeal.

It is well-settled that no federal constitutional right exists obligating courts to hear appeals from criminal convictions. *See Abney v. United States*, 431 U.S. 651, 52 L.Ed.2d 651 (1977). In North Carolina, a defendant's right to pursue an appeal from a criminal conviction is a creation of state statute. *See* N.C. Gen. Stat. § 15A-1444 (1988); *State v. Blades*, 209 N.C. 56, 57, 182 S.E. 714 (1935). This Court has an ever-standing obligation to apply the laws governing the right to appeal. *Estrada v. Jaques*, 70 N.C. App. 627, 640-41, 321 S.E.2d 240, 249 (1984). This obligation would be rendered illusory if we ignored the

very processes which operate to make our system of justice fair as well as efficient.

N.C. Gen. Stat. § 15A-979(b) (1988) allows review of an order finally denying a motion to suppress evidence on appeal from a judgment of conviction, including a judgment entered on a guilty plea. This statutory right to appeal is conditional, not absolute.

Pursuant to this statute, a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty. *State v. Reynolds*, 298 N.C. 380, 396-97, 259 S.E.2d 843, 853 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed.2d 795 (1980). The rule in this state is that notice must be *specifically* given. *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990); *accord State v. Walden*, 52 N.C. App. 125, 126-27, 278 S.E.2d 265, 266 (1981). After reviewing the entire record in *Tew*, we observe the defendant there repeatedly, and specifically, preserved the right to appeal the suppression motion, by giving notice of intent to appeal prior to entry of the plea.

In the instant case, defendant failed to preserve his right to appeal by not ensuring that his intent to do so was given to the trial court and prosecution, prior to finalization of his plea bargain. We have carefully reviewed the entire record and note the absence of any notice whatsoever by defendant of intent to appeal based on the trial court's denial of his motion to suppress.

We do observe that defendant has placed a one page document entitled "Notice of Appeal" in the Record on Appeal, dated 18 May 1994. The document does not certify service to the trial court or to the prosecution, though a stamp at the top of the page indicates it was filed with the clerk of court in New Hanover County. This document is not the type of notice required under *Reynolds*, wherein the burden is placed on the defendant to ensure proper and actual notice of intent to appeal. *Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853.

A Notice of Appeal is distinct from giving notice of *intent* to appeal. Notice of *intent* to appeal prior to plea bargain finalization is a rule designed to promote a "fair posture for appeal from a guilty plea." *Id.* Notice of Appeal is a procedural appellate rule, required in order to give "this Court jurisdiction to hear and decide a case." *State v. Morris*, 41 N.C. App. 164, 166, 254 S.E.2d 241, 242 (1979), *appeal dismissed and cert. denied*, 297 N.C. 616, 267 S.E.2d 657 (1979); N.C.

Gen. Stat. §§ 7A-26 (1989) and 15A-1448 (1988). The two forms of notice serve different functions, and performance of one does not substitute for completion of the other.

The United States Supreme Court addressed the propriety of an appeals process nearly identical to ours in *Lefkowitz v. Newsome*, 420 U.S. 283, 43 L.Ed.2d 196 (1975). There the United States Supreme Court noted:

> Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained.

Id. at 289, 43 L.Ed.2d at 202.

The logic of this appellate rule is based on a straightforward theory. Once a defendant strikes the most advantageous bargain possible with the prosecution, that bargain is incontestable by the state once judgment is final. If the defendant may first strike the plea bargain, "lock in" the State upon final judgment, and then appeal a previously denied suppression motion, it gets a second bite at the apple, a bite usually meant to be foreclosed by the plea bargain itself.

We have previously observed that "it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction" in circumstances like those before us. *Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853. The appeals process is not meant to be played like three-card monte, as guessing games in this setting upset basic notions of fairness, and threaten the efficient administration of justice. *Id.*

This Court is bound by the principle of *stare decisis*, which demands that like situations be treated in a consistent manner. *See State v. Collins*, 334 N.C. 54, 63, 431 S.E.2d 188, 194 (1993). In this case, both *Reynolds* and *Tew* have set forth unequivocal rules concerning appeals made subsequent to a plea bargain. Defendant has not complied with those rules.

Dismissed.

Judges GREENE and LEWIS concur.

CHARLES VANSON ALLEN, EMPLOYEE v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, EMPLOYER

No. COA94-1023

(Filed 7 November 1995)

Torts § 12 (NCI4th)— general release—claim against DOT barred

Plaintiff's execution of a general release discharging his claims arising from an automobile accident against a named individual and "all other persons" barred plaintiff's claim of negligence against the North Carolina Department of Transportation.

Am Jur 2d, Release §§ 28 et seq.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission entered 7 July 1994. Heard in the Court of Appeals 26 May 1995.

Devore and Acton, P.A., by William D. Acton, Jr., for plaintiff appellant.

Attorney General Michael F. Easley, by Assistant Attorney General D. Sigsbee Miller and Special Deputy Attorney General E. H. Bunting, Jr., for defendant appellee.

COZORT, Judge.

The question presented by this appeal is whether plaintiff's execution of a general release discharging his claims against a named individual and "all other persons" bars plaintiff's claim of negligence against the North Carolina Department of Transportation. We hold the phrase "all other persons" includes the Department of Transportation, and we affirm the Industrial Commission's opinion and award dismissing plaintiff's claim.

On 11 June 1992, plaintiff was travelling west on North Carolina Highway 27 in Mecklenburg County. John Massengill was travelling east on Highway 27 at the same time. As the two vehicles approached, Mr. Massengill's right tire dropped onto the shoulder, seven to nine inches below the roadway. Mr. Massengill lost control of his vehicle attempting to drive back on the roadway. He crossed the center line and collided head-on with plaintiff's vehicle. Plaintiff suffered serious injuries and incurred significant medical expenses. Plaintiff settled

with Mr. Massengill for Massengill's policy limits of $25,000.00 and on 29 September 1992 executed a "Release of All Claims." This release provided that the plaintiff

> does hereby . . . release, acquit and forever discharge John A. Massengill and . . . all other persons, firms, corporations, associations or partnerships of and 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 damage and the consequences thereof resulting or to result from the accident, casualty or event which occurred on or about the 11th day of June, 1992, at or near N.C. Hwy 27 West in Charlotte, Mecklenburg County, North Carolina.

On 3 November 1992, plaintiff initiated this action, pursuant to the North Carolina Tort Claims Act, in the North Carolina Industrial Commission against the North Carolina Department of Transportation (DOT). Plaintiff alleged that Mecklenburg County DOT Maintenance Engineer Sidney Sandy was negligent in failing to maintain the shoulder of Highway 27 and in failing to correct or repair the dangerous condition that existed on the highway shoulder. On 9 December 1992, defendant filed an answer pleading the release as a bar to plaintiff's claim. Deputy Commissioner Morgan S. Chapman heard this matter on 11 August 1993, and filed a decision and order on 10 January 1994 ruling that the release barred plaintiff's claim. Plaintiff appealed to the Industrial Commission, which heard oral arguments on 28 June 1994, and filed a decision on 7 July 1994 affirming Deputy Commissioner Chapman. The Commission held:

> The release signed by plaintiff discharged all claims of action arising from the accident on June 11, 1992 against John Massengill and all other persons, firms, corporations, associations, or partnerships. There was no exclusion for a claim against Mr. Sandy of the state. Mr. Sandy was certainly a "person" within the meaning of the document. Plaintiff has claimed that the Department of Transportation was not a "person" under the terms of the release. However, any liability of the Department of Transportation must arise [from] the negligence of a person employed by it, and the Tort Claims Act allows agencies of the state to be sued only under circumstances where "a private per-

> son would be liable." Consequently, it appears that the state would be a person within the meaning of the release. Furthermore, the released [*sic*] purported to be a release of all claims, which would include any claim against defendant.

Plaintiff appeals the decision of the Industrial Commission. Plaintiff contends the Commission erred by holding that the North Carolina Department of Transportation is a "person" within the language of the release. We disagree.

In *Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835 (1994), we discussed the scope of a general release with operative language virtually identical to the language of the release at issue here. In *Spivey*, plaintiff Spivey executed a release discharging all claims against the alleged tortfeasor Lowery, Lowery's insurance carrier Integon, and

> all other persons, firms, corporations, associations or partnerships of and from any and all claims of action, demands, rights, [and] damages . . . whatsoever, which the undersigned now has . . . or which may hereafter accrue . . . [as a result of] the accident . . . which occurred on or about the 17th day of October, 1989, at or near Laurinburg, N.C.

Id. at 125, 446 S.E.2d at 836.

After executing the release, plaintiff Spivey filed suit against Lowery and The Hartford Accident and Indemnity Company, plaintiff's insurance carrier, seeking to recover under Hartford's underinsurance motorist coverage. The trial court granted summary judgment for Hartford. On appeal, we affirmed, stating:

> [B]ecause plaintiff signed a general release, plaintiff may not assert any claims arising out of the accident. Furthermore, notwithstanding the fact that plaintiff signed a general release, since plaintiff released the tortfeasor, Lowery, plaintiff may not assert a claim against Hartford because of the derivative nature of Hartford's liability.

Id. at 126, 446 S.E.2d at 837.

We find our reasoning in *Spivey* persuasive here. Plaintiff Allen's release was general, discharging all other persons and all claims, and providing for no exclusions from the release. The State's liability under the Tort Claims Act is derivative of the negligence of an officer, employee, involuntary servant or agent of the State, N.C. Gen. Stat. § 143-291(a) (1993), and any such employee, such as DOT

Maintenance Engineer Sandy, would be a "person" as contemplated by the release executed by plaintiff. We find no reason to treat the State any differently than its employee would be treated under the release. We hold the Commission properly dismissed plaintiff's claim for the reason that plaintiff's execution of the general release released the State from any claim by plaintiff.

Affirmed.

Judges JOHN and WALKER concur.

TOWN OF CHAPEL HILL, PLAINTIFF v. RANDOLPH DUDLEY FOX, DEFENDANT

No. COA95-52

(Filed 7 November 1995)

Costs § 40 (NCI4th)— experts deposed pursuant to subpoena—witness fees properly awarded by trial court

Since defendant deposed experts pursuant to a subpoena, the trial court had the statutory authority to order defendant to pay the stated expert witness fees. N.C.G.S. § 7A-314(d).

Am Jur 2d, Costs §§ 51, 65.

Appeal by defendant from order entered 9 September 1994 by Judge Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 2 October 1995.

Northen, Blue, Rooks, Thibaut, Anderson & Woods, LLP, by David M. Rooks, for plaintiff-appellee.

Faison & Fletcher, by Reginald B. Gillespie, Jr. and Keith D. Burns, for defendant-appellant.

LEWIS, Judge.

By letter dated 9 April 1992 plaintiff requested permission of defendant to perform certain soil testing procedures on his property attendant to its search for a landfill site. Defendant refused entry for any clearing, borings, or land disturbing activities. On 15 November 1993 plaintiff filed a complaint alleging statutory authority to conduct the tests on defendant's property, and sought to enjoin defendant

from interfering with plaintiff's entering his land for this purpose. Defendant answered the complaint, denying plaintiff had statutory authority to perform the tests in question.

Following discovery, the parties executed a consent order which was entered by the trial court. The order contained defendant's permission for plaintiff to enter his land and dictated the method by which plaintiff could conduct its tests. The consent order stated that it "shall not be construed as adjudicating or determining any issue or matter other than the plaintiff's motion for a preliminary injunction."

On 31 May 1994 plaintiff moved to tax defendant $4,388.75 in fees charged by three expert witnesses employed by plaintiff. The fees were based on time and travel incurred by the witnesses in response to defendant's subpoena for their depositions. The trial court granted plaintiff's motion and ordered defendant to pay the expert witness fees in the amount of $3,477.25. The court further noted that "the plaintiff has entered upon defendant's property and conducted the testing it sought to do and, as a result, has obtained all the relief it sought in this case." Accordingly, the order stated that "[t]his case should be closed." Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred in granting plaintiff's motion for costs. We note that defendant has not disputed the trial court's determination that no issue remained in controversy, nor its conclusion that for this reason the case should be closed. Accordingly, the trial court's dismissal of the action is not before this Court. *See* N.C.R. App. P. 10 (1995).

Defendant first contends that the trial court erred in awarding costs because the order does not constitute a final judgment. *See Whaley v. Taxi Company*, 252 N.C. 586, 588-89, 114 S.E.2d 254, 256 (1960). However, as discussed above, the order clearly dismisses the action as having no justiciable issue remaining, and defendant has not assigned error to that ruling. Therefore, the order is a final judgment in this case, and it was not error for the trial court to award costs.

Defendant also argues that the trial court lacked the authority to order the amount of fees awarded. He contends that the witnesses' fees for appearing at a deposition should be limited to the hourly wage plaintiff was obligated to pay them for their professional services; and that the hours charged by the witnesses for preparation for the depositions were unreasonable.

Costs may only be awarded in accordance with statutory authority. *Fox v. Fox*, 114 N.C. App. 125, 136, 441 S.E.2d 613, 620 (1994). N.C. Gen. Stat. § 7A-314(d) (1989) provides that "An expert witness, . . . , shall receive such compensation and allowances as the court, . . . , in its discretion, may authorize." However, expert witness fees may be recoverable as costs only when the testifying expert has been subpoenaed to appear. *Brandenburg Land Co. v. Champion International Corp.*, 107 N.C. App. 102, 104, 418 S.E.2d 526, 528 (1992).

Defendant relies on *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972) to support his position that costs may only be assessed to reimburse the opposing party for their expenses. We find defendant's reliance on this case to be misplaced. The language limiting costs to reimbursement is specific to the facts of that case. Additionally, the statute relied on in that case differs greatly from the one now in existence. At the time *Charlotte* was decided, N.C. Gen. Stat. § 6-1 (1969) read: "To either party for whom judgment is given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same." *Charlotte*, 281 N.C. at 692, 190 S.E.2d at 186. Today, G.S. § 6-1 (1986) provides: "To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter." The reimbursement language has been removed.

The issue in this case is whether the trial court properly allowed expert witness fees under G.S. § 7A-314(d). We discern no meaningful difference between an expert who is called to testify at trial and an expert who is called to testify at a deposition. In each case, under G.S. § 7A-314(d), the trial court may grant "compensation and allowances" in its discretion. Therefore, since defendant deposed the experts pursuant to a subpoena, the trial court had the statutory authority to order defendant to pay the stated expert witness fees.

As to the amount of the fees awarded, we find no abuse of discretion.

For these reasons, we affirm the award of fees against defendant.

Affirmed.

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

STATE OF NORTH CAROLINA v. THOMAS WATSON COTHRAN

No. COA94-1432

(Filed 7 November 1995)

Evidence and Witnesses § 2311 (NCI4th)— impaired driving charged—evidence of blood-breath ratio properly excluded

In a prosecution of defendant for impaired driving in a commercial motor vehicle, the trial court did not err in excluding expert testimony that defendant's Intoxilyzer reading did not accurately reflect his blood alcohol level because his normal blood-breath ratio was different than the calibration of the Intoxilyzer, since the legislature has adopted a breath alcohol *per se* offense as an alternative method of committing a driving while impaired offense, and it is immaterial whether defendant is in fact impaired or whether his blood alcohol content is in excess of that permitted in the statutes. N.C.G.S. § 20-138.2.

Am Jur 2d, Automobiles and Highway Traffic § 379; Evidence § 1021.

Validity of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood. 46 ALR2d 1176.

Construction and application of statutes creating presumption or other inference of intoxication from specified percentages of alcohol present in system. 16 ALR3d 748.

Necessity and sufficiency of proof that tests of blood alcohol concentration were conducted in conformance with prescribed methods. 96 ALR3d 745.

Appeal by defendant from judgment entered 28 June 1994 in Cleveland County Superior Court by Judge James R. Strickland. Heard in the Court of Appeals 2 October 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Joseph P. Dugdale, for the State.

J. Stephen Gray for defendant-appellant.

GREENE, Judge.

Thomas Watson Cothran (defendant) appeals from a judgment of the superior court, entered after a jury verdict, finding him guilty of

"Impaired Driving in a commercial motor vehicle," in violation of N.C. Gen. Stat. § 20-138.2, and suspending his sixty-day prison sentence and placing him on unsupervised probation for two years.

Defendant was arrested in Cleveland County on 9 November 1993 and charged with impaired driving in a commercial vehicle. A chemical analysis of defendant's breath, using the Intoxilyzer 5000 revealed that the alcohol content of defendant's breath was .04 grams per 210 liters of breath.

At trial, defendant presented the testimony of Dr. James Woodford (Woodford), a chemist, who was found by the trial court to be an expert in medicinal chemistry and in alcohol and blood testing devices. The trial court refused to permit Woodford to offer the following testimony to the jury:

> To be an approved machine in the United States, all—the Intoxilyzer plus every other breath alcohol testing apparatus must be tuned to a certain [blood-breath] ratio, 2100 to one. . . .
>
> Now, that 2100 to one number is an average number of [blood-breath] ratios in the general population. There are some people who have lower [blood-breath] ratios. Those people score too high on the breath test on the Intoxilyzer 5000. There are people who have higher [blood-breath] ratios and they score too low on the Intoxilyzer 5000. We didn't know which way it was going to go.
>
> We have to test the person to find out what their personal [blood-breath] ratio is and if it's—if it is 2100 to one, that's the way the machine is calibrated, the Intoxilyzer 5000, then there is no error. There is no correction to be made.
>
> But in this case, I found out that [the defendant's blood-breath] ratio was 1722 to one, which is—by direct testing of the defendant, which means he does not match the calibration of the Intoxilyzer. It causes him to read about eighteen percent too high [on the Intoxilyzer].
>
> . . . .
>
> The overall significance is that his corrected—if you correct his body chemistry to the calibration of the machine, he should have read .03 on the machine . . . .

The issue is whether the trial court erred in excluding Woodford's testimony relating to defendant's blood-breath ratio.

A person commits the offense of impaired driving if he drives a commercial vehicle either while under the influence of an impairing substance or after having consumed sufficient alcohol that he has an alcohol concentration of .04 or more. N.C.G.S. § 20-138.2 (1993). The legislature has determined that a person's alcohol concentration is expressed as *either* grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. N.C.G.S. § 20-4.01(0.2) (1993).

The defendant contends that the trial court erred in denying him an opportunity to present evidence that his blood-breath ratio was different from that used in the statute. We disagree.

There is no dispute that the conversion factor (grams of alcohol per 210 liters of breath) used in section 20-4.01(0.2) is based on an assumed blood-breath ratio. *See State v. Brayman*, 751 P.2d 294, 297 (Wash. 1988). In other words, the "assumption is that a [concentration of alcohol in breath] of .10 g/210L is equivalent to a [blood alcohol concentration] of .10%." 2 Richard E. Erwin, *Defense of Drunk Driving Cases* § 21.01 (3d ed. 1995) (hereinafter *Erwin*). It therefore follows that "[b]ecause blood-breath ratios vary both between individuals, and at different times in the same individual, a breath test based on a 2100:1 blood-breath ratio may not accurately represent a particular individual's blood alcohol level." *Brayman*, 751 P.2d at 297; *see Erwin* § 21.01 ("A number of physiological factors, that have no effect on a direct blood analysis, can materially affect a breath test."). Because, however, our legislature has adopted a breath alcohol per se offense as an alternative method of committing a driving while impaired offense, it is immaterial whether the defendant is in fact impaired or whether his blood alcohol content is in excess of that permitted in the statutes. *Cf. Dixon v. Peters*, 63 N.C. App. 592, 601, 306 S.E.2d 477, 483 (1983) (General Assembly may legislate an objective standard where it is a rational way to correct a perceived problem and serves a legitimate State function). Accordingly, Woodford's excluded testimony that the defendant's Intoxilyzer reading did not accurately reflect his blood alcohol level is not admissible and the trial court correctly excluded this evidence. N.C.G.S. § 8C-1, Rules 402, 403 (1992) (only evidence tending to prove a fact *in consequence* is relevant and admissible).

Breath test evidence is not, however, conclusive proof of the per se offense as the State must still establish the foundational requirements of the test, that the machine was in proper working order, that the reading is correct and that the officer is certified and competent to administer the test. The defendant does not contest these issues.

No error.

Chief Judge ARNOLD and Judge SMITH concur.

SHARMA G'NELL DEVANE, A MINOR BY AND THROUGH HER GUARDIAN AD LITEM, AUDREY ROBINSON; DERRICK D'SELL DEVANE, A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM, AUDREY ROBINSON; AND SANDRA DENISE DEVANE PLAINTIFFS-APPELLEES V. WILLIE WALFUS CHANCELLOR, DEFENDANT-APPELLANT

No. COA95-12

(Filed 7 November 1995)

Judgments § 224 (NCI4th)— previous actions adjudicating paternity—plaintiffs not parties to previous actions—present action not barred

The mother of defendant's alleged children and the children were not collaterally estopped from bringing an action to establish defendant's paternity and to thereby gain child support where a previous criminal nonsupport action barred the State from prosecuting defendant; a prior civil adjudication barred only the Sampson County Child Support Enforcement Agency from proceeding against defendant; but plaintiffs were not in privy with the parties to the previous actions and therefore were not barred by them.

Am Jur 2d, Judgments § 531.

Appeal by defendant-appellant from order entered 14 September 1994 by Judge Marilyn R. Bissell in Mecklenburg County District Court. Heard in the Court of Appeals 4 October 1995.

Timothy M. Stokes for plaintiff-appellees.

Gregory T. Griffin and Timothy H. Graham for defendant-appellant.

WYNN, Judge.

In this action, plaintiffs, Sharma G'Nell Devane and Derrick D'Sell Devane, and their mother, Sandra Denise Devane, seek to establish defendant's paternity and thereby gain child support from him.

The defendant was previously tried, in 1979, on charges of criminal nonsupport of these same children, and was found not guilty. In a special verdict, the jury specifically found that the State of North Carolina had not proven beyond a reasonable doubt that the defendant was the father of these children. Following this proceeding, in 1986, the Sampson County Child Support Enforcement Agency instituted a civil action against the defendant seeking to establish paternity and gain child support. That action was dismissed with prejudice by the "IV-D Attorney."

Based on these prior adjudications, defendant moved to dismiss the instant action on the ground that the plaintiffs are collaterally estopped from asserting that defendant is the father of the children. The trial court held that neither the previous jury finding nor the dismissal of the civil action, bars the present claim for child support. We agree, and affirm the decision of the trial court.

We find the case of *County of Rutherford Ex Rel. Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990) controlling. In *County of Rutherford*, this Court reiterated that to prevail on the affirmative defense of collateral estoppel based on a prior paternity proceeding: "(1) The issue of paternity must necessarily have been determined previously and (2) the parties to that prior action must be identical or privies to the parties in the instant case." *Id.* at 75, 394 S.E.2d at 265 quoting *State By and Through New Bern C.S.A. v. Lewis*, 311 N.C. 727, 731, 319 S.E.2d 145, 148 (1984).

In the instant case, the defendant met the first part of his proof by showing that the issue of paternity was necessarily determined in the prior actions. The special verdict form in the criminal proceeding and the Rule 41 dismissal with prejudice in the civil action were adjudications on the issue of paternity. The defendant, however, has failed to show that the plaintiffs in this action are privy to either the State of North Carolina or the Sampson County Child Support Enforcement Agency.

Thus, in light of *County of Rutherford*, we find that the prior criminal jury determination bars only the State of North Carolina from prosecuting the defendant for criminal nonsupport of these

same children. Likewise, the prior civil adjudication bars only the Sampson County Child Support Enforcement Agency and entities in privy with it from proceeding against the defendant. The plaintiffs in this action, however, are unaffected by these prior adjudications since they are not in privy with the parties to the previous actions. *See*, *State ex. rel. Tucker v. Frinze*, 119 N.C. App. 389, 458 S.E.2d 729 (1995). The decision of the trial court is,

Affirmed.

Judges JOHNSON and EAGLES concur.

KAREN P. PERKINS v. WILLIAM N. PERKINS

No. 94-1364

(Filed 7 November 1995)

Divorce and Separation § 409 (NCI4th)— child support—interpretation of provision based on pleading in prior action

The trial court properly construed a provision in the parties' separation agreement to mean that defendant would provide child support as long as each child was in college but not after each turned twenty-two or got married where the trial court based this conclusion in part on a verified pleading filed by defendant in a prior proceeding to modify child support in which he specifically alleged the intent of the parties.

Am Jur 2d, Divorce and Separation § 1037.

Appeal by defendant from order entered 19 September 1994 by Judge William M. Cameron in Onslow County District Court. Heard in the Court of Appeals 13 September 1995.

Lana S. Warlick for plaintiff-appellee.

Donald G. Walton, Jr. for defendant-appellant.

PER CURIAM

The issue in this appeal is the proper construction of a paragraph found in a separation agreement and property settlement entered into by the parties on 5 November 1992 and incorporated into judgment entered 12 November 1992. The paragraph provides:

> Husband shall pay to wife for the maintenance and support of his children the sum of $1,000.00 per month, said sum to be paid on or before the first day of each calendar month beginning November 1, 1992, and continuing thereafter in a like amount until each child marries, *otherwise becomes emancipated*, finishes college, or attains the age of twenty-two (22) years, whichever shall first occur. (emphasis added)

Defendant argues the italicized words terminate his support duty when each child reaches the age of 18. The trial court rejected this argument and found the phrase to be ambiguous. The court then concluded that it was the intent of the parties that the support continue as long as each child was in college but not after each turned twenty-two or got married. This conclusion was based in part on a verified pleading filed by defendant in a prior proceeding to modify child support in which he alleged the intent of the parties was "that if a child was enrolled in and attending college then defendant would pay child support for that child until that child graduated from college or attained the age of twenty-two years."

We affirm the decision of the trial court. We find defendant's construction illogical, and will not allow him to take a position contrary to one he asserted in an earlier proceeding. "[H]is mouth is shut, and he shall not say, that is not true which he had before in a solemn manner asserted to be the truth." *Crawford v. Crawford*, 214 N.C. 614, 618, 200 S.E. 421, 423 (1939) (quoting *Armfield v. Moore*, 44 N.C. 157, 161 (1852)).

Affirmed.

Panel Consisting of:

Judges EAGLES, LEWIS and JOHN

FREDERICK TINCH, PLAINTIFF-APPELLANT v. VIDEO INDUSTRIAL SERVICES, INC., WESTERN TEMPORARY SERVICES, INC., HENDON ENGINEERING ASSOCIATES, INC., METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY AND CARYLON CORPORATION, DEFENDANTS-APPELLEES

No. COA95-151

(Filed 7 November 1995)

Appeal by plaintiff from summary judgment entered 31 October 1994 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 October 1995.

Mraz & Dungan, by John A. Mraz, for plaintiff-appellant.

Jones, Hewson & Woolard, by Kenneth H. Boyer and R.G. Spratt, III, for defendant-appellee, Western Temporary Services, Inc.

PER CURIAM

For the reasons stated in *Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 460 S.E.2d 356 (1995), we affirm the entry of summary judgment in this case.

Although plaintiff contends that the trial court erred in hearing defendants' motion for summary judgment before allowing the parties time for discovery, and before allowing plaintiff's motion to amend his complaint, we find that even if summary judgment was improperly awarded, plaintiff's case would not have succeeded on the merits because of our holding in *Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 460 S.E.2d 356 (filed August 15, 1995).

Affirmed.

Panel consisting of:

Judges LEWIS, WYNN, and JOHN.

FRED T. SULLIVAN AND PAMELA SULLIVAN, PLAINTIFFS-APPELLANTS v. NEW HANOVER COUNTY AND DOUG A. GARRETT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEFENDANTS-APPELLEES

FRED T. SULLIVAN AND BESSIE SULLIVAN, PLAINTIFFS-APPELLANTS v. NEW HANOVER COUNTY AND DOUG A. GARRETT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEFENDANTS-APPELLEES

No. COA 95-144

No. COA 95-145

(Filed 7 November 1995)

Appeal by plaintiffs from order entered 9 December 1994 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 27 October 1995.

Shipman & Lea, by Gary K. Shipman, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Ursula M. Henninger, for defendants-appellees.

PER CURIAM

For the reasons stated in Judge John C. Martin's opinion, *Sinning v. Clark*, 119 N.C. App. 515, 459 S.E.2d 71 (1995), we affirm the judgment of the trial court in this case.

Affirmed.

Panel consisting of:

Judges LEWIS, WYNN, and JOHN.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 OCTOBER 1995

BELL v. BUILDERS TRANSPORT No. 94-1398	Ind. Comm. (103573)	Affirmed
BLUE RIDGE LTD. PARTNERSHIP v. PEANUT SHACK OF AMERICA No. 94-1372	Henderson (93CVS1331)	Affirmed
BRADLEY v. UNITED MERCHANTS & MFG. No. 94-1154	Ind. Comm. (505474)	Affirmed
BRADSHAW v. BOLCH No. 93-1093	Catawba (93CVS68)	Reversed
BRANTON v. SCHNEIDER MILLS, INC. No. 94-251	Alexander (93CVS243)	Reversed & Remanded
COGGINS v. COGGINS No. 94-1304	Mecklenburg (90CVD17004)	Affirmed
DEAN v. FOWLER No. 94-1400	Wake (92CVS06767)	Affirmed
DICKENS v. KEY No. 94-1342	Lee (87CVD473)	Affirmed
FIELDS v. FIELDS No. 94-349	Moore (92CVS65)	Affirmed
HARVEY v. HARVEY No. 95-357	Rockingham (81CVD905) (83CVD604)	Affirmed
HOWELL v. OWEN MFG. CO. No. 94-1248	Ind. Comm. (830340)	Affirmed
IN RE ANDERSON No. 95-87	Union (94J005)	Affirmed
IN RE JERRY C. No. 94-1363	Buncombe (93J368)	Affirmed
IN RE PARRISH No. 94-1458	Bladen (94SPC111)	Affirmed
JENKINS v. WILSON No. 94-905	Davidson (92CVS1271)	Affirmed

KIEHART v. O'NEILL No. 95-269	Cumberland (94CVD5712)	Dismissed
LIBERMAN v. LIBERMAN No. 94-1373	New Hanover (93CVD1893)	Reversed
LOVE v. TYSON No. 94-1292	Union (93CVS00690)	Affirmed
MARTIN v. PIEDMONT ASPHALT & PAVING No. 94-1188	Ind. Comm. (959577)	Affirmed
McLAURIN v. AVERITT No. 95-384	Cumberland (94CVS2757)	Dismissed
OWENS v. MASSIE FURNITURE CO. No. 94-1315	Ind. Comm. (083143)	Affirmed
PURIFOY v. SPIVEY No. 94-1348	Craven (93CVS453)	Affirmed
REPUBLICAN PARTY OF N.C. v. BARTLETT No. 94-1068	Wake (94CVS2076)	Dismissed
SMITH v. KIRK No. 94-1092	Sampson (93CVD882)	Dismissed
STATE v. BONHAM No. 95-239	Forsyth (94CRS14614)	No Error
STATE v. BOULWARE No. 94-1447	Mecklenburg (93CRS32467) (93CRS32468) (93CRS32469)	No Error
STATE v. DORSETTE No. 94-1464	Forsyth (94CRS17048)	No Error
STATE v. ELLIS No. 94-1419	Mecklenburg (94CRS021330) (94CRS021331) (94CRS021332)	No Error
STATE v. GARRISON No. 95-348	Davidson (94CRS8533)	No Error
STATE v. HINTON No. 95-143	Wake (92CRS88838) (92CRS6232)	No Error
STATE v. JOHNSON No. 94-1326	Pitt (94CRS7997) (94CRS7998) (94CRS7999)	Affirmed

STATE v. MILTON No. 94-1438	Guilford (92CRS54879)	No Error
STATE v. NIMER No. 94-1336	Edgecombe (94CRS5290) (94CRS5294) (94CRS5301)	No Error
STATE v. PONE No. 94-1399	Mecklenburg (94CRS19557)	Affirmed
STATE v. PROCTOR No. 95-240	Halifax (92CRS9681) (92CRS9682)	No Error
STATE v. REDDICK No. 95-451	Craven (94CRS5652)	No Error
STATE v. SIDES No. 94-1282	Pitt (93CRS21945)	No Error
STATE v. SMITH No. 95-92	Alamance (94CRS6457)	No Error
STATE v. STEWART No. 94-1420	Mecklenburg (93CRS69959)	No Error
STATE v. STEWART No. 95-377	Wake (94CRS76482) (94CRS76483)	No Error
STATE v. TONEY No. 94-1113	Randolph (93CRS6030)	No Error
STATE v. WALLACE No. 94-1319	Cabarrus (93CRS2349)	New Trial
STATE v. WORKMAN No. 95-429	Davie (94CRS1398) (94CRS1399)	Affirmed
STATE v. WORLEY No. 94-1444	Catawba (93CRS156) (93CRS157)	No Error
STATE v. WORLEY No. 95-416	Robeson (93CRS4932)	No Error
TERRY v. TERRY No. 95-353	Forsyth (92CVD4339)	Remanded
TRIPP v. PERDUE FARMS, INC. No. 94-1139	Ind. Comm. (920358) (060145)	Affirmed
VICK v. WILLIAMS No. 94-1278	Edgecombe (94CVD601)	Affirmed

WILKIE v. WILKIE No. 94-1298	Chatham (90CVD32)	Affirmed
WINNER v. INTEGON INDEMNITY CORP. No. 94-1234	Wake (91CVS12565)	Affirmed

FILED 7 NOVEMBER 1995

BLUE RIDGE LINES v. FOX No. 95-241	Buncombe (93CVD2959)	Affirmed
BOARD OF EDUCATION OF HICKORY v. BLICKENSDERFER No. 94-1129	Catawba (93CVS987)	Affirmed
BOARD OF EDUCATION OF HICKORY v. BRITTAIN No. 94-1130	Catawba (93CVS988)	Affirmed
BOARD OF EDUCATION OF HICKORY v. LATTA No. 94-1131	Catawba (93CVS989)	Affirmed
BOISSEAU v. ROBERT BOSCH POWER TOOL CORP. No. 95-453	Ind. Comm. (230086)	Affirmed
BOYD v. COMMISSIONERS OF HYDE COUNTY No. 95-332	Wake (94CVS2919)	Dismissed
BRITT v. BRITT No. 95-94	Guilford (92CVD413)	Affirmed
CHASSON v. BROWN No. 94-1466	Orange 93CVD924)	Dismissed
CHILDRESS v. TRION, INC. No. 94-1136	Ind. Comm. (911907)	Affirmed
CONGRESS v. COLLINS & AIKMAN No. 94-1365	Ind. Comm. (038337)	Affirmed in Part and Reversed in Part
DAVIS v. DAVIS No. 94-1386	New Hanover (92CVD03260)	Affirmed
HAIR v. HAIR No. 94-957	Cumberland (88CVD4591)	Affirmed In Part, Reversed in Part and Remanded
HOOTS v. WILKINS No. 95-14	Henderson (86CVD351)	Dismissed

IN RE AYERS No. 94-1296	Lenoir (94J49) (94J50) (94J51) (94J52)	Affirmed
IN RE MAXWELL No. 95-91	Mecklenburg (91J697)	Affirmed
IN RE WALDREN No. 94-1082	New Hanover (92J261)	Affirmed in Part, Reversed in Part and Remanded
IN RE WILL OF MASON No. 95-244	Macon (93E184)	No Error
IN RE WYATT No. 95-174	Orange (92J18)	Affirmed
JOHNSON v. WACHOVIA BANK & TRUST CO. No. 94-1460	Harnett (93CVS00309)	Affirmed
JORDAN v. PFEIFFER COLLEGE No. 95-335	Ind. Comm. (089467)	Dismissed
KRYDER v. CHAPEL HILL-CARRBORO BD. OF EDUC. No. 94-1176	Orange (92CVS1001)	Affirmed in Part and Reversed in Part
LACY v. WEYERHAEUSER CO. No. 95-330	Ind. Comm. (305989)	Affirmed
LEWIS v. YONKERS CONTRACTING/DIVERSIFIED CONCRETE PRODUCTS No. 95-53	Ind. Comm. (073245)	Affirmed
McCAIN v. MID-STATE FORD, INC. No. 94-982	Lee (93CVD773)	No Error
McCORMICK v. CECIL KING TRUCKING CO. No. 95-293	Ind. Comm. (533417)	Affirmed
McLEAN v. GENERAL SPRAY & MAINTENANCE SERVICE No. 94-1451	Ind. Comm. (814062)	Affirmed
MILLER v. BETZ No. 94-1429	Macon (94SP36)	Affirmed
PRUITT v. HESTER No. 95-229	Richmond (91CVS837)	Dismissed

RATLIFFE v. SUN STATE DRYWALL No. 94-1341	Ind. Comm. (747042)	Vacated and Remanded
RESORT SHOPS, INC. v. HEROLD No. 94-1189	Buncombe (93CVS02610)	Reversed
SPEARS v. TALFORD No. 95-315	Mecklenburg (93CVS12525)	Affirmed
STATE v. ANDERSON No. 95-343	Guilford (93CRS46002) (93CRS46003) (93CRS46004)	Affirmed
STATE v. BETHEA No. 94-1261	Wake (94CRS25902) (94CRS26485)	Reversed and Remanded
STATE v. BLAKENEY No. 95-124	Mecklenburg (94CR52974) (91CRS83679)	Affirmed
STATE v. BRIGHT No. 94-1430	Pitt (94CRS9688) (94CRS9689)	No Error
STATE v. BROWN No. 95-464	Halifax (93CRS8848) (93CRS8849)	No Error
STATE v. COFFEY No. 95-334	Guilford (94CRS61502) (94CRS61503) (94CRS61504)	No Error
STATE v. COLBURN No. 95-386	Swain (92CRS1044) (92CRS1045) (92CRS1046) (92CRS1047) (92CRS1048) (92CRS1068)	No Error
STATE v. CRUMMY No. 94-1289	New Hanover (93CRS19724) (93CRS19725) (93CRS19726) (93CRS19727) (93CRS19728)	No Error
STATE v. DUKE No. 95-427	Dare (93CRS1978)	Reversed & Remanded

STATE v. ELLIS No. 94-1254	Mecklenburg (94CRS6796) (94CRS6797) (94CRS6798)	No Error
STATE v. FASHAW No. 94-1463	New Hanover (94CRS5890)	Affirmed
STATE v. HOOPER No. 95-162	Harnett (93CRS11331-A) (93CRS11332-A) (93CRS11333-A)	No Error
STATE v. JACKSON No. 95-254	New Hanover (93CRS28587) (93CRS28588)	No Error
STATE v. JENKINS No. 95-189	Buncombe (94CRS53023) (94CRS53025)	No Error
STATE v. LYLES No. 95-452	Mecklenburg (94CRS24550)	No Error
STATE v. MILLER No. 95-495	Forsyth (94CRS26343)	No Error
STATE v. MILLSAPS No. 95-540	Rowan (93CRS1328)	No Error
STATE v. MOSBY No. 95-504	Forsyth (94CRS3294)	No Error
STATE v. MOTLEY No. 95-105	Stanly (94CRS2425) (94CRS2426)	No Error
STATE v. OBIESHI No. 95-296	Wake (94CRS20535)	No Error
STATE v. ORMOND No. 94-1357	Beaufort (93CRS662)	No Error
STATE v. PHIPPS No. 95-354	Duplin (91CRS3615)	Affirmed
STATE v. POOLE No. 95-391	Cabarrus (93CRS8556)	Affirmed
STATE v. PRICE No. 94-1418	Wake (94CRS66993) (94CRS23349)	No Error
STATE v. PULLEY No. 95-478	Wake (94CRS46241)	No Error

STATE v. REESE No. 95-439	Wake (94CRS05150) (94CRS17823)	Affirmed
STATE v. RHODIE No. 94-1385	Forsyth (93CRS01075)	Affirmed
STATE v. SIMPSON No. 95-344	Mecklenburg (94CRS8684) (94CRS8666) (94CRS9401)	Affirmed
STATE v. TILLEY No. 95-319	Guilford (94CRS59465)	No Error
STATE v. WADSWORTH No. 94-1331	Edgecombe (93CRS9290)	Affirmed
STATE v. WILLIAMS No. 95-304	Pitt (93CRS25031)	No Error
STATE v. YON No. 95-234	Wake (94CRS26661) (94CRS26662)	No Error
TWEED v. BRYAN EASLER ENTERPRISES No. 95-281	Buncombe (92CVD806)	Reversed and Remanded for a new trial
VOSBURGH v. MILLER No. 95-511	Beaufort (93CVD189)	Appeal Dismissed
WINFREE v. CURLY'S HARLEY DAVIDSON No. 95-41	Ind. Comm. (306980)	Affirmed
WINGO v. WINGO No. 94-1450	Rutherford (86CVD36)	Affirmed

PLEASANT VALLEY PROMENADE, A CALIFORNIA LIMITED PARTNERSHIP, PLAINTIFF-APPELLANT v. LECHMERE, INC., LECHMERE REALTY LIMITED PARTNERSHIP, AND AEW PARTNERS, L.P., DEFENDANT-APPELLEES/CROSS-APPELLANTS

No. 9310SC1016 and 9410SC49

(Filed 7 November 1995)

1. Conspiracy § 11 (NCI4th); Unfair Competition or Trade Practices § 37 (NCI4th)— breach of shopping center agreement—insufficiency of evidence of misconduct

In an action arising out of the closing of a Lechmere Department Store at Pleasant Valley Promenade Shopping Center, the trial court did not err in directing verdict for defendant AEW on plaintiff's civil conspiracy, tortious interference with contract, and unfair trade practices claims where there was insufficient evidence showing an agreement between AEW and Lechmere to commit a wrongful act; the evidence instead showed the closing of the Lechmere store was an operational decision made by Lechmere; there was no evidence indicating AEW induced Lechmere to breach its agreement with Pleasant Valley to operate the store for seven years; there was no evidence of bad motive; AEW never had a business relationship with plaintiff; and plaintiff presented no evidence showing that AEW acted contrary to established business principles or in a deceptive, immoral, unethical, oppressive, or unscrupulous manner.

Am Jur 2d, Conspiracy §§ 68, 69; Consumer and Borrower Protection §§ 302 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

2. Contracts § 148 (NCI4th)— defendant not party to shopping center agreement—no breach of contract or fraud

In an action arising out of the closing of a Lechmere store in a shopping center, the trial court did not err in directing verdicts on plaintiff's breach of contract, fraud, and unfair trade practices claims in favor of defendant Lechmere Realty Limited Partnership, since Lechmere Realty Limited Partnership was not bound by plaintiff's agreement with defendant Lechmere, Inc. and therefore could not breach the terms of the covenant to operate the store for seven years; as support for its fraud and unfair trade practices claims, plaintiff relied upon evidence adduced to support similar claims against defendant Lechmere, Inc.; plaintiff failed to establish defendant Lechmere, Inc. committed fraud or

unfair trade practices; and plaintiff offered no evidence demonstrating it detrimentally relied on any statements made by Lechmere Realty Limited Partnership.

Am Jur 2d, Contracts §§ 716-748.

3. Pleadings § 61 (NCI4th)— denial of summary judgment— no automatic bar to sanctions

The denial of a motion for summary judgment is not an automatic bar to imposition of Rule 11 sanctions.

Am Jur 2d, Pleading §§ 236, 237.

4. Courts § 84 (NCI4th)— summary judgment denied by one judge—ruling as matter of law by another judge—first judge not overruled by second

There was no merit to defendant Lechmere's contention that the trial court erred in ruling as a matter of law that Lechmere breached the parties' agreement because another judge had previously denied Lechmere's motion for partial summary judgment on the issue of breach of the agreement, concluding there was a genuine issue as to material fact, since the trial court's ruling was most analogous to directing a verdict on the question of Lechmere's liability under the operating covenants of the agreement, rather than reconsidering the first judge's decision to deny summary judgment.

Am Jur 2d, Judges §§ 37-43.

5. Contracts § 70 (NCI4th)— unambiguous language in covenant—parties' intent as question of law—failure to comply with restrictive covenant

Where the language of the parties' covenant was unambiguous, the parties' intent constituted a question of law for the court. The trial court in this case properly construed the language of a contract to require Lechmere to operate its store within plaintiff's shopping center for the seven-year contract term or to require a Lechmere store or store having the trade name used by Lechmere in substantially all its southeastern stores to be operated within the shopping center for the entire contract term, and the court on appeal concludes that Lechmere did not comply with the requirements of this covenant.

Am Jur 2d, Contracts §§ 350-353, 370.

6. Fraud, Deceit, and Misrepresentation § 18 (NCI4th)—shopping center anchor store closed—misrepresentation about closing—no reliance on misrepresentation—insufficiency of evidence of fraud

In an action arising out of the closing of a Lechmere store in plaintiff's shopping center, the trial court did not err in directing a verdict in favor of defendant Lechmere on plaintiff's fraud and unfair and deceptive trade practices claims where the evidence tended to show that defendant intentionally misrepresented its plan to close the Raleigh store by assuring plaintiff through letters and telephone conversations that their agreement to operate the store for seven years would be honored; plaintiff acted or refrained from acting in a certain manner due to defendant's representations; but the evidence showing that plaintiff was aware of the fact that defendant planned to close its store and was seeking a suitable replacement tenant belied other testimony that plaintiff actually relied upon defendant's misrepresentations.

Am Jur 2d, Fraud and Deceit §§ 223 et seq.

Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon. 32 ALR2d 184.

7. Damages § 35 (NCI4th); Contracts § 163 (NCI4th)—breach of contract to operate anchor store in shopping center—diminished market value recoverable

Diminished market value of a shopping center is recoverable for an anchor store's breach of its contract to operate its store in the shopping center for a specified time.

Am Jur 2d, Damages §§ 401 et seq.

Measure of damages for conversion or loss of, or damage to, personal property having no market value. 12 ALR2d 902.

Recovery of value of use of property wrongfully attached. 45 ALR2d 1221.

8. Damages § 96 (NCI4th); Contracts § 163 (NCI4th)—breach of contract to operate anchor store in shopping center—diminished market value—special damages

Any damages suffered by plaintiff as a result of defendant's breach of the parties' contract for operation of an anchor store in

a shopping center were special damages. To recover special damages, plaintiff had to demonstrate it had suffered damages which could reasonably be supposed to have been within the contemplation of the parties when the contract was made; therefore, since the jury was not presented with the question whether defendant did in fact foresee or had reason to foresee the injury that plaintiff suffered, its $8.0 million award of general damages could not stand.

Am Jur 2d, Damages §§ 831 et seq.

Judge GREENE concurring.

Appeal by plaintiff from judgment entered 30 December 1992 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 5 April 1995.

Parker, Poe, Adams & Bernstein, by Fred T. Lowrance and John J. Butler, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Pressly M. Millen, and Young, Moore, Henderson & Alvis, P.A., by Jerry S. Alvis, for defendant-appellee/cross-appellant Lechmere, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael E. Weddington and Susan M. Parker, for defendant-appellee/cross-appellant Lechmere Realty Limited Partnership.

Maupin Taylor Ellis & Adams, P.A., by John C. Cooke and Ronald R. Rogers for defendant-appellee/cross-appellant AEW Partners, L.P.

MARTIN, MARK D., Judge.

This case involves an appeal by plaintiff Pleasant Valley Promenade (Pleasant Valley), and cross-appeals by defendants Lechmere, Inc. (Lechmere), Lechmere Realty Limited Partnership (LRLP), and AEW Partners, L.P. (AEW). The parties have presented numerous assignments of error for our consideration.

We consolidate the primary assignments of error into five issues—whether the trial court erred by: (1) directing verdicts in favor of AEW and LRLP on Pleasant Valley's fraud, unfair and deceptive trade practices, civil conspiracy, and tortious interference with contract claims; (2) excluding certain evidence offered at trial by

Pleasant Valley; (3) denying AEW's motion for attorney's fees and Rule 11 sanctions against Pleasant Valley; (4) ruling in favor of Pleasant Valley on the issue of Lechmere's liability for breach of contract during the pre-trial conference; and (5) granting Lechmere's motion for judgment notwithstanding the verdict.

After an exhaustive review of these questions, we reverse the trial court's entry of judgment notwithstanding the verdict, remand for reconsideration of AEW's motion for sanctions and a new trial on damages, and otherwise affirm the trial court's extensive rulings in all other respects.

This controversy arose out of the March 1990 closing of the Lechmere store at Pleasant Valley Promenade Shopping Center in Raleigh, North Carolina. The record indicates on 2 February 1987, Lechmere, a chain of department stores, entered into an Operation and Reciprocal Easement Agreement (the Agreement) with Schurgin Development (Schurgin), the developer of the Pleasant Valley Promenade Shopping Center (the Center). The Agreement contained restrictive covenants requiring Lechmere to open and operate a Lechmere store in the Center for a period of seven years. Before Lechmere entered the Agreement, Schurgin sold Lechmere the land on which its store was to be located. In April 1987 Schurgin transferred the Agreement and the Center, less the tract owned by Lechmere, to Pleasant Valley Partners, a limited partnership in which Schurgin was a general partner. In September 1987 the Lechmere store opened.

In the fall of 1989, Pleasant Valley began hearing rumors Lechmere's parent corporation planned to sell Lechmere to a group consisting of AEW and selected members of Lechmere's management. Lechmere responded to Pleasant Valley's repeated inquiries into the plans for the Raleigh store by affirming its intention to honor the Agreement.

On 26 September 1989 Lechmere hired the Sam Nassi Company, a California corporation, to plan the advertising, marketing, and sales promotions for the upcoming liquidation/clearance sales in its southeastern stores.

In late 1989 Lechmere's parent corporation, the Dayton-Hudson Corporation, sold Lechmere to a group including AEW. In conjunction with the sale, LRLP purchased from and immediately leased back to Lechmere the realty encompassing the Raleigh store. To finance the

purchase of the realty, LRLP obtained loans from AEW pursuant to a leveraged buy-out (LBO) agreement. In accordance with the LBO, Lechmere was to sell all of its southeastern stores, including the Raleigh store, and the funds would be used to pay AEW's fees and repay AEW's loans. Subsequently, Lechmere began to look for new retail tenants for its stores.

In November 1989 Pleasant Valley borrowed $7.0 million from Chase Manhattan Bank for site improvements, leasing operations, and interest payments.

On 20 November 1989 Pleasant Valley received notice of the "sell and lease back" arrangement between Lechmere and LRLP. On 22 February 1990 Lechmere notified Pleasant Valley it intended to close the Raleigh store and lease the space to Phar-Mor, a discount pharmacy chain. Six days later LRLP terminated its lease with Lechmere and executed a lease with Phar-Mor, thereby transferring the possessory interest of the space within the Center to Phar-Mor. Lechmere closed on 9 March 1990.

Pleasant Valley filed its complaint on 14 March 1990 seeking recovery from defendants Lechmere and LRLP for breach of contract, fraud, and unfair trade practices. The complaint also named AEW as defendant. On 18 May 1990 Lechmere and LRLP filed an answer and counterclaim against Pleasant Valley. Pleasant Valley amended the complaint on 26 September 1991 to add claims against AEW for tortious interference with contract, civil conspiracy, unfair trade practices, and aiding and abetting.

The action was tried during the 9 November 1992 Session of Wake County General Court of Justice, Superior Court Division. At the pretrial conference the trial court determined the restrictive covenants contained in the Agreement between Schurgin and Lechmere ran with the land and, therefore, Pleasant Valley could enforce the covenants in the Agreement. The trial court also ruled Lechmere breached the Agreement requiring Lechmere to operate a store at the Center for seven years.

On 2 December 1992, at the close of Pleasant Valley's evidence, the trial court directed verdicts in favor of LRLP and AEW on all of Pleasant Valley's claims and granted a partial directed verdict in favor of Lechmere on Pleasant Valley's fraud and unfair and deceptive trade practices causes of action. Thus, the trial proceeded solely on the issue of damages arising from Lechmere's breach of the Agreement.

On 11 December 1992 the jury returned a verdict awarding Pleasant Valley $8.0 million in damages for Lechmere's breach of the Agreement. Lechmere moved for judgment notwithstanding the verdict, which the court granted on 30 December 1992. In setting aside the jury verdict, the trial court entered judgment against Lechmere for $1.00 in nominal damages, plus costs. At the conclusion of the trial, defendant AEW moved for attorney's fees, which the trial court denied. From this judgment Pleasant Valley appeals and AEW, LRLP, and Lechmere cross-appeal.

PLEASANT VALLEY'S CLAIMS AGAINST AEW

[1] Pleasant Valley asserts AEW was inextricably involved in the breach of the Agreement, and thus the court erred in directing a verdict for AEW on plaintiff's civil conspiracy, tortious interference with contract, and unfair trade practices claims. In support of this contention, Pleasant Valley alleges: (1) AEW knew about the existence of the Agreement; (2) AEW was aware of a dispute over the Agreement; (3) AEW assisted in developing a plan to close the southeastern Lechmere stores and, specifically, to sell the inventory and real estate at the Raleigh location; (4) AEW participated in the lease to Phar-Mor; and (5) AEW received proceeds from the closing of the southeast stores.

When ruling on a motion for directed verdict, "the trial court must determine whether the evidence, when considered in the light most favorable to the nonmovant, is sufficient to take the case to the jury." *Southern Bell Telephone and Telegraph Co. v. West*, 100 N.C. App. 668, 670, 397 S.E.2d 765, 766 (1990), *aff'd*, 328 N.C. 566, 402 S.E.2d 409 (1991). Further, "[t]he testimony of plaintiff's witnesses must be accepted at face value" because credibility is an issue for the jury. *McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 286, 293 S.E.2d 632, 635 (1982), *aff'd*, 307 N.C. 695, 300 S.E.2d 374 (1983). "If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied." *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991).

On appeal, the scope of review is limited to those grounds asserted by the moving party before the trial court. *Southern Bell*, 100 N.C. App. at 670, 397 S.E.2d at 766. Nonetheless, the reviewing court is confronted with the identical task as the trial court—"to determine whether the evidence, when considered in the light most favorable to the nonmovant, was sufficient to have been submitted to the jury."

Harshbarger v. Murphy, 90 N.C. App. 393, 395, 368 S.E.2d 450, 451 (1988).

A.

A civil conspiracy requires: (1) an agreement between two or more persons to do a wrongful act; (2) an overt act committed in furtherance of the agreement; and (3) damage to the plaintiff. *Nye v. Oates*, 96 N.C. App. 343, 347, 385 S.E.2d 529, 531-532 (1989). Direct evidence of a conspiracy agreement is not necessary and often does not exist. *State v. Whiteside*, 204 N.C. 710, 712-713, 169 S.E. 711, 712 (1933). However, to submit the case to the jury, the circumstantial evidence must amount to more than mere suspicion or conjecture. *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981). We do not find sufficient evidence showing an agreement between AEW and Lechmere to commit a wrongful act. Rather, the evidence shows the closing of the Lechmere store was an operational decision made by Lechmere.

B.

To support a tortious interference with contract claim, Pleasant Valley must have presented evidence showing: (1) the Agreement was a valid contract between Pleasant Valley and Lechmere; (2) AEW had knowledge of the Agreement; (3) AEW intentionally induced Lechmere not to perform its obligations to Pleasant Valley under the Agreement; (4) AEW's actions were not justified by legitimate business interests; and (5) AEW's actions caused Pleasant Valley to suffer actual damages. *See Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-182 (1954), *reh'g denied*, 242 N.C. 123, 86 S.E.2d 916 (1955). Plaintiff refers to no evidence, and we find no evidence, indicating AEW induced Lechmere to breach the Agreement. We also discern no evidence of bad motive. *See Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 439, 293 S.E.2d 901, 916, *disc. review denied and appeal dismissed*, 307 N.C. 127, 297 S.E.2d 399 (1982) ("bad motive is the gist of the [tortious interference] action").

C.

Chapter 75 of our General Statutes prohibits unfair acts which undermine ethical standards and good faith between persons engaged in business dealings. *McDonald v. Scarboro*, 91 N.C. App. 13, 18, 370 S.E.2d 680, 683, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988). In support of its unfair trade practices claim, Pleasant Valley first relies upon the factual allegations it asserts to support its civil

conspiracy and tortious interference with contract claims. We summarily dismiss this contention since we have already determined Pleasant Valley failed to introduce sufficient evidence at trial to overcome AEW's motion for directed verdict on those claims.

Pleasant Valley also contends "the totality of AEW's conduct with respect to the 'busted' Agreement independently supports the Chapter 75 claim against AEW." We note, however, AEW never had a business relationship with Pleasant Valley. Further, Pleasant Valley presented no evidence showing AEW acted contrary to established business principles or in a deceptive, immoral, unethical, oppressive, or unscrupulous manner.

Therefore, we find no merit in Pleasant Valley's claims for civil conspiracy, tortious interference with contract, or unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1. Accordingly, we affirm the trial court's grant of a directed verdict in favor of AEW as to all claims.

PLEASANT VALLEY'S CLAIMS AGAINST LRLP

[2] Pleasant Valley submits the trial court erred in directing verdicts on its breach of contract, fraud, and unfair trade practices claims in favor of defendant LRLP.

A.

Pleasant Valley suggests LRLP was liable for Lechmere's breach of the Agreement since LRLP purchased the store and leased it back to Lechmere. The evidence clearly indicates LRLP was not bound by the Agreement. Therefore, LRLP could not breach the terms of the covenant. Accordingly, we reject this claim.

B.

As support for its fraud and unfair trade practices claims, Pleasant Valley relies upon evidence adduced to support its fraud and unfair trade practice claims against Lechmere. We dismiss this argument because we ultimately conclude Pleasant Valley failed to establish Lechmere committed fraud or unfair trade practices. Further, addressing the fraud claim, we note Pleasant Valley offered no evidence demonstrating it detrimentally relied on any statements made by LRLP. Accordingly, we conclude the trial court properly directed a verdict in favor of LRLP on Pleasant Valley's fraud and unfair trade practices causes of action.

PLEASANT VALLEY'S EVIDENTIARY CLAIMS

Pleasant Valley asserts the trial court erred in excluding certain deposition testimony and exhibits from evidence.

We conclude Pleasant Valley abandoned its allegation the trial court improperly excluded exhibits from evidence because it failed to cite any authority or offer any support for this contention. *Byrne v. Bordeaux*, 85 N.C. App. 262, 265, 354 S.E.2d 277, 279 (1987).

To be admissible at trial, the deposition of an unavailable non-party witness must meet the requirements of both N.C.R. Civ. P. 32 and N.C.R. Evid. 804(b)(1). *Investors Title Insurance Co. v. Herzig*, 330 N.C. 681, 690-691, 413 S.E.2d 268, 273 (1992). Rule 32 generally allows the use of an unavailable witness' deposition. N.C. Gen. Stat. § 1A-1, Rule 32 (1990). Rule 804(b)(1) does not allow an unavailable witness' deposition to be introduced at trial, however, unless the party against whom such testimony is offered had the "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." N.C. Gen. Stat. § 8C-1, Rule 804(b)(1) (1992).

At the time Pleasant Valley deposed Rubin and DeSimone, Pleasant Valley was not seeking damages from AEW. Thus, AEW had no motive to develop testimony to rebut a non-existent damages claim. At trial, however, Pleasant Valley amended its complaint to assert damages against AEW. Accordingly, we hold the trial court properly excluded the deposition testimony under Rule 804(b)(1).

AEW'S CROSS-APPEAL

[3] AEW contends the trial court erred in denying its motion for attorney's fees and Rule 11 sanctions against Pleasant Valley.

Our review of the record indicates the trial court may have been uncertain as to whether AEW's motion for Rule 11 sanctions survived the denial of AEW's motion for summary judgment on the underlying claims. The trial court's uncertainty is understandable as this Court recently considered, but did not decide, this precise question. *See Pugh v. Pugh*, 111 N.C. App. 118, 431 S.E.2d 873 (1993). After careful consideration of this question, we conclude the denial of a motion for summary judgment is not an automatic bar to imposition of Rule 11 sanctions. *Cf. Higgins v. Patton*, 102 N.C. App. 301, 305, 401 S.E.2d 854, 856 (1991), *overruled on other grounds*, *Bryson v. Sullivan*, 330 N.C. 664, 412 S.E.2d 327 (1992).

As noted by the United States Court of Appeals for the Ninth Circuit in *Matter of Yagman*:

> In some situations, liability under proper sanctioning authority will not be immediately apparent or may not be precisely and accurately discernible until a later time. For example, findings under Rule 11 occasionally cannot be made until after the evidentiary portion of the trial. A claim may appear to raise legitimate and genuine issues before trial, even in the face of summary judgment challenges, but will be unmasked as not well-founded in fact after the claimant has presented his evidence.

Matter of Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986), *cert. denied*, *Real v. Yagman*, 484 U.S 963, 98 L. Ed. 2d 390 (1987) (emphasis added). We agree with the reasoning of the Court in *Matter of Yagman.*

We offer no opinion at this juncture as to whether sanctions are appropriate under the facts and circumstances of the present case. Rather, we remand to the trial court in the first instance for reconsideration of this question with knowledge the denial of a motion for summary judgment does not constitute an absolute bar to the imposition of Rule 11 sanctions.

LECHMERE'S CROSS-APPEAL

Lechmere contends the trial court erred by ruling, as a matter of law, that it breached the Agreement.

A.

[4] We agree with Lechmere's assertion that one trial judge "may not modify, overrule, or change the judgment . . . previously made in the same action." *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 164, 374 S.E.2d 160, 162 (1988) (*quoting Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987)). Accordingly, where one judge has denied a motion for summary judgment, another judge may not reconsider and grant summary judgment on the same issue. *Whitley's Electrical Service v. Walston*, 105 N.C. App. 609, 611, 414 S.E.2d 47, 48 (1992).

In the instant case, Judge Robert L. Farmer denied Lechmere's motion for partial summary judgment on the issue of breach of the Agreement concluding, "there [was] a genuine issue as to material fact." At the pre-trial conference, Judge Barnette ruled in favor of Pleasant Valley, as a matter of law, on the issue of breach of the

Agreement. In his ruling, Judge Barnette stated it was, "procedurally, the type of ruling that would normally be made at the directed verdict stage or at least during the charge conference. . . . I have made them preliminarily to trial, but procedurally that's where I think they would fit."

Having determined the meaning of the covenant was unambiguous, the parties' intent constituted a question of law for the court. *Runyon v. Paley*, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992). Judge Barnette reviewed all evidence pertinent to this question (*i.e.*, the language of the operating covenants) prior to his ruling from the bench. Assuming the trial court correctly determined the intent of the operating covenant was unambiguous, no further evidence could be introduced during trial relevant to this inquiry. Perhaps most important, Judge Barnette considered the question of Lechmere's liability under the operating covenants pursuant to N.C.R. Civ. P. 50 at the close of plaintiff's evidence, and at the close of all the evidence, in each instance re-affirming his initial ruling.

Thus, assuming the trial court properly determined the intent of the operating covenant was unambiguous, we believe Judge Barnette's ruling was most analogous to directing a verdict on the question of Lechmere's liability under the operating covenants, rather than reconsidering Judge Farmer's decision to deny summary judgment.

B.

[5] We next consider the substantive question of whether the trial court properly construed the Agreement. When interpreting the meaning of a covenant, the court must ascertain the parties' intent at the time they entered into the covenant. *Runyon*, 331 N.C. at 305, 416 S.E.2d at 186. The intention of the parties is determined by examining all of the covenants within the instrument. *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967). If the language of the covenant is unambiguous, as already indicated, the parties' intent constitutes a question of law for the court. *Runyon*, 331 N.C. at 305, 416 S.E.2d at 186.

Pursuant to Section 8.1 of the Agreement, Lechmere covenants and agrees with Developer:

> [T]hat it will open and thereafter operate, or cause to be opened and operated, a retail store under the trade name "Lechmere", or under such other name as it is doing business in

> substantially all of its stores in the southeastern region, on or before September 1, 1987, and thereafter operate in not less than 60,000 square feet of Floor area for a period of seven consecutive (7) years from and after the date upon which it shall first open for business (the "operating period").
>
> The hours of business, the number and types of departments to be operated in such store, the particular contents, wares and merchandise to be offered for sale and the services to be rendered, . . . and the manner of operating such store in every respect whatsoever shall be within the sole and absolute discretion of Lechmere. Provided, however, that Lechmere shall operate in a fashion comparable to a majority of its other stores in the southeastern region. Lechmere may operate a department or departments in its store in whole or in part by . . . tenants . . . . Provided, however, that said store shall present to the public the appearance of being operated as a single unified store.

Lechmere asserts the parties included: (1) the "cause . . . to be operated" language; and (2) the language allowing the use of a trade name other than "Lechmere," to enable another entity to fulfill Lechmere's operating obligations. We disagree.

We believe the language of the restrictive covenant unambiguously required either Lechmere operate its store within the Center for the seven-year contract term; or, alternatively, Lechmere cause a Lechmere store (or a store having the trade name used by Lechmere in substantially all of its southeastern stores prior to September 1, 1987) to be operated within the Center for the entire seven-year contract term. We conclude Lechmere did not comply with the requirements of this restrictive covenant.

We believe the trial court properly construed the Agreement, as a matter of law, in favor of Pleasant Valley. Therefore, we also reject Lechmere's contention Judge Barnette committed reversible error in ruling on this question at the pretrial conference. Accordingly, we find no merit in Lechmere's contention the trial court erred in determining Lechmere breached the Agreement with Pleasant Valley.

PLEASANT VALLEY'S APPEAL

Pleasant Valley presents two issues on appeal—whether the trial court erred: (1) in directing a verdict in favor of Lechmere on Pleasant Valley's fraud and unfair and deceptive trade practices

claims; and (2) in granting Lechmere's motion for judgment notwithstanding the verdict and setting aside the $8.0 million verdict.

A.

[6] To recover for fraud, Pleasant Valley must present evidence tending to show (1) a 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) which was relied upon and which resulted in damages to the injured party. *Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 611, 306 S.E.2d 519, 523-524 (1983), *disc. review denied*, 310 N.C. 154, 311 S.E.2d 294 (1984).

After reviewing the evidence in the light most favorable to Pleasant Valley, we find Lechmere intentionally misrepresented its plan to close the Raleigh store by assuring Pleasant Valley, through letters and telephone conversations, the Agreement would be honored.

Actual reliance is demonstrated by evidence plaintiff acted or refrained from acting in a certain manner due to defendant's representations. *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983). Moreover, plaintiff's reliance upon the false representations must be justified or reasonable. *Johnson v. Owens*, 263 N.C. 754, 757, 140 S.E.2d 311, 313 (1965).

Pleasant Valley directs our attention to Rosalind Schurgin's testimony. In her testimony, Rosalind Schurgin stated Pleasant Valley would not have incurred a $7.0 million loan in November 1989 to finance improvements at the shopping center if it had known Lechmere intended to abandon the Center.

However, Rosalind Schurgin's testimony admits Lechmere never represented it would occupy the premises for the term of the Agreement. Rosalind Schurgin also testified she was aware of newspaper articles in the *Raleigh News & Observer*, beginning 5 October 1989, stating Lechmere was trying to find a replacement tenant and close its store.

Further, on 25 October 1989, Pleasant Valley circulated internal documents which noted Lechmere was selling the store and Pleasant Valley might seek to buy the store. Another internal memo dated 26 October 1989 disclosed Pleasant Valley was aware of rumors Lechmere planned to close the store. Finally, in a letter dated 4

January 1990, the property manager for Schurgin told another tenant in the Center Lechmere was seeking a "suitable replacement."

Therefore, we hold Pleasant Valley's cognizance of this information belies Rosalind Schurgin's testimony that Pleasant Valley actually relied upon Lechmere's statements. Accordingly, we uphold the trial court's directed verdict in favor of Lechmere on plaintiff's fraud claim.

B.

To establish a *prima facie* claim for unfair trade practices, the plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, N.C. Gen. Stat. § 75-1.1 (1994), and (3) the act proximately caused injury to the plaintiff. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-274 (1980) (plaintiff must also establish it "suffered actual injury as a proximate result of defendant['s] misrepresentations.").

Pleasant Valley did not sufficiently demonstrate actual reliance on Lechmere's misrepresentations and, therefore, failed to provide the requisite causal connection. Accordingly, we believe Pleasant Valley failed to prove Lechmere committed unfair and deceptive acts which proximately caused injury to Pleasant Valley.

C.

We next examine Pleasant Valley's contention the trial court erred in granting Lechmere's motion for judgment notwithstanding the verdict.

When considering motions for judgment notwithstanding the verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, the trial court applies the same standard as applied in considering motions for directed verdict. *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987). In deciding whether to set aside a verdict, the trial court must consider the evidence in the light most favorable to the non-moving party, giving it the benefit of all reasonable inferences to be drawn therefrom. *Id.* at 733-734, 360 S.E.2d at 799. A judgment notwithstanding the verdict is not proper unless it appears, as a matter of law, recovery cannot be had by a plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Id.* at 734, 360 S.E.2d at 799. Accordingly, such a judgment is ordinarily not proper where plaintiff has presented evidence from which dam-

ages can be found when viewed in the light most favorable to the plaintiff. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 90-91, 394 S.E.2d 824, 829, *disc. review denied*, 327 N.C. 636, 399 S.E.2d 328 (1990).

The trial court determined, and we agree, that Lechmere breached its Agreement with Pleasant Valley. It follows, therefore, any suit premised on this breach must sound in contract, and any damages must be recovered, if at all, under well settled principles of contract law.[1]

As a general rule, " '[f]or a breach of contract the injured party is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed.' " *First Union Nat. Bank v. Naylor*, 102 N.C. App. 719, 725, 404 S.E.2d 161, 164 (1991) (*quoting Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 259 N.C. 400, 415, 131 S.E.2d 9, 21 (1963)). *See also Fulcher v. Nelson*, 273 N.C. 221, 226, 159 S.E.2d 519, 523 (1968). The interest protected by this general rule is the non-breaching party's "expectation interest." *First Union*, 102 N.C. App. at 725, 404 S.E.2d at 164 (*citing* RESTATEMENT (SECOND) OF CONTRACTS § 344(a), comment a (1979)). Based on this expectation interest, an injured party has

> a right to damages . . . measured by:
>
> > (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
> >
> > (b) any other loss, including incidental or consequential loss, caused by the breach, less
> >
> > (c) any cost or other loss that he has avoided by not having to perform.

Id. (*citing* RESTATEMENT (SECOND) OF CONTRACTS 347 (1979)); *Ward v. Zabady*, 85 N.C. App. 130, 135, 354 S.E.2d 369, 373, *disc. review denied*, 320 N.C. 177, 358 S.E.2d 71 (1987) (plaintiff may only recover

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1. The parties do not dispute the covenants within the Agreement constitute restrictive covenants, as they "evince[] the intention of the parties that . . . [the land upon which the Lechmere store was located would] not be used other than in [the] designated manner for [the] designated purpose." PATRICK K. HETRICK, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA, § 385 (3d ed. 1988). As such, "[t]he usual measure of damages for breach of a covenant, in accordance with the rule governing damages for breach of contracts generally, is compensation for actual loss suffered by reason of the breach." 20 AM. JUR. 2d *Covenants, Conditions, and Restrictions* § 28 (2d ed. 1965).

actual losses in breach of contract action). Simply stated, the amount of money which will completely indemnify the injured party is the true measure of damages. *Troitino v. Goodman*, 225 N.C. 406, 412, 35 S.E.2d 277, 281 (1945).

Pleasant Valley vigorously urged the trial court, and now urges on appeal, that the law of this State and other jurisdictions requires its damages be measured by diminution in market value—present worth of the property with the anchor store less the present worth of the property without the anchor store.

Lechmere opposes Pleasant Valley's measure of damages contending: (1) diminished market value is not the appropriate measure of damages; or, in the alternative, (2) diminished market value constitutes a special damage which Pleasant Valley failed to specifically plead in its complaint.

1.

[7] The initial question for determination, therefore, is whether diminished market value is recoverable in a breach of contract action arising out of an anchor store's breach of covenants with the shopping center in which it resides. This is a question of first impression for North Carolina courts.

North Carolina courts have routinely applied diminished market value as a measure of damages for physical harm to property. *See Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E.2d 884, 887 (1960) (breach of building or construction contracts); *Patrick v. Mitchell*, 44 N.C. App. 357, 359-360, 260 S.E.2d 809, 811 (1979) (breach of building or construction contracts); *Paris v. Aggregates, Inc.*, 271 N.C. 471, 484, 157 S.E.2d 131, 141 (1967) (damage to house allegedly caused by blasting operations); *Broadhurst v. Blythe Brothers Co.*, 220 N.C. 464, 469, 17 S.E.2d 646, 649 (1941) (damage to house allegedly caused by negligent excavations). In the seminal case of *Phillips v. Chesson*, 231 N.C. 566, 58 S.E.2d 343 (1950), our Supreme Court held diminished market value was not the appropriate measure of damages where defendant diverted water into plaintiff's lower lot by dumping clay on plaintiff's upper lot. The Court based its decision on the fact the injury to plaintiff's property was temporary, not permanent. *Id.* at 570-572, 58 S.E.2d at 347-348. Careful review of this precedent indicates diminished market value has been applied in cases involving permanent, physical damage to property.

The Fourth Circuit, however, has applied the diminished market value measure of damages to a breach of contract action arising under North Carolina law. *See United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054, 70 L. Ed. 2d 590 (1981). In *United Roasters* Colgate entered into a manufacturing and distribution contract with United Roasters for "Bambeanos," a soybean product. Over two years later, in 1975, Colgate began to slowly phase out its participation in Bambeanos without informing United Roasters of its intention to discontinue the line. By May 1976, five months after the phaseout began, Colgate was no longer selling Bambeanos. As a result of Colgate's actions, United Roaster's opportunity to operate the Bambeanos product line was effectively foreclosed. At trial, the fair market value of the Bambeanos product line was found to be zero. Relying on this evidence, the jury awarded United Roasters $571,000 in damages based on the difference between the estimated value of Bambeanos before Colgate's abandonment <u>and</u> the present value of Bambeanos. *Id.* at 992-993.

On appeal, Colgate contended the award was improper because the jury applied the wrong standard. The Fourth Circuit stated:

> The plaintiff's expert offered a reasoned estimate of future profits and, by the application of a discount earnings method, arrived at an amount which, in his opinion, a willing buyer would be prepared to pay for the business. In none of this do we find any error . . . . By letting the business run out, Colgate had deprived the plaintiff of an opportunity to sell the business as a going concern or to develop it on its own.

Id. at 992.

Conceptually, *United Roasters* applied diminished market value to a breach of contract occurring during the initial "start-up period" of a business enterprise. As such, we believe *United Roasters* supports the proposition diminished market value is an appropriate contractual damages measure where the harm suffered will not otherwise be fully compensated. Similarly, the present case arises from a breach of contract occurring during the initial start-up or stabilization period of the Center. Further, Pleasant Valley alleges extensive damages when Lechmere abandoned the Center. Therefore, applying the rationale of *United Roasters*, we believe the genesis of diminished market value as primarily a property law measure does not automat-

ically foreclose its application to breach of contract under appropriate circumstances.

Examination of cases from other jurisdictions provides further support for application of diminished market value in appropriate breach of contract actions.

In *Hornwood v. Smith's Food King No. 1*, 807 P.2d 208 (Nev. 1991), the owners of a shopping center alleged the anchor tenant violated an operating covenant by moving out of and re-leasing its space to other tenants. The owners claimed they were entitled to recover the decline in value of the center due to the anchor tenant's breach. The Nevada Supreme Court concluded:

> [D]amages in this case should be assessed as the present worth of the property with the anchor tenant less the present worth of the property without the anchor tenant.

Id. at 212.

In so holding the Nevada Supreme Court relied on *Washington Trust Bank* v. *Circle K Corp.*, 546 P.2d 1249 (Wash. App.), *review denied*, 87 Wash.2d 1006 (1976). In *Washington Trust*, the lessor's trustee sought specific performance of a lease or, in the alternative, damages. The breach involved a single store not located in a shopping center. The Washington Court of Appeals dismissed the trustee's suit for specific performance because there was an adequate remedy at law available to the injured party. *Id.* at 1252. According to the Washington Court of Appeals, the remedy at law in their case was damages measured by "the difference between the present worth of the property with the lease less the present worth of the property without the lease." *Id.*

Lechmere contends the *Hornwood* court misapprehended the holding in *Washington Trust*, *supra*, thereby removing the *Hornwood* court's only precedent for applying diminished market value to breach of contract. In support of this proposition, Lechmere directs our attention to the Washington Supreme Court case of *Family Medical Bldg., Inc. v. Washington*, 702 P.2d 459 (Wash. 1985). In *Family Medical*, the landlord of a two-story building brought an action against the State Department of Social Services, and the Department of General Administration, for damages which resulted when the state allegedly breached a promise to renew an existing lease and to lease additional space in the landlord's building. The Washington Supreme Court held:

> Generally, the measure of a lessor's damages resulting from a lessee's breach of a lease is the difference in the value of the property independent of the lease.

Id. at 464 (*citing Washington Trust Bank v. Circle K Corp.*, 15 Wash. App. 89, 93, 546 P.2d 1249, *review denied*, 87 Wash.2d 1006 (1976)). Based on the Washington Supreme Court's citation to *Washington Trust*, Lechmere contends the *Hornwood* Court misapplied its only cited authority, *Washington Trust Bank v. Circle K Corp., supra.*

However, a more detailed reading of the *Family Medical* decision reveals the Washington Supreme Court went on to hold:

> Additional damages which a lessor may recover for breach of a lease may properly include consequential damages which flow from the breach and which could reasonably have been anticipated by the parties. The amount of damages should reflect what is required to place the lessor in the same financial position he would have enjoyed in the absence of the breach.

Id. at 464 (emphasis added). As the Washington Supreme Court recognized, the general rule on lease damages requires occasional modification to fully compensate an injured party for its losses. Thus, contrary to Lechmere's assertion, the *Family Medical* opinion does not necessarily foreclose the application of diminished market value in appropriate contract actions.

We believe our interpretation of *Family Medical* is consistent with the Supreme Court's admonition in *Phillips v. Chesson* that courts, by "always moving toward rules of general application to frequently recurring situations, have evolved many rules which achieve the merit of convenient application and easy provability at the expense of a nearer approach to reality in the particular case." *Phillips*, 231 N.C. at 571, 58 S.E.2d at 347.

We note the courts in *Hornwood* and *Washington Trust Bank* did not apply precisely the same diminished market value formula in calculating damages. This is consistent with our Supreme Court's declaration that diminished market value "is applied with caution, and often with modifications designed to relax its rigidity and fit it to the facts of the particular case." *Id.* (emphasis added).

In the context of a breach of contract between the anchor store and the shopping center in which it resides, we recognize there are often extensive damages. *See Hornwood v. Smith Food King No. 1*,

807 P.2d 208 (Nev. 1991); Tyson, *Drafting, Interpreting, and Enforcing Commercial and Shopping Center Leases*, 14 CAMPBELL L. REV. 275 (1992). These damages result because the shopping center is a "cooperative enterprise, with each store's success dependent on the continued operation of the other stores . . . ." *Dover Shopping Center, Inc. v. Cushman's Sons, Inc.*, 164 A.2d 785, 790 (N.J. Super. Ct. App. Div. 1960). The contribution of each store determines the flow of business of the entire shopping center, and likewise, a store leaving affects the center as a whole. *See W & G Seafood Associates, L.P. v. Eastern Shore Markets, Inc.*, 714 F. Supp. 1336, 1348 (D. Del. 1989). Though a shopping center is "cooperative" in nature, the anchor store is the focal point of the entire shopping center. Tyson, 14 CAMPBELL L. REV. 301-303. The function of the anchor is "to provide certainty of income stream, an identity and stability for the center which, in turn, draws customers, attracts other tenants and increases overall sales." *Id.* at 303. Further, without an anchor store long-term financing is virtually impossible to obtain. *Hornwood v. Smith's Food King No. 1*, 772 P.2d 1284, 1286 (Nev. 1989). Therefore, the anchor's loss has been described as "worse than a flood, fire or tornado, because usually there is insurance to cover [natural] disasters." Tyson, 14 CAMPBELL L. REV. at 303.

Pleasant Valley installed Lechmere as the Center's anchor store based on Lechmere's product mix, value offered, aggressive advertising method, and regional drawing power. Lechmere, in breach of the Agreement, abandoned the Center. As a result of Lechmere's abandonment, Pleasant Valley claimed damages arising from: (1) harm to the overall probability of success of the Center; (2) harm to the fair market value of the Center; and (3) harm to the Center's ability to attract and retain non-anchor tenants and a corresponding reduction in customer traffic and the attendant decrease in sales revenue.

Therefore, consistent with the guidance of our Supreme Court, we believe a damages remedy should be available to Pleasant Valley which promotes the frequently declared objective of placing "the injured part[y] in as good a position as they would have been in if the contract had not been breached. . . ." Knapp, COMMERCIAL DAMAGES: A GUIDE TO REMEDIES IN BUSINESS LITIGATION, § 1.02 (Matthew Bender 1995). Accordingly, we conclude the damages measure asserted by Pleasant Valley, diminution in market value, is recoverable in a breach of contract action.[2]

2. We summarily reject Lechmere's contention damages are inappropriate in the present case because Pleasant Valley's injury could have been equitably abated. Our

2.

[8] Having determined diminution in market value may be applied to redress breach of contract occurring between an anchor store and the shopping center in which it resides, we next examine whether this measure constitutes the damages remedy implied by law or, alternatively, a consequential damage measure.

According to our Supreme Court, " 'general damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case.' " *Penner v. Elliot*, 225 N.C. 33, 35, 33 S.E.2d 124, 126 (1945) (*quoting* Black's Law Dictionary 314-315 (2d ed.)). As noted in a leading treatise on damages:

> Consequential or special damages for breach of contract are those claimed to result as a secondary consequence of the defendant's non-performance. They are distinguished from general damages, which are based on the value of the performance itself, not on the value of some consequence that performance may produce.

3 Dan B. Dobbs, LAW OF DAMAGES, § 12.4(1) (2d ed. 1993) (emphasis added). Finally, as Lechmere correctly asserts, the *Hornwood* court determined "diminution in value of the shopping center occurring when [defendant] breached the lease is a recoverable consequential damage." *Hornwood*, 772 P.2d at 1286 (emphasis added).

After careful review of the evidence presented at trial, we believe any damages caused by Lechmere's breach occurred "by reason of the particular circumstances of the case." *Penner v. Elliot*, *supra*. More-

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courts, in analogous situations, have held that an aggrieved party may seek damages or elect to require specific performance. *See, e.g., Brannock v. Fletcher*, 271 N.C. 65, 73, 155 S.E.2d 532, 541 (1967); *Lyerly v. Malpass*, 82 N.C. App. 224, 230, 346 S.E.2d 254, 258 (1986), *disc. review denied*, 318 N.C. 695, 351 S.E.2d 748 (1987).

We also reject Lechmere's contention the general measure of damages for breach of lease is appropriate under the present facts and circumstances. Because Lechmere owned the land upon which its store was located, damages cannot arise directly from any lease agreement. In addition, we believe the general measure of damages for breach of lease is under-inclusive, as it fails to compensate plaintiff for several elements of harm established by expert testimony, including: (1) the reduction in fair market value of the Center caused by Lechmere's departure; (2) the reduction in plaintiff's ability to attract and retain non-anchor tenants caused by Lechmere's early departure; and (3) the reduction in the Center's overall probability of success due to Lechmere's departure during the Center's stabilization period.

over, as Lechmere purchased its space within the Center from Pleasant Valley, Pleasant Valley did not receive rent, or other periodic payments, for its use. Consequently, Lechmere's non-performance under Section 8.1 of the operating covenants did not *directly* cause financial harm to Pleasant Valley. Rather, the damages claimed by Pleasant Valley, (1) harm to the overall probability of success of the Center; (2) harm to the fair market value of the Center; and (3) harm to the Center's ability to attract and retain non-anchor tenants (and thus a corresponding reduction in customer traffic and the attendant decrease in sales revenue), occurred, if at all, as a "secondary consequence of defendant's non-performance." 3 Dobbs, LAW OF DAMAGES, § 12.4(1).

Accordingly, we believe Pleasant Valley's alleged damages are best characterized as special damages as defined by Rule 9(g) of the North Carolina Rules of Civil Procedure. *See Piedmont Plastics, Inc. v. Mize Co.*, 58 N.C. App. 135, 140, 293 S.E.2d 219, 223 (1982).

At the charge conference in the instant action, Pleasant Valley requested the jury be charged to consider the diminution in market value measure as "general damages." Although Lechmere objected to the proposed jury instruction, it did not object on the ground diminution in market value constituted a special damage not specifically pled in plaintiff's complaint. Consequently, the trial court, faced with complex commercial litigation raising matters of first impression within our jurisdiction, did not have the opportunity to consider the question of whether diminution in market value constituted special damages under the particular circumstances of the present case.

The trial court instructed the jury:

> Now, a party seeking recovery for losses occasioned by another's breach of contract need not prove the amount of its prospective damages with absolute certainty. A reasonable showing will suffice. . . .
>
> . . . .
>
> The damages claimed by the plaintiff for the breach of the contract consist of general damages. Now I will explain to you what that term means.

We find no fault with the trial court's instruction on *general* damages for breach of contract. As noted by this Court, however, "special damages . . . must be pleaded, and the facts giving rise to the special

damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand." *Rodd v. Drug Co.*, 30 N.C. App. 564, 568, 228 S.E.2d 35, 38 (1976) (emphasis added).

Furthermore, to recover special damages at trial, plaintiff must demonstrate it has suffered damages such as may reasonably be supposed to have been within the contemplation of the parties when the contract was made. *Troitino v. Goodman*, 225 N.C. at 412, 35 S.E.2d at 281. "The question whether or not the defendant did in fact foresee, or had reason to foresee, the injury that the plaintiff has suffered is a question of fact for the jury . . . ." 5 Arthur L. Corbin, CORBIN ON CONTRACTS, § 1012 (2d ed. 1964). Because the jury was not presented with this question for determination, its $8.0 million award of general damages cannot stand.

3.

Because the jury's $8.0 million verdict must be set aside, we now turn to fashioning an appropriate remedy.

Under North Carolina law, the appellate division may order a new trial notwithstanding plaintiff's failure to move for a new trial or except to the conditional denial of one on remand. *Plyler v. Moss & Moore, Inc.*, 40 N.C. App. 720, 254 S.E.2d 534 (1979); *Lindsey v. Clinic for Women*, 40 N.C. App. 456, 253 S.E.2d 304 (1979). *See* N.C. Gen. Stat. §§ 1-297 (1983), and 1A-1, Rule 50(d) (1990).

At trial the parties, and the trial court, proceeded under the impression that diminution in value was an appropriate remedy, if at all, as a general measure of damages. Pleasant Valley did not specifically plead diminution in market value as a special damage in its complaint. Lechmere, on the other hand, did not assert the defense that diminution in market value constituted a special damage in the trial court. See *Mobley v. Hill*, 80 N.C. App. 79, 84, 341 S.E.2d 46, 49 (1986) ("[g]rounds [for JNOV] not specifically raised at trial generally may not be raised on appeal, unless it is readily apparent from the record what grounds were relied on at trial."); *Lee v. Keck*, 68 N.C. App. 320, 328, 315 S.E.2d 323, 329, *disc. review denied*, 311 N.C. 401, 319 S.E.2d 271 (1984).

Attempting, as we must, to balance the equities between the parties, and in light of the complexity of the novel issues raised at the trial of this matter, we reverse the trial court's grant of judgment notwithstanding the verdict and award of nominal damages in the amount of $1, and remand this case, in the interests of justice, for a

new trial on damages. *Cf. Shankle v. Shankle*, 289 N.C. 473, 486-487, 223 S.E.2d 380, 388 (1976).

On remand the trial court may, in its discretion, afford the parties a reasonable opportunity for further discovery in light of the additional issues related to special damages which may be asserted at retrial. We have concluded diminution in market value may be applied to redress breach of contract occurring between an anchor store and the shopping center within which it resides. Nevertheless, because a new trial is appropriate in the present case, the trial court must determine, based on the evidence offered at retrial, whether the evidence justifies submission of the diminution in market value measure of damages.

We have carefully reviewed the remaining assignments of error and conclude they are without merit.

Affirmed in part, reversed in part, and remanded for new trial.

Judge LEWIS concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurring.

I write separately to emphasize that we are not holding that diminished market value is the measure of damages in this breach of contract case. We simply hold that because diminished market value is in the nature of a special damage in this case, damages based on diminished value are recoverable *if* such damages were in the contemplation of the parties at the time the contract was made.

STATE OF NORTH CAROLINA v. MICHAEL DEAN McABEE

No. 9429SC284

(Filed 7 November 1995)

1. Evidence and Witnesses § 176 (NCI4th)— murder prosecution—evidence of defendant's employment status—no error

In a prosecution of defendant for the murder of his girlfriend's four-month-old daughter, the trial court did not err in

allowing the girlfriend to testify concerning defendant's employment status since defendant did not object to the questions at the time they were asked; later in the trial defendant's own attorney asked him a series of questions regarding his employment status; the evidence was not evidence of bad character; the evidence was relevant to illustrate the financial status and living conditions of the parties involved; and the testimony helped demonstrate access and opportunity for defendant to have committed the crime because he was frequently at home with the child.

Am Jur 2d, Evidence §§ 64-70.

2. Evidence and Witnesses § 386 (NCI4th)— murder prosecution—defendant's drinking habits—evidence admissible

In a prosecution of defendant for the murder of his girlfriend's four-month-old daughter, the trial court did not err in admitting testimony related to defendant's drinking habits where defendant failed to object to a number of references to alcohol consumption; defendant gave detailed testimony as to his alcohol consumption after his own attorney asked him for a description of his drinking habits; and the evidence of his drinking habits was relevant to show that there was a deterioration in defendant's relationship with the child.

Am Jur 2d, Evidence §§ 320, 321.

3. Evidence and Witnesses § 720 (NCI4th)— negative answer by witness—absence of prejudice

Defendant was not prejudiced where a witness answered negatively when asked if he knew whether defendant had been hospitalized for alcoholism since the answer advanced nothing of evidentiary value.

Am Jur 2d, Appellate Review §§ 714, 752, 753, 759.

4. Evidence and Witnesses § 2679 (NCI4th)— DSS records—partial use for cross-examination

Assuming that confidential DSS records were privileged, the trial court did not abuse its discretion by finding that it was in the interest of justice to allow the State to use the records to cross-examine defendant only about his alcoholism where the issue of defendant's alcoholism appeared in earlier testimony.

Am Jur 2d, Witnesses § 296.

5. Appeal and Error § 155 (NCI4th)— absence of objection or motion—waiver of appellate review

Defendant's failure to object to the prosecutor's question as to why he had been hospitalized, to move to strike defendant's answer that he was on cocaine, and to ask for a cautionary instruction waived his right to assert error on appeal.

Am Jur 2d, Appellate Review §§ 135-263.

6. Evidence and Witnesses § 2750.1 (NCI4th)— direct testimony by defendant—opening door to cross-examination

Defendant's testimony about his drinking habits during direct examination opened the door to the prosecutor's cross-examination of defendant as to whether he had said he was an alcoholic during a hospital interview.

Am Jur 2d, Witnesses § 417.

7. Evidence and Witnesses § 2266 (NCI4th)— murder of four month old—expert medical evidence that injuries intentionally inflicted—evidence properly admitted

In a prosecution of defendant for murder of his girlfriend's four-month-old daughter, the trial court did not err in allowing the State to introduce testimony from two medical experts that the child's injuries were intentionally inflicted, since the testimony was within each physician's area of expertise, was helpful to the factfinder, and did not embrace a legal term of art or conclusion of law.

Am Jur 2d, Evidence §§ 1457, 1467, 1477.

Admissibility of expert medical testimony on battered child syndrome. 98 ALR3d 306.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome. 43 ALR4th 1203.

8. Evidence and Witnesses § 3070 (NCI4th)— allegedly inconsistent statements—evidence properly excluded

In a prosecution of defendant for murder of his girlfriend's four-month-old daughter, the trial court did not err in preventing defendant from eliciting further testimony from a defense witness regarding allegedly inconsistent statements made by the girlfriend, since there was no evidence that the statement in question was in fact a prior inconsistent statement; impeachment in this

manner is not permitted when employed as a mere subterfuge to get before the jury evidence not otherwise admissible; and the testimony in question was vague, required speculation to give it any value, and thus could have confused the jury.

Am Jur 2d, Witnesses §§ 596 et seq.

Right of counsel representing party at trial, but employed by his liability insurer, to cross-examine or impeach him for asserted contradictory statements. 48 ALR2d 1239.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

Appeal by defendant, Michael Dean McAbee, from judgment entered 4 August 1993 by Judge Loto Greenlee Caviness in Henderson County Superior Court. Heard in the Court of Appeals 11 January 1995.

Defendant was convicted of second degree murder and sentenced to life in prison for the death of his girlfriend's four-month-old daughter. From this judgment and commitment, defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General William B. Crumpler, for the State.

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

McGEE, Judge.

On 25 October 1992, defendant Michael Dean McAbee and Nancy Henson rushed Henson's four-month-old daughter to the Park Ridge Hospital emergency room. Dr. Kenneth Michael Dennis conducted a thorough examination of the child and concluded she was suffering from central nervous system hemorrhaging. The child was transferred to another hospital where Dr. Dennis discovered several other bruises which were at various stages of healing, and ultimately she was sent to Memorial Mission Hospital for treatment.

Drs. Harald Kowa and Catherine Gish further evaluated the child at Memorial Mission Hospital. Dr. Kowa noted that there were bruises

on the child's chin, head and tongue. The following day, a CAT scan revealed the child's brain had begun to swell. Her heart rate began to increase, her breathing was irregular and her pupils were less responsive. Dr. Kowa concluded she suffered from gross cerebral edema, a swelling of the brain. Despite continued monitoring and treatment, the child's condition deteriorated and on 29 October, after consulting with three other physicians, Dr. Kowa pronounced the child brain dead.

Both the defendant and Nancy Henson were arrested and following an investigation, defendant was charged with the second degree murder of Henson's daughter. The State's evidence at trial included testimony from several medical experts that the injuries to the child were consistent with a battered child and shaken baby syndrome. Defendant's medical expert stated he would not have concluded the baby's death was caused by a shaking injury.

Henson testified that in late 1991 she met defendant and they began a relationship. She was already pregnant before she met defendant. According to Henson, defendant assumed full responsibility for the baby's care after her birth and for the first few weeks, he treated the baby well. His conduct soon changed and Henson began observing abusive behavior, including defendant burning the child while bathing her, necessitating special medical treatment in Cincinnati, Ohio. He spanked the child and slapped her face when she was crying or not doing exactly what he wanted her to do. Henson began to notice bruises on her daughter's body and when she confronted defendant, he said the child was injured while crawling around on the floor or bumping into her bassinet. On one occasion, Henson noticed her daughter's eye was scratched and she was told by defendant that the child had scratched it herself.

Both Henson and Deputy Walter Harper of the Henderson County Sheriff's Department testified that defendant hated to hear the child cry and several times he picked up the child by the torso, placed his hands under her arms, and shook her to stop the crying. Henson said defendant would often take her daughter into another room of the trailer until the crying ceased or he would shake the child while going from one room of the trailer to another.

On the day the child was taken to the emergency room, Henson testified she woke up mid-day and found her daughter on the floor, motionless, with blood all over her mouth. Defendant attempted to

get the child to respond by pulling her ears, pushing on her chest and shaking her. Defendant claimed that as he started to feed the child baby food, she choked on it. The couple then rushed the child to the hospital emergency room.

On cross-examination of Henson, defense counsel emphasized inconsistencies in her testimony. Henson admitted she may have told the doctors and police that she was feeding her daughter when she started choking on the day she was taken to the emergency room. Additionally, Henson acknowledged she told the Department of Social Services she had never seen defendant shake her daughter.

Defendant gave a different account of the various incidents Henson described. He testified it was Henson who was bathing her daughter when she was burned. He stated he noticed bruises on the child and when he confronted Henson, she speculated the child must have crawled out of the bassinet. Defendant denied shaking the baby in any manner necessary to cause the injuries she sustained. Finally, defendant testified that although he was innocent, he decided to take the blame for the child's injuries because he felt that he was better able to handle incarceration than Henson.

As to the incident on the day the child was taken to the hospital, defendant stated that Henson fed the child that day and that when he woke up, he started down the hallway to go to the bathroom, but Henson would not allow him to enter the living room. He pushed her aside and found the child on the floor choking. He noticed some blood on the floor. Defendant attempted to assist the child by clearing her throat, breathing into her mouth, picking her up by the feet, hitting her on her back and by pushing on her chest. They then took the child to the emergency room.

On 3 August 1993, defendant was found guilty of second degree murder and sentenced to life in prison. Defendant brings forward four issues on appeal. He claims the trial court erred (1) in allowing State's witness, Nancy Henson, to testify regarding prior bad acts of the defendant; (2) in allowing the State to impeach defendant with prior acts of misconduct which do not go to truthfulness; (3) in allowing the State to introduce testimony that the child's injuries were intentionally inflicted; and (4) in preventing defendant from inquiring into inconsistent statements made by Nancy Henson, the key prosecution witness. For the reasons below, we disagree with defendant's contentions.

I.

Defendant first argues the trial court erred in allowing Nancy Henson to testify regarding defendant's prior bad acts in violation of N.C.R. Evid. 404. In support of his contention, defendant cites four exchanges at trial which he claims violate the rule. The first such instance involves three questions related to defendant's employment status and the other three examples involve defendant's drinking habits. Defendant argues these questions were designed by the State to show evidence of bad character, that defendant was lazy and had an alcohol problem, and this evidence predisposed the jurors to believe defendant was capable of murder. The State argues defendant exaggerates the effect of the evidence that was admitted and more importantly, that defendant waived objection by failing to object or move to strike at critical times during the trial. Additionally, the State points out that similar evidence was admitted without objection at other times during the trial and therefore, the benefit of the earlier objection is lost under *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984), *overruled in part on other grounds in State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988). We agree.

[1] As to the employment testimony, the State asked Henson whether defendant was working and if he had worked during the four months after the child's birth. Henson responded "[n]o, sir" to those two questions with no objection being raised by defendant. The State then asked, "[w]hat did he do?" and it was at that point that defense counsel objected. The court overruled the objection and Henson answered, "[t]here was one time that he went on a truck with Mr. Don Blue, but other than that he never worked at all. He was always at the house."

Later in the trial, defendant's own attorney asked defendant a series of questions regarding his employment status. Defendant testified he stopped working just before he and Henson began their relationship. In response to the question of whether he lost his job because he was spending too much time with Henson, he stated, "I started—well, it was my fault—I got careless and started taking them where they wanted to go and I was the only one that had a vehicle and they depended on me, so I took them where they wanted to go, and I didn't go to work." The benefit of the earlier objection was lost when similar evidence was admitted without objection later during the trial. *State v. Kyle*, 333 N.C. 687, 697, 430 S.E.2d 412, 417 (1993).

We also note this evidence was not character evidence used for the purpose of proving that defendant acted in conformity therewith. Defendant's employment status was hardly related to his propensity to commit murder. Furthermore, this evidence is relevant to illustrate the financial status and living conditions of the parties involved and the testimony helped demonstrate access and opportunity for defendant to have committed the crime because he was frequently at home with the child. Relevant evidence in criminal cases is "any evidence calculated to throw any light upon the crime charged" and should be admitted by the trial court. *State v. Huffstetler*, 312 N.C. 92, 104-05, 322 S.E.2d 110, 118-19 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985), *denial of habeas corpus affirmed sub nom. Huff v. Dixon*, 28 F.3d 1209 (4th Cir. 1994), *cert. denied sub nom. Huff v. French*, 115 S. Ct. 1258, 131 L. Ed. 2d 138 (1995).

[2] The next three exchanges defendant challenges involve testimony related to defendant's drinking habits. The first such instance was, as follows:

Q. Well, did at [sic] time—did a time come when things took a turn either for the better than that or the worse than that? Did a time come when he started drinking, Ms. Henson?

MR. EDNEY: Objection.

THE COURT: Sustained at this point.

Q. Well, did things—did any event in his life—his conduct—change after about—the child—when the child was about two weeks old?

A. Yes, he started drinking.

Q. Had he been, during the relationship with you, had he had a problem with drinking prior to that?

A. Yes.

MR. EDNEY: Objection.

THE COURT: Overruled. I'll let her respond, if she knows.

A. Yes.

Q. And then about the second week of her life, what did he start drinking?

MR. EDNEY: Objection.

THE COURT: I'll overrule it and let her respond, if she knows.

A. Just anything he could get a hold of.

MR. EDNEY: Motion to strike.

THE COURT: Sustained and strike at this point.

The second reference to alcohol consumption was when the State asked Henson if defendant's conduct toward the child changed when he was drinking. Defense counsel objected but the trial court overruled the objection and Henson responded, "[h]e really didn't start doing anything with her. He'd always start with me." The third reference to defendant's drinking habits occurred later during Henson's testimony when the State asked her if there was a time when defendant started drinking, and defense counsel objected. The court overruled the objection, but the State rephrased the question and asked what defendant was drinking after returning from Cincinnati (where the child had been taken for burn treatment earlier in the summer). Henson responded that defendant was drinking liquor and beer.

Defendant failed to object or move to strike a number of the references to alcohol consumption to which he now objects and some of the objections he did raise were sustained. Therefore, defendant has no grounds to except on those points. *State v. Barton*, 335 N.C. 696, 709, 441 S.E.2d 295, 302 (1994). Like the employment questions, we note that defendant gave detailed testimony as to his alcohol consumption after his own attorney asked him for a description of his drinking habits during the time he was involved with Henson. Defendant stated, "I didn't really drink at the house. When I was drinking, . . . I was gone with friends or wherever, and there was [sic] occasions that me [sic] and her [sic] would sit around the house and drink together . . . ." Furthermore, defendant volunteered that he only drank Canadian Mist and that he would "sit around and sip when me [sic] and her [sic] were together, 'cause [sic] I knew what it would be if I got drunk." Since similar evidence of defendant's drinking habits was admitted without objection at other times during the trial, the benefit of the few objections he raised earlier at trial are now waived. *Kyle*, 333 N.C. at 697, 430 S.E.2d at 417.

Furthermore, the evidence of defendant's drinking habits was relevant. The prosecutor was attempting to show there was a deterioration in defendant's relationship with the child. There had been some evidence that in the beginning, defendant had been responsible and caring toward the child but this began to change a few weeks after

her birth. Therefore, the State was appropriately developing this evidence, notwithstanding the fact that much of this testimony was not especially probative. This assignment of error is overruled.

II.

Defendant next argues the trial court erred in allowing the State to impeach the defendant with prior acts of misconduct which were not probative of truthfulness. While defendant has not properly matched his assignments of error to the question presented as required under North Carolina Rule of Appellate Procedure 28(b)(5) we will, in our discretion, consider the arguments presented in defendant's brief.

In support of his contentions, defendant points to the following: (1) an exchange between the State and defendant's brother about defendant's alcoholism, (2) the court's order during voir dire as to the State's use of Department of Social Services (hereinafter DSS) files by the State to cross-examine defendant, and (3) the prosecutor's cross-examination of defendant in which he asked about defendant's previous hospitalization for alcohol abuse.

[3] In the first challenged testimony, the State asked defendant's brother, "[defendant has] been hospitalized in the past for alcoholism, has he not?" Defendant objected and the court sustained the objection. The State then asked the witness if he knew whether defendant had been hospitalized for alcoholism and the court overruled defendant's objection to that question. The witness then answered, "[n]o, I don't." Even if this were error, we conclude that the testimony was harmless error. The witness' answer advanced nothing of evidentiary value and defendant suffered no prejudice. In order to obtain relief, a defendant must show that the error asserted is material and prejudicial. *State v. Franklin*, 23 N.C. App. 93, 96, 208 S.E.2d 381, 383 (1974).

[4] Defendant's next argument is that the trial court improperly allowed the State to use confidential DSS records, which contained some medical records, to cross-examine defendant. He maintains that this information was privileged and that he never waived this privilege before or during the trial. Although defendant did not adequately develop this argument, a review of the record reveals that the trial court conducted a voir dire hearing, and made the following findings of fact and conclusions as to the introduction of the DSS records during cross-examination:

> [The DSS] records are confidential in nature, . . . *defendant's counsel subpoenaed them* and was given access to them by virtue of Court order . . . . [T]he Court will find as the issue of the defendant's alcoholism or abuse of alcohol appears in earlier testimony, the Court will permit cross examination into that area only. *The rest of the files are determined to be confidential.* That issue [alcoholism] has been raised, Court will find it's in the interest of justice, . . . [to] proceed into that area. (emphasis added)

Assuming, *arguendo*, this confidential file was privileged information and the privilege was not waived by defendant, this privilege is a statutory creation, and is qualified rather than absolute. The law allows the trial court discretion to require disclosure of privileged communications so long as the disclosure is "necessary to a proper administration of justice." *In Re Farrow*, 41 N.C. App. 680, 682, 255 S.E.2d 777, 779 (1979); *See generally State v. Efird*, 309 N.C. 802, 309 S.E.2d 228 (1983). Since the trial court found it was in the interest of justice to allow a limited inquiry into the DSS records on defendant's alcoholism, we conclude the trial court did not abuse its discretion.

Defendant's final argument is that the trial court erred in allowing the following exchange:

> Q. Mr. McAbee, do you remember being, in the past, being hospitalized for alcoholism?
>
> A. No, sir.
>
> MR. EDNEY: Objection.
>
> THE COURT: Sustained at this point.
>
> Q. Do you—have you been—were you hospitalized, Mr. McAbee, over at a place called Crossroads in Chattanooga, over in Tennessee, for alcoholism? Do you remember that?
>
> MR. EDNEY: Objection
>
> THE COURT: I'm going to overrule that and permit him to respond, if he knows.
>
> A. I was hospitalized, but it was not for alcohol.
>
> Q. What was it for?
>
> A. I was on cocaine at the time.
>
> Q. Let me—let me ask you this—
>
> A. And I went on my own free will.

Q. I understand that; I'm not doubting that, Mr. McAbee, but I noticed on page 13 of your hospital interview you said, "I am an alcoholic."

MR. EDNEY: Objection.

THE COURT: I'm going to overrule that and permit him to respond.

Q. Page 13 of your hospital interview, do you remember saying, "I am an alcoholic"; do you remember that?

A. I am.

The trial court sustained defendant's objection to the State's first question, but defendant did not move to strike the answer. By failing to move to strike this testimony, defendant waived the right to assert error on appeal under *Barton*, 335 N.C. at 709, 441 S.E.2d at 302.

Defendant also objected to the State's second question about whether defendant remembered being hospitalized in Chattanooga for alcoholism. The court overruled defendant's objection and defendant answered he was hospitalized, but not for alcohol. While we detect no error, any possible error was certainly not so material as to have amounted to prejudicial error. *See Franklin*, 23 N.C. App. at 96, 208 S.E.2d at 383.

[5] The State then asked the follow-up question of why defendant had been hospitalized. Defendant answered he was on cocaine at the time. Defense counsel never objected to the question, never moved to strike the offensive testimony, and never asked for a cautionary instruction. "[F]ailure to object to errors at trial constitutes a waiver of the right to assert the errors on appeal." *Murray*, 310 N.C. at 545, 313 S.E.2d at 527. This testimony did not rise to the level of plain error in that it was not so "*fundamental* [an] error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

[6] Defendant's final objection occurred after the State asked defendant whether he had said, "I am an alcoholic" during his hospital interview. The court overruled the objection and defendant responded, "I am." Even if this evidence would not otherwise have been admissible, the law permits the introduction of such evidence to explain or rebut evidence offered by the defendant himself. *State v. Brown*, 310 N.C.

563, 572, 313 S.E.2d 585, 590 (1984) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)). Prior to this exchange, defendant had voluntarily testified about his drinking habits during direct examination by defense counsel. Since the door had already been opened by defendant, the State was entitled to cross-examine defendant about his alcohol consumption.

None of the three arguments constituted prejudicial error; therefore, we overrule this assignment of error.

III.

[7] Defendant's third argument is that the trial court erred in allowing the State to introduce testimony from two medical experts that the child's injuries were intentionally inflicted. He argues this testimony was improper because it permitted the experts to testify about a precise legal standard and conclusion. We disagree.

Rule 702 of the North Carolina Rules of Evidence allows an expert witness to offer an opinion if "scientific, technical or other specialized knowledge 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). This rule has been construed to allow expert testimony that aids the factfinder "in drawing certain inferences from facts, and the expert is better qualified than the [factfinder] to draw such inferences." *In re Hayden*, 96 N.C. App. 77, 82, 384 S.E.2d 558, 561 (1989) (quoting *State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988) (citations omitted). "A trial court is afforded wide latitude in applying Rule 702 and will be reversed only for an abuse of discretion." *Id.* We find no such abuse of discretion is present under these facts.

Defendant first objected to testimony elicited from Dr. Thomas Clark, a forensic pathologist in the state Medical Examiner's office. The State asked him if he had an opinion "as to whether the shaking injury that [he] diagnosed as this child's cause of death is consistent with intentionally inflicted injuries?" Dr. Clark responded, "[y]es. It had to be an intentionally inflicted injury." During that same exchange, the State asked Dr. Clark if he had an opinion "as to whether the fracture of the right arm is consistent with being an intentionally inflicted injury." Defendant objected and the State clarified the question by adding, "as opposed to accidentally sustained?" After defendant's objections were overruled, Dr. Clark responded:

> It is inconceivable to me that a four-month-old child could do anything to injure this arm without assistance. The child can't walk; the child can barely roll over, if the child can roll over. And for those reasons, I conclude that this injury would have to have been inflicted upon this child in some way.

The other medical expert who provided testimony about intentionally inflicted injuries was defense witness, Dr. Joseph Scheller, a pediatric neurologist at the University of Maryland. The testimony in question was the following:

> Q. Does the word "abused" imply intentional abuse—the scenario that I've given you: corneal abrasion, severe immersion burn, untreated fracture to the right arm, tongue laceration, lethargy, possible seizures, serious injury to the central nervous system, cut tongue and bruises of various ages—you—do you not—you as a medical professional not agree that the number one differential diagnosis would not simply be abuse, but intentional, physical abuse?
>
> MR. EDNEY: Objection, Your Honor.
>
> Q. That's my question.
>
> THE COURT: Just a minute. I'm going to overrule and let him respond, if he can.
>
> A. I would be very suspicious that this child had been intentionally abused. I need to qualify that by saying—am I allowed to?
>
> THE COURT: Yes, sir, you may.
>
> Q. [sic]—that the corneal abrasion is not high on the list as far as the suspicious injuries, based on the description that was offered by the parents. The burn was described—the caretaker did have an excuse or a—how would I put it?—a reason.
>
> The other injuries are more suspicious: the cut tongue, the broken arm, and the blood in the spinal fluid.

The record indicates that both Dr. Clark and Dr. Scheller are duly licensed, board certified medical physicians. In his capacity as a forensic pathologist, Dr. Clark's areas of expertise include the performance of autopsies and the determination of the cause and manner of death of children as well as adults. Dr. Scheller is an assistant professor at the University of Maryland and specializes in the area of pediatric neurology. Both physicians testified they have had experi-

ence with the medical conditions known as Battered-Child Syndrome and Shaken-Baby Syndrome; both gave detailed explanations of the general nature of these conditions and how they are medically evaluated. In discussing the specific injuries sustained by Henson's daughter, each physician offered his opinion as to whether the injuries were consistent with intentionally, as opposed to accidentally, inflicted injuries. The trial court did not abuse its discretion in allowing the testimony since it was within each physician's area of expertise, was helpful to the factfinder and did not embrace a legal term of art or conclusion of law. We therefore overrule this assignment of error.

IV.

[8] Defendant's final argument is that the trial court erred in preventing him from eliciting further testimony from defense witness, Linda Burrell, regarding allegedly inconsistent statements made by Henson. The testimony in question was the following:

> Q. What, if anything else, did Nancy ever say during your conversations in January and February?
>
> A. She said once that her body was so good that she had a man that was going to pay for her crime.
>
> MR. LEONARD: Objection. Motion to strike. Irrelevant.
>
> THE COURT: Sustained and strike.

Defendant argues the exchange in question constituted a valid impeachment of Henson by a prior inconsistent statement and that the trial court should have admitted this testimony for impeachment purposes. However, defendant has not cited, and we are unable to find, any statements in Henson's testimony which support the conclusion that the statement now at issue amounts to a prior inconsistent statement. While prior inconsistent statements are admissible for impeachment purposes, impeachment in this manner is not permitted when "employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible." *State v. Hunt*, 324 N.C. 343, 349, 378 S.E.2d 754, 757 (1989) (quoting *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975).

Moreover, the testimony in question is vague and requires speculation to give it any value. Because it could have confused the jury, the trial court properly excluded the testimony and we therefore overrule this assignment of error. *See* N.C.R. Evid. 403.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges LEWIS and WYNN concur.

HARRY FRANK GARRETT v. HERMAN WINFREE, INDIVIDUALLY AND AS GENERAL PARTNER, AND CHARLES WINFREE, INDIVIDUALLY AND AS GENERAL PARTNER, AND WINFREE AND WINFREE, A GENERAL PARTNERSHIP

No. 9418SC452

(Filed 7 November 1995)

1. **Limitations, Repose, and Laches § 26 (NCI4th)— legal malpractice claims—actions accruing in 1984 and 1989—actions barred by statute of limitations**

Even if plaintiff did have a viable cause of action for professional negligence, that action was barred by the statutes of limitation and repose where plaintiff's first claim arose out of defendant Herman Winfree's 1979 representation of plaintiff in a workers' compensation matter; the first cause of action began to accrue in February 1984, the point immediately after which defendant was no longer legally able to fulfill his continuing duty to plaintiff; plaintiff's second cause of action was based on defendant Charles Winfree's representation beginning in the fall of 1989 in an attempt to re-open plaintiff's workers' compensation case; there was nothing defendant or any other attorney could have done to have avoided the two-year statute of limitations of N.C.G.S. § 97-47; and defendant's efforts were therefore moot and did not result in any damages to plaintiff.

Am Jur 2d, Attorneys at Law §§ 219-221.

What statute of limitations governs damage action against attorney for malpractice. 2 ALR4th 284.

2. **Limitations, Repose, and Laches § 26 (NCI4th)— statute of repose—no violation of equal protection**

The statute of repose, N.C.G.S. § 1-15(c), was not unconstitutional as applied in this case on the ground that it was a violation of plaintiff's rights to equal protection guaranteed by the United States and North Carolina Constitutions.

Am Jur 2d, Attorneys at Law §§ 219-221.

Appeal by plaintiff from Order entered 24 January 1994 by Judge Thomas W. Seay, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 2 February 1995.

Michael A. Swann, Esquire for plaintiff-appellant.

Adams Kleemeier Hagan Hannah & Fouts, L.L.P. by Margaret Shea Burnham and David S. Pokela for defendant-appellees.

McGEE, Judge.

This is a legal malpractice claim arising out of a workers' compensation case in which defendants, Herman Winfree and Charles Winfree, represented plaintiff, Harry Frank Garrett.

On 7 December 1975, plaintiff was injured in a work-related accident when he fell from a roof. As a result of the fall, plaintiff's left knee was broken into fragments. Plaintiff originally entered into an agreement for compensation with his employer. However, a disagreement developed and in May 1979, plaintiff retained defendant Herman Winfree to represent him in his workers' compensation case. A hearing on plaintiff's claim was held before the Industrial Commission and, among other things, plaintiff was awarded permanent partial disability benefits on 14 April 1981 for injury to his left leg. Plaintiff received compensation for this injury until mid-February of 1982.

Over the years, plaintiff continued to experience medical difficulties. He underwent a total left knee replacement in March 1982, a fusion of the left knee in April 1986, and finally his left leg had to be amputated in December 1987. In March 1989, he received a permanent partial disability rating for his right leg, which subsequently worsened and was later amputated in 1991. During these years, plaintiff alleged he contacted defendants to inquire about filing for additional workers' compensation claims and that defendants advised him to wait and not pursue any further claims.

In the fall of 1989, defendant Charles Winfree attempted to reopen plaintiff's workers' compensation claim at plaintiff's request. By letter dated 13 November 1989, defendant Charles Winfree reviewed with plaintiff the background and status of his case and advised him that an attempt to reopen his case would likely be barred by the two-year statute of limitations on workers' compensation change of condition claims. However, since plaintiff claimed he had not received the Industrial Commission's Form 28B Report of Compensation and Medical Paid, which is required when the last

compensation check is issued, defendant agreed to pursue the matter. In January 1990 defendant filed requests for hearings for compensation for injuries to the right leg and to reopen the claim for injuries to the left leg. On 20 September 1990, Commissioner Gregory M. Willis entered an Opinion and Award refusing to re-open the case based on the two-year statute of limitations under N.C. Gen. Stat. § 97-47.

Plaintiff filed this negligence action against defendants on 9 September 1993. Defendants timely filed a motion to dismiss and answer with plaintiff filing a reply. Defendants filed a motion for judgment on the pleadings on 7 January 1994. On 24 January 1994, Judge Thomas Seay, Jr. entered an order granting defendants' motion and dismissing the action with prejudice. From this order, plaintiff appeals.

Plaintiff contends the pleadings in this case were sufficient to withstand defendants' motion for judgment on the pleadings and that a careful review of the matter will show the defendants have failed to meet the stringent standards for a Rule 12(c) motion. We disagree and for the reasons stated below, we affirm the trial court's decision to grant defendants' 12(c) motion.

A motion for judgment on the pleadings is authorized by Rule 12(c) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(c) (1990). "The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Where all the material allegations of fact are admitted, only questions of law remain and no question of fact is left for jury determination, a motion for judgment on the pleadings is proper. *Id.* Judgment on the pleadings is improper where the pleadings do not resolve all the factual issues. *Id.*

Since a judgment on the pleadings is a summary procedure with the decision being final, these motions must be carefully examined to ensure that the non-moving party is not prevented from receiving a full and fair hearing on the merits. *Id.* The standard is strict and the moving party must show that, when considering the pleadings in the light most favorable to the non-moving party, "no material issue of facts exists and that he is clearly entitled to judgment." *Id.* "When a party moves for judgment on the pleadings, he admits . . . [t]he truth of all well-pleaded facts in the pleading of his adversary . . . and the untruth of his own allegations in so far as they are controverted by the pleading of his adversary." *Gammon v. Clark*, 25 N.C. App. 670,

671, 214 S.E.2d 250, 251 (1975) (quoting *Erickson v. Starling*, 235 N.C. 643, 656, 71 S.E.2d 384, 393 (1952)).

In support of his contention that judgment on the pleadings was improper, plaintiff makes four arguments for our consideration: (1) he has three separate grounds for recovery for professional negligence; (2) his claim for negligence is not barred by the statute of limitations or repose found in the professional malpractice limitations statute; (3) the statute of repose provision of N.C. Gen. Stat. § 1-15(c) is unconstitutional; and (4) defendants should be estopped from asserting a statute of limitations or repose defense.

[1] Plaintiff's first argument is that he can sustain a claim for professional negligence based on the following: (1) defendant Herman Winfree failed to file to re-open plaintiff's case based on a change of condition even though he knew or should have known that plaintiff's condition had worsened; (2) defendant Herman Winfree repeatedly assured plaintiff that "everything was alright" and that he would "take care of it" thereby inducing plaintiff to wait instead of taking action to receive additional workers' compensation benefits; (3) plaintiff's injury to his right leg would have been compensable under G.S. 97-47 but the claim was improperly abandoned by both of the defendants. In considering the pleadings in a light favorable to plaintiff, even if there were a viable cause of action for professional negligence, that action is barred by the statutes of limitations and repose.

N.C. Gen. Stat. § 1-15(c) (1983) provides:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four

> years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

G. S. 1-15(c) (1983). This statute creates, among other things, a statute of repose which is not measured from the date of injury, but accrues on the date of the last act of the defendant giving rise to the cause of action or "from substantial completion of some service rendered by defendant." *Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (quoting *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n. 3, 328 S.E.2d 274, 276-77 n. 3 (1985), *reh'g denied*, 338 N.C. 672, 453 S.E.2d 177 (1994).

In *Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784 and *McGahren v. Saenger*, 118 N.C. App. 649, 456 S.E.2d 852 (1995), *defendant's disc. review denied*, 340 N.C. 568, 460 S.E.2d 318, *plaintiffs' disc. review denied and appeal dismissed*, 340 N.C. 568, 460 S.E.2d 319 (1995), our appellate courts examined the question of what constitutes the last act of defendant which gives rise to the legal action and we find these cases dispositive as to this case. In *Hargett*, our Supreme Court considered the case of an attorney who drafted a will in 1978. Thirteen years later, the attorney was sued for negligently drafting the 1978 will. The Court concluded that, under these particular circumstances, the attorney had no continuing legal duty to correct the will. *Hargett*, 337 N.C. at 655, 447 S.E.2d at 788. The attorney had entered into a contract "to prepare a will after which defendant [attorney] was an attesting witness to the will, defendant's duty was simply to prepare and supervise the execution of the will. This arrangement did not impose on defendant a continuing duty . . . to review or correct the will." *Id.* The Court further stated "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 . . . is barred by the four-year statute of repose provision contained in the professional malpractice statute of limitations." *Id.* at 654, 447 S.E.2d at 787.

In *McGahren*, defendant prepared a deed in 1985 which was to have transferred title to all the property in a subdivision, but the deed

failed to include one of the lots. Plaintiff learned of the omission in 1989 and in January of 1990, he informed defendant of the problem. Defendant attempted to correct the problem, but the second deed prepared by defendant in 1990 to convey the lot to plaintiff was also defective. This Court held that there were two distinct causes of action against defendant: the first arose out of defendant's failure to properly prepare a deed transferring one of the subdivision lots in 1985. *McGahren*, 118 N.C. App. at 653, 456 S.E.2d at 854. The "last act" of the first claim was defendant's delivery of the deed to plaintiff. *Id.* The second cause of action arose in 1990 when defendant prepared a subsequent deed in an attempt to convey the lot to the plaintiff. *Id.* The Court found the first cause of action was barred by G.S. 1-15(c), but the second was not. *Id.*

Like *McGahren*, this case contains two distinct causes of action against defendants and both are barred as a matter of law. The first claim arises out of defendant Herman Winfree's 1979 representation of plaintiff in a workers' compensation matter and the second cause of action is based on defendant Charles Winfree's representation of plaintiff beginning in the fall of 1989.

Defendant Herman Winfree's 1979 representation of plaintiff resulted in a final adjudication and an award to plaintiff for permanent partial disability to the left leg. Plaintiff's last payment on this award was in February 1982. If plaintiff felt that further compensation was necessary, a change of condition request should have been filed asking the Industrial Commission to review the award and make an award increasing the compensation previously awarded, based on a change of condition. *See* G.S. 97-47. However, no review is possible under G.S. 97-47 if the request is filed after two years from the date of the last payment of compensation. *Apple v. Guilford County*, 321 N.C. 98, 100-01, 361 S.E.2d 588, 590 (1987).

"[A]n attorney's duty to a client is . . . determined by the nature of the services he agreed to perform." *Hargett*, 337 N.C. at 656, 447 S.E.2d at 788. The contractual arrangement between attorney and client determines the extent of the attorney's duty to the client and the end of the attorney's professional obligation. *Id.* at 658, 447 S.E.2d at 789. Assuming, *arguendo*, that under these facts, the nature of defendant's arrangement with plaintiff was such that defendant had a continuing duty to submit a change of condition request to the Industrial Commission under G.S. 97-47, his opportunity to do so ended in February of 1984, two years after plaintiff received his last

payment of compensation. Once the two-year period had passed, there was nothing any attorney could have done to re-open plaintiff's case. Therefore, the first cause of action began to accrue in February 1984, the point immediately after which defendant was no longer legally able to fulfill his continuing duty to plaintiff. Substantial completion of service rendered by defendant occurred when he failed to timely file a change of condition request; this omission was defendant's last act giving rise to plaintiff's claim. *See Hargett v. Holland*, 337 N.C. 651, 657-58, 447 S.E.2d 784, 789 (1994) (discussion distinguishing *Sunbow Industries, Inc. v. London*, 58 N.C. App. 751, 294 S.E.2d 409, *disc. review denied*, 307 N.C. 272, 299 S.E.2d 219 (1982)).

Plaintiff's second cause of action is based on defendant Charles Winfree's representation of plaintiff beginning in the fall of 1989 and is also barred as a matter of law. The pleadings and attachments show that on 13 November 1989, defendant wrote plaintiff a detailed letter which summarized the history of plaintiff's workers' compensation claim and advised plaintiff that the two-year statute of limitations for requesting a change of condition under G.S. 97-47 ended in 1984. However, defendant agreed to further investigate the matter with the Industrial Commission to see if the case could be re-opened. Plaintiff then signed a letter agreeing to allow Charles Winfree to represent him in pursuing additional workers' compensation benefits.

A legal malpractice case requires the plaintiff to show by the greater weight of the evidence "(1) that the attorney breached the duties owed to his client, as set forth by *Hodges*, 239 N.C. 517, 80 S.E.2d 144, and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 365-66 (1985). As defendants point out, there was nothing Charles Winfree or any other attorney could have done to have avoided the two-year statute of limitations problem presented by G.S. 97-47. If no claim could have survived, then Charles Winfree's efforts were moot and did not result in any damages to plaintiff; therefore, this second cause of action fails.

Plaintiff also argues defendants improperly abandoned any claim he might have successfully made for compensation for injury to his right leg. Plaintiff's complaint states:

> "9. Plaintiff also injured his right leg in the accident of December 7, 1975. In August, 1991, Plaintiff underwent a total knee replacement for that right knee, but the right leg eventually had to be amputated above the right knee. On information and belief, the

foregoing was a proximate result of the accident and injury suffered on December 7, 1975. A claim for that portion was not filed until January, 1990.

The law in effect at the time of this action stated that a claimant was barred from the right to receive compensation under the Workers' Compensation Act unless a claim was filed with the Industrial Commission within two years after his accident. N.C. Gen. Stat. § 97-24(a). Plaintiff's complaint indicates that the right leg was injured during the same 1975 accident in which his left leg was injured. Therefore, plaintiff had two years from the date of the accident, not from the date that he became aware of his disorder, in which to bring an action for recovery under the Workers' Compensation Act. *See Perdue v. Daniel Int'l, Inc.*, 59 N.C. App. 517, 520, 296 S.E.2d 845, 848 (1982), *disc. review denied*, 307 N.C. 577, 299 S.E.2d 647 (1983).

The only other possibility for coverage of the right leg would have been to proceed under G.S. 97-47 for a change of condition and as we have already stated, this option was foreclosed in February 1984, two years after the date plaintiff received his last compensation check.

[2] Plaintiff next argues that G.S. 1-15(c) is unconstitutional as applied on the ground that it is a violation of plaintiff's rights to equal protection guaranteed under the 14th Amendment to the U.S. Constitution and Article I, sec. 19 of the North Carolina Constitution. We disagree. Similar arguments have been considered and rejected in a number of previous cases, notably *Roberts v. Durham County Hospital Corp.*, 56 N.C. App. 533, 289 S.E.2d 875, *dismissal denied, disc. review allowed*, 306 N.C. 387, 294 S.E.2d 205 (1982), *decision affirmed*, 307 N.C. 465, 298 S.E.2d 384 (1983); *Walker v. Santos*, 70 N.C. App. 623, 320 S.E.2d 407 (1984); and *Square D Co. v. C.J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

In *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983), our Supreme Court analyzed and upheld the constitutionality of another statute of repose, N.C. Gen. Stat. § 1-50(5). Since *Lamb*, our appellate Courts have used the *Lamb* analysis to uphold the constitutionality of different statutes of repose. The statute of repose found at N.C. Gen. Stat. § 1-50(6) was held constitutional under the *Lamb* analysis in *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 396, 320 S.E.2d 273, 277 (1984), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 485 (1985). In *Davis v. Mobilift Equipment Co.*, 70 N.C. App. 621, 622, 320 S.E.2d 406, 407 (1984), *appeal dismissed, disc. review denied*, 313 N.C. 328, 329 S.E.2d 385 (1985), the

Court again upheld the constitutionality of G.S. 1-50(6) reasoning "[w]hile *Lamb* dealt with G.S. 1-50(5) rather than G.S. 1-50(6), both are statutes of repose, and no rational basis appears for treating them differently with respect to the issues presented."

G.S. 1-15(c) has specifically been addressed using the *Lamb* analysis in *Walker v. Santos*, 70 N.C. App. 623, 320 S.E.2d 407. In *Walker* we said:

> This Court has upheld this statute [G.S. 1-15(c)] against constitutional attack based on vagueness, denial of equal protection, and the prohibition against exclusive emoluments . . . . No rational basis appears for applying to G.S. 1-15(c) a constitutionality analysis different from that which our Supreme Court applied to G.S. 1-50(5) in *Lamb* and which this Court by analogy applied to G.S. 1-50(6) in *Davis* and *Colony Hill.*

Walker v. Santos, 70 N.C. App. at 624, 320 S.E.2d at 408. We hold that the statute as applied in this case does not violate the federal constitution or the state constitution.

Finally, plaintiff argues that even if the statute of limitations or repose would have served as a bar to this cause of action, defendants should be estopped from asserting this defense because defendants allegedly told plaintiff to wait and not take any action. We find no merit to this argument. Since plaintiff did not institute his action in a timely fashion, his cause of action is barred under G.S. 1-15(c) and we hold that the trial court correctly granted defendants' Rule 12(c) motion for judgment on the pleadings.

Affirmed.

Judges EAGLES and MARTIN, JOHN C. concur.

AHMED TAHA D/B/A GRILLMEISTER v. JOSEPH M. THOMPSON, RALPH F. GORDON, JR. AND GARY T. SHOOK, D/B/A MIMOSA PROPERTIES

No. 94-1344

(Filed 7 November 1995)

1. Landlord and Tenant § 18 (NCI4th)— breach of lease—ambiguous language—finding as matter of law error

The trial court erred in finding a breach of the parties' lease as a matter of law where the language in the lease "provided ten-

ant operates a full service sandwich and grill landlord will not lease shop space to another grill or sandwich shop," was susceptible to two interpretations, that the lease precluded defendants' renting space to another actual grill or sandwich shop, as contended by defendants, or that the lease prevented defendants from leasing to any other restaurant which served grilled items or sandwiches, as contended by plaintiff.

Am Jur 2d, Alteration of Instruments §§ 7, 24, 42 et seq.; Landlord and Tenant §§ 158 et seq., 176, 180, 181.

Validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee upon condemnation of leased property. 22 ALR5th 327.

2. Waiver § 3 (NCI4th)— breach of lease—failure to submit waiver to jury—no error

The trial court in an action for breach of a lease did not err in failing to submit the issue of waiver to the jury where defendants did not plead waiver in their original answer or in their answer to plaintiff's first amended complaint, nor was there express or implied consent at trial.

Am Jur 2d, Estoppel and Waiver § 150.

3. Judgments § 650 (NCI4th)— pre-judgment interest—award by trial court proper

The trial court did not err in awarding pre-judgment interest from a specified date when the jury did not distinguish between principal and interest, since the court and attorneys said nothing about interest; it was therefore presumed that the jury did not include it in their award; computing the interest was a mere clerical matter; and it would have been a pointless waste of time to ask the jury to distinguish between principal and interest.

Am Jur 2d, Judgments §§ 477-493.

4. Conversion § 10 (NCI4th); Trespass § 45 (NCI4th); Unfair Competition or Trade Practices § 38 (NCI4th)— conversion of restaurant equipment—trespass by landlord—unfair and deceptive trade practices—failure to submit to jury—error

The trial court erred in failing to submit to the jury plaintiff tenant's claims against defendant landlords for (1) conversion,

where plaintiff offered evidence that defendants converted his property by refusing to allow him to remove his walk-in cooler and freezer from the premises, since those items were trade fixtures and remained the personal property of plaintiff; (2) trespass, where plaintiff's evidence showed that a locksmith under defendants' instruction entered onto the leased premises without plaintiff's authorization and attempted to change the locks; and (3) unfair and deceptive trade practices, since trespass and conversion by a landlord constitute an unfair and deceptive trade practice.

Am Jur 2d, Consumer and Borrower Protection §§ 302 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735; Trespass § 215.

5. Contracts § 143 (NCI4th); Damages § 129 (NCI4th)— tortious breach of contract—insufficiency of evidence—wrongful eviction—punitive damages—directed verdict proper

The trial court did not err in refusing to submit to the jury plaintiff's claim for tortious breach of contract, in directing verdict for defendants on plaintiff's claim for constructive eviction, or in directing verdict for defendants on plaintiff's claim for punitive damages.

Am Jur 2d, Contracts §§ 716-745.

Measure of damages for conversion or loss of commercial paper. 85 ALR2d 1349.

Appeal by plaintiff and defendants from judgment entered 2 August 1994 by Judge F. Gordon Battle in Wake County Superior Court. Heard in the Court of Appeals 11 September 1995.

Law Offices of Charles H. Montgomery, by Charles H. Montgomery and Kenneth M. Craig, for plaintiff.

Hunter, Wharton & Stroupe, L.L.P., by John V. Hunter, for defendants.

LEWIS, Judge.

Plaintiff commenced this action alleging breach of lease, loss of business income, conversion, unfair and deceptive trade practices, tortious breach of contract, trespass and wrongful eviction. He

sought compensatory and punitive damages. Defendants counterclaimed for unpaid rents and damages to the leased premises. Prior to closing arguments, Judge Battle ruled as a matter of law that defendants had breached their contract with plaintiff. The only issue submitted to the jury was that of damages. Plaintiff was awarded $40,000. Following the jury verdict, Judge Battle denied plaintiff's unfair and deceptive trade practices claim and his motion for a new trial. Plaintiff then moved to amend the judgment to have interest run from the date of the breach rather than from the date of the filing of the complaint. This motion was allowed and an order was entered. Plaintiff and defendants appeal.

On February 27, 1991, Ahmed Taha, an Egyptian citizen, entered into a lease with Joseph M. Thompson, Ralph F. Gordon, Jr. and Gary T. Shook, d/b/a Mimosa Properties for restaurant space in Swift Creek Shopping Center. At plaintiff's request, a clause was inserted into the lease which provided that if "tenant operates a full service sandwich and grill landlord will not lease shop space to another grill or sandwich shop."

The parties agreed that plaintiff would prepare the interior of the restaurant with an allowance provided by defendants. In addition to the allowance, plaintiff spent a large sum of his own money fixing up the space and purchasing equipment for the restaurant. Plaintiff's restaurant, "Grillmeister", opened on May 24, 1991.

Prior to the opening of the restaurant, plaintiff and defendants had a disagreement over who was to pay for the screening around the air conditioning unit on the roof. The screening was required by the Town of Cary. Defendants eventually paid for the screening, but charged the cost against plaintiff as additional rent, even though they had provided the screening for another restaurant without charge. Plaintiff alleges that defendants lied to him by denying that they had paid for the neighboring restaurant's screening. As a result of the screen dispute, Defendant Thompson (1) asked the Town of Cary to revoke Taha's certificate of occupancy, which would have put Grillmeister out of business, and (2) sent plaintiff notice that he was in violation of his lease.

Defendants also notified Mr. Taha that he was in violation of his lease after he began selling yogurt, an activity not allowed by his contract. Mr. Taha stopped selling yogurt.

In the spring of 1991, defendants first mentioned to plaintiff that a barbecue restaurant might be coming to the shopping center. Plaintiff asserted that the lease to such a restaurant would be in violation of the clause in his lease prohibiting defendants from leasing to another grill or sandwich shop. Despite Mr. Taha's objections, B.J.'s Bar-B-Q and Home Cook'n restaurant ("B.J.'s") opened in Swift Creek Shopping Center on September 24, 1991. In addition to barbecue, B.J.'s served hamburgers, grilled chicken sandwiches, chicken salad sandwiches, BLT's, and several grilled items.

Plaintiff testified that after he objected to the barbecue restaurant coming to the shopping center, Defendant Thompson approached him with a raised fist and said, "I am going to get you." Mr. Taha also testified that Mr. Thompson told him people said his restaurant was dirty and expensive and his buns were cold, to which Mr. Taha responded that people thought Thompson was greedy and two-faced. Thompson admitted telling others that the food was bland and buns were cold. A witness for plaintiff also testified that Mr. Thompson told him he did not want to rent to Arabs anymore.

In November, 1991, plaintiff closed the restaurant for the Thanksgiving holiday. He testified that he left a sign in the window displaying the date when he would reopen, December 2, 1991. On that date, Mr. Taha was called to the restaurant and found someone changing the locks on his restaurant, at defendants' request. Defendants believed Mr. Taha had abandoned the premises.

The next day, Mr. Taha decided to remove his property from the restaurant. However, he was unable to remove his walk-in cooler and freezer because Defendant Thompson refused to disconnect the water supply, which was necessary before he could remove the machinery. Thompson testified he believed these items were fixtures, not the personal property of plaintiff.

[1] Defendants first contend that the trial court erred in finding a breach of the lease as a matter of law. We agree. Contract language which is "plain and unambiguous on its face" can be interpreted as a matter of law; however, if it is ambiguous, it is a question for the jury. *Cleland v. Children's Home*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983). Ambiguity exists where the "language of the [contract] is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981). In the present case, defendants claim the lease only precluded their renting space to another actual grill or

sandwich shop. However, plaintiff contends the provision prevented them from leasing to any other restaurant which served grilled items or sandwiches. We believe the language ("provided tenant operates a full service sandwich and grill landlord will not lease shop space to another grill or sandwich shop.") to be "fairly and reasonably susceptible" to either construction. As such, we find the provision ambiguous and thus a jury issue. We reverse on this issue and remand this matter for a jury trial.

[2] Defendants also argue that the trial court erred in failing to submit the issue of waiver to the jury. We disagree. Waiver is an affirmative defense which "must be pled with certainty and particularity." *Duke University v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989). Failure to plead an affirmative defense results in a surrender of that defense unless it is tried by express or implied consent. *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984). Defendants in this case did not plead waiver in their original answer or in their answer to plaintiff's first amended complaint. Additionally, our review of the record discloses no express or implied consent at trial. As a result, we find no error in the failure to submit the waiver issue to the jury.

[3] Defendants also claim that the trial court erred in awarding prejudgment interest from December 3, 1991 when the jury did not distinguish between principal and interest as directed by N.C. Gen Stat. § 24-5 (1991). We find no error. G.S. § 24-5 authorizes interest on damages from the date of breach. *Craftique, Inc. v. Stevens and Co., Inc.*, 321 N.C. 564, 568, 364 S.E.2d 129, 132 (1988). The requirement that the jury distinguish between principal and interest "obviously pertains only to those rare situations where *evidence as to both principal and interest* is submitted to the jury for their consideration." *Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 403, 331 S.E.2d 148, 159, *disc. review denied*, 314 N.C. 664, 336 S.E 2d 399 (1985). In this case, the court instructed the jury only to find the amount of damages plaintiff suffered as a result of the breach. There was no mention of interest. Since the court and attorneys said nothing about interest, it is presumed that the jury did not include it in their award. *Perry v. Norton*, 182 N.C. 585, 589, 109 S.E. 641, 644 (1921). Therefore, as this Court previously found in *Dailey*, "[i]n this case, computing the interest due was a mere clerical matter, and it would have been an absurd, pointless waste of time to ask the jury to 'distinguish' between principal and interest." *Dailey*, 75 N.C. App. at 403-04, 331 S.E.2d at 159. Furthermore, we find no prejudice to defendants from the trial court's

choice of December 3, 1991 as the date of breach, for this date was the latest one on which breach could have been found.

We see no need to address the remaining assignments of error proposed by defendants, as they may or may not arise for determination when this case is tried again. If so, we have confidence that the trial judge will decide them correctly.

Plaintiff sets forth several assignments of error as well. He finds error in the trial court's failure to submit his conversion, trespass, unfair and deceptive trade practices and tortious breach of contract claims to the jury. Both parties and this Court recognize this failure in essence to be a directed verdict on these issues.

"To survive a motion for a directed verdict, the nonmoving party . . . must present 'sufficient evidence to sustain a jury verdict in [his] 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. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991)). All conflicts in the evidence must be resolved in plaintiff's favor and he is entitled to the benefit of every inference that could reasonably be drawn in his favor. *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 605 (1985).

[4] Plaintiff first contends that defendants converted his property by refusing to allow him to remove the walk-in cooler and freezer from the premises. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956). Plaintiff asserts that the walk-in cooler and freezer at issue were trade fixtures and therefore his personal property. Items of personal property which are attached to the leasehold for business purposes are trade fixtures, *Lewis v. Lewis Nursery, Inc.*, 80 N.C. App. 246, 253, 342 S.E.2d 45, 49, *disc. review denied*, 317 N.C. 704, 347 S.E.2d 43 (1986), and they remain the personal property of the tenant. *Stephens v. Carter*, 246 N.C. 318, 321, 98 S.E.2d 311, 313 (1957). Viewing the facts of this case in a light most favorable to the plaintiff, we hold that he has presented sufficient evidence to warrant submission of the conversion claim to the jury.

Plaintiff also asserts that defendants trespassed on his property. To establish a trespass claim, plaintiff must prove that (1) plaintiff was in possession of the land at the time of the alleged trespass; (2)

defendant made an unauthorized entry on the land; and (3) plaintiff was damaged by the alleged invasion of his possessory rights. *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952). Actual damages do not have to be proven, since any unauthorized entry at least entitles plaintiff to nominal damages. *Keziah v. R. R.*, 272 N.C. 299, 311, 158 S.E.2d 539, 548 (1968). In the present case, plaintiff's evidence shows that a locksmith under defendants' instruction entered onto the leased premises without plaintiff's authorization and attempted to change the locks. Viewed in a light most favorable to plaintiff, this evidence is sufficient to support each element of a trespass claim. We find this issue should have been submitted to the jury as well.

Plaintiff also assigns error to the failure of the trial court to instruct the jury and submit evidence to them of defendants' unfair and deceptive trade practices. We agree. In *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), *disc. review denied*, 294 N.C. 441, 241 S.E.2d 843 (1978), interpreting an earlier version of N.C. Gen. Stat. § 75-1.1 which was more narrow in scope, this Court held that trespass and conversion by the landlord constituted an unfair and deceptive trade practice. *Love*, 34 N.C. App. at 515-17, 239 S.E.2d at 582-83. Because we find sufficient evidence to submit the trespass and conversion claims to the jury, we conclude it would be error not to submit the factual issues underlying plaintiff's unfair and deceptive trade practices claim as well. Furthermore, since plaintiff cannot recover treble damages or attorney's fees unless this claim is resolved in his favor, we need not address his assignment of error regarding these issues.

[5] Plaintiff also argues that his tortious breach of contract claim was erroneously withheld from the jury. We disagree. Reading *Olive v. Great American Ins. Co.*, 76 N.C. App. 180, 333 S.E.2d 41, *disc. review denied*, 314 N.C. 668, 336 S.E.2d 400 (1985) and *Dailey*, 75 N.C. App 387, 331 S.E.2d 148 together, it is clear that in analyzing the substance of tortious breach of contract claims, this Court uses the same standard as in determining whether punitives are available for breach of contract. In *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), our Supreme Court expressed the law in North Carolina regarding a claim for punitive damages in a contract action:

> The general rule as it has often been stated in the opinions of this Court is that punitive damages are not recoverable for breach of contract with the exception of breach of contract to marry. But

> when the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages. Our recent holdings in this area of the law clearly reveal, moreover, that allegations of an identifiable tort accompanying the breach are insufficient alone to support a claim for punitive damages. In *Newton* the further qualification was stated thusly: "Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed."

Id. at 196, 254 S.E.2d at 621 (citations omitted).

Aggravation includes "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, [and] willfulness." *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). Because we find that the evidence of defendants' behavior does not rise to the level of aggravation required to submit this claim to the jury, we affirm the trial court's directed verdict.

Plaintiff also assigns error to the trial court's directed verdict for defendants on his claim for wrongful eviction, specifically, constructive eviction. Constructive eviction is an act by a landlord "which deprives his tenant of that beneficial enjoyment of the premises to which he is entitled under his lease, causing the tenant to abandon them." *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 92, 394 S.E.2d 824, 830, *disc. review denied*, 327 N.C. 636, 399 S.E.2d 328 (1990). Constructive eviction is a breach of the lease by the landlord which makes the property "untenable." *Id.* Even taking the facts alleged by plaintiff as true, we find no act committed by defendants sufficient to cause plaintiff to abandon his restaurant because it was untenable. We affirm the trial court's directed verdict as to the constructive eviction claim.

Plaintiff also contends that the trial court's directed verdict as to punitive damages was error. We disagree. In *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989), *disc. review improv. allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990), this Court stated the law on punitive damages:

> "Punitive damages are awarded in addition to compensatory damages for the purpose of punishing the wrongdoer and deferring others from committing similar acts." . . . "Punitive damages are

> recoverable in tort actions only where there are aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and wilful wrong, insult, indignity, or a reckless or wanton disregard of plaintiff's rights." . . . [Punitive] damages "are not recoverable as a matter of right in any case, but only in the discretion of the jury when the evidence warrants."

Id. at 438, 378 S.E.2d at 236 (citations omitted).

"Whether the evidence of outrageous conduct is sufficient to carry the issue of punitive damages to the jury is a question for the court." *Rogers v. T.J.X. Companies*, 329 N.C. 226, 231, 404 S.E.2d 664, 667 (1991).

Plaintiff argues that punitive damages should be awarded for defendants' trespass, conversion, wrongful eviction and tortious breach of contract. However, we have affirmed the trial court's directed verdict as to wrongful eviction and tortious breach, leaving trespass and conversion as the only possible torts for which punitives may be available. In considering the plaintiff's evidence in a light most favorable to him, we do not find a sufficient basis to warrant a punitive damages award. Defendant's conduct surrounding these alleged torts, while not commendable, simply does not rise to the level of outrageous conduct necessary for punitive damages.

Finally, plaintiff argues that the trial court erred in refusing to admit a letter from his attorney to defendants. The court sustained defendants' objection on the grounds that it contained an inadmissible opinion and was based on hearsay. Since we have granted plaintiff a new trial we need not address this issue.

For the reasons stated above, we reverse and remand for a new trial on the issues of breach, trespass, conversion, and unfair and deceptive trade practices. On all other issues, we affirm.

Affirmed in part, reversed in part and new trial.

Judges EAGLES and JOHN concur.

BARBARA E. WILLIAMS, PLAINTIFF v. BENNIE S. WILLIAMS, DEFENDANT

No. 9419DC320

(Filed 21 November 1995)

1. Divorce and Separation § 3 (NCI4th)— agreement made on verge of resuming marital relations—no separation agreement

The trial court did not err in determining that the parties' agreement was not a separation agreement under N.C.G.S. § 52-10.1 where the express and unambiguous language of the agreement declared that the parties were not contemplating living separate and apart forever when they executed the document, but rather were on the verge of resuming marital relations; plaintiff's verified allegation that the agreement was a "Post Nuptial Agreement" was admitted by defendant, and plaintiff could not later assert a contrary contention; and the resumption of marital relations would void executory provisions of the separation agreement, in this case, provisions for future alimony payments.

Am Jur 2d, Divorce and Separation §§ 819 et seq.

2. Divorce and Separation § 35 (NCI4th)— no integration or non-integration language in agreement—no integrated property settlement

The parties' agreement was not an integrated property settlement wherein the executory provision would withstand reconciliation of the signatories where the agreement lacked unequivocal integration or non-integration language and contained ambiguities and inconsistencies.

Am Jur 2d, Divorce and Separation §§ 852 et seq.

3. Divorce and Separation § 14 (NCI4th)— promise to pay alimony upon future separation—agreement void as against public policy

The trial court did not err in concluding that one paragraph of the parties' agreement was void as against public policy since that paragraph comprised a promise looking toward a future separation in stating that "should parties hereinafter again separate, [defendant] shall continue to pay permanent alimony of Five Hundred Dollars ($500.00) per month . . . ," and such proviso would serve to discourage plaintiff from putting forth a concerted

effort to maintain the marriage because of the knowledge she would continue to receive alimony regardless of whether the parties separated following reconciliation.

Am Jur 2d, Divorce and Separation § 822.

Judge GREENE dissenting.

Appeal by plaintiff from judgment filed 3 January 1994 by Judge Frank M. Montgomery in Rowan County District Court. Heard in the Court of Appeals 27 October 1994.

Wallace & Whitley, by Robert L. Inge, for plaintiff-appellant.

Carlyle Sherrill for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court's judgment dismissing her complaint. She contends the court erred by: (1) finding a written agreement between the parties to be a marital contract as opposed to a separation agreement; and (2) concluding the contract was void as against public policy. We find plaintiff's arguments unpersuasive.

Pertinent facts and procedural information are as follows: Barbara E. Williams (plaintiff) and Bennie S. Williams (defendant) married 6 September 1959 and separated 30 May 1985. On 18 April 1988, the parties entered into an agreement (the Agreement) which recited that they were "considering the resumption of cohabitation," and required defendant to pay plaintiff $500.00 per month throughout the course of their marriage, the payments to continue "should [the] parties hereinafter again separate." Plaintiff and defendant separated anew in August 1993.

Plaintiff filed the instant action seeking specific performance of the Agreement and payment of $1,700.00 in alimony arrearage. Defendant answered admitting execution of the Agreement, but asserting it was void as a matter of public policy. He further moved that plaintiff's complaint be dismissed.

Defendant's motion was heard 16 December 1993 before the Honorable Frank M. Montgomery who entered judgment in pertinent part as follows:

> 2. That the basis of the Plaintiff's Complaint was Section Eight (8) of the Separation Agreement which reads as follows:

> *8. Husband and Wife agree that Husband shall continue to make a payment of Five Hundred Dollars ($500.00) per month to Wife for her suport* [*sic*] *and maintenance. Both parties acknowledge that should parties hereinafter again separate, Husband shall continue to pay permanent alimony of Five Hundred Dollars ($500.00) per month pursuant to prior Agreement of parties; that he will be collaterally estopped from pleading the resumption of marital relationship as a bar to his continued paying this sum; he acknowledges that the resumption of marital relationship shall have no effect on the payment of this amount as his obligation to pay said amount was and remains an intrical part of this property settlement and for that reason not modifiable and not affected by the resumption.* [emphasis added]
>
> . . . .
>
> 6. That the contract between the parties is not a "premarital agreement" as defined by North Carolina General Statute 52B-2(1) because it is not an agreement "between prospective spouses made in contemplation of marriage and to be effective upon marriage" in that the parties hereto were married at the time of the making of this agreement.
>
> 7. That the agreement between the parties was not a separation agreement pursuant to North Carolina General Statute 52-10.1, because it was not executed in anticipation of a separation, but, in fact was occasioned by a resumption of the marital relationship between the parties; and further that its provisions, including specifically the provisions of Paragraph Eight (8), were to apply during the marital relationship as well as should there be a later separation of the parties.
>
> 8. That the agreement between the parties is a contract between husband and wife pursuant to North Carolina General Statute Section 52-10.

Based on these findings, the court concluded:

> 8. That Paragraph Eight (8) of the agreement between Plaintiff and Defendant violates public policy . . . and is, therefore, void.

The court concluded by ordering plaintiff's complaint dismissed, and plaintiff gave notice of appeal to this Court 10 January 1994.

[1] Plaintiff contends the trial court erred by finding the Agreement not to be a separation agreement under N.C. Gen. Stat. § 52-10.1 (1991), but rather a marital contract as provided in N.C. Gen. Stat. § 52-10 (1991) which by its terms was void as against public policy. We disagree.

N.C.Gen. Stat. § 52-10(a) (1991) provides:

> Contracts between husband and wife not inconsistent with public policy are valid, and any . . . married persons may, with or without a valuable consideration, release and quitclaim such rights which they . . . may have acquired by marriage in the property of each other . . . . No contract . . . between husband and wife during their coverture shall be valid . . . for a longer time than three years . . . unless it is in writing and is acknowledged by both parties before a certifying officer.

G.S. § 52-10.1 states in pertinent part:

> Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid and binding in all respects . . . .

A "separation agreement" is defined as " 'a contract between spouses providing for marital support rights and . . . executed while the parties are separated or are planning to separate immediately.' " *Small v. Small*, 93 N.C. App. 614, 620, 379 S.E.2d 273, 277, *disc. review denied*, 325 N.C. 273, 384 S.E.2d 519 (1989) (citation omitted). "[T]he heart of a separation agreement is the parties' intention and agreement to live separate and apart forever . . . ." *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976) (citation omitted).

The statutory sections set out above are distinguishable in that a separation agreement may affect support rights whereas G.S. § 52-10 refers only to "rights . . . in property"; further, as indicated by the terms requiring formalities for contracts entered into "during coverture," a contract under G.S. § 52-10 may be entered into at any time during marriage, not only in contemplation of separation or divorce. *See Edwards v. Edwards*, 102 N.C. App. 706, 708, 403 S.E.2d 530, 531, *disc. review denied*, 329 N.C. 787, 408 S.E.2d 518 (1991) (under G.S. § 52-10.1, "parties to a divorce may enter into [an] agreement to settle the question of alimony . . ."), and *Eubanks v. Eubanks*, 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968) (G.S. § 52-10, " 'relates to the release of an interest in property, *but has no bearing whatsoever on*

the right of a wife to support' " (citation omitted)). *See also Howell v. Landry*, 96 N.C. App. 516, 530, 386 S.E.2d 610, 618 (1989), *disc. review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990) (although G.S. § 52-10 requires acknowledgment of contracts between spouses entered into "during coverture, the period of marriage, it does not require acknowledgment for premarital agreements.")

The document at issue herein recites that on the date of execution, the parties were "living separate and apart." However, it further provides that "the parties may desire to resume cohabitation as Husband and Wife in an effort to reconcile their differences," and that "[o]n the date of the signing of [the] agreement, the parties are considering the resumption of cohabitation." Thereafter, defendant is required to pay plaintiff $500.00 monthly, and "acknowledges that the resumption of marital relationship shall have no effect on the payment of this amount . . . ."

The express and unambiguous language of the Agreement thus declares that the parties were not contemplating living "separate and apart forever," *Adamee*, 291 N.C. at 391, 230 S.E.2d at 545, when they executed the document, but rather were on the verge of resuming marital relations. Under *Adamee* and *Small*, therefore, the trial court did not err in determining the Agreement was not a separation agreement under G.S. § 52-10.1. *See Robuck v. Robuck*, 20 N.C. App. 374, 201 S.E.2d 557 (1974) (agreement which stated parties "have encountered serious marital difficulties" and one party is contemplating filing for divorce, *id.* at 375, 201 S.E.2d at 558, was not a separation agreement because face of document was silent with respect to parties' desire to live separate and apart), *id.* at 379, 201 S.E.2d at 561; *cf. Stegall v. Stegall*, 100 N.C. App. 398, 411, 397 S.E.2d 306, 313 (1990), *disc. review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991) (from terms of agreement which provide "parties shall henceforth live separate and apart . . . free from all interference, authority and control, direct or indirect, by the other, as fully as if each party were unmarried" and circumstances of execution, "it is obvious" parties intended a separation agreement).

In addition, we note the following language in paragraph five of plaintiff's complaint:

> [T]he parties reconciled and entered into a *Post Nuptial Agreement* on April 18, 1988, a copy of which is attached hereto and incorporated by reference . . . . (emphasis added).

Defendant in his answer admitted "the parties entered into a Post Nuptial Agreement which included the language specified in the Complaint," but asserted the language was "void as a matter of public policy." Had plaintiff considered the Agreement as founded upon the separation of the parties rather than a marital contract during cohabitation, that contention should have been forthcoming at the time her suit was instituted. Plaintiff's verified allegation that the Agreement was a "Post Nuptial Agreement" having been admitted by defendant, plaintiff cannot now be heard in this Court to assert a contrary position. *Crawford v. Crawford*, 214 N.C. 614, 618, 200 S.E. 421, 423 (1939) ("in other words, his mouth is shut, and he shall not say, that is not true which he had before in solemn manner asserted to be the truth").

Notwithstanding, plaintiff insists the statement in the Agreement that the parties were living separate and apart at the time of execution renders the document a separation agreement. Even were plaintiff's arguments persuasive, however, it remains well established that resumption of the marital relationship voids executory portions of a separation agreement, *i.e.*, provisions for future alimony payments. *Jones v. Lewis*, 243 N.C. 259, 261, 90 S.E.2d 547, 549 (1955). *See also* Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C.L. Rev. 319, 363 (1991) ("reconciliation voids all executory provisions of a settlement agreement, without regard to whether those provisions concern support or property"). "[E]xecutory provisions of a separation agreement are those in which 'a party binds himself to do or not to do a particular thing *in the future*.' 'Executed' provisions are those which have been carried out, and which require no future performance." *Carlton v. Carlton*, 74 N.C. App. 690, 693, 329 S.E.2d 682, 684 (1985) (citations omitted). Further, should a subsequent separation follow reconciliation, the original agreement is not revived. *Hand v. Hand*, 46 N.C. App. 82, 85, 264 S.E.2d 597, 599, 300 N.C. 556, 270 S.E.2d 107 (1980). Thus, even assuming *arguendo* the document at issue herein to be a separation agreement, when plaintiff and defendant resumed marital relations, any obligation on the part of defendant to pay alimony in the future ceased, the contrary provisions of the Agreement notwithstanding. *See Schultz v. Schultz*, 107 N.C. App. 366, 374, 420 S.E.2d 186, 191 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993).

[2] However, plaintiff maintains "[i]t is totally irrelevant . . . that the parties reconciled after the entry of the agreement." Because the

"property settlement and 'alimony' payment[] [provisions] are mutually dependent," she argues, citing *Love v. Mewborn*, 79 N.C. App. 465, 468, 339 S.E.2d 487, 489 (1986), *disc. review denied*, 317 N.C. 704, 347 S.E.2d 43, reconciliation did not terminate the alimony obligation of defendant set out in the Agreement.

At issue in *Love* was the proviso in a "separation agreement and property settlement" that the husband pay "alimony" in the amount of $800.00 per month for a period of ten years. *Love*, 79 N.C. App. at 465-66, 339 S.E.2d at 488. While this provision *arguendo* was technically "executory" in that the payments continued over a period of time and had not been paid in full, the circumstance in *Love* is distinguishable from that *sub judice* in two respects. First, the payments in *Love* were of defined duration and no clause purported to limit the effect of reconciliation on the parties' agreement; second, while the periodic payments in *Love* were designated "alimony," the evidence, including negotiation correspondence between counsel, indisputably indicated the payments were reciprocal consideration for the wife's relinquishment of her right to certain marital property; reconciliation thus did not affect the payment provisions. *Id.* at 467-68, 339 S.E.2d at 489. *See also Marks v. Marks*, 316 N.C. 447, 454-55, 342 S.E.2d 859, 864 (1986) (the test "is whether the support provisions for the dependent spouse 'and other provisions for a property division between the parties constitute reciprocal consideration for each other.' " (citation omitted)), and *Morrison v. Morrison*, 102 N.C. App. 514, 519, 402 S.E.2d 855, 858 (1991) (if payments not reciprocal consideration for property transfers or if agreement reflects the property settlement was conditioned upon agreement to live separate and apart, executory provisions of the agreement are rescinded upon reconciliation. (citations omitted)).

In addition, defendant argues plaintiff "did not argue" the issue of reciprocal consideration "before the trial court and should not be permitted to raise it for the first time on appeal." Defendant's representation appears to have merit. *See State v. Robbins*, 319 N.C. 465, 496, 356 S.E.2d 279, 298, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987) (theory not presented to trial court and first raised on appeal not properly before appellate court.)

We note plaintiff as appellant bore ultimate responsibility for compilation of the record on appeal and for inclusion therein of evidence and other materials pertinent to the assignments of error raised. *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468

(1988). No transcript of the hearing below was included in the instant record, and we find no refutation in the record as compiled of defendant's assertion.

Even had plaintiff properly raised the issue below, moreover, her argument is unavailing. The trial court's order stated it ruled

> after review of the Plaintiff's Complaint and Defendant's Answer and Motion, including the Bench Brief presented by the Defendant, and after review of relevant case law, as well as statutes, as well as the arguments of counsel . . . .

As noted above, plaintiff argues the property settlement and alimony payment provisions of the Agreement were "mutually dependent," that is, they constituted reciprocal consideration for each other and are thus deemed "integrated." *Morrison*, 102 N.C. App. at 519, 402 S.E.2d at 858. In *Morrison*, this Court pointed out that:

> [t]here exists a presumption that the provisions of a marital agreement are separable and the burden of proof is on the party claiming that the agreement is integrated. 'This presumption of separability prevails unless the party with the burden to rebut the presumption proves by a preponderance of the evidence that an integrated agreement was in fact intended by the parties.' 'However, where the parties include unequivocal integration or non-integration clauses in the agreement, this language governs.'

Id. at 520, 402 S.E.2d at 859 (citations omitted). In *Hayes* v. Hayes, 100 N.C. App. 138, 147-48, 394 S.E.2d 675, 680 (1990), moreover, we emphasized that "[i]n those cases where no . . . explicit clauses exist, an evidentiary hearing to determine the parties' intent is required."

The Agreement herein contains no "unequivocal," *Morrison*, 102 N.C. App. at 520, 402 S.E.2d at 859, language reflecting the parties' intent concerning integration. While it contains the typical "boilerplate" phraseology "in consideration of the mutual covenants herein contained," that statement is contradicted by a later condition to the effect that "if any provision of this agreement is held to be invalid or unenforceable, all other provisions hereof shall nevertheless continue in full force and effect."

The appearance of the incomprehensible expression "intrical" in the Agreement creates further confusion. While the drafter, which the Agreement reveals to have been plaintiff's former counsel, *see Krickhan v. Krickhan*, 34 N.C. App. 363, 367, 238 S.E.2d 184, 187

(1977) (ambiguity in written agreement construed against drafter) may have wished to write "integral," that is not what the Agreement states. The expression "intrical" is not contained in Webster's Third New International Dictionary (1966); it is therefore impossible to assign a meaning to it absent testimony from the drafter as to whether "integral" or some other word was contemplated. *See Bowles v. Bowles*, 237 N.C. 462, 465, 75 S.E.2d 413, 415 (1953) (utilizing Webster's New International Dictionary to ascertain the meaning of word used in separation agreement facilitated court's adherence to " 'the cardinal rule . . . in determining the effect of property settlement agreements,' " *i.e.*, " 'to ascertain the intention of the parties as expressed in the agreement, and to carry out such intention as nearly as may be done without violence to the language used.' " (citation omitted.))

Because the Agreement lacks "unequivocal integration or non-integration" language, *Morrison*, 102 N.C. App. at 520, 402 S.E.2d at 859, and contains ambiguities and inconsistencies, therefore, the presumption of separability of the provisions prevails unless the party with the burden of proof has presented sufficient evidence to convince the trier of fact that an integrated agreement was intended. *Hayes*, 100 N.C. App. at 147, 394 S.E.2d at 680. The court's order, however, reflects that plaintiff presented *no* evidence and nothing in the record suggests plaintiff was in any way thwarted by the trial court from presenting evidence. *See Hayes* at 148, 394 S.E.2d at 680. Plaintiff thus failed in her burden of proof. *See Marks*, 316 N.C. at 458, 342 S.E.2d at 865 (where no evidence appears in record which would support a contrary result, "trial judge's findings must be presumed to have been based on the apparent failure of plaintiff to produce such evidence as was required in order for her to carry her burden of proof.").

The Agreement thus is not an integrated property settlement wherein the executory provision would withstand reconciliation of the signatories.

[3] Plaintiff next challenges the trial court's determination that paragraph 8 of the Agreement was void as against public policy. We affirm the court's conclusion.

N.C. Gen. Stat. § 52-10(a) states that "[c]ontracts between husband and wife not inconsistent with public policy are valid . . . ." By implication, therefore, those contracts between spouses which conflict with public policy are void. *See In re Estate of Tucci*, 94 N.C.

App. 428, 437, 380 S.E.2d 782, 787, *disc. review denied*, 325 N.C. 271, 384 S.E.2d 514 (1989), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990) ("marital agreements must always comply with public policy").

In *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E.2d 697 (1968), the parties entered into a marital contract following twelve years of marriage and divorced approximately fifteen years subsequent to execution of the contract. *Id.* at 144-45, 162 S.E.2d at 697-98. Plaintiff-husband thereafter petitioned for partition and sale of lands held as tenants in common. *Id.* at 144, 162 S.E.2d at 697. Defendant-wife relied upon the marital contract in which plaintiff had promised "that if I ever leave Edith Summers Matthews, everything I have or will have will be hers to have and hold for the benefit of our children and herself—I make no claim on anything we own jointly, and separately." *Id.* at 145, 162 S.E.2d at 698. Plaintiff's demurrer to the response of defendant was sustained by the trial court. *Id.*

On appeal, this Court determined the contract, "if [it] met the tests of consideration and clarity," *id.* at 147, 162 S.E.2d at 699, would constitute merely "a promise looking to a future separation . . . ." *Id.* We concluded such promises "will not be sustained" because such an agreement

> would induce the wife to goad the husband into separating from her in order that the agreement could be put into effect and she could strip him of all of his property. Our society has been built around the home, and its perpetuation is essential to the welfare of the community. And the law looks with disfavor upon an agreement which will encourage or bring about a destruction of the home.

Id. Based on the foregoing reasoning, we held the contract was "unenforceable because it is void on grounds of public policy." *Id.*

Paragraph 8 of the Agreement similarly comprises a promise looking towards a future separation in stating that "should parties hereinafter again separate, [defendant] shall continue to pay permanent alimony of Five Hundred Dollars ($500.00) per month . . . ." Such a proviso would serve to discourage plaintiff from putting forth a concerted effort to maintain the marriage because of the knowledge she would continue to receive alimony regardless of whether the parties separated following reconciliation. Accordingly, the trial court did not err in concluding that paragraph 8 of the Agreement was void as against public policy. *See Morrison*, 102 N.C. App. at 520, 402 S.E.2d

at 859 (*citing Adamee*, 291 N.C. at 391, 230 S.E.2d at 545) ("contracts which provide that reconciliation will not affect the terms of a separation agreement violate the policy behind separation agreements and are therefore void"); *see also Tucci*, 94 N.C. App. at 438, 380 S.E.2d at 788 (public policy will not permit parties to enforce the "separation" provisions of their agreement, *i.e.*, support and alimony, and yet live together as a married couple).

The dissent acknowledges we are bound by precedent set by earlier panels of this Court unless overturned by our Supreme Court, *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), yet declines to respect *Matthews* and subsequent cases neither overruled nor modified by the higher court. The dissent justifies its position by the perception of a purported change in public policy.

Since *Matthews* was decided nearly thirty years ago, the General Assembly, presumed to know the content of the decisions of our courts, *see Whittington v. N.C. Dept. of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990) and *Blackmon v N.C. Dept. of Correction*, 118 N.C. App. 666, 673, 457 S.E.2d 306, 310 (1995), has enacted legislation affecting marital agreements as indicated by the dissent. However, these statutes in nowise abrogate the thrust of *Matthews*, *Tucci* and other decisions to the effect that spouses who lack the intent to "live separate and apart forever," *Adamee*, 291 N.C. at 391, 230 S.E.2d at 545, may *not* contravene public policy by contracting regarding support and alimony. "[W]here the law-making power speaks on a particular subject over which it has power to legislate, public policy in such cases is what the law enacts." *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E.2d 77, 80 (1947).

The General Assembly, by declining to negate *Matthews* in subsequent legislation, has spoken, *see In re Taxi* Co., 237 N.C. 373, 376-77, 75 S.E.2d 156, 158-59 (1953) (where a statute sets forth the instances of its coverage, other coverage is necessarily excluded under the maxim *expressio unius est exclusio alterius*, *i.e.*, "the expression of one thing is the exclusion of another"); the dissent misperceives a change in public policy, *see Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 633, *aff'd*, 275 N.C. 234, 166 S.E.2d 686 (1968) (function of a court is to declare what the law is and not what the law ought to be, and "a court will not ordinarily substitute its judgment for that of the Legislature"). The trial court did not err.

Affirmed.

Judge WYNN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with the majority that under the current law in this State,[1] the Agreement, because it was executed in contemplation of "resumption of cohabitation," is not a separation agreement within the meaning of N.C. Gen. Stat. § 52-10.1. *See In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976) (intent to live separate and apart is "the heart of a separation agreement"). I also agree, for the reasons given by the majority, that the support and property provisions of the Agreement are not integrated and that reconciliation therefore voids the executory provisions of the Agreement.

Although not a separation agreement within the meaning of section 52-10.1, I believe the Agreement qualifies as a valid contract within the meaning of section 52-10. I do not agree with the majority that the Agreement is void on the grounds it is "inconsistent with public policy." I acknowledge that the public policy in 1968, as articulated in the *Matthews* opinion relied on by the majority, would not support the agreement at issue and require that it be rejected as invalid. The *Matthews* opinion does not, however, represent the current public policy with regard to postmarital contracts. The North Carolina General Assembly first evidenced a change in public policy as to marital agreements in 1981 with the adoption of N.C. Gen. Stat. § 50-20(d). This statute permits parties "[b]efore, during or after marriage" to agree to the distribution of the marital property at the time of their separation. Thus, an agreement entered pursuant to this

1. The requirement that in order to execute a valid separation agreement the parties must have a present intent to live separate and apart, has been criticized. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 18.1 (2d ed. 1988). Professor Clark notes that the rule was based on the idea that to permit married parties living together to contract with regard to property division and support rights would in someway be "conducive to divorce." *Id.* "It was never made quite clear why [such an agreement] . . . was always and necessarily conducive to divorce, but the courts assumed that it was." *Id.* He argues that "[n]ow that fault is no longer the basis for the grounds for divorce . . . little is to be served by continuing to reject separation agreements on the ground that they are conducive to divorce." *Id.* "The new [divorce] statutes make it plain that there is no longer any general public policy opposed to divorce. . . . It therefore seems no longer rational to require that the parties separate before they may make a valid separation agreement." *Id.* Although I agree with Professor Clark, I am bound by the previous decisions of this Court and the Supreme Court holding to the contrary.

statute is valid even though the parties continue to live together after its execution. *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984). In 1987 the General Assembly again indicated its choice of public policy when it adopted the Uniform Premarital Agreement Act (UPAA). N.C.G.S. ch. 52B (1987). Prior to the adoption of the UPAA, the public policy forbad some premarital agreements on the grounds that they encouraged divorce. 1 Suzanne Reynolds, *Lee's North Carolina Family Law* § 1.13(B) (5th ed. 1993). Under the UPAA, parties who anticipate marriage are permitted to contract with regard to support and property rights that may arise upon divorce. N.C.G.S. § 52B-4(a) (1987). Thus with regard to property settlement agreements and premarital agreements, the General Assembly has decided that such agreements do not incite divorce or separation but instead promote marital stability by defining the expectations and responsibilities of the parties.

There is no justification for adhering to a different public policy with regard to non-property postmarital agreements, especially when the agreement, as in this case, is entered into between married parties who are not living together. Indeed because N.C. Gen. Stat. § 52B-4(a), N.C. Gen. Stat. § 50-20(d) and N.C. Gen. Stat. § 52-10(a) each relate to contracts in the family, they should be construed together to ascertain the legislative intent. *See Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984). When read *in pari materia*, N.C. Gen. Stat. § 52-10(a) must be construed to reflect the same public policy accepted by the General Assembly in its adoption of N.C. Gen. Stat. § 52B-4(a) and N.C. Gen. Stat. § 50-20(d). Therefore, the Agreement must not be read as discouraging the marriage but instead as encouraging it. Indeed the fact that the parties resumed their marital relationship soon after the Agreement was executed indicates it encouraged, rather than discouraged, resumption of the marriage. As such the Agreement is not inconsistent with the public policy of this State and is enforceable. I would reverse and remand.

ROBERTS v. YOUNG

[120 N.C. App. 720 (1995)]

NATHAN WAYNE ROBERTS, DERALD WAYNE ROBERTS, AND WIFE, MARY JENENE ROBERTS v. RONALD CHARLES YOUNG AND CAROLYN NELSON TUGGLE

No. COA95-120

(Filed 21 November 1995)

1. Trial § 121 (NCI4th)— bifurcation of compensatory and punitive damages issues—trial court's discretion

The plain language of N.C.G.S. § 1A-1, Rule 42(b) vests in the trial court broad discretionary authority to determine when bifurcation of compensatory and punitive damages issues is appropriate.

Am Jur 2d, Trial §§ 120, 121.

2. Trial § 213 (NCI4th)— motion to dismiss own claim—time for making

Under the plain language of N.C.G.S. § 1A-1, Rule 41(a)(1), a plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief; therefore, the trial court did not err in allowing plaintiff to dismiss his claim of punitive damages where plaintiff made his motion to dismiss prior to the close of his case-in-chief.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 9 et seq.

3. Trial § 412 (NCI4th)— objection to instructions—time for objection

There was no merit to plaintiff's contention that the Court should dismiss State Farm's assignments of error to the trial court's instructions on damages for failure to contemporaneously object to the trial court's instructions, since State Farm submitted proposed jury instructions and a proposed damages issue to the trial court at the charge conference and thus satisfied the policy of N.C.R. App. P. 10(b)(2).

Am Jur 2d, Trial §§ 1465, 1466.

4. Trial § 302 (NCI4th)— defendants' requested instruction—instruction given in substance

State Farm's requested instruction informing the jury of the withdrawal of the punitive damages issue and emphasizing that the jury must not consider evidence already presented at trial was provided in substance by the trial court.

Am Jur 2d, Trial §§ 1092 et seq.

5. Trial § 200 (NCI4th)— final jury argument—defendant not denied

There was no merit to unnamed defendant State Farm's contention that the trial court erred by failing to provide this defendant with the final argument to the jury where the court gave defendants the opening and closing arguments; the record did not indicate anything in the trial court's order which prevented the two defendants from splitting the time allotted for closing argument; the two defendants decided the order of argument; and State Farm suffered no prejudice in having to open while the other defendant, a party with the similar interest of minimizing the jury award, was afforded the opportunity to rebut plaintiff's summation.

Am Jur 2d, Trial §§ 535 et seq.

6. Evidence and Witnesses § 1017 (NCI4th)— admissions properly admitted and argued

The trial court did not err in admitting defendant's admissions and allowing plaintiff's counsel to argue the same to the jury where, prior to closing arguments, plaintiff requested that defendant's initial denial of liability be admitted into evidence to rebut the assertion in opening statements that defendants had always admitted liability. N.C.G.S. § 1A-1, Rule 36(b).

Am Jur 2d, Evidence §§ 754 et seq.

7. Trial § 563 (NCI4th)— $450,000 award—evidence of injuries and medical expenses—motion for new trial—denial proper

In light of the evidence of plaintiff's physical injuries and medical expenses, the jury's award of $450,000 was not excessive as a matter of law and the trial court therefore did not abuse its discretion in denying defendants' motion for a new trial.

Am Jur 2d, New Trial §§ 393 et seq.

8. Judgments § 652 (NCI4th)— prejudgment interest—interest not tolled

The trial court properly denied State Farm's motion to toll prejudgment interest in a personal injury action based on the plain language of N.C.G.S. § 24-5.

Am Jur 2d, Interest and Usury §§ 87 et seq.

Appeal by defendant from judgment entered 6 October 1994 by Judge Claude S. Sitton in Buncombe County Superior Court. Heard in the Court of Appeals 29 September 1995.

Long & Parker, P.A., by Robert B. Long, Jr., and W. Scott Jones, for plaintiff-appellee Nathan Wayne Roberts.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Roy W. Davis, Jr., and Michelle Rippon, for unnamed defendant-appellant, State Farm Automobile Insurance Company.

MARTIN, MARK D., Judge.

Unnamed defendant State Farm Automobile Insurance Company (State Farm) appeals from jury verdict alleging 10 assignments of error. We find no error.

State Farm contends the trial court erred by: (1) failing to bifurcate the damages issue; (2) admitting evidence relating to punitive damages; (3) allowing plaintiff, at the close of its evidence, to dismiss its claim for punitive damages; (4) instructing the jury on the effect of plaintiff's withdrawal of the punitive damages issue in a materially different way than proposed by State Farm; (5) instructing the jury on the effect of the withdrawal of the punitive damages issue prior to closing arguments; (6) failing to submit State Farm's proposed issue concerning the plaintiff's recovery of actual damages; (7) requiring State Farm, even though it offered no evidence, to present the first jury summation; (8) admitting into evidence plaintiff's exhibit 45, defendant's Answers to Request for Admissions, and permitting plaintiff's counsel to argue the same in summation; (9) denying State Farm's Motion for a New Trial; and (10) denying State Farm's Motion to Toll Prejudgment Interest.

On 28 October 1991 plaintiff Nathan Roberts (Roberts) filed his complaint for personal injuries and medical expenses. Roberts amended his complaint on 14 May 1993 to include an allegation of emotional distress and to add Derald and Mary Roberts, Roberts' parents, as plaintiffs. Derald and Mary Roberts ultimately dismissed their emotional distress claim without prejudice. Roberts also dismissed his claim against Carolyn Tuggle without prejudice.

The facts surrounding the accident are undisputed. On 11 October 1994 Young was driving a 1974 Oldsmobile. At around 9:30 or 10 p.m., Young drove into an apartment complex located on Erskine Street. After leaving the apartment complex, nearby police officers

were suspicious of Young's activities and stopped his car. As the officers approached his vehicle, Young sped away and the ensuing chase eclipsed speeds of 75 miles per hour. In his efforts to elude the police, Young ran a red light at the intersection of Southside and Charlotte streets and struck Roberts' car. When the police officers arrived at the scene of the accident, Roberts was semi-conscious and bleeding extensively.

At trial Roberts presented evidence tending to show he suffered the following injuries as a result of the accident: (1) a broken right leg which required the insertion of a steel rod; (2) several broken teeth which will require future corrective surgery; (3) the initial symptoms of temporomandibular dysfunction; (4) lacerations on his chin, including a scar which plastic surgery will not completely erase, and lacerations on his right leg; (5) pain in his lower back and sciatic nerve; and (6) muscle damage to his right leg. At oral argument the parties stipulated that Roberts' present and future medical expenses total approximately $30,000.

Beyond his observable physical injuries, medical and psychological experts testified Roberts suffered a "closed head injury"—an injury which often results in personality changes, memory and attention deficits, irritability, and an overall slowing of mental functions. Roberts also called family and teachers who cited specific manifestations of Roberts' post-accident changes in personality and decreased mental capacity.

At trial Young stipulated: (1) he was negligent in operation of his vehicle; and (2) his negligence was the proximate cause of Roberts' injuries. Further, neither Young nor State Farm presented any evidence regarding the injuries Roberts suffered in the accident.

After being charged solely on the issue of damages, the jury returned a verdict for Roberts in the amount of $450,000. Young and State Farm appealed. On 6 March 1995 Young voluntarily dismissed his appeal.

A.

[1] State Farm contends, in its first and second assignments of error, that the trial court abused its discretion by failing: (1) to bifurcate the compensatory and punitive damages issues; and (2) to exclude evidence relating to punitive damages at trial.

Bifurcation is governed by N.C.R. Civ. P. 42(b), which provides:

> The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

N.C. Gen. Stat. § 1A-1, Rule 42(b) (1990) (emphasis added). State Farm contends the trial court was required, pursuant to Rule 42(b), to bifurcate the damages issue.

" 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *Hyler v. GTE Products Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993) (*quoting Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). If the language of the statute is clear, this Court must implement the statute according to the plain meaning of its terms. *Id.* Further, when according a statute its plain meaning, courts "may not interpolate or superimpose provisions and limitations not contained therein." *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 783, *disc. review denied and appeal dismissed*, 304 N.C. 392, 285 S.E.2d 833 (1981).

Rule 42(b) provides the trial court "may . . . order a separate trial on any claim . . . ." N.C. Gen. Stat. § 1A-1, Rule 42(b) (1990) (emphasis added). The definition of "may" is "have liberty to—used nearly interchangeably with *can*." WEBSTERS NEW COLLEGIATE DICTIONARY 523 (7th ed. 1969). The use of "may," as opposed to "shall," is indicative of discretion or choice between two or more alternatives. *See United States v. Cook*, 432 F.2d 1093, 1098 (7th Cir. 1970), *cert. denied*, 401 U.S. 996, 28 L. Ed. 2d 535 (1971). Thus, we believe, contrary to State Farm's contentions, that the plain language of Rule 42(b) vests in the trial court broad discretionary authority to determine when bifurcation is appropriate.

Our interpretation of Rule 42(b) is in complete accord with our Supreme Court's admonition the trial court must accept a broad supervisory role over the structure of a trial. *In re Will of Hester*, 320 N.C. 738, 741-742, 360 S.E.2d 801, 804 (1987). As our Supreme Court stated:

> The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice. In discharging this duty, the court possesses broad discretionary powers sufficient to meet the circumstances of each case. This supervisory

> power encompasses the authority to structure the trial logically and to set the order of proof.

Id. (citations omitted). The legislative comment to Rule 42 also supports this view stating, "the power of severance is an indispensable safety valve to guard against the occasion where a suit of unmanageable size is thrust on the court. Whether or not there should be a severance rests in the sound discretion of the judge." N.C. Gen. Stat. § 1A-1, Rule 42, official commentary (1990).

Because of its broad discretionary powers, the trial court's decisions regarding trial supervision and control will not be disturbed on appeal absent abuse of discretion. *Hester*, 320 N.C. at 742, 360 S.E.2d at 804. A trial court abuses its discretion when it makes "a patently arbitrary decision, manifestly unsupported by reason." *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994) (*citing State v. Locklear*, 331 N.C. 239, 248-249, 415 S.E.2d 726, 732 (1992)).

In the present case, State Farm made its motion to bifurcate the punitive and compensatory damages issues after the case was called for trial. State Farm argued the jury would be confused and the compensatory award inflated if evidence relating to punitive damages was presented and thereafter dismissed. After careful review of the record, we cannot say the trial court abused its discretion by denying State Farm's motion to bifurcate the damages issue.

Further, in light of our decision upholding the trial court's denial of State Farm's motion to bifurcate, admission of evidence regarding the issue of punitive damages was proper. See N.C.R. Evid. 401, *et seq.*

B.

[2] State Farm alleges, in its third assignment of error, that the trial court erred by allowing Roberts to dismiss his claim of punitive damages.

N.C.R. Civ. P. 41(a)(1) provides in pertinent part:

> [A]n action or any claim therein may be dismissed by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990) (emphasis added). As previously indicated, where the language of a statute is unambiguous, we are bound by the plain language of the statute. *See Hyler*, 333 N.C. at 262, 425 S.E.2d at 701. Under the plain language of Rule 41(a)(1), we believe a plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief. *See Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 355, 198 S.E.2d 741, 743 (1973) (holding plaintiff's absolute right to dismiss his action is limited in duration by Rule 41(a)(1) to any time before plaintiff rests his case.).

In the instant case, Roberts presented his Motion to Dismiss the issue of punitive damages under Rule 41(a) prior to the close of his case-in-chief. Accordingly, we find no merit in State Farm's contention the trial court misapplied Rule 41(a).

C.

[3] State Farm asserts, in its fourth, fifth, and sixth assignments of error, that the trial court: (1) erroneously instructed the jury on the effect of Robert's withdrawal of the punitive damages issue; and (2) improperly failed to submit State Farm's proposed issue concerning the plaintiff's recovery of actual damages.

At the outset we note Roberts urges this Court to dismiss the above assignments of error under N.C.R. App. P. 10(b)(2) for failure to contemporaneously object to the trial court's instruction. Our courts hold, however, that the policy of Rule 10(b)(2) is met when a request to alter an instruction has been submitted to the trial court at the charge conference. *See Wall v. Stout*, 310 N.C. 184, 189, 311 S.E.2d 571, 574-575 (1984); *State v. Smith*, 311 N.C. 287, 289-290, 316 S.E.2d 73, 75 (1984). Because State Farm submitted proposed jury instructions and a proposed damages issue to the trial court at the charge conference, we find, under *Wall* and *Smith*, that State Farm has satisfied the policy of Rule 10(b)(2) and, therefore, now consider the merits of State Farm's contentions.

It is well settled "[t]he trial court must give the instructions requested, at least in substance, if they are proper and supported by evidence. However, the trial court may exercise discretion to refuse instructions based on erroneous statements of the law." *Haymore v. Thew Shovel Co.*, 116 N.C. App. 40, 49, 446 S.E.2d 865, 871 (1994) (citations omitted). Further, the trial court is not required to provide a verbatim rendition of requested instructions which appropriately

state the law—substantial compliance is sufficient. *See Mut. Benefit Life Ins. Co. v. City of Winston-Salem*, 100 N.C. App. 300, 305, 395 S.E.2d 705, 708, *disc. review denied*, 327 N.C. 637, 399 S.E.2d 328 (1990); *Dinkins v. Booe*, 252 N.C. 731, 737, 114 S.E.2d 672, 676 (1960). In other words, " '[t]he [trial] court is not required to charge the jury in the precise language of [a] request [stating the correct legal standard] so long as the substance of the request is included in language which does not weaken its force.' " *Mut. Benefit*, 100 N.C. App. at 305, 395 S.E.2d at 708 (*quoting King v. Higgins*, 272 N.C. 267, 270, 158 S.E.2d 67, 69 (1967) (per curiam)).

[4] In the present case, the instruction proposed by State Farm informed the jury of the withdrawal of the punitive damages issue and emphasized that the jury must not consider evidence already presented at trial on the issue of punitive damages. We believe, after careful review, that the jury instruction given by the trial court regarding the withdrawal of the punitive damages issue sufficiently conveyed the substance of State Farm's concerns. Thus, under *Mutual Benefit* and *Dinkins*, we conclude the instruction provided by the trial court was proper.

State Farm also contends it was prejudiced by the timing of the above referenced curative instruction, which was given prior to closing arguments. Although State Farm asserts this objection for the first time on appeal, we have carefully reviewed the record and conclude State Farm did not suffer any prejudice due to the timing of the curative instruction.

Further, State Farm asserts the trial court's failure to submit its proposed damages issue to the jury prejudiced the ultimate verdict. The pattern jury instruction on personal injury damages reads, "What amount is the plaintiff entitled to recover for personal injury?" N.C.P.I., Civ. 810.10 (emphasis added). State Farm proposed an issue which read, "What amount is the plaintiff entitled to recover for actual damages?" (emphasis added). The trial court refused to present State Farm's proposed issue to the jury. The record reflects the trial court charged the jury on "actual damages" using language virtually identical to that of the pattern jury instructions. *See* N.C.P.I., Civ. 810.10 - 810.15. Accordingly, we find no merit in the contention State Farm was prejudiced by the trial court's refusal to present its proposed issue.

D.

[5] State Farm contends, in its seventh assignment of error, that the trial court erred by denying State Farm the right to make the final closing argument to the jury.

It is undisputed neither Young nor State Farm presented evidence at trial. Further, State Farm correctly asserts "[i]n all civil cases, if no evidence is introduced by the defendant, the right to open and close the argument to the jury belongs to him." *See* General Rules of Practice for the Superior and District Courts, Rule 10 (Michie 1995); *Trust Co. v. Braznell*, 227 N.C. 211, 215, 41 S.E.2d 744, 747 (1947).

At trial, the trial court ruled on the order of jury summations stating, "[defendants are] entitled to the opening and closing, so [plaintiff will] have the middle." When State Farm continued to argue for the right to close, the trial court responded "I'm giving you the first and last [argument], and forcing [plaintiff] to take the middle [argument]." The record does not disclose anything in the trial court's order which prevented State Farm from closing or State Farm and Young from splitting the time allotted for closing argument. Rather, State Farm and Young decided the order of argument—State Farm opened and Young closed—without direction from the trial court. Further, we believe State Farm suffered no prejudice in having to open as Young, a party with the similar interest of minimizing the jury award, was afforded the opportunity to rebut Roberts' summation.

Accordingly, we find no merit in State Farm's contention the trial court erred by failing to provide State Farm with the final argument to the jury.

E.

[6] State Farm next alleges, in assignment of error eight, that the trial court erred in admitting defendant's Answers to Requests for Admissions and allowing plaintiff's counsel to argue the same to the jury.

It is beyond question that "[a]ny matter admitted [in a request for admission] is conclusively established unless the court on motion permits withdrawal or amendment of the admission." N.C. Gen. Stat. § 1A-1, N.C.R. Civ. P. 36(b) (1990).

In the present action, defendants denied Young's negligence was the proximate cause of Roberts' injuries in response to written requests for admissions (Admissions) submitted by Roberts.

Immediately prior to the start of trial, State Farm and Young stipulated, and the trial court accepted, that Young's negligence was the proximate cause of Roberts' injuries.

During opening arguments Young's counsel implied, in direct contravention of their initial denial, that defendants have always admitted liability and were, even now, concerned with being fair to Roberts. Prior to closing arguments Roberts requested that defendant's initial denial be admitted into evidence to rebut the assertion in opening statements that defendants have always admitted liability. The trial court entered the Admissions into evidence. We conclude, after careful review of the record, that the trial court did not abuse its discretion by allowing the Admissions into evidence. *See* 1 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 36-5 (1989); *Williams v. Howard Johnson's Inc. of Washington*, 323 F.2d 102, 105 n. 9 (4th Cir. 1963) (holding admissions under Fed. R. Civ. P. 36, which is identical to N.C.R. Civ. P. 36, "stand in the same relation to the case as sworn testimony."). Accordingly, we dismiss State Farms' contention the trial court erred by entering the Admissions in evidence.

State Farm also contends allowing Roberts to reference the Admissions during his closing argument was prejudicial and a new trial is merited. As a general rule, "counsel may argue all the evidence [admitted at trial] to the jury, with such inferences as may be drawn therefrom . . . ." *Crutcher v. Noel*, 284 N.C. 568, 572, 201 S.E.2d 855, 857 (1974). Further, a new trial is inappropriate where:

> the record discloses that the remarks of [plaintiff's counsel] were apparently invited by remarks of the attorney for defendant in addressing the jury. As to such matter, the control of arguments of [plaintiff's counsel] and of [defendant's] counsel to the jury must be left largely to the discretion of the trial court.

State v. Seipel, 252 N.C. 335, 335, 113 S.E.2d 432, 433 (1960) (per curiam). We have already concluded the trial court did not abuse its discretion by allowing the Admissions into evidence and, therefore, under *Crutcher* and *Seipel*, dismiss State Farm's contention the trial court erred by allowing Roberts to reference defendants' initial denial of liability during closing argument.

F.

[7] State Farm next claims, in assignment of error nine, the trial court erred by failing to grant a new trial where the inclusion of evi-

dence relating to punitive damages during Roberts' case-in-chief resulted in jury confusion and inflation of the damages award.

At trial Roberts presented evidence showing he suffered from a myriad of physical injuries—including a broken leg, lacerations on his chin and leg, and pain in his sciatic nerve. The parties stipulated, at oral argument, that Roberts' present and future medical expenses total approximately $30,000. Roberts also presented expert testimony concerning the nature and severity of his "closed head injury." Further, Roberts' family and teachers were called to cite specific manifestations of his alleged "closed head injury." During closing argument, Roberts requested $750,000 in damages for his injuries, the attendant pain and suffering, and any future complications for his life expectancy of 50.65 years.

The trial court charged the jury that "the total of all compensatory damages are to be awarded in one lump sum. Such damages may include medical expenses, loss of earning capacity, pain and suffering (physical and mental), scars or disfigurement, loss of use of a part of the body, and permanent injury." Permanent injury includes Roberts' "future pain, suffering and diminished ability to work caused by the accident" for his entire life expectancy. The jury returned a verdict awarding $450,000 in damages.

We believe the trial court's instructions properly charged the jury as to the evidence it could consider regarding the possible measures of damages. Further, we note, where there is sufficient evidence to support a verdict, this Court "must assume that the jury followed the court's instruction and based its verdicts on [the] evidence which supports the [compensatory award]." *State v. McCarroll*, 336 N.C. 559, 567, 445 S.E.2d 18, 22 (1994). After careful review of the record, including the evidence of permanent injury, we cannot say the jury's award of $450,000 was, as a matter of law, excessive in the present case. Accordingly, we do not believe the trial court abused its discretion in denying State Farm's motion for a new trial.

G.

[8] Finally, State Farm contends, in assignment of error ten[1], that the trial court erred by denying State Farm's motion to toll prejudgment interest under the facts of the present case.

1. Although State Farm's brief denotes this as assignment of error number nine, we note, in the present record, the listing of the assignments of error submitted by State Farm denominates this issue as assignment of error number ten.

Prejudgment interest is governed by N.C. Gen. Stat. § 24-5, which provides in pertinent part:

> In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C. Gen. Stat. § 24-5 (1991). Again we note this Court is bound by the plain meaning of a statute where its language is clear and unambiguous. *See Hyler*, 333 N.C. at 262, 425 S.E.2d at 701. Further, this Court must remain consistent with any previous interpretations of a statute. *See Lowery v. Haithcock*, 239 N.C. 67, 73, 79 S.E.2d 204, 208-209 (1953) (holding a statute must be applied as previously construed even though it appears the former decisions may have liberalized the statute beyond the original intent); See also *Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding one panel of this Court is bound by the decision of another panel).

This Court has interpreted the plain language of N.C. Gen. Stat. § 24-5 to allow prejudgment interest to accrue "from the time the action is instituted." *Harris v. Scotland Neck Rescue Squad*, 75 N.C. App. 444, 452, 331 S.E.2d 695, 701, *disc. review denied and stay denied*, 314 N.C. 329, 333 S.E.2d 486-487 (1985). N.C.R. Civ. P. 3 provides, "[a] civil action is commenced by filing a complaint with the court." N.C. Gen. Stat. § 1A-1, Rule 3 (1990).

In *Harris* plaintiff filed his complaint on 4 June 1982. Appellants contended the trial court erred in allowing prejudgment interest for the period prior to the time they were served with a valid complaint. This Court held the action was instituted on 4 June 1982 and prejudgment interest accrued from that date. *Harris*, 75 N.C. App. at 452, 331 S.E.2d at 701.

Likewise, Roberts commenced this civil action when he filed his complaint on 28 October 1991. Thus, under the plain language of N.C. Gen. Stat. § 24-5 and this Court's decision in *Harris*, we conclude State Farm is responsible for interest dating from 28 October 1991.

We believe our interpretation of N.C. Gen. Stat. § 24-5 is consistent with our Supreme Court's admonition that,

> [r]equiring the [underinsured motorist (UIM)] carrier to pay prejudgment interest up to its policy limits is not a harsh result since

> the UIM carrier has had the opportunity to invest the money during the pendency of the suit. In addition, it is within the UIM carrier's power to stop the accrual of prejudgment interest by offering (or posting) its policy limit.

Baxley v. Nationwide Mut. Ins. Co., 334 N.C. 1, 9, 430 S.E.2d 895, 900 (1993).

Accordingly, we conclude the trial court properly denied State Farm's Motion to Toll Pre-Judgment Interest.

No error.

Judges LEWIS and WALKER concur.

STATE OF NORTH CAROLINA v. RODNEY SCOTT MERRITT

No. 9415SC455

(Filed 21 November 1995)

1. Burglary and Unlawful Breakings § 140 (NCI4th)— burglary at sorority house—director's apartment and main house as one dwelling—court's expression of opinion—error not prejudicial

The trial court's instruction constituted an indirect statement that the apartment of the victim, who was the resident director of a sorority house, and the common areas of the sorority house constituted a single "dwelling house" for purposes of application of the burglary statute, and such statement violated N.C.G.S. § 15A-1232 by expressing an opinion as to the existence of a material fact; however, because the common areas of the sorority house, appurtenant to the victim's apartment, were within the curtilage and a portion of the victim's "dwelling house" for purposes of the burglary statute, the trial court's erroneous expression of opinion was non-prejudicial.

Am Jur 2d, Burglary §§ 67 et seq.

2. Burglary and Unlawful Breakings § 162 (NCI4th)— residence occupied—failure to instruct on second-degree burglary—no error

The trial court did not err in refusing to instruct the jury on the lesser included offense of second-degree burglary when the evidence was uncontradicted that the house was actually occupied by the victims at the time of the breaking and entering.

Am Jur 2d, Burglary § 69.

3. Criminal Law § 793 (NCI4th)— instruction on acting in concert—failure to include presence at scene—no plain error

The trial court did not commit plain error in its instruction to the jury on acting in concert by failing to include the element of presence at the scene where there was substantial evidence of defendant's actual and constructive presence at the scene.

Am Jur 2d, Trial §§ 723 et seq.

Appeal by defendant from judgment entered 19 January 1994 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 24 January 1995.

Attorney General Michael F. Easley, by Assistant Attorney General, David N. Kirkman, for the State.

Assistant Appellate Defender, Charlesena Elliott Walker, for defendant-appellant.

JOHN, Judge.

Defendant was convicted of first degree burglary in violation of N.C. Gen Stat. § 14-51 (1993). He contends the trial court erred in various aspects of its jury charge. We disagree.

The State's evidence tended to show the following: On 2 January 1993, Laura Long (Long) was employed as house director of the Kappa Kappa Gamma sorority house located at 302 Pittsboro Street in Chapel Hill, North Carolina. Twenty-nine (29) female university students reside at the facility during the University of North Carolina's academic year. Long's duties include responsibility for matters such as menu planning, meal service, cleaning and maintenance, as well as budgeting, bookkeeping, and payroll.

As part of her compensation, Long and her husband (Mr. Long) receive use of a private apartment within the sorority house. The apartment occupies two floors and entry is prohibited to other residents; however, Long has free access to all portions of the building.

During Christmas break at the University, the sorority house is closed and none of the students may occupy the building; however, the Longs are permitted to remain in their apartment. The Christmas vacation period relevant to the case *sub judice* took place from 19 December 1992 through 10 January 1993.

On the evening of 2 January 1993, the Longs were upstairs in their apartment when they heard a floorboard creak. The structure is old and floorboards in the Longs' apartment often creak and move when someone walks by the door leading into the main portion of the house. Shortly before the noise, between 10:30 and 11:00 p.m., Mr. Long had "walked the perimeter of the building to check doors, windows and lights" and had ascertained that all were locked and undamaged. After Long telephoned police, the couple heard the sound of footsteps running down the main stairs and through the foyer. Seconds later, the alarm on the fire door in the back of the dining room went off. Long looked out her bathroom window and saw people running across the street. She observed an officer overtake and subdue one of the individuals.

Officer Jack Terry (Terry) testified he arrived at the sorority house in response to the dispatcher's call. As he approached the residence, he noticed a door had been broken into and communicated this observation to other officers en route to the scene. Upon arriving, these officers surrounded the house. After a few moments, they heard a noise and saw two persons running out of the dining room door. Terry identified defendant as one of those individuals, both of whom were apprehended.

Terry further testified that his search of defendant's person uncovered a wallet later identified as belonging to Kristin Hill, a student resident of the sorority house. Terry also stated a disconnected VCR was discovered on the floor between the dining room and the living room, and stereo equipment taken from at least two rooms had been placed at the head of the stairs.

Defendant presented no evidence and was found guilty of first degree burglary. He appeals the court's judgment sentencing him to twenty-five (25) years imprisonment.

I.

Defendant first maintains the trial court erred "by instructing the jury that the dwelling would be occupied if the Long's (*sic*) were in their quarters at the time of the unauthorized entry and by refusing to submit the possible verdict of second degree burglary to the jury." We find defendant's arguments unpersuasive.

A.

[1] The indictment herein charged defendant with burglary of "the dwelling house of Tim and Laura Long located at 302 Pittsboro Street, Chapel Hill, North Carolina." Burglary is the breaking and entering of a dwelling house or sleeping apartment of another during the nighttime with intent to commit a felony therein. N.C. Gen. Stat. § 14-51 (1993). Burglary in the first degree occurs if the dwelling is occupied; if unoccupied, the crime is burglary in the second degree. *Id.*

With respect to the element of occupancy, the trial court instructed the jury as follows:

> If you find that Mr. and Mrs. Long were in their quarters at the Kappa Kappa Gamma Sorority House at the time of the breaking and entering, then the house would be occupied.

Defendant objected to this portion of the court's instruction and states in his brief that the instruction "was an impermissible assumption that all of the separate living units in the building constituted but one dwelling."

N.C. Gen. Stat. § 15A-1232 (1988) states:

> In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.

This provision establishes three fundamental propositions:

> (1) That it is the duty of the judge alone to decide the legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case; (2) that it is the task of the jury alone to determine the facts of the case from the evidence adduced; and (3) that "no judge, in giving a charge to the petit jury, . . . shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury."

State v. Canipe, 240 N.C. 60, 63-64, 81 S.E.2d 173, 176 (1954).

In *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976), *overruled on other grounds*, *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994), the trial court instructed the jury that " 'the apartment described for you herein located at 2655 Pendleton Drive, Apartment number one, is a sleeping apartment.' " *Id.* at 497, 226 S.E.2d at 333. On appeal, the Supreme Court held the court's affirmative statement violated G.S. § 1-180 (predecessor to G.S. § 15A-1232) by "erroneously invading the province of the jury." *Id.* However, this constituted harmless error on the facts of the case in that all the evidence supported the court's statement. *Id.*

In *State v. Nelson*, 298 N.C. 573, 260 S.E.2d 629 (1979), *cert. denied*, *Jolly v. North Carolina*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980), the trial court instructed the jury that the motel room which had been broken into was a " 'sleeping apartment' " for purposes of the burglary statute. *Id.* at 596-97, 260 S.E.2d at 646. Relying on *Wells*, the Supreme Court again held "such an affirmative statement constituted an impermissible expression of opinion, or an assumption that a material fact had been proved." *Id.* at 597, 260 S.E.2d at 646. However, the *Nelson* Court also concluded the instruction was harmless error. *Id.*

The challenged instruction of the trial court in the case *sub judice* constituted an indirect statement that the Longs' apartment and the common areas of the sorority house constituted a single "dwelling house" for purposes of application of the burglary statute. Under *Wells* and *Nelson*, the court's statement violated G.S. § 15A-1232 by expressing an opinion as to the existence of a material fact. The issue becomes, therefore, whether the error was prejudicial. N.C. Gen. Stat. § 15A-1443(a) (1988).

The State contends the trial court's statement, if erroneous as an expression of opinion, nonetheless was not prejudicial because it accurately reflected the evidence. The State argues that the sorority house and the Longs' apartment indeed constitute but one "dwelling house" since the common areas of house traversed by the burglars lay within the "curtilage" of the Longs' quarters.

"There may be several dwelling units in a single structure, as the rooms of an inn, hotel, or lodging house. In such case, each room is regarded as the 'dwelling house' of its respective occupant." Charles E. Torcia, *Wharton's Criminal Law* § 335, at 208 (14th ed. 1980).

Thus, defendant's contention is accurate to the extent that, if entered, the rooms assigned to each sorority member as well as the quarters solely occupied by the Longs would properly be considered individual dwelling houses for purposes of our burglary statute.

However,

> [t]he term 'dwelling house' includes within it not only the house in which the owner or renter and his family, or any member of it, may live and sleep, but all other houses appurtenant thereto, and used as part and parcel thereof, . . . provided they are within the curtilage, or are adjacent or very near to the dwelling-house.

State v. Green, 305 N.C. 463, 472, 290 S.E.2d 625, 631 (1982) (citing *State v. Jake*, 60 N.C. 471, 472 (1864)). "The curtilage is the land around a dwelling house upon which those outbuildings lie that are 'commonly used with the dwelling house.' " *State v. Fields*, 315 N.C. 191, 194, 337 S.E.2d 518, 520 (1985) (quoting *State v. Twitty*, 2 N.C. 102 (1794)). In determining whether a building is within the curtilage of the dwelling house, "two themes consistently emerge: the function of the building and its proximity to the dwelling house." *Id.*

First, "if a structure's use 'contributes materially to the comfort and convenience of habitation in the dwelling house,' then it will be considered part of the dwelling for purposes of the burglary statute." *Stewart v. Commonwealth*, 793 S.W.2d 859, 860 (199) (quoting C.S. Powell, Annotation, *Burglary: outbuildings or the like as part of "dwelling house,"* 43 A.L.R.2d 831, 838 (1955).

> [T]he law throws her mantle around the dwelling of man, because it is the place of his *repose*, and protects, not only the house in which he sleeps, but also all the other appurtenances thereto, as parcel or parts thereof, from meditated harm. Thus the kitchen, the laundry, the meat or smoke-house and the dairy are within its protection, for they are all used as parts of one whole, each contributing, in its way, to the comfort or convenience of the place, as a mansion or dwelling. They are used with that view, and that alone, and it may be admitted that all houses, contiguous to the dwelling, are, *prima facie*, of that description. But when it is proved that they are used for other purposes, as for labor, as a workshop—for vending goods, as a store-house, this destroys the presumption. It then appears that they are there for purposes unconnected with the actual dwelling-house, and do not render it more comfortable or convenient as a dwelling; in short, that they

> are not parcel or part thereof, but are used for other and distinct purposes. The house, as a dwelling, is equally as comfortable and convenient without as with them. Their contiguity to the dwelling may afford convenience or comfort to the occupant as a mechanic, or laborer, or shop-keeper, but none to him as a house-keeper.

State v. Jenkins, 50 N.C. 430, 431-32 (1858).

The record herein reflects Long's testimony that her numerous daily responsibilities in maintaining the house required full access to every portion of the building. She stated "it's not unusual for me to be in other parts of the house as part of my job." For example, Long frequently entered the students' rooms to check for safety hazards such as curling irons which occupants had failed to disconnect or turn off. Mr. Long also had "open access to all of the first floor portions of the house" and would often check the house at night for security purposes.

In addition, Long testified:

> [T]here's the large TV out in the main house living room, which is where we will go if we have friends or such over, because our apartment area is very small, and we can't entertain. So we would be maybe out in the main house living room.

Long further indicated that at the time in question she and her husband kept their "road bikes, fifteen speed bikes," in the living room along with a training stand, "something you put the back tire of the bike up on so that you can ride it as a stationary bike." The training stand was "set up so that we could be training in the winter on the bike and watching the TV."

Moreover, Long declared that when "doing holiday cooking and such, or we were entertaining, I need to go into the main house refrigerator and freezer," but that "[w]hen I'm receiving my meals, when the house was open at the sorority house, I don't need to have as much refrigerator-freezer space."

Finally, Long stated she had personal items, including "sewing and crafts supplies and odds and ends" stored in a closet in the main house hallway which was "only accessible from a doorway [in the main house] that goes into the main house hallway." An additional closet in the main house was used by the Longs for storage of "luggage and out-of-season clothing and that kind of thing." Long and her

husband also parked their vehicle in one of the twenty-nine spaces allocated to residents of the house.

Based on the foregoing, we conclude the main portion of the sorority house contributed "in its way, to the comfort or convenience" of the Longs' apartment "as a dwelling." *Jenkins*, 50 N.C. at 431.

Moreover, the common areas of the sorority house are contiguous to the Longs' apartment, *prima facie* evidence of status as a portion of the "dwelling house." *Id.* at 431. The apartment is under the same roof and has one exterior entrance and three interior entrances, including a door which opens into their bedroom from the main hallway. There is also a primary entrance to the Longs' quarters located in the house foyer.

Under the facts of the case *sub judice*, we therefore hold that the common areas of the sorority house, appurtenant to the Longs' private apartment, are within the curtilage and a portion of the Long's "dwelling house" for purposes of the burglary statute. *See State v. Green*, 305 N.C. at 472-73, 290 S.E.2d at 630-31 (storage room constituted curtilage of a dwelling house so as to sustain conviction of first degree burglary where storage room entered was at back of house just behind occupied bedroom and storage room could be entered through an outside door or a window in the bedroom). *See also State v. Foster*, 129 N.C. 704, 40 S.E. 209 (1901) (defendant properly convicted of first degree burglary where he broke into a storeroom, off of which opened an occupied sleeping apartment); *State v. Mordecai*, 68 N.C. 207 (1873) (building within the curtilage of a residence, and regularly used as a sleeping room, is in contemplation of law, a "dwelling house" in which a burglary may be committed).

Our holding is consistent with the legislative purpose in specifying nighttime forcible entry to the occupied home of another as violative of the criminal law. "It is well to remember that the law of burglary is to protect people, not property." *Fields*, 315 N.C. at 196, 337 S.E.2d at 521.

> It is evident that the offense of burglary at common law was considered one aimed at the security of the habitation rather than against property. That is to say, it was the circumstance of midnight terror aimed toward a man or his family who were in rightful repose in the sanctuary of the home, that was punished. . . . Such attempted immunity extended to a man's dwelling or man-

> sion house has been said to be attributable to the early common-law principle that a man's home is his castle.

Parnell, *supra*, 43 A.L.R.2d at 834-35 (citation omitted).

Mr. Long testified the noises he and his wife heard in the main portion of the house were "directly next to us and through one wall" and outside their bedroom door which opens into the main hallway. The trial court noted this circumstance during the charge conference:

> Certainly, at one point, the burglars were very close to the room that was being occupied by the Longs, just in the hall right outside their bedroom door.

Thus, the protection afforded those occupying a "dwelling house" includes the common areas of the house as part and parcel of the Longs' "dwelling."

The evidence revealed that the intruders traversed the hallways, stairs, foyer, and dining room of the sorority house—all common areas of the house within the curtilage of the Longs' apartment. The trial court's "assumption" that the Longs' apartment and the common areas of the sorority house "constituted but one dwelling" was therefore neither, in defendant's word, "impermissible," nor inaccurate. Accordingly, under *Long* and *Nelson*, the trial court's erroneous expression of opinion, based upon its proper, albeit tacit, consideration of the Longs' quarters and the common areas of the Kappa Kappa Gamma sorority house as a single "dwelling house," was non-prejudicial.

B.

[2] Defendant requested that the lesser-included offense of second degree burglary be submitted to the jury on the basis that it could find the dwelling house was not actually occupied. The State did not disagree. However, the trial court stated "it's my opinion that as far as the law is concerned, the sorority house was occupied." The court thereupon ordered the clerk to prepare a verdict form which allowed but two possible verdicts: guilty of first degree burglary or not guilty.

To justify a charge on second degree burglary, there must be evidence from which the jury could find that the dwelling house or sleeping apartment in question was unoccupied at the time of the breaking. *State v. Tippett*, 270 N.C. 588, 595, 155 S.E.2d 269, 274 (1967), *overruled on other grounds*, *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994).

The record reveals that Mr. Long checked the entire premises before retiring to the Long's sleeping quarters and discovered nothing unusual. Shortly thereafter, the couple heard floorboards creaking and other sounds of movement within the main portion of the residence. Officers also located a door which had been broken, but which Mr. Long testified had not been damaged when he observed it during his security check of the premises. No evidence indicated either Mr. Long or his wife exited the premises prior to hearing the sounds of intruders.

"[W]here all the evidence is to the effect that the building was actually occupied at the time of the breaking and entry, the court is not authorized to instruct the jury that it may return a verdict of burglary in the second degree." *State v. Tippett*, 270 N.C. at 595, 155 S.E.2d at 274. *Cf. State v. Powell*, 297 N.C. 419, 424, 255 S.E.2d 154, 157 (1979) (failing to submit lesser-included offense of second degree burglary requires new trial where homeowners failed to check third bedroom before retiring to bed and never heard sound of breaking glass); *State v. Simons*, 65 N.C. App. 164, 166, 308 S.E.2d 502, 503 (1983) (court erred in failing to instruct on second degree burglary where neither victim checked the back bedroom before going to sleep and defendant could have entered before victims returned home).

Having previously determined the Long's apartment and the common areas of the sorority house to constitute the "dwelling house of Tim and Laura Long located at 302 Pittsboro Street" charged in the indictment, we conclude the evidence was uncontradicted that the house was, in the words of that indictment, "[a]t the time of the breaking and entering actually occupied by Tim and Laura Long." The trial court thus did not err in refusing to instruct the jury on the lesser included offense of second degree burglary.

II.

[3] Defendant next contends the trial court erred in its instruction to the jury on "acting in concert" by failing to include the element of presence at the scene. We disagree.

At trial, counsel for defendant submitted numerous proposed instructions to the jury; none contained any requested instruction on the legal theory of acting in concert. Moreover, defendant concedes in his appellate brief that he interposed no timely objection at trial to the court's jury charge or responses to jury inquiries. *See* N.C.R. App.

P. 10(b)(2). Assuming *arguendo* that the court committed error, therefore, defendant may not prevail on appeal unless the alleged error constitutes "plain error," *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

However, only in the "rare case" will an improper instruction "justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 661, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). As defendant further concedes, moreover, the court's failure to instruct on presence may constitute plain error only when there is not substantial evidence of the defendant's actual or constructive presence at the scene of the crime. *State v. Gilmore*, 330 N.C. 167, 171, 409 S.E.2d 888, 890 (1991). *See also State v. Hunt*, 339 N.C. 622, 651, 457 S.E.2d 276, 292-93 (1994) ("It is well settled that a charge on presence at the scene of the crime is unnecessary in a case in which the evidence shows that the defendant was actually present at the time the crime was committed.").

The uncontradicted evidence in the record reveals that defendant was identified as one of two persons who hurriedly exited the dining room of the sorority house and that he was apprehended running from the residence by police who had surrounded the building. The evidence further reflects that a wallet belonging to one of the house residents was recovered from defendant's person. Suffice it to observe the foregoing comprises substantial evidence of defendant's actual and constructive presence at the scene. *See, e.g., State v. Ruffin*, 90 N.C. App. 712, 716, 370 S.E.2d 279, 281 (1988). Defendant's claim of "plain error" is therefore unavailing.

III.

Defendant final assignments of error are directed at the trial court's failure to instruct the jury on the possible verdicts of felonious and non-felonious breaking or entering. These contentions are unfounded.

While the statutory offense of felonious breaking or entering is a lesser included offense of burglary in the first degree, *State v. Fowler*, 1 N.C. App. 546, 548-49, 162 S.E.2d 37, 39 (1968), submission of this lesser included offense is required only when the evidence tends to show that defendant could have gained entry into the building in question by means other than a burglarious breaking. *State v. Jolly*,

297 N.C. 121, 127, 254 S.E.2d 1, 5 (1979) (citations omitted). No such indication may be found in the evidence *sub judice.*

The lesser included offense of misdemeanor breaking and entering must be submitted to the jury if there is substantial evidence the defendant broke and entered for some non-felonious reason other than that alleged in the indictment. *See State v. Patton*, 80 N.C. App. 302, 305-06, 341 S.E.2d 744, 746-47 (1986). The indictment herein alleged defendant intended to commit larceny. The record indicates no other explanation for the unauthorized entry into the sorority house; submission to the jury of misdemeanor breaking or entering was therefore not required. *Cf. State v. Owen*, 111 N.C. App. 300, 309, 432 S.E.2d 378, 385 (1993) (reversible error in failing to submit misdemeanor breaking or entering where evidence indicated defendant merely wanted to retrieve his shotgun).

No error.

Judges COZORT and MARTIN, John C. concur.

STATE OF NORTH CAROLINA, ON RELATION OF JAMES E. LONG, COMMISSIONER OF INSURANCE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. INTERSTATE CASUALTY INSURANCE COMPANY, DEFENDANT v. NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, DEFENDANT-INTERVENOR

No. COA95-38

(Filed 21 November 1995)

1. Contracts § 118 (NCI4th)— attorneys' claims for breach of agreement—attorneys not third-party beneficiaries

The trial court properly dismissed attorneys' claim for breach of an agreement between the Department of Insurance and Interstate Insurance Company since attorneys were not parties to the agreement nor were they third-party beneficiaries, as the agreement was a voluntary supervision agreement; the attorneys represented insureds of Interstate prior to the delinquency proceeding; the agreement did not specifically mention attorneys; and the attorneys were not specifically contemplated by Interstate or the Commissioner as beneficiaries of the agreement.

Am Jur 2d, Contracts §§ 426, 435 et seq.

2. Insurance § 37 (NCI4th)— attorneys' representation of insureds—claims assigned Class 5 priority—no application of common fund doctrine

In a liquidation proceeding where attorneys who had represented Interstate's insureds sought reimbursement, the comprehensive nature of N.C.G.S. § 58-30-220 precluded the application of any equitable doctrine, including the common fund doctrine, to alter the Class 5 priority assigned to attorneys' claims.

Am Jur 2d, Insurance §§ 98 et seq.

3. Insurance § 37 (NCI4th)— attorneys' representations of insureds—no conservation or administration of assets—claims not entitled to Class 1 priority

Claims of attorneys who represented Interstate's insureds were not "costs for administration or conservation of assets of the insurer" entitled to Class 1 priority since Class 1 priority is awarded only to entities which conserve or administer assets of the insurer *after* the items have become part of the "insurer's estate," and no estate existed when the attorneys' claims arose.

Am Jur 2d, Insurance §§ 98 et seq.

4. Insurance § 37 (NCI4th)— collection of files prior to liquidation—no conservation or administration of assets—claims not entitled to Class 1 priority

Collection of files by Eastern Appraisal Services did not amount to conservation or administration of the assets after the establishment of the "insurer's estate," so that Eastern's claim was not entitled to Class 1 priority.

Am Jur 2d, Insurance §§ 98 et seq.

Appeal by petitioners from order entered 3 October 1994 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 5 October 1995.

Poyner and Spruill, L.L.P., by Benjamin P. Dean and James T. Cheatham, for petitioner-appellant Attorney-Claimants.

Yeargan, Thompson & Mitchiner, by W. Hugh Thompson, for petitioner-appellant Eastern Appraisal Services, Inc.

Attorney General Michael F. Easley, by Assistant Attorney General Sue Y. Little and Special Deputy Attorney General

Thomas D. Zweigart, for plaintiff-appellee State of North Carolina.

Moore & Van Allen, PLLC, by Christopher J. Blake, for defendant-intervenor North Carolina Insurance Guaranty Association.

MARTIN, MARK D., Judge.

Petitioners, Attorney-Claimants (Attorneys) and Eastern Appraisal Services Incorporated (Eastern), appeal from order entered by the trial court affirming the Liquidator's Report and Recommendation. We affirm.

On 16 December 1989, Interstate Casualty Insurance Company (Interstate) and Commissioner of Insurance James E. Long (Commissioner) agreed to a voluntary supervision agreement (Agreement). The Agreement provides, in pertinent part:

> 2. [Interstate] will continue to conduct operations in the normal course of business during the pendency of the examination, under the supervision of a representative of the Department [of Insurance]. . . . Such supervision shall be upon the terms and conditions hereinafter described.
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> . . . .
>
> 7. [Interstate] will not incur any debt, obligation, or liability without the prior approval of the Department. Department specifically agrees that it will not unreasonably withhold approval of the utilization and payment by [Interstate] of specialized consultants or service providers, such as legal counsel, accountants, actuaries, or other insurance experts.
>
> . . . .
>
> 16. This Agreement is to be held confidential under G.S. 58-16.2 and is to be shared only with legal counsel and Department personnel directly involved. [Interstate] reserves whatever rights it may have to seek civil redress for breach of this Agreement.

Paragraphs 3-6 further divested Interstate of any authority to make payments or otherwise transfer assets without the prior approval of the Department of Insurance, the supervising authority.

On 5 February 1990 the Commissioner instituted this delinquency proceeding against Interstate. On 5 March 1990 the trial court entered

an Order of Rehabilitation and appointed the Commissioner as Rehabilitator. On 9 April 1990 the trial court converted the rehabilitation proceeding into a liquidation proceeding and appointed the Commissioner as Liquidator. After the determination of insolvency and Order of Liquidation, the North Carolina Insurance Guaranty Association (Guaranty Association) initiated its obligations under the Insurance Guaranty Association Act, N.C. Gen. Stat. § 58-48-1, *et seq.* (1994).

Attorneys include claimants within the law firms of Poyner & Spruill; Teague & Rotenstreich; Jenkins & Hinton; Arthurs & Foltz; and Henson, Henson, Bayliss & Sue. Attorneys represented insureds of Interstate prior to the delinquency proceeding. Attorneys filed a Petition for Payment of Counsel Fees alleging: (1) they were "retained as counsel by [Interstate] for the purpose of defending its insureds;" and (2) they were entitled to "reasonable counsel fees for legal services and expenses incurred in connection with the defense of [Interstate's] insureds prior to the entry of the Order of Rehabilitation on March 5, 1990." Attorneys next filed a Petition to Determine Priority of Distribution of Counsel Fees contending their fees were costs for the "administration or conservation of assets of [Interstate]" entitled to Class 1 priority. On 8 April 1993 Eastern served its Proof of Claim on the Liquidator.

On 17 February 1994 the Liquidator filed its Domiciliary Liquidator's Report and Recommendations in the trial court. The Liquidator's Report allowed the claims of Attorneys and Eastern. Both claims were categorized as general unsecured creditors, a Class 5 claim. Attorneys objected to this classification on 3 March 1994 and Eastern objected on 12 April 1994. On 5 October 1994 the trial court approved the report.

We review two issues on appeal: (1) whether Attorneys are entitled to Class 1 priority in distribution; and (2) whether Eastern is entitled to Class 1 or, in the alternative, Class 3 priority.

I.

Attorneys contend they are entitled to Class 1 priority because: (1) the Commissioner breached the Agreement by failing to pay for legal services rendered; (2) the "common fund" doctrine entitles Attorneys to Class 1 priority distribution; and (3) the distribution scheme of N.C. Gen. Stat. § 58-30-220 requires that Attorneys' claims be afforded Class 1 status.

Although Attorneys present several compelling public policy arguments, we note at the outset that our final decision is ultimately constrained by prior precedent and the comprehensive statutory framework of Chapter 58 of the North Carolina General Statutes.

A.

[1] We first turn to Attorneys' allegation the Commissioner breached the Agreement between the Department of Insurance and Interstate.

"To assert a claim for breach of contract, defendant must be either a party to the contract or a third-party beneficiary." *Jefferson-Pilot Life Ins. Co. v. Spencer*, 110 N.C. App. 194, 205, 429 S.E.2d 583, 589, *disc. review allowed and cert. allowed*, 334 N.C. 434, 433 S.E.2d 176 (1993), *rev'd on other grounds*, 336 N.C. 49, 442 S.E.2d 316 (1994). Attorneys are not parties to the Agreement and, therefore, must assert standing as third-party beneficiaries.

It is well-settled a claimant is a third-party beneficiary if he can establish, " '(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; [and] (3) that the contract was entered into for his direct, and not incidental, benefit.' " *Hoots v. Pryor*, 106 N.C. App. 397, 408, 417 S.E.2d 269, 276 (*quoting Leasing Corp. v. Miller*, 45 N.C. App. 400, 405-406, 263 S.E.2d 313, 317, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980)), *disc. review denied*, 332 N.C. 545, 421 S.E.2d 148 (1992). In the present case, the existence of a valid and enforceable contract between the Commissioner and Interstate is undisputed.

A claimant is a direct beneficiary if " 'the contracting parties intended that a third party should receive a benefit which might be enforced in the courts. It is not sufficient that the contract does benefit him if in fact it was not intended for his direct benefit.' " *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991) (*quoting Snyder v. Freeman*, 300 N.C. 204, 220, 266 S.E.2d 593, 603-604 (1980)) (citations omitted). The court, in determining the contracting parties intent, "should consider [the] circumstances surrounding the transaction as well as the actual language of the contract." *Id.* at 652, 407 S.E.2d at 182. Specifically, " '[w]hen a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement.' " *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 34, 351 S.E.2d 786, 791 (1987) (*quot-*

ing Lane v. Surety Co., 48 N.C. App. 634, 638, 269 S.E.2d 711, 714 (1980), *disc. review denied*, 302 N.C. 219, 276 S.E.2d 916 (1981)).

In the present case, Attorneys rely on *Trust Co. v. Processing Co.*, 242 N.C. 370, 88 S.E.2d 233 (1955), to support the proposition they are direct and intended beneficiaries of the Agreement. In *Trust Company* Wilson sold one-half of his majority share in Bowling Green Spinning to Catawba Processing. On the same day, the parties entered into two other contracts: (1) Catawba agreed to sell Bowling Green's product at a 5% commission so long as Wilson and Catawba owned the majority of Bowling Green stock; and (2) Catawba agreed to pay Wilson 30% of its 5% commission for the life of the sales agreement. The Supreme Court noted Wilson was specifically included in the other contracts, and the contracts were all part of a common plan. Relying on these facts, the Court found Wilson was a third-party beneficiary of the sales contract. *Trust Co.*, 242 N.C. at 378-379, 88 S.E.2d at 239-240.

We find the present case distinguishable from *Trust Company* because the Agreement does not specifically mention Attorneys. The only reference to retained counsel is found in the generic phraseology of paragraph 7 of the Agreement. Application of the rule in *Chemical Realty* to the language of paragraph 7 indicates, in our view, that Attorneys were not specifically contemplated by Interstate or the Commissioner as beneficiaries of the Agreement. Thus, we believe *Trust Company* does not support the proposition Attorneys are third-party beneficiaries of the Agreement.

Further, after careful review of the present record, we are not persuaded by Attorneys' contention they are intended, direct beneficiaries of the Agreement. Accordingly, we affirm the trial court's dismissal of Attorneys' claim for breach of the Agreement.

B.

[2] We next address the Attorneys' argument the "common fund doctrine" entitles them to Class 1 priority distribution.

The common fund doctrine is an equitable exception to the general rule attorney fees are not awarded without statutory authority. *Raleigh-Durham Airport Authority v. Howard*, 88 N.C. App. 207, 211-212, 363 S.E.2d 184, 186 (1987), *disc. review denied*, 332 N.C. 113, 367 S.E.2d 916 (1988). The common fund doctrine allows " 'a court of equity, or a court in the exercise of equitable jurisdiction, [] in its discretion, and without statutory authorization, [to] order an allowance

for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property . . . ." *Id.* (*quoting Horner v. Chamber of Commerce*, 236 N.C. 96, 97-98, 72 S.E.2d 21, 22 (1952)).

The common fund doctrine, as with all equitable doctrines,

> "supplements the law. . . . Its character as the complement merely of legal jurisdiction rests in the fact that it seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of the case, are incompetent to do. It was never intended that it should, and it will never be permitted to, override or set at naught a positive statutory provision. . . . "

Jones Cooling & Heating v. Booth, 99 N.C. App. 757, 759, 394 S.E.2d 292, 294 (1990) (*quoting Zebulon v. Dawson*, 216 N.C. 520, 522, 5 S.E.2d 535, 537 (1939) (plaintiffs could not use an equitable theory to reduce the post-judgment interest rate mandated by statute)), *disc. review denied*, 328 N.C. 732, 404 S.E.2d 869 (1991). In other words, "[e]quity will not lend its aid in any case when the party seeking it has a full and complete remedy at law." *Development Co. v. County of Wilson*, 44 N.C. App. 469, 470, 261 S.E.2d 275, 276, *disc. review denied and appeal dismissed*, 299 N.C. 735, 267 S.E.2d 660 (1980) (plaintiff could not use an injunction to prevent the county's use of eminent domain when plaintiff had a statutory remedy).

N.C. Gen. Stat. § 58-30-220 provides the comprehensive statutory scheme for determination of claim priority in the present context. N.C. Gen. Stat. § 58-30-220 (1994). Thus, under *Development Company*, the equitable common fund doctrine may be used only to secure a right to payment, not alter priority of payment, under Chapter 58 of the North Carolina General Statutes.

Attorneys' right to their fees is not, and never has been, contested. Rather, Attorneys' objection goes to the level of priority their claim was afforded by the Liquidator and the trial court. Thus, under our interpretation of N.C. Gen. Stat. § 58-30-220, Attorneys' contention their claims are entitled to higher priority under the common fund doctrine must fail.

Accordingly, we conclude the comprehensive nature of N.C. Gen. Stat. § 58-30-220 precludes the application of any equitable doctrine—including the common fund doctrine—to alter the Class 5 priority assigned to Attorneys' claims.

C.

[3] Finally, we turn to Attorneys' contention their fees constitute "cost[s] of administration and conservation of assets" entitled to Class 1 priority.

N.C. Gen. Stat. § 58-30-225(b) provides the trial court with broad discretionary powers to approve, disapprove, or modify the Liquidator's report. N.C. Gen. Stat. § 58-30-225(b) (1994). Such broad discretion is clearly consistent with other cases arising under Chapter 58. *See State ex rel. Long v. American Security Life Assurance Co.*, 109 N.C. App. 530, 533, 428 S.E.2d 200, 202 (1993) (the trial court has been granted broad discretion to award the fees and costs incurred in defending against a petition for liquidation); *Ingram, Comr. of Insurance v. Assurance Co.*, 34 N.C. App. 517, 523, 239 S.E.2d 474, 477 (1977) (trial court has broad ministerial and initiative authority in rehabilitation proceedings).

Because of the discretionary nature of N.C. Gen. Stat. § 58-30-225(b), we believe the trial court's decision should not be disturbed absent an abuse of discretion. *See American Security*, 109 N.C. App. at 534, 428 S.E.2d at 202. The trial court abuses its discretion when it makes "a patently arbitrary decision, manifestly unsupported by reason." *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994) (*citing State v. Locklear*, 331 N.C. 239, 248-249, 415 S.E.2d 726, 732 (1992)). Absent an abuse of discretion, we are bound by the trial court's findings of fact if they are supported by competent evidence. *Nobles v. First Carolina Communications*, 108 N.C. App. 127, 132, 423 S.E.2d 312, 315 (1992), *disc. review denied*, 333 N.C. 463, 427 S.E.2d 623 (1993).

Attorneys allege the plain language of N.C. Gen. Stat. § 58-30-220(1) does not limit Class 1 priority solely to actions taken to conserve assets after the creation of a Chapter 58 estate. Rather, Attorneys contend, under the plain language of the statute, any action that conserves assets which are ultimately incorporated into the estate also merits Class 1 priority. This allegation must necessarily be resolved by recourse to principles of statutory interpretation.

" 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *Hyler v. GTE Products Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993) (*quoting Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). If the language of the statute is clear, this Court must implement the statute

according to the plain meaning of its terms, *id.*, " 'unless the context . . . of the statute requires otherwise,' " *In Re Appeal of Medical Center*, 91 N.C. App. 107, 110, 370 S.E.2d 597, 599 (1988) (*quoting State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967), *cert. denied*, 340 U.S. 1028, 20 L. Ed. 2d 285 (1968)).

The first sentence of N.C. Gen. Stat. § 58-30-220 plainly states, "The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section." N.C. Gen. Stat. § 58-30-220 (1994) (emphasis added). In our view, "assets," as used in N.C. Gen. Stat. § 58-30-220(1), must refer to items listed by the Liquidator which become part of the "insurer's estate." Class 1 priority, therefore, is awarded only to entities which conserve or administer assets of the insurer after the items have become part of the "insurer's estate."

The trial court here found, and we agree, that Attorneys' claims are not "costs for administration or conservation of assets of the insurer" because no estate existed when Attorneys' claims arose.

Accordingly, we conclude the trial court's interpretation and application of N.C. Gen. Stat. § 58-30-220 was not an abuse of discretion and therefore affirm the trial court's approval of the Liquidator's Report under N.C. Gen. Stat. § 58-30-225(b).

II.

[4] Eastern alleges its claim for services rendered should be accorded Class 1 priority or, in the alternative, Class 3 priority.

Initially, we note Eastern did not raise its contention concerning Class 3 priority in the trial court. Accordingly, we dismiss Eastern's alternative claim for Class 3 priority. *See* N.C.R. App. P. 10(b)(1).

Eastern next alleges it aided in the "administration" or "conservation" of the "assets of the insurer" because the files it collected for Interstate prior to entry of the Order of Liquidation were made available after entry of the Order of Liquidation.

We believe the files seized from Eastern by the Liquidator and the Guaranty Association relate to the "insurer's estate" in the same way as Attorneys' claims for counsel fees—both sets of claims accrued prior to the delinquency proceeding. Thus, for the reasons we previously stated, Eastern did not directly "conserve" or "administer" the assets of the insurer after establishment of the "insurer's estate."

Accordingly, we find no merit in Eastern's claim of Class 1 priority and affirm the trial court's order.

Affirmed.

Judges LEWIS and WALKER concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER EUGENE EVANS

No. COA94-1413

(Filed 21 November 1995)

1. Criminal Law § 1145 (NCI4th)— heinous, atrocious, and cruel offenses—sufficiency of evidence of aggravating factor

The evidence was sufficient to support the trial court's finding that three assaults were heinous, atrocious, or cruel where defendant broke open one victim's door and began shooting; all three victims suffered multiple gunshot wounds; the initial act of firing the weapon and injuring the three victims was sufficient to support a conviction for assault with a deadly weapon with intent to kill inflicting serious injury in each case; and the additional shots which resulted in further injury to each victim were not necessary to the conviction. N.C.G.S. § 15A-1340.4(a)(1)(f).

Am Jur 2d, Criminal Law §§ 598, 599.

2. Criminal Law § 1120 (NCI4th)— permanent disability—sufficiency of evidence of aggravating factor

The trial court in an assault prosecution did not err in finding as a nonstatutory aggravating factor that the injuries to two of the victims resulted in permanent disability where the evidence that one victim underwent a hysterectomy as a result of the assault and that another had to undergo surgery which resulted in half of her collarbone being removed was sufficient to permit a finding of permanent injury, and the evidence was separate from that required to prove the assaults.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1149 (NCI4th)— use of weapon normally hazardous to more than one person—sufficiency of evidence

The trial court did not err in finding the statutory 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 in each of the assault charges where the evidence showed that defendant indiscriminately fired a semi-automatic weapon in the house which was occupied by three women and two minor children. N.C.G.S. § 15A-1340.4(a)(1)(g).

Am Jur 2d, Criminal Law §§ 598, 599.

4. Criminal Law § 1120 (NCI4th)— excessive monetary damages—sufficiency of evidence of aggravating factor

The trial court properly found that monetary damages of $135,000 and $28,325 incurred by the victims in this case exceeded the amount normally found in this type of assault and therefore properly considered this as a nonstatutory aggravating factor.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgments entered 21 July 1994 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 September 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Elaine A. Humphreys, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Stephanie W. Jordan, for defendant-appellant.

WALKER, Judge.

The defendant, Christopher Eugene Evans, pled guilty to three counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of felonious breaking and entering. At the sentencing hearing the following facts were summarized by the prosecutor without objection:

Ms. Carter and the defendant were in a dating relationship for about one year until 1 January 1994, when Ms. Carter ended the rela-

tionship. Ms. Carter was afraid of the defendant because of his jealous nature.

More than a month after the relationship ended, the defendant saw Ms. Carter with another man, Mr. Johnson, and pointed a gun at both of them. The defendant then assaulted Mr. Johnson and Ms. Carter.

Following the assaults, Ms. Carter and Mr. Johnson went to the magistrate's office and took out warrants against defendant. For additional safety, Ms. Carter obtained a domestic violence protective order.

Three days later on 22 February 1994, the three victims, Vivian Carter, Addie Davis, and Pamela Dover were outside Ms. Carter's residence washing a car. The victims became frightened and ran inside when they saw the defendant approaching them. They locked the front door to Ms. Carter's residence, but defendant broke open the door, entered the house, and began firing at all three victims with a semi-automatic handgun. During this time, defendant said, "You don't take out any warrants on me." Two minor children were present in the house during the shooting.

Ms. Carter was shot six times causing serious injury to her right armpit, left hip, and pelvic and abdominal areas. Ms. Carter testified that she had no feeling in her right arm, had nerve damage in her right leg, had difficulty moving her right leg, had a scar on her back, and would have to undergo further plastic surgery. As a result of these injuries, Ms. Carter had to have a hysterectomy performed and will be unable to have children.

Ms. Davis was in critical condition after being shot three times; once in the collarbone, once in the side of her head, and once on the tip of her eyebrow and chin. Ms. Davis stated that the bullet became lodged in her collarbone and that one-half of the collarbone had to be removed. She also testified that the movement in her right arm was restricted, that the nerve around her eyebrow was damaged, and that she had a large scar from her right ear to her right armpit which required plastic surgery.

Ms. Dover was shot in the stomach and in the foot area. As a result of her injuries, Ms. Dover was hospitalized.

Prior to sentencing the defendant, the court made findings of aggravating and mitigating factors. As to each of the three assault

charges, the court found that the offense was especially cruel, heinous, or atrocious; that defendant knowingly created a great risk of death; and that the offense was committed to disrupt or hinder law enforcement. Further, with regard to each of the assaults against Ms. Carter and Ms. Davis, the court found as non-statutory factors that the offenses resulted in permanent disability and in excessive monetary damages not incident to the type of assault. The court then found that the aggravating factors outweighed the mitigating factors in each case and sentenced defendant to imprisonment for a term totalling 70 years.

[1] Defendant first argues that the court erred in finding as an aggravating factor that the offense was "especially heinous, atrocious, or cruel" with respect to the charges of assault with a deadly weapon with intent to kill inflicting serious injury. N.C. Gen. Stat. § 15A-1340.4(a)(1)(f) (1988). Defendant contends that the trial court violated N.C. Gen. Stat. § 15A-1340.4(a)(1), which states that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." He argues that the evidence used to support this aggravating factor is the same evidence used to satisfy the serious injury element of the charge.

The charge of assault with a deadly weapon with intent to kill inflicting serious injury may be aggravated where the offense was especially heinous, atrocious, or cruel. The question for the court is whether the facts of a particular case disclose "excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983) (emphasis in original). The extent of mutilation of the body of the victim is relevant to measuring the brutality of the crime. *Id.* "Excessive brutality" or "conscienceless, pitiless, or unnecessarily tortuous" conduct is necessary to categorize a crime as heinous, atrocious, or cruel. *State v. Massey*, 62 N.C. App. 66, 68, 302 S.E.2d 262, 264 (1983), *aff'd and modified on other grounds*, 309 N.C. 625, 308 S.E.2d 332 (1983). Furthermore, psychological or physical pain not normally present in the offense will support a finding of heinous, atrocious, or cruel. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985) (finding aggravating factor where victim was tied to bedpost and had a towel forced down his throat causing him to suffer emotional distress before dying of asphyxiation).

This Court has refused to find that the crime was especially heinous, atrocious, or cruel in the following cases: *State v.*

Hammonds, 61 N.C. App. 615, 301 S.E.2d 457 (1983) (finding no evidence of this factor apart from evidence necessary to prove elements of crime where defendant without provocation shot victim once in the face); *State v. Massey*, 62 N.C. App. 66, 302 S.E.2d 262 (1983) (holding that defendant's action of going to victim's house and knocking down the door at 11:30 at night was insufficient to find that the offense was especially heinous, atrocious, or cruel); and *State v. Medlin*, 62 N.C. App. 251, 302 S.E.2d 483 (1983) (holding that there was insufficient evidence to support a finding that crime was especially heinous, atrocious, or cruel where the victim was shot five times).

In a later case *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983), our Supreme Court criticized the decision in *Medlin*. There the Court noted:

> While the Court of Appeals in Medlin applied the correct standard, i.e. whether the offense was excessively brutal beyond that normally present in any assault with a deadly weapon with intent to kill inflicting serious injury, the court ignored, to defendant's favor, that the victim was shot five times. Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious, or cruel.

Id., at 413 n.1, 306 S.E.2d at 786 n. 1 (emphasis added).

In a similar case, *State v. Vaught*, 318 N.C. 480, 349 S.E.2d 583 (1986), our Supreme Court upheld the trial court's finding that the offense was especially heinous, atrocious, or cruel. In *Vaught*, the defendant approached the victim's back door with a plant in her hand; when the victim opened the door and took the plant, the defendant shot her in the chest causing injury to her heart. *Id.* at 483, 349 S.E.2d at 585. The defendant then shot the victim three additional times which resulted in a severed jugular vein and permanent injury to the victim's arm. The second, third, and fourth shots were not necessary to the conviction of assault with a deadly weapon with intent to kill inflicting serious injury and therefore were sufficient to aggravate the sentence. *Id.* at 485, 349 S.E.2d at 586.

Applying the law to the facts of the present case, it is clear from the record that there was sufficient evidence to support the trial court's finding that the three assaults were heinous, atrocious, or

cruel. Defendant broke open Ms. Carter's door and began shooting. All three victims suffered multiple gunshot wounds. The initial act of firing the weapon and injuring the three victims was sufficient to support a conviction for assault with a deadly weapon with intent to kill inflicting serious injury in each case. The additional shots which resulted in further injury to each victim were not necessary to the conviction.

[2] By his next assignment of error, defendant contends that the court erred in finding as a nonstatutory aggravating factor that the injuries to victims Carter and Davis resulted in permanent disability. Specifically, defendant contends that this factor was based on the same evidence used to support the aggravating factor that the offense was especially heinous, atrocious, or cruel.

N.C. Gen. Stat. § 15A-1340.4(a)(1) provides that "the same item of evidence may not be used to prove more than one factor in aggravation." This issue was raised in a recent decision by our Supreme Court. In *State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994), defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence showed that defendant got into a confrontation with Eason, his cellmate, whereupon defendant struck Eason in the jaw and then slammed his head against the bars. Eason then heard his neck "pop" but the defendant continued to slam Eason's head on the floor. *Id.* at 766, 448 S.E.2d at 823. Eason was permanently paralyzed from the chest down as a result of a broken neck. The Court held that "[t]he evidence relating to the victim's broken neck, aside from evidence relating to the resulting paralysis, was sufficient to establish the element of the crime that the defendant inflicted a 'serious injury' upon the victim." *Id.* at 770, 448 S.E.2d 826. Further, the Court found that the evidence relating to the broken neck was not used in making the finding that the "injuries sustained by the victim were extremely severe and permanent;" instead, that finding rested solely on the victim's paralysis. *Id.* The Court recognized the principle that an appellate court is to presume that the trial court's findings were based on competent evidence. *Id.* *(citing Contracting Co. v. Ports Authority*, 284 N.C. 732, 739, 202 S.E.2d 473, 477 (1974). Thus, without any indication in the record to the contrary, the Court is to presume that the trial court did not improperly aggravate the sentence.

Applying the Court's reasoning to the present case, with regard to Ms. Carter's injuries, there was sufficient evidence to find that Ms.

Carter suffered a permanent disability, aside from the evidence supporting the finding that the offense was especially heinous, atrocious, or cruel. The record shows that Ms. Carter underwent a hysterectomy and will not be able to have children.

The trial court also found as a non-statutory aggravating factor that Ms. Davis' injuries were of a permanent nature not inherent in this type of assault. As a result of defendant's actions, Ms. Davis had to undergo surgery which resulted in one-half of her collarbone being removed. Therefore, in each case the court properly found these two aggravating factors supported by separate evidence.

[3] In his third assignment of error, defendant contends that the trial court erred in finding the statutory 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 in each of the assault charges. In order to impose this aggravating factor, the sentencing judge must consider: (1) whether the weapon in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was knowingly created. *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990). In *State v. Bethea*, 71 N.C. App. 125, 129, 321 S.E.2d 520, 523 (1984), we held:

> The legislature intended this aggravating factor to be limited to those weapons or devices which are indiscriminate in their hazardous power. Automatic weapons such as machine guns or bombs would fit that description. These weapons are normally hazardous to the lives of more than one person. (Emphasis in original.)

Defendant argues that there was insufficient evidence to find that the risk of death was knowingly created. We disagree.

In this case, the evidence shows that defendant indiscriminately fired a semi-automatic weapon in the house, which was occupied by three women and two minor children. After carefully considering the evidence, we find that the presence of three women and two minor children in the house during defendant's shooting rampage created a knowing risk of death to more than one person.

With regard to the second factor—whether the weapon in its normal use is hazardous to the lives of more than one person—the evidence indicates that defendant used a .38 or 9 millimeter automatic handgun. This Court in *State v. Antoine*, 117 N.C. App. 549, 451 S.E.2d

368 (1995) held that a semi-automatic pistol in its normal use is hazardous to the lives of more than one person and is the type of weapon contemplated by N.C. Gen. Stat. § 15A-1340.4(a)(1)(g) (1988). *See also State v. Burton*, 119 N.C. App. 625, 460 S.E.2d 181 (1995). Accordingly, we find that the trial court properly found that the handgun used by defendant was the type of weapon which, in its normal use, is hazardous to the lives of more than one person.

[4] As his fourth assignment of error, defendant argues that the court erred in finding the non-statutory aggravating factor that the monetary damage incurred by victims Carter and Davis was in excess of that normally contemplated in this offense. The State bears the burden of establishing the existence of an aggravating factor. *State v. Jones*, 104 N.C. App. 251, 409 S.E.2d 322 (1991). In *Jones*, this Court held that expenses of $4,700.00 were not sufficient to be considered as a non-statutory aggravating factor. *Id.* at 256, 409 S.E.2d 325. The Court noted that "[w]hile medical expenses, which represent a financial burden on the victim, may be considered as a non-statutory factor in aggravation, . . . we find that they may not be so used unless they are excessive and go beyond that normally incurred from an assault of this type." Id. at 258, 409 S.E.2d 326 (1991).

In this case, Ms. Carter's monetary damage was $135,000.00 and Ms. Davis' monetary damage was $28,325.00. After careful consideration of the evidence, we find that the trial court properly found that the monetary damages incurred by these victims exceeded the amount normally found in this type of assault and therefore properly considered this as an aggravating factor.

By his next assignment of error, defendant argues that the court erred in rendering a judgment which is not consistent with the aggravating factors found by the court as shown in the record. With regard to the breaking and entering charge, the judgment reflects that the court found the following factors in aggravation: (1) that the offense was especially heinous, atrocious, or cruel and (2) that the 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. The record reflects that the court gave the following instructions:

> In each case, Madam Clerk, I want you to find number 6, that the offense was especially heinous, atrocious or cruel in each of the three assaults. This is not the breaking or entering case. I'll need four separate factor sheets, but in each of the three assault cases

find number 6. In each of the three cases find number 7, that the defendant knowingly committed—created a 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.

Defendant asks that this case be remanded to correct a discrepancy between what the trial judge pronounced in open court and the resulting judgment. We interpret the trial judge's instruction to only find No. 6 (especially heinous, atrocious, and cruel) and No. 7 (that defendant knowingly created a risk of death to more than one person) as aggravating factors in each of the assault cases.

Further, the record indicates that the court found as an aggravating factor that Ms. Carter and Ms. Davis suffered permanent disabilities. While the evidence supports a finding that Ms. Davis suffered permanent disability, this aggravating factor is not reflected in Ms. Davis' judgment. Accordingly, this case is remanded for resentencing on the breaking and entering conviction and correction of the judgment in 94 CRS 34302.

In defendant's last assignment of error, he contends that the trial court committed error by finding that the aggravating factors outweighed the mitigating factors. We find this argument to be without merit as to the judgments in 94 CRS 34301, 34302, and 34303.

It is well established that the trial court has discretion to determine the weight it gives to mitigating and aggravating factors. *State v. Green*, 101 N.C. App. 317, 399 S.E.2d 376 (1991). As our Supreme Court has explained:

> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may properly emphasize one factor more than another in a particular case. . . . The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

State v. Ahearn, 59 N.C. App. 44, 50, 295 S.E.2d 621, 625 (1982), *rev'd on other grounds*, 307 N.C. 584, 300 S.E.2d 689 (1983).

Accordingly, the trial court in its discretion properly found that the aggravating factors outweighed the mitigating factors in each of the assault cases.

Affirmed as to the judgments in 94 CRS 34301, 34302, and 34303.

Remanded for resentencing in 94 CRS 34304.

Judges LEWIS and MARTIN, MARK D. concur.

CAROLYN M. WRENN v. JESSE RANDALL BYRD, M.D.

No. COA95-83

(Filed 21 November 1995)

1. Negligence § 75 (NCI4th)— plaintiff's chronic depression—sufficiency of evidence

In an action to recover for negligent infliction of emotional distress, the evidence was sufficient to show that plaintiff suffered from severe emotional distress where a doctor testified that she suffered from moderate depression, and the depression had spanned three years and was thus chronic.

Am Jur 2d, Negligence § 81.

2. Negligence § 19 (NCI4th)— plaintiff's distress reasonably foreseeable—sufficiency of evidence

In an action to recover for negligent infliction of emotional distress, the distress suffered by plaintiff was reasonably foreseeable where plaintiff personally observed the negligent act of defendant in misdiagnosing the malady of plaintiff's husband, defendant was aware that plaintiff and his patient were married, and plaintiff was present with her husband after the negligent act and observed first hand the disabling effects of the negligence; furthermore, there was no merit to defendant's argument that summary judgment must be sustained because there was no evidence that defendant knew that plaintiff was subject to an emotional or mental condition as a result of his negligence.

Am Jur 2d, Negligence §§ 488 et seq.

Appeal by plaintiff from order filed 11 October 1994 in Durham County Superior Court by Judge Henry V. Barnette, Jr. Heard in the Court of Appeals 24 October 1995.

Bentley & Kilzer, P.A., by Charles A. Bentley, Jr. and Susan B. Kilzer, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, John D. Madden, and James Y. Kerr, II, for defendant-appellee.

GREENE, Judge.

Carolyn M. Wrenn (plaintiff) appeals from the trial court's 11 October 1994 order which granted summary judgment for Jesse Randall Byrd, M.D. (defendant) on plaintiff's negligent infliction of emotional distress claim. Defendant cross-assigns error to the trial court's denial of his motion to exclude plaintiff's expert testimony regarding her severe emotional distress.

On 4 September 1989, George T. Wrenn (Wrenn) became ill and was taken by plaintiff, his wife of twenty-four years, to the emergency room at the Maria Parham Hospital (Hospital) in Vance County, North Carolina. Wrenn was seen by defendant, a doctor at the Hospital, who diagnosed him with gastroenteritis and released Wrenn. Approximately fourteen hours later, Wrenn developed black spots on his body and plaintiff again took him to the Hospital. Wrenn saw another doctor on this occasion who stated that his symptoms were of septic shock and after administering treatment had Wrenn transported to Duke, where he had most of both feet and one finger amputated because of the progressive stage of the infection.

Plaintiff and Wrenn sued the Hospital, its owner and defendant. At the time of this appeal, all claims, except plaintiff's negligent infliction of emotional distress claim against defendant, which is now before us, have been voluntarily dismissed without prejudice. In her claim for relief, plaintiff alleges that defendant was negligent in his treatment of Wrenn, which caused plaintiff to suffer "great emotional distress, mental anguish and anxiety" which was foreseeable by defendant.

Defendant moved for summary judgment on plaintiff's negligent infliction of emotional distress claim on 24 September 1994 and argued that the discovery reveals that plaintiff cannot present evi-

dence that she suffered severe emotional distress or that such distress was foreseeable by defendant. The evidence at the summary judgment hearing, viewed in the light most favorable to plaintiff, *see Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 101 N.C. App. 1, 4, 398 S.E.2d 889, 890 (1990) (on summary judgment must view evidence in light most favorable to plaintiff), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991), reveals other than leaving Wrenn's side to call her pastor and to greet him when he arrived, plaintiff was with Wrenn the entire time he was in the emergency room, being treated by defendant. Defendant asked plaintiff questions about Wrenn and gave her instructions regarding his care. Defendant knew that plaintiff was Wrenn's wife. After leaving the emergency room and following defendant's advice, plaintiff watched Wrenn's condition deteriorate, over the next fourteen hours, to the point that she had to take him back to the Hospital. Upon their second visit to the emergency room, Wrenn had to lie in the back of the car and had to be taken into the Hospital in a wheelchair. After Wrenn was diagnosed in the Hospital, he was flown to Duke University Hospital (Duke) via Life Flight, and plaintiff was driven there by her pastor and his wife. Wrenn was a patient at Duke for three weeks on one occasion and after about one week at home, again a patient at Duke for about six weeks. While there he "underwent extensive treatment, including surgical procedures of amputations of portions of both feet and one of his fingers." During Wrenn's hospitalization at Duke, plaintiff would drive to work in another town every day and return to Duke to stay with Wrenn at night. On her trips to and from work, plaintiff "cr[ied] a lot." During his recuperation from his amputations, plaintiff bathed Wrenn, brought him the bedpan, helped him into a wheelchair and wheeled him around and had people come and sit with him while she was at work.

Because Wrenn has been unable to do things at home since his recuperation, plaintiff has also taken over those responsibilities. Wrenn cannot garden and often does not eat in the kitchen, because it is difficult for Wrenn to walk on a hard surface. It is undisputed that Wrenn has suffered "skin breakdowns" at the points of amputation and that he has been unable to work in the business that he maintained prior to the amputations. Based upon a 1992 evaluation of plaintiff, Dr. Anthony D. Sciara (Sciara) opined that plaintiff is "somewhat depressed at the changes that [have] happened in their life. . . . It's not a severe depression, but it's moderate." Plaintiff also testified that the entire ordeal has been a nightmare and that she has cried

many times since the 4 September 1989 incident, because of the ordeal with which Wrenn has been presented.

Prior to the summary judgment motion, defendant made a motion to compel Sciara to provide certain financial information, because Sciara refused to provide the information when requested by defendant to do so during Sciara's deposition. The trial court granted defendant's motion to compel and provided that "Sciara shall not be permitted to testify at the trial of this matter," unless the information is provided to "the judge presiding at the trial of this action." Because defendant had not received this information prior to the summary judgment hearing, he requested that the court exclude Sciara's deposition testimony at the summary judgment hearing. The trial court denied defendant's motion.

Based upon the evidence, including Sciara's testimony, the trial court determined that there was no evidence in the record that plaintiff had suffered severe emotional distress and thus plaintiff could not establish a material element of her claim and granted defendant's summary judgment motion.

The issues are (I) whether there is substantial evidence that (A) plaintiff suffers from "severe emotional distress," and if so, (B) that it was foreseeable by defendant that the plaintiff would experience this distress as a result of his negligent conduct; and (II) whether the trial court correctly denied defendant's motion to exclude Dr. Sciara's testimony.

I

In North Carolina a person who sustains severe emotional distress arising from concern for another person may recover damages from a defendant if "they can prove they 'suffered such severe emotional distress as a proximate and foreseeable result of the defendant's negligence.' " *Hickman v. McKoin*, 337 N.C. 460, 462, 446 S.E.2d 80, 82 (1994) (*quoting Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 321 (1993)). "[N]either a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an element of the tort [known as] negligent infliction of emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). Severe emotional distress is defined to mean "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and

disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.* "[M]ere temporary fright, disappointment or regret" does not constitute severe emotional distress. *Id.* Although the question of foreseeability is generally for the jury, the trial judge is required to dismiss the claim as a matter of law upon a determination that the injury is too remote. *Id.* at 305, 395 S.E.2d at 98 (foreseeability must be determined on a "case-by-case basis by the trial court, and where appropriate, by a jury"); *Sorrells v. M.Y.B Hospitality Ventures of Asheville*, 108 N.C. App 668, 671-72, 424 S.E.2d 676, 679, *rev'd on other grounds*, 334 N.C. 669, 435 S.E.2d 320 (1993). Factors to be considered by the judge or the jury in making the foreseeability determination "include, *but are not limited to*: (1) 'the plaintiff's proximity to the negligent act' causing injury to the other person, (2) 'the relationship between the plaintiff and the other person,' and (3) 'whether the plaintiff personally observed the negligent act.' " *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) (emphasis in original); *see Sorrells*, 108 N.C. App. at 671-72, 424 S.E.2d at 679 (listing other factors appropriately considered by the judge).

A

[1] The defendant first contends that the evidence does not show that plaintiff has sustained severe emotional distress. We disagree. Sciara testified that plaintiff suffers from "moderate depression." Although he does not state that the depression is chronic, chronic depression by definition is depression "[o]f long duration." *Taber's Cyclopedic Medical Dictionary* 355 (16th ed. 1989). Therefore, the evidence can support a finding that the depression occurred as a consequence of the injuries to her husband three years prior to her diagnosis and is chronic because it has extended over the entire three years. *See Dettor v. BHI Property Co.*, 324 N.C. 518, 522, 379 S.E.2d 851, 853 (1989) (summary judgment inappropriate where reasonable minds might differ as to the import of evidence); *see also Sloan v. Miller Bldg. Corp.*, 119 N.C. App. 162, 165-66, 458 S.E.2d 30, 32 (summary judgment inappropriate where reasonable jurors could differ), *disc. rev. denied*, 341 N.C. App. 652, 462 S.E.2d 517 (1995). Because chronic depression is specifically enumerated as a mental condition which equates to severe emotional distress, the evidence cannot support entry of summary judgment for the defendant on this basis. Furthermore, because the evidence supports a finding that the depression is chronic, it is not material that the depression is classified as "moderate." There is no requirement that chronic depression

be severe in order to qualify as severe emotional distress under the *Ruark* definition.

In so holding we reject the defendant's argument that even if we determine that the evidence could support a finding of chronic depression, that summary judgment was proper because there is no evidence that the depression was disabling. Proof that a person suffers from neurosis, psychosis, chronic depression or phobia is sufficient to show severe emotional distress, without an additional showing that the disorders are also disabling. It is incorrect to read the second part of the severe emotional distress definition as qualifying the first part. *Cf. Davis v. Granite Corp.*, 259 N.C. 672, 675, 131 S.E.2d 335, 337 (1963) (disjunctive term "or" creates two separate clauses).

B

[2] Defendant next argues that summary judgment can be supported on the basis that the distress suffered by plaintiff was not reasonably foreseeable. We disagree.

The plaintiff, who is the wife of Wrenn, personally observed the negligent act of the defendant[1] and did so in the very room where the negligent diagnosis occurred. The defendant was aware that the plaintiff and Wrenn were married. Additionally, the plaintiff was present with Wrenn after the negligent act and observed first hand the disabling effects of the negligence. This evidence requires that the issue of foreseeability be submitted to the jury. *See Willis v. Duke Power Co.*, 42 N.C. App 582, 591, 257 S.E.2d 471, 477 (1979) (where reasonable persons could differ summary judgment improper).

In so holding we reject the defendant's argument that summary judgment must be sustained because there is no evidence that the defendant knew that the plaintiff was subject to an emotional or mental condition as a result of his negligence. We are aware that our Supreme Court has used language which appears to suggest that absent evidence of the defendant's knowledge of the plaintiff's emotional or mental condition, the plaintiff cannot recover for negligent infliction of emotional distress. *Gardner v. Gardner*, 334 N.C. 662, 667, 435 S.E.2d 324, 328 (1993); *Butz v. Holder*, 113 N.C. App. 156, 159, 437 S.E.2d 672, 674 (1993) (it "appears" that the *Gardner* Court requires forecast of evidence that defendant knew that plaintiff was

1. For the purposes of this appeal, the defendant does not dispute his negligence.

subject to emotional distress). To construe *Gardner* in the manner contended by the defendant would effectively abolish the tort of negligent infliction of emotional distress, as all claims against strangers would be precluded. The only claims permitted would be those against a defendant who knows the plaintiff. A more reasonable construction can be placed on the *Gardner* opinion if read in the context of the general rule of law that provides

> if the defendant's act would not have resulted in any injury to an ordinary person, he is not liable for its harmful consequences to one of peculiar susceptibility, except insofar as he was on notice of the existence of such susceptibility, but if his misconduct amounted to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by plaintiff notwithstanding the fact that these damages were unusually extensive because of peculiar susceptibility.

Lockwood v. McCaskill, 262 N.C. 663, 670, 138 S.E.2d 541, 546 (1964). In this context, proof of knowledge by the defendant of the plaintiff's peculiar susceptibility to emotional distress is required *only* if the conduct of the defendant would not have caused injury to an ordinary person. This construction of *Gardner* is consistent with other opinions from the Supreme Court addressing this tort, which have not included, as an element of foreseeability in every case, the defendant's knowledge of plaintiff's peculiar susceptibility to emotional distress. *Hickman*, 337 N.C. 460, 446 S.E.2d 80; *Ruark Obstetrics*, 327 N.C. at 305-06, 395 S.E.2d at 98; *Sorrells*, 334 N.C. at 672-73, 435 S.E.2d at 322; *Andersen v. Baccus*, 335 N.C. 526, 532, 439 S.E.2d 136, 139 (1994) (not forseeable because "plaintiff was not in close proximity to" and did not observe negligent act).

In this case, the defendant makes no argument that the injuries allegedly sustained by the plaintiff would not have been sustained by a person of ordinary susceptibilities or that the plaintiff was a person who was peculiarly susceptible to emotional distress. Indeed the record would not support such arguments. Thus, there is no requirement that the plaintiff, in this summary judgment proceeding, show that defendant had knowledge of her susceptibility to emotional distress.

II

Defendant alternatively argues that the trial court erred by not excluding Sciara's testimony from its determination of summary judg-

ment, because the plaintiff failed to comply with the trial court's order to produce certain documents relating to Sciara's testimony. It follows, the defendant contends, that without Sciara's testimony the plaintiff cannot prove her case with regard to severe emotional distress. The trial court's denial to issue sanctions, however, is within its sound discretion, and defendant has not argued nor is there evidence that the trial court abused its discretion in this case. *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992), *aff'd*, 334 N.C. 303, 432 S.E.2d 339 (1993). Moreover, the specific sanction provided in the discovery order was that if plaintiff does not comply with the order "Sciara shall not be permitted to testify at the trial of this matter." The deposition testimony used in the summary judgment determination is not the same as "testif[ing] at . . . trial."

Reversed.

Judges MARTIN, Mark D., and McGEE concur.

RICHARD ZANONE, PLAINTIFF-APPELLANT v. RJR NABISCO, INC., DEFENDANT-APPELLEE

No. COA95-65

(Filed 21 November 1995)

1. Accord and Satisfaction § 8 (NCI4th)— objection to amount of check—check cashed—sufficiency of evidence of accord and satisfaction

Cashing a check known to be offered as an accord and satisfaction establishes, as a matter of law, that the payee intended to accept the offer even though he previously voiced reservations about the amount of the settlement; in this case, defendant's letter clearly established that it intended the check to be full and final payment of the disputed debt, and, although plaintiff registered his objection to defendant's proffered amount, he had no further communication with defendant concerning the disputed debt prior to cashing defendant's check.

Am Jur 2d, Accord and Satisfaction §§ 18-23, 26, 27.

Modern status of rule that acceptance of check purporting to be final settlement of disputed amount constitutes accord and satisfaction. 42 ALR4th 12.

2. Fraud, Deceit, and Misrepresentation § 38 (NCI4th)— representations by former employer—insufficiency of evidence of fraud

The evidence was insufficient to support plaintiff's fraud claim arising out of defendant employer's moving and relocation policy designed to ease financial burdens on employees affected by the move of corporate headquarters where plaintiff's own admissions indicated that he had numerous conversations with defendant about the policy, believed that defendant's employee made every effort to respond to his questions, and thought that any confusion was probably a result of his failure to ask the right questions.

Am Jur 2d, Fraud and Deceit §§ 437 et seq.

Appeal by plaintiff from order entered 9 February 1994 by Judge E. Lynn Johnson in Wake County Superior Court. Heard in the Court of Appeals 20 October 1995.

Wood & Francis, PLLC, by Brent E. Wood, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, PLLC, by W. Andrew Copenhaver and Timothy A. Thelen, for defendant-appellee.

MARTIN, MARK D., Judge.

Plaintiff Richard Zanone (Zanone) appeals from entry of summary judgment in favor of defendant RJR Nabisco (RJR) on his breach of contract and fraudulent misrepresentation claims. We affirm.

In 1987, Zanone, then an RJR employee, was relocated by RJR to Atlanta where he and his wife purchased a home. In 1989, as a result of the RJR buy-out, the corporate headquarters was moved from Atlanta and several employees, including Zanone, were released. In an effort to ease the financial burden on these released employees, RJR initiated the Atlanta-Based Special Moving & Relocation Policy (ABSMR), an "opt-in" policy. ABSMR was created to reimburse eligible employees for losses and expenses incurred in locating other jobs, including relocation expenses and losses incurred in selling their homes. After meeting with RJR management to discuss ABSMR, Zanone "opted-in" to the policy.

On 7 September 1991 Zanone sold his home. Zanone's request for certain benefits under ABSMR was denied because Karl F. Yena (Yena), Director of Organizational Development for RJR and overseer of ABSMR, determined the request came after the policy deadline. Zanone appealed the denial by letter to RJR's New York Headquarters dated 14 October 1991. The New York office reviewed Zanone's request and agreed to provide compensation for finding suitable housing, shipping Zanone's household goods, and moving Zanone's family to Raleigh. The primary reason for RJR's reconsideration was the impending surgery on Zanone's son.

Under ABSMR Zanone initially received $15,040.79 in benefits. Zanone objected to the $1960.83 amount RJR assigned as his recoverable "loss-on-sale." RJR reconsidered its previous valuation and, on the advice of an independent appraiser, paid Zanone another $2500 for loss on the sale of his home. Despite accepting the $2500 check, Zanone continued to complain and wrote a letter to RJR requesting $15,778 as "final settlement."

On 22 July 1992 Yena notified Zanone by letter that RJR considered the $5000 payment to follow "full and final payment of [his ABSMR] benefits." Zanone responded by letter dated 12 August 1989 stating, "As of today I have not, as yet, received your payment . . . I assume this is an accounting delay. . . . I regret, as much as I would like this situation to be concluded, that I cannot accept your offer as final. I wish to review my position on a number of issues." RJR subsequently sent Zanone a check for $5000 ($5000 check) on 20 August 1992 which Zanone deposited on 31 August 1992. The check, on its face, did not indicate RJR considered it "full and final" payment. Since 20 August 1992 RJR has refused to pay Zanone any further benefits under ABSMR.

On 10 November 1992 Zanone filed his complaint seeking reimbursement for the difference between the amount he claimed he lost on the sale of his house and the benefits already provided by RJR under ABSMR. Zanone seeks recovery alleging, in the alternative, RJR breached the terms of ABSMR and RJR fraudulently misrepresented the terms of ABSMR. After discovery, the trial court granted RJR's motion for summary judgment on both of Zanone's claims.

We address two issues on appeal—whether summary judgment was proper as to Zanone's (1) breach of contract claim; and (2) fraud claim.

I.

To prevail in summary judgment, the moving party must "positively and clearly" show there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. *James v. Clark*, 118 N.C. App. 178, 180, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). Further, all material filed in support of or opposition to the summary judgment motion must be viewed in the light most favorable to the nonmoving party. *Id.* at 181, 454 S.E.2d at 828.

"[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (*quoting* 3 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 1234 (Wright Ed., 1958)). An issue is material if the facts alleged "affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." *Id.*

The moving party can establish it is entitled to judgment as a matter of law by: " '(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.' " *James*, 118 N.C. App. at 181, 454 S.E.2d at 828 (*quoting Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *rev'd. on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986)).

A.

[1] Zanone first contends the trial court erred in granting summary judgment to RJR on his breach of contract claim because material facts were still at issue regarding the existence of an accord and satisfaction.

Although the existence of accord and satisfaction is generally a question of fact, "where the only reasonable inference is existence or non-existence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record." *Construction Co. v. Coan*, 30 N.C. App. 731, 737, 228 S.E.2d 497, 501, *disc. review denied*, 291 N.C. 323, 230 S.E.2d 676 (1976). The facts surrounding the delivery of the $5000 check in the present action are not contested, only their legal significance remains in dispute. Thus, we believe the issue of whether an accord

and satisfaction existed was ripe for summary judgment. *See Blades v. City of Raleigh*, 280 N.C. 531, 545, 187 S.E.2d 35, 43 (1972).

It is well recognized

> "An 'accord' is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considered himself entitled to; and a 'satisfaction' is the execution or performance, of such agreement."

Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 565, 302 S.E.2d 893, 894, *cert. denied*, 309 N.C. 823, 310 S.E.2d 353 (1983) (*quoting Allgood v. Trust Co.*, 242 N.C. 506, 515, 88 S.E.2d 825, 830-831 (1955)).

> The word "agreement" implies the parties are of one mind—all have a common understanding of the rights and obligations of the others—there has been a meeting of the minds. . . . Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood.

Prentzas v. Prentzas, 260 N.C. 101, 103-104, 131 S.E.2d 678, 680-681 (1963) (citations omitted). In other words, "[e]stablishing an accord and satisfaction . . . as a matter of law requires evidence that permits no reasonable inference to the contrary and that shows the 'unequivocal' intent of one party to make and the other party to accept a lesser payment in satisfaction . . . of a larger claim." *Moore v. Frazier*, 63 N.C. App. 476, 478-479, 305 S.E.2d 562, 564 (1983).

In the present case, RJR, by letter dated 22 July 1992, offered Zanone the $5000 check as "full and final payment of [Zanone's] severance relocation associated benefits." We believe this letter clearly established RJR's intent the $5000 check be treated as an accord. We also note RJR asserted at trial, and now on appeal, that it intended the $5000 check as an accord and satisfaction. Thus, Zanone's breach of contract claim will be barred if RJR can establish Zanone intended to accept the $5000 check in satisfaction of the debt. *See Moore*, 63 N.C. App. at 478-479, 305 S.E.2d at 564; *Coan*, 30 N.C. App. at 736, 228 S.E.2d at 501.

Zanone contends his response to RJR's offer, by letter dated 12 August 1992, establishes he did not accept the $5000 check as satis-

faction of the disputed debt. Zanone's letter stated, "I regret, as much as I would like this situation to be concluded, that I cannot accept your offer as final." Zanone's letter continued by explaining why he believed $5000 was insufficient and denoted $15,778 as an acceptable figure. Without further communication between the parties, RJR mailed the $5000 check on 20 August 1992 and Zanone cashed it on 31 August 1992.

Although we agree Zanone's letter conveyed his displeasure with the amount RJR offered, the law clearly states, "[t]he cashing of a check tendered in full payment of a disputed claim establishes an accord and satisfaction as a matter of law. . . . [T]he claim is extinguished, regardless of any disclaimers which may be communicated by the payee." *Sharpe*, 62 N.C. App. at 566, 302 S.E.2d at 894 (citations omitted). Accordingly, we believe cashing a check known to be offered as an accord and satisfaction establishes, as a matter of law, the payee intended to accept the offer even though he previously voiced reservations about the amount of the settlement. *See Barber v. White*, 46 N.C. App. 110, 112, 264 S.E.2d 385, 386 (1980); *Moore v. Greene*, 237 N.C. 614, 616-617, 75 S.E.2d 649, 650 (1953).

In *Barber v. White*, plaintiff, a house painter, presented the defendant with a final bill of $2359.19. Defendant contested the bill as too high and offered plaintiff a check for $1813.19 with the words "painting in full" written on the check. Plaintiff accepted and cashed the check with the caveat he was doing so only because he was "in a rather tight position" and defendant still owed him $615.19. This Court concluded, notwithstanding the reservations plaintiff expressed to defendant, that cashing of the check established an accord and satisfaction as a matter of law. *Barber*, 46 N.C. App. at 112-113, 264 S.E.2d at 386.

Likewise, in *Moore v. Greene*, defendant fired plaintiff and notified him by mail that his contractual share of the net profits was $1179.39. In the same letter, defendant enclosed a check with the words "For Settlement under terms of employment contract 7-1-47 to 7-1-48" written on its face. Plaintiff wrote defendant objecting to certain deductions totalling $769.45. More specifically, plaintiff's letter stated, "If you will pay me [an additional $256.48] within a reasonable time, I will accept it in full payment and close the issue." Plaintiff had no further communications with defendant and, on 10 November 1948, cashed the initial $1179.39 check. Our Supreme Court held defendant was entitled to a judgment of nonsuit reasoning, "[t]he

plaintiff had a right to decline the proffered settlement and sue for the full amount he claimed was due. . . . We think he made his election when he cashed the check and may not now be allowed to change his position." *Moore*, 237 N.C. at 616-617, 75 S.E.2d at 650.

Zanone, like the payees in *Barber* and *Moore*, expressed his reservations about the amount of the settlement; claimed RJR still owed him $15,778; and cashed the check without further communication with RJR. Thus, under *Barber* and *Moore*, we conclude that Zanone, by cashing the $5000 check, demonstrated his intent to accept RJR's offer of accord and satisfaction.

In an effort to distinguish the present case from *Barber* and *Moore*, Zanone asserts RJR's $5000 check was neither marked as "payment in full" nor accompanied by a letter explaining it was "payment in full."

It is well settled in North Carolina, however, that the offer and acceptance of an accord can be established by the facts and circumstances surrounding the receipt of the check. *Phillips v. Construction Co.*, 261 N.C. 767, 771-772, 136 S.E.2d 48, 51-52 (1964). As stated by our Supreme Court:

> "when, in case of a disputed account between parties, a check is given and received clearly purporting to be [payment] in full or when such check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full [payment] of all indebtedness . . . the courts will allow to such a payment the effect contended for."

Id. (emphasis added) (*quoting Hardware Company v. Farmers Federation*, 195 N.C. 702, 143 S.E.2d 471 (1928)).

In the present case, we believe RJR's letter dated 22 July clearly establishes RJR intended the $5000 check, mailed 20 August, to be "full and final" payment of the disputed debt. Although Zanone registered his objection to the $5000 amount by letter dated 12 August, he had no further communication with RJR concerning the disputed debt prior to cashing the $5000 check. Based on these facts and circumstances, we conclude Zanone received the $5000 check clearly understanding RJR was offering the $5000 check as "full and final" payment of the disputed debt. Therefore, under *Phillips v. Construction Co.*, acceptance of RJR's offer of accord and satisfaction was established, as a matter of law, when Zanone cashed the $5000 check.

Accordingly, we conclude accord and satisfaction existed as a matter of law and bars any claims based on the underlying contract. We therefore affirm the trial court's grant of summary judgment for defendant on plaintiff's breach of contract claim.

B.

[2] We next turn to Zanone's contention the trial court erred in granting summary judgment on his fraud claim.

To establish a viable fraudulent misrepresentation claim, plaintiff must prove: "(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).

After careful review of the present record, we find Zanone, in his own deposition, stated: (1) he was aware the policy limited its reimbursement to "approved capital expenditures," yet never sought RJR's opinion on the recoverability of capital expenditures undertaken after he "opted-in" to ABSMR; (2) he had between ten and twenty conversations with Yena concerning eligibility under ABSMR and still claims RJR failed to provide necessary information about eligibility; (3) he believed Yena made every effort to respond to his questions and any confusion was probably a result of his failure to ask the right questions; and (4) he did not mean to imply Yena gave misleading or incorrect information because any confusion was probably a case of his failing to ask the right questions. We also note this is not an exhaustive list of the statements contained within Zanone's own deposition which undercut his claim of fraudulent misrepresentation.

Thus, we believe the record, especially in light of Zanone's own admissions, does not support Zanone's fraud claim and, accordingly, affirm the trial court's grant of summary judgment in favor of RJR.

Affirmed.

Judges LEWIS and WALKER concur.

BILLY TUCKER, FATHER, ANTONIO D'JUAN TUCKER, MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, RHONDA PARKER, DONALD RAY TUCKER, DECEASED, EMPLOYEE, PLAINTIFFS v. CITY OF CLINTON, SELF-INSURED EMPLOYER ADMINISTERED BY GAB BUSINESS SERVICES, INC., AND CARTERET COUNTY, SELF-INSURED EMPLOYER ADMINISTERED BY SEDGWICK JAMES OF THE CAROLINAS, DEFENDANTS

No. COA94-798

(Filed 21 November 1995)

Workers' Compensation § 274 (NCI4th)— acknowledgment of paternity by deceased father—commission's order based on clerk's order—clerk's order not reliable

The evidence was insufficient to support a determination that the deceased putative father acknowledged paternity of plaintiff's child in a legally cognizable fashion, thus entitling the child to survivor's benefits under the Workers' Compensation Act, where the Industrial Commission's order was based on the Sampson County clerk's order finding paternity, but the clerk's order was so lacking in the traditional indicia of trustworthiness as to be incompetent as evidence sufficient to establish acknowledgment under the standards enumerated in *Carpenter v. Hawley*, 53 N.C. App. 715, since the hearing before the clerk did not take place in an adversarial setting, the legitimation petition was filed by the putative grandfather who lacked standing to attempt the legitimation, the N.C. legitimation and paternity statutes are inoperative after the death of the father, and an action to establish acknowledgment of a child under *Carpenter*, for workers' compensation purposes, is limited to the Industrial Commission.

Am Jur 2d, Workers' Compensation §§ 209, 210.

What amounts to recognition within statutes affecting the status or rights of illegitimates. 33 ALR2d 705.

Supreme Court's view as to the status and the rights of illegitimate children. 41 L. Ed. 2d 1228.

Appeal by defendant from the opinion and award of the North Carolina Industrial Commission filed 11 April 1994. Heard in the Court of Appeals 25 September 1995.

Benjamin R. Warrick for the plaintiff appellee.

Brooks, Stevens & Pope, by Daniel C. Pope, Jr., and Michael C. Sigmon, for defendant appellant.

Teague, Campbell, Dennis & Gorham, by George W. Dennis, III, and Bryan T. Simpson, for Carteret County, defendant appellee.

SMITH, Judge.

Plaintiff Rhonda A. Parker alleges that her child Antonio D'Juan Parker was fathered by the late Donald Tucker. Donald Tucker was a police officer killed in the line of duty. Based on her claim of paternity, Rhonda A. Parker seeks workers' compensation benefits for her child, claiming the child as a dependent survivor of the deceased Mr. Tucker. (Because Ms. Parker is the primary actor here, she is referred to as plaintiff.) The contested issue is whether Mr. Tucker acknowledged paternity of the child in a legally cognizable fashion, thus entitling the child to survivor's benefits under the Workers' Compensation Act. We find the evidence *sub judice* insufficient to support a paternity determination; thus, we reverse and remand for rehearing.

Donald Tucker was a police officer employed by the City of Clinton. In August 1991, Donald Tucker was "loaned" to Carteret County to assist in an undercover narcotics investigation. While working in this undercover capacity for Carteret County, he was fatally wounded.

Prior to his death, Mr. Tucker had an ongoing, intimate relationship with plaintiff. In December 1990, Mr. Tucker gave plaintiff an engagement ring. The next month, plaintiff informed Mr. Tucker that she was pregnant. Mr. Tucker did not want plaintiff to have the child and requested that plaintiff have an abortion. Plaintiff refused, and this turn of events led to the termination of the couple's romantic association.

After the death of Donald Tucker, the deceased's father Billy Tucker (also personal administrator of the Donald Tucker estate), initiated a special proceeding before the Clerk of Court of Sampson County to establish the legitimacy of the child. Billy Tucker's acquiescence to the proceeding was premised upon a *quid pro quo*: He would support plaintiff's claim for workers' compensation survivor benefits for the child, if plaintiff would not make a claim against Donald Tucker's estate on the child's behalf.

Based on this agreement, Billy Tucker and plaintiff requested scientific testing to establish the paternity of Antonio D'Juan Tucker. A tissue sample was taken from the cadaver of Donald Tucker. Blood and tissue samples were drawn from plaintiff and her child. The samples were then taken to a genetics laboratory, where tests were run comparing the biological makeup of the three involved parties. It is unclear from the record exactly what tests were administered by the laboratory. At various times in the record and briefs, the tests are called blood tests, or "HLA"; at others, the tests are described as genetic, or "DNA."

With the biological tests in hand, Billy Tucker petitioned the Sampson County Clerk of Court for an order establishing Antonio D'Juan Tucker as Donald Tucker's son. During the special proceeding, the clerk took evidence on the nature of Donald Tucker's and plaintiff's relationship. The clerk also heard testimony concerning the biological tests conducted, comparing the tissue and blood of the decedent with Antonio D'Juan Tucker and plaintiff. Ultimately, the clerk concluded Antonio D'Juan Tucker to be the biological son of Donald Tucker, and issued an Order Legitimating Child.

Three and a half months later, plaintiff filed a Notice of Accident and Claim with the Industrial Commission (Commission), to obtain benefits based upon the fatal injury to Donald Tucker. The Commission heard testimony tending to show the relationship between plaintiff and Donald Tucker. The Commission determined that Donald Tucker had conditionally acknowledged the child prior to his death, qualified upon receipt of the blood test results.

The blood test results were offered into evidence by the plaintiff, by way of the clerk's Order Legitimating Child (clerk's Order). Admission of the clerk's Order was objected to by defendant, on grounds of hearsay and lack of trustworthiness. Nevertheless, the Commission admitted the Order into evidence. The Commission concluded that Donald Tucker's condition for acknowledgment had been fulfilled by the blood tests referred to in the Sampson County Clerk's Order.

The clerk's Order included findings that the biological tests had occurred, and paternity was established to a 99.83% certainty. Based on the information before it, the Commission found that Donald Tucker had acknowledged Antonio D'Juan Tucker through his actions, and concluded Donald Tucker was the biological father. In its Award, the Commission ordered defendant to pay plaintiff benefits,

as support for the child Antonio D'Juan Tucker, until the child reaches age eighteen.

In the instant case, defendant argues the Commission committed reversible error by concluding that Antonio D'Juan Tucker was the acknowledged son of Donald Tucker. Particularly, defendant assigns as error the Commission's admission of the Sampson County Clerk's Order into evidence, the blood sample or tissue sample findings arising therefrom, and the Commission's ultimate conclusion that Donald Tucker had acknowledged paternity of Antonio D'Juan Tucker. We agree.

The crucial question in the instant case is whether Donald Tucker left surviving him a "child" as defined in the Workers' Compensation Act. The Act defines a child as including: "a posthumous child . . . or acknowledged illegitimate child dependent upon the deceased . . . ." N.C. Gen. Stat. § 97-2(12) (1991 and Cum. Supp. 1994). A "child" is conclusively presumed to be wholly dependent for support upon a deceased employee. N.C. Gen. Stat. § 97-39 (1991).

Thus, to qualify for survivor's benefits under the Act, an illegitimate child must be acknowledged in sufficient fashion by the father. There are several methods by which a child may be acknowledged or legitimated under North Carolina law. One such way is through statutory procedure, as enumerated by N.C. Gen. Stat. §§ 49-10 through 49-14 (1984 and Cum. Supp. 1994). See *Helms v. Young-Woodard*, 104 N.C. App. 746, 749-50, 411 S.E.2d 184, 185 (1991), *disc. review denied*, 331 N.C. 117, 414 S.E.2d 756 (1992). Another way is through actions or conduct of a party, which rise to the level of parental cognizance. This method is limited to matters involving workers' compensation. *Carpenter v. Hawley*, 53 N.C. App. 715, 718, 281 S.E.2d 783, 786-87 (1981).

Plaintiff has attempted to prove acknowledgment through the method espoused by this Court in *Carpenter*. Whether the evidence before the Commission was sufficient to meet the *Carpenter* standard is a mixed question of law and fact. In such a situation, the Commission's designations of "findings" and "conclusions" are not binding on this Court, and our review extends to whether the facts found by the Commission are sufficient to support its conclusion that the *Carpenter* acknowledgment standard has been met. *See Brown v. Charlotte-Mecklenburg Board of Education*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967).

The *Carpenter* standard is intentionally malleable, so as to encompass realities inherent in the acknowledgment of an illegitimate child. *Carpenter*, 53 N.C. App. at 720-21, 281 S.E.2d at 785, 786-87. However malleable the standard may be, the Commission must apply only competent evidence in making an acknowledgment determination. We recognize the Commission is not required to strictly apply the rules of evidence applicable to a court of law. *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 97, 360 S.E.2d 109, 110 (1987). But, in determining on review whether any "competent" evidence supports the Commission's findings, this Court must apply "those courtroom evidentiary principles which embody the legal concept of 'competence.' " *Id.*

The Commission's conclusions vis-a-vis Donald Tucker's acknowledgment of Antonio D'Juan Tucker are not based on competent evidence. They are based largely on the factual assertions found in the Sampson County Clerk's Order Legitimating Child. So, the integrity of the Commission's conclusions are necessarily a function of the competence of the fact-finding employed by the Sampson County Clerk. The clerk's Order, replete with double hearsay, was apparently admitted by the Commission under the public records exception to the rules of evidence. N.C. Gen. Stat. § 8C-1, Rule 803(8) (1992). However, the overriding principle governing admission of records, such as the clerk's Order, is whether "the sources of information or other circumstances indicate lack of trustworthiness." *Id.*; 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 229 (4th ed. 1993); *Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 446, 386 S.E.2d 76, 77 (1989), *aff'd*, 327 N.C. 464, 396 S.E.2d 323 (1990).

We find the clerk's Order to be so lacking in the traditional indicia of trustworthiness as to be incompetent as evidence sufficient to establish acknowledgment under the standards enumerated in *Carpenter*. Because the clerk's Order is the primary domino in the Commission's factual findings, the Commission's conclusions of law are unsound and cannot stand.

The Sampson County Clerk's Order gives us substantial pause for many reasons. Billy Tucker admits the hearing before the clerk did not take place in an adversarial setting. Prior to the hearing, both Billy Tucker and plaintiff struck what amounts to a "Mary Carter Agreement." *See* Black's Law Dictionary 974 (6th ed. 1990). Billy Tucker agreed to support plaintiff's claim of paternity, if plaintiff would refrain from asserting a claim against the decedent Donald

Tucker's estate. Billy Tucker gained from this agreement, as he was administrator of Donald Tucker's estate, and had an interest in protecting those assets. By reaching an agreement with plaintiff, Billy Tucker ensured that responsibility for supporting the child would be shifted away from Donald Tucker's estate, into the hands of a third party, *viz.*, the City of Clinton. Plaintiff gained from the agreement, as the Order Legitimating Child could be used to help establish the acknowledgment necessary to procure workers' compensation benefits.

Put simply, both parties had the motive and opportunity to present the Sampson County Clerk with testimony and evidence tailored to their objectives. The level of scrutiny applied to the evidence before the clerk was undoubtedly affected by the nonadversarial nature of the proceeding. Neither party had a motive to contradict the other. Since no transcript or record from the hearing before the clerk exists in the record on this appeal, we cannot adjudge the quality or integrity of that proceeding.

Another factor casting doubt on the veracity of the facts contained in the clerk's Order is its propriety as a legitimation under law. The clerk's Order draws its authority from the legitimation statute, N.C. Gen. Stat. § 49-10 (1984). However, this statute unambiguously limits who may file a legitimation petition to the "putative father of any child born out of wedlock." *Id.* The petitioner of the Order at hand, Billy Tucker, was not the putative father, but the putative grandfather of Antonio D'Juan Tucker. Thus, the putative grandfather lacked standing to attempt the legitimation.

Secondly, both the North Carolina legitimation and paternity statutes are inoperative after the death of the father. The cause of action delineated in the legitimation statute (§ 49-10) is limited to the putative father. *Id.* Civil actions to establish paternity, per the paternity statute, are expressly barred after the death of the putative father. N.C. Gen. Stat. § 49-14 (1984). Our precedent supports this view, as we have held that "[a]ll of the legitimation routes authorized by the North Carolina statutes require the proceeding to be completed prior to the putative father's death." *Helms*, 104 N.C. App. at 750, 411 S.E.2d 184, 186 (1991).

Finally, an action to establish acknowledgment of a child under *Carpenter*, for workers' compensation purposes, is limited to the Industrial Commission. *Carpenter*, 53 N.C. App. at 718, 281 S.E.2d at 786-87. The Commission has exclusive jurisdiction over matters relative to rights and remedies afforded by the Workers' Compensation

Act. *Id.* at 718, 281 S.E.2d at 785. *Ergo*, the action of legitimation before the clerk could not have been under the aegis of *Carpenter.*

Unquestionably, the clerk had subject matter jurisdiction to entertain a legitimation petition under § 49-10. *In the Matter of Baby Boy Belton*, 11 N.C. App. 560, 561, 181 S.E.2d 760, 761 (1971), *cert. denied*, 279 N.C. 394, 183 S.E.2d 244 (1971); *and see generally Stump v. Sparkman*, 435 U.S. 349, 55 L.Ed.2d 331, *reh'g denied*, 436 U.S. 951, 56 L.Ed.2d 795 (1978). Clearly though, the clerk should have denied Billy Tucker's petition on the merits for failure to state a claim upon which relief may be granted, or dismissed for lack of standing. *Id.* We note substantial legal irregularities in the hearing, because such irregularities cast a pall over the veracity of the result.

Before admitting the clerk's Order under the hearsay exception for public records, the Commission should have made such reasonable foundational inquiries necessary to ensure the Order contained a reasonable modicum of trustworthiness. 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 229 (4th ed. 1993); *Bolick*, 96 N.C. App. at 446, 386 S.E.2d at 77. According to the record on appeal, the Commission conducted no such analysis. Therefore, it was an abuse of discretion to admit the Order.

It is impossible to glean whether, and to what extent, the Commission's conclusions were drawn from this improper evidence. The Commission's second conclusion of law, which addresses the acknowledgment issue, is derived almost verbatim from the clerk's Order.

Equally problematic is the Commission's legal conclusion that acknowledgment can become operative subsequent to the death of the putative father, if that putative father made acknowledgment conditional on some future event (here, the blood test results). *Carpenter* requires the existence of some "satisfactory evidence that the relation was recognized and admitted." *Carpenter*, 53 N.C. App. at 720, 281 S.E.2d at 786. Thus, *Carpenter* requires conscious, volitional behavior by the putative father. It is manifest that a condition met after a person's death is not such an act. Further, allowing conditional acknowledgments, especially in a post-death situation, creates an all too inviting setting for fraud. We are unwilling to venture down such a road.

This is not to say that plaintiff will be unable to meet its burden of showing acknowledgment in the instant case. On the contrary, we

recognize that evidence can exist independent of the clerk's Order which might suffice to pass the *Carpenter* test. For instance, plaintiff's mother testified that Donald Tucker personally acknowledged the child in her presence, on at least one occasion. The Full Commission makes no mention of this testimony in its decision. Whether this omission is a judgment on the credibility of the testimony, or merely a recognition of the testimony as superfluous evidence of an already proven fact, is a question unanswerable from the record. Moreover, the task of sorting and weighing the evidence is an improper task for this Court. *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980).

Therefore, we remand for a rehearing of the acknowledgment issue, absent the clerk's Order. Evidence of the facts within the clerk's Order may be tendered to the Commission, but those facts must be individually proven, and not "bootstrapped" from the Order itself.

This case is reversed and remanded to the Industrial Commission for rehearing consistent with this opinion.

Judges GREENE and LEWIS concur.

WILLIAM A. BAKER, EMPLOYEE/PLAINTIFF v. CITY OF SANFORD, EMPLOYER; SELF-INSURED (HEWITT, COLEMAN & ASSOCIATED, AGENT), DEFENDANT

No. COA94-1455

(Filed 21 November 1995)

1. Workers' Compensation § 208 (NCI4th)— work-related depression—occupational disease—failure of Commission to apply significant contributing factor standard

Where the Industrial Commission found as fact that plaintiff suffered from work-related depression and concluded as a matter of law that this depression was an occupational disease, the Commission erred in concluding that plaintiff's severe, disabling depression arose from his brother's death and was not a direct and natural result of his occupational disease without first determining that, but for the occupational disease, the depression would not have developed to the point of disability.

2. Workers' Compensation § 213 (NCI4th)— disabling depression—death of plaintiff's brother not intervening cause

The Industrial Commission erred in characterizing plaintiff's disabling depression as the result of "an intervening event"—his brother's death, since the application of an intervening cause standard in Workers' Compensation cases has been limited to consideration of those intervening events that are the result of a claimant's own intentional conduct, and in this case the death of plaintiff's brother was not attributable to plaintiff's own intentional conduct.

Appeal by plaintiff appellant from Opinion and Award entered 27 June 1994 by the Full Industrial Commission. Heard in the Court of Appeals 4 October 1995.

Plaintiff was employed by defendant Sanford Police Department as a detective sergeant from 1981 until 16 February 1990, and was the lead investigator for all major crimes, including homicide cases. Plaintiff testified that one particular homicide trial in 1989, which he investigated and in which he had to testify, caused him fear and stress.

On 10 October 1989 he told his doctor, Dr. Peter Clemens, a family practitioner, that he was having many job stresses related to this trial, and Dr. Clemens testified that he suffered from an acute anxiety attack with "some definite depressive features as well." Plaintiff testified that he spent most of his time in late 1989 at home and at work alone in locked rooms with the lights out. Dr. Clemens also testified that plaintiff reported this behavior to him. Plaintiff's supervisor testified that although he did not remember this specific behavior in the fall of 1989, plaintiff "was acting very strange."

In the fall of 1989 Dr. Clemens diagnosed plaintiff with agitated depression "related to his job and to his stresses at work," and scheduled an appointment with a clinical psychologist. He testified that "depression is something that builds over a long time," and that in the fall of 1989 "things reached a blowing point . . . . I don't think that that one trial alone caused him to be depressed. I think this was something that took a number of years." He testified that plaintiff's work stress was a significant factor in his development of depression. Dr. Clemens further testified that plaintiff's depression in the fall of 1989 was different from "situational depression," which is caused by a

traumatic experience and which, in most healthy people, lifts after a grieving period.

Plaintiff's wife testified that in late 1989 plaintiff became withdrawn and wanted to be left alone. She testified that in January 1990 he attempted suicide because, although he loved his job, he had a lot invested in it, and it was "getting to him." On 15 February 1990, Dr. Clemens saw plaintiff again, and he assessed plaintiff's anxiety and depression as "stable." However, he did not testify to the medical definition of this assessment.

On 17 February 1990, plaintiff's brother was found dead, and plaintiff believed he had been murdered, although no murder investigation occurred. Plaintiff did not return to work after his brother's death, and in March 1990 he was hospitalized with depression at Holly Hill Hospital until June 1990 when he was transferred to Cumberland Hospital until 23 July 1990. Dr. Antonio Cusi treated plaintiff at Cumberland and testified by deposition that he diagnosed plaintiff with "major depression, severe, recurrent, with some psychotic features." He defined "major depression" as a disease that "is not just brought about by a situation, but is also related to a possible chemical imbalance coupled with physical and psychological components." He testified further that major depression "takes awhile" to develop, is "ongoing and chronic," and is "not an overnight phenomenon."

Dr. Cusi further testified that although plaintiff's brother's death was one major contributing factor in his depression, "work stressors" also contributed to his condition. He identified the death of plaintiff's brother as "the last straw that broke the camel's back," and he described it as "just the end of a process that has already begun even before his brother's death. That he was already having a lot of difficulties, and that his brother's death just brought it to a head where he needed to be hospitalized." He also testified that it would be difficult to quantify the factors that brought about his depression. After plaintiff's discharge from Cumberland Dr. Cusi continued to see him on an outpatient basis until 11 February 1991, at which time his diagnosis was the same as his initial one.

Because his depression left him unable to work, plaintiff filed for disability benefits with the Commission. On 8 May 1992, Deputy Commissioner Edward Garner, Jr., filed an Opinion and Award, concluding that plaintiff suffered depression as an occupational disease,

that his work exposure significantly contributed to or was a significant causal factor in the disease's development, and that he was totally and permanently disabled, within the meaning of N.C. Gen. Stat. § 97-29.

Defendants appealed to the Full Industrial Commission (the Commission), and the Commission reversed by majority opinion on 27 June 1994, denying plaintiff's claim. The Commission's findings of fact, in pertinent part were:

> 12. As of October 1989 plaintiff was experiencing symptoms of anxiety and depression which were related in significant part to the stress associated with his job with defendant. He was placed at an increased risk of developing depression by virtue of his job duties as a detective with defendant's police department. However, there were multiple other factors involved, including endogenous changes within his brain. Nevertheless his condition improved with minimal treatment by February 15, 1990 when it was considered stable. Throughout that time his work related depression did not cause him to be unable to work.
>
> 13. Following his brother's death on February 17, 1990, plaintiff developed severe, disabling depression which required inpatient treatment. The death of his brother was an intervening event which was unrelated to his employment. The severe depression developed as a result of this intervening event and was not shown to have been a direct and natural result of his work related depression. Consequently, the disability he suffered as a result of this severe depression arose from his brother's death.

The Commission concluded that as of October 1989 plaintiff had developed depression as an occupational disease, but that it was not disabling and thus noncompensable. The Commission further concluded that the death of plaintiff's brother was an "intervening event," and plaintiff's subsequent depression arose from that event and was "not a direct and natural result of his occupational disease." Commissioner J. Randolph Ward filed a dissenting opinion.

Van Camp, West, Hayes & Meacham, P.A., by Stanley W. West, for plaintiff appellant.

Maupin Taylor Ellis & Adams, P.A., by Jack S. Holmes and Julie A. Alagna, for defendant appellee City of Sanford.

ARNOLD, Chief Judge.

Plaintiff's first three arguments on appeal address the issue of causation, assigning as error the Commission's finding of fact that plaintiff's disability was not the direct and natural result of his work-related depression, and its conclusions of law that (1) his depression arose from an intervening event and (2) his occupational disease was not disabling.

[1] In determining complex causation in workers' compensation cases, "the Commission may, of course, consider medical testimony, but its consideration is not limited to such testimony." *Rutledge v. Cultex Corp.*, 308 N.C. 85, 105, 301 S.E.2d 359, 372 (1983). The Commission "is not limited to the consideration of expert medical testimony in cases involving complex medical issues," *Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989); *contra Click v. Freight Carriers*, 300 N.C. 164, 168, 265 S.E.2d 389, 391 (1980), and the Commission need not "find in accordance with plaintiff's expert medical testimony if the defendant does not offer expert medical testimony to the contrary." *Harvey*, 96 N.C. App. at 34, 384 S.E.2d at 552.

However, the Commission must still base its findings of fact on competent evidence. *See Click*, 300 N.C. at 166, 265 S.E.2d at 390. It is settled that if there is any competent evidence to support the Commission's findings, this Court is "not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached." *Rewis v. Insurance Co.*, 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946). "This is so, notwithstanding the evidence upon the entire record might support a contrary finding." *Vause v. Equipment Co.*, 233 N.C. 88, 93, 63 S.E.2d 173, 177 (1951).

The standard for identifying occupational diseases under the Workers' Compensation Act was set out in *Rutledge*. For a disease to be occupational under N.C. Gen. Stat. § 97-53(13), it must be:

> (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge, 308 N.C. at 93, 301 S.E.2d at 365. The Commission found as fact that plaintiff suffered from work-related depression and con-

cluded as a matter of law that this depression was an occupational disease in October 1989. *See, e.g., Harvey v. Raleigh Police Dept.*, 85 N.C. App. 540, 355 S.E.2d 147, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 86 (1987) (recognizing depression as an occupational disease of police officers under the Workers' Compensation Act). However, the Commission concluded that plaintiff's occupational disease was not compensable because it did not result in disability.

This conclusion does not account for the possibility that the occupational disease simply developed into a disabling, compensable disease due to aggravation by the death of plaintiff's brother. In the context of occupational diseases, the proper factual inquiry for determining causation is

> whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

Rutledge, 308 N.C. at 102, 301 S.E.2d at 370. In *Rutledge*, the Supreme Court adopted the principle that

> it was not necessary that the work-related injury be the sole cause of the worker's incapacity for work but that full benefits would be allowed when it is shown that "the employment is a contributing factor to the disability."

Id. at 104, 301 S.E.2d at 371 (quoting *Bergmann v. L. & W. Drywall*, 222 Va. 30, 32, 278 S.E.2d 801, 803 (1981)). Under this significant contributing factor standard, therefore, the Commission should have determined, by examining competent evidence, whether *but for* the occupational disease, the depression would not have developed to the point of disability. The Commission failed to apply this causation standard and did not consider that the occupational disease may have been a significant contributing factor in plaintiff's disability. Instead, the Commission's conclusion that plaintiff's severe, disabling depression arose from an intervening event and was not a direct and natural result of his occupational disease indicates that the Commission found that plaintiff suffered from two separate and distinct depressions. We find no competent evidence, however, that the occupational depression, and the depression after the death of plaintiff's brother, were separate and distinct diseases.

In denying relief, the Commission failed to find that plaintiff's "occupation was not a significant causal factor in the development of

his [disease]. Therefore, the Commission failed to find the absence of the third element set out in *Rutledge*." *Harvey v. Raleigh Police Dept.*, 85 N.C. App. 540, 544, 355 S.E.2d 147, 150, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 86 (1987). We find that the Commission erred in making this conclusion as to causation without applying the *Rutledge* significant contributing factor analysis, and we remand for determination under the correct standard.

[2] In his second assignment of error plaintiff argues that the Commission erred in concluding that his disabling depression arose from an intervening event. The Commission found that plaintiff's severe, disabling depression following his brother's death was non-compensable because it was "not a direct and natural result of his occupational disease." The Commission arrived at this conclusion by characterizing plaintiff's disabling depression as the result of "an intervening event"—his brother's death. We find no support for this analysis.

In the context of the Workers' Compensation Act, an "intervening cause" 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, 173 S.E.2d 321 (1970)), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985); *see Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 459 S.E.2d 797 (1995). The application of an intervening cause standard has been limited to consideration of those intervening events that are the result of a claimant's own intentional conduct.

Specifically, an intervening event has been held to defeat recovery under the Workers' Compensation Act only if it is "attributable to claimant's own intentional conduct." *Weaver v. Swedish Imports Maintenance, Inc.*, 80 N.C. App. 432, 435, 343 S.E.2d 205, 207 (1986) (citing *Starr v. Charlotte Paper Co.*, 8 N.C. App. 604, 611, 175 S.E.2d 342, 347 (1970)), *rev'd in part on other grounds*, 319 N.C. 243, 354 S.E.2d 477 (1987); *see also Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 308 S.E.2d 485 (1983), *disc. review denied*, 310 N.C. 309, 312 S.E.2d 652 (1984); 1 Larson, *Workmen's Compensation Law* § 13.00 at 3-502 (1995). In this case, the death of plaintiff's brother was not attributable to plaintiff's own intentional conduct, and the Commission's analysis and denial of recovery based on the characterization of that event as "intervening" was erroneous.

Finally, plaintiff assigns as error the Commission's denial of his motion to reopen the record to take additional expert medical testimony. The standard under Rule 701(7) of the Rules of the Industrial Commission is the same as the standard for the admissibility of newly discovered evidence. Under that standard, newly discovered evidence must be, among other things, newly discovered, not merely cumulative, and significant enough that a different result would be reached. *State v. Britt*, 320 N.C. 705, 712-13, 360 S.E.2d 660, 664 (1987). Because we find that the evidence plaintiff wishes to present does not meet the admissibility requirements of newly discovered evidence, we affirm the Commission's decision to deny plaintiff's motion to take additional evidence.

Reversed in part and remanded for determination in accordance with the standards set out above.

Reversed in part and remanded.

Judges GREENE and SMITH concur.

NANETTE RAMSEY SCHROADER, PLAINTIFF v. TERRY RANDALL SCHROADER, DEFENDANT

No. COA94-1281

(Filed 21 November 1995)

1. Divorce and Separation § 444 (NCI4th)— child support—plaintiff's voluntary reduction in income—no change of circumstances affecting needs of children

Although the trial court erred in concluding that plaintiff could not claim a voluntary reduction in income because of her full time enrollment in college as a change of circumstances in a child support proceeding, plaintiff failed to meet the additional burden of showing a change of circumstances relating to the needs of the children.

Am Jur 2d, Divorce and Separation §§ 1082-1087.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

Divorce: power of court to modify decree for support of child which was based on agreement of parties. 61 ALR3d 657.

2. Divorce and Separation § 446 (NCI4th)— child support— defendant's income not increased

The trial court did not err in its findings of fact and conclusion of law that there had been no showing that defendant's income had increased to constitute a change of circumstances where the evidence tended to show that defendant was the owner in name only of his parents' business; defendant had a paper income which was not the same as his actual spendable income; and this same confusing income structure existed at the time child support was originally awarded.

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.

Divorce: power of court to modify decree for support of child which was based on agreement of parties. 61 ALR3d 657.

3. Divorce and Separation § 447 (NCI4th)— child support— switch of medical insurance from defendant to plaintiff— no change of circumstances

There was no merit to plaintiff's contention that the switch of the obligation to carry medical insurance for the parties' children from defendant to plaintiff was a change of circumstances, since the switch was part of a consent judgment between the parties, and plaintiff failed to show a change in circumstances which affected the welfare of the children or how the switch affected her ability to pay her portion of child support.

Am Jur 2d, Divorce and Separation § 1083.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

Divorce: power of court to modify decree for support of child which was based on agreement of parties. 61 ALR3d 657.

Appeal by plaintiff from order entered 13 June 1994 by Judge Robert S. Cilley in Henderson County District Court. Heard in the Court of Appeals 21 August 1995.

Plaintiff and defendant were married on 15 September 1984. They had two children, Casey Ramsey and Jessie James Schroader, born 5 December 1985 and 26 January 1988 respectively. The parties separated on 13 July 1990 and were divorced by judgment entered on 20 August 1991.

At the 20 August 1991 hearing, the parties stipulated to the evidence on the issues of child custody and support, and a child custody and support judgment was entered 22 November 1991. The judgment provided joint legal custody of the minor children, with plaintiff having primary physical custody. It further required defendant to pay child support pursuant to Worksheet B (Joint or Shared Physical Custody) of the North Carolina Child Support Guidelines (hereinafter "the Guidelines") in the amount of $258 per month, to maintain medical insurance coverage through his employment, and to pay 59% of all uninsured medical and dental bills of the minor children.

On 22 November 1991, the parties consented to an order modifying custody filed and entered, *nunc pro tunc* to 1 November 1991. The order stated that as a result of plaintiff moving her residence from Henderson County to Madison County and taking a new job that provided medical and dental insurance at an economic savings in comparison to defendant's coverage, a substantial and material change of circumstances had occurred, thereby justifying a modification of child custody for defendant. The court therefore ordered defendant to have custody of the children no less than 123 nights per year and ordered plaintiff to provide medical and dental insurance coverage through her employer. Except as specifically stated in the modification order, the child custody and support judgment remained in effect.

On 16 November 1992, plaintiff filed a motion in the cause (and subsequently filed two amended motions in the cause) requesting a modification of the child support provisions previously entered in Henderson County District Court. Plaintiff alleged the following change of circumstances had occurred to justify requiring defendant to pay an increased amount of child support: (1) plaintiff was required to maintain medical and dental insurance coverage on the children; (2) plaintiff had assumed a disproportionate share of the costs, and the Guidelines did not meet the reasonable needs of the

children considering the relative abilities of the parties to provide support; (3) defendant's income had substantially increased and plaintiff's income had decreased; (4) defendant refused to voluntarily increase his child support contribution despite having an increased income; and (5) the actual time the children had spent with defendant was less than 123 nights in 1993, thereby rendering the use of Worksheet B of the Guidelines inappropriate for the calculation of child support.

After a hearing on 13 April 1994, the trial court denied plaintiff's motion in the cause. Plaintiff appeals.

Stephen E. Huff for plaintiff appellant.

Mullinax & Alexander, by William M. Alexander, Jr., for defendant appellee.

ARNOLD, Chief Judge.

[1] Plaintiff's first assignment of error is that the court erred by finding and concluding as a matter of law that plaintiff cannot claim as a change of circumstances her decision to quit her job and enroll in college. Plaintiff, having primary custody of the children, voluntarily left her employment to enroll as a full-time college student. As a basis for modification of child support, she claimed that her decision to go back to school resulted in a decrease in her income and justified an increase in defendant's child support obligation. The trial court made the following finding of fact concerning plaintiff's employment and income history:

> 5. Plaintiff has remarried; her last name is now Agnew. Her income has diminished since August of 1991, when she worked at a rest home she had started (with help from Defendant's parents), and also for a beauty salon. In late September, 1991, she moved from Dana (in Henderson County) to Mars Hill, N.C., where she still lives, and began working (for less money) for Asheville Federal Savings Bank. Her reason for changing to a lower-paying job was that the salon job was temporary, whereas the Asheville Federal one was permanent. She quit work at Asheville Federal in June, 1993, having reached the maximum advancement possible there without a college degree, and enrolled as a full-time student as [sic] Western Carolina University, in Speech and Language Pathology, a six-year program. She earns a little money ($839.64 gross in 1993) waiting tables, and works about eight weeks a year

in the office at her father's tobacco warehouse, where she grossed $3,075 in 1992.

The court concluded as a matter of law that plaintiff could not claim as a change of circumstances "a change that she brought about herself." The court further stated, "Granted, Plaintiff's income is now lower than it formerly was, but this is because of her voluntarily quitting her employment."

If a trial court finds that a party was acting in bad faith by deliberately depressing her income or otherwise disregarding the obligation to pay child support, the party's earning capacity may be the basis for the award; or in the case of a motion for modification, the motion may be denied. *O'Neal v. Wynn*, 64 N.C. App. 149, 153, 306 S.E.2d 822, 824 (1983); *Fischell v. Rosenberg*, 90 N.C. App. 254, 256, 368 S.E.2d 11, 13 (1988); *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E.2d 375 (1978). These principles apply regardless of whether the custodial parent or non-custodial parent is requesting modification of child support. *Fischell*, 90 N.C. App. at 256, 368 S.E.2d at 13. Under the 1991 version of the North Carolina Child Support Guidelines, "even if the court determines that a parent is *voluntarily* unemployed or underemployed, the court is vested with discretion regarding whether or not to impute income." *Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (emphasis added); *see* North Carolina Child Support Guidelines A(3) (August 1, 1991).

In *Fischell*, the custodial father voluntarily reduced his income by returning to school, and the trial court denied his motion to increase the mother's child support obligation on the grounds that his decrease in income was voluntary. We held that "the trial court erred in concluding that [movant's] reduction in income could not be considered on his motion to increase [non-movant's] child support obligations." *Fischell*, 90 N.C. App. at 256, 368 S.E.2d at 14. Accordingly, in the case at hand, we find that the trial court erred as a matter of law in concluding that "[p]laintiff cannot claim, as a change of circumstances, a change that she brought about herself."

Thus, a voluntary decrease in income, absent a finding of bad faith, may be considered to support a finding of changed circumstances. However, if the decrease is voluntary, the movant has the additional burden of showing that the changed circumstances relate to child-oriented expenses. *Id.* at 256-57, 368 S.E.2d at 14. We have recently established that an *involuntary* decrease in income is sufficient alone to constitute changed circumstances for the purposes of

modification of child support, even in the absence of any evidence showing a change in the child's needs. *Pittman v. Pittman*, 114 N.C. App. 808, 443 S.E.2d 96 (1994); *see also Askew v. Askew*, 119 N.C. App. 242, 458 S.E.2d 217 (1995); *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531 (1995). Because plaintiff's reduction in income here was voluntary, the *Pittman* rule is inapplicable.

To warrant modification of child support in the case at hand it was necessary for plaintiff to show a change of circumstances relating to the needs of the children, and the trial court concluded that this factor was not "proven to the Court's satisfaction." Thus, although the trial court erred in concluding that plaintiff cannot claim a voluntary reduction in income as a change of circumstance, plaintiff failed to meet the additional burden of showing a change in circumstances to modify child support.

[2] Plaintiff next assigns error to the trial court's findings of fact and conclusion of law that there had been no showing that defendant's income had increased to constitute a change of circumstances. The trial court made the following findings of fact regarding defendant's income:

> 3. Defendant's chief source of income is from a business called "Schroader's Honda." This was also true at the time of the August judgment. The business sells motorcycles retail, and it also sells motorcycle parts through the mail at a discount. The business was formerly owned by Defendant's parents, during which time they thought to acquire a Honda Automobile dealership as well. Honda does not permit the same person to hold the franchise on its car and motorcycle outlets, and so Defendant's parents put the motorcycle franchise into Defendant's name. They kept ownership of the land on which the business is located, and they continue to draw all of the net profits from the business, shown on the business's books as "rent." This "rent" varies wildly from month to month, unlike Defendant's salary of $400 per week. Defendant files income tax returns as the sole proprietor of the business, even though he, his parents, the bookkeeper and the C.P.A. who prepares the taxes, all understand that it is the parents who actually own the operation and make the important decisions affecting it. Whatever might be the tax consequences, present or future, of this arrangement, as a practical consequence it renders Defendant's tax returns useless as a source of reliable information about his disposable income.

> 4. Defendant's evidence at this most recent hearing satisfied the Court that his only actual earned income is the salary he gets from the motorcycle business. His tax returns, however, reflecting the fiction that as the straw man who holds the franchise certificate he is in some sense the owner of the business, recite an adjusted gross income much higher than his $400/week salary: $58,228 in 1991, and $45,054 in 1992. Part of the difference is explained by the interest he draws from two NCNB (now Nationsbank) certificates of deposit, but this amounts to little more than $2000 per year. However, as far as the evidence shows, this same confusing income structure existed when child support was last judicially calculated, and Plaintiff has not shown to the Court's satisfaction that Defendant's true income differs in source or in amount from what it was in August of 1991, when Judge Coats found as a fact that it was $2,852.68 per month.

Based on its findings of fact, the court concluded that

> Plaintiff cannot claim, as a change of circumstances, that Defendant's paper income has increased, where she has not shown any change in his actual income since the previous computation of child support. The guidelines are based on the assumption that real income is spent on the children, and regardless that accounting tricks and straw-man transactions have produced a paper income in Defendant's name, his actual, spendable income has not been shown to have increased.

A trial court's findings of fact are conclusive on appeal if the trial court sits as the trier of fact and they are supported by competent evidence, even if there exists evidence that might sustain a finding to the contrary. *Floto v. Pied Piper Resort, Inc.*, 96 N.C. App. 241, 385 S.E.2d 157 (1989), *cert. denied*, 326 N.C. 47, 389 S.E.2d 87 (1990). The evidence in this case supports the trial court's findings. Several witnesses associated with Schroader Honda testified that they considered defendant the owner and operator of the business in name only. The accountant testified that defendant's only actual income was his $400 per week salary, and all other business profits were paid to defendant's parents for rent of the real property occupied by the business. While this structure certainly seems unusual, the Guidelines instruct that income from operation of a business "should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business

income for tax purposes." North Carolina Child Support Guidelines A(2) (August 1, 1991). We therefore agree with the trial court that, as a matter of law under the Guidelines, plaintiff failed to show that defendant's actual, spendable income had increased to constitute a change of circumstances.

[3] Plaintiff next contends that the switch of the obligation to carry medical insurance for the children from defendant to plaintiff was a change of circumstances. We disagree.

Under the Guidelines, health insurance should be provided by the parent who, through his employer, has the most comprehensive coverage at the least cost. North Carolina Child Support Guidelines C (August 1, 1991). Furthermore, the cost of that insurance coverage "should be deducted from that parent's gross income." *Id.* In this case, the original child custody and support judgment obligated defendant to maintain for the children his medical insurance coverage provided to him through his employer at $322 per month. In the order modifying custody, although defendant only requested a modification of custody based upon plaintiff's move from Henderson to Madison County, the court also took into account her new employment, which enabled her to obtain medical and dental insurance at a more economical cost of $80.19 every two weeks. Therefore, the court ordered a switch of the obligation to provide medical insurance coverage from defendant to plaintiff. The court concluded in the modified custody order that these terms were "fair, reasonable, adequate and necessary[,]" and the parties knowingly and voluntarily consented to the order.

Upon plaintiff's motion in the cause for modification of child support based on the switch in insurance obligation, the trial court concluded that plaintiff could not claim the switch as a change of circumstances because it was "part and parcel of a consent Order which took into account . . . her change of employment, and the problems the parties encountered since the earlier order." We agree that the order modifying custody filed 22 November 1991 amounted to a consent decree between the parties. This Court has stated that

> It is generally recognized that decrees entered by our courts in child custody and support matters are impermanent in character and are res judicata of the issue only so long as the facts and circumstances remain the same as when the decree was rendered. The decree is subject to alteration upon a change of circumstances affecting the welfare of the child.

Tate v. Tate, 9 N.C. App. 681, 683, 177 S.E.2d 455, 457 (1970).

Although a consent judgment to which the parties have bound themselves is modifiable by the court where it involves the court's inherent authority to protect the interests and welfare of the children of the marriage, plaintiff has failed to show a change in circumstances that affects the welfare of the children. Moreover, she does not even argue how the switch in insurance has affected her ability to pay her portion of child support. Rather, plaintiff merely asserts that defendant's child support obligation "needs to be recalculated based upon this change in maintenance of insurance." Since plaintiff has failed to meet the threshold burden of showing a change in circumstances, we find this assignment of error unpersuasive.

As for plaintiff's remaining assignments of error, we have carefully reviewed them and find them to be without merit.

Affirmed.

Judges JOHNSON and MARTIN, Mark D., concur.

KEITH JOHN CASSELL, PLAINTIFF v. SAMUEL L. COLLINS AND AMERICAN SECURITY AND INVESTIGATION SYSTEMS, INC., DEFENDANTS

No. COA94-1157

(Filed 21 November 1995)

Negligence § 108 (NCI4th)— guest at apartment complex stabbed—duty of security service to provide protection—breach of duty—summary judgment improper

The trial court erred in entering summary judgment for defendant which had contracted to provide unarmed security guard service at an apartment complex where plaintiff, who was visiting a tenant, was stabbed in the presence of a security guard who offered no aid but instead ran from the building, since plaintiff was a licensee on the premises; defendant had assumed an affirmative duty to provide some protection to plaintiff; and, applying a standard of reasonable care, defendant breached its duty.

Am Jur 2d, Negligence § 21; Premises Liability § 513.

Comment Note—Private person's duty and liability for failure to protect another against criminal attack by third person. 10 ALR3d 619.

Landlord's obligation to protect tenant against criminal activities of third persons. 43 ALR3d 331.

Judge WYNN concurring.

Judge MARTIN (John C.) dissenting.

Appeal by plaintiff from order entered 1 November 1993 in New Hanover County Superior Court by Judge Richard B. Allsbrook. Heard in the Court of Appeals 22 August 1995.

Law Offices of Alexander M. Hall, by Virginia R. Hager, for plaintiff-appellant.

Yates, McLamb & Weyher, by Andrew A. Vanore, III, and Beth Y. Smoot, for defendant-appellee.

GREENE, Judge.

Keith John Cassell (plaintiff) appeals from the grant of a summary judgment for American Security and Investigation Systems, Inc. (ASI).

The evidence, in the light most favorable to the plaintiff, reveals that ASI provided, pursuant to a contract with the management company, unarmed security guard service at the Pines of Wilmington, an apartment complex. On 23 May 1991, while the plaintiff was visiting a tenant of the apartment complex, plaintiff was stabbed by Samuel L. Collins (Collins). The assault occurred in the presence of one of ASI's security guards who had earlier been asked to keep an eye on Collins and who was asked for help during the assault. The security guard provided no help to the plaintiff and instead ran from the building.

The complaint alleges that ASI was negligent in that it "made no effort to prevent the assault, despite . . . being alerted and requested to do so."

The dispositive issue is whether ASI owed a duty of reasonable care to the plaintiff.

As a social guest at the apartment complex, the plaintiff held the status of licensee. *Murrell v. Handley*, 245 N.C. 559, 561-62, 96 S.E.2d 717, 719-20 (1957). Ordinarily, the duty of care owed to a licensee by

the owner of land is to "refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger." *McCurry v. Wilson*, 90 N.C. App 642, 645, 369 S.E.2d 389, 392 (1988). When, however, "the licensee's injury is caused by the owner's active conduct or 'affirmative negligence,' " a different duty arises. *DeHaven v. Hoskins*, 95 N.C. App. 397, 400, 382 S.E.2d 856, 858, *disc. rev. denied*, 325 N.C. 705, 388 S.E.2d 452 (1989); *Thames v. Nello Teer Co.*, 267 N.C. 565, 569, 148 S.E.2d 527, 530 (1966); *Howard v. Jackson*, 120 N.C. App. 243, 247, 461 S.E.2d 793, 796 (1995). In this latter instance, the "owner must exercise reasonable care for the protection of [the] licensee." *DeHaven*, 95 N.C. App. at 400, 382 S.E.2d at 858.

In this case, the evidence, considered in the light most favorable to the plaintiff, *Raritan River Steel Co. v. Cherry Bekaert & Holland*, 101 N.C. App. 1, 3-4, 398 S.E.2d 889, 890-91 (1990) (standard for evaluating summary judgment motion), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991), can support findings that (1) at the time of the assault the plaintiff was a licensee on the premises of the apartment complex; (2) ASI, who is subject to the same liability as the owner, *see Restatement (Second) of Torts* § 383 (1965), in providing a security guard, had assumed an affirmative duty to provide some protection to the plaintiff; and (3) applying a standard of reasonable care, ASI breached its duty. Thus, summary judgment for ASI is improper and must be reversed. *See* N.C.G.S. § 1A-1, Rule 56 (1990) (summary judgment appropriate only if no genuine issue of material fact and movant entitled to judgment as matter of law).

Reversed and remanded.

Judge WYNN concurs with separate opinion.

Judge MARTIN, John C., dissents.

Judge WYNN concurring with separate opinion.

I concur with the majority opinion determining that there is an issue of fact as to whether ASI was affirmatively negligent in failing to provide the plaintiff protection from the assault. I, however, would reach this conclusion for different reasons.

In my opinion, the common-law distinction between invitees and licensees should be applied only when a plaintiff seeks recovery of damages resulting from some condition or use of the landowner's premises. Our state's precedent demonstrates that an injured plain-

tiff's status as a trespasser, licensee, or invitee is relevant only when the plaintiff was injured due to some condition on or in the defendant's land or premises. In *Pafford v. J.A. Jones Constr. Co.*, 217 N.C. 730, 9 S.E.2d 408 (1940), our Supreme Court explained:

> The owner or person in possession of property is ordinarily under no duty to make or keep property in a safe condition for the use of a licensee or to protect mere licensees from *injury due to the condition of the property*, or from damages incident to the ordinary uses to which the premises are subject . . . the owner or person in charge of property, is not liable for injuries to licensees due to the condition of the property, ...

Id. at 736, 9 S.E.2d at 412 (*emphasis supplied*).

Furthermore, in *Dunn v. Bomberger*, 213 N.C. 172, 175, 195 S.E. 364, 366-67 (1938), plaintiff's intestate, an employee of a contractor for the State Highway Commission, was killed when an excavation of defendant's land suddenly caved in on the employee. The defendant landowner was held not liable to the decedent, a licensee, because "defendant did not owe him the duty to keep his premises in a reasonably safe condition," and under the circumstances, was not liable for injuries resulting from "defects, obstacles or pitfalls upon the premises."

The trespasser-licensee-invitee classification scheme is also appropriately used in analyzing a defendant's liability for activities carried on upon the land, such as construction work, yard work, or using fire or explosives.

In the case at hand, plaintiff does not allege that he was injured due to the defendant's provision of security guard services at the apartment complex. Rather, the plaintiff alleges that the security guard "was negligent in that he was present and observed the events immediately preceding the stabbing assault, but made no effort to intervene, speak to [the assailant], or prevent the assault." The security guard's negligence cannot fairly be characterized as a condition or activity upon the land or premises of the apartment complex. Here, plaintiff contends that the defendant American Security and Investigation Systems, Inc. is vicariously liable for the security's guard's negligence under the theory of *respondeat superior*.

The doctrine of *respondeat superior* provides that the employer is liable for the negligence of his employee while the employee is acting within the scope of his employment. *Thomas v. Poole*, 45 N.C.

App. 260, 264, 262 S.E.2d 854, 856 (1980), *disc. rev. denied*, 304 N.C. 733, 287 S.E.2d 902 (1982). To establish liability based on the doctrine of *respondeat superior*, the following facts must be shown: "(1) an injury by the negligence of the wrongdoer, (2) the relationship of employer-employee between the party to be charged and the wrongdoer, (3) a wrong perpetrated in the course of employment or within the employee's scope of authority, and (4) an employee going about the business of his superior at the time of the injury." *White v. Hardy*, 678 F.2d 485, 487 (4th Cir. 1982).

In this case, the landlord provided security services for the apartment complex. Because a security guard's duties entail keeping the premises and persons on the premises safe and free from injury, a genuine issue of material fact exists as to whether the guard was negligent in performing these duties. Indeed, it appears futile to hire a security guard if he fails to act whenever a breach of security arises.

Inasmuch as plaintiff has forecasted in support of these allegations evidence that is sufficient to create a question of fact for the jury, summary judgment should be precluded.

Judge MARTIN, John C., dissenting.

I agree with Judge Greene that the duty owed to plaintiff in this case is determined by plaintiff's status as a licensee. I further agree that an owner of land normally owes a licensee only the duty to refrain from willfully injuring the licensee or wantonly and recklessly exposing the licensee to danger; but that if the owner of land is engaged in active conduct or "affirmative negligence," "the owner must exercise reasonable care for the protection of a licensee." *DeHaven v. Hoskins*, 95 N.C. App. 397, 400, 382 S.E.2d 856, 859, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989). The evidentiary record in this case, however, reveals no active conduct or affirmative negligence on the part of ASI's security guard. Therefore, I vote to affirm the judgment of the trial court.

Plaintiff's claim against ASI is based upon allegations of negligence. Negligence is a failure to exercise proper care in the performance of some legal duty owed by a defendant to a plaintiff under the circumstances. *Mattingly v. R.R.*, 253 N.C. 746, 117 S.E.2d 844 (1961). In the absence of a legal duty owed the injured party by the defendant, there can be no liability in tort. *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). In the present case, ASI, as an independent contractor of the

apartment complex, is subject to the same liability, or lack thereof, as the landowner. *Restatement (Second) of Torts* § 383 (1965).

The majority asserts that "ASI assumed an affirmative duty to provide some protection to the plaintiff." The only evidence with respect to ASI's responsibilities is contained in a memorandum from the management of the apartment complex to ASI stating that ASI's guard was "to be visible both as a deterrant [sic] to potential vandals as well as a sense of security for residents." Neither ASI's contract nor the memorandum impose a duty upon ASI to protect social guests or licensees. While this may appear a narrow distinction, it is precisely the distinction upon which premises liability is based. *See, e.g., Clarke v. Kerchner*, 11 N.C. App. 454, 460, 181 S.E.2d 787, 791, *cert. denied*, 279 N.C. 393, 183 S.E.2d 241 (1971) ("[T]he duty owed a person on the premises of another depends on the status enjoyed by the visitor; different duties are owed to the invitee, the licensee, and the trespasser."). North Carolina courts have repeatedly held that the duty owed by landowners in protecting visitors from foreseeable criminal activity by third parties is dependent upon the visitors' legal status. *See Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (1988); *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981); *Purvis v. Bryson's Jewelers*, 115 N.C. App. 146, 443 S.E.2d 768 (1994); *Abernethy v. Spartan Food Systems, Inc.*, 103 N.C. App. 154, 404 S.E.2d 710 (1991); *Helms v. Church's Fried Chicken, Inc.*, 81 N.C. App. 427, 344 S.E.2d 349 (1986); *Sawyer v. Carter*, 71 N.C. App. 556, 322 S.E.2d 813 (1984), *disc. review denied*, 313 N.C. 509, 329 S.E.2d 393 (1985); *Brown v. N.C. Wesleyan College*, 65 N.C. App. 579, 309 S.E.2d 701 (1983); *Shepard v. Drucker & Falk*, 63 N.C. App. 667, 306 S.E.2d 199 (1983); *Urbano v. Days Inn*, 58 N.C. App. 795, 295 S.E.2d 240 (1982). Each of the cited cases involved the landowner's duty to protect invitees from foreseeable criminal acts of third parties; no such duty has been extended to licensees by the courts of this State.

Plaintiff argues, however, that it is illogical to apply a different standard of care with respect to the apartment complex tenant he was visiting, who was also stabbed, than to himself, when they were both injured at the same time and in the same manner. He cites to us decisions of other jurisdictions which accord to the social guest of a tenant the same legal status as the tenant for tort liability. *See, e.g., Hancock v. Alabama Home Mortgage Co.*, 393 So. 2d 969, 970 (Ala. 1981); *Shirley v. National Applicators of Cal., Inc.*, 566 P.2d 322, 326 (Ariz. App. 1977); *Hiller v. Harsh*, 426 N.E.2d 960, 964 (Ill. App. 1 Dist., 1981); *Murray v. Lane*, 444 A.2d 1069, 1072-73 (Md. App. 1982);

Lindsey v. Massios, 360 N.E.2d 631, 633 (Mass. 1977); *Lucas v. Mississippi Housing Authority*, 441 So. 2d 101, 103 (Miss. 1983); *Wilder v. Chase Resorts, Inc.*, 543 S.W.2d 527, 530-31 (Mo. App. 1976). *See also Restatement (Second) of Torts* § 360 (1965).

It is true that some jurisdictions have abandoned status distinctions in determining the liability of a landowner to a person injured on the landowner's property. *See, e.g.*, 62 Am. Jur. 2d *Premises Liability* §§ 79-83 (1990). However, North Carolina has not adopted this position, and it is the responsibility of this Court to follow the decisions of the North Carolina Supreme Court. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985). Inasmuch as the guard was not affirmatively negligent, he breached no duty owed to plaintiff as a licensee.

STATE OF NORTH CAROLINA v. WILLIAM DAVIS WATKINS

No. COA95-258

(Filed 21 November 1995)

1. **Evidence and Witnesses § 621 (NCI4th)— motion to suppress adjudicated through appellate process—discovery of new facts—amendment of motion properly allowed**

The trial court had the authority to grant defendant's supplemental motion to suppress on the ground of newly discovered evidence even though defendant's original motion to suppress had been adjudicated through the appellate process where it had been determined on appeal that an anonymous tip received by law enforcement and the arresting officer's observations supported a reasonable articulable suspicion to stop defendant, and defendant presented subsequently discovered evidence that the "anonymous tip" had been fabricated by the police. N.C.G.S. § 15A-975(c).

Am Jur 2d, Motions, Rules and Orders § 26.

2. **Searches and Seizures § 77 (NCI4th)— anonymous tip fabricated by police—unlawful seizure—suppression of evidence proper**

The evidence was sufficient to support the trial court's findings of fact that an "anonymous tip" was fabricated by the police chief and that through trickery he orchestrated an investigatory

stop of defendant by another officer, and such findings were sufficient to support the trial court's conclusions that the second officer did not have a reasonable articulable suspicion of criminal activity to stop defendant and that evidence obtained during the stop of defendant must be suppressed in his trial for driving while impaired.

Am Jur 2d, Searches and Seizures § 48.

Appeal by State from order entered 9 November 1994 in Rockingham County Superior Court by Judge Melzer A. Morgan, Sr. Heard in the Court of Appeals 24 October 1995.

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

McNairy, Clifford & Clendenin, by Robert O'Hale and Locke T. Clifford, for defendant-appellee.

GREENE, Judge.

The State appeals from the trial court's 9 November 1994 order which granted William Davis Watkins' (defendant) motion to suppress evidence in his trial for driving while impaired.

Defendant was arrested and charged with driving while impaired on 11 February 1990. On 16 August 1991, defendant made a motion to suppress the evidence obtained during defendant's stop on the ground that the arresting officer did not have a reasonable articulable suspicion to stop defendant. The trial court granted defendant's motion on 1 July 1992, but the trial court's order was reversed on appeal on 29 July 1994, after it was determined that an anonymous tip received by law enforcement and the arresting officer's subsequent observations supported a "reasonable articulable suspicion" to stop defendant. *State v. Watkins*, 337 N.C. 437, 446 S.E.2d 67 (1994). Subsequently, on 12 October 1994, the defendant made a "Supplemental Motion to Suppress based on Newly Discovered Evidence." In support of his motion, the defendant submitted an affidavit by Teresa Hundley Carter (Carter) stating that the Chief of Police of Stoneville, Jerry Fowler (Fowler), whom Carter dated in 1990, "set up" the defendant on 11 February 1990.

After a hearing on the supplemental motion to suppress, the trial court found that on 10 February 1990, defendant had been at the

Virginia Carolina Well Drilling Company (Well Company) all day and at 11:30 p.m. called his wife to say that he had had too much to drink and would not be coming home. The Well Company was known by law enforcement to be a place where people in the community gathered to drink and Fowler "was having his department conduct a vigorous campaign to ferret out those motorists who drove while impaired in the Stoneville area" and Fowler knew that "defendant hung out at the" Well Company. On 10 February 1990, Fowler was "out socially" with Carter. Although Fowler was in his personal vehicle, he had his Stoneville Police walkie-talkie radio with him. After leaving Carter's home, and when the two were in the vicinity of the Well Company, Fowler "saw and recognized" defendant's vehicle, which did not have its lights on at the time. Defendant was not outside the building at any time that Fowler observed his vehicle at the Well Company. After telling Carter that the vehicle belonged to defendant, Fowler returned to Carter's home where he used the telephone and telephone book. Fowler asked Carter how the Well Company would be listed in the telephone book and then dialed and spoke into the phone, when Carter heard Fowler "tell the person on the other end that there was an emergency." The trial court further found that Fowler's call from Carter's home was to the defendant, at the Well Company, and that Fowler "without identifying himself, told the defendant there was an ambulance at the defendant's house." "This statement was false and was designed and intended to cause the defendant . . . to leave the [Well Company] and to get on the public road, so that he could be arrested for driving while impaired." After making the call to defendant, Fowler called Officer Shockley of the Stoneville Police Department on his walkie-talkie and requested that he meet Fowler and Carter in Stoneville. During this meeting, Fowler instructed Shockley to report a suspicious vehicle behind the Well Company to the Sheriff's Department, which Shockley did. Meanwhile, defendant called home and was told by his wife that there was no ambulance, but was requested to return home. Deputy Robert Knight was dispatched by the Sheriff's Department, in response to Shockley's report, and because he was "a good distance away, Stoneville Police Officer Harbour advised that he would assist." Defendant was stopped by Harbour, upon Harbour observing defendant's vehicle leave the Well Company parking lot. Fowler and Carter rode through the area where Harbour had stopped defendant and Fowler remarked to Carter that this was Harbour's second DWI arrest.

The trial court then found that "defendant left the inside of [the Well Company], started his car and drove it on the public highway because of the trickery of the Stoneville Chief of Police, Jerry Fowler" and that "[t]he act of the former Chief of Police saying there was a suspicious vehicle at the [Well Company] and to have Officer Shockley pass that on to the Sheriff's Department dispatcher was an act done with reckless disregard of the truth."

The trial court further found that this evidence was "not available to the defendant at the original suppression hearings in 1991" and that Officer Harbour had no knowledge of Fowler's actions nor did he participate in Fowler's trickery. The trial court then concluded that:

> 3. The very foundation of the reasonable suspicion here, the purported anonymous tip, was manufactured by law enforcement officers. It is inappropriate to make up, create, or fabricate an anonymous tip. Such trickery is not an appropriate police practice where Fourth Amendment seizures are involved.
>
> 4. . . . [S]uch made-up tip cannot be an anonymous tip on which a warrantless stop and seizure can be made.
>
> 5. The actions of Officer Harbour are tainted, not by Officer Harbour's actions, but by the recklessly published tip from Chief Fowler.

The trial court finally ordered that "the fruits of" defendant's seizure be suppressed.

The evidence which is relevant to these findings is testimony by Carter, defendant and Fowler. The testimony of Carter and defendant is in accord with the trial court's findings.

Fowler testified that he did not see defendant's car at the Well Company when he and Carter rode by, but she did and mentioned that she "saw some tail lights." Fowler further testified that he never went back to Carter's mobile home to use the telephone, but that he did stop and ask Shockley to report a suspicious vehicle at the Well Company to the Sheriff's Department based upon Carter's statement. Fowler stated that he and Carter then went back to his apartment and never drove back by the area where Harbour had stopped defendant. Fowler testified that he did not mention to anyone in the District Attorney's office of his involvement in defendant's arrest until Carter came forward.

The issues are whether (I) the trial court had the authority to grant defendant's supplemental motion to suppress on the grounds of newly discovered evidence; (II) there is sufficient evidence in the record to support the trial court's findings of fact; and (III) whether the facts support the trial court's conclusion that "defendant's Fourth Amendment right to be free from unreasonable seizure has been violated" and its resulting suppression of the evidence obtained by the seizure.

I

[1] Although the State argues that there is no authority which allows "defendant to amend or supplement a motion to suppress where the question raised in the original motion has been adjudicated through the appellate process," our legislature has provided that "after a pretrial determination and denial of the motion" a defendant may request a new suppression hearing to present "additional pertinent facts . . . which [defendant] could not have discovered with reasonable diligence before the determination of the motion." N.C.G.S. § 15A-975 (1988). The original determination and denial of defendant's motion in the North Carolina Supreme Court relied upon the assumption that the tip to Harbour was anonymous. *See Watkins*, 337 N.C. at 442, 446 S.E.2d at 70. In his supplemental motion, defendant presented evidence that the "anonymous tip" in this case was fabricated by police. Defendant's new evidence was pertinent and presented after a pretrial determination and denial of his motion to suppress, and the State's assignment is overruled.

II

[2] Although there was testimony which would support contrary findings than those made by the trial court, we are bound by the trial court's determinations of credibility and the weight to be afforded the testimony, absent an abuse of discretion. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982). We see no abuse of discretion here, where there is competent evidence, testimony by Carter and defendant, which supports findings that Fowler made the call and arranged to meet Shockley so that he could radio the report to the Sheriff's Department. *See State v. Smith*, 118 N.C. App. 106, 111, 454 S.E.2d 680, 683 (question on appeal from suppression motion is whether findings are supported by competent evidence and whether findings support legally correct conclusions of law), *cert. denied*, 340 N.C. 362, 458 S.E.2d 196 (1995). This competent evidence also supports the trial court's findings that Fowler acted with "trickery" and made a

report based upon a situation which he orchestrated in reckless disregard for the truth.

III

In *Watkins*, our Supreme Court determined that Harbour's stop of defendant was justified by his reasonable suspicion, which was based upon an anonymous tip and his own observations, following the tip, of the defendant. *Watkins*, 337 N.C. at 442-43, 446 S.E.2d at 70-71. The question in the present case is, however, whether a "tip" which is fabricated by a police officer may serve as a basis for an officer's reasonable suspicion.

Although reasonable suspicion is less stringent than probable cause, it nevertheless requires that statements from tipsters carry some "indicia of reliability." *Alabama v. White*, 496 U.S. 325, 332, 110 L. Ed. 2d 301, 310 (1990). Because the evidence which supports a reasonable suspicion, like that supporting probable cause, must bear some "indicia of reliability," it follows that the evidence which will support reasonable suspicion, though it may be of a lesser "quantity or content" than that to support probable cause, *White*, 496 U.S. at 330, 110 L. Ed. 2d at 309, must be genuine and not contrived misstatements by law enforcement officers. *See Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667 (1978) (misstatements and material omissions by government employees cannot legally support a determination of probable cause). Furthermore, "police [can]not insulate [one] officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity." *Franks*, 438 U.S. at 163, 57 L. Ed. 2d at 677 n.6.

In this case, Fowler orchestrated a situation which, after alerting a second officer who knew nothing of Fowler's actions, gave rise to another officer's reasonable suspicion. The facts upon which Harbour's reasonable suspicion were grounded were not genuine and the fact that he had no knowledge of Fowler's "trickery" does not attenuate his actions from Fowler's illegal actions. *Franks*, 438 U.S. at 163, 57 L. Ed. 2d at 677 n.6; *see State v. Cooke*, 54 N.C. App. 33, 45, 282 S.E.2d 800, 808 (1981), *aff'd*, 306 N.C. 132, 291 S.E.2d 618 (1982). Accordingly, the trial court properly granted defendant's motion to suppress.

Affirmed.

Judges MARTIN, Mark D., and McGEE concur.

BENJAMIN L. COLVIN, ADMINISTRATOR OF THE ESTATE OF MARGARET T. COLVIN, DECEASED, AND BENJAMIN L. COLVIN, PLAINTIFFS v. GLENN EDWARD BADGETT, DEFENDANT AND THIRD-PARTY PLAINTIFF v. WENDELL SANDERFORD McDONALD, THIRD-PARTY DEFENDANT

No. COA94-1404

(Filed 21 November 1995)

1. **Automobiles and Other Vehicles § 765 (NCI4th)— sudden emergency—erroneous instruction**

In an action to recover for injuries sustained in an automobile accident, the trial court erred in instructing on the doctrine of sudden emergency where defendant saw his sister-in-law's disabled truck on the side of the road and felt fear and apprehension, but that did not give rise to a situation where he had to act instantly to avoid injury to himself or another.

Am Jur 2d, Automobiles and Highway Traffic § 1117.

Instructions on sudden emergency in motor vehicle cases. 80 ALR2d 5.

Modern status of sudden emergency doctrine. 10 ALR5th 680.

2. **Automobiles and Other Vehicles § 585 (NCI4th)— defendant rear-ended by third-party defendant—excessive speed—judgment n.o.v. improper**

The trial court erred in granting third-party defendant's motion for judgment n.o.v. in an action to recover for injuries sustained in an automobile accident where there was evidence which tended to show that third-party defendant was driving at a rate of speed in excess of a speed which would have been safe in light of the rainstorm which was occurring at the time her vehicle rear-ended defendant's car, and the question of whether third-party defendant was negligent was a question for the jury to decide.

Am Jur 2d, Automobiles and Highway Traffic § 1100.

Judge GREENE dissenting.

Appeal by plaintiffs and third-party plaintiff from final judgment entered 31 May 1994 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 14 September 1995.

Ligon & Hinton by George Ligon, Jr. for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P. by Steven M. Sartorio & James Y. Kerr, II for defendant and third-party plaintiff-appellant, Glenn Edward Badgett.

Broughton, Wilkins, Webb & Sugg, P.A. by R. Palmer Sugg for third-party defendant-appellee, Wendell Sanderford McDonald.

WYNN, Judge.

On 6 September 1992, defendant and third-party plaintiff Glenn Badgett drove his car with his wife as a passenger along Interstate 40 in Johnston County. I-40 is a four lane highway at that point, and the Badgetts' vehicle was being driven in the left lane in a westerly direction when they noticed that a pick-up truck had run into a ditch off of the right side of the highway. Mrs. Badgett told Mr. Badgett that the truck on the side of the road belonged to his sister-in-law, Suellen Berkshire. Mr. Badgett also noticed that another truck with its emergency red lights flashing was also off the right side of the road near Ms. Berkshire's truck.

Mr. Badgett stopped his car, pulled over onto the left shoulder of the road, put his car into reverse and backed up to get closer to his sister-in-law's truck. After Mr. Badgett backed up far enough so that he was almost directly across from his sister-in-law's truck he put his car in park. There was a dispute in the testimony as to whether Mr. Badgett stopped on the shoulder of the road, or stopped while his car was partially in the left lane of traffic. Mr. Badgett did not turn on his hazard lights, nor make any other attempt to warn cars passing him that he was moving in reverse in the left lane of traffic or on the shoulder of the road. At this time, there was intermittent heavy rain, and visibility was poor.

Plaintiff Benjamin L. Colvin, and his mother, Margaret Colvin, were passengers in another car being driven in a westerly direction along Interstate 40 by third-party defendant Wendell McDonald. The subject accident occurred when their car rear-ended the Badgetts' car.

Mr. Colvin's mother died subsequent to the accident for reasons unrelated to the accident. He filed suit individually and in his capacity as Administrator of the Estate of his mother, Margaret Colvin, against Mr. Badgett, alleging that both he and his mother sustained injuries due to the negligence of Mr. Badgett. Mr. Badgett answered

and filed a third-party complaint against Ms. McDonald. Prior to resting his case, Mr. Colvin took a voluntary dismissal on his individual claim.

In a special verdict form, the jury found that the plaintiff's mother was not injured by the negligence of Mr. Badgett. Plaintiff's resulting motions for judgment notwithstanding the verdict or in the alternative for a new trial were denied by the trial judge. However, the trial judge granted Ms. McDonald's motion for judgment notwithstanding the verdict against Mr. Badgett. Mr. Colvin and Mr. Badgett appeal.

On appeal, there are two issues before this Court: (1) Whether the trial court erred by granting the defendant's request for a jury instruction on the doctrine of sudden emergency, and (2) whether the trial court erred by granting Ms. McDonald's motion for judgment notwithstanding the verdict. We conclude that the trial court erred in both instances, and we reverse and remand for a new trial.

I.

[1] The doctrine of sudden emergency applies when one is confronted with an emergency situation which compels him or her to act instantly to avoid a collision or injury. *Schaefer v. Wickstead*, 88 N.C. App. 468, 363 S.E.2d 653 (1988). An emergency situation has been defined by our courts as: "[T]hat which 'compels [defendant] to act instantly to avoid a collision or injury . . . .' " *Keith v. Polier*, 109 N.C. App. 94, 98-99, 425 S.E.2d 723, 726 (1993), quoting *Schaefer v. Wickstead*, 88 N.C. App. 468, 471, 363 S.E.2d 653, 655 (1988).

In the case *sub judice*, Mr. Badgett contends that he was entitled to an instruction on the doctrine of sudden emergency because he noticed his sister-in-law stranded on the side of the road. He argues he should be held to a lesser standard of care because he saw his sister-in-law's truck disabled on the side of the road. We disagree.

The fact that Mr. Badgett felt fear and apprehension upon seeing his sister-in-law's truck on the side of the road, while understandable, did not give rise to a situation where he had to act instantly to avoid injury to himself or another. Thus, the facts of this case do not allow for an instruction on the doctrine of sudden emergency. Since the trial court erroneously instructed the jury on the doctrine of sudden emergency, the plaintiff is entitled to a new trial. *Masciulli v. Tucker*, 82 N.C. App. 200, 346 S.E.2d 305 (1986).

II.

[2] Third-party plaintiff Badgett separately appeals and contends that the trial court erred by granting third-party defendant McDonald's motion for judgment notwithstanding the verdict. We agree.

In determining whether to grant a motion for judgment notwithstanding the verdict a trial court is required to apply the same standard as in a directed verdict. *Allen v. Pullen*, 82 N.C. App. 61, 345 S.E.2d 469 (1986), *disc. rev. denied*, 318 N.C. 691, 351 S.E.2d 758 (1987). That standard requires that: "All of the evidence which supports the non-movant's claim [be viewed] as true and must be considered in the light most favorable to the non-movant, giving that party the benefit of all reasonable inferences. . . ." *Id.* at 64, 345 S.E.2d at 472 quoting *Bryant v. Nationwide Mutual Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985). The motion may be granted only when the evidence, when so considered, is insufficient as a matter of law to support a verdict for the non-movant. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974).

In *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966) our Supreme Court stated:

> Unless the driver of the leading vehicle is himself guilty of negligence, or unless an emergency is created by some third person or other highway hazard . . . the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist in the rear was not keeping a proper lookout or that he was following too closely.

Id. at 188, 146 S.E.2d at 42 (citations omitted). In *Masciulli v. Tucker*, 82 N.C. App. 200, 346 S.E.2d 305 (1986), this Court applied *Beanblossom* and held that evidence showing a driver rear-ended a car after driving faster than road conditions permitted, without more, allowed an inference of negligence, and thus the issue of the negligence of the driver of the car which rear-ended the other car is an issue for the jury.

In the case *sub judice*, there was evidence offered which, if believed by the jury, tended to show that Ms. McDonald was driving at a rate of speed in excess of a speed which would have been safe in light of the rainstorm which was occurring at the time her vehicle rear ended Mr. Badgett's car. The question of whether Ms. McDonald was negligent is a question for the jury to decide.

New Trial.

Judge McGEE concurs.

Judge GREENE dissents with separate opinion.

Judge GREENE dissenting.

Because I believe that the trial court properly instructed the jury on the doctrine of sudden emergency, I do not agree that the plaintiffs are entitled to a new trial.

The evidence, viewed in the light most favorable to defendant, *see Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 448, 386 S.E.2d 76, 79 (1989) (in determining whether instruction is required, evidence must be viewed in light most favorable to proponent), *aff'd per curiam*, 327 N.C. 464, 396 S.E.2d 323 (1990), reveals that defendant was driving behind his sister-in-law in a rain storm. Defendant approached a truck on the side of the road with its "emergency red lights flashing" and his wife noticed that his sister-in-law's truck was over in a ditch, near the truck with its emergency lights on. Defendant knew that his sister-in-law and her youngest child were in the truck. Defendant's wife saw that his sister-in-law was inside the truck with the emergency lights, but defendant did not know the location of the child. In response to this situation, defendant "pull[ed] over to . . . the emergency exit on the road . . . backed" down the side of the road about "eight or ten yards," waited for a car to pass, backed "another eight to ten yards" and stopped, because he was close enough to his sister-in-law's truck. This evidence can support a reasonable inference that the defendant was faced with an "emergency and [was] compelled to act instantly to avoid . . . injury" to another. *Foy v. Bremson*, 286 N.C 108, 116, 209 S.E.2d 439, 444 (1974); *Bolick*, 96 N.C. App. at 448, 386 S.E.2d at 79. A reasonable inference is that the defendant, after being suddenly confronted with an accident scene which involved his sister-in-law and her child, believed that the situation required immediate action to prevent some possible further harm to them and it was, therefore, proper to instruct the jury to evaluate his conduct accordingly. Because I believe that the plaintiffs are not entitled to a new trial, I likewise would not disturb the judgment of the trial court dismissing the third party action.

STATE OF NORTH CAROLINA v. FRANKLIN JESSIE BRANDON

No. COA94-1260

(Filed 21 November 1995)

1. Robbery § 84 (NCI4th)— attempted robbery with dangerous weapon—sufficiency of evidence

The evidence was sufficient to be submitted to the jury in a prosecution for attempted robbery with a dangerous weapon where it tended to show that defendant struck a skating rink owner on the head with a stick while he was attempting to leave the rink with the night's receipts; after he was struck, the owner tried to hide his briefcase, which contained the night's receipts, but defendant entered the skating rink through an apartment and threatened the owner and the occupant of the apartment; and $300 was missing from a desk in the apartment after defendant fled.

Am Jur 2d, Robbery § 89.

2. Burglary and Unlawful Breakings § 62 (NCI4th)— first-degree burglary—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of burglary in the first degree where it tended to show that defendant broke into a skating rink which had an apartment; defendant struck the owner on the head with a stick as he was leaving with a briefcase containing the night's receipts; and $300 lying on a desk in the apartment was gone after defendant left the skating rink.

Am Jur 2d, Burglary § 45.

3. Robbery § 145 (NCI4th)— robbery with dangerous weapon—no instruction on lesser offense based on alibi testimony—question as to whether stick was dangerous weapon—instruction on lesser offense required

There was no merit to defendant's contention that his alibi testimony entitled him to a charge on attempted common law robbery; however, defendant was entitled to an instruction on the lesser-included offense because there was a question as to whether the stick he used was a dangerous weapon.

Am Jur 2d, Robbery § 90.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

Appeal by defendant from judgments entered 12 July 1994 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 September 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

WALKER, Judge.

On 17 July 1993, at approximately 12:15 a.m., Robert Schisler, the owner of Tradewinds Skating Club, was preparing to leave the skating rink. He had with him a briefcase containing the night's receipts and some personal money. The skating rink had a sleeping apartment in the back where an employee, Jeffrey Clement, frequently stayed. As Schisler opened the back door out of the apartment, a man, later identified as the defendant, struck him with a stick (approximately two by two inches in size). Schisler tried to pull the door closed but defendant pushed open the door and entered the apartment. The owner fell back into Clement and pushed him into the other office. The defendant then entered the office "making animalistic sounds" and threatening to kill both men. Defendant chased the two men with the stick raised in his hand. Schisler ran through the game room which set off the motion detector. When the alarm sounded, Clement saw the defendant turn around and walk out the back door. Schisler then called the police but defendant was gone when they arrived.

An investigation revealed that $300, which had been laying on the desk in the apartment, was missing. Schisler described the intruder as having a full beard, kind of tall and thin, with a very distinctive look. Clement gave a similar description stating that the man had a full whitish beard, was approximately six feet tall and skinny, and had a strange walk. Schisler was then taken to the hospital where he received twenty-five stitches in the head.

Other convenience stores were alerted about the incident and asked to keep a lookout for a man fitting the description of defendant. On the afternoon of 30 October 1993, Clement spotted the defendant in the skating rink parking lot. He called the police but the

defendant disappeared before they arrived. About fifteen minutes later, a clerk from a nearby convenience store called and told Clement that a man fitting the description of the defendant was in his store. The police were notified and Clement identified the defendant as the man who had assaulted Schisler and committed the robbery.

At trial, the defendant testified that he was not involved in the incident but admitted that he had been at the skating rink to look for work once before when he first arrived in Charlotte. Defendant stated that he heard from a police officer that the skating rink had been robbed by someone with a knife. Defendant further testified that he had been arrested some fifty times in the previous ten years for various misdemeanors but he had no prior convictions for serious offenses.

Defendant was charged with attempted robbery with a dangerous weapon on Schisler. At trial, defendant requested an instruction on the lesser-included offense of attempted common law robbery which the trial court denied. The court instructed the jury on first degree burglary and attempted robbery with a dangerous weapon. Defendant was found guilty of both charges.

[1] For his first assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charge of attempted robbery with a dangerous weapon based on insufficiency of the evidence. In ruling on defendant's motion to dismiss, the trial court must determine whether the State has offered substantial evidence of the defendant's guilt on every element of the crime charged. *State v. Corbett*, 307 N.C. 169, 182, 297 S.E.2d 553, 562 (1982). The trial court should consider such evidence in the light most favorable to the State. *State v. Easterling*, 300 N.C. 594, 604, 268 S.E.2d 800, 807 (1980).

Attempted robbery with a dangerous weapon is defined as: "(1) the unlawful attempted taking of personal property from another, (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means, and (3) danger or threat to the life of the victim." *State v. Torbit*, 77 N.C. App. 816, 817, 336 S.E.2d 122, 123 (1985), *appeal dismissed and cert. denied*, 316 N.C. 201, 341 S.E.2d 573 (1986). Defendant specifically contends that the State failed to offer substantial evidence that he had the requisite intent to unlawfully take personal property of another.

The State's evidence showed that defendant struck Schisler on the head with a stick while he was attempting to leave the skating rink with the night's receipts. After he was struck, Schisler tried to hide his briefcase, which contained the night's receipts, but the defendant entered the skating rink through the apartment and threatened Schisler and Clement. Three hundred dollars was missing from a desk in the apartment after the defendant fled. We conclude that this evidence, when viewed in the light most favorable to the State, is sufficient to give rise to a reasonable inference that defendant intended to deprive another of personal property.

[2] Defendant also contends that there was a variance between the indictment for first degree burglary and the evidence presented. N.C. Gen. Stat. § 14-51 (1993) defines first degree burglary as the breaking and entering, in the nighttime, of a dwelling house or sleeping apartment of another, which is actually occupied, with the intent to commit a felony therein. *See State v. Joyner*, 301 N.C. 18, 269 S.E.2d 125 (1980). Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974).

In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though it is not necessary that the actual commission of the intended felony be charged or proven. *State v. Allen*, 186 N.C. 302, 306, 119 S.E. 504 (1923). Here Schisler and Clement both testified that defendant broke into the skating rink which had an apartment. Defendant struck Schisler on the head with a stick as he was leaving with a briefcase containing the night's receipts. Clement also testified that $300 laying on a desk in the apartment was gone after defendant left the skating rink. Thus, the State's evidence was sufficient to support the conviction of burglary in the first degree.

[3] Defendant's last assignment of error is that the trial court erred in failing to instruct the jury on the lesser-included offense of attempted common law robbery. "The essential difference between armed robbery and common law robbery is that the former is accomplished by the use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened." *State v. Lee*, 282 N.C. 566, 569, 193 S.E.2d 705, 707 (1973). Defendant specifically

argues that his alibi testimony entitled him to a charge on attempted common law robbery.

This argument was rejected by this Court in *State v. Coley*, 23 N.C. App. 374, 208 S.E.2d 886 (1974). In *Coley*, the defendant was charged with breaking and entering with intent to commit a felony. The evidence produced by the State was uncontradicted except for the alibi offered by the defendant. *Id.* at 375, 208 S.E.2d at 886. This Court upheld the trial court's refusal to charge on the lesser-included offense of non-felonious breaking and entering finding that defendant's denial of the charges did not entitle him to a lesser-included instruction. *Id.* at 375-376, 208 S.E.2d 887.

In the alternative, defendant argues that he was entitled to an instruction on the lesser-included offense because there was a question as to whether the stick was a dangerous weapon. We agree.

This Court has stated:

> Common law robbery is accordingly a lesser included offense of armed robbery. . . . It is error to refuse to submit common law robbery to the jury where the evidence does not compel a finding that the weapon allegedly used is a dangerous weapon as a matter of law.

State v. Smallwood, 78 N.C. App. 365, 367, 337 S.E.2d 143, 144 (1985). This issue was raised by defendant in *State v. Jackson*, 85 N.C. App. 531, 355 S.E.2d 224 (1987). In *Jackson*, the defendant was convicted of attempted armed robbery based on his use of a hammer. *Id.* at 224-225, 355 S.E.2d at 531-532. On appeal, defendant argued that the trial court erred in failing to instruct on the lesser-included offense of common law robbery because the hammer was not found to be a dangerous weapon as a matter of law. This Court granted the defendant a new trial, stating:

> the trial judge properly left the question of whether the hammer was a dangerous weapon to the jury. . . . Since the trial judge submitted the determination of the hammer's dangerousness to the jury, she clearly did not conclude that the hammer was a dangerous weapon as a matter of law. The evidence in the present case did not compel a finding that the hammer was a dangerous weapon. Therefore, we hold that the trial court erred in refusing to instruct the jury on the lesser included offense of common law robbery.

Id. at 532, 355 S.E.2d 225.

In the present case, the trial judge agreed to instruct the jury on the defense of alibi but refused to instruct on the lesser-included offense. During the charge conference the trial judge stated:

> Now, it will only be robbery with a dangerous weapon, attempted robbery with a dangerous weapon and a first degree burglary, guilty or not guilty, no lesser included because he is claiming alibi. And when he claims alibi, he's entitled to no lesser included.

As a general rule, a trial court does not err in failing to submit a lesser-included offense to the jury where (1) there is no evidence to support such an instruction, and (2) the defendant claims alibi or generally denies committing the offense. *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). However, this rule should not be misinterpreted to mean that a lesser-included instruction may not be given whenever the defendant asserts alibi as a defense.

Here, as in *Jackson*, the evidence supported an instruction on the lesser-included offense because the trial judge did not find that the stick was a dangerous weapon as a matter of law. The court instructed the jury that a dangerous weapon is "a weapon which is likely to cause death or serious bodily injury" and properly submitted the issue of the stick's dangerousness to the jury. Accordingly, defendant was prejudiced by the court's failure to instruct on the lesser-included offense of common law robbery entitling him to a new trial on the charge of attempted robbery with a dangerous weapon.

No error as to defendant's conviction of first degree burglary (No. 93 CRS 81395).

New trial granted on the charge of attempted robbery with a dangerous weapon (No. 93 CRS 81398).

Judges MARTIN, JOHN C. and McGEE concur.

STATE OF NORTH CAROLINA v. MILTON KELLY AND TYRONE GARDNER

No. COA94-1052

(Filed 21 November 1995)

1. Conspiracy § 39 (NCI4th)— conspiracy instruction—prejudicial error

The trial court's instruction with regard to conspiracy was prejudicial error where it allowed the jury an opportunity to act upon an incorrect interpretation and convict defendants of conspiracy upon a finding that defendants knowingly possessed or attempted to possess cocaine.

Am Jur 2d, Trial § 1142.

Propriety of imposing special parole term as part of sentence, under 21 USCS sec. 846, for a conspiracy to violate Comprehensive Drug Abuse Prevention and Control Act of 1970. 48 ALR Fed 767.

Proper venue in prosecution under 21 USCS sec. 846 for attempt or conspiracy to violate Comprehensive Drug Abuse Prevention and Control Act of 1970. 74 ALR Fed. 669.

2. Narcotics, Controlled Substances, and Paraphernalia § 136 (NCI4th)— maintaining dwelling for controlled substance activity—sufficiency of evidence

The evidence was sufficient to be submitted to the jury in a prosecution for intentionally keeping and maintaining a dwelling for the purpose of using, keeping, or selling controlled substances where it tended to show that defendant possessed a key to the house in question and used it to go in and out of the house; inside the house in an upstairs bedroom was a letter from an insurance company addressed to defendant at the house in question; scales and baking soda, items commonly used to cut and package cocaine, were located in the kitchen of the house; a package containing cocaine was addressed to Randy Brown at the house; defendant stated he was Randy Brown when asked by an undercover officer; and defendant listed the address of the house as his address after he was arrested.

Am Jur 2d, Drugs, Narcotics and Poisons § 47.

Appeal by defendants from judgments entered 9 June 1994 in Wake County Superior Court by Judge Stafford Bullock. Heard in the Court of Appeals 16 October 1995.

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

Law Offices of George W. Hughes, by George W. Hughes and John F. Oakes, Jr., for defendant-appellant Kelly.

Aguirre Law Office, by Bridgett Britt Aguirre, for defendant-appellant Gardner.

GREENE, Judge.

Milton Kelly and Tyrone Gardner (defendants) were tried together and convicted of conspiracy to traffic cocaine by possession of 200 grams or more but less than 400 grams, pursuant to N.C. Gen. Stat. § 90-95(h)(3)(b). Defendant Gardner was also tried and convicted of intentionally maintaining a dwelling for the purpose of keeping and/or selling a controlled substance, pursuant to N.C. Gen. Stat. § 90-108(a)(7). Judgments were entered on 9 June 1994, with both defendants being sentenced to fourteen years imprisonment.

The evidence offered by the State tended to show that on 4 November 1993, Federal Express in Durham called authorities, stating that they were holding a "suspicious" package. Upon investigation, the package was discovered to contain approximately 300 grams of cocaine, a black shirt and potpourri. It was also discovered that the phone number on the sending bill was fictitious, as was the address on the package. The package was addressed to "Randy Brown, 1225 Jacksontown Court, Carry [sic], North Carolina." Federal Express received a call the same day from an anonymous caller asking why the package had not been delivered and told Federal Express that the address was actually 1225 Jamestown Court in Cary, North Carolina, which was a valid address.

On 5 November 1993, officers conducted a controlled delivery of a "dummy" package, which looked like the original package, but did not contain any cocaine, to 1225 Jamestown Court. Before delivery, defendants were observed standing in the doorway of the house at that address looking like they were waiting for something. Defendant Kelly was seen leaving the residence in a burgundy car, and then com-

ing back. Upon delivery, the undercover officer told defendant Gardner that he had a package for Randy Brown and Gardner stated that he was Randy Brown, and signed for the package "Randy Borwn [sic]." Gardner had a key to the residence which he used when the package was delivered. However, the package never went inside the house, but was placed in the trunk of the car used by Kelly.

When officers closed in to make an arrest, defendants fled. While running, Gardner was seen throwing a membership card from his pocket, which bore the name "Randy Brown." Inside the house, officers discovered a letter addressed to Gardner at 1225 Jamestown Court, scales and baking soda, a ziplocked bag of potpourri, and two US Air airline tickets in the name of James King. The day before the "dummy" delivery, officers working at Raleigh-Durham Airport saw Kelly get off a US Air flight that had arrived from La Guardia Airport. When approached at the airport by the officers, Kelly said his name was James King and showed an airline ticket in that name, but did not have any other identification.

The defendants moved to dismiss all the charges, which motions were denied. The defendants did not present evidence.

The trial court initially instructed the jury that defendants "has [sic] been accused of trafficking in cocaine, which is the unlawful possession of 200 to 399 grams of cocaine." The trial court then proceeded to inform the jury that the State had the burden of proving "two things beyond a reasonable doubt." Finally the trial court instructed the jury that they had a "duty to return a verdict of guilty of trafficking in cocaine" if they found the State had satisfied its burden of proof. The trial court also instructed on felony conspiracy to commit the offense of drug trafficking by possession of cocaine. After both the State and defendants informed the trial court that it had improperly instructed on trafficking, the court told the jury that

> it was properly brought to my attention that the instruction that I had given you needed to be modified and that is that part of the instruction that dealt with drug trafficking and possession of controlled substance and feloniously [sic] conspiracy. That which I said to you about the two elements or three elements in drug trafficking by way of possession and that which I said to you about feloniously [sic] conspiracy, disregard that altogether and take this instruction instead.

The new instruction stated:

> Now I charge that for you to find the defendant guilty of felonious conspiring to commit trafficking in cocaine the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant and at least one other person entered into an agreement.
>
> Second, that the agreement was to commit trafficking in cocaine by possession of 200 or more grams but less than 400 grams of cocaine. Trafficking in cocaine by possession consists of the defendant knowingly possessed, and a person possesses cocaine when he is aware of its presence and has either by himself or together with others both the power and the intent to control the disposition or use of that substance.
>
> Second, that the amount of cocaine which the defendant possessed was more than 200 but less than 400 grams of cocaine.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant Tyrome [sic] Gardner knowingly possessed or attempted to possess cocaine.
>
> And third, that the defendant and at least one other person intended the agreement be carried out at the time it was made.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant agreed with at least one other person trafficking in cocaine by possession of 200 grams but less than 400 grams of cocaine and the defendant and at least one other person intended at the time the agreement was made that it would be carried out, it would be your duty to return a verdict of guilty as charged. However, if you're not so able to find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

A similar instruction was also read as to Kelly. After the instruction, defendants made a motion for a mistrial, which was denied. The motions to dismiss and for a mistrial were renewed after the jury returned a verdict of guilty on all counts, and denied, as was defendants' motion for appropriate relief. Defendants appeal.

The issues are whether (I) the instruction with regard to conspiracy was prejudicial error; and (II) the trial court erred in denying

Gardner's motion to dismiss the charge of intentionally maintaining a dwelling for the purpose of keeping and/or selling controlled substances.

I

[1] Defendants argue that the conspiracy instruction was error because it included the following:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant[s] . . . knowingly possessed or attempted to possess cocaine.

The State argues that although the "corrective charge . . . was not the model of clarity . . . when the charge is considered contextually as a whole no prejudicial error is made to appear." We agree with the defendants.

It is well accepted that a proper subsequent instruction corrects any harmful effect of an earlier improper instruction. *State v. Cousins*, 289 N.C. 540, 550-51, 223 S.E.2d 338, 345 (1976). Therefore, in this case the first instruction given by the trial court, although in error, would not require a new trial if the subsequent instruction was correct. The second instruction, however, was not correct. The trial court no doubt intended to charge the jury that a verdict of guilty of conspiracy to commit trafficking in cocaine by possession should be returned only upon a finding by the jury that each defendant agreed with the other to commit the offense. Even so, the instruction afforded the jury an opportunity to "act upon a[n] . . . incorrect interpretation" and convict the defendants of conspiracy upon a finding that the defendants "knowingly possessed or attempted to possess cocaine." *See State v. Parrish*, 275 N.C. 69, 76, 165 S.E.2d 230, 235 (1969) (instruction correct in part and incorrect in part was error). This is particularly so in light of the previous erroneous instruction informing the jury that it could convict the defendants for possession of cocaine. Because there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial," the defendants have satisfied their burden of showing prejudicial error and are entitled to a new trial. N.C.G.S. § 15A-1443(a) (1988); *Parrish*, 275 N.C. at 76, 165 S.E.2d at 235; *see State v. Wallace*, 104 N.C. App. 498, 505, 410 S.E.2d 226, 230 (1991) (instructional errors are generally subject to harmless error analysis).

II

[2] Defendant Gardner also argues that the trial court erred in denying his motion to dismiss and set aside the jury verdict for the charge of intentionally keeping and maintaining a dwelling for the purpose of using, keeping, or selling controlled substances. N.C.G.S. § 90-108(a)(7) (1993). Defendant Gardner contends there was insufficient evidence to support this charge.

The record shows that defendant possessed a key to the house at 1225 Jamestown Court and used it to go in and out of the house. Inside the house, in the upstairs master bedroom, a letter from Integon Insurance was found addressed to defendant at 1225 Jamestown Court. Scales and baking soda, items commonly used to cut and package cocaine, were located in the kitchen of the house. Potpourri similar to that found in the package containing cocaine was also found in a ziplock bag in the home. The package was addressed to Randy Brown, and defendant stated that he was Randy Brown when asked by an undercover officer. Defendant also listed 1225 Jamestown Court as his address after he was arrested.

Although this evidence is not overwhelming, a reasonable person could infer from the evidence that defendant was in control of and maintained the residence for drug activities. To withstand a motion to dismiss, overwhelming evidence is not needed. In close or borderline cases, "courts have consistently expressed a preference for submitting issues to the jury. . . ." *State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (*quoting State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986)). There was no error with respect to this issue.

New trial on the conspiracy to traffic in cocaine by possession.

No error on the maintaining a dwelling conviction.

Chief Judge ARNOLD and Judge SMITH concur.

EVA DOCKERY, PETITIONER v. N.C. DEPARTMENT OF HUMAN RESOURCES, DIVISION OF YOUTH SERVICES, SAMARKAND MANOR TRAINING SCHOOL, RESPONDENT

No. COA94-1039

(Filed 21 November 1995)

1. Public Officers and Employees § 64 (NCI4th)— discrimination against state employee applicant alleged—consideration of qualifications presented during hearing proper

Where petitioner claimed that she was not given a nursing supervisor's position in a state agency based on respondent's discrimination against her by failing to hire her as a "career state employee," the Personnel Commission did not err in considering evidence of petitioner's qualifications presented during the hearing but not during the application process.

Am Jur 2d, Public Officers and Employees §§ 147-151.

2. Public Officers and Employees § 52 (NCI4th)— state employee applying for another state job—application of state employee priority consideration proper

Where petitioner was a state employee who applied for another position of state employment, and there was substantial evidence to support the Personnel Commission's findings, including the finding that petitioner's qualifications were "substantially equal" to the non-state employee applicant, the Personnel Commission, as a matter of law, did not err in applying the state employee priority consideration provision of N.C.G.S. § 126-7.1(c).

Am Jur 2d, Public Officers and Employees §§ 44-63.

Appeal by respondent from order entered 8 June 1994 by Judge Orlando F. Hudson in Wake County Superior Court, affirming a final Amended Decision and Order of the State Personnel Commission (the Commission). Heard in the Court of Appeals 2 October 1995.

In 1990, petitioner was employed as a nurse by respondent North Carolina Department of Human Resources (the Department), Division of Youth Services (DYS), at the Samarkand Manor Training School (the School), which provides rehabilitation services for students who have been committed to the custody of DYS. In December 1990, she applied for the position of nurse supervisor at the School,

and the School interviewed petitioner and other applicants in July 1991. On 31 December 1991 the Department notified her that she was not chosen and that a better qualified candidate was offered the job.

On 8 January 1992, petitioner filed a petition for hearing with the Office of Administrative Hearings (OAH), claiming that the Department discriminated against her on the basis of race and political affiliation. In addition, she claimed that the Department discriminated against her by failing to hire her as a "career state employee" and by retaliating against her for having previously filed a grievance. After the hearing, the Administrative Law Judge (ALJ) issued a decision to the State Personnel Commission, recommending that petitioner be placed in the nurse supervisor position with full backpay.

The Commission issued a decision on 10 November 1993 and issued an amended decision on 9 December 1993. In its amended decision, the Commission adopted many of the ALJ's recommended findings of fact but declined to adopt any of the ALJ's conclusions of law, instead adopting its own. The Commission found that although petitioner failed to establish a prima facie case of either racial or political discrimination, petitioner's qualifications were "substantially equal to those of the applicant actually selected for the position," and therefore ordered that petitioner be placed in the position she sought, with backpay.

On appeal to the superior court, the Department excepted to thirty-one findings of fact on the grounds that they are not supported by substantial evidence in the record. The Department excepted to six findings of fact on the grounds that they are affected by error of law. In addition, the Department excepted to two conclusions of law claiming that they "(a) [are] not supported by the substantial evidence in the entire record; (b) [are] affected by error of law; (c) [were] made as a result of the Commission's acting in excess of its statutory authority; and (d) [are] arbitrary and capricious."

Finally, the Department excepted to the Commission's Amended Decision and Order as a whole, claiming that it "is in excess of the [Commission's] statutory authority, affected by errors of law, unsupported by substantial evidence in the record, and arbitrary and capricious."

On 8 June 1994, the Wake County Superior Court affirmed the Commission's Amended Decision and Order "[b]ased on papers filed and oral arguments presented by Petitioner and Respondent, and for

good cause shown . . . ." Respondent now appeals the decision of the superior court.

Attorney General Michael F. Easley, by Assistant Attorney General Jane L. Oliver, for respondent appellant.

Gill & Dow, by Randolph C. Dow, for petitioner appellee.

ARNOLD, Chief Judge.

While *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994), might appear to state a new and different standard of review of administrative agency decisions at the appellate level, the standard of review is long-standing and has been correctly and lately followed in several recent cases, *e.g.*, *Wilkie v. Wildlife Resources Commission*, 118 N.C. App. 475, 455 S.E.2d 871 (1995); *Brooks v. Ansco & Associates*, 114 N.C. App. 711, 443 S.E.2d 89 (1994); *Teague v. Western Carolina University*, 108 N.C. App. 689, 424 S.E.2d 684, *disc. review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993).

In a most recent case, *In re Ramseur*, 120 N.C. App. ——, 463 S.E.2d —— (1995), moreover, it was properly pointed out that the precise scope of review by this Court is contained in N.C. Gen. Stat. § 150B-51 (1991):

> (b) Standard of Review.—After making the determinations, if any, required by subsection (a), the 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 admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Ramseur, in summarizing the familiar standard of review, notes that the appropriate standard will depend on the precise nature of appellant's quarrel with the lower tribunal.

> If it is alleged that the agency's decision was based on an error of law, then *de novo* review is required. If, however, it is alleged that the agency's decision was not supported by the evidence or that the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.

Ramseur, 120 N.C. App. at —, 463 S.E.2d at —.

First, we note that, pursuant to N.C. Gen. Stat. § 150B-51(b), we apply *de novo* review in reviewing the claims alleging errors of law, and the whole record test in reviewing the claims alleging that the Commission's decision was not supported by substantial evidence. *Id.*

In its first assignment of error, the Department argues generally that the Commission's decision was not supported by substantial evidence on the record. We disagree. "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, 503, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). Moreover, "[if], after all the record has been reviewed, substantial evidence supports the agency's ruling, then the agency's ruling must stand." *In Re: Appeal by McCrary*, 112 N.C. App. 161, 168, 435 S.E.2d 359, 365 (1993). Upon review of the whole record, we find that although contradictory evidence may exist, there was substantial evidence to support the Commission's Amended Decision and Order.

[1] In its second assignment of error the Department argues that the Commission's decision was affected by errors of law. We apply *de novo* review to address this issue. *See Ramseur, supra.* The Department argues first that the Commission improperly considered evidence of petitioner's qualifications presented during the hearing but not during the application process. Respondent relies on *Teague*, 108 N.C. App. 689, 424 S.E.2d 684, to support its argument that it would be error for the Commission to consider evidence the Department was not aware of when making its decision.

Reliance on *Teague* for this contention is misplaced. In *Teague*, we considered whether the Commission was arbitrary and capricious in upholding the decision of an administrator who interviewed and declined to hire a state employee applying for another position with the state. In that case, unlike the case *sub judice*, the applicant was not required to file a new or updated application, and the administrator interviewing her did not have first-hand knowledge of the applicant's work or qualifications. We noted that her "application was seriously deficient in describing her qualifications," *id.* at 691, 424 S.E.2d at 685, and held that the Commission's decision had a rational basis in the evidence and was not arbitrary and capricious. *Id.* at 693, 424 S.E.2d at 687. It was not necessary, then, to address the propriety of the Commission's considering additional evidence.

Our conclusion in *Teague*, under the arbitrary and capricious standard, was not based on any pronouncement by this Court that it is an error of law for the Commission to consider additional evidence presented by the applicant after the application process is completed. Thus, as a matter of law, the Commission did not err in considering evidence of petitioner's qualifications not presented during the application process.

[2] The Department also argues that the Commission misapplied the state employee priority consideration provision under Section 126-7.1 of the State Personnel Act. N.C. Gen. Stat. § 126-7.1(c) (1993) states:

> If a State employee subject to this section:
>
> (1) Applies for another position of State employment; and
>
> (2) Has substantially equal qualifications as an applicant who is not a State employee
>
> then the State employee shall receive priority consideration over the applicant who is not a State employee.

Here, petitioner was a state employee who applied for another position of state employment, and there was substantial evidence to support the Commission's findings, including the finding that petitioner's qualifications were "substantially equal" to the non-state employee applicant. Thus, as a matter of law, the Commission did not err in applying the state employee priority consideration provision.

In its third assignment of error, the Department argues generally that the Commission's decision was arbitrary and capricious. We disagree.

> The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," . . . or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . ."

Lewis v. N.C. Dept. of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citing *Comm'r of Ins. v. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (citations omitted)). Upon review of the record we do not find that the Commission's decision was "patently in bad faith" or lacking in fair and careful consideration. Applying the whole record test, we find that the Commission's decision was not arbitrary and capricious.

We find it unnecessary to address the Department's fourth assignment of error.

Finally, we note that the petitioner appellee's brief was not double-spaced and violated Rule 26(g) of the North Carolina Rules of Appellate Procedure. We caution counsel that such conduct is not acceptable to this Court.

Affirmed.

Judges GREENE and SMITH concur.

HAYWOOD STREET REDEVELOPMENT CORPORATION, INC. v. HARRY S. PETERSON, CO., INC.

No. COA95-56

(Filed 21 November 1995)

1. Limitations, Repose, and Laches § 29 (NCI4th)— negligent damage to real property—plaintiff's knowledge of defect—action barred by statute of limitations

Plaintiff's action for negligent damage to real property was barred by the statute of limitations where defendant agreed to install a waterproofing surface on plaintiff's parking deck in February of 1987; as of 15 December 1987 plaintiff was aware that

the surface area was already peeling up and water was leaking into plaintiff's building; the three year statute of limitations began to accrue then; and this negligence claim was not filed until 1992.

Am Jur 2d, Building and Construction Contracts § 114.

2. Estoppel § 22 (NCI4th)— issue raised first time on appeal—issue not considered

Because plaintiff did not raise estoppel in its pleading below or in its responsive pleading on the summary judgment motion, it could not raise the issue for the first time on appeal.

Am Jur 2d, Estoppel and Waiver §§ 134 et seq.

3. Limitations, Repose, and Laches § 57— prospective warranty of waterproofing—continued defects—new breaches—action not barred by statute of limitations

Where defendant's warranty of its work provided that waterproofing would be free of certain defects for a period extending through 15 March 1993, there was a new breach of agreement each day that the waterproofing was not free of defects, and with the occurrence of each breach, a new cause of action accrued; therefore, plaintiff's action instituted in 1992 was not barred by the statute of limitations.

Am Jur 2d, Limitation of Actions § 127.

4. Limitations, Repose, and Laches § 57 (NCI4th)— seller's efforts to make repairs—statute of limitations tolled

Since a statute of limitations is tolled during the time the seller endeavors to make repairs to enable the product to comply with a warranty, defendant continued to attempt to repair the waterproofing through 30 November 1990, and this action was filed in 1992, the statute of limitations had not expired.

Am Jur 2d, Limitation of Actions § 127.

Appeal by plaintiff from judgment entered 21 October 1994 in Buncombe County District County by Judge Shirley H. Brown. Heard in the Court of Appeals 29 September 1995.

Steven Andrew Jackson, and Kaylor & Luffman, by Stephen D. Kaylor, for plaintiff-appellant.

R. Cartwright Carmichael, Jr., for defendant-appellee.

GREENE, Judge.

Haywood Street Redevelopment Corporation, Inc. (plaintiff) appeals from summary judgment entered 21 October 1994 in District Court for Buncombe County, North Carolina.

Harry S. Peterson, Co., Inc., (defendant) contracted on 9 February 1987 to install a waterproofing surface on plaintiff's parking deck. Defendant gave a written express warranty on 15 June 1988, which did not expire until 15 March 1993. The warranty provided:

> [T]he sealant or waterproofing work provided under this warranty shall be free of defects related to the following causes for the stated warranty period.
>
> 1) Cohesive or adhesive failure of the materials supplied resulting from faulty workmanship or defective materials.
>
> 2) Material failure due to weathering.
>
> 3) Abrasion or tear failure of the work supplied resulting from normal use.
>
> During the warranty period Peterson will make, or cause to be made, any repairs necessary to correct deficiencies in the work provided such deficiencies result directly from the above described causes.

The warranty also stated that all other express or implied warranties, including the implied warranty of merchantability and fitness, are excluded.

The waterproofing began being applied in 1987, at which time plaintiff became aware that the surface area was "already peeling up" and "water was already leaking into the Haywood Park building." A letter from defendant to plaintiff dated 30 November 1990 indicates that defendant was still trying to repair leaks in the surface area when the letter was written. However, in the same letter, defendant refused to do any further repairs without payment for past work. Plaintiff rejected this offer, and on 6 October 1992 filed a complaint for negligence, breach of contract and breach of implied and express warranties.

Defendant filed a motion to dismiss, claiming plaintiff's claims were barred by the three year statute of limitations in N.C. Gen. Stat.

§ 1-52(1), (5) and (16). Defendant's Motion for Summary Judgment was granted "based upon the statute of limitations."

The issues are (I) (A) whether plaintiff's negligence claim is barred by the statute of limitations, and if so, (B) is defendant estopped from asserting the statute of limitations; and (II) whether plaintiff's breach of warranty claim is barred by the statute of limitations.

I

(A)

[1] The statute of limitations for negligent damage to real property is set out in N.C. Gen. Stat. § 1-52. Section 1-52(5) provides that an action "for any other injury to the person or rights of another not arising on contract" must be brought within three years from when the cause of action accrues. N.C.G.S. § 1-52(5) (1983); *see Condominium Assoc. v. Scholz Co.*, 47 N.C. App. 518, 526, 268 S.E.2d 12, 18 (1980) (negligence action is limited by section 1-52(5)). The action does not accrue until the physical damage "becomes apparent or ought reasonably to have become apparent . . . ." N.C.G.S. § 1-50(5)(f) (1983); N.C.G.S. § 1-52(16) (1983).

In the affidavit submitted by plaintiff, plaintiff acknowledges that as of 15 December 1987, the surface area was "already peeling up, and water was already leaking into the Haywood Park building." At this time, plaintiff was aware of the defective condition, and the three year statute of limitations began to accrue. Because this negligence claim was not filed until 1992, more than three years later, the trial court correctly dismissed this claim as barred by the statute of limitations.

(B)

[2] Plaintiff argues alternatively that his negligence claim is not barred by the statute of limitations because the defendant is estopped to assert the statute of limitations. Plaintiff contends that defendant is estopped from raising the statute of limitations as a defense because of its "misrepresentations upon which Plaintiff Haywood Street reasonably relied." Specifically, plaintiff argues that it relied upon defendant's five year express warranty and oral promises by defendant to repair the defective waterproofing.

Plaintiff is raising estoppel for the first time in this Court. This Court has held that an affirmative defense, under N.C. Gen. Stat. § 1A-1, Rule 8(c), must be plead before it reaches this Court, or it will not be allowed. *See Allred v. Tucci*, 85 N.C. App. 138, 144, 354 S.E.2d 291, 295-96, *disc. rev. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987) (plaintiff could not use estoppel on appeal where she failed to plead estoppel in her responses to defendant's motions); *see also Gillis v. Whitley's Discount Auto Sales*, 70 N.C. App. 270, 277, 319 S.E.2d 661, 666 (1984) (because *necessity* was not pleaded or effectively argued before the trial court, it cannot be raised for the first time on appeal). Because plaintiff did not raise estoppel in its pleadings below, or in its responsive pleading on the summary judgment motion, it cannot raise it for the first time on appeal.

II

[3] The statute of limitations for breach of warranty and contract claims is also three years. N.C.G.S. § 1-52(1) (1983). For the same reasons given for affirming the dismissal of the negligence claim, the breach of contract claim was properly dismissed. With regard to the breach of warranty claim, the defendant contends that because the damages were apparent to the plaintiff in December 1987, that claim also accrued on that date and is thus barred by the statute of limitations. We disagree.

In this case, the warranty provides that the waterproofing will "be free of [certain] defects" for a period extending through 15 March 1993. The warranty, therefore, is in the nature of a prospective warranty, in that it guarantees the future performance of the waterproofing for a stated period of time. *See* E.E. Woods, Annotation, *Statute of Limitations: When Cause of Action Arises on Action Against Manufacturer or Seller of Product Causing Injury or Death*, 4 A.L.R.3d 821 § 4 (contrasting present and prospective warranties); *see also* N.C.G.S. § 25-2-725(2) (1986) (statute of limitations statute making distinction for warranties extending to future performance); *Ontario Hydro v. Zallea Sys., Inc.*, 569 F. Supp. 1261, 1266 (D. Del. 1983) (under Uniform Commercial Code (UCC), warranty for future performance "*guarantees the performance* of the product itself for a stated period of time" (emphasis in original)). In other words, the warranty was a guarantee that the waterproofing would be free of defects through 15 March 1993 and on each day the waterproofing was not free of defects, there was a new breach of the agreement.

With the occurrence of each breach, a new cause of action accrued. *See* 54 C.J.S. *Limitations of Actions* § 84, at 120 (1987) ("where a cause of action is predicated on numerous acts occurring over an extended period, the action accrues with each act"). Other courts agree with this position. *See Bulova Watch Co. v. Celotex Corp.*, 389 N.E.2d 130, 132 (N.Y. 1979); *Vogelsang v. McQuestion*, 518 N.Y.S.2d 345, 346 (Sup. 1987); *Beckstead v. Deseret Roofing Co.*, 831 P.2d 130, 132 (Utah App. 1992); *Krueger v. V.P. Christianson Silo Co.*, 240 N.W. 145, 146 (Wis. 1932); *cf. Oakley v. Texas Co.*, 236 N.C. 751, 753, 73 S.E.2d 898, 899 (1953) (each separate act of a recurring trespass gives rise to a separate cause of action); *cf. Sunbow Indus., Inc. v. London*, 58 N.C. App. 751, 753, 294 S.E.2d 409, 410, *disc. rev. denied*, 307 N.C. 272, 299 S.E.2d 219 (1982) (attorney had continuing duty to file financing statement). We are aware that under the UCC, a breach of a warranty that extends to future performance accrues when the breach is or should have been discovered. N.C.G.S. § 25-2-725(2) (1986); 3 William D. Hawkland, *Hawkland UCC Series* § 2-725:02 (1994). If the UCC applied to this case, therefore, the breach of warranty action would have accrued at the time the plaintiff became aware that the waterproofing was defective, which was in 1987, and this action would have to be dismissed. This case is not, however, governed by the UCC. N.C.G.S. § 25-2-102 (1986) (applies only to "transactions in goods"); *see Forsyth Memorial Hosp. v. Armstrong World Indus.*, 336 N.C. 438, 443, 444 S.E.2d 423, 426 (1994) (upon installation, vinyl floor covering became improvement to real property). Indeed the UCC has its own set of rules with regard to accrual of actions, which are not consistent with the general rules applicable in non-UCC cases. N.C.G.S. § 25-2-725 (1986) (breach of contract action accrues when the breach occurs, without regard to when the injury is discovered). Accordingly, in this non-UCC case, because the plaintiff's action was filed within three years of a breach of the warranty, the trial court erred in dismissing it.

[4] In this case, there is an additional reason why the statute of limitations has not expired. A statute of limitations is tolled during the time the seller endeavors to make repairs to enable the product to comply with a warranty. *Styron v. Supply Co.*, 6 N.C. App. 675, 680, 171 S.E.2d 41, 45 (1969); *see Mack v. Hugh*, 225 Cal. App. 2d 583, 589-90 (1964); *cf. Stallings v. Gunter*, 99 N.C. App 710, 714, 394 S.E.2d 212, 215, *disc. rev. denied*, 327 N.C. 638, 399 S.E.2d 125 (1990) (statute of limitations tolled in malpractice action where physician continues to treat the patient). The defendant continued to attempt to

repair the waterproofing through 30 November 1990 and this action was filed in 1992, well within the three year statute.

We do not address the statute of limitations with regard to the plaintiff's claim based on breach of implied warranty because any implied warranties were excluded in the express warranty agreement.

Reversed in part and remanded.

Chief Judge ARNOLD and Judge SMITH concur.

STATE OF NORTH CAROLINA v. WILLIAM D. McLEAN

No. COA95-262

(Filed 21 November 1995)

Searches and Seizures § 93 (NCI4th)— unlawful entry by police officer—taint purged by information from others—search warrant valid

A search warrant was based upon information independent of and unrelated to an unlawful entry of defendant's apartment by a police officer so as to purge the taint and validate the search warrant where the managers of the apartment complex and an exterminator who treated defendant's apartment gave sufficient information about marijuana plants and drug paraphernalia found by them in the apartment to dissipate any taint arising from the officer's unlawful entry.

Am Jur 2d, Searches and Seizures § 118.

Appeal by defendant from judgment entered 8 November 1994 by Judge Dexter Brooks in Robeson County Superior Court. Heard in the Court of Appeals 24 October 1995.

Attorney General Michael F. Easley, by Assistant Attorney General William B. Crumpler, for the State.

Musselwhite, Musselwhite, Musselwhite & Branch, by David F. Branch, Jr., for defendant-appellant.

MARTIN, MARK D., Judge.

On 8 November 1994 defendant pled guilty to one count of intentionally maintaining a drug dwelling house, in violation of N.C. Gen. Stat. § 90-108(a)(7), and one count of possession with intent to manufacture marijuana, in violation of N.C. Gen. Stat. § 90-95(a)(1). The trial court placed defendant on probation for three years. Prior to entry of his guilty plea, defendant reserved his right to appeal from the trial court's denial of his motion to suppress evidence. We affirm.

On 15 December 1993 the managers of Oakwood Apartments in Lumberton, North Carolina, contacted the Lumberton Police Department (Department) concerning the discovery of marijuana plants in apartment V-2, defendant's apartment. In response the Department dispatched Patrolman Clay Rogers to the scene. Patrolman Rogers, accompanied by Oakwood managers, entered defendant's apartment and observed marijuana plants growing inside a closet. Afterwards, Patrolman Rogers removed everyone from the apartment and called detectives in the vice-narcotics unit. When Detectives M.J. Biggs and S.J. Morton arrived, Patrolman Rogers was standing at the front door. Also present were the Oakwood managers, Brenda Andrews and Carol Kendall, and the exterminators, Scott Fountain and Hector Bermudez.

Andrews and Kendall related to Detective Biggs that Oakwood Management had given notice to tenants an exterminating company would be spraying apartments on 15 December 1993. During the extermination of defendant's apartment, Bermudez discovered a locked closet in an upstairs bedroom. Andrews and Kendall unlocked the closet to allow extermination of the area inside. After gaining entry to the locked closet, Andrews, Kendall, and Bermudez observed artificial light devices, plant food, plant tools, and approximately thirty plants in individual planters which they recognized to be marijuana. Subsequently, the Oakwood managers contacted police about discovering the marijuana plants.

After interviewing Andrews, Kendall, Bermudez, Fountain, and Patrolman Rogers, Detective Biggs presented the magistrate with an affidavit in support of his request for a search warrant. Detective Biggs referenced, as grounds for probable cause, that Andrews, Kendall, and Bermudez observed approximately thirty marijuana plants, plant food, artificial lights, and plant tools inside the locked closet. Detective Biggs also included Patrolman Rogers' corrobora-

tive observations of the marijuana plants. At the suppression hearing, Detective Biggs indicated he would have attempted to obtain a warrant based solely on his conversation with the apartment managers and the exterminators.

Having obtained the warrant, Detective Biggs conducted a search of defendant's apartment and seized marijuana plants and paraphernalia.

On 4 May 1993 defendant moved to suppress all evidence seized as a result of the search. On 5 December 1994 the trial court entered an order *nunc pro tunc* denying defendant's motion to suppress. The trial court concluded, "regardless of the unlawful entry by police officer, Clay Rogers, Detective M.J. Biggs and Detective S.J. Morton had sufficient probable cause in their probable cause affidavit exclusive of the entry by police officer [] Clay Rogers for the issuance of a search warrant and therefore the same is valid." We agree.

The sole issue presented on appeal is whether the trial court erred in denying defendant's motion to suppress evidence seized at his apartment.

This Court's "review of a denial of a motion to suppress is limited to determining whether the trial court's findings of facts are supported by competent evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law are legally correct." *State v. Trapp*, 110 N.C. App. 584, 587, 430 S.E.2d 484, 486 (1993).

Defendant first contends the trial court erred by denying his motion to suppress because police officers failed to comply with N.C. Gen. Stat. § 15A-974. Section 15A-974 requires suppression of evidence "if it is obtained as a result of a substantial violation" of the Criminal Procedure Act, Chapter 15A of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 15A-974 (1988). Defendant, however, fails to present any argument concerning the alleged violation of section 15A-974, nor does he allege any other violation of Chapter 15A. Accordingly, this argument is deemed abandoned. *See* N.C.R. App. 28(b)(5).

Defendant next contends the trial court erred by denying his motion to suppress because the warrant authorizing the search was allegedly tainted by the unlawful entry and corroborative observa-

tions of Patrolman Rogers in violation of the Fourth Amendment to the United States Constitution.[1]

The threshold question is whether the affidavit contained information sufficient to establish probable cause for the issuance of a search warrant.

When considering an application for a search warrant, magistrates are required to make "a practical, common-sense decision." *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d. 527, 548 (1983). The standard is whether probable cause exists under the totality of the circumstances. *State v. Wallace*, 111 N.C. App. 581, 584, 433 S.E.2d 238, 240, *disc. review denied*, 335 N.C. 242, 439 S.E.2d 161 (1993). "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates*, 462 U.S. at 238-239, 76 L. Ed. 2d. at 548 (*quoting Jones v. United States*, 362 U.S. 257, 271, 4 L. Ed. 2d 697, 708 (1960)).

In the present case, the managers of Oakwood Apartments initially contacted police about marijuana located in a locked closet at defendant's apartment. The two managers and an exterminator stated defendant possessed marijuana plants and paraphernalia in his residence. They each stated the marijuana plants were located in an upstairs locked closet. We believe the totality of these circumstances provided adequate, reliable information to constitute probable cause.

We now determine whether the search warrant was based upon sufficient information independent of and unrelated to the unlawful entry so as to purge the taint and validate the search warrant.

The exclusionary rule prohibits introduction of evidence seized during an unlawful search. *Murray v. United States*, 487 U.S. 533, 536, 101 L. Ed. 2d. 472, 480 (1988). The exclusionary rule does not apply, however, if the connection between the unlawful entry and the discovery and seizure of the evidence "is so attenuated as to dissipate the taint, as where police had an independent source for discovery of the evidence." *Wallace*, 111 N.C. App. at 589, 433 S.E.2d at 243. The independent source is not sufficient to purge the taint of an earlier unlawful entry if "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate

1. We assume, without deciding, that the warrantless entry of defendant's apartment was unlawful. *See Chapman v. United States*, 365 U.S. 610, 616-617, 5 L. Ed. 2d 828, 833-834 (1961).

and affected his decision to issue the warrant." *Murray*, 487 U.S. at 542, 101 L. Ed. 2d at 483-484 (footnote omitted).

Application of *Murray* reveals the information obtained from Andrews, Kendall, and Bermudez was sufficient to dissipate any taint arising from the unlawful entry. First, Detective Biggs, the officer who applied for the search warrant, did not participate in the unlawful entry. In addition, the information presented by Detective Biggs to the magistrate included sufficient evidence from independent, reliable sources to constitute probable cause "independent of and unrelated to the illegal entry." *State v. Knight*, 340 N.C. 531, 548, 459 S.E.2d 481, 492 (1995) (*citing Segura v. United States*, 468 U.S. 796, 811, 82 L. Ed. 2d 599, 613 (1984)). *See State v. Waterfield*, 117 N.C. App. 295, 298, 450 S.E.2d 524, 526-527 (1994). Therefore, we do not believe Officer Biggs' decision to seek the warrant was prompted by the unlawful entry but rather based on information "independently distinguishable so as to purge the search warrant of the primary taint." *Wallace*, 111 N.C. App. at 589, 433 S.E.2d at 243.

Second, the totality of the information obtained from Andrews, Kendall, and Bermudez, which independently coalesced to support a finding of probable cause, was "wholly unconnected" with the unlawful entry. *See Id.* at 590, 433 S.E.2d at 243. Therefore, we do not believe the corroborative information obtained from the warrantless search "affected [the magistrate's] decision to issue the warrant." *Murray*, 487 U.S. at 542, 101 L. Ed. 2d at 484.

Accordingly, we conclude the warrant authorizing the search of defendant's apartment was not tainted by the unlawful entry and therefore did not violate the Fourth Amendment. The trial court did not err in denying defendant's motion to suppress.

Affirmed.

Judges GREENE and McGEE concur.

SHIRLEY FINNEY AND HUSBAND, J.W. FINNEY, JR., PLAINTIFFS v. ROSE'S STORES, INC., AND DIVERSIFIED PRODUCTS CORPORATION, DEFENDANTS

No. 9430SC105

(Filed 21 November 1995)

Negligence § 99 (NCI4th)— injury while using treadmill—plaintiff's contributory negligence—summary judgment proper

In an action to recover for personal injuries sustained by plaintiff when she fell from an electric treadmill manufactured by one defendant and on display in the other defendant's store, the trial court properly entered summary judgment for defendants based on plaintiff's contributory negligence where the evidence tended to show that plaintiff took no precautions in examining the treadmill; she was "just fiddling" with the treadmill's controls for no apparent reason without determining what the consequences of her touching might be; and plaintiff readily admitted that she was not thinking and was therefore not exercising ordinary care to protect herself from injury.

Am Jur 2d, Negligence §§ 1096 et seq.

Judge GREEBE dissenting in part, concurring in part.

Appeal by plaintiffs from order of summary judgment entered 14 October 1993 by Judge Julia V. Jones in Haywood County Superior Court. Heard in the Court of Appeals 16 October 1995.

On 7 January 1991, the plaintiffs went to Rose's place of business in Waynesville, North Carolina. On display in the Sporting Goods section of the store were electric treadmills for home use. Shirley Finney stepped onto a treadmill manufactured by defendant Diversified Products and she began to touch the control panel of the treadmill. Unaware that the treadmill manufactured by defendant Diversified Products was plugged in, plaintiff touched the on/off control button and was thrown from the treadmill. As a result she sustained injuries to her back and knee.

Plaintiffs sued defendants for damages arising from personal injuries sustained as a result of the accident. On 14 October 1993 both defendants moved for summary judgment. Defendant Rose's moved for summary judgment on the issue of plaintiff's contributory negli-

gence. Defendant Diversified Products Corporation moved for summary judgment on the issue of its own negligent design and plaintiff's contributory negligence. The trial court granted summary judgment in favor of the defendants. Plaintiffs appeal.

Russell L. McLean, III, for plaintiff appellants.

Kathy A. Gleason for defendant appellee Rose's Stores, Inc. and Frank P. Graham for defendant appellee Diversified Products Corporation.

ARNOLD, Chief Judge.

Plaintiffs presented evidence that Rose's was aware that the treadmill was plugged in and that the signs indicating such had been removed from the treadmill. Further, plaintiffs presented evidence that Rose's employees had witnessed other individuals falling off of the treadmill. However, a large number of these were children who would intentionally increase the treadmill speed to see if they could remain standing on the treadmill. Also, anytime that a Rose's employee was aware that someone was testing the treadmill, the employee would warn the individual to be careful. Plaintiff, Shirley Finney's deposition also reveals several key factors: (1) she had no personal experience with the use of treadmills; (2) she knew that treadmills worked by having a moving belt on which individuals stand and are thereby able to walk in place; (3) she made no attempt to locate, or to ask a salesperson for assistance before stepping onto the treadmill and manipulating its control panel; (4) she says that at the moment that she touched the treadmill's control panel she was just not thinking; (5) she says she was just fiddling with the treadmill's controls for no apparent reason; (6) she did not try to determine what the consequences of her touching the controls might be; (7) she did not hold on to the treadmill's handrails while standing on the treadmill; (8) she explains her behavior of touching the control panel buttons by saying that in general she just liked to touch things.

Defendant, as owner of the premises, owed to plaintiffs as invitees the duty to exercise ordinary care to keep the property in a reasonably safe condition, and to warn them of hidden or concealed dangers, express or implied. *Newsom v. Byrnes*, 114 N.C. App. 787, 788, 443 S.E.2d 365, 367 (1994). But business proprietors are not insurers of an invitee's safety. *Wren v. Convalescent Home*, 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967). Plaintiff may not recover if she knew of the unsafe condition, or if it should have been obvious to any ordinary

person under the circumstances existing at the time she was injured. *Pulley v. Rex Hosp.*, 326 N.C. 701, 705, 392 S.E.2d 380, 383 (1990).

Plaintiff is required by law to exercise ordinary care for her own safety.

> Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury. Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety.

Smith v. Fiber Controls Corp., 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (quoting *Clark v. Roberts*, 263 N.C. 336, 139 S.E.2d 593 (1965)). Plaintiff took no precautions in examining the treadmill. She readily admits that she was not thinking and was therefore not exercising ordinary care to protect herself from injury. In light of plaintiff's forecast of evidence the trial court correctly granted summary judgment on the issue of plaintiff's contributory negligence.

Plaintiff next argues that the trial court erred in granting summary judgment for defendant Diversified Products Corporation on the issues of contributory negligence and defendant's negligent design. We disagree. N.C. Gen. Stat. § 99B-4(3) (1994) supports the trial court's entry of summary judgment because plaintiff was contributorily negligent when she manipulated the controls of the treadmill. G.S. § 99B-4(3) provides:

> No manufacturer or seller shall be held liable in any product liability action if: (3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage to the claimant.

G.S. § 99B-4(3) codifies the common law doctrine of contributory negligence. Where a complete defense, such as contributory negligence exists as to a plaintiff's negligence claim, summary judgment is properly entered for the defendant. *Bonestell v. North Topsail Shores*

Condominiums, Inc., 103 N.C. App. 219, 222, 405 S.E.2d 222, 224 (1991).

Plaintiff's forecast of evidence shows that she did not exercise ordinary care in order to protect herself from injury when using defendant Diversified Products treadmill on display in defendant Rose's store. Thus, she is contributorily negligent and barred from asserting any claim against defendant Diversified Products. The trial court correctly found no genuine issue as to any material fact and correctly granted summary judgment in favor of defendant Diversified Products.

Affirmed.

Judge SMITH concurs.

Judge GREENE dissents in part and concurs in part with a separate opinion.

Judge GREENE dissenting in part, concurring in part.

I do not agree that the evidence supports the grant of summary judgment for the defendants on the basis of plaintiff's contributory negligence.

The evidence, in the light most favorable to the plaintiff, reveals that: the plaintiff had no understanding of how a treadmill was powered or operated, as she had never used one; there were no signs informing the plaintiff that the treadmill was electrically powered; the treadmill was electrically powered and was connected to the power source with a cord leading from the front of the treadmill to a plug box on the floor in front of the treadmill and then through a plastic pipe into the ceiling; boxes were stacked in front of the treadmill with the open tread facing the aisle; the plaintiff entered onto the treadmill from the open end of the machine; the plaintiff did not see any electrical outlets in the area of the treadmill or notice that it was connected to a power source; and she touched the controls on the machine, it came on at a high rate of speed and threw her off and onto the floor. This evidence raises a genuine issue of fact with regard to plaintiff's contributory negligence, but it does not in my opinion constitute contributory negligence as a matter of law. The evidence does show, as noted by the majority, that the plaintiff touched the control panels without thinking and did not hold onto the handrails. This evidence must, however, be evaluated in the context of whether she

knew or should have known that the machine was electrically powered and if so, connected to a power source. The evidence, in the light most favorable to the plaintiff, does not show that she knew or should have known that the treadmill was connected to a power source.

I do agree, however, that summary judgment for the defendant Diversified Products Corporation (Diversified) was proper for a different reason. The evidence simply does not support the allegations that Diversified was negligent. I would therefore affirm the summary judgment for Diversified and reverse the summary judgment for Rose's Stores, Inc., and remand for trial.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, PLAINTIFF-APPELLEE v. PAUL DAVID LINDQUIST, DARLA R. LINDQUIST AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT-APPELLANT

No. COA94-1445

(Filed 21 November 1995)

Insurance § 516 (NCI4th)— out of state insurer of owner—in state insurer of driver—driver's coverage primary—owner's policy not "collectible insurance"

The driver's in-state insurer, Farm Bureau, rather than the owner's out-of-state insurer, Metropolitan, provided primary coverage for an accident, since Farm Bureau's "other insurance" provision stated that "any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance"; the "out of state" clause of Metropolitan's policy provided that "coverage [for another state's financial responsibility act] shall be reduced to the extent that other automobile liability insurance applies"; this clause thus excluded coverage where the out-of-state compulsory insurance law was satisfied by the driver's policy; the Metropolitan policy did not, until the limits of the Farm Bureau policy were exhausted, provide coverage for the accident; and the Metropolitan policy thus was not "collectible insurance" for purposes of Farm Bureau's "other insurance" provision.

Am Jur 2d, Automobile Insurance § 432.

Appeal by Defendant from judgment entered 12 September 1994 by Judge Knox V. Jenkins in Cumberland County Superior Court. Heard in the Court of Appeals 3 October 1995.

Anderson, Broadfoot, Johnson, Pittman, Lawrence & Butler, by Steven C. Lawrence and Suzanne M. Fenzel, for defendant-appellant North Carolina Farm Bureau Mutual Insurance Company.

Cansler, Lockhart, Campbell, Evans & Garlitz, P.A., by Thomas D. Garlitz, for plaintiff-appellee.

MARTIN, MARK D., Judge.

Defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) appeals from summary judgment granted to plaintiff Metropolitan Property & Casualty Insurance Company (Metropolitan). We affirm.

This appeal arises from a declaratory judgment action filed by Metropolitan to determine the amount, if any, of its liability for the 21 August 1991 automobile accident (Accident) between Paul D. Lindquist (Paul) and his then wife, Darla R. Lindquist (Darla).

On 21 August 1991 Paul, while driving a 1978 Plymouth automobile (Plymouth), collided with a 1984 Dodge automobile (Dodge) being driven by Darla on Rural Paved Road 2014. At all times pertinent to this case: (1) the Plymouth was owned by Paul's father, an Ohio resident; (2) the Dodge was jointly owned by Paul and Darla; (3) the Plymouth was insured by Metropolitan under policy no. 000 99 8171 0 (Metropolitan Policy) issued to Paul's father; and (4) the Dodge was insured by Farm Bureau under policy no. AP3825229 (Farm Bureau Policy) issued to Paul and Darla. Further, on 21 August 1991, Paul and Darla were still married and living together.

On 18 August 1992, Darla instituted a civil action against her then estranged husband to recover for personal and property damages arising out of the Accident. It is undisputed Paul is an insured under both policies. Metropolitan, however, denied coverage asserting Darla's claims fell within the general exclusions of its policy.

On 22 August 1994, Farm Bureau moved for summary judgment. The trial court determined there was no genuine issue of material fact and ruled the damages to property and person claimed by Darla were not covered by the Metropolitan Policy.

On appeal, Farm Bureau contends the trial court erred by granting summary judgment to Metropolitan on the grounds: (1) a genuine

issue of material fact existed as to whether Paul and Darla resided in the same household; and (2) the Metropolitan Policy provided primary insurance coverage in this case.

A trial court's grant of summary judgment is fully reviewable by this Court because the trial court rules only on questions of law. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 384-385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). Thus, this Court must determine whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, — N.C. —, 276 S.E.2d 283 (1981).

Initially we note Farm Bureau has failed to offer any argument, precedent, or evidence to support its contention a genuine issue of material fact existed as to whether Paul and Darla resided in the same household. Accordingly, we deem this assignment of error abandoned. *See* N.C.R. App. P. 28(b)(5).

We now consider Farm Bureau's allegation that Metropolitan was not entitled to summary judgment.

Farm Bureau contends the Metropolitan Policy must provide Paul with, at a minimum, the amount of coverage mandated by our Motor Vehicle and Financial Responsibility Act (Act), N.C. Gen. Stat. § 20-279.1, *et seq.* (1993). To support its argument, Farm Bureau correctly asserts:

> It is well recognized in North Carolina that the provisions of a statute applicable to insurance policies are a part of the policy to the same extent as if therein written, and when the terms of the policy conflict with statutory provisions favorable to the insured, the provisions of the statute will prevail.

Insurance Co. v. Casualty Co., 283 N.C. 87, 91, 194 S.E.2d 834, 837 (1973). We note, consistent with the above rule, that either the Metropolitan Policy or the Farm Bureau Policy would provide Paul with the coverage mandated by the Act had the other policy not been in existence. See *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967); N.C. Gen. Stat. § 20-279.21(j) (1993).

Nevertheless, both policies are in effect and this Court must therefore determine whether the trial court erred in ruling the Farm

Bureau Policy provides primary coverage for the damages Darla suffered in the Accident.

Farm Bureau, seeking to impose the duty of primary coverage upon Metropolitan, cites JAMES E. SNYDER, JR., NORTH CAROLINA AUTOMOBILE INSURANCE LAW § 4-1 (2d ed. 1994), for the proposition that where, as here, two policies exist—driver and owner—"primary coverage in North Carolina is provided by the vehicle owner's policy." In jurisdictions which accept this proposition as law, courts ordinarily limit its application to actions involving the construction of opposing "Other Insurance" provisions where one of the policies contains an excess insurance clause pertaining to coverage of vehicles not owned by the insured and the other a pro rata clause. *See* GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 62:60 and 62:73 (2d ed. 1983).

We note the instant action does not involve the construction of opposing "Other Insurance" clauses. Rather, our task is construction of Farm Bureau's "Other Insurance" provision and Metropolitan's "Out of State Insurance" provision. Further, while Farm Bureau's "Other Insurance" provision contains an excess clause pertaining to coverage of vehicles not owned by Paul, we believe Metropolitan's "Out of State Insurance" provision contains a no liability or escape clause, not a pro rata clause. Therefore, even assuming this Court adopted the proposition that the vehicle owner's policy provides primary coverage, *see* SNYDER, NORTH CAROLINA AUTOMOBILE INSURANCE LAW § 4-1, we nonetheless believe it is inapplicable to the present case.

We find instructive, however, our Supreme Court's ruling that where two policies satisfy the Act's coverage requirements, the driver's insurance carrier, depending on the language of the policies, provides primary coverage. *See United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 334, 420 S.E.2d 155, 156 (1992); *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 345, 152 S.E.2d 436, 440 (1967). As the Supreme Court stated, "an insurer by the terms of its policy could exclude liability coverage under [the owner's] policy if the driver of a vehicle . . . was covered under his own policy for the minimum amount of liability coverage required by the Motor Vehicle Financial Responsibility Act, N.C.G.S. § 20-279.1 *et seq.*" *United Services*, 332 N.C. at 334, 420 S.E.2d at 156. Therefore, whether Metropolitan (owner's insurer) or Farm Bureau (driver's insurer) provides primary coverage for the Accident is controlled by the terms and exclusions within each policy.

Insurance policies are considered contracts between two parties. *Insurance Co.*, 269 N.C. at 346, 152 S.E.2d at 440. The court's main purpose in interpreting contracts is to ascertain the intention of the parties. *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989). The plain language of the contract is the clearest indicator of the parties' intentions. *Dunes South Homeowners Assn. v. First Flight Builders*, 117 N.C. App. 360, 367, 451 S.E.2d 636, 640 (1994) (*quoting Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983)). Further, "it is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties." *Insurance Co.*, 269 N.C. at 346, 152 S.E.2d at 440.

The amount of Farm Bureau's present liability is governed by its "Other Insurance" provision which states, in pertinent part, "any insurance we provide for a vehicle you do not own shall be <u>excess over any other collectible insurance</u>." (emphasis added). Absent coverage mandated by the Act, as already indicated, the Metropolitan Policy does not provide "collectible insurance," within the meaning of the Farm Bureau Policy, unless its "Out of State Insurance" provision acknowledges coverage under the present facts. We believe the plain language of the "Out of State" clause—"coverage [for another state's financial responsibility act] shall be reduced to the extent that other automobile liability insurance applies"—excludes coverage where the out-of-state compulsory insurance law is satisfied by the driver's policy.

In the present action, Farm Bureau does not contest: (1) it covers Paul as mandated by the Act; and (2) the $20,000 settlement in this case is within the limits of the Farm Bureau Policy. Thus, we conclude the Farm Bureau Policy represents "other automobile insurance" as envisioned under the plain language of the Metropolitan Policy. Therefore, the Metropolitan Policy does not, until the limits of the Farm Bureau Policy are exhausted, provide coverage for the Accident. In other words, the Metropolitan Policy is not "collectible insurance" for purposes of Farm Bureau's "Other Insurance" provision.

Finally, we note our holding is not intended to imply the driver's policy should provide primary coverage in all factual settings. In the instant action, however, we believe our holding allocates responsibility to the party in the best position to avoid loss altogether—the driver.

Accordingly, we hold the trial court did not err in granting summary judgment because there exists no genuine issue as to any material fact and Metropolitan was entitled to judgment as a matter of law.

Affirmed.

Judges LEWIS and WALKER concur.

VENTURE PROPERTIES I, LLC, PLAINTIFF-APPELLEE v. GRADY ANDERSON, DEFENDANT-APPELLANT

No. COA 94-1338

(Filed 21 November 1995)

1. Trial § 78 (NCI4th)— summary judgment—refusal to consider unverified answer—no error

The trial court did not err in refusing to consider defendant's unverified answer filed on the morning of the hearing in granting plaintiff's motion for summary judgment, since N.C.G.S. § 1A-1, Rule 56 provides that a party opposing a motion for summary judgment may serve opposing affidavits prior to the date of the hearing and that certain verified pleadings may be treated as affidavits for the purpose of a summary judgment motion.

Am Jur 2d, Summary Judgment § 20.

2. Trial § 92 (NCI4th)— summary judgment for plaintiff—no error

The trial court did not err in granting summary judgment for plaintiff, the party with the burden of proof, where defendant failed to raise an issue of fact.

Am Jur 2d, Summary Judgment § 15.

3. Landlord and Tenant § 38 (NCI4th)— Section 8 tenant—notice of termination of lease—sufficiency

Notice of termination of a lease provided to defendant, who was a tenant pursuant to the Section 8 program, was sufficient to meet all the legal requirements where defendant was informed of the pending sale and lease termination in a meeting, then informed in a letter dated 17 May 1994 from the owner's attorney, and then sent a certified letter dated 19 May 1994 from the

Housing Authority which explained that 30 June 1994 would be the date of termination.

Am Jur 2d, Landlord and Tenant §§ 230-232.

4. Appeal and Error § 194 (NCI4th)— summary ejectment—writ of possession—no entitlement to stay of execution

Defendant was not entitled to a stay of execution of a writ of possession where defendant did not request the setting of a bond, post a bond as required to the effect that during his possession of such property he would pay the value of the use and occupation of the property, or otherwise make any attempt to comply with the requirements of N.C.G.S. § 1-292.

Am Jur 2d, Appellate Review § 441.

Measure and amount of damages recoverable under supersedeas bond in action involving recovery or possession of real estate. 9 ALR3d 330.

Judge MARTIN, Mark D., concurring in the result.

Appeal by defendant from order entered 16 August 1994 by Judge James M. Honeycutt in Iredell County District Court. Heard in the Court of Appeals 27 September 1995.

Albert F. Walser for plaintiff-appellee.

Legal Aid Society of Northwest North Carolina, Inc., by Denise S. Hartsfield and Gloria L. Woods, for defendant-appellant.

WALKER, Judge.

Defendant Grady Anderson rented a house owned by Minnie G. Gill pursuant to the Section 8 program. Under this program, the federal government pays the landlord a subsidy to supplement the rent paid by the tenant. On 11 June 1993, the tenant entered into an Assisted Lease Agreement which contained the following relevant provisions regarding termination:

> The Landlord shall not terminate the tenancy except for: (i). Serious or repeated violation of the terms and conditions of the Lease; (ii). Violation of Federal, State, or local law which imposes obligations on a tenant in connection with the occupancy or use of the dwelling unit and surrounding premises; or (iii). Other

good cause. However, during the first year of the term of the lease, the Landlord may not terminate the tenancy for "other good cause" unless the termination is based on malfeasance or non-feasance of the Tenant Family. (2). The following are some examples of "other good cause" for termination of tenancy by the Landlord. . . . (v). A business or economic reason for termination of the tenancy (such as sale of property, renovation of the unit, desire to rent the unit at a higher rental). (emphasis omitted).

On 28 June 1994, the house was purchased by Venture Properties I, LLC (Venture) who has since razed the property for commercial development. The owner's attorney-in-fact, Jane Walker, sent a letter to Mr. Anderson, dated 17 May 1994, notifying him that the property was being sold and he would need "to make plans to move around the end of June." Prior to this letter, Mr. Anderson was personally notified by Mr. Bill Reaves that the property was going to be sold. On 19 May 1994, a certified letter from the Statesville Housing Authority was sent to defendant, as required by law, notifying him that the lease would terminate on 30 June 1994. Further, the letter provided that "the resident has the right to appeal this decision in writing within ten (10) days of the above date."

On 1 July 1994, Venture filed a complaint in summary ejectment, demanding possession of the house and money damages for plaintiff's alleged failure to pay the June 1994 rent. On 12 July 1994, a magistrate entered judgment for possession in favor of the plaintiff. Defendant appealed this decision to district court on 19 July 1994. Plaintiff subsequently filed a motion for summary judgment which was heard on 16 August 1994. On the morning of the hearing, defendant filed an unverified answer raising certain defenses and counterclaims. At the hearing later that day, the court refused to consider the pleadings of defendant in granting plaintiff's motion for summary judgment and ordering a writ of possession.

[1] Defendant assigns as error the trial court's failure to consider his pleadings in granting summary judgment for the plaintiff. We disagree.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that a party opposing a motion for summary judgment may serve opposing affidavits "prior to the date of hearing." N.C. Gen. Stat. § 1A-1, Rule 56 (1990). Here, the defendant did not respond to plaintiff's motion for summary judgment by affidavit but instead filed

only an unverified answer. Certain verified pleadings may be treated as affidavits for the purposes of a motion for summary judgment. *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 162 (1976). However, in order to properly consider verified pleadings in response to a motion for summary judgment such pleadings must meet the requirements of Rule 56(e). *Lowe's v. Quigley*, 46 N.C. App. 770, 773, 266 S.E.2d 378, 380 (1980). Rule 56(e) provides that "[s]upporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990). Since defendant's pleadings were unverified, the trial court acted properly in refusing to consider them. *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972). *See also*, *Lineberger v. Insurance Co.*, 12 N.C. App. 135, 136-139, 182 S.E.2d 643, 644 (1971) (holding that letters which are not under oath cannot be considered as a supporting or opposing affidavit in a motion for summary judgment).

[2] By his next assignment of error, defendant argues that the trial court improperly granted plaintiff's motion for summary judgment. Summary judgment is appropriate when the pleadings, depositions, interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact, and that the party is entitled to judgment as a matter of law. *Rose v. Guilford County*, 60 N.C. App. 170, 298 S.E.2d 200 (1982).

In urging this Court to reverse summary judgment, the defendant cites *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 329 S.E.2d 728 (1985) as support. In *Parks*, the plaintiff sought payment of a deficiency balance due after the resale of defendant's repossessed vehicle. *Id.* at 720, 329 S.E.2d at 729. The court stated that the party with the burden of proof would ordinarily not be entitled to summary judgment when supported only by his own affidavits. *Id.* However, in that case, the defendant answered and responded with an affidavit of her own in which she asserted that the resale of the vehicle was not conducted in the proper manner. *Id.* at 722, 329 S.E.2d at 730. On this basis the court determined that there was an issue of fact for the jury. *Id.* However, in the present case, defendant has failed to raise an issue of fact.

[3] Defendant further contends that plaintiff was not entitled to possession as a matter of law because plaintiff failed to provide the required notice of termination. Since the house was rented pursuant

to the Section 8 program, the following federal regulations govern the termination of its lease:

> (c) *Notice of termination of tenancy.* (1) The Owner must serve a written notice of termination of tenancy on the Family which states the date the tenancy shall terminate....(2) The notice of termination must: (i) State the reasons for such termination with enough specificity to enable the Family to prepare a defense. (ii) Advise the Family that if a judicial proceeding for eviction is instituted, the tenant may present a defense in that proceeding.

24 C.F.R. § 882.511(c) (1993).

Here, defendant was informed of the pending sale and lease termination in a meeting with Bob Reaves, by letter dated 17 May 1994, from the owner's attorney-in-fact advising that the property was being sold, and in a certified letter dated 19 May 1994 from the Housing Authority which explained that 30 June 1994 would be the date of termination and that said action could be appealed within ten (10) days. It is clear from the provisions of the lease that the notice provided defendant stated an adequate ground for termination; namely, the pending sale of the property. Furthermore, after carefully reviewing this evidence, we find that the notice provided defendant was sufficient to meet all the legal requirements.

[4] In his next assignment of error, defendant argues that the trial court erred by including a writ of possession in its judgment. This argument is without merit.

Defendant argues that Rule 62 of the North Carolina Rules of Civil Procedure prevents the issuance of an execution in this case. Rule 62(d) provides that "[w]hen an appeal is taken, the appellant may obtain a stay of execution, subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of...G.S. 1-292." N.C. Gen. Stat. § 1A-1, Rule 62 (1990). Therefore, N.C. Gen. Stat. § 1-292 must be complied with notwithstanding defendant's appeal rights under Rule 62. N.C. Gen. Stat. § 1-292 provides, "[i]f the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed unless a bond is executed on the part of the appellant." N.C. Gen. Stat. § 1-292 (1983).

In this case, defendant did not request the setting of a bond nor did he post a bond as required to the effect that during his possession of such property, he would pay the value of the use and occupation of

the property. In sum, the defendant made no attempt to comply with the requirements of N.C. Gen. Stat. § 1-292.

Accordingly, we affirm the trial court's granting of summary judgment for the plaintiff.

Affirmed.

Judge LEWIS concurs.

Judge MARTIN, MARK D. concurs in the result.

Judge MARTIN, Mark D., concurring in the result.

I write separately to emphasize that compliance with 24 C.F.R. § 881.511(c) is best ensured, and the rights of tenants safeguarded, where written notice is sent to the tenant which incorporates all the requisite disclosures. Because the record demonstrates the tenant here received notice concerning termination of his leasehold which substantially complied with the requirements of 24 C.F.R. § 881.511(c), I concur in the result of the majority opinion.

STACEY LAVELLE, AND HUSBAND, ALLEN LAVELLE, PLAINTIFF-APPELLANTS v. DAVID B. SCHULTZ, AND WIFE, KAREN C. SCHULTZ; TOWN OF HOPE MILLS, A MUNICIPAL CORPORATION; AND UNITED REALTY OF FAYETTEVILLE, INC., A CORPORATION, DEFENDANT-APPELLEES

No. COA94-1316

(Filed 21 November 1995)

1. Highways, Streets, and Roads § 62 (NCI4th)— tree on private property—no duty of city to remove obstruction—summary judgment for city proper

In an action to recover for injuries resulting from an automobile accident, the trial court did not err in granting summary judgment for defendant city where plaintiff alleged that defendant was negligent in failing to keep its streets free from unnecessary obstructions, but the tree which allegedly obstructed plaintiff's view was located on defendants' private property over which defendant city had no duty to exercise control.

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

Liability for injury or damage by tree or limb overhanging street or highway. 54 ALR2d 1195.

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

2. Automobiles and Other Vehicles § 415 (NCI4th)— tree obstructing view—no proximate cause of accident—summary judgment for landowners proper

In an action to recover for injuries sustained in an automobile accident, the trial court did not err in granting summary judgment for defendants who owned property at the intersection where the accident occurred and for defendant realty company which served as rental agent for the property where the evidence clearly demonstrated that the tree on defendants' property, even if obstructive in nature, was not a proximate cause of the accident.

Am Jur 2d, Automobiles and Highway Traffic § 431.

Appeal by plaintiff from an order filed 11 August 1994 by Judge Wiley F. Bowen in Cumberland County Superior Court. Heard in the Court of Appeals 29 August 1995.

Mast, Morris, Schulz & Mast, by Charles D. Mast and George B. Mast, for plaintiff-appellants.

Walker, Barwick, Clark & Allen, L.L.P., by Jerry A. Allen, Jr., for defendant-appellees David B. Schultz and Karen C. Schultz.

Bailey & Dixon L.L.P., by Gary S. Parsons and Kenyann G. Brown, for defendant-appellee Town of Hope Mills.

Anderson, Broadfoot, Johnson, Pittman, Lawrence & Butler, byT. Alan Pittman, for defendant-appellee United Realty of Fayetteville, Inc.

WALKER, Judge.

This action arises out of an accident that occurred on 23 April 1990 in the Town of Hope Mills, North Carolina (the Town) at the intersection of Spinner Road and Metric Drive. The accident involved two vehicles, one operated by the plaintiff, Stacey Lavelle, and the other operated by Judy Wagner. At the time of the accident, the defendants, David and Karen Schultz (the Schultzes), owned a house

at 5937 Spinner Road which was on the corner of the intersection where the accident occurred. The Schultzes rented the house to Jerry White through their rental agent, United Realty of Fayetteville, Inc. (United Realty).

At this time, Spinner Road and Metric Drive were public streets maintained by the Town. Located on the Schultzes' property at this intersection was a tree, a few feet outside of the right-of-way of the Town.

On the morning of the accident, the weather was clear and sunny. While taking her children to school, plaintiff stopped at the stop sign on Metric Drive, preparing to turn onto Spinner Road. Plaintiff testified that her view to the right on Spinner Road was obstructed by the Schultzes' tree. Plaintiff stated that as she pulled her vehicle forward past the stop sign in an effort to check for traffic, she was struck by Ms. Wagner's vehicle. In her deposition, plaintiff stated that Ms. Wagner was in plaintiff's lane of travel at the time of impact.

Ms. Wagner testified that as she was turning left onto Metric Drive the sun blinded her, causing her to make too sharp a turn, cross the center line, and strike plaintiff's car in plaintiff's lane of travel. Ms. Wagner also testified that the Schultzes' tree was not a factor in her inability to see the plaintiff's car at the time of the accident.

Plaintiff filed this action seeking to recover damages from defendants for injuries suffered as a result of the accident. All three defendants filed motions for summary judgment which were granted. Plaintiff argues that the trial court erred in granting summary judgment for all three defendants.

Pursuant to Rule 56, of the North Carolina Rules of Civil Procedure, a moving party is entitled to summary judgment if there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1990). Even though summary judgment is seldom appropriate in a negligence case, summary judgment may be granted in a negligence action where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983). *See Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985).

[1] In order to survive a motion for summary judgment, plaintiff must establish a prima facie case of negligence by showing: (1) that defendant failed to exercise proper care in the performance of a duty owed

plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances. *Talian v. City of Charlotte*, 98 N.C. App. 281, 283, 390 S.E.2d 737, 739 (1990), *aff'd per curiam*, 327 N.C. 629, 398 S.E.2d 330 (1990). *See Westbrook v. Cobb*, 105 N.C. App. 64, 411 S.E.2d 651 (1992). Plaintiff alleges that the Town was negligent in failing to keep its streets in proper repair, failing to keep its streets free from unnecessary obstructions, maintaining an alleged dangerous condition on its streets, and failing to reasonably inspect its streets.

At the time of plaintiff's accident, the Town was subject to N.C. Gen Stat. § 160A-296 which establishes a municipality's duty concerning streets:

> A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to:
>
> > (2) The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions.

N.C. Gen Stat. § 160A-296 (1994).

Plaintiff contends that this statute created an affirmative duty on the Town to keep the intersection of Spinner Road and Metric Drive free from unnecessary obstructions. In support of this argument plaintiff relies on *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 293 S.E.2d 235 (1982). In *Cooper*, the Town planted and maintained shrubbery in an area bordering both sides of the railroad tracks. Plaintiff testified that her view of the tracks was obstructed by the shrubbery. *Id.* at 174, 293 S.E.2d at 237. Under those facts, this Court held that the trial court erred in directing a verdict in favor of the defendants. *Id.* The Court noted that N.C. Gen. Stat. § 160A-296 specifically creates a duty to keep public streets free from obstructions. However, the facts in our case can clearly be distinguished from *Cooper*. Unlike *Cooper* where the Town planted and maintained the shrubbery which obstructed plaintiff's view of the tracks, in the present case, the tree was planted and maintained on private property.

The facts in our case more closely resemble those in *Bowman v. Town of Granite Falls*, 21 N.C. App. 333, 204 S.E.2d 239 (1974). In *Bowman*, the plaintiff sued the town for damages sustained to plaintiff's vehicle when a tree fell on it. The court held that the tree which fell on plaintiff's vehicle was on private property over which the city had no control and to which it owed no duty, and therefore the city was not liable under N.C. Gen. Stat. § 160A-296 for plaintiff's damages. *Id.* at 334, 204 S.E.2d at 240. Here, since the tree which plaintiff contends obstructed her view was located on the Schultzes' property, the Town had no duty to exercise control over this property and therefore owed no duty to the plaintiff.

[2] The plaintiff also argues that the trial court erred in granting summary judgment in favor of the Schultzes and United Realty. In her complaint, plaintiff contends that the Schultzes were negligent by creating, and allowing to remain, an obstruction on their property. As landowners, plaintiff argues that the Schultzes had a common law duty to prevent hazards to those traveling past their property. Furthermore, plaintiff argues that the Schultzes breached a statutory duty by failing to abide by Town Ordinance § 102.07 which prohibits obstructions to vision between the heights of three feet and fifteen feet within twenty feet of an intersection. Plaintiff also alleges that United Realty, as agent for the Schultzes, breached a duty by allowing an obstruction to remain on the Schultzes' property.

Assuming *arguendo*, that the defendants owed plaintiff a duty to remove the tree, if obstructive in nature, summary judgment was still appropriate because plaintiff's forecast of the evidence failed to show that defendants' negligence was a proximate cause of her damages.

Summary judgment may be properly granted where the alleged negligence of the defendant was not a proximate cause of the plaintiff's injury. *Rorrer v. Cooke*, 313 N.C at 335, 329 S.E.2d at 366. Proximate cause is a cause which in its natural and continuous sequence produced the plaintiff's injuries. *Kanoy v. Hinshaw*, 273 N.C. 418, 426, 160 S.E.2d 296, 302 (1968). The omission or failure to perform a duty cannot constitute a proximate cause of an accident unless performing the omitted act would have prevented the accident. *Wilson v. Camp*, 249 N.C. 754, 107 S.E.2d 743 (1959). In determining whether summary judgment is appropriate, the trial court should consider the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits" to determine

if there are genuine issues of material fact. *Meyer v. McCarley and Co.*, 288 N.C. 62, 67-68, 215 S.E.2d 583, 586 (1975).

Officer William D. Huff of the Hope Mills Police Department testified that, based on his investigation, the accident occurred because Ms. Wagner turned her vehicle into the Lavelle vehicle. He further testified that he did not consider the tree to be a contributing cause of the accident. Ms. Wagner corroborated this testimony in her deposition by admitting that the sun blinded her, that she cut the corner with her vehicle making the left turn and that her vehicle was in plaintiff's lane of travel at the time of impact.

Plaintiff's affidavit alleged in part that the "tree obstructed the vision of motorists traveling southwest on Metric Drive and trying to look right onto Spinner Road, as well as the vision of motorists traveling southeast on Spinner Road and trying to look left for cars approaching on Metric Drive" and "the tree was a significant cause of the collision." These statements are conclusory and fail to point to specific facts sufficient to support each element of negligence, particularly with regard to the issue of proximate cause. There is nothing in the record which establishes that the absence of the tree would have prevented this accident.

Here, the evidence clearly demonstrates that the tree on the Schultzes' property, even if obstructive in nature, was not a proximate cause of the accident. Therefore, a forecast of the plaintiff's evidence does not establish an issue of fact and fails to show that but for the defendants' alleged breach of duty the accident would not have occurred.

In sum, absent evidence of proximate cause, the trial court properly granted summary judgment in favor of each defendant.

Affirmed.

Judges COZORT and McGEE concur.

RICKEY A. SWAIM v. ELMER LARRY SIMPSON AND WIFE, JOAN K. SIMPSON

No. COA94-1205

(Filed 21 November 1995)

Easements § 10 (NCI4th)— ingress and egress—expansion to allow for installation of utilities—error

The trial court erred in expanding an easement for ingress and egress to include the location, installation, and maintenance of facilities for domestic utilities.

Am Jur 2d, Easements and Licenses § 81.

Correlative rights of dominant and servient owners in right of way for electric lines. 6 ALR2d 205.

Extent and reasonableness of use of private way in exercise of easement granted in general terms. 3 ALR3d 1256.

Judge JOHNSON dissenting.

Appeal by defendants from order entered 29 August 1994 by Judge Samuel L. Osborne in Yadkin County District Court. Heard in the Court of Appeals 21 August 1995.

Plaintiff filed this declaratory judgment action after defendants refused to allow the installation of underground utility and telephone lines on plaintiff's easement which runs across their property. Defendants acknowledged the existence of the easement, but maintained that it was limited to ingress and egress. The trial court granted summary judgment for plaintiff and stated that "the easement . . . is hereby declared to include the right to locate, install and maintain all facilities for the provision of domestic utilities in furtherance of plaintiff's use of his property for residential purposes." Defendants appeal.

Morrow, Alexander, Tash & Long, by C. R. "Skip" Long, Jr., for defendant appellants.

Shore Hudspeth & Harding, P.A., by N. Lawrence Hudspeth, III, and Douglas P. Mayo, for plaintiff appellee.

ARNOLD, Chief Judge.

Defendants argue that the trial court erred by increasing the extent and scope of the easement. They maintain that "[n]o language

exists in any of the deeds of record which suggest that the scope of easement was anything other than an access easement to and from the state road." Conversely, plaintiff argues that the grantors clearly "intended to provide the owners . . . with an easement sufficient to maintain a residence, which would logically include access and utilities."

The purpose of an easement "should be set forth precisely." I Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 15-9 (4th ed. 1994). When the scope and extent of an easement is in debate, the following rules apply:

> First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied.

Id. at § 15-21; *see also Williams v. Abernethy*, 102 N.C. App. 462, 464-65, 402 S.E.2d 438, 440 (1991) (stating that "[w]hen an easement is created by an express conveyance and the conveyance is 'perfectly precise' as to the extent of the easement, the terms of the conveyance control").

Here, plaintiff was granted an express easement over Lot Six. The grant states that "[a]lso conveyed herewith is an easement of right of way for ingress and egress to the above described tract to N. C. S. R. #1146, and which easement is more fully described in that conveyance recorded in Book 233, page 210 . . . on April 30, 1982." The easement, in Book 233, page 210, is described as "providing access of ingress and egress to and from" plaintiff's lots.

Generally, "once an easement has been established, the easement holder must not change the use for which the easement was created so as to increase the burden of the servient tract." *Webster's*, *supra*, § 15-21 (italics omitted). In construing the easement to provide for the location, installation, and maintenance of facilities for domestic utilities, the trial court increased the use of the easement and the burden on the servient estate. Had the grantors intended a greater use, such

use should have been specified. *See Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962) (stating that "[w]hen the language . . . is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit"). Because the deed identified the easement as one for ingress and egress, the trial court erred in expanding its use.

The trial court's order is reversed and this case is remanded for entry of summary judgment for defendants.

Reversed and remanded.

Judge MARTIN, Mark D., concurs.

Judge JOHNSON dissents with a separate opinion.

Judge JOHNSON dissenting.

I respectfully dissent from the majority's opinion in which they contend that a burden would be placed upon the servient estate by providing domestic utilities. This Court has previously held that a buried septic tank system does not constitute an encumbrance on the property of another; accordingly, the installation of underground utility lines would not increase the burden on the servient estate, nor the use of the easement. *See Commonwealth Land Title Ins. Co. v. Stephenson*, 101 N.C. App. 379, 399 S.E.2d 380 (1991).

Moreover, employing the principles of ordinary reasoning and common sense leads one to conclude that a deed, which included an easement restricting a lot to residential use sufficient to maintain a residence, would necessarily provide the right to install utilities to the residential lot. In *Sparrow v. Tobacco Co.*, 232 N.C. 589, 61 S.E.2d 700 (1950), the Court held that, when determining what uses of an easement are reasonably necessary, consideration must be given to the purposes or uses for which the easement was granted. It would be reasonably necessary that an easement for residential use include, not only the right to ingress and egress, but also the right to lay utility lines. Any other conclusion would render the lot restricted for residential use basically uninhabitable.

I therefore vote to affirm the trial court's judgment.

PRECISION FABRICS GROUP, INC. v. TRANSFORMER SALES AND SERVICE, INC.

No. COA94-1181

(Filed 21 November 1995)

1. Trial § 60 (NCI4th)— summary judgment hearing—plaintiff's evidence not timely served, filed, or authenticated

The trial court properly refused to consider plaintiff's affidavit and purchase order in a summary judgment hearing where the affidavit was not served in a timely manner; the affidavit was not filed prior to the day of the hearing; and the purchase order was not properly authenticated.

Am Jur 2d, Summary Judgment §§ 16, 20.

2. Negligence § 104 (NCI4th)— negligent manufacture of transformer alleged—summary judgment motion—burden met by defendant

In an action to recover for negligent manufacture of a transformer, defendant carried its burden of proof on a summary judgment motion where defendant's uncontroverted evidence established that the transformer was tested and met national industry standards before it was delivered to plaintiff; the transformer was made of new materials and there was no indication of any defect in the materials or the transformer after it was manufactured; the transformer was properly designed; and plaintiff offered nothing to counter defendant's evidence.

Am Jur 2d, Negligence § 21; Products Liability §§ 224, 302.

Appeal by plaintiff from order entered 8 July 1994 in Guilford County Superior Court by Judge Catherine C. Eagles. Heard in the Court of Appeals 18 October 1995.

Cozen and O'Connor, by Pamela M. Pearson, for plaintiff-appellant.

Mast, Morris, Schulz & Mast, by Bradley N. Schulz and George B. Mast, for defendant-appellee.

GREENE, Judge.

Precision Fabrics Group, Inc. (plaintiff) appeals from an order granting summary judgment for Transformer Sales and Service, Inc. (defendant) entered 8 July 1994.

Plaintiff filed an amended complaint on 17 August 1992, alleging breach of implied warranty and negligence after a transformer manufactured by defendant and sold to plaintiff failed to operate properly six months after delivery. Plaintiff's negligence action stated that defendant failed to properly design the transformer, failed to properly manufacture the winding coils and use uncontaminated oil, failed to properly inspect the transformer, and "otherwise fail[ed] to use that degree of skill, care, caution and prudence reasonably expected of a manufacturer and distributor in similar circumstances . . . ." Plaintiff also alleged that through defendant's negligence, defendant breached implied warranties of merchantability and fitness because the transformer, among other things, was not "fit for the purpose for which it was sold or purchased, . . . was not made of good and merchantable materials, . . . contained defective and improperly manufactured windings, [and] was not properly inspected, tested, or serviced . . . ."

Defendant denied any breach of warranty or negligence and asserted several affirmative defenses, including contributory negligence and assumption of risk. On 21 June 1994, defendant made a motion for summary judgment, submitting affidavits of William F. Outlaw (Outlaw), its Vice-President, and Johnny B. Dagenhart (Dagenhart), a registered professional engineer.

Outlaw's affidavit stated, among other things, that defendant's design of the transformer "meets and exceeds all the requirements for proper performance of this unit," and "[e]ngineering guidelines utilized in the design . . . are in accordance with ANSI (American National Standard Institute) and NEMA maintenance standards . . . ." Further, the transformer was thoroughly tested before leaving the plant and tests did not indicate any defect within the unit. The materials used to construct the transformer were new and "were represented by the suppliers as being of good quality."

On 1 July 1994 plaintiff served defendant, by mail, with an affidavit in opposition to the summary judgment motion, and attached to the affidavit was an unverified purchase order. At the hearing, held 5 July 1994, defendant moved the court to receive into evidence Outlaw's and Dagenhart's affidavits as well as defendant's answers to

plaintiff's first set of discovery, and Dagenhart's deposition. Plaintiff moved the court to receive plaintiff's affidavit and the purchase order. Plaintiff's documents had not been filed with the court at that time, but were filed with the court later that morning. The attorney for the defendant stated in open court that he had not yet received the plaintiff's documents. The trial court found that plaintiff's affidavit and purchase order had not been properly served on defendant or filed with the court "at least one day prior to this matter coming on for hearing on 5 July 1994[,]" and "[p]ursuant to *Battle v. Nash*, . . . the Rules of Civil Procedure, and in its discretion, the Court chooses not to receive" these items. It also found that the purchase order had not been properly authenticated. Summary judgment was granted for defendant and plaintiff now appeals.

The issues are whether (I) the trial court erred in refusing to consider plaintiff's evidence in opposition to defendant's summary judgment motion; and (II) the defendant satisfied its burden of proof that there existed no genuine issue of material fact.

I

[1] Plaintiff argues that it served and filed its affidavit and purchase order in a timely fashion and that this evidence should have been received and considered by the trial court. We disagree.

There is no dispute that the plaintiff's affidavit was served on the defendant's attorney, within the meaning of Rule 5(b), on 1 July 1994. N.C.G.S. § 1A-1, Rule 5(b) (1990). The plaintiff's attorney certified that on 1 July 1994 she deposited the documents in the mail addressed to defendant's attorney. Whether the service was timely requires the application of several rules. Affidavits in opposition to summary judgment must be served "not later than one day before the hearing." N.C.G.S. § 1A-1, Rule 6(d) (1990); N.C.G.S. § 1A-1, Rule 56(c) (1990). In computing the period of time, "the day of the act . . . is not to be included" and "[t]he last day of the period . . . is to be included, unless it is a Saturday, Sunday or a legal holiday . . . ." N.C.G.S. § 1A-1, Rule 6(a) (1990). When the service is by mail, three days must be added to the prescribed period. *See* N.C.G.S. § 1A-1, Rule 6(e) (1990); *Trust Co. v. Rush*, 17 N.C. App. 564, 566, 195 S.E.2d 96, 97-98 (1973). In applying these rules, we take judicial notice that 1 July 1994 was a Friday, 2 July 1994 was a Saturday, 3 July 1994 was a Sunday, and 4 July 1994 was a legal holiday.

In this case, because the service of the plaintiff's affidavit was made by mail, the plaintiff was required to serve the documents four days prior to the date of the hearing. In computing the four days, the days of 2 July through 4 July must be excluded. Thus, in order for the service to be timely it had to be mailed on 27 June 1994. Accordingly, the service by mail on 1 July 1994 was not timely and the trial court properly refused to consider the plaintiff's documents.

For an additional reason, the trial court properly refused to consider the plaintiff's affidavit in opposition to the summary judgment. This Court has held that Rule 56(c) implicitly requires that opposing affidavits be "filed prior to the day of the [summary judgment] hearing." *Nationwide Ins. Co. v. Chantos*, 21 N.C. App. 129, 130, 203 S.E.2d 421, 423 (1974); *but see* N.C.G.S. § 1A-1, Rule 5(d) (1990) (permitting filing "before service or within five days" after service). In this case, the filing of the documents did not occur until the day of the hearing.

The purchase order the plaintiff attempted to offer, however, is not subject to the same prior filing requirement, *Battle v. Nash Tech. College*, 103 N.C. App. 120, 128, 404 S.E.2d 703, 707 (1991) (Greene, J., concurring), and is admissible if properly authenticated. N.C.G.S. § 1A-1, Rule 56(e) (1990). In this case it was not properly authenticated and thus properly excluded by the trial court.

II

[2] Plaintiff argues that even if the affidavit was properly excluded, summary judgment was erroneously granted because defendant did not present evidence sufficient to satisfy its burden of proof that no genuine issue of material fact existed in the record.

Because plaintiff's evidence at the hearing was properly excluded, the issue is whether defendant carried its burden of proof. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Plaintiff alleged negligence by defendant in manufacturing the transformer, "and in so doing [defendant] breached implied warranties of merchantability." Defendant's uncontroverted evidence establishes that the transformer was tested and met national industry standards before it was delivered to plaintiff; that the transformer was made of new materials and there was no indication of any defect in the materials or the transformer after it was manufactured; and that the transformer was properly designed. This evidence refutes the allegations of the complaint and supports the motion for summary

judgment. Because the plaintiff offered nothing to counter defendant's evidence, summary judgment for the defendant was proper. N.C.G.S. § 1A-1, Rule 56(e) (1990) (adverse party cannot rest on mere allegations of pleadings but must "set forth specific facts showing that there is a genuine issue for trial").

Affirmed.

Chief Judge ARNOLD and Judge SMITH concur.

SAMUEL N. JACKSON, APPELLANT v. CAROLINA HARDWOOD COMPANY, INC.; W.F. SLEDGE D/B/A/ CAROLINA HARDWOOD COMPANY, INC.; W.F. SLEDGE, INDIVIDUALLY, AND WIFE, KATHERINE C. SLEDGE, APPELLEES

No. COA94-1346

(Filed 21 November 1995)

1. **Contracts § 126 (NCI4th); Quasi Contracts and Restitution § 24 (NCI4th)— sufficiency of complaint to state a claim for relief**

Plaintiff's complaint was sufficient to state a claim for relief for breach of an express contract and unjust enrichment where plaintiff alleged that he entered into a written ten-year lease of land from the corporate defendant which he improved for use as a golf driving range; the amount he spent on improvements amounted to a prepayment of rent for the entire ten-year period; the corporate defendant conveyed the property to the individual defendant who sold it to a doctor approximately three years into the lease; the individual defendant filed an affidavit stating that plaintiff was a lessee and that no default occurred; and the doctor who bought the land demanded that plaintiff vacate because he had no valid lease.

Am Jur 2d, Contracts § 728; Restitution and Implied Contracts § 85.

2. **Evidence and Witnesses § 23 (NCI4th)— judicial notice— facts of separate action—absence of proceedings from record**

The Court of Appeals could not take judicial notice of the "adjudicative facts" of a separate action filed by defendant against plaintiff which allegedly supported a defense of *res judi-*

cata where the record failed to include any of the proceedings in the separate action.

Am Jur 2d, Evidence §§ 138, 139.

Appeal by plaintiff from judgment entered 5 October 1994 by Judge Wiley F. Bowen, in Cumberland County Superior Court. Heard in the Court of Appeals 12 September 1995.

The Barrington & Jones Law Firm, by Carl A. Barrington, Jr.; and John M. Tyson; for plaintiff-appellant.

Reid, Lewis, Deese, Nance & Person, by Marland C. Reid, for defendants-appellees.

WALKER, Judge.

[1] The sole issue presented on appeal is whether the trial court erred in granting defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). When ruling on a motion to dismiss, the trial court must consider the allegations to be true. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). The question before the court is whether the allegations in the complaint, if true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979). A complaint should not be dismissed unless it appears that the plaintiff is not entitled to relief under any set of facts which could be proved in support of the claim. *Clouse v. Motors, Inc.*, 14 N.C. App. 117, 187 S.E.2d 398 (1972).

Plaintiff's complaint includes a claim for breach of an express contract. In order to state such a claim, plaintiff must demonstrate that a valid contract existed which terms were breached by the defendant. Here, plaintiff alleges that prior to 5 August 1987, he entered into a written agreement entitled "statement of intent to lease" (agreement) with W. F. Sledge (Sledge). The agreement provided that Sledge would lease a portion of a tract of land located on the All-American Expressway in Cumberland County to Jackson for a period of ten years. The agreement also stated that Jackson could offset his monthly rent of $500.00 by the cost of improving the land for a golf driving range. This agreement was signed by Jackson, as the

proposed tenant, and Sledge, President of Carolina Hardwood, Inc., as the proposed landlord. Plaintiff further alleged that the proposed agreement constitutes an express contract and that the amount spent by plaintiff to improve the land amounted to a prepayment of rent for the entire 10-year period.

On 6 March 1989, Carolina Hardwood conveyed by deed the entire property to W.F. Sledge, and wife, individually. During November 1990, Sledge sold this property to Dr. Inad Atassi, as evidenced by a deed recorded in Cumberland County.

On 21 June 1991, plaintiff received a letter from Dr. Atassi's attorney demanding that plaintiff vacate the land by 31 July 1991 on the grounds that plaintiff did not have a valid lease in the property. Sledge filed an affidavit stating that plaintiff was "rightly a lessee under the said lease agreement," and that no default occurred.

Plaintiff alleges that his agreement with Sledge is enforceable as between the parties and that the subsequent conveyance to Dr. Atassi was a breach of this agreement. After carefully considering plaintiff's allegations at this stage, we find that the complaint sufficiently states a claim upon which relief may be granted.

The complaint also states a claim for relief under the theory of unjust enrichment. In order to state a claim for unjust enrichment, the plaintiff's allegations must set forth that a benefit was conferred on the defendant, that the defendant accepted the benefit, and that the benefit was not gratuitous. *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988), *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). Here, the complaint alleges that plaintiff made substantial improvements to the land, with defendant's knowledge, upon a good faith belief that he had the exclusive use of the property for ten years. Plaintiff contends that the value of the land has improved substantially and that it would be unjust to allow defendant to retain the benefit of these improvements without paying for them. At this stage of the proceedings we must consider the allegations in plaintiff's complaint to be true. Accordingly, we find that plaintiff's complaint is sufficient to state a claim for unjust enrichment.

[2] In response, defendant argues that the complaint should be dismissed because plaintiff's claims are barred under the doctrine of *res judicata*. Where the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim, the complaint may prop-

erly be dismissed by a motion under Rule 12(b)(6). *Brown v. Brown*, 21 N.C. App. 435, 437, 204 S.E.2d 534, 535 (1974).

"*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). Prior to the filing of this action on 21 June 1994, Dr. Atassi filed suit seeking to have plaintiff removed from his property. In that action, plaintiff joined Sledge individually, and Carolina Hardwood Co., Inc., as third party defendants.

In his brief, defendant requests this Court to take judicial notice of the "adjudicative facts" in that action. However, we are unable to address the merits of defendant's argument because this Court may only take judicial notice of its own records in another interrelated proceeding where the parties are the same, and the interrelated case is referred to in the case under construction. Here, however, we are not being asked to take judicial notice of our records. *West v. Reddick*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981). Furthermore, it is the duty of the appellant to see that the record is properly compiled and transmitted to the court. *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983). Rule 9(a)(1)(e) provides that the record on appeal in civil actions shall contain "so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned." N.C. R. App. P. 9(a)(1)(e) (1994). Rule 9(c) further provides that "[t]estimonial evidence, voir dire and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3)." N.C. R. App. P. 9(c) (1994). Here, the record fails to include any of the proceedings in the *Atassi* action and we are unable to address defendant's argument in this regard.

In sum, we find that plaintiff's complaint is sufficient to state a claim upon which relief may be granted. Accordingly, the lower court's decision is reversed.

Reversed.

Judges MARTIN, JOHN C. and McGEE concur.

IN THE MATTER OF TERRY ANTON ROBINSON

No. COA94-1262

(Filed 21 November 1995)

1. Appeal and Error § 81 (NCI4th); Infants or Minors § 140 (NCI4th)— juvenile case—denial of transfer to superior court—no right of State to appeal

The State had no right to appeal an order denying transfer of a juvenile case to superior court based on a finding that the juvenile had "not fully lived thirteen years." N.C.G.S. §§ 7A-666, 7A-667(2).

Am Jur 2d, Appellate Review §§ 147, 148.

2. Infants or Minors § 71 (NCI4th)— crime committed by juvenile on birthday—fraction of day not considered

The trial court erred by ruling that respondent had not reached thirteen years at the time he committed the charged offenses, a time that was several hours before his birth hour but on the date of his thirteenth birthday, since the law does not regard the fraction of a day in the computation of birthdays.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 37.

3. Time or Date § 1 (NCI4th)— birthday rule adopted by North Carolina

North Carolina adopts the "birthday rule" whereby a person attains a given age on the anniversary date of his or her birth, rather than the "coming of age" rule whereby a person reaches a given age at the earliest moment of the day before his day of birth.

Am Jur 2d, Time § 13.

Inclusion or exclusion of the day of birth in computing one's age. 5 ALR2d 1143.

Appeal by the State from order entered 29 September 1994 by Judge William G. Jones in Mecklenburg County District Court. Heard in the Court of Appeals 11 September 1995.

Attorney General Michael F. Easley, by Associate Attorney General Elizabeth R. Bare and Associate Attorney General Carol K. Barnhill, for the State.

Harkey, Lambeth, Nystrom & Fiorella, by Bradford F. Icard, for respondent-appellee.

LEWIS, Judge.

Respondent was born at 10:45 p.m. on 22 August 1981. On 22 August 1994, he was charged in a juvenile petition with criminal offenses allegedly occurring at 3:00 a.m. on 22 August 1994. Respondent moved to prohibit transfer of his case to superior court on the ground that he was not thirteen (13) years old at the time of the offense. After reviewing respondent's birth certificate, the allegations of when the offenses occurred, and hearing the arguments of the parties, the court, by written order filed 29 September 1994, denied a transfer hearing and ruled that respondent's case could not be transferred to superior court pursuant to N.C.G.S. section 7A-608 because he had "not fully lived 13 years." The State appeals this order. The State also filed a motion to suspend the appellate rules and treat the appeal as a petition for certiorari in the event that there is no appeal of right.

[1] We first address whether the State has an appeal of right in this juvenile matter under N.C.G.S. sections 7A-666 and -667. Section 7A-667(2) limits the State's appeal in delinquency or undisciplined cases to the following:

> a. An order finding a State statute to be unconstitutional;
>
> b. Any order which terminates the prosecution of a petition by upholding the defense of double jeopardy, by holding that a cause of action is not stated under a statute, or by granting a motion to suppress.

N.C.G.S. § 7A-667(2) (1989). Since this is a delinquency case and the order appealed from is not provided for in the above section, the State has no appeal of right. The State has moved to treat the appeal as a petition for writ of certiorari. Given the importance of the issue presented, we hereby grant a writ of certiorari, pursuant to our supervisory power under N.C.G.S. section 7A-32(c), and review the order of the district court. N.C.G.S. § 7A-32(c); *see In re Palmer*, 296 N.C. 638, 646, 252 S.E.2d 784, 789 (1979) (stating that Court of Appeals may exercise supervisory power and issue remedial writs); *see also State*

v. Ward, 46 N.C. App. 200, 206, 264 S.E.2d 737, 741 (1980) (treating notice of appeal as petition for writ of certiorari and allowing the writ when no appeal of right).

[2] The State argues that the court erred by ruling that respondent had not reached thirteen years at the time he committed the charged offenses, a time that was several hours before his birth hour but on the date of his thirteenth birthday. We agree.

N.C.G.S. section 7A-608 provides:

> The court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults.

N.C.G.S. § 71-608 (Cum. Supp. 1994).

In absence of a contrary statutory provision, the common law principle is well-established that "the law does not regard the fraction of a day" in the computation of birthdays. *State v. Mason*, 66 N.C. 636, 637 (1872). We reject respondent's argument that our Supreme Court changed this principle by stating that "we grow older a day (or less) at a time" in *State v. McGaha*, 306 N.C. 699, 701, 295 S.E.2d 449, 450 (1982). Construing the 1981 version of the statutory rape statute, our Supreme Court in *McGaha* held that a victim who was twelve (12) years and eight (8) months old at the time the offense was committed was no longer 12 years old but "something *more* than twelve." *Id.* at 701, 295 S.E.2d at 450. Since there was no issue in *McGaha* as to what time of day the victim's age changed, it does not alter the "no fractions of a day" principle.

The State presents two possible methods for calculation of when respondent became thirteen, the "coming of age" common law rule, and the more modern "birthday" rule. Under the "coming of age" rule, a person reaches a given age at the earliest moment of the day *before* his day of birth. *See Mason*, 66 N.C. at 637 (stating common law rule that a person born on the first day of the year 1800 becomes twenty-one years old, on the last day of the year 1820, at the earliest moment of the day); *see also*, *Ellingham v. Morton*, 498 N.Y.S.2d 650, 651 (N.Y. App. Div.), *appeal denied*, 494 N.E.2d 112 (N.Y. Ct. App. 1986) (explaining common law rule). Under the more modern "birthday

rule," a person attains a given age on the anniversary date of his or her birth. *See Ellingham*, 498 N.Y.S.2d at 651 (holding that defendant became sixteen at the beginning of the day of his sixteenth birthday). The court in *Ellingham* acknowledged that New York courts had rejected the "coming of age" rule in favor of the "birthday rule," but that the adoption of the "birthday" rule did not affect the common law principle that fractions of a day are not counted. *Id.* at 651. The court chose to retain the "no fractions of a day" approach because it "furnishes a rule of uniformity and certainty that is most desirable." *Id.*

We agree that the "no fractions of a day" approach provides needed uniformity and certainty. Thus, we hold that fractions of days may not be considered in determining when a juvenile can be transferred to superior court for trial pursuant to N.C.G.S. section 7A-608. Consequently, under either the "coming of age" rule or the "birthday rule," applied without consideration of fractions of days, respondent was thirteen years of age at the time the offenses were allegedly committed.

[3] Since the issue of whether to apply the "coming of age" or the "birthday rule" needs resolution, we will undertake to resolve it. The modern "birthday rule" is more reflective of common practice and understanding as to when a person reaches a given age. Since North Carolina courts have not expressly decided which rule applies, we hold today that the "birthday rule" is the better approach and apply it to respondent under N.C.G.S. section 7A-608. Accordingly, respondent became thirteen years of age on the date of his thirteenth birthday at 0000:01 hour or 00:00:01 a.m, the first second of the 22nd of August, 1994. The district court erred in denying the transfer hearing and ruling that respondent "cannot be transferred" to superior court for trial. The district court judge apparently believed he could not exercise his discretion under the facts of this case. He can once probable cause is found. We remand for a probable cause and transfer hearing.

Reversed and remanded.

Judges EAGLES and JOHN concur.

LINDA R. SHARP, PLAINTIFF-APPELLANT v. JACK P. GULLEY, AND SMITH DEBNAM HIBBERT & PAHL, DEFENDANT-APPELLEES

No. COA94-1084

(Filed 21 November 1995)

Judges, Justices, and Magistrates § 3 (NCI4th)— action against court appointed referee—action barred by judicial immunity

Because plaintiff sought damages from defendant for alleged wrongs committed in his official capacity as a court appointed referee, she sought damages from him as an adjunct of the Dare County District Court, and since her action against the court appointed referee was implicitly an action against the trial judge, it was barred by judicial immunity.

Am Jur 2d, Judges §§ 72 et seq.

Civil liability of judicial officer for malicious prosecution or abuse of process. 64 ALR3d 1251.

Appeal by plaintiff from order filed 18 April 1994 by Judge Thomas S. Watts in Dare County Superior Court. Heard in the Court of Appeals 17 October 1995.

Linda R. Sharp, pro se.

Michael F. Easley, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for Jack P. Gulley.

Smith Debnam Hibbert & Pahl, L.L.P., by Bettie Kelley Sousa, for Smith Debnam Hibbert & Pahl.

WYNN, Judge.

Plaintiff, Linda R. Sharp, appeals the trial court's order granting defendants, Jack P. Gulley and Smith Debnam Hibbert & Pahl's Motion to Dismiss, and dismissing plaintiff's action with prejudice. We affirm.

This action arises out of a domestic action involving the equitable distribution of marital property between Ms. Sharp and her ex-husband, and the determination of marital assets and liabilities. Both parties were represented by counsel.

By order dated on or about 15 August 1988, the Dare County District Court appointed Mr. Gulley as referee "to hear and determine all of the issues involved in the [Sharps' equitable distribution] action." Mr. Gulley was specifically granted the powers stated in N.C. Gen. Stat. § 1A-1, Rule 53 (1990) governing the responsibilities of court-appointed referees, and was also given guidelines as to matters to be considered and addressed in his formal report. Mr. Gulley subsequently filed and submitted a report to the district court for review in the spring of 1993. Thereafter, the court entered an order adopting in part and modifying in part the report of Mr. Gulley.

On 11 January 1994, Ms. Sharp filed a complaint against Mr. Gulley for alleged wrongs committed by him as a court-appointed referee. Additionally, Mr. Gulley's former law firm, Smith Debnam Hibbert & Pahl, was included as a party to this action. The complaint alleged breach of contract, breach of fiduciary duty, negligent misrepresentation, and malpractice by Mr. Gulley and his former law firm.

On 20 April 1994, the trial court dismissed with prejudice the complaint under N.C.G.S. § 1A-1, Rule 12(b), for lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign and judicial immunity, and failure to state a claim upon which relief can be granted. Plaintiff appealed to this Court.

Ms. Sharp contends that the trial court erred in dismissing the complaint under Rule 12(b) for lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign and judicial immunity, and failure to state a claim upon which relief can be granted. Finding that this action is barred by judicial immunity, we conclude that the trial court properly dismissed plaintiff's action.

In the case before us, Ms. Sharp construes Mr. Gulley's position as a referee as one of an agent or an attorney. However, North Carolina law provides that a referee is not an agent of the parties, but of the court. *See Weaver v. Hampton*, 204 N.C. 42, 44, 167 S.E. 484, 485 (1933); *see also*, N.C.R. Civ. P. 53(e). As such, a referee "becomes a mere adjunct of, and acts in place of the court, or of the court and jury, in respect to the trial." *Id.*, *quoting McNeill v. Lawton*, 97 N.C. 16, 19, 1 S.E. 493, 495 (1887). Therefore, because Ms. Sharp seeks damages from Mr. Gulley for alleged wrongs committed in his official capacity as a court-appointed referee; then, she seeks damages from him as an adjunct of the Dare County District Court.

It is well established that "[a] judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties." *Fuquay Springs v. Rowland*, 239 N.C. 299, 300, 79 S.E.2d 774, 776 (1954). In the instant case, this action is no different from one in which a plaintiff claims to have been damaged by a judge of the general court of justice. Since Ms. Sharp's action against the court-appointed referee is implicitly an action against the trial judge, it is barred by judicial immunity.

Affirmed.

Judges JOHNSON and EAGLES concur.

PENELOPE SLADE ROYALL v. LOGAN EVERETT SAWYER, JR.

No. COA94-1042

(Filed 21 November 1995)

Divorce and Separation § 453 (NCI4th)— only custody before court—no authority to order defendant to pay boarding school costs

Where the only issue before the trial court was custody of the parties' son, the trial court was without authority to issue an order modifying an earlier consent order setting child support so as to require defendant to pay the cost of private boarding school.

Am Jur 2d, Divorce and Separation § 971.

Divorce: voluntary contributions to child's education expenses as factor justifying modification of spousal support award. 63 ALR4th 436.

Appeal by defendant from orders signed 7 January 1994 and 6 April 1994 in Orange County District Court by Judge Patricia S. Love. Heard in the Court of Appeals 16 October 1995.

Lewis & Anderson, P.C., by Susan H. Lewis and Christina L. Goshaw, for plaintiff-appellee.

Margaret Dube' Rundell for defendant-appellant.

GREENE, Judge.

Defendant appeals from an order entered 7 January 1994, ordering defendant to pay the fees and tuition for his son to attend a boarding school in the Fall of 1994, and an order entered 6 April 1994, denying defendant's motions made pursuant to North Carolina Rules of Civil Procedure, Rules 59 and 60, to strike the language in the order entered 7 January 1994 that defendant will be required to pay for his son to attend a boarding school.

Plaintiff and defendant entered into a Consent Order stating in part that defendant was to pay $500 a month to plaintiff for support of their child. On 30 July 1993, the parties agreed to a Consent Order Regarding Temporary Custody. It was stayed upon motion by plaintiff "pending resolution of the marital situation between Defendant and his current wife . . . and a determination of the best interests of the child in light of such resolution." Defendant gave notice of hearing for his request for child custody and relief from the stay of the Temporary Consent Order.

At the hearing held 12 October 1993 the evidence showed that defendant wanted his child to attend Phillips Andover Academy, a preparatory school. At the hearing, the trial court asked defense counsel if defendant would have any objections to paying for his son to attend Phillips Andover Academy even if the child was not allowed to reside with defendant. Counsel responded, "There will be problems with trying to get him in if [defendant] doesn't have some kind of custodial power to make the application." On direct examination, defendant stated that if his son did not move to his home and instead attended Episcopal High School, another boarding school, defendant "would be happy to pay for . . . it."

The trial court found that it would not be in the best interests of the child to live with defendant "at this time" but it would be in the child's best interests to "attend Phillips Andover Academy or another boarding school . . . and the Defendant, his father, is willing to send him there." The court then ordered that the child "shall attend Phillips Andover Academy or another boarding school . . . with his father, the Defendant, paying fees and tuition."

On 18 January 1994 defendant moved the trial court to strike the above finding and order pursuant to Rules 59 and 60 of the Rules of Civil Procedure. The motion was denied on 6 April 1994 and defendant appeals.

The issue is whether the trial court erred in ordering defendant to pay the fees and tuition for his son to attend Phillips Andover Academy or another boarding school.

Pursuant to N.C. Gen. Stat. § 50-13.7(a) an order of support may only be modified "upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C.G.S. § 50-13.7(a) (1987). A court is without authority to *sua sponte* modify an existing support order. *See Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (trial court may modify custody only upon a motion by either party or anyone interested); *Smith v. Smith*, 15 N.C. App. 180, 182-83, 189 S.E.2d 525, 526 (1972) (it was error for court to modify custody or support when only question before court was alimony).

The only issue before the trial court was the custody of plaintiff's and defendant's son. There was no motion before the trial court to modify the child support. Accordingly, the trial court was without authority to issue an order modifying an earlier Consent Order setting child support. The order, to the extent that it requires the defendant to pay the cost of the private schooling, is vacated.

Vacated in part.

Chief Judge ARNOLD and Judge SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS
FILED 21 NOVEMBER 1995

Case	Court	Disposition
BATEMAN v. AMERICAN THREAD CO. No. 94-1178	Ind. Comm. (846559) (853048)	Affirmed
BINGHAM v. BINGHAM No. 94-1457	Mecklenburg (94CVD8712)	Affirmed
CITY OF CHARLOTTE v. GATEWAY OUTDOOR ADVERTISING No. 94-1165	Mecklenburg (92CVS14060)	Affirmed
EARLEY v. EARLEY No. 94-1142	Robeson (93CVD1460)	Affirmed
FRANKLIN v. N.C. ALCOHOLIC BEVERAGE CONTROL COMM. No. 94-1212	Craven (93CVS1723)	Reversed and Remanded
IN RE DOSTER No. 95-520	Union (91J124)	Affirmed
LEWIS v. NATIONWIDE MUTUAL INS. CO. No. 95-108	Johnston (93CVS2196)	Affirmed
MARSHALL v. MBG MANAGEMENT, INC. No. 94-1391	Wake (94CVS05096) (94CVS05097)	Affirmed
MILES INC. v. PHOTO MAGIC, INC. No. 95-612	Craven (94CVS1228)	Affirmed
MURPHY v. VANDERPOOL No. 95-70	Ind. Comm. (539510)	Affirmed
MURPHY v. WILLIAMS No. 94-1377	Warren (92CVS39)	Affirmed
QUALITY FOOD MANAGEMENT v. PERRY No. 94-1293	New Hanover (93CVD2325)	Affirmed in Part; Dismissed in Part
REINHARDT v. CRONLAND LUMBER CO. No. 95-128	Ind. Comm. (242872)	Affirmed
RICHARDSON v. DELLINGER No. 95-57	Halifax (93CVS1151)	Dismissed
SAUNDERS v. ALLSTATE INS. CO. No. 95-132	Ind. Comm. (544920)	Affirmed

SMITH v. McMACKIN No. 94-1299	Ashe (93CVD227)	Affirmed
SMITH v. SMITH No. 95-622	Lincoln (93CVD1134)	Affirmed
STATE v. HALL No. 95-487	Forsyth (94CRS45477)	No Error
STATE v. HONEYCUTT No. 94-933	Mecklenburg (94CRS4644)	No Error
STATE v. JAMES No. 95-528	Mecklenburg (93CRS040182) (93CRS040183)	No Error
STATE v. LEWIS No. 94-1459	Ashe (94CRS85) (94CRS107) (94CRS458)	No Error
STATE v. LUCAS No. 94-1380	Guilford (94CRS4470) (94CRS4471) (94CRS4472)	No Error
STATE v. MARSHALL No. 94-1199	Lenoir (93CRS10384) (93CRS10386)	Reversed and Remanded
STATE v. NEWSOME No. 95-566	Pitt (93CRS22620)	As to the guilt-innocence phase of the trial: No Error. As to the sentencing: Remanded for re-sentencing.
STATE v. OSTLING No. 95-542	Caswell (94CRS2031)	No Error
STATE v. RAYMER No. 95-475	Iredell (93CRS18129)	Affirmed
STATE v. ST. JOHN No. 94-1453	Yadkin (93CRS2901) (93CRS2902)	No Error
STATE v. WHITAKER No. 95-620	Guilford (93CRS43757)	Affirmed
THOMPSON v. SOUTHWESTERN FREIGHT CARRIERS No. 95-516	Ind. Comm. (314661)	Affirmed
WHITIN ROBERTS CO. v. ALLIANCE INS. GROUP No. 94-1443	Guilford (93CVS7882)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION
ACCOUNTS
ADMINISTRATIVE LAW AND PROCEDURE
ADVERSE POSSESSION
ANIMALS, LIVESTOCK, OR POULTRY
APPEAL AND ERROR
ARBITRATION AND AWARD
ASSAULT AND BATTERY
ATTORNEYS AT LAW
AUTOMOBILES AND OTHER VEHICLES

BURGLARY AND UNLAWFUL BREAKINGS

COLLEGES AND UNIVERSITIES
CONSPIRACY
CONSTITUTIONAL LAW
CONTEMPT OF COURT
CONTRACTS
CONVERSION
CORPORATIONS
COSTS
COUNTIES
COURTS
CRIMINAL LAW

DAMAGES
DECLARATORY JUDGMENT ACTIONS
DEDICATION
DISCOVERY AND DEPOSITIONS
DIVORCE AND SEPARATION

EASEMENTS
ELECTIONS
EMBEZZLEMENT
ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION
ESTOPPEL
EVIDENCE AND WITNESSES

FALSE PRETENSES, CHEATS, AND RELATED OFFENSES
FRAUD, DECEIT, AND MISREPRESENTATION

HIGHWAYS, STREETS, AND ROADS
HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS
HOUSING, AND HOUSING AUTHORITIES AND PROJECTS

ILLEGITIMATE CHILDREN
INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS
INFANTS OR MINORS
INSURANCE
INTENTIONAL INFLICTION OF MENTAL DISTRESS
INTEREST AND USURY

JUDGES, JUSTICES, AND MAGISTRATES
JUDGMENTS

LABOR AND EMPLOYMENT
LANDLORD AND TENANT
LIBEL AND SLANDER
LIMITATIONS, REPOSE, AND LACHES

MALICIOUS PROSECUTION
MUNICIPAL CORPORATIONS

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA
NEGLIGENCE

PARENT AND CHILD
PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS
PLEADINGS
PRINCIPAL AND AGENT
PUBLIC OFFICERS AND EMPLOYEES

QUASI CONTRACTS AND RESTITUTION
QUIETING TITLE

RAPE AND ALLIED SEXUAL OFFENSES
ROBBERY

SCHOOLS
SEARCHES AND SEIZURES
SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS
STATE

TAXATION
TIME OR DATE
TORTS
TRESPASS
TRIAL

UNFAIR COMPETITION OR TRADE PRACTICES

WAIVER
WEAPONS AND FIREARMS
WORKERS' COMPENSATION

ZONING

ACCORD AND SATISFACTION

§ 6 (NCI4th). Agreements constituting accord and satisfaction generally

The settlement agreement reached by the parties, the terms of which were announced in open court and recorded by the court reporter, constituted an accord where defendants were aware their attorneys were conducting settlement negotiations with opposing counsel and were fully informed of and agreed to the terms of the settlement agreement. **Griffin v. Sweet,** 166.

§ 8 (NCI4th). Agreements constituting accord and satisfaction; checks given as payment in full or as agreed settlement

The evidence was sufficient to show satisfaction, despite defendants' failure to negotiate plaintiff's checks, where plaintiff fully performed as required under a settlement agreement and defendants did not instruct their attorney to return the checks to plaintiff until eight months after the first check had been issued and received. **Griffin v. Sweet,** 166.

Plaintiff's cashing of a check constituted an accord and satisfaction where defendant's letter established that it intended the check to be a full and final payment of the disputed debt, even though plaintiff registered his objection to defendant's proffered amount. **Zanone v. RJR Nabisco,** 768.

ACCOUNTANTS

§ 20 (NCI4th). Liability to third party for negligent misrepresentation

Plaintiff shareholders' negligent misrepresentation and constructive fraud claims against defendant accountants arising from plaintiffs' personal guarantees of corporate loans reflected a genuine issue of material fact where the evidence would permit an inference that one defendant was aware plaintiffs would rely on his opinion in personally guaranteeing loans for the corporation and that the parties may have had a relationship of trust which defendants breached to the detriment of plaintiffs. **Barger v. McCoy Hillard & Parks,** 326.

ADMINISTRATIVE LAW & PROCEDURE

§ 69 (NCI4th). Procedure on review; review of facts; sufficiency of evidence to support findings or decision

The Personnel Commission, upon remand by the Supreme Court, was without authority to find facts on the issue of an employee's back pay based upon an internal memo which was not a part of the official record, and the superior court erred in failing to remand the case to the OAH to take evidence and make findings of fact. **N.C. Dept. of Correction v. Harding,** 451.

ADVERSE POSSESSION

§ 23 (NCI4th). Statutory periods to ripen title generally; twenty years

The evidence was sufficient to establish defendant's adverse possession of disputed land for the twenty-year statutory period. **Beam v. Kerlee,** 203.

ANIMALS, LIVESTOCK, OR POULTRY

§ 9 (NCI4th). Vicious character of dog

In an action to declare a dog as potentially dangerous pursuant to G.S. 67-4.1, the trial court erred by conducting only a de novo review of the existing record rather than a de novo hearing. **Caswell County v. Hanks,** 489.

ANIMALS, LIVESTOCK, OR POULTRY—Continued

The definition of "potentially dangerous dog" in G.S. 67-4.1(a)(2)c as a dog which has "approached a person when not on the owner's property in a vicious or terrorizing manner in an apparent attitude of attack" is not unconstitutionally vague and overbroad. **Ibid.**

APPEAL AND ERROR

§ 81 (NCI4th). Appeal by State from superior or district court to appellate division

The State had no right to appeal an order denying transfer of a juvenile case to superior court based on a finding that the juvenile had not fully lived thirteen years. **In re Robinson,** 874.

§ 87 (NCI4th). Appealability of other interlocutory orders in civil actions

An order vacating a decision of the Licensing Board of General Contractors and remanding the case for a rehearing based on the court's findings that the Board's refusal to allow plaintiff to question the Board members as to their bias violated due process and that the Board did not comply with evidence rules was interlocutory and not immediately appealable. **Heritage Pointe Bldrs. v. N.C. Licensing Bd. of Gen. Contractors,** 502.

§ 118 (NCI4th). Appealability of particular orders; summary judgment denied

The denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits. **Vance Construction Co. v. Duane White Land Corp.,** 401.

The trial court's order in a condemnation case granting summary judgment on all issues except just compensation was immediately appealable. **Board of Education of Hickory v. Seagle,** 566.

§ 147 (NCI4th). Reserving question for appeal generally; necessity of request, objection, or motion

Defendant did not properly preserve for review questions relating to the sufficiency of the trial court's findings and the reasonableness of its award of counsel fees. **West v. Tilley,** 145.

Plaintiffs' assignment of error to the trial court's special instruction on proximate cause is overruled where plaintiffs failed to make a timely objection to the charge. **Lumley v. Capoferi,** 578.

§ 155 (NCI4th). Preserving question for appeal; failure to make motion, objection, or request; criminal actions

Defendant's failure to object to the prosecutor's question as to why he had been hospitalized, to move to strike defendant's answer that he was on cocaine, and to ask for a cautionary instruction waived his right to assert error on appeal. **State v. McAbee,** 674.

§ 175 (NCI4th). Mootness of other particular questions

Although this action seeking a permit to hold a vigil outside Central Prison prior to the execution of John Gardner would seem to be moot since Gardner was executed, the case is not dismissed because it is one which is "capable of repetition yet evading review." **N.C. Council of Churches v. State of North Carolina,** 84.

APPEAL AND ERROR—Continued

§ 194 (NCI4th). Stay of judgment for real property

Defendant was not entitled to a stay of execution of a writ of possession where defendant did not request the setting of a bond, post a bond or otherwise make any attempt to comply with the requirements of G.S. 1-292. **Venture Properties I v. Anderson,** 852.

§ 205 (NCI4th). Time for appeal in civil actions

The Court of Appeals did not acquire jurisdiction where entry of judgment occurred on the date the written judgment was filed, and no notice of appeal was given within ten days after that date. **In re Hawkins,** 585.

§ 486 (NCI4th). Findings or judgments on findings generally

There was competent evidence to support the trial court's findings with regard to the parties' contract to repair a building, the date that last work was performed, and the amount of damages. **Vance Construction Co. v. Duane White Land Corp.,** 401.

§ 538 (NCI4th). Costs on appeal generally; judgment affirmed

The cost of this appeal will be assessed against appellants' attorney personally where no timely written request was made for production of the transcript. **Thompson v. Town of Warsaw,** 471.

ARBITRATION AND AWARD

§ 2 (NCI4th). Requirement that agreement to arbitrate exist

Plaintiff's contention that an arbitration provision in the parties' contract was void because it was not independently negotiated was without merit since both parties properly signed the contract and thereby validly agreed to arbitrate. **Carteret County v. United Contractors of Kinston,** 336.

§ 4 (NCI4th). Effect of arbitration agreement on right to seek judicial relief

An arbitration clause was not invalid on the ground it conflicted with plaintiff's constitutional right to a jury trial. **Carteret County v. United Contractors of Kinston,** 336.

§ 10 (NCI4th). Appointment of arbitrators by parties

There was no merit to plaintiff's contention that an arbitration award should be vacated because the arbitration panel consisting of three contractors was fundamentally unfair where the only link between the arbitrators and defendant was that they had the same occupation. **Carteret County v. United Contractors of Kinston,** 336.

§ 19 (NCI4th). Particular actions as constituting waiver of right to arbitration

Regardless of whether defendant's claims for arbitration were timely filed, defendant did not waive its contractual right to arbitration because of the strong public policy in favor of arbitration and because no prejudice to plaintiff was shown. **Carteret County v. United Contractors of Kinston,** 336.

§ 23 (NCI4th). Matters arbitrable; construction contract claims

Counties may enter into arbitration agreements incident to their power to contract. **Carteret County v. United Contractors of Kinston,** 336.

ARBITRATION AND AWARD—Continued

Arbitrators had the power to rule on the issue of whether plaintiff would be entitled to increased overhead expenses due to extension of the contract completion date. **Ibid.**

§ 33 (NCI4th). Award generally

Plaintiff's contention that the award impermissibly included consequential and punitive damages was speculation, but even if the award did contain such damages, this would not provide grounds for vacating the award. **Carteret County v. United Contractors of Kinston,** 336.

ASSAULT AND BATTERY

§ 26 (NCI4th). Assault with intent to kill of inflicting serious injury; sufficiency of evidence; where weapon is a firearm

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon inflicting serious injury where it tended to show that defendant either intentionally shot the victim or that he was culpably negligent when he intentionally pulled the trigger of the gun. **State v. Dammons,** 182.

ATTORNEYS AT LAW

§ 29 (NCI4th). Nature and scope of authority, generally

An attorney-client relationship existed between plaintiff sellers and defendant attorney, who closed a real estate transaction, where plaintiffs relied on defendant to draw a purchase money note and deed of trust, and plaintiffs could thus sue defendant for malpractice. **Cornelius v. Helms,** 172.

An attorney for defendant hospital's insurer had no authority to move to set aside an entry of default against the individual defendant where no contact had taken place between the attorney and the individual defendant. **Johnson v. Amethyst Corp.,** 529.

§ 44 (NCI4th). Proof of malpractice; burden and sufficiency

The evidence was sufficient to show that defendant attorney negligently breached his fiduciary duty to plaintiffs in the closing of the sale of plaintiffs' property by failing properly to apply the land draw check toward the purchase of plaintiffs' lot in accordance with the terms of the closing instructions from the construction lender. **Cornelius v. Helms,** 172.

AUTOMOBILES AND OTHER VEHICLES

§ 415 (NCI4th). Civil liability for injuries in operation of motor vehicles; miscellaneous circumstances as proximate cause

Summary judgment was properly entered for defendant property owners and defendant rental agent where the evidence showed that a tree obstructing the views of drivers was not a proximate cause of the accident in question. **Lavelle v. Schultz,** 857.

§ 585 (NCI4th). Contributory negligence; striking vehicle from rear; effect of weather or road conditions

The question of whether third-party defendant was negligent was a question for the jury where there was evidence that third-party defendant was driving at a rate of

AUTOMOBILES AND OTHER VEHICLES—Continued

speed in excess of a safe speed in light of a rainstorm at the time her vehicle rear-ended defendant's car. **Colvin v. Badgett,** 810.

§ 765 (NCI4th). Instructions; sudden emergency and unavoidable accident generally

The trial court erred in instructing on sudden emergency where defendant saw his sister-in-law's disabled truck on the side of the road and felt fear and apprehension, but he did not have to act instantly to avoid injury to himself or another. **Colvin v. Badgett,** 810.

BURGLARY AND UNLAWFUL BREAKINGS

§ 62 (NCI4th). Sufficiency of evidence; first-degree burglary in conjunction with robbery

The evidence was sufficient to support defendant's conviction of first-degree burglary of an occupied apartment in a skating rink. **State v. Brandon,** 815.

§ 140 (NCI4th). Jury instructions; expression of opinion on evidence by trial judge

The trial court expressed an opinion on the evidence by its instruction indirectly stating that the apartment of the victim, who was the resident director of a sorority house, and the common areas of the sorority house constituted a single dwelling house for purposes of the burglary statute, but defendant was not prejudiced because the common areas of the sorority house appurtenant to the apartment were within the curtilage and a portion of the victim's dwelling house for purposes of the burglary statute. **State v. Merritt,** 732.

§ 162 (NCI4th). Instructions on second-degree burglary as lesser included offense of first-degree burglary

The trial court did not err in refusing to instruct the jury on the lesser included offense of second-degree burglary when the evidence was uncontradicted that the house was occupied at the time of the breaking and entering. **State v. Merritt,** 732.

COLLEGES AND UNIVERSITIES

§ 13 (NCI4th). Student matters related to academics

No implied contract existed between defendant university and plaintiff pre-nursing student that she would be admitted into the school of nursing upon her successful completion of the minimum requirements for admission even if faculty members had assured her that she would be admitted. **Long v. University of North Carolina at Wilmington,** 267.

CONSPIRACY

§ 11 (NCI4th). Sufficiency of evidence generally

The trial court properly directed a verdict for defendant AEW on plaintiff's civil conspiracy claim arising out of the closing of a Lechmere Department Store at Pleasant Valley Promenade Shopping Center. **Pleasant Valley Promenade v. Lechmere, Inc.,** 650.

§ 39 (NCI4th). Instructions as to requisite elements, generally

The trial court's conspiracy instruction was prejudicial error where it allowed the jury to convict defendants of conspiracy upon a finding that defendants knowingly possessed or attempted to possess cocaine. **State v. Kelly,** 821.

CONSTITUTIONAL LAW

§ 51 (NCI4th). Standing to challenge constitutionality of statutes; taxpayer status; injunctive relief

Plaintiff taxpayer lacked standing to challenge the manner in which a city financed the construction of a ballpark. **Cannon v. City of Durham,** 612.

§ 86 (NCI4th). State and federal aspects of discrimination

Plaintiffs were not entitled to relief under 42 U.S.C. § 1983 against a city or the individual defendants in their official capacities where they sought monetary damages. **Moore v. City of Creedmoor,** 27.

Summary judgment was properly granted for defendant police commissioner and defendant police chief in their individual capacities on plaintiffs' claim that their right to equal protection was violated by defendants' conspiracy to discriminate against them on the basis of race and on the basis of selective enforcement of a parking ordinance. **Ibid.**

§ 115 (NCI4th). Right of free speech and press generally

The trial court properly granted summary judgment for defendant police commissioner and defendant police chief in their individual capacities on plaintiffs' claims that defendants violated his First Amendment right to free speech and to petition the government for redress of grievances based on plaintiff's complaints about the police department's handling of his calls for assistance. **Moore v. City of Creedmoor,** 27.

The denial of a permit for plaintiffs to hold a vigil on a grassy knoll on prison property prior to an execution did not violate their right to free speech. **N.C. Council of Churches v. State of North Carolina,** 84.

§ 342 (NCI4th). Presence of defendant at proceedings generally

Assuming error by the trial court in conducting an in camera proceeding outside the presence of defendant, it was unnecessary to consider whether the State showed the error to be harmless where the hearing pertained to witnesses against defendant as to only one charge, and defendant has been granted a new trial on that charge on other grounds. **State v. Rhome,** 278.

CONTEMPT OF COURT

§ 35 (NCI4th). Punishment; civil contempt

A consent order regarding repairs to a dwelling was enforceable through the contempt powers of the trial court where it contained findings and an order based on those findings, but the trial court erred by failing to provide defendant with a means to purge himself of the contempt and by making a conditional award of attorney fees. **Nohejl v. First Homes of Craven County, Inc.,** 188.

CONTRACTS

§ 70 (NCI4th). Ascertaining intention of parties generally; punctuation

The trial court properly construed the language of a contract to require Lechmere to operate its store within plaintiff's shopping center for the seven-year contract term or to require a Lechmere store or store having the trade name used by Lechmere in substantially all its southeastern stores to be operated within the shopping center for the entire contract term. **Pleasant Valley Promenade v. Lechmere, Inc.,** 650.

CONTRACTS—Continued

§ 118 (NCI4th). Who does not qualify for third-party beneficiary status

Attorneys who represented insureds of Interstate Insurance Company prior to a delinquency proceeding were not third-party beneficiaries of a voluntary supervision agreement between the Department of Insurance and Interstate. **State ex rel. Long v. Interstate Casualty Ins. Co.**, 743.

§ 126 (NCI4th). Sufficiency of pleadings generally

Plaintiff's complaint stated a claim for breach of contract where it alleged that the parties entered into a written agreement for a lease of property for ten years, that plaintiff prepaid rent for the entire period by making improvements, and that defendant landlord breached the lease by a conveyance of the property to a third party. **Jackson v. Carolina Hardwood Co.**, 870.

§ 144 (NCI4th). Sufficiency of evidence as to breach of contract; building construction contracts

The trial court properly refused to dismiss defendant's counterclaim where defendant presented evidence that construction completed by plaintiff was defective, defendant was damaged, and a letter signed by the parties was merely a stage in the negotiations and not a final settlement. **Vance Construction Co. v. Duane White Land Corp.**, 401.

§ 148 (NCI4th). Sufficiency of evidence as to breach of contract; other miscellaneous contracts

The trial court properly directed verdicts for defendant Lechmere Realty Limited Partnership on plaintiff's claims for breach of contract, fraud, and unfair trade practices arising out of the closing of a Lechmere store in a shopping center. **Pleasant Valley Promenade v. Lechmere, Inc.**, 650.

§ 163 (NCI4th). Measure of damages; real property

Diminished market value of a shopping center is recoverable for an anchor store's breach of its contract to operate its store in the shopping center for a specified time. **Pleasant Valley Promenade v. Lechmere, Inc.**, 650.

Any damages suffered by plaintiff as a result of defendant's breach of the parties' contract for operation of an anchor store in a shopping center were special damages, and the jury should have been presented with the question of whether defendant foresaw or had reason to foresee the injury that plaintiff suffered. **Ibid.**

CONVERSION

§ 10 (NCI4th). Civil conversion; sufficiency of evidence to take case to jury

The trial court erred in failing to submit to the jury plaintiff tenant's claims against defendant landlords for conversion where plaintiff offered evidence that defendants converted his property by refusing to allow him to remove his walk-in cooler and freezer from the premises. **Taha v. Thompson**, 697.

CORPORATIONS

§ 146 (NCI4th). Shareholder derivative actions; who can bring action

Plaintiff shareholders were not entitled to bring an action in their personal capacities against the accounting firm used by their corporation where they alleged that

CORPORATIONS—Continued

defendants' malfeasance resulted in the bankruptcy of their corporation and the loss of all present and future value in their shares of stock since this claim could only be asserted by the corporation or by plaintiffs in a derivative suit on behalf of the corporation. **Barger v. McCoy Hillard & Parks,** 326.

Plaintiffs had no breach of contract claim arising from their personal guarantees of loans made to their corporation based on defendant accountants' representations as to the corporation's financial viability. **Ibid.**

§ 187 (NCI4th). Restrictions on share transfers generally

A restriction on the transfer of stock does not apply to interspousal transfers of stock incident to equitable distribution absent an express provision prohibiting such transfers. **Bryan-Barber Realty, Inc. v. Fryar,** 178.

COSTS

§ 30 (NCI4th). Attorneys' fees in particular actions; personal injury actions or property damage suits

Although counsel stipulated to jury consideration of plaintiff child's medical expenses so as to prevent multiplicity of suits related to the same incident, plaintiff's mother did not function as a "litigant," and the recovery attributed to her for plaintiff's medical expenses could not be incorporated with that of plaintiff in determining eligibility for attorney fees under G.S. 6-21.1. **West v. Tilley,** 145.

§ 32 (NCI4th). Attorney's fees in particular actions; necessary findings

The trial court did not abuse its discretion in awarding attorney fees of $8,400 on a $10,000 judgment where the court carefully considered the time expended by counsel as well as the fees normally charged in the area for attorneys with similar experience and expertise. **West v. Tilley,** 145.

§ 37 (NCI4th). Attorney's fees; other particular actions or proceedings

The trial court erred in failing to make findings necessary to arrive at an hourly attorney fee, and the case is remanded for a determination of how many attorney hours were spent in the first judicial review of the case and the appropriate hourly rate for plaintiff's attorney. **N.C. Dept. of Correction v. Harding,** 451.

The trial court erred in ordering the Department of Correction to pay attorney's fees to respondent's attorney at the "judicially recognized lodestar fee" of $160.00 per hour where the court made no findings as to the time and labor expended, the skill required, the customary fee for like work, or the experience or ability of the attorney. **N.C. Dept. of Correction v. Myers,** 437.

§ 40 (NCI4th). Witness fees; expert witnesses

The trial court had statutory authority to order defendant to pay expert witness fees to experts deposed by defendant pursuant to a subpoena. **Town of Chapel Hill v. Fox,** 630.

COUNTIES

§ 52 (NCI4th). Powers, functions, and duties; contracts generally

Counties may enter into arbitration agreements incident to their power to contract. **Carteret County v. United Contractors of Kinston,** 336.

COURTS

§ 15 (NCI4th). Personal jurisdiction; presence, domicil, or substantial activity within State

A nonresident defendant who was a financial advisor to North Carolina residents had sufficient minimum contacts with North Carolina to permit the exercise of personal jurisdiction over him. **Strother v. Strother,** 393.

The trial court properly exercised personal jurisdiction over one defendant who performed actions outside North Carolina which injured plaintiff in this state at the time business activities were being carried on in this state by a corporation of which defendant was a purported director, officer, and controlling shareholder. **Ibid.**

Sufficient minimum contacts with North Carolina existed as to both nonresident defendants so as to permit the exercise of personal jurisdiction over both of them where defendants negotiated the purchase of a North Carolina company on behalf of their corporation, some of the negotiations were conducted in North Carolina, and defendants became officers, directors, and shareholders of a North Carolina company. **Better Business Forms, Inc. v. Davis,** 498.

§ 16 (NCI4th). Personal jurisdiction; promise to perform, or performance of, services within state; goods shipped from, or received in, state

The trial court's exercise of personal jurisdiction over the nonresident defendants did not violate due process where defendants sought out plaintiff to perform work for them in North Carolina and made numerous trips to this state to check on plaintiff's progress. **Kath v. H.D.A. Entertainment,** 264.

The nonresident defendant had sufficient minimum contacts with North Carolina to permit the exercise of personal jurisdiction over defendant in plaintiff's action to recover for consultation services and the engineering and designing of a computer system for defendant. **Chapman v. Janko, U.S.A.,** 371.

§ 84 (NCI4th). Review of rulings of another superior court judge; motion for summary judgment or judgment on pleadings

The trial court did not err in ruling as a matter of law that Lechmere breached the parties' agreement because another judge had previously denied Lechmere's motion for partial summary judgment on the issue of breach of the agreement. **Pleasant Valley Promenade v. Lechmere, Inc.,** 650.

CRIMINAL LAW

§ 118 (NCI4th). Record of arraignment; failure to formally arraign

Failure of the trial court to formally arraign defendant on a habitual felon charge was not reversible error where defendant had filed a waiver of arraignment and at no time claimed he was unaware of the habitual felon charge against him. **State v. Brunson,** 571.

§ 304 (NCI4th). Joinder of multiple charges against same defendant; multiple drug charges

The trial court did not err in consolidating for trial charges against one defendant for conspiracy to traffic and trafficking in controlled substances. **State v. Holmes,** 54.

CRIMINAL LAW—Continued

§ 326 (NCI4th). Joinder of charges against multiple defendants; drug offenses

The trial court's joinder for trial of defendant son's substantive narcotics trafficking offenses with defendant mother's conspiracy offense did not deprive each of them of a fair trial. **State v. Holmes,** 54.

§ 374 (NCI4th). Expression of opinion on evidence during trial; comments regarding admission of particular evidence

The trial court's explanations of its rulings on evidentiary matters did not constitute impermissible expressions of opinion on the evidence. **State v. Holmes,** 54.

§ 375 (NCI4th). Expression of opinion on evidence during trial; miscellaneous comments and actions

The trial court's comments upon denying the jury's request to rehear the testimony of an eleven-year-old alleged sexual offense victim that requiring the child to recount the testimony would be "very traumatic" and "injurious" to the child constituted an improper expression of opinion on the evidence. **State v. Hensley,** 313.

§ 390 (NCI4th). Expression of opinion on evidence during trial; particular comments concerning credibility of witnesses

The trial court's actions in asking the eleven-year-old victim of alleged sexual abuse if he were doing all right and in assisting the victim down from the stand so that he would not stumble did not amount to an improper expression of opinion on the credibility of the victim. **State v. Hensley,** 313.

§ 395 (NCI4th). Expression of opinion on evidence during trial; statements made during jury selection

The trial court's preliminary instructions did not fail to comply with G.S. 15A-1213 because the trial court erred as to the number of felonies required for habitual felon status. **State v. Brunson,** 571.

§ 412 (NCI4th). Argument of counsel; opening statements

The trial court did not abuse its discretion by failing to give a curative instruction when the prosecutor in her opening statement incorrectly indicated an overlap between drug conspiracy charges against both defendants and a drug trafficking charge against one defendant. **State v. Holmes,** 54.

§ 686 (NCI4th). Recorded conference on instructions

Defendant failed to show he was materially prejudiced by the trial court's failure to hold a recorded charge conference. **State v. Brunson,** 571.

§ 720 (NCI4th). Instructions; correction or cure of misstatement or other error

The trial court did not commit plain error when it misinstructed the jury on conspiracy law prior to evidence being presented where the charge at the close of all evidence correctly stated the law on conspiracy. **State v. Holmes,** 54.

§ 723 (NCI4th). Instructions; prohibition of expression of opinion by court

The trial court did not improperly express an opinion during the preliminary instructions in the habitual felon phase of the trial by its comment that "you have now convicted this defendant on these three cases." **State v. Brunson,** 571.

CRIMINAL LAW—Continued

§ 788 (NCI4th). Instructions pertaining to multiple defendants generally

Defendant was not deprived of a fair trial by the court's decision not to repeat the entire instruction on conspiracy because it had just been given for defendant's son. **State v. Holmes,** 54.

§ 793 (NCI4th). Instruction as to acting in concert generally

The trial court did not commit plain error in its instruction on acting in concert by failing to include the element of presence at the scene. **State v. Merritt,** 732.

§ 796 (NCI4th). Instruction as to "aiding and abetting" generally

The trial court did not err in failing to give defendant's proposed instruction on mere presence at the scene of the crime where there was more evidence against defendant than his mere presence at the scene. **State v. Jordan,** 364.

§ 830 (NCI4th). Instructions on State's witnesses; accomplices; when instructions should be given or refused

The trial court did not err in finding that two defense witnesses in an armed robbery trial were interested witnesses and in instructing the jury on accomplice testimony even though one witness had been sentenced for the armed robbery and charges against the second witness had been dropped. **State v. Jordan,** 364.

§ 1043 (NCI4th). Requisites of judgment or sentence; conformity to indictment

A judgment for the substantive crime of uttering a forged instrument is void where defendant was charged only with an attempt to commit that crime. **State v. Kirkpatrick,** 405.

§ 1094 (NCI4th). Aggravating factors under Fair Sentencing Act generally

The trial court abused its discretion in weighing aggravating and mitigating factors where the court may have improperly considered a conviction of defendant which was on direct appeal at the time of sentencing. **State v. Dammons,** 182.

§ 1102 (NCI4th). Fair Sentencing Act; permissible use of nonstatutory aggravating factors

The evidence supported the trial court's finding as a nonstatutory aggravating factor for desecrating a gravesite that defendants' conduct was intended to show disrespect to law enforcement in a manner calculated to be highly publicized. **State v. Sammartino,** 597.

§ 1120 (NCI4th). Fair Sentencing Act; nonstatutory aggravating factors; impact of crime on victim

The trial court in an assault prosecution did not err in finding as a nonstatutory aggravating factor that the injuries to two of the victims resulted in permanent disability. **State v. Evans,** 752.

The trial court properly found as a nonstatutory aggravating factor for two assaults that the monetary damages of $135,000 and $28,325 incurred by the victims exceeded the amount normally found in this type of assault. **Ibid.**

CRIMINAL LAW—Continued

§ 1133 (NCI4th). Fair Sentencing Act; statutory aggravating factors; position of leadership or inducement of others to participate generally

The trial court did not err in sentencing defendants to the maximum allowable sentences for conspiracy to sell cocaine and trafficking in cocaine by finding that each was a leader in the charged crimes. **State v. Holmes,** 54.

§ 1145 (NCI4th). Fair Sentencing Act; statutory aggravating factors; especially heinous, atrocious, or cruel offense generally

The evidence was sufficient to support the trial court's finding that three assaults on victims who suffered multiple gunshot wounds were heinous, atrocious, or cruel. **State v. Evans,** 752.

§ 1149 (NCI4th). Fair Sentencing Act; statutory aggravating factors; use of weapon normally hazardous to lives of more than one person

The trial court did not err in finding the statutory 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 in each of three assault charges where defendant fired a semi-automatic weapon in a house occupied by three women and two minor children. **State v. Evans,** 752.

§ 1172 (NCI4th). Fair Sentencing Act; statutory aggravating factors; great monetary loss; evidence of element of offense

The trial court's finding as an aggravating factor for desecrating a gravesite that the offense involved damage causing great monetary loss did not violate the rule against using the same evidence to prove an element of the offense and the aggravating factor where defendants stipulated that damages to the monument amounted to $10,000. **State v. Sammartino,** 597.

§ 1183 (NCI4th). Fair Sentencing Act; statutory aggravating factors; proof of prior convictions; alternative methods of proof

The trial court did not err in admitting a faxed copy of a Connecticut police record check into evidence for sentencing purposes. **State v. Jordan,** 364.

§ 1193 (NCI4th). Aggravating factors under Fair Sentencing Act; prior convictions; matters on appeal

Though it is erroneous to find a prior conviction which is on appeal as an aggravating factor, the trial court's finding of the aggravating factor of prior convictions was supported by three prior convictions admitted by defendant which were not on appeal. **State v. Dammons,** 182.

§ 1283 (NCI4th). Indictment charging defendant as an habitual felon

It makes no difference whether defendant is charged with the underlying felony and with habitual felon status in separate indictments or in separate counts of the same indictment. **State v. Young,** 456.

§ 1288 (NCI4th). Repeat or habitual offender; determination by court or by a jury

Defendant's motion to continue the habitual felon phase of his trial in order to empanel a new jury was properly denied. **State v. Brunson,** 571.

CRIMINAL LAW—Continued

§ 1681 (NCI4th). Modification or correction of judgment or sentence by court in term; increase of punishment

The trial court had authority to modify judgments increasing defendant's prison terms where all judgments were entered during the week of court assigned to the trial judge and there had been no adjournment sine die. **State v. Sammartino,** 597.

DAMAGES

§ 35 (NCI4th). Measure of damages; real property

The trial court erred by assessing damages for negligent damage to real property based on the replacement costs of trees and groundcover rather than on the difference in market value before and after the negligent injury. **Huberth v. Holly,** 348.

Diminished market value of a shopping center is recoverable for an anchor store's breach of its contract to operate its store in the shopping center for a specified time. **Pleasant Valley Promenade v. Lechmere, Inc.,** 650.

§ 66 (NCI4th). Punitive damages generally

Though plaintiffs were not entitled to punitive damages under the Sedimentation Pollution Control Act, they were entitled to punitive damages on their property damage claim. **Huberth v. Holly,** 348.

§ 96 (NCI4th). Special damages; effect of failure to allege special damages

Any damages suffered by plaintiff as a result of defendant's breach of the parties' contract for operation of an anchor store in a shopping center were special damages, and the jury should have been presented with the question of whether defendant foresaw or had reason to foresee the injury that plaintiff suffered. **Pleasant Valley Promenade v. Lechmere, Inc.,** 650.

DECLARATORY JUDGMENT ACTIONS

§ 8 (NCI4th). Requirement of actual justiciable controversy; where controversy concerns statute or ordinance

An actual controversy existed in a declaratory judgment action where defendants maintained conflicting positions as to the proper source of funds necessary to pay additional North Carolina estate tax due as a result of the inclusion of the value of a QTIP trust in testator's gross estate for federal estate tax purposes, and plaintiff executor has a duty to obtain the funds and administer their payment. **Branch Banking and Trust Co. v. Staples,** 227.

DEDICATION

§ 11 (NCI4th). Sufficiency of acts of dedication

Where a trustee does not sign a dedication, the dedication is made subject to the deed of trust and is cut off by a subsequent foreclosure, but when the mortgagee gives implied consent to the dedication by releasing lots sold referring to the plat which dedicates the streets, the dedication is enforceable. **Tower Development Partners v. Zell,** 136.

§ 12 (NCI4th). Offer of dedication

There was a valid offer of dedication of an entire street where the original owner recorded a subdivision plat showing the entire street and sold lots referring to the

DEDICATION—Continued

recorded plat, and the plat included a statement signed by the company president which specifically dedicated the streets to the public. **Tower Development Partners v. Zell,** 136.

§ 13 (NCI4th). Acceptance of dedication

There was a valid acceptance of dedication of an entire street where defendant city maintained the streets shown on a subdivision plat, adopted the recorded plat into its official zoning map, removed the land covered by the dedication from its tax rolls, and part of the street was opened and used by the public. **Tower Development Partners v. Zell,** 136.

DISCOVERY AND DEPOSITIONS

§ 62 (NCI4th). Enforcing discovery; sanctions; failure to respond to discovery request

In denying plaintiff's motion for sanctions, the Industrial Commission erred in considering as factors that representation for both parties was publicly funded, that plaintiff did not personally incur any additional expense for his motion to compel discovery, and that such tactics were out of character for the office of defendant's counsel. **Williams v. N.C. Dept. of Correction,** 356.

The record did not present sufficient evidence to support a conclusion that defendant failed to provide plaintiff with the specific documents required by the Deputy Commissioner's discovery order. **Ibid.**

§ 64 (NCI4th). Violation of requirements as to signing of papers

This case is remanded for a determination as to whether defense counsel's certification of responses to interrogatories violated Rule 26(g) and, if so, for the imposition of appropriate sanctions. **Williams v. N.C. Dept. of Correction,** 356.

§ 67 (NCI4th). Failure to comply with order; sanctions by court in which action is pending

Defendant's failure to disclose all prior injuries on brick setting machines in response to plaintiff's interrogatories and defendant's failure to produce loss prevention documents were abuses of discovery which would support imposition of sanctions, but the trial court did not abuse its discretion in declining to impose sanctions but instead ordering defendant to produce documents responsive to plaintiff's discovery requests for an in camera inspection. **Rose v. Isenhour Brick & Tile Co.,** 235.

DIVORCE AND SEPARATION

§ 3 (NCI4th). Separation agreements; formal statutory requisites generally

The trial court did not err in determining that the parties' agreement was not a separation agreement under G.S. 52-10.1. **Williams v. Williams,** 707.

§ 14 (NCI4th). Violations of public policy against promoting separation or divorce

A provision of the parties' agreement stating that should the parties hereinafter again separate, defendant would continue to pay permanent alimony of $500 per month was void as against public policy. **Williams v. Williams,** 707.

DIVORCE AND SEPARATION—Continued

§ 35 (NCI4th). Resumption of marital relations

The parties' agreement was not an integrated property settlement wherein the executory provision would withstand reconciliation of the signatories. **Williams v. Williams**, 707.

§ 112 (NCI4th). Distribution of marital property; property subject to distribution, generally

A restriction on the transfer of stock does not apply to interspousal transfers of stock incident to equitable distribution absent an express provision prohibiting such transfers. **Bryan-Barber Realty, Inc. v. Fryar**, 178.

§ 136 (NCI4th). Valuation of property; measure of value

The trial court did not err in its valuation of the marital residence even though defendant asserted that his expert witnesses were more qualified than plaintiff's experts. **Leighow v. Leighow**, 619.

§ 143 (NCI4th). Equitable division of property generally; "equitable" and "equal" distinguished

The trial court's finding of three distributional factors was sufficient to support its conclusion that an equal division would not be equitable. **Leighow v. Leighow**, 619.

§ 145 (NCI4th). Distribution factors; income and earning potential

The trial court did not err in categorizing mortgage notes as marital property and determining that an unequal distribution of the marital estate in favor of plaintiff would be equitable because the interest on the notes accrued to defendant's benefit during separation when plaintiff was entitled to one-half of the interest. **Leighow v. Leighow**, 619.

§ 155 (NCI4th). Distribution factors; maintenance or development of property after separation

The trial court did not erroneously fail to award defendant credit for plaintiff's exclusive post-separation use of the marital residence where the evidence showed that, although defendant did have exclusive use of the residence, she also was forced to spend considerable sums to repair and maintain the home. **Leighow v. Leighow**, 619.

§ 174 (NCI4th). Entry of equitable distribution judgments and orders, generally

The judgment in this equitable distribution action was not required to be reversed because it placed in the clerk of court rather than in the court itself the authority to execute documents for property transfers specified in the judgment. **Leighow v. Leighow**, 619.

§ 201 (NCI4th). Allowance of alimony; who is a dependent spouse

Child care expenses incurred by a custodial parent constitute a "condition" to be considered by the trial court in determining whether the custodial parent is dependent and thus entitled to alimony, and the noncustodial spouse's child support contributions must also be considered in determining whether the custodial parent is dependent. **Fink v. Fink**, 412.

Where a consent order reflected defendant's child support obligation by application of the current child support guidelines, it was reversible error for the trial court

DIVORCE AND SEPARATION—Continued

to make its own calculations based upon plaintiff's testimony and financial affidavit regarding the actual reasonable needs of the child and plaintiff's contribution thereto in making its dependency determination. **Ibid.**

§ 220 (NCI4th). Amount of alimony allowance; other factors

The trial court did not err in failing to include in plaintiff's income the sum of $2,000 received annually as a Christmas gift from plaintiff's father and properly included in plaintiff's expenses payments on a loan made to her by her father. **Fink v. Fink,** 412.

§ 279 (NCI4th). Amount of alimony; expenses; needs of dependent spouse

The trial court in an alimony action did not err in removing from its calculation of defendant husband's reasonable needs and expenses the amount for health insurance for the minor child claimed on his affidavit where the court credited defendant with this amount to compensate for the amount withheld from his wages for medical insurance for the child. **Fink v. Fink,** 412.

§ 340 (NCI4th). Contents of custody order

The trial court properly included in its order reciprocal provisions requiring both parties to refrain from making any degrading or negative comments about the other or interfering with the other party's relationship with the child. **Watkins v. Watkins,** 475.

§ 350 (NCI4th). Particular considerations in awarding custody; miscellaneous circumstances

An order compelling the parties to submit to blood grouping and DNA testing to determine paternity will best promote the interests and welfare of the child in a custody proceeding. **Johnson v. Johnson,** 1.

§ 359 (NCI4th). Modification of custody order generally

The rule that a fit natural parent not found to have neglected a child has a right to custody superior to third persons was inapplicable where custody of the children was initially placed with the maternal grandparents in lieu of the natural mother who had been found to be a fit and proper parent, and the trial court erred in awarding custody to defendant mother without conducting a hearing to determine if there were sufficient changed circumstances to merit the change in custody. **Bivens v. Cottle,** 467.

§ 385 (NCI4th). Child support generally

The trial court erred in reducing defendant mother's child support obligation because of her parents' contribution to the support of the minor children living with the father. **Guilford County ex rel. Easter v. Easter,** 260.

§ 409 (NCI4th). Child support; construction of separation agreements

The trial court properly construed a provision in the parties' separation agreement to mean that defendant would provide child support as long as each child was in college but not after each turned twenty-two or got married. **Perkins v. Perkins,** 638.

§ 444 (NCI4th). Modification of child support order; changed circumstances; decrease in custodial parent's income

Although the trial court erred in concluding that plaintiff could not claim a voluntary reduction in income because of her full time enrollment in college as a change

DIVORCE AND SEPARATION—Continued

of circumstances, plaintiff failed to meet the additional burden of showing a change of circumstances relating to the needs of the children. **Schroader v. Schroader,** 790.

§ 446 (NCI4th). Modification of child support order; changed circumstances; increase in non-custodial parent's income

The trial court did not err in finding that there had been no showing that defendant's income had increased to constitute a change of circumstances where defendant was the owner in name only of his parents' business, and defendant had a paper income which was not the same as his actual spendable income. **Schroader v. Schroader,** 790.

§ 447 (NCI4th). Modification of child support order; miscellaneous changed circumstances

The switch of the obligation to carry medical insurance for the parties' children from defendant to plaintiff was not a change of circumstances supporting modification of child support. **Schroader v. Schroader,** 790.

§ 453 (NCI4th). Custody, visitation, and child support; jurisdiction after divorce

Where the only issue before the trial court was child custody, the court was without authority to issue an order modifying an earlier consent order setting child support so as to require defendant to pay the costs of private boarding school. **Royall v. Sawyer,** 880.

§ 499 (NCI4th). Jurisdiction when simultaneous proceedings occur in other states; convenience of forum

The trial court erred in relinquishing to Texas courts jurisdiction over child custody and visitation issues without first considering the noncustodial parent's ability to take advantage of custody and visitation privileges, residence of the child's extended family, information about the child in the foreign jurisdiction and in this state, and other circumstances bearing on the child's best interest. **Watkins v. Watkins,** 475.

EASEMENTS

§ 6 (NCI4th). Creation of easements generally

Driveway easements were not created by dedication since the driveways were not offered to the public and accepted by some public authority as streets. **Tower Development Partners v. Zell,** 136.

§ 9 (NCI4th). Creation by deed or agreement generally

Creation of driveway easements through express grant failed ab initio where the original owner of the land was the beneficial owner of both tracts when it purported to create the driveway easements. **Tower Development Partners v. Zell,** 136.

§ 10 (NCI4th). Creation by deed or agreement; construction; unambiguous instruments

The trial court erred in expanding an easement for ingress and egress to include the location, installation, and maintenance of facilities for domestic utilities. **Swaim v. Simpson,** 863.

§ 17 (NCI4th). Creation by implication generally

A use of eighteen months is insufficient to create an easement by implication. **Tower Development Partners v. Zell,** 136.

EASEMENTS—Continued

§ 59 (NCI4th). Sufficiency of evidence; easement by express grant or agreement

The trial court properly determined that no easement existed over the portion of plaintiff's property on which the "Old Yadkin Road" lay since plaintiff's offer to sign an easement conditioned on defendant's not removing any trees was not accepted; even if language in a deed from plaintiff was an offer of dedication of the road, no public authority accepted the dedication; and plaintiffs were not parties in a declaratory judgment action establishing defendant's easement in the road across a neighboring landowner's property. **Huberth v. Holly,** 348.

ELECTIONS

§ 93 (NCI4th). State Board of Elections proceedings generally; authority of the board

The State Board of Elections denied appellants procedural due process by failing to consider evidence with regard to alleged voting irregularities involving voting equipment and counting and recounting of votes. **In re Appeal of Ramseur,** 521.

§ 98 (NCI4th). State Board of Elections proceedings; decision; order

The State Board of Elections erred in failing to state specific reasons why it did not adopt the County Board's recommended decision of a new referendum. **In re Appeal of Ramseur,** 521.

§ 105 (NCI4th). Election contest; sufficiency of evidence

Appellants were unable to meet their burden of proving that the outcome of a mixed beverage referendum would have been different absent irregularities in the voting process where the referendum passed by three votes, ten voters admitted their ineligibility but only five would disclose how they voted, and it was therefore impossible to determine whether those ten votes affected the outcome of the referendum. **In re Appeal of Ramseur,** 521.

EMBEZZLEMENT

§ 24 (NCI4th). Variance between indictment and proof

The trial court erred in denying defendant magistrate's motion to dismiss a charge of embezzlement where defendant was charged with embezzling U.S. currency belonging to the State of North Carolina but the money actually belonged to the person who had overpaid it and never belonged to the State as defendant's principal. **State v. Rhome,** 278.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 124 (NCI4th). Sedimentation; violations of law; enforcement; remedies

The trial court properly awarded only nominal damages for violations of the Sedimentation Pollution Control Act where there was no evidence that the violations caused the loss of plaintiff's trees and groundcover plants. **Huberth v. Holly,** 348.

ESTOPPEL

§ 18 (NCI4th). Conduct of party asserting estoppel generally

Defendant university was not estopped to deny plaintiff student admission into its school of nursing upon her completion of the minimum requirements for admission

ESTOPPEL—Continued

even if her faculty advisors assured her she would be admitted upon her completion of those requirements. **Long v. University of North Carolina at Wilmington,** 267.

§ 22 (NCI4th). Pleading

Where plaintiff did not plead estoppel, it could not raise that issue for the first time on appeal. **Haywood Street Redevelopment Corp. v. Peterson Co.,** 832.

EVIDENCE AND WITNESSES

§ 23 (NCI4th). Judicial notice; matters pertaining to a particular case, generally

The Court of Appeals could not take judicial notice of the "adjudicative facts" of a separate action filed by defendant against plaintiff which allegedly supported a defense of res judicata. **Jackson v. Carolina Hardwood Co.,** 870.

§ 148 (NCI4th). Existence of insurance; liability insurance

Plaintiff was properly permitted to elicit testimony that a witness was hired by defendant's automobile liability insurer to make a videotape of plaintiff in order to show bias of the witness. **Carrier v. Starnes,** 513.

§ 176 (NCI4th). Facts indicating opportunity

The trial court in a prosecution of defendant for the murder of his girlfriend's four-month-old daughter properly allowed the girlfriend to testify concerning defendant's employment status since the testimony demonstrated access and opportunity for defendant to have committed the crime because he was frequently at home with the child. **State v. McAbee,** 674.

§ 192 (NCI4th). Mental or physical condition and appearance of plaintiff

Plaintiff's drug use twenty years prior to her medical malpractice action was not admissible under Rule 404(b) on the issue of damages to develop the entire picture of a personality type. **Johnson v. Amethyst Corp.,** 529.

§ 285 (NCI4th). Specific acts of victim to prove self-defense; requirement that defendant be present or have knowledge of acts

The trial court in a prosecution of defendant for the murder of her husband properly excluded testimony by the husband's ex-girlfriend concerning his violent and abusive behavior which occurred six years before defendant shot the husband where there was no evidence that defendant knew of her husband's abusive behavior toward his ex-girlfriend. **State v. Brown,** 276.

§ 386 (NCI4th). Other crimes, wrongs, or acts; admissibility to show relationship between defendant and victim

Evidence of defendant's drinking habits was relevant in a prosecution of defendant for the murder of his girlfriend's four-month-old daughter to show that there was a deterioration in defendant's relationship with the child. **State v. McAbee,** 674.

§ 621 (NCI4th). Suppression of evidence; time of motion in superior court

The trial court had the authority to grant defendant's supplemental motion to suppress on the ground of newly discovered evidence even though defendant's original motion to suppress had been adjudicated through the appellate process where defendant presented subsequently discovered evidence that an anonymous tip which supported a stop of defendant's car had been fabricated by the police. **State v. Watkins,** 804.

EVIDENCE AND WITNESSES—Continued

§ 627 (NCI4th). Suppression of evidence; appeal; motion to suppress denied

Defendant was not entitled to appeal the denial of his motion to suppress where he failed to give notice to the prosecution and to the court of his intent to appeal this issue before he accepted a plea bargain. **State v. McBride,** 623.

§ 649 (NCI4th). Suppression of evidence; time of ruling

The trial court did not impermissibly chill defendant's right to testify in his own behalf when it declined to rule on his motion in limine to suppress Rule 404(b) evidence of the underlying facts of prior convictions but deferred its decision until such time as the facts and context would allow the court to make a well reasoned decision. **State v. Barber,** 505.

§ 720 (NCI4th). Error as harmless or prejudicial; evidence as to defendant's character, generally

Defendant was not prejudiced when a witness answered negatively when asked if he knew whether defendant had been hospitalized for alcoholism. **State v. McAbee,** 674.

§ 765 (NCI4th). Error as harmless or prejudicial; where party opposing admission of evidence had opened door

The investigating officer was properly permitted to testify on redirect in a rape case that the victim's inconsistent statements were only memory problems common to victims of sex crimes to reestablish the officer's credibility after the defense opened the door by calling into question the thoroughness of her investigative report. **State v. Barber,** 505.

§ 977 (NCI4th). Residual exception to hearsay rule

Reliance by the court, however minimal, upon the racial identity of defendant and a witness in admitting into evidence the witness's hearsay statement to an SBI agent under the residual hearsay exception constituted error. **State v. Rhome,** 278.

§ 1017 (NCI4th). Admissions or declarations against interest; statements regarding fault or liability

The trial court did not err in admitting defendant's admissions and allowing plaintiff's counsel to argue them to the jury where plaintiff requested that defendant's initial denial of liability be admitted into evidence to rebut the assertion in opening statements that defendant had always admitted liability. **Roberts v. Young,** 720.

§ 1373 (NCI4th). Admissibility of fact that civil suit was brought, settled, or dismissed

Defense counsel's references to a former defendant's role in this medical malpractice case in questions to plaintiffs' expert witnesses were not unduly prejudicial to plaintiffs. **Lumley v. Capoferi,** 578.

§ 1920 (NCI4th). Blood tests to establish or disprove parentage

The putative father of a child born to defendant mother during her marriage to plaintiff was an "interested party" within the meaning of G.S. 8-50.1(b) and as such could move the trial court to order blood grouping tests to establish or disprove parentage. **Johnson v. Johnson,** 1.

Plaintiff husband could be compelled to submit to blood grouping tests under G.S. 8-50.1(b) where he was named defendant in the mother's counterclaim and in the

EVIDENCE AND WITNESSES—Continued

paramour's crossclaim, and he alleged in his own complaint that he was the parent of the child in question. **Ibid.**

§ 2266 (NCI4th). Opinion testimony by experts; conclusion that wounds were characteristic of battered child syndrome

The trial court properly allowed the State to introduce testimony from two medical experts that an infant's injuries were intentionally inflicted. **State v. McAbee,** 674.

§ 2311 (NCI4th). "Breathalyzer" test and results generally

In a prosecution of defendant for impaired driving of a commercial vehicle, the trial court did not err in excluding expert testimony that defendant's Intoxilyzer reading did not accurately reflect his blood alcohol level because his normal blood-breath ratio was different than the calibration of the Intoxilyzer. **State v. Cothran,** 633.

§ 2327 (NCI4th). Post-Traumatic Stress Disorder

The trial court erred in allowing a clinical psychologist to make a statement which did not name defendant specifically but which intimated that the cause of the victim's post-traumatic stress syndrome was the sexual abuse inflicted by defendant. **State v. Hensley,** 313.

§ 2545 (NCI4th). Competency of witnesses; children; voir dire hearing; when held

The trial court did not commit plain error in making an unrequested inquiry before the jury into the competency of an eleven-year-old alleged sexual abuse victim to testify. **State v. Hensley,** 313.

§ 2618 (NCI4th). Privileged communications; husband and wife; confidentiality of communications, generally

Defendants were not prejudiced by the court's instruction with regard to the marital privilege where defendants requested the instruction. **State v. Holmes,** 54.

§ 2679 (NCI4th). Privileged communications; social worker and client; compelling disclosure

Assuming that confidential DSS records were privileged, the trial court did not abuse its discretion by finding that it was in the interest of justice to allow the State to use the records to cross-examine defendant about his alcoholism. **State v. McAbee,** 674.

§ 2750.1 (NCI4th). Scope of examination; when defendant "opens door"

Defendant's testimony about his drinking habits during direct examination opened the door to the prosecutor's cross-examination of defendant as to whether he had said he was an alcoholic during a hospital interview. **State v. McAbee,** 674.

§ 2983 (NCI4th). Basis for impeachment; conviction of crime generally

The trial court did not violate Rule 404 by allowing into evidence testimony of the prior bad acts of witnesses since that rule applies only to parties. **State v. Holmes,** 54.

§ 3052 (NCI4th). Basis for impeachment; specific instances of conduct; drug use or addiction

Plaintiff's drug use twenty years prior to her medical malpractice action was irrelevant to plaintiff's credibility under Rule 608(b). **Johnston v. Amethyst Corp.,** 529.

EVIDENCE AND WITNESSES—Continued

§ 3070 (NCI4th). Basis for impeachment; inconsistent or contradictory statements generally

The trial court did not err in preventing defendant from eliciting further testimony from a defense witness regarding allegedly inconsistent statements made by defendant's girlfriend. **State v. McAbee,** 674.

FALSE PRETENSES, CHEATS, AND RELATED OFFENSES

§ 7 (NCI4th). Variance between indictment and evidence; surplusage

There was no fatal variance between the indictment and evidence for a charge against a magistrate of obtaining property by false pretense in naming the wrong bank upon which the check in question was drawn; nor was there a fatal variance where the indictment charged defendant with an attempt to obtain money from a named victim and the evidence showed that funds paid in satisfaction of a worthless check came from the victim's mother. **State v. Rhome,** 278.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 18 (NCI4th). Detrimental reliance generally

The trial court properly entered a directed verdict in favor of defendant Lechmere on plaintiff's fraud and unfair trade practices claims arising out of the closing of a Lechmere store in plaintiff's shopping center where the evidence showed that plaintiff did not actually rely upon defendant's misrepresentations that their agreement to operate the store for seven years would be honored. **Pleasant Valley Promenade v. Lechmere, Inc.,** 650.

§ 38 (NCI4th). Summary judgment; jury questions

The trial court properly refused to submit plaintiff's action for fraud against defendant substance abuse hospital to the jury based upon her claim that the hospital's brochure falsely represented that the hospital "provides you with a very safe and secure facility" and that she was sexually assaulted while a patient there, since there was no evidence that the reference to safety in the hospital's brochure was intended to deceive plaintiff. **Johnson v. Amethyst Corp.,** 529.

The evidence was insufficient to support plaintiff's fraud claim arising out of defendant employer's moving and relocation policy designed to ease financial burdens on employees affected by the move of corporate headquarters. **Zanone v. RJR Nabisco,** 768.

HIGHWAYS, STREETS, AND ROADS

§ 32 (NCI4th). Outdoor Advertising Control Act, generally

The Department of Transportation had no authority to promulgate any regulation with respect to petitioner's nonconforming sign which was in existence prior to the enactment of the Outdoor Advertising Control Act. **Appalachian Poster Advertising Co. v. Harrington,** 72.

§ 62 (NCI4th). Civil liability; municipalities; trees and shrubbery

The trial court properly granted summary judgment for defendant city where plaintiff alleged that defendant was negligent in failing to keep its streets free from unnecessary obstructions, but the tree which allegedly obstructed plaintiff's view was located on private property over which defendant city had no duty to exercise control. **Lavelle v. Schultz,** 857.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 1 (NCI4th). Creation and organization of public hospitals and facilities generally; character and status of facilities

Defendant county's home health agency was a "hospital facility" as defined by G.S. 131E-6(4). **Hospital Corp. of N.C. v. Iredell County,** 445.

§ 2 (NCI4th). Municipal hospitals

A county's contract to transfer "management" of a home health agency was a "lease, sale, or conveyance" requiring compliance with statutory notice provisions. **Hospital Corp. of N.C. v. Iredell County,** 445.

HOUSING, AND HOUSING AUTHORITIES AND PROJECTS

§ 23 (NCI4th). Housing authorities and projects; rental of dwellings

Defendant could not be evicted from public housing because of a shooting by her son where defendant had no knowledge of the shooting and had no reason to know her son might commit such an act. **Charlotte Housing Authority v. Patterson,** 552.

§ 54 (NCI4th). Unit ownership and condominiums; common areas and expenses

Defendant homeowners association was not authorized to require persons who rented units within a condominium on a short term basis to pay a fee to use common areas and recreational facilities to which owners of the units, their guests, and invitees had been granted an easement. **Miesch v. Ocean Dunes Homeowners Assn.,** 559.

ILLEGITIMATE CHILDREN

§ 7 (NCI4th). Civil action to establish paternity; standard of proof; blood grouping tests

The putative father of a child born to defendant mother during her marriage to plaintiff was an "interested party" within the meaning of G.S. 8-50.1(b) and as such could move the trial court to order blood grouping tests to establish or disprove parentage. **Johnson v. Johnson,** 1.

When the question of paternity arises, blood grouping tests may be used to rebut any presumptions of paternity in both criminal and civil actions, and in this case the putative father, who is now married to the mother, presented other facts and circumstances sufficient to question the presumption that the child in question, though born during the mother's marriage to plaintiff, was legitimate. **Ibid.**

Plaintiff husband could be compelled to submit to blood grouping tests under G.S. 8-50.1(b) where he was named defendant in the mother's counterclaim and in the paramour's crossclaim, and he alleged in his own complaint that he was the parent of the child in question. **Ibid.**

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 57 (NCI4th). Sufficiency of indictment to support conviction of other degrees of the crime

A judgment for the substantive crime of uttering a forged instrument is void where defendant was charged only with an attempt to commit that crime. **State v. Kirkpatrick,** 405.

INFANTS OR MINORS

§ 71 (NCI4th). Delinquent children; jurisdiction as governed by juvenile's age

The trial court erred by ruling that respondent had not reached thirteen years at the time he committed the charged offense where the offense was committed on his thirteenth birthday but several hours before his birth hour. **In re Robinson,** 874.

§ 120 (NCI4th). Sufficiency of evidence; abused and neglected children

The evidence was sufficient to support the trial court's conclusion that a minor was abused and neglected where respondent admitted she was afraid she would hurt her baby and did not want her child, and a pediatric expert testified that injuries to the child probably did not occur in the manner described by the mother. **In re Hawkins,** 585.

§ 140 (NCI4th). Delinquent children; parties who may appeal

The State had no right to appeal an order denying transfer of a juvenile case to superior court based on a finding that the juvenile had not fully lived thirteen years. **In re Robinson,** 874.

INSURANCE

§ 37 (NCI4th). Insolvent insurance companies; protection from, early detection of, and rehabilitation of insurers

The application of any equitable doctrine, including the common fund doctrine, was precluded in an insolvent insurer's liquidation proceeding to alter the Class 5 priority assigned to the claims of attorneys who had represented the insolvent's insureds. **State ex rel. Long v. Interstate Casualty Ins. Co.,** 743.

Claims of attorneys who represented an insolvent insurer's insureds were not "costs for administration or conservation of assets of the insurer" entitled to Class 1 priority. **Ibid.**

Collection of files by Eastern Appraisal Services did not amount to conservation or administration of the assets after the establishment of the "insurer's estate" so that Eastern's claim was not entitled to Class 1 priority. **Ibid.**

§ 516 (NCI4th). Effect of policy provision that uninsured motorist clause should constitute only excess insurance

The driver's in-state policy rather than the owner's out-of-state policy provided primary coverage for an accident since the driver's policy was "other automobile insurance" within the meaning of a provision of the owner's policy excluding coverage to the extent that out-of-state compulsory insurance law was satisfied by other automobile liability insurance, and the owner's policy was not "collectible insurance" within the meaning of the "other insurance" clause of the driver's policy. **Metropolitan Prop. and Casualty Ins. Co. v. Lindquist,** 847.

INTENTIONAL INFLICTION OF MENTAL DISTRESS

§ 2 (NCI4th). Sufficiency of claim

The trial court properly allowed the motion for summary judgment by defendant city and defendant police chief with respect to plaintiffs' intentional infliction of emotional distress claim based upon defendants' actions in obtaining an injunction for the abatement of a nuisance at plaintiffs' dance and disco business. **Moore v. City of Creedmoor,** 27.

INTEREST AND USURY

§ 5 (NCI4th). Time from which interest runs

Plaintiff was entitled to interest from the date of a breach of contract, and the trial court, rather than the jury, properly determined that the date plaintiff issued its Certificate of Substantial Completion, rather than the date individual breaches were discovered, was the date of breach. **Metromont Materials Corp. v. R.B.R. & S.T.,** 616.

JUDGES, JUSTICES, AND MAGISTRATES

§ 3 (NCI4th). Civil actions against judges

A civil action against a court appointed referee for alleged wrongs committed in his official capacity was implicitly an action against the trial judge and was barred by judicial immunity. **Sharp v. Gulley,** 878.

§ 49 (NCI4th). Magistrates; suspension, removal, and reinstatement

The trial court committed plain error entitling defendant to a new trial on charges of refusal to discharge the duties of a magistrate where the jury was never instructed either upon the duties of a magistrate or the specific duty alleged in the indictments to have been violated. **State v. Rhome,** 278.

JUDGMENTS

§ 224 (NCI4th). Who is bound or estopped by judgment; particular cases

The mother of defendant's alleged children and the children were not collaterally estopped from bringing an action to establish defendant's paternity and thereby gain child support where a previous criminal nonsupport action barred the State from prosecuting defendant, and a prior civil adjudication barred only the Sampson County Child Support Enforcement Agency from proceeding against defendant. **Devane v. Chancellor,** 636.

§ 650 (NCI4th). Award of interest as question of law or fact

The trial court did not err in awarding prejudgment interest from a specified date when the jury did not distinguish between principal and interest. **Taha v. Thompson,** 697.

§ 652 (NCI4th). When interest beings to accrue

The trial court properly denied State Farm's motion to toll prejudgment interest in a personal injury action based on the language of G.S. § 24-5. **Roberts v. Young,** 720.

LABOR AND EMPLOYMENT

§ 71 (NCI4th). Wrongful discharge or demotion; jury instructions

The trial court in a wrongful termination case erred in instructing the jury in such a manner that an affirmative answer to both questions submitted would require a finding that an employee was wrongfully terminated and that the employer would have terminated the employee in any event. **Johnson v. Friends of Weymouth, Inc.,** 255.

§ 142 (NCI4th). Eligibility of particular types of employees for unemployment benefits

"Loaders" who worked for defendant loading tires onto the trailers of various trucking companies at the Kelly Springfield Tire plant were employees for which

LABOR AND EMPLOYMENT—Continued

defendant owed unemployment taxes. **State ex rel. Employment Security Comm. v. Huckabee,** 217.

§ 161 (NCI4th). Unemployment benefits; violation of employer's rule or policy constituting misconduct

A discharged deputy sheriff's failure to inform the sheriff or chief deputy of a phone tap in his supervisor's office, though a violation of departmental policy, did not rise to the level of misconduct which would make the deputy ineligible for unemployment benefits. **Williams v. Davie County,** 160.

§ 189 (NCI4th). Liability of independent contractor for injuries to third persons; negligent hiring

The trial court properly entered summary judgment for defendant on plaintiff's claims for negligent hiring, supervision, and retention of employees who stole a bracelet from plaintiff's home while performing plumbing repairs. **Moricle v. Pilkington,** 383.

§ 192 (NCI4th). Inherently dangerous work; injury to employee

Cleaning a boiler was not an "ultrahazardous activity" for which defendant employer was strictly liable. **Jones v. Willamette Industries, Inc.,** 591.

LANDLORD AND TENANT

§ 18 (NCI4th). Leases; construction of other miscellaneous provisions

The trial court erred in finding a breach of the parties' lease as a matter of law where the language "provided tenant operates a full service sandwich and grill landlord will not lease shop space to another grill or sandwich shop" was susceptible to two interpretations. **Taha v. Thompson,** 697.

§ 38 (NCI4th). Termination of tenancy; notice to quit

Notice of termination of a lease provided to defendant, a tenant pursuant to a Section 8 program, based on a pending sale of the property was sufficient to meet all the legal requirements. **Venture Properties I v. Anderson,** 852.

LIBEL AND SLANDER

§ 43 (NCI4th). Summary judgment; sufficiency of evidence; publication; privilege

The trial court properly granted summary judgment for defendants in plaintiff's action for slander where the individual defendant, the president of defendant association, questioned expenditures by plaintiff and accused him of stealing during a private telephone conversation with the chairman of the association's audit committee, since the individual defendant's conversation was privileged. **Lee v. Lyerly,** 250.

§ 43 (NCI4th). Sufficiency of evidence to take issues to jury; publication; privilege

The trial court properly granted defendant's motion for directed verdict on plaintiff's defamation claim since letters from defendant's counsel to plaintiff's counsel regarding plaintiff agent's contractual liability for the proceeds of the sale of stolen bus tickets contained no defamatory statements and were privileged as communications relevant to proposed judicial proceedings, and plaintiff failed to establish publication to others of statements made by defendant's employee. **Smith v. Carolina Coach Co.,** 106.

LIMITATIONS, REPOSE, AND LACHES

§ 26 (NCI4th). Attorney and accountant malpractice

Plaintiff shareholders' negligent misrepresentation claim against defendant accountants was barred by the *three-year statute of limitations.* **Barger v. McCoy Hillard & Parks**, 326.

Even if plaintiff had a viable cause of action for professional negligence by defendant attorneys in failing to reopen his workers' compensation case, that action was barred by the statutes of limitation and repose. **Garrett v. Winfree,** 689.

The statute of repose in G.S. 1-15(c) did not violate defendant's state or federal rights to equal protection. **Ibid.**

§ 29 (NCI4th). Improvements to real property generally

Plaintiff's negligence action against the installer of a waterproofing surface on plaintiff's parking deck was barred by the statute of limitations where it was filed more than three years after plaintiff became aware that the surface area was already peeling up and water was leaking into plaintiff's building. **Haywood Street Redevelopment Corp. v. Peterson Co.,** 832.

§ 37 (NCI4th). Fraud generally

Plaintiff shareholders' constructive fraud claims against defendant accountants based upon a breach of fiduciary duty was governed by the ten-year statute of limitations and was not barred. **Barger v. McCoy Hillard & Parks,** 326.

§ 57 (NCI4th). Contract actions; obligation subject to condition or contingency; breach of warranty

Where defendant warranted that its waterproofing work would be free of certain defects for a period extending through 15 March 1993, there was a new breach of the agreement each day that the waterproofing was not free of defects, and a new cause of action accrued with the occurrence of each breach. **Haywood Street Redevelopment Corp. v. Peterson Co.,** 832.

The statute of limitations was tolled during the time the installer of waterproofing on plaintiff's parking deck attempted to make repairs to enable the waterproofing to comply with the written warranty. **Ibid.**

§ 139 (NCI4th). New action after failure of original suit

Where plaintiff's action was involuntarily dismissed without prejudice pursuant to Rule 41(b), plaintiff's second action filed within the applicable statute of limitations was timely although it was not filed within one year of the dismissal. **84 Lumber Co. v. Barkley,** 271.

§ 160 (NCI4th). Laches; application of doctrine to particular proceedings

Plaintiff's action challenging a city's financing and construction of a ballpark as ultra vires was barred by laches where it was instituted more than two years after the project was approved. **Cannon v. City of Durham,** 612.

MALICIOUS PROSECUTION

§ 4 (NCI4th). Proceedings which will support action

Evidence that defendants initiated or participated in a civil nuisance action would suffice to show the first element of a malicious prosecution claim. **Moore v. City of Creedmoor,** 27.

MALICIOUS PROSECUTION—Continued

§ 17 (NCI4th). Sufficiency of evidence generally

The evidence was sufficient to raise genuine issues of material fact regarding whether defendant police chief and defendant city, through its board of commissioners, initiated an earlier nuisance abatement action upon which this malicious prosecution action was based, but the evidence was insufficient to raise a genuine issue as to whether a former city commissioner initiated the earlier action. **Moore v. City of Creedmoor,** 270.

§ 19 (NCI4th). Sufficiency of evidence; probable cause

The evidence raised a justiciable issue of fact as to whether defendants initiated a nuisance abatement action without probable cause, and based upon the inference of implied malice arising from evidence of the absence of probable cause, plaintiffs presented sufficient factual evidence to withstand defendants' motion for summary judgment. **Moore v. City of Creedmoor,** 27.

§ 21 (NCI4th). Sufficiency of evidence; special damages

The evidence was sufficient to forecast special damages where it showed that plaintiffs' disco-dancing business was enjoined from operation for seven months pending trial. **Moore v. City of Creedmoor,** 27.

MUNICIPAL CORPORATIONS

§ 444 (NCI4th). Effect of procuring liability insurance generally

Plaintiffs' malicious prosecution claim against defendant city was not barred by governmental immunity where the city had purchased liability insurance. **Moore v. City of Creedmoor,** 27.

Defendant city's "risk management operations," carried out in cooperation with Mecklenburg County and the local school board, constituted a "local government risk pool" as contemplated by G.S. 160A-485(a) so that defendant waived the right to assert governmental immunity in bar of plaintiff's action for the death of her police officer husband. **Lyles v. City of Charlotte,** 96.

§ 446 (NCI4th). Torts of employees

Plaintiffs' claim against defendant police chief was not barred in his official capacity where the city had purchased liability insurance, and it was not barred in his individual capacity where the evidence raised an issue of fact as to whether his conduct was corrupt or malicious. **Moore v. City of Creedmoor,** 27.

§ 459 (NCI4th). Tort liability; sufficiency of evidence; in relation to performance of governmental function or immunity

Defendant city and defendant police officer, in her official capacity, were immune from suit under the doctrine of governmental immunity for damages of $250,000 or less where the city did not have liability insurance for damages of $250,000 or less, and defendant police officer was performing a governmental function when the horse she was riding stepped on and injured plaintiff's foot. **Jones v. Kearns,** 301.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 42 (NCI4th). Property subject to forfeiture

The trial court was without authority to compel the Department of Revenue to remit to the sheriff's department cash taken from a criminal defendant's home which the district attorney released for payment of a controlled substance tax assessment. **State v. Bonds,** 546.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA—*Continued*

§ 136 (NCI4th). Sufficiency of evidence; maintaining dwelling for purpose of keeping and selling controlled substance

The evidence was sufficient for the jury on the issue of defendant's guilt of keeping and maintaining a dwelling for the purpose of using, keeping, or selling controlled substances. **State v. Kelly,** 821.

§ 220 (NCI4th). Sentences for trafficking

Defendant's consecutive sentences for trafficking by sale and trafficking by delivery did not violate double jeopardy. **State v. Holmes,** 54.

NEGLIGENCE

§ 19 (NCI4th). Factors to be considered on question of foreseeability of emotional distress arising from concern for another

The distress suffered by plaintiff was reasonably foreseeable where plaintiff personally observed defendant's negligent act in misdiagnosing the malady of her husband, defendant was aware plaintiff and his patient were married, and plaintiff observed firsthand the disabling effects of the negligence. **Wrenn v. Byrd,** 761.

§ 75 (NCI4th). Sufficiency of claim for negligent infliction of emotional distress

The evidence was sufficient to show that plaintiff suffered from severe emotional distress where a doctor testified she suffered from moderate depression which had spanned three years and was thus chronic. **Wrenn v. Byrd,** 761.

§ 99 (NCI4th). Sufficiency of evidence; contributory negligence

The trial court properly entered summary judgment for defendants on the basis of plaintiff's contributory negligence in an action to recover for injuries sustained by plaintiff when she fell from an electric treadmill manufactured by one defendant and on display in the other defendant's store. **Finney v. Rose's Stores, Inc.,** 843.

§ 101 (NCI4th). Sufficiency of evidence; willful and wanton negligence

In an action to recover for the wrongful death of plaintiff's daughter, a licensee, who drowned in defendants' pool, failure of defendants to have a ladder at the deep end, underwater lighting, and a trained lifeguard did not rise to the level of willful or wanton misconduct. **Howard v. Jackson,** 243.

§ 104 (NCI4th). Sufficiency of other particular evidence

Defendant carried its burden of proof on a summary judgment motion in plaintiff's action to recover for negligent manufacture of a transformer. **Precision Fabrics Group v. Transformer Sales and Service,** 866.

§ 106 (NCI4th). Premises liability; duty of reasonable care and to notify of unsafe condition; proximate cause

Defendants did not owe decedent who drowned in their pool a higher standard of care than that generally afforded a licensee because she was a child. **Howard v. Jackson,** 243.

§ 108 (NCI4th). Premises liability; criminal activity

The trial court erred in entering summary judgment for defendant which had contracted to provide unarmed security guard service at an apartment complex where

NEGLIGENCE—Continued

plaintiff, who was visiting a tenant, was stabbed in the presence of a security guard who offered no aid but instead ran from the building. **Cassell v. Collins,** 798.

§ 174 (NCI4th). Particular instructions; proximate cause

The trial court did not abuse its discretion in denying plaintiffs' request for a clarifying instruction on the issue of proximate cause. **Lumley v. Capoferi,** 578.

PARENT AND CHILD

§ 8 (NCI4th). Right of parent to recover for injuries to child

A mother's claim for medical expenses was not "derivative" of plaintiff child's claim, and the child and mother were not required to be joined as plaintiffs in one action resulting in one judgment. **West v. Tilley.** 145.

§ 19 (NCI4th). Parent's right to custody and control of minor child, generally

The rule that a fit natural parent not found to have neglected a child has a right to custody superior to third persons was inapplicable where custody of the children was initially placed with the maternal grandparents in lieu of the natural mother who had been found to be a fit and proper parent, and the trial court erred in awarding custody to defendant mother without conducting a hearing to determine if there were sufficient changed circumstances to merit the change in custody. **Bivens v. Cottle,** 467.

§ 25 (NCI4th). Factors in determining custody to third persons; other relatives; sufficiency of evidence

The trial court erred in awarding custody to a third person rather than to the father based solely on a best interest and welfare analysis without making findings with respect to the father's fitness to have custody and whether he had neglected the child's welfare. **Lambert v. Riddick,** 480.

§ 29 (NCI4th). Scope of parental duty to support child, generally

The trial court erred in reducing defendant mother's child support obligation because of her parents' contribution to the support of the minor children living with the father. **Guilford County ex rel. Easter v. Easter,** 260.

§ 81 (NCI4th). Uniform Reciprocal Enforcement of Support Act; who may bring action

The trial court erred in concluding that Georgia did not have standing to initiate a URESA action for child support arrearages under a Virginia child support order where plaintiff resided in Georgia when she filed her petition to enforce the Virginia order. **Kalen v. Kalen,** 196.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 110 (NCI4th). Medical malpractice; improper remarks or arguments in presence of jury constituting prejudicial error

In a medical malpractice action arising from plaintiff patient's sexual molestation by defendant employee of defendant substance abuse hospital, the closing argument of counsel for the individual defendant which referred to the sexual harassment allegations made by Anita Hill against Clarence Thomas and which contained disparaging remarks about a female judge's ability to be fair in sexual misconduct trials was so prejudicial as to entitle plaintiff to a new trial. **Johnson v. Amethyst Corp.,** 529.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS —Continued

§ 121 (NCI4th). Medical malpractice; sufficiency of evidence; breach of contract or promise; assurances, guarantees, or warranties

The trial court properly refused to submit plaintiff's action for fraud against defendant substance abuse hospital to the jury based upon her claim that the hospital's brochure falsely represented that the hospital "provides you with a very safe and secure facility" and that she was sexually assaulted while a patient there, since there was no evidence that the reference to safety in the hospital's brochure was intended to deceive plaintiff. **Johnson v. Amethyst Corp.,** 529.

§ 127 (NCI4th). Medical malpractice; sufficiency of evidence; breach of duty or standard of care generally

Plaintiff's evidence was sufficient for the jury in a medical malpractice action against the individual defendant where it tended to show that defendant, a clinical assistant in the substance abuse hospital where plaintiff was a patient, sexually molested plaintiff while she was lying in her hospital bed, and an expert testified that defendant's conduct violated the standard of care for clinical assistants in substance abuse hospitals in similar communities. **Johnson v. Amethyst Corp.,** 529.

PLEADINGS

§ 61 (NCI4th). Sanctions generally

The denial of a motion for summary judgment is not an automatic bar to imposition of Rule 11 sanctions. **Pleasant Valley Promenade v. Lechmere, Inc.,** 650.

§ 63 (NCI4th). Imposition of sanctions in particular cases

The trial court did not err in imposing sanctions on plaintiffs' attorneys because they violated the "improper purpose" prong of Rule 11(a) by signing a subpoena to a hospital to obtain confidential medical records of a nonparty and by signing a receipt to remove the sealed medical records from the clerk of court's office without the court's permission. **Bass v. Sides,** 485.

§ 374 (NCI4th). Amended pleadings; to elaborate on or make clear basis of claim or defense; addition of new legal theory

The trial court did not err in denying plaintiffs' second motion to amend their complaint to add claims for viewpoint discrimination and violation of equal protection based on the failure of defendants to interfere with a demonstration by death penalty proponents on a grassy knoll on prison property without a permit. **N.C. Council of Churches v. State of North Carolina,** 84.

§ 401 (NCI4th). Evidence before court by consent of parties; issue tried by implied consent without objection

The issue of whether plaintiff was fired for financial reasons was tried by implied consent of the parties. **Johnson v. Friends of Weymouth, Inc.,** 255.

PRINCIPAL AND AGENT

§ 18 (NCI4th). Liability of agent to principal for acts of subagent

A jury question was presented as to whether plaintiff agent was liable for his subagent's conversion of defendant bus company's property by the sale of stolen tickets and thus breached his contract with defendant under the theory that an agent is

PRINCIPAL AND AGENT—Continued

responsible to the principal for the conduct of a subagent with reference to the principal's affairs entrusted to the subagent. **Smith v. Carolina Coach Co.,** 106.

Defendant bus company failed to establish that plaintiff ticket agent breached provisions of its agency agreement by failing to report the sales of stolen tickets by a subagent, to hold the proceeds of those tickets in trust, and to indemnify defendant for the proceeds of the sales of the stolen tickets. **Ibid.**

PUBLIC OFFICERS AND EMPLOYEES

§ 52 (NCI4th). State personnel system; vacancies and priorities

The Personnel Commission did not err in applying the state employee priority consideration provision of G.S. 126-7.1(c) where the qualifications of a state employee who applied for another position of state employment were substantially equal to that of a non-state employee applicant. **Dockery v. N.C. Dept. of Human Resources,** 827.

§ 58 (NCI4th). Reporting improper government activities

Summary judgment was properly entered for defendants on plaintiff's whistleblower claim based upon defendants' failure to reappoint plaintiff as an associate dean at a state university. **Aune v. University of North Carolina,** 430.

§ 64 (NCI4th). State personnel system; grievances and grievance procedures; direct appeal to Personnel Commission; discrimination cases

Where petitioner claimed she was not given a nursing supervisor's position in a state agency based on respondent's discrimination against her by failing to hire her as a career state employee, the Personnel Commission properly considered evidence of petitioner's qualifications presented during the hearing but not during the application process. **Dockery v. N.C. Dept. of Human Resources,** 827.

§ 66 (NCI4th). Disciplinary actions involving career State employees generally

A correctional officer who was demoted without just cause was properly reinstated where he was returned to the same pay grade and step as before his demotion even though he works in a different position and location. **N.C. Dept. of Correction v. Myers,** 437.

§ 67 (NCI4th). Disciplinary actions involving career State employees; what constitutes "just cause"

There was no just cause for the demotion of respondent correctional supervisor where the evidence was insufficient to show that respondent breached confidentiality or failed to provide complete responses to questions causing the omission of important facts at a probation officer's disciplinary hearing in that none of respondent's comments revealed anything of a confidential nature about the probation officer herself but amounted to a criticism of the manner and method of conducting predisciplinary hearings. **N.C. Dept. of Correction v. Myers,** 437.

QUASI CONTRACTS AND RESTITUTION

§ 24 (NCI4th). Pleadings and allegations; claim for unjust enrichment

Plaintiff tenant's complaint stated a claim against defendant landlord for unjust enrichment where it alleged that plaintiff made substantial improvements to the prop-

QUASI CONTRACTS AND RESTITUTION—Continued

erty with defendant's knowledge upon a good faith belief that he had exclusive use of the property for ten years. **Jackson v. Carolina Hardwood Co.,** 870.

QUIETING TITLE

§ 20 (NCI4th). Evidentiary matters generally

In an action to quiet title, the trial court did not err in refusing to allow plaintiffs to introduce deeds which were not listed in plaintiffs' pretrial order, in allowing defendant to introduce old maps into evidence and allowing defendant's witness to testify about conclusions drawn from the maps, in allowing defendant to testify he has been "in possession" of the disputed land, and in refusing to allow plaintiffs to introduce into evidence sketches made by plaintiffs' counsel. **Beam v. Kerlee,** 203.

§ 27 (NCI4th). Sufficiency of evidence generally; summary judgment

The trial court properly denied plaintiffs' motion for summary judgment in an action to quiet title where the pleadings and other documents did not settle the dispute over whether defendant or plaintiffs had marketable record title, and where defendant's answers to plaintiffs' interrogatories supported his claim to title by adverse possession. **Beam v. Kerlee,** 203.

§ 29 (NCI4th). Effect of establishment of marketable record title and prima facie case

The trial court properly denied plaintiffs' motion for directed verdict on defendant's claim to quiet title where the deeds and expert testimony presented by defendant supported his theory that he had marketable record title to the property under the Marketable Title Act. **Beam v. Kerlee,** 203.

RAPE AND ALLIED OFFENSES

§ 73 (NCI4th). Variance between indictment and proof; time of offense

No fatal variance existed between the indictment and proof with regard to the date of an alleged sexual assault on a child although defendant brought out some inconsistencies regarding the date of the offense on cross-examination of the victim. **State v. Hensley,** 313.

ROBBERY

§ 55 (NCI4th). Sufficiency of evidence; common law robbery generally

The trial court properly submitted the charge of common law robbery to the jury where it tended to show that defendant shoved a partially paralyzed man back down on a couch every time he tried to stand up and took the victim's property from his presence and without his consent. **State v. Young,** 456.

§ 84 (NCI4th). Sufficiency of evidence; attempted armed robbery generally

The evidence was sufficient for the jury in a prosecution for attempted armed robbery of the owner of a skating rink. **State v. Brandon,** 815.

§ 145 (NCI4th). Jury instructions; lesser-included offenses; attempted common law robbery

Defendant's alibi testimony did not entitle him to a charge on attempted common law robbery in an armed robbery case, but defendant was entitled to an instruction on

ROBBERY—Continued

common law robbery because there was a question as to whether the stick he used was a dangerous weapon. **State v. Brandon,** 815.

SCHOOLS

§ 90 (NCI4th). Selection of school sites

Defendants' evidence concerning whether plaintiff board of education must secure a permit before beginning work on a school site and the considerations plaintiff must give to the historical district location did not raise material issues of fact as to the property's status as a suitable site or to the issue of plaintiff's discretion in selecting this property. **Board of Education of Hickory v. Seagle,** 566.

SEARCHES AND SEIZURES

§ 49 (NCI4th). Search and seizure incident to arrest; vehicle

Officers were justified in searching the passenger area of defendant's vehicle incident to an arrest for possession of a concealed weapon, and drugs found in an ashtray were admissible. **State v. Clyburn,** 377.

§ 62 (NCI4th). Consent to search luggage or other personal effects

The trial court properly denied defendant's motion to suppress evidence obtained during a search preceding defendant's arrest at an airport since defendant's Fourth Amendment rights were not implicated when a detective approached him and asked to see his ticket and identification, and defendant consented to accompany officers and to allow the search in the airport authority room. **State v. Pope,** 462.

§ 77 (NCI4th). Investigatory stops of motor vehicles generally

An officer had a sufficient reasonable articulable suspicion to justify an investigatory stop of the car in which defendant was a passenger near the scene of an armed robbery, and officers lawfully seized evidence from the car at the time of defendant's arrest. **State v. Jordan,** 364.

The investigatory stop of defendant's vehicle was permissible where officers who were conducting surveillance in a drug trafficking area observed what they believed to be a drug transaction. **State v. Clyburn,** 377.

The evidence supported the trial court's finding that an anonymous tip which preceded an investigatory stop of defendant by an officer was fabricated by the chief of police, and the officer thus did not have a reasonable articulable suspicion of criminal activity to stop defendant and evidence obtained during the stop must be suppressed in defendant's trial for driving while impaired. **State v. Watkins,** 804.

§ 82 (NCI4th). Stop and frisk procedures; reasonable suspicion that person may be armed

A search of the glove compartment of defendant's car was justified as a protective frisk, and the seizure of a handgun found in the glove compartment was lawful, where officers made an investigatory stop of defendant's car, defendant became belligerent, and officers reasonably believed that defendant might be armed because of his suspected involvement in drug trafficking. **State v. Clyburn,** 377.

§ 93 (NCI4th). Probable cause to issue search warrant generally; totality of circumstances

A search warrant was based upon information independent of and unrelated to an unlawful entry of defendant's apartment by a police officer so as to purge the taint and validate the search warrant. **State v. McLean,** 838.

SEARCHES AND SEIZURES—Continued

§ 109 (NCI4th). Search warrants; probable cause; sufficiency of particular affidavits of informants

Probable cause existed for the issuance of a search warrant based upon a confidential informant's purchase of cocaine from defendant at his residence, and the statement that the purchase occurred within six days of the application in order to conceal the identity of the informant did not render the controlled purchase stale from the passage of time. **State v. Ledbetter,** 117.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 21 (NCI4th). Civil and criminal liability; death or injury caused by law enforcement officer

Defendant police officer was immune from suit in her individual capacity for injuries sustained by plaintiff when a horse ridden by defendant stepped on plaintiff's foot where the officer was attempting to control an unruly crowd during a medical emergency at a fair when the incident occurred, and there was no evidence that defendant acted with malice in performing her duties or owed a special duty to plaintiff. **Jones v. Kearns,** 301.

The trial court properly dismissed plaintiff's wrongful death action against defendant police officer in his official capacity where plaintiff did not allege a waiver of immunity by the purchase of insurance, but the trial court erred in dismissing plaintiff's claim against defendant in his individual capacity where plaintiff alleged that defendant's actions in shooting an innocent bystander at a drug bust were intentional and reckless and outside the scope of his duties. **Ingram v. Kerr,** 493.

STATE

§ 23 (NCI4th). Sovereign immunity; applicability to state officers and to individual state employees

Summary judgment was properly entered for defendant state university administrators based on sovereign immunity in plaintiff's emotional distress and misrepresentation claims against them in their official capacities. **Aune v. University of North Carolina,** 430.

TAXATION

§ 66 (NCI4th). Property taxes; exemptions, exclusions and deductions

The evidence supported the Property Tax Commission's findings that a camp operated by taxpayer was religious and furthered the beliefs and objectives of the Methodist Church even though others were permitted to use the camp for a fee and timber had been sold from a portion of the property. **In re Appeal of Mount Shepherd Methodist Camp,** 388.

The Property Tax Commission did not err in concluding that land on which no improvements were located was an integral part of taxpayer's religious camp and was exempt from property taxes. **Ibid.**

§ 160 (NCI4th). Inheritance tax returns; liability for payment of taxes

A QTIP trust was the proper source of funds for payment of the additional North Carolina estate tax due by reason of inclusion of the value of the QTIP trust in decedent's federal taxable estate. **Branch Banking and Trust Co. v. Staples,** 227.

TIME OR DATE

§ 1 (NCI4th). Construction of terms "month" and "year"

North Carolina adopts the "birthday rule" whereby a person attains a given age on the anniversary date of his or her birth. **In re Robinson,** 874.

TORTS

§ 12 (NCI4th). Construction and interpretation of release from liability

Plaintiff's execution of a release discharging his claims arising from an automobile accident against a named individual and "all other persons" barred plaintiff's claim of negligence against the Department of Transportation. **Allen v. N.C. Dept. of Transportation,** 627.

TRESPASS

§ 45 (NCI4th). Sufficiency of evidence generally

The trial court erred in failing to submit to the jury plaintiff tenant's claim against defendant landlords for trespass where plaintiff's evidence showed that a locksmith under defendants' instruction entered the leased premises without plaintiff's authorization and attempted to change the locks. **Taha v. Thompson,** 697.

TRIAL

§ 60 (NCI4th). Time for filing affidavits in opposition to summary judgment

The trial court properly refused to consider plaintiff's affidavit and purchase order in a summary judgment hearing where the affidavit was not filed prior to the day of the hearing and the purchase order was not properly authenticated. **Precision Fabrics Group v. Transformer Sales and Service,** 866.

§ 64 (NCI4th). Entry of judgment prior to completion of discovery

The trial court did not abuse its discretion in denying plaintiffs' motion to deny summary judgment for defendants or to continue the summary judgment hearing pending further discovery in an action challenging the denial of a permit to hold a vigil on a grassy knoll on prison property during an execution. **N.C. Council of Churches v. State of North Carolina,** 84.

The trial court did not err in granting defendants' motion for summary judgment before plaintiff completed discovery where the hearing on the motion took place nearly a year after plaintiff filed his complaint and nearly two months after defendants filed the motion. **Howard v. Jackson,** 243.

§ 78 (NCI4th). Verified pleading as affidavit

The trial court did not err in refusing to consider defendant's unverified answer filed on the morning of the hearing in granting plaintiff's motion for summary judgment. **Venture Properties I v. Anderson,** 852.

§ 92 (NCI4th). Granting of summary judgment on moving parties' own evidence

The trial court did not err in granting summary judgment for plaintiff, the party with the burden of proof. **Venture Properties I v. Anderson,** 852.

TRIAL—Continued

§ 121 (NCI4th). Discretion of court to order separate trials; appellate review

The trial court has broad discretionary authority under Rule 42(b) to determine when bifurcation of compensatory and punitive damages issues is appropriate. **Roberts v. Young,** 720.

§ 200 (NCI4th). Order of argument generally

The trial court did not err by failing to provide the unnamed defendant insurer with the final argument to the jury where the court gave defendants the opening and closing arguments, and the two defendants decided the order of argument. **Roberts v. Young,** 720.

§ 213 (NCI4th). Voluntary dismissal without order of court generally

Plaintiff had authority under Rule 41(a)(1) to dismiss his punitive damages claim prior to the close of his case in chief. **Roberts v. Young,** 720.

§ 302 (NCI4th). Granting request for jury's instructions in part; instructions substantially covering request

A requested instruction informing the jury of the withdrawal of the punitive damages issue and emphasizing that the jury must not consider evidence already presented at trial was provided in substance by the trial court. **Roberts v. Young,** 720.

§ 372 (NCI4th). Additional instructions after submission of case to jury generally; effect of failure to reach verdict

The trial court did not err in giving the "Allen charge" where the jurors deliberated for five days and then sent the judge a note stating they were deadlocked eleven to one, that it was an emotional problem for one juror to continue, and they did not feel they could reach a verdict. **Lumley v. Capoferi,** 578.

§ 412 (NCI4th). Waiver of appeal of errors in instructions by failure to object at trial

State Farm's assignments of error to the trial court's instructions on damages were not subject to dismissal for failure to contemporaneously object to the instructions since State Farm satisfied the policy of Appellate Rule 10(b)(2) by submitting proposed jury instructions and a proposed damages issue to the trial court at the charge conference. **Roberts v. Young,** 720.

§ 563 (NCI4th). Excessive or inadequate damages given under influence of passion or prejudice generally

The jury's award of $450,000 in damages to plaintiff was not excessive as a matter of law in light of the evidence of plaintiff's physical injuries and medical expenses. **Roberts v. Young,** 720.

§ 624 (NCI4th). Relation of motion for involuntary dismissal to motion for directed verdict

Though the court's granting of defendant's motion to dismiss plaintiffs' complaint at the close of plaintiffs' evidence was improper since this was a jury trial and the proper motion would have been a motion for a directed verdict, such error was harmless where the jury never knew the case had been dismissed, and plaintiffs were given an opportunity to rebut defendant's evidence. **Beam v. Kerlee,** 203.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 37 (NCI4th). Sufficiency of evidence; evidence that defendant committed alleged acts

The trial court properly directed a verdict for defendant AEW on plaintiff's tortious interference with contract and unfair trade practices claims arising out of the closing of a Lechmere Department Store at Pleasant Valley Promenade Shopping Center. **Pleasant Valley Promenade v. Lechmere, Inc.**, 650.

§ 38 (NCI4th). Sufficiency of evidence; evidence that person or entity is within scope of unfair competition statute

The trial court erred in failing to submit to the jury plaintiff tenant's claim against defendant landlords for unfair and deceptive trade practices where plaintiff's evidence tended to show trespass and conversion by the landlords. **Taha v. Thompson**, 697.

WAIVER

§ 3 (NCI4th). Pleadings, proof, and determination

The trial court did not err in failing to submit the issue of waiver in an action for breach of a lease where defendants did not plead waiver in their answers. **Taha v. Thompson**, 697.

WEAPONS AND FIREARMS

§ 16 (NCI4th). Place of possession; government buildings; courthouses

A gun need not be operable for a student to be adjudicated delinquent under the statute prohibiting the possession of "any gun" on educational property. **In re Cowley**, 274.

WORKERS' COMPENSATION

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

Plaintiff window washer stated a *Woodson* claim against defendant employer based upon allegations that defendant required plaintiff to wash protruding windows of a high-rise building without fall protection while standing on a small ledge and leaning off balance. **Arroyo v. Scottie's Professional Window Cleaning**, 154.

Plaintiff's forecast of evidence was insufficient to show that defendant employer engaged in misconduct knowing it was substantially certain to cause serious injury or death where defendant left a brick setting machine in the automatic rather than the manual mode while decedent was cleaning the spreader table, and the carriage head of the machine descended and crushed decedent's head and shoulders. **Rose v. Isenhour Brick & Tile Co.**, 235.

Plaintiff's forecast of evidence was insufficient to establish a *Woodson* claim against the employer for the death of an employee who died while cleaning the inside of a boiler used for disposing of waste from manufacturing plywood sheeting. **Jones v. Willamette Industries, Inc.**, 591.

§ 69 (NCI4th). Remedies against fellow employees; willful, wanton, or reckless conduct as tantamount to intentional tort

Plaintiff's claim against her husband's co-employees for intentional torts were properly dismissed where evidence that defendants instructed the employee to clean

WORKERS' COMPENSATION—Continued

the inside of a boiler without ensuring that adequate safety measures were used did not support inferences that they intended for the employee to be injured or that they were indifferent to the consequences. **Jones v. Willamette Industries, Inc.**, 591.

§ 103 (NCI4th). Jurisdiction of Industrial Commission pending appeal before appellate court

Defendants' notice of appeal to the Court of Appeals divested the Industrial Commission of jurisdiction to enter an order granting plaintiff's request for attorney fees. **Andrews v. Fulcher Tire Sales and Service**, 602.

§ 118 (NCI4th). Factors affecting injury's relationship to employment; prior injury, disease, or condition

The evidence supported the Industrial Commission's finding that plaintiff's disability arose from a 17 November 1989 job-related automobile accident instead of an 18 October 1989 accident. **McAnelly v. Wilson Pallet and Crate Co.**, 127.

§ 133 (NCI4th). Assault by third person unrelated to employment

The murder of an employee by her ex-husband did not arise out of and in the course of the employee's employment even though it occurred while she was on her way to the bank to deposit the employer's funds. **Ross v. Mark's Inc.**, 607.

§ 187 (NCI4th). Non-occupational diseases arising from accidents

The evidence was insufficient to support a finding that plaintiff's salmonella infection was caused by contaminated water in the work place. **Phillips v. U.S. Air, Inc.**, 538.

§ 200 (NCI4th). Duration of exposure to hazard of silicosis or asbestosis

The statute providing that compensation shall not be payable for disability or death due to silicosis or asbestosis unless the employee was exposed in employment for not less than two years in North Carolina during the ten years prior to his last exposure, G.S. 97-63, violates equal protection under the North Carolina and United States Constitutions. **Walters v. Blair**, 398.

§ 208 (NCI4th). Occupational diseases; stress, depression, or other psychological problems

Where the Industrial Commission found that plaintiff suffered from work-related depression which constituted an occupational disease, the Commission erred in concluding that plaintiff's disabling depression arose from his brother's death and was not a direct result of his occupational disease without first determining that, but for the occupational disease, the depression would not have developed to the point of disability. **Baker v. City of Sanford**, 783.

§ 213 (NCI4th). Subsequent injury caused by original, compensable injury

The Industrial Commission erred in characterizing plaintiff's disabling depression as the result of "an intervening event," his brother's death, where the death of plaintiff's brother was not attributable to plaintiff's own intentional conduct. **Baker v. City of Sanford**, 783.

§ 230 (NCI4th). Requirement of showing impairment of earning capacity; existence of disability

The Industrial Commission's finding that plaintiff was unable to "work at the same level as before the injury" was supported by a doctor's testimony that plaintiff was "unable to function." **Andrews v. Fulcher Tire Sales and Service**, 602.

WORKERS' COMPENSATION—Continued

§ 252 (NCI4th). Determination of total temporary disability in particular cases

The evidence supported the Industrial Commission's finding that plaintiff was temporarily totally disabled as a result of his injury arising out of and in the course of his employment where two doctors offered testimony with regard to plaintiff's inability to work. **McAnelly v. Wilson Pallet and Crate Co.,** 127.

§ 263 (NCI4th). Approximation of average weekly wage under exceptional circumstances

Where plaintiff sole proprietor lawfully elected to be treated as any other employee of his company, the Industrial Commission could not properly base its compensation award on whether the employer showed a profit, but should have based its award on the wages paid to the employee. **McAnelly v. Wilson Pallet and Crate Co.,** 127.

§ 274 (NCI4th). Dependents of deceased employee; illegitimate children

A clerk of court's paternity order was insufficient to support a determination that the deceased putative father acknowledged paternity of plaintiff's child in a legally cognizable fashion. **Tucker v. City of Clinton,** 776.

§ 378 (NCI4th). Burden of proof and presumptions regarding compensability

The Industrial Commission's rejection of certain evidence as not being "convincing" and rejection of medical evidence as being insufficient "to any reasonable degree of medical certainty" did not show that the Commission applied an improper standard of proof to plaintiff's evidence. **Phillips v. U.S. Air, Inc.,** 538.

§ 416 (NCI4th). Review by Industrial Commission; consideration of newly discovered or additional evidence

The Industrial Commission did not err by refusing to consider defendants' new evidence by a private investigator that he observed plaintiff "walking without a limp and in no apparent distress and driving automobiles" where this same type of evidence was introduced by defendants at the first hearing. **Andrews v. Fulcher Tire Sales and Service,** 602.

§ 427 (NCI4th). What constitutes change of condition; where evidence supports increase of compensation

The Industrial Commission erred in concluding that plaintiff had not undergone a change of condition and was thus not entitled to additional compensation where the Commission found that "plaintiff's back went from being relatively asymptomatic and returning to work to being unable to work for a period of time." **Dinkins v. Federal Paper Board Co.,** 192.

ZONING

§ 119 (NCI4th). Timeliness of petition for judicial review

Plaintiffs' action challenging defendant's amendment to its zoning ordinance was barred by the nine-month statute of limitations even if the amendment was adopted inconsistent with the notice requirements of Chapter 160A. **Thompson v. Town of Warsaw,** 471.

WORD AND PHRASE INDEX

ABUSED AND NEGLECTED CHILD

Sufficiency of evidence, **In re Hawkins**, 585.

ACCOMPLICE TESTIMONY

Instruction, **State v. Jordan**, 364.

ACCORD AND SATISFACTION

Check cashed, **Zanone v. RJR Nabisco**, 768.

Sufficiency of evidence, **Griffin v. Sweet**, 166.

ACCOUNTANTS

Action by individual shareholders of corporation, **Barger v. McCoy Hillard & Parks**, 326.

ACTING IN CONCERT

Instruction, **State v. Merritt**, 732.

ADVERSE POSSESSION

Marketable title, **Beam v. Kerlee**, 203.

AGENT

Liability to principle for conversion, **Smith v. Carolina Coach Co.**, 106.

AGGRAVATING FACTORS

Disrespect of law enforcement, **State v. Sammartino**, 597.

Great monetary loss, **State v. Sammartino**, 597.

Permanent disability, **State v. Evans**, 752.

Prior conviction on appeal, **State v. Dammons**, 182.

Weapon hazardous to more than one person, **State v. Evans**, 752.

AIRPORT

Consensual search, **State v. Pope**, 462.

ALIMONY

Child care expenses, **Fink v. Fink**, 412.

Exclusion of gift from income, **Fink v. Fink**, 412.

Health insurance premium, **Fink v. Fink**, 412.

Noncustodial spouse's child support contributions, **Fink v. Fink**, 412.

Promise to pay upon future separation, **Williams v. Williams**, 707.

ANCHOR STORE

Closing in shopping center, **Pleasant Valley Promenade v. Lechmere, Inc.**, 650.

ANONYMOUS TIP

Fabricated by police, **State v. Watkins**, 804.

ANSWER

Unverified, **Venture Properties I v. Anderson**, 852.

APPEAL

Cost assessed against attorney, **Thompson v. Town of Warsaw**, 471.

ARBITRATION

Arbitrators with same occupation as defendant, **Carteret County v. United Contractors of Kinston**, 336.

Award of damages, **Carteret County v. United Contractors of Kinston**, 336.

Power of county to enter into agreement, **Carteret County v. United Contractors of Kinston**, 336.

ARGUMENT OF COUNSEL

Anita Hill's sexual harassment allegations against Clarence Thomas, **Johnson v. Amethyst Corp.**, 529.

ASBESTOSIS

Statute requiring two-year exposure unconstitutional, **Walters v. Blair**, 398.

ASSAULT WITH DEADLY WEAPON

Intentional act or culpable negligence, **State v. Dammons**, 182.

ATTEMPTED ARMED ROBBERY

Skating rink owner struck with stick, **State v. Brandon**, 815.

ATTORNEY FEES

Amount reasonable, **West v. Tilley**, 145.

Insufficient findings, **N.C. Dept. of Correction v. Harding**, 451.

Mother awarded expenses for injured child, **West v. Tilley**, 145.

No basis for hourly amount, **N.C. Dept. of Correction v. Myers**, 437.

ATTORNEYS

Existence of attorney-client relationship, **Cornelius v. Helms**, 172.

Hospital's attorney unauthorized to act for individual, **Johnson v. Amethyst Corp.**, 529.

Representation of insureds in liquidation proceeding, **State ex rel. Long v. Interstate Casualty Ins. Co.**, 743.

AUTOMOBILE INSURANCE

Driver's in-state insurer providing primary coverage, **Metropolitan Prop. and Casualty Ins. Co. v. Lindquist**, 847.

Insurer's hiring investigator to make videotape, **Carrier v. Starnes**, 513.

BACK PAY

Insufficient record, **N.C. Dept. of Correction v. Harding**, 451.

BALLPARK

Challenge to financing, **Cannon v. City of Durham**, 612.

BIRTHDAY RULE

Adopted, **In re Robinson**, 874.

BIRTHDAY RULE—Continued

Fraction of day not considered, **In re Robinson**, 874.

BLOOD GROUPING TEST

Standing to request, **Johnson v. Johnson**, 1.

BOAT STORAGE BUILDING

Action arising from construction, **Vance Construction Co. v. Duane White Land Corp.**, 401.

BREACH OF LEASE

Sandwich shop in shopping center, **Taha v. Thompson**, 697.

BURGLARY

At sorority house, **State v. Merritt**, 732.

BYSTANDER

Shot by police, **Ingram v. Kerr**, 493.

CAMP

Religious for tax purposes, **In re Appeal of Mount Shepherd Methodist Camp**, 388.

CASH

Seized as evidence and not forfeiture, **State v. Bonds**, 546.

CHARGE CONFERENCE

Failure to hold recorded, **State v. Brunson**, 571.

CHILD CUSTODY

Change where initial custody with grandparents, **Bivens v. Cottle**, 467.

No authority to order payment of boarding school costs, **Royall v. Sawyer**, 880.

Parties ordered to refrain from negative comments, **Watkins v. Watkins**, 475.

CHILD CUSTODY—Continued

Relinquishment of jurisdiction, **Watkins v. Watkins**, 475.

Third person and natural parent, **Lambert v. Riddick**, 480.

CHILD SUPPORT

Grandparents' contribution, **Guilford County ex rel. Easter v. Easter**, 260.

Guidelines, **Fink v. Fink**, 412.

Pleading in prior action, **Perkins v. Perkins**, 638.

Voluntary reduction in income, **Schroader v. Schroader**, 790.

CHRONIC DEPRESSION

Negligent infliction of emotional distress, **Wrenn v. Byrd**, 761.

CIVIL RIGHTS

Monetary damages, **Moore v. City of Creedmoor**, 27.

CLERK OF COURT

Authority to execute documents, **Leighow v. Leighow**, 619.

CLOSING ARGUMENT

See Argument of Counsel this Index.

CONDEMNATION

Order immediately appealable, **Board of Education of Hickory v. Seagle**, 566.

CONDOMINIUM

Short term renter user fee, **Miesch v. Ocean Dunes Homeowners Assn.**, 559.

CONSPIRACY

Incorrect instruction before opening statements, **State v. Holmes**, 54.

Instruction prejudicial error, **State ex rel. Employment Security Comm. v. Huckabee**, 821.

CONTEMPT POWERS OF COURT

Repairs on home, **Nohejl v. First Homes of Craven County, Inc.**, 188.

CONVERSION

By subagent, **Smith v. Carolina Coach Co.**, 106.

CORRECTIONAL OFFICER

Demotion of, **N.C. Dept. of Correction v. Myers**, 437.

DAMAGES

Bifurcation of compensatory and punitive issues, **Roberts v. Young**, 720.

DEADLOCKED JURY

Allen charge given, **Lumley v. Capoferi**, 578.

DECLARATORY JUDGMENT

Source of funds for estate taxes, **Branch Banking and Trust Co. v. Staples**, 227.

DEDICATION OF STREET

Partial or entire, **Tower Development Partners v. Zell**, 136.

Subsequent foreclosure, **Tower Development Partners v. Zell**, 136.

DEFAULT

Entry by unauthorized attorney, **Johnson v. Amethyst Corp.**, 529.

DELINQUENCY

Student with inoperable gun on school property, **In re Cowley**, 274.

DEPRESSION

Occupational disease, **Baker v. City of Sanford**, 783.

DISCOVERY

Failure to impose sanctions, **Rose v. Isenhour Brick & Tile Co.**, 225.

DISMISSAL OF OWN CLAIM

Authority, **Roberts v. Young**, 720.

DOG

Potentially dangerous, **Caswell County v. Hanks**, 489.

DOUBLE JEOPARDY

Trafficking by sale and by delivery, **State v. Holmes**, 54.

DRINKING HABITS

Of murder defendant admissible, **State v. McAbee**, 674.

DRIVEWAY EASEMENTS

Express grant or dedication, **Tower Development Partners v. Zell**, 136.

DRIVING RANGE

Unjust enrichment, **Jackson v. Carolina Hardwood Co.**, 870.

DROWNING

No willful misconduct by pool owner, **Howard v. Jackson**, 243.

DSS RECORDS

Partial use for cross-examination, **State v. McAbee**, 674.

EASEMENT

Condition not accepted, **Huberth v. Holly**, 348.

Driveway easements not dedicated, **Tower Development Partners v. Zell**, 136.

Expansion to allow installation of utilities, **Swaim v. Simpson**, 863.

EASEMENT—Continued

Use of eighteen months, **Tower Development Partners v. Zell**, 136.

EMOTIONAL DISTRESS

Intentional infliction by nuisance abatement, **Moore v. City of Creedmoor**, 27.

Negligent infliction by misdiagnosis, **Wrenn v. Byrd**, 761.

Whistleblower claim barred by sovereign immunity, **Aune v. University of North Carolina**, 430.

EMPLOYMENT STATUS

Of defendant admissible, **State v. McAbee**, 674.

EQUITABLE DISTRIBUTION

Authority to execute documents, **Leighow v. Leighow**, 619.

Evaluation of marital residence, **Leighow v. Leighow**, 619.

Interspousal stock transfer, **Bryan-Barber Realty, Inc. v. Fryar**, 178.

Mortgage notes, **Leighow v. Leighow**, 619.

Post-separation use of residence, **Leighow v. Leighow**, 619.

ESTATE TAXES

Source of funds, **Branch Banking and Trust Co. v. Staples**, 227.

EXECUTION VIGIL

Denial of permission, **N.C. Council of Churches v. State of North Carolina**, 84.

EXPRESSION OF OPINION

Assisting victim from stand, **State v. Hensley**, 313.

Denial of jury request to rehear child's testimony, **State v. Hensley**, 313.

Preliminary habitual felon instruction, **State v. Brunson**, 571.

FAXED POLICE RECORD

Admissibility for sentencing, **State v. Jordan**, 364.

FIDUCIARY DUTY

Attorney's breach of, **Cornelius v. Helms**, 172.

FIRST-DEGREE MURDER

Girlfriend's four-month-old daughter, **State v. McAbee**, 674.

FORGERY

Uttering conviction when attempt alleged, **State v. Kirkpatrick**, 405.

GEORGIA

Standing to initiate child support action in North Carolina, **Kalen v. Kalen**, 196.

GOVERNMENTAL IMMUNITY

Bystander shot by police, **Ingram v. Kerr**, 493.

Officer on horse, **Jones v. Kearns**, 301.

Participant in local government risk pool, **Lyles v. City of Charlotte**, 96.

Whistleblower claim, **Aune v. University of North Carolina**, 430.

GRAVE DESECRATION

Monument to slain police officers, **State v. Sammartino**, 597.

GUEST AT APARTMENT COMPLEX

Duty of security service to provide protection, **Cassell v. Collins**, 798.

HABITUAL FELON

Indictment, **State v. Young**, 456.

No formal arraignment, **State v. Brunson**, 571.

No right to empanel new jury, **State v. Brunson**, 571.

HAZARDOUS WEAPON

Aggravating factor, **State v. Evans**, 752.

HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATING FACTOR

Evidence sufficient for assaults, **State v. Evans**, 752.

HOME HEALTH AGENCY

Hospital facility, **Hospital Corp. of N.C. v. Iredell County**, 445.

Transfer of, **Hospital Corp. of N.C. v. Iredell County**, 445.

HORSE

Police horse stepping on plaintiff's foot, **Jones v. Kearns**, 301.

HOSPITAL BROCHURE

Claim for fraud, **Johnson v. Amethyst Corp.**, 529.

HUSBAND-WIFE PRIVILEGE

Instruction, **State v. Holmes**, 54.

ILLEGITIMATE CHILDREN

Blood grouping test, **Johnson v. Johnson**, 1.

IMPAIRED DRIVING

Evidence of blood breath ratio, **State v. Cothran**, 633.

IMPLIED CONTRACT

Admission to nursing school, **Long v. University of North Carolina at Wilmington**, 267.

IN CAMERA HEARING

Defendant excluded, **State v. Rhome**, 278.

IN PERSONAM JURISDICTION

See Personal Jurisdiction this Index.

INDICTMENT

Defendant convicted of greater offense than charged, **State v. Kirkpatrick**, 405.

INSTRUCTIONS

Misinstruction on conspiracy before opening statements, **State v. Holmes**, 54.

INSURANCE INVESTIGATOR

Secret videotape of plaintiff, **Carrier v. Starnes**, 513.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Abatement of nuisance, **Moore v. City of Creedmoor**, 27.

INTEREST

Breach of contract, **Metromont Materials Corp. v. R.B.R. & S.T.**, 616.

INTERLOCUTORY ORDER

Not appealable, **Heritage Pointe Bldrs. v. N.C. Licensing Bd. of General Contractors**, 502.

INVESTIGATORY STOP

Anonymous tip fabricated by police, **State v. Watkins**, 804.

Of car after robbery, **State v. Jordan**, 364.

Suspected drug transaction, **State v. Clyburn**, 377.

INVOLUNTARY DISMISSAL

Refiling within statute of limitations, **84 Lumber Co. v. Barkley**, 271.

JOINDER

Charges against mother and son, **State v. Holmes**, 54.

Injured minor and parent, **West v. Tilley**, 145.

JUDGMENT

Modified during term, **State v. Sammartino**, 597.

JUDICIAL IMMUNITY

Referee, **Sharp v. Gulley**, 878.

JUDICIAL NOTICE

Adjudicative facts of separate action, **Jackson v. Carolina Hardwood Co.**, 870.

JURISDICTION

See Personal Jurisdiction this Index.

JUVENILE

Fraction of day not considered for age, **In re Robinson**, 874.

Student with inoperable gun, **In re Cowley**, 274.

LACHES

Challenge to financing of ballpark, **Cannon v. City of Durham**, 612.

LEASE

Notice of termination, **Venture Properties I v. Anderson**, 852.

Provision prohibiting another sandwich shop, **Taha v. Thompson**, 697.

LEGAL MALPRACTICE

Statute of limitations, **Garrett v. Winfree**, 689.

LICENSEE

Duty owed to child at pool, **Howard v. Jackson**, 243.

LOADERS

Unemployment taxes for, **State ex rel. Employment Security Comm. v. Huckabee**, 217.

MAGISTRATE

Embezzling funds, **State v. Rhome**, 278.

MALICIOUS PROSECUTION

Civil nuisance claim, **Moore v. City of Creedmoor**, 27.

MARITAL PRIVILEGE

Instruction, **State v. Holmes**, 54.

MEDICAL MALPRACTICE

Sexual molestation of patient, **Johnson v. Amethyst Corp.**, 529.

MERE PRESENCE AT CRIME SCENE

Requested instruction not given, **State v. Jordan**, 364.

MINIMUM CONTACTS

Nonresident defendants, **Kath v. H.D.A. Entertainment**, 264; **Chapman v. Janko, U.S.A.**, 371; **Strother v. Strother**, 393; **Better Business Forms, Inc. v. Davis**, 498.

MOTION IN LIMINE

Failure to rule, **State v. Barber**, 505.

MOTION TO SUPPRESS

Adjudicated through appellate process, **State v. Watkins**, 804.

Review subsequent to guilty plea, **State v. McBride**, 623.

MURDER

Of employee, **Ross v. Mark's Inc.**, 607.

NEGLIGENT DAMAGE TO REAL PROPERTY

Damages to trees and groundcover, **Huberth v. Holly**, 348.

Waterproofing surface on parking deck, **Haywood Street Redevelopment Corp. v. Peterson Co.**, 832.

NEGLIGENT HIRING, SUPERVISION, RETENTION

Plumbers who stole from home, **Moricle v. Pilkington**, 383.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Negligent diagnosis, **Wrenn v. Byrd**, 761.

NONRESIDENT DEFENDANTS

Sufficient minimum contacts, **Kath v. H.D.A. Entertainment**, 264; **Chapman v. Janko, U.S.A.**, 371; **Strother v. Strother**, 393; **Better Business Forms, Inc. v. Davis**, 498.

NOTICE OF APPEAL

Not timely, **In re Hawkins**, 585.

NUISANCE ABATEMENT ACTION

Malicious prosecution, **Moore v. City of Creedmoor**, 27.

NURSING SCHOOL

No implied contract for admission to, **Long v. University of North Carolina at Wilmington**, 267.

OBTAINING MONEY BY FALSE PRETENSE

Magistrate, **State v. Rhome**, 278.

PARKING DECK

Waterproofing surface, **Haywood Street Redevelopment Corp. v. Peterson Co.**, 832.

PATERNITY

Acknowledgment based on clerk's order, **Tucker v. City of Clinton**, 776.

Blood grouping test, **Johnson v. Johnson**, 1.

Previous actions adjudicating, **Devane v. Chancellor**, 636.

PERSONAL JURISDICTION

Minimum contacts by nonresident defendants, **Kath v. H.D.A. Entertainment**, 264; **Chapman v. Janko, U.S.A.**, 371; **Strother v. Strother**, 393; **Better Business Forms, Inc. v. Davis**, 498.

Purchase of North Carolina corporation, **Better Business Forms, Inc. v. Davis**, 498.

Services performed in this state, **Kath v. H.D.A. Entertainment**, 264; **Chapman v. Janko, U.S.A.**, 371; **Strother v. Strother**, 393.

PHONE TAP

Failure to report to sheriff, **Williams v. Davie County**, 160.

POST NUPTIAL AGREEMENT

Not a separation agreement, **Williams v. Williams**, 707.

POST-TRAUMATIC STRESS SYNDROME

Expert testimony as to cause, **State v. Hensley**, 313.

PREJUDGMENT INTEREST

Award proper, **Taha v. Thompson**, 697.

Not tolled, **Roberts v. Young**, 720.

PRELIMINARY JURY INSTRUCTION

Subsequent correction, **State v. Brunson**, 571.

PRIOR BAD ACTS OF WITNESSES

Admissible, **State v. Holmes**, 54.

PROTECTIVE FRISK

Search of glove compartment, **State v. Clyburn**, 377.

PROXIMATE CAUSE

Instruction, **Lumley v. Capoferi**, 578.

PUBLIC HOUSING

Eviction for shooting by son, **Charlotte Housing Authority v. Patterson**, 552.

PUNITIVE DAMAGES

Dismissal of claim, **Roberts v. Young**, 720.

QUIET TITLE

Sufficiency of evidence of adverse possession, **Beam v. Kerlee**, 203.

RACE

Court's reliance on in admitting evidence, **State v. Rhome**, 278.

RAPE

Victim's memory problems, **State v. Barber**, 505.

REAL ESTATE TRANSACTION

Liability of attorney, **Cornelius v. Helms**, 172.

REFEREE

Judicial immunity, **Sharp v. Gulley**, 878.

REFERENDUM

Action to invalidate, **In re Appeal of Ramseur**, 521.

RELEASE

General, **Allen v. N.C. Dept. of Transportation**, 627.

RESTAURANT EQUIPMENT

Conversion of, **Taha v. Thompson**, 697.

ROBBERY

Partially paralyzed man, **State v. Young**, 456.

SALMONELLA

Contaminated water in work place, **Phillips v. U.S. Air, Inc.**, 538.

SANCTIONS

Improper factors considered, **Williams v. N.C. Dept. of Correction**, 356.

Signing of subpoena for confidential records, **Bass v. Sides**, 485.

SCHOOL

Student with inoperable gun, **In re Cowley**, 274.

SCHOOL CONSTRUCTION

Suitable site, **Board of Education of Hickory v. Seagle**, 566.

SEALED RECORDS

Removal from clerk's office, **Bass v. Sides**, 485.

SEARCHES

Anonymous tip fabricated by police, **State v. Watkins**, 804.

Consent at airport, **State v. Pope**, 462.

Drugs found in ashtray incident to arrest, **State v. Clyburn**, 377.

Glove compartment search as protective frisk, **State v. Clyburn**, 377.

Warrant affidavit based on controlled cocaine buy, **State v. Ledbetter**, 117.

Warrant affidavit not tainted by officer's unlawful entry, **State v. McLean**, 838.

SECURITY SERVICE

Duty to provide protection to apartment guest, **Cassell v. Collins**, 798.

SEDIMENTATION POLLUTION CONTROL ACT

Nominal damages, **Huberth v. Holly**, 348.

SEPARATION AGREEMENT

Made on verge of resuming marital relations, **Williams v. Williams**, 707.

SEXUAL ASSAULT

No fatal variance between indictment and proof on date, **State v. Hensley**, 313.

Patient at substance abuse hospital, **Johnson v. Amethyst Corp.**, 529.

SHOPPING CENTER AGREEMENT

Breach by anchor store, **Pleasant Valley Promenade v. Lechmere, Inc.**, 650.

SIGN

Authority of Department of Transportation to regulate, **Appalachian Poster Advertising Co. v. Harrington**, 72.

SLANDER

Accusation of stealing from association, **Lee v. Lyerly**, 250.

SOVEREIGN IMMUNITY

See Governmental Immunity this Index.

STATE EMPLOYEE

Priority consideration statute, **Dockery v. N.C. Dept. of Human Resources**, 827.

Reinstatement at another location, **N.C. Dept. of Correction v. Myers**, 437.

STATUTE OF REPOSE

Not unconstitutional, **Garrett v. Winfree**, 689.

STOCK

Transfer restriction inapplicable to equitable distribution, **Bryan-Barber Realty, Inc. v. Fryar**, 178.

STUDENT

With inoperable gun on school property, **In re Cowley**, 274.

SUDDEN EMERGENCY

Sister-in-law's truck on side of road, **Colvin v. Badgett**, 810.

SUMMARY EJECTMENT

No entitlement to stay of execution, **Venture Properties I v. Anderson**, 852.

SUMMARY JUDGMENT

No review on appeal from trial on merits, **Vance Construction Co. v. Duane White Land Corp.**, 401.

Refusal to consider unverified answer, **Venture Properties I v. Anderson**, 852.

TICKETS

Subagent's sales of stolen, **Smith v. Carolina Coach Co.**, 106.

TRANSFORMER

Negligent manufacture, **Precision Fabrics Group v. Transformer Sales and Service**, 866.

TREADMILL

Injury while using in department store, **Finney v. Rose's Stores, Inc.**, 843.

TREE ON PRIVATE PROPERTY

No duty of city to remove, **Lavelle v. Schultz**, 857.

TRIAL BY CONSENT

Issue not raised in pleadings, **Johnson v. Friends of Weymouth, Inc.**, 255.

UNEMPLOYMENT TAXES

Employees rather than independent contractors, **State ex rel. Employment Security Comm. v. Huckabee**, 217.

VIGIL

Outside prison, **N.C. Council of Churches v. State of North Carolina**, 84.

VOTING IRREGULARITIES

Mixed drink referendum, **In re Appeal of Ramseur**, 521.

WARRANTY

Statute of limitations, **Haywood Street Redevelopment Corp. v. Peterson Co.**, 832.

WHISTLEBLOWING CLAIM

State university, **Aune v. University of North Carolina**, 430.

WINDOW WASHING

Woodson claim, **Arroyo v. Scottie's Professional Window Cleaning**, 154.

WITNESS

Inquiry into competency of eleven-year-old abuse victim, **State v. Hensley**, 313.

WITNESS FEES

Experts deposed pursuant to subpoena, **Town of Chapel Hill v. Fox**, 630.

WORKERS' COMPENSATION

Acknowledgment of paternity by deceased father, **Tucker v. City of Clinton**, 776.

Attorney fees, **Andrews v. Fulcher Tire Sales and Service**, 602.

Brick setting machine, **Rose v. Isenhour Brick & Tile Co.**, 225.

Change of condition, **Dinkins v. Federal Paper Board Co.**, 192.

Employee murdered by husband, **Ross v. Mark's Inc.**, 607.

Inability to work, **Andrews v. Fulcher Tire Sales and Service**, 602.

Injury arising from second accident, **McAnelly v. Wilson Pallet and Crate Co.**, 127.

Salmonella infection not caused by work place water, **Phillips v. U.S. Air, Inc.**, 538.

WORKERS' COMPENSATION—Continued

Standard of proof, **Phillips v. U.S. Air, Inc.**, 538.

Temporary total disability, **McAnelly v. Wilson Pallet and Crate Co.**, 127.

Unprofitable sole proprietor, **McAnelly v. Wilson Pallet and Crate Co.**, 127.

WRONGFUL DEATH

Cleaning inside of boiler, **Jones v. Willamette Industries, Inc.**, 591.

WRONGFUL TERMINATION

Improper instructions, **Johnson v. Friends of Weymouth, Inc.**, 255.

ZONING

Statute of limitations, **Thompson v. Town of Warsaw**, 471.

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