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2. Recalled 1 September 1995.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JOHN BILLY FRAZIER

No. COA94-1140

(Filed 5 December 1995)

1. Evidence and Witnesses § 373 (NCI4th)— common plan or scheme to abuse adolescent female family members— admissibility of evidence

In a prosecution of defendant for taking indecent liberties with a child and rape, the trial court did not err in admitting testimony which tended to demonstrate a common plan or scheme by defendant to sexually abuse adolescent female family members, and there was no merit to defendant's contentions that the testimony was not sufficiently similar to the conduct for which he stood trial and that the testimony was too remote in time to be admissible, since all the females in this case testified that defendant looked after them when they were young and began his misconduct by touching them and fondling them; defendant began to touch more invasively as they grew older; defendant had sexual intercourse with all but one of them; defendant convinced each of them to remain quiet about the abuse by threatening to send them away or by threatening to stop taking care of their financial needs; all of the witnesses thus testified to similar forms of abuse which demonstrated a distinct pattern over a protracted period; defendant's prior acts of sexual abuse occurred over a period of approximately twenty-six years; and an eight-year lapse in

defendant's abusive conduct did not render the witnesses' testimony too remote to be admissible. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Rape §§ 71, 73.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offenses. 88 ALR3d 8.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

2. **Evidence and Witnesses § 3058 (NCI4th)— defendant's prior sexual misconduct—cross-examination improperly allowed—defendant not prejudiced**

In a prosecution of defendant for taking indecent liberties with a child and rape, the trial court erred in allowing the State to cross-examine defendant about prior acts of sexual misconduct involving other female family members after defendant denied he had abused those family members, since a witness may be cross-examined about specific instances of misconduct only if the instances are probative of the witness's character for truthfulness or untruthfulness, and instances of sexual misconduct are not probative of a witness's character for truthfulness or untruthfulness; however, defendant was not prejudiced by such error where evidence of defendant's alleged prior acts of sexual misconduct had already been admitted through the testimony of other witnesses. N.C.G.S. § 8C-1, Rule 608(b)

Am Jur 2d, Evidence §§ 409, 418, 430; Witnesses §§ 965, 966, 968, 969.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

3. Evidence and Witnesses § 2891 (NCI4th)— sexual misconduct by wife—cross-examination of defendant—absence of prejudice

A defendant charged with taking indecent liberties and rape failed to show that he was prejudiced by the State's cross-examination of him concerning acts of sexual misconduct by his wife.

Am Jur 2d, Evidence §§ 404-412; Witnesses §§ 811, 812.

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

4. Evidence and Witnesses § 3058 (NCI4th)— cross-examination of defendant's wife—sexual misconduct—absence of prejudice

While it was error for the trial court to allow the State to cross-examine defendant's wife about specific instances of sexual misconduct committed by her because they were not probative of her veracity, defendant was not prejudiced by this error since the questions related to the wife's conduct rather than defendant's actions. N.C.G.S. § 8C-1, Rule 608(b).

Am Jur 2d, Evidence §§ 404-412; Witnesses § 904.

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

5. Evidence and Witnesses § 3033 (NCI4th)— defendant's wife—attempt to get victims to change stories—probative of veracity

The State could properly cross-examine the wife of a defendant on trial for taking indecent liberties with children and rape about whether she had attempted to get the victims to change their stories since such specific instances of conduct are probative of the wife's veracity. N.C.G.S. § 8C-1, Rule 608(b).

Am Jur 2d, Evidence § 404; Witnesses §§ 902, 903.

6. Evidence and Witnesses § 2873 (NCI4th)— cross-examination of defense witness—actions to get not guilty verdict—probative of credibility

The State's cross-examination of a defense witness in a prosecution for rape and taking indecent liberties with children as to whether she, defendant, and defendant's wife would "do anything in this case to get a verdict of not guilty" was probative of the

credibility of the witness and was permissible under N.C.G.S. § 8C-1, Rule 611(b).

Am Jur 2d, Evidence § 434; Witnesses §§ 811, 878-880, 885, 886.

7. Evidence and Witnesses § 3064 (NCI4th)— impeachment—extrinsic evidence to rebut denial—collateral matter—absence of prejudice

In a prosecution of defendant for rape and taking indecent liberties with children, it was improper for the State to use extrinsic evidence to rebut the denial by defendant's wife that she had attempted to show the breasts of another woman to defendant by questioning the other woman about this event, but this rebuttal testimony did not prejudice defendant because it pertained to a collateral matter. N.C.G.S. § 8C-1, Rule 608(b).

Am Jur 2d, Witnesses §§ 992-994, 998.

8. Criminal Law § 433 (NCI4th)— prosecutor's closing argument—remarks about defendant and his wife—new trial not required

The prosecutor's closing arguments in a trial for rape and taking indecent liberties accusing witnesses of not being truthful on the witness stand, questioning the morals of defendant's wife, and calling defendant a "monster," to which defendant made no objection, were not so prejudicial as to require a new trial. Nor is defendant entitled to a new trial based upon the prosecutor's reference to defendant and his wife as "just as evil and just as sorry and just as mean as two despicable people could ever be on this earth" where the trial court indicated its disapproval of this comment by sustaining defendant's objection thereto.

Am Jur 2d, Trial §§ 681, 682, 692, 693.

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

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

9. Criminal Law § 545 (NCI4th)— prosecutor's remarks about spectators—mistrial denied

Defendant was not entitled to a mistrial where the prosecutor remarked that a man and woman were making noises as witnesses testified; the trial court then excused the jury and out of the jury's presence warned everyone in the courtroom to refrain from making noises; defendant's counsel made a motion for mistrial, arguing that the prosecutor's actions prejudiced defendant; and the trial court admonished the prosecutor, denied the motion for mistrial, and the jury returned.

Am Jur 2d, Trial §§ 254, 255, 566.

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

10. Indictment, Information, and Criminal Pleadings § 53 (NCI4th)— alleged variance between indictment and proof—no error

In a prosecution of defendant for taking indecent liberties with a minor and rape, there was no merit to defendant's contention that there was a fatal variance between the indictments and the evidence presented at trial, since specificity regarding dates diminishes in child abuse cases, the indictments alleged that defendant's sexual misconduct occurred "on or about" certain dates, and the State took adequate measures to put defendant on notice that the dates alleged should not be relied upon for any degree of certainty.

Am Jur 2d, Indictments and Informations § 267.

Propriety and effect of amendment of indictment, or of variance between indictment and proof—Supreme Court cases. 85 L. Ed. 2d 878.

Judge JOHN dissenting.

Appeal by defendant from judgments and commitments entered 4 March 1994 by Judge James C. Davis in Northampton County Superior Court. Heard in the Court of Appeals 29 August 1995.

In January and March of 1993, defendant was indicted for ten counts of taking indecent liberties with a child and for two counts of

first degree rape. The named victims of defendant's alleged crimes were his two stepgranddaughters (referred to as L. and S.).

At trial, fourteen-year-old L. testified that defendant began touching her inappropriately on her "butt [and] boobies" when she was nine or ten. She testified that one day when she was ten and was in defendant's trailer, defendant's wife, Polly Frazier (hereinafter Polly) told her to go in their bedroom to get a cake as a reward for helping Polly clean the trailer. Polly left for town and when L. went into the bedroom to get her reward, defendant grabbed her and pushed her on the bed. Defendant took off L.'s clothes and had intercourse with her. L. said that she started crying and told defendant to stop because he was hurting her, but defendant told her to shut up. After he was finished, defendant told her to put her clothes back on and not to tell anyone or he would "send [her] away." L. stated that she did not tell anyone because defendant had threatened to send her away and she did not think anyone would believe her. L. testified that defendant raped her a second time when she was eleven or twelve when she and defendant were alone in defendant and Polly's trailer. After defendant was finished, he once again told L. that if she told anyone, he would send her away.

L. eventually told her cousin, Tammy, that defendant "had messed with" her. This disclosure occurred after Polly took L. to a doctor who told them that L. needed to be on birth control pills. L. then told her sister, S., who told L. that defendant had also "messed with her," but that defendant had not had sexual intercourse with her. L. then disclosed the sexual abuse to the school psychiatrist and a police detective.

Sixteen-year-old S. also testified. She stated that defendant began touching her inappropriately when she was thirteen and that the conduct occurred two to three times per week until she was fifteen. Defendant would fondle her breasts and stick his hand down her pants. Defendant told S. not to tell anyone. S. did not tell anyone until after L. revealed that defendant had sexually abused her.

Over defendant's objection, the trial court admitted the testimony of three female members of defendant's family who told how defendant sexually abused them when they were young girls.

Defendant took the stand and denied ever sexually abusing L. or S. Several witnesses, including Polly, offered testimony to establish alibis for dates listed in the indictments when defendant had allegedly

abused L. and S. Several people also testified to defendant's good character in the community.

At the close of the evidence, the jury found defendant guilty of all charges. The trial court sentenced defendant to two consecutive life sentences. Defendant appeals.

Attorney General Michael F. Easley, by Investigative Law Clerk/Attorney Sondra C. Panico, for the State.

Steven F. Bryant for defendant-appellant.

EAGLES, Judge.

I.

[1] Defendant first argues that the trial court violated Rule 404(b) by admitting the testimony of the State's witnesses Kathy (Susie) Barnes, Vickie Brewer Wright, and Patricia A. Bryant. G.S. 8C-1, Rule 404(b) provides in part:

> 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.

Rule 404(b) is a rule of inclusion of relevant evidence of prior bad acts unless the only reason the evidence is offered is to show the defendant's propensity to commit a crime like the act charged. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990); *State v. Matheson*, 110 N.C. App. 577, 581, 430 S.E.2d 429, 431 (1993); *State v. Faircloth*, 99 N.C. App. 685, 689, 394 S.E.2d 198, 201 (1990). Here, the State argues that the three witnesses' testimony was admissible to demonstrate a common plan or scheme by defendant to sexually abuse adolescent female family members.

One of the three witnesses whose testimony was offered to show a common plan was Kathy (Susie) Barnes (hereinafter Susie), one of Polly's daughters and the stepmother of L. and S. The State's evidence tended to show that Susie first remembered seeing defendant when she was approximately four years old (approximately 1964) after defendant married her mother. When Susie was sixteen, defendant remarked that he could not wait until she fully developed. After she

began "filling out," defendant started "feeling" Susie around her waist, breasts, buttocks, and vagina. Though Susie was still in the fifth grade when she turned sixteen, she quit school. Thereafter, she was often alone with defendant while her mother, Polly, worked. On occasion after Susie quit school, defendant kissed Susie "[i]n the mouth [and] on the face." Susie lived with an aunt for a year while defendant and Polly traveled with defendant's company. Defendant and Polly returned when Susie was seventeen and defendant resumed touching her inappropriately. He told her that "[h]e just wanted to be [her] boyfriend if [she] wanted him to."

Susie married her first husband when she was twenty and lived with him until she was twenty-one. Their son was born shortly after she separated from her husband. Susie had no money so she lived with defendant and Polly in Florida until 1983. During this time, defendant told Susie "[h]e would like to f— [her]." In 1983 or 1984 after Susie married her second husband, the father of L. and S., defendant paid a substantial portion of their expenses. In return for his financial contributions, defendant said Susie needed to show him "some affection" or he would take her son away from her. Susie, her husband, and L. and S. lived in a trailer near defendant and Polly's trailer. Eventually, defendant had sexual intercourse with Susie in the back bedroom of his trailer while her husband was at work, her children were at school, and her mother was gone. Defendant threatened to have Susie's stepdaughters sent away and raise her son himself if she told anyone.

Patricia A. Bryant (hereinafter Patricia), Susie's sister and Polly's other daughter, also testified for the State. She stated that defendant often intervened on her behalf when her mother would start to whip or beat her. As she got older, defendant began kissing her on the mouth instead of on the cheek. Patricia testified that on one evening when she was twelve or had just turned thirteen (approximately 1966), defendant got into the shower as she was taking her shower and began caressing her. He then placed her arms on the wall, lifted her leg, and had sex with her in the shower. Patricia had previously been sexually abused by her grandfather who had always told her to be submissive, so she was completely submissive with defendant. Defendant made it clear to Patricia that if she told anyone, he would not protect her from her mother anymore. Patricia eventually attempted to commit suicide. When Patricia awoke in the hospital, her mother, Polly, told her that if she revealed the abuse to anyone, she would send her away to an insane asylum. Thereafter, Patricia

stayed away from defendant and spent a lot of nights with her brother Larry and his wife, Vickie Brewer Wright (hereinafter Vickie).

Vickie was the third witness whose testimony was offered to show a common plan by defendant to sexually abuse adolescent female family members. She was twelve when she first met the defendant. In 1964 when she was fourteen, she married defendant's sixteen-year-old son, Larry Frazier. While the couple were newlyweds, they lived with defendant and Polly. Vickie testified that she looked up to defendant because he took care of her and Larry financially. She also stated that defendant had a "hold over [her]" because he showed her the attention that her husband and father never did. Approximately one week before her first child was born, she and Larry moved in with defendant's sister for a short time. Vickie and Larry then moved into their own home. Defendant began stopping by every evening to see how the baby was. Vickie testified that one day when she was fifteen and her husband was at work, defendant led her into the bedroom and had sexual intercourse with her. After Larry began working third shift, defendant dropped by Vickie's house "a lot of mornings" between five and six and he would have sexual intercourse with her. Vickie testified that she did not want for it to happen, but that she "was too young and afraid to say anything about it." This conduct continued for approximately two years until Vickie finally confided in Patricia.

"North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges." *State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994), *citing State v. McCarty*, 326 N.C. 782, 785, 392 S.E.2d 359, 361 (1990). To be admissible as showing a common plan, the evidence of prior conduct must be similar and not too remote in time. *State v. Jones*, 322 N.C. 585, 589, 369 S.E.2d 822, 824 (1988), *appeal dismissed and disc. review denied*, 328 N.C. 95, 402 S.E.2d 423 (1991).

Defendant first argues that the testimony by Susie and Vickie should not have been admitted because it was not sufficiently similar to the conduct for which defendant stood trial. A prior act or crime is "similar" if it " 'tend[s] to support a *reasonable* inference that the same person committed both the earlier and later acts.' " *State v. Sneeden*, 108 N.C. App. 506, 510, 424 S.E.2d 449, 451 (1993) (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)), *aff'd*, 336 N.C. 482, 444 S.E.2d 218 (1994). In *Sneeden*, 108 N.C. App. at 510, 424 S.E.2d at 451, this Court found that a 1967 prior act by defendant

was sufficiently similar to the 1990 charged act where in both instances, "defendant gained the trust of his victims, lured them into an automobile and then took them to a different location where they were sexually assaulted." Here, all five females testified that defendant looked after them when they were young and began his misconduct by touching them and fondling them. Defendant began to touch them more invasively as they grew older. Defendant had sexual intercourse with all but one of them. Defendant convinced each of them to remain quiet about the abuse by threatening to send them away or by threatening to stop taking care of their financial needs. Based on *Sneeden*, we conclude the evidence of prior acts of sexual abuse by defendant was sufficiently similar to the acts described by L. and S. to be admissible at trial. All of the witnesses testified to similar forms of abuse which demonstrated a distinct pattern over a protracted period. While Susie's testimony that defendant forced her to have sex with him when she was twenty-four did not precisely parallel the testimony of the other witnesses, we hold that the conduct was not so dissimilar as to render it not part of defendant's pattern of sexual conduct with youthful female family members.

Defendant also argues that the testimony of Susie, Vickie, and Patricia was too remote in time to be admissible. In making this argument, defendant relies on *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988), a case involving alleged sexual abuse by a man against his stepdaughter. In *Jones*, the court held that the testimony of a female who stated she had previously been subjected to similar sexual abuse by the defendant was inadmissible because the prior sexual abuse had occurred seven years earlier and was too remote in time. *Jones*, 322 N.C. at 591, 369 S.E.2d at 825. *Jones* does not control here.

Since *Jones*, our courts have permitted testimony of prior acts of sexual misconduct which occurred greater than seven years earlier. In *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989), our Supreme Court held it was not error for the trial court to admit the testimony of sisters of the victim where the sisters testified that their father had also sexually abused them. There, the defendants' prior sexual misconduct with the sisters occurred during a twenty year period. *Shamsid-Deen*, 324 N.C. at 447, 379 S.E.2d at 848.

Here, the testimony offered by Susie, Patricia, and Vickie showed that defendant's prior acts of sexual abuse occurred over a period of approximately twenty six years.

> While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

State v. McKinney, 110 N.C. App. 365, 372, 430 S.E.2d 300, 304 (quoting *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989)), *appeal dismissed, cert. denied and disc. review denied*, 334 N.C. 437, 433 S.E.2d 182 (1993) (citation omitted). When there is a period of time during which there is no evidence of sexual abuse, the lapse does not require exclusion of the evidence if the defendant did not have access to the victims during the lapse. *State v. Jacob*, 113 N.C. App. 605, 611, 439 S.E.2d 812, 815 (1994); *State v. Davis*, 101 N.C. App. 12, 20, 398 S.E.2d 645, 650 (1990).

Here, the evidence showed that defendant sexually abused Patricia in 1966 and Vickie from 1966 to 1968. From 1968 until 1976, there was no evidence of sexual abuse by defendant, but the evidence showed that defendant did not have access to Patricia and Vickie during that time. In 1976 when Susie was sixteen, defendant began sexually abusing her; the evidence showed that defendant's sexual abuse of Susie continued until 1985 except when defendant did not have access to her. Four years later, defendant began sexually abusing L., one of the two minor victims in this case. Based on *Jacob*, we conclude the eight year lapse did not render the witnesses' testimony too remote to be admissible. Accordingly, this assignment of error fails.

II.

[2] Defendant also argues that the trial court erred by allowing the State to cross-examine defendant because the questions were prejudicial. Specifically, defendant argues he was prejudiced by the prior bad acts testimony because he was required to defend against those allegations in addition to the pending charges. In making this argument, defendant relies on *State v. Bailey*, 80 N.C. App. 678, 343 S.E.2d 434, *disc. review allowed*, 317 N.C. 336, 346 S.E.2d 503, *disc. review dismissed as improvidently granted*, 318 N.C. 652, 350 S.E.2d 94 (1986), a case where the defendant was accused of sexually abusing and attempting to rape a woman. On cross-examination, the prosecution asked the defendant if he had not previously attempted to rape another woman. *Bailey*, 80 N.C. App. at 680, 343 S.E.2d at 436. The

cross-examination questions were designed to rebut the defendant's defense of consent. We held that this cross-examination was improper under Rule 404(b) because evidence of other non-consensual sexual activity was not relevant to the issue of the victim's consent. Defendant's reliance on *Bailey* is misplaced because here defendant's prior misconduct was not admitted on the issue of consent.

However, the trial court erred in allowing the State to cross-examine defendant about alleged prior acts of sexual misconduct. Rule 608(b) of the North Carolina Rules of Evidence provides that a witness may not be cross-examined about specific instances of misconduct unless the instances are probative of the witness's character for truthfulness or untruthfulness. G.S. 8C-1, Rule 608(b). Instances of sexual misconduct are not probative of a witness's character for truthfulness or untruthfulness. *State v. Gordon*, 316 N.C. 497, 506, 342 S.E.2d 509, 514 (1986); *State v. Morgan*, 315 N.C. 626, 635, 340 S.E.2d 84, 90 (1986); *State v. Moore*, 103 N.C. App. 87, 99, 404 S.E.2d 695, 702, *disc. review denied*, 330 N.C. 122, 409 S.E.2d 607 (1991). Here, defendant testified and denied he had ever sexually abused any of the witnesses. The State then cross-examined defendant about his prior acts of sexual misconduct. While it was error for the trial court to allow this cross-examination, the error does not require us to grant defendant a new trial because "there is no 'reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.' " *Gordon*, 316 N.C. at 506, 342 S.E.2d at 514, *quoting* G.S. 15A-1443(a). As in *Moore*, 103 N.C. App. at 99, 404 S.E.2d at 702, where we held the error did not require a new trial, here evidence of defendant's alleged prior acts of sexual misconduct had already been admitted through the testimony of Susie, Vickie, and Patricia. Accordingly, "any cross-examination of defendant concerning [these prior acts] was merely cumulative." *Id.*

[3] Defendant also argues that he was prejudiced by the State's cross-examination questions concerning his wife, Polly. Specifically, defendant argues he was prejudiced when the State asked about (1) Polly threatening to hurt Vickie if defendant had sexual intercourse with Vickie again; (2) Polly trying to show defendant the breasts of a pregnant woman; and (3) Polly fondling a child's penis. This cross-examination was irrelevant and should have been excluded. Defendant argues he is entitled to a new trial based on our Supreme Court's decision in *State v. Kimbrell*, 320 N.C. 762, 360 S.E.2d 691 (1987). In *Kimbrell*, 320 N.C. at 769, 360 S.E.2d at 694-95, our

Supreme Court found cross-examination by the State about defendant's "devil worshipping" had little or no probative value in the case, was error, and required defendant to receive a new trial. Defendant's reliance on *Kimbrell* is misplaced. Here, the improper questions related to Polly's actions rather than defendant's actions. Defendant has failed to show that absent this error, the outcome of his trial would have been different. Accordingly, we conclude defendant is not entitled to a new trial based on the trial court's error.

III.

[4] Defendant next argues that the trial court erred by allowing improper and prejudicial cross-examination of two defense witnesses. Defendant first objects to the State's questioning Polly about fondling her grandson's penis and attempting to show defendant a pregnant woman's breast. Defendant also argues that the trial court erred in allowing the State to question Polly about a photograph defendant took of Polly and defendant having sexual intercourse which Polly allegedly showed to S. Defendant further argues that the trial court should not have allowed the State to ask Polly whether she had previously had sexual relations with her son-in-law and whether she called Patricia a whore when she was a child. While it was error pursuant to Rule 608(b) for the trial court to allow the State to cross-examine Polly about specific instances of sexual misconduct because they were not probative of Polly's veracity, the error does not require a new trial. The testimony did not prejudice defendant's case because, as we indicated above, the questions related to Polly's conduct rather than defendant's actions. After reviewing the record, we conclude there is not a reasonable possibility that, absent the error, the outcome of the trial would have been different.

[5] Defendant also argues the trial court erred in allowing the State to cross-examine Polly about whether she had attempted to get L. and S. to change their stories. Rule 608(b) allows a witness to be cross-examined about specific instances of conduct if they are probative of the witness's veracity. Our Supreme Court has previously stated that conduct which is probative of veracity includes "attempting to corrupt or cheat others . . . and attempting to deceive or defraud others." *State v. Morgan*, 315 N.C. at 635, 340 S.E.2d at 90. Based on the guidance supplied by *Morgan*, we conclude the cross-examination by the State about L. and S. fits within the type of questioning allowed by the Rules of Evidence; the trial court did not err in allowing it.

[6] Defendant also argues it was improper to allow the State to ask defense witness Barbara Jean Frazier (hereinafter Barbara Jean), over objection, if she, defendant, and defendant's wife would "do anything in this case to get a verdict of not guilty." Barbara Jean is the wife of Polly's son, John Billy Frazier, Jr. Rule 611(b) of the North Carolina Rules of Evidence provides that the scope of cross-examination is extremely broad: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." G.S. 8C-1, Rule 611(b). We conclude the State's questioning here was probative on the issue of Barbara Jean's credibility as a witness. Accordingly, the trial court did not err in allowing this cross-examination.

[7] Defendant also argues that the State impeached Polly's testimony that she never attempted to show Marsha Frazier's (hereinafter Marsha) breasts to defendant by questioning Marsha about this event. Marsha had previously been married to John Billy Frazier, Jr. Pursuant to Rule 608(b) of the North Carolina Rules of Evidence, it was improper for the State to use extrinsic evidence (Marsha's testimony) to attack Polly's denial that she never attempted to show Marsha's breasts to defendant.

Defendant argues that the trial court's error requires a new trial, as our Supreme Court required in *State v. Williams*, 322 N.C. 452, 368 S.E.2d 624 (1988). There, the victim accused the defendant of raping her, but the defendant insisted that he was innocent. *Williams*, 322 N.C. at 453, 368 S.E.2d at 625. The defendant's brother-in-law testified on defendant's behalf. On cross-examination, the brother-in-law denied that the defendant had ever told him that he had sex with the victim on the night of the alleged rape. *Id.* The State then called two rebuttal witnesses who testified that the brother-in-law had told them that the defendant admitted raping the victim. *Id.* at 454, 368 S.E.2d at 625-26. Our Supreme Court stated that the "question of defendant's guilt hing[ed] solely upon whether the jury believed his testimony or the prosecutrix's testimony." *Id.* at 457, 368 S.E.2d at 627. The court concluded in *Williams* that if the testimony had not been erroneously admitted, there was a reasonable possibility that the outcome of the trial might have been different and awarded the defendant a new trial. *Id.*

Here, Marsha was a rebuttal witness to challenge the truthfulness of Polly's testimony—not defendant's testimony. The erroneously admitted evidence pertained to a collateral matter. Therefore, we

conclude that the admission of this testimony did not prejudice defendant because there is no reasonable possibility that its exclusion would have changed the outcome of this case.

Defendant further argues that the trial court improperly allowed the State on rebuttal to impeach the testimony of Barbara Jean by asking Marsha whether Barbara Jean had ever called Social Services to report anyone in the family for sexual abuse or neglect. After reviewing the record, we conclude there was no error. Even if admission of this testimony was error, defendant has not shown how it prejudiced him. *See* G.S. 15A-1443(a) (stating that "[t]he burden of showing . . . prejudice [requiring a new trial] . . . is upon the defendant").

IV.

[8] Defendant next argues that the trial court erred by allowing improper comments, conduct, and arguments by the prosecutor. Generally, "arguments of counsel are within the domain of the trial [court's] discretion." *State v. Brooks*, 113 N.C. App. 451, 458, 439 S.E.2d 234, 238 (1994). Although the State is obligated to assure that a defendant is given a fair trial, "counsel is given wide latitude in the argument of hotly contested trials." *State v. Barfield*, 298 N.C. 306, 331, 259 S.E.2d 510, 531 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed.2d 1137 (1980).

This was a hotly contested sexual abuse case. It is clear that the prosecutor became argumentative at times by, *inter alia*, accusing witnesses of not being truthful on the witness stand, questioning Polly's morals, and calling defendant a "monster." However, at trial, no objection was made to several of the prosecutor's comments of which defendant now complains. When no objection is made regarding inappropriate argument by the prosecutor during trial, a new trial is not merited unless the argument " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993), *cert. denied*, — U.S. —, 129 L.Ed.2d 895 (1994) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L.Ed.2d 144, 157 (1986)). After reviewing the prosecutor's comments here to which defendant made no objection, we conclude the prosecutor's arguments were not so prejudicial as to meet the *McCollum* standard.

As for the prosecutor's other inappropriate comments, defendant relies on *State v. Brooks*, 113 N.C. App. 451, 439 S.E.2d 234 (1994), to argue for a new trial. In *Brooks*, the defendant was on trial for mur-

dering his stepdaughter's boyfriend. *Brooks*, 113 N.C. App. at 452-53, 439 S.E.2d at 235-36. During argument to the jury, the prosecutor characterized the defendant as a " 'liquor-drinking, dope-smoking, defendant.' " *Brooks*, 113 N.C. App. at 458, 439 S.E.2d at 238. The prosecutor also commented on defendant's past abusive behavior toward his wife. *Id.* Because the prosecutor's comments were unrelated to the defendant's murder charge, we concluded that the comments were "calculated to prejudice and to inflame the jury." *Id.* at 458, 439 S.E.2d at 238. Accordingly, we held that defendant Brooks was entitled to a new trial. *Id.* at 459, 439 S.E.2d at 239.

Brooks is distinguishable from this case because in *Brooks*, the trial court failed to sustain an objection to the inappropriate comments of the prosecutor. *Id.* at 459, 439 S.E.2d at 238-39. Here, the trial court sustained defendant's objections to the majority of the prosecutor's other inappropriate statements. In particular, after the prosecutor referred to defendant and Polly as "[j]ust as evil and just as sorry and just as mean as two despicable people could ever be on this earth," it appears that the trial court sustained defendant's objection. While defendant did not move to strike the prosecutor's statement, it is clear that by sustaining defendant's objection, the trial court indicated its disapproval of the prosecutor's comment. We conclude the prosecutor's comment regarding defendant and Polly does not merit a new trial for defendant. Furthermore, after carefully reviewing the pertinent portions of the trial transcript, we conclude that none of the prosecutor's inappropriate comments were so prejudicial as to merit a new trial for defendant. This assignment of error fails.

V.

[9] Defendant also argues that the trial court erred by denying his motions for a mistrial. The trial court has wide discretion in controlling the conduct of counsel during trial. *State v. Davis*, 80 N.C. App. 143, 147, 341 S.E.2d 101, 103 (1986). G.S. 15A-1061 provides that the trial court may declare a mistrial when conduct occurs which results in "substantial and irreparable prejudice to the defendant's case." Here, the prosecutor remarked that a man and woman were making noises as witnesses testified. The trial court then excused the jury and out of the jury's presence warned everyone in the courtroom to refrain from making noises. Defendant's counsel made a motion for mistrial, arguing that the prosecutor's actions prejudiced the defendant. The trial court admonished the prosecutor, denied the motion for

mistrial, and the jury returned. On this record, we conclude defendant sustained no "substantial and irreparable prejudice" as a result of the prosecutor's comment.

Defendant's counsel also moved for a mistrial after the prosecutor asked Polly about a meeting with defendant's counsel. In *Barfield*, 298 N.C. at 333-34, 259 S.E.2d at 532, the defendant argued she was prejudiced after the prosecutor asked an improper question of a witness. Our Supreme Court concluded that the defendant was not prejudiced because the defendant's counsel made a timely objection and the witness did not respond to the question. *Barfield*, 298 N.C. at 334, 259 S.E.2d at 532. Here, defendant's counsel objected immediately after the prosecutor asked his question, Polly did not respond to the question, and the trial court sustained the objection. Accordingly, this assignment of error fails.

VI.

[10] Finally, defendant argues the trial court erred by denying defendant's motion to dismiss because there was a fatal variance between the dates of abuse alleged in the indictments and the evidence presented at trial. Defendant's argument fails. In child sexual abuse cases, specificity regarding dates diminishes. *State v. Burton*, 114 N.C. App. 610, 613, 442 S.E.2d 384, 386 (1994). In *State v. Everett*, 328 N.C. 72, 399 S.E.2d 305 (1991), our Supreme Court stated:

> 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.

Everett, 328 N.C. at 75, 399 S.E.2d at 306, *quoting State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984). Here, defendant argues that his reliance on an alibi defense made the dates crucial. However, the record shows that defendant did not rely solely on an alibi defense. Defendant also denied that he had ever sexually abused the victims; defendant and several of his witnesses testified that the victims fabricated the stories of abuse. Furthermore, our Supreme Court has stated that a defendant is not prejudiced when the State has "placed [the] defendant on notice that the victim [is] a child and therefore the information provided [relating to dates and times] should not be relied upon for any degree of certainty." *State v. Effler*, 309 N.C. 742, 750, 309 S.E.2d 203, 207-08 (1983). Here, the indictments alleged that

defendant's sexual misconduct occurred "on or about" certain dates. In addition, the State argued that the dates alleged in the indictments were not precise because the victims could not be expected to remember precisely every date on which the multiple instances of sexual abuse occurred. We conclude the State took adequate measures to put defendant on notice that the dates alleged should not be relied upon for any degree of certainty.

After careful review of the entire record, we conclude that defendant received a fair trial free of prejudicial error.

No prejudicial error.

Judge LEWIS concurs.

Judge JOHN dissents.

Judge JOHN dissenting.

I respectfully dissent and vote to award defendant a new trial based upon the reasons which follow.

First, the majority holds the trial court erred "in allowing the State to cross-examine defendant about alleged prior acts of sexual misconduct" and concerning alleged misconduct of his wife, in allowing "the State to cross-examine [defendant's wife] about specific instances of [her] sexual misconduct," and in permitting "the State to use extrinsic evidence" to attack the denial by defendant's wife of sexual misconduct. It also characterizes certain statements of the prosecutor to the jury as "inappropriate" and "argumentative." However, the majority excuses as not requiring a new trial each of the foregoing prosecutorial transgressions tolerated by the trial court. I disagree and would hold that, even assuming *arguendo* defendant has not shown that the prejudicial effect of any one particular error is such as to merit a new trial, *see* N.C. Gen. Stat. § 15A-1443(a) (1988), the prejudicial impact of these errors considered in combination or *in toto* is such that defendant must receive a new trial. *See State v. White*, 331 N.C. 604, 616, 419 S.E.2d 557, 564 (1992) (cumulative effect of erroneously admitted evidence "deprived defendant of his fundamental right to a fair trial").

Second, I believe the evidence of defendant's alleged prior sexual misconduct should have been excluded and that its admission, especially in light of the errors found by the majority, constituted prejudi-

cial error requiring a new trial. Under N.C. Gen. Stat. § 8C-1, Rule 404(b) (1992), evidence of prior offenses by a defendant is "inadmissible on the issue of guilt if its *only* relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged . . . ." *State v. Young*, 317 N.C. 396, 412, 346 S.E.2d 626, 635 (1986).

The majority relies primarily on *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989), in approving the testimony of Susie Barnes, Patricia Bryant, and Vickie Wright as indicative of a common scheme or plan of defendant. In *Shamsid-Deen*, the defendant was charged with the August 1983 rape of his approximately twenty year-old daughter. He objected to testimony that he began having intercourse with her about once a week when she was nine and almost daily as she grew older. The Court observed these acts

> formed a distinct pattern of forced sexual intercourse over an eleven-year period, saving only the hiatus from April 1983 to August 1983.

Id. at 445, 379 S.E.2d at 847. As the majority points out, the Court emphasized that "a lapse of time between instances of sexual misconduct" makes the "probability of an ongoing plan more tenuous," while similar acts "performed *continuously* over a period of years" serve to demonstrate "the existence of a plan." *Id.* (emphasis added).

Regarding testimony by two other daughters of the defendant, the *Shamsid-Deen* court noted these women had also been molested by their father as they reached puberty and continuously into their adult lives, *Id.* at 447, 379 S.E.2d at 848, logically a period spanning about ten years. Since the defendant's daughters were relatively close in age—twenty, twenty-seven, and twenty-nine at trial—the abuse of each must therefore have occurred in close temporal proximity to that of the others, thus reinforcing the Court's emphasis on the constant nature of "defendant's pattern of forcing his daughters to submit to intercourse as they reached puberty and *continuing* to assault them . . . into their adulthood . . . ." *Id.* (emphasis added).

In the case *sub judice*, the earliest conduct "upon which this appeal is based," *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988), was alleged to have occurred on 12 March 1990 (in case 92 CRS 2831 charging the first degree rape of L.). Susie Barnes testified about occasional sexual touching and comments by defendant in the period when she was sixteen into her early twenties, as well as about

intercourse with defendant at age twenty-four in 1983. Thus, defendant's last abusive contact with Barnes occurred approximately seven years before the first alleged offense *sub judice.*

Patricia Bryant testified that after "several months" of touching her inappropriately, defendant raped her when she "had either already [become] thirteen or was just between twelve and thirteen." Born in 1953, Bryant would have been thirteen in 1966. The rape therefore occurred twenty-four years prior to the earliest alleged current offense.

Vickie Wright testified she had sexual intercourse with defendant "maybe once a month, every two months" for approximately two years, from 1966 to 1968, when she was fifteen to seventeen years-old. Thus, the incidents involving Wright and defendant concluded twenty-two years prior to the earliest conduct upon which defendant was brought to trial.

In *Jones*, 322 N.C. 585, 369 S.E.2d 822, our Supreme Court held that prior acts of sexual abuse which occurred seven years before the incidents involved in the case before the Court were too remote to be allowed into evidence as part of a common plan or scheme. The Court reasoned:

> the passage of time between the commission of the two acts slowly erodes the commonality between them. The probability of an ongoing plan or scheme then becomes tenuous. Admission of other crimes at that point allows the jury to convict defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged.

Id. at 590, 369 S.E.2d at 824.

The *Jones* court cited the earlier decision of *State v. Shane*, 304 N.C. 643, 285 S.E.2d 813 (1982), which found erroneous admission of evidence concerning acts committed but seven months prior to the crimes before the Court. The *Shane* court stated:

> it is evident that the period of time elapsing between the separate sexual events plays an important part in [the] balancing process, especially when the State offers the evidence of like misconduct to show the existence of a common plan or design for defendant's perpetration of this sort of crime.

Id. at 655, 285 S.E.2d at 820.

Also instructive is *State v. Gross*, 104 N.C. App. 97, 408 S.E.2d 531, *disc. review denied*, 330 N.C. 444, 412 S.E.2d 78 (1991), in which this Court found error in the admission of evidence the defendant had sexually assaulted an individual, Michael Reep, approximately seven years before the crimes alleged in the case before the Court. We held that:

> [t]he passage of time between the alleged assaults upon Mr. Reep and those against the victims here is so great as to make the existence of any plan or scheme tenuous at best.

Id. at 103, 408 S.E.2d at 534.

The majority accurately points to our Supreme Court's characterization of itself as "markedly liberal" in admitting evidence of "prior, similar sex offenses by a defendant." *See State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). However, that same Court has proclaimed:

> The period of seven years "substantially negate[s] the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities." As such, the reasoning that gave birth to Rule 404(b) exceptions is lost.

Jones, 322 N.C. at 590, 369 S.E.2d at 824 (citation omitted).

The *Jones* court's pronouncement is precisely on point with regards to the testimony of Barnes, involving an identical interval of seven years between incidents. I respectfully submit the Court's decree also most assuredly precludes admission of evidence, as part of a common scheme or plan, of incidents separated from the instant charges by periods of *twenty-two* and *twenty-four* years.

In justifying such incidents as not being excessively remote, the majority also relies on cases in which this Court has found the length of an interval between incidents less significant when defendant had no access to the victims because, for example, defendant was incarcerated. *See State v. Jacob*, 113 N.C. App. 605, 439 S.E.2d 812 (1994); *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990), *appeal dismissed*, 328 N.C. 574, 403 S.E.2d 516 (1991). I suggest that access to potential victims and the absence of evidence of abuse would, by means of converse analogy, weigh against the element of commonality. Unlike the majority, I believe the record demonstrates significant

periods of time during which defendant had "access" to Barnes, Bryant, and Wright and during which there was no evidence of abuse.

For example, the majority concedes the record contains no evidence of sexual abuse by defendant between 1968 and 1976, but asserts "the evidence showed that defendant did not have access to Patricia [Bryant] and Vickie [Wright] during that time." To the contrary, the record reveals that after defendant ceased having intercourse with Wright in 1968, she continued to live near him until 1972 when she separated from his son. Further, although the record suggests Bryant attempted to avoid defendant after he abused her in 1966, she did continue to spend time in his home. Finally, the record reflects that Barnes lived near defendant in a trailer owned by him from approximately 1983 until 1993. Nonetheless, the rape of Barnes was described as occurring in 1983 and no other evidence of similar conduct towards Barnes by defendant was introduced. The necessary element of commonality regarding Barnes' testimony is thus further negated. *See Jacobs*, 113 N.C. App. at 611, 439 S.E.2d at 815 (Where defendant had "almost no access" to victims of earlier conduct following divorce, the Court noted, "[t]he remoteness factor must be examined carefully to determine whether the plan or scheme of molestation was interrupted or ceased due to underlying circumstances, and then resumed in a continual fashion.").

In sum, I believe the evidence of incidents allegedly involving defendant and Barnes, Bryant and Wright was too remote and that "its probative impact [was] so attenuated by time that it [became] little more than character evidence illustrating the predisposition of the accused." *Jones*, 322 N.C. at 590, 369 S.E.2d at 825. It therefore was not admissible under Rule 404(b) to demonstrate a common scheme or plan of defendant. Moreover, the extensive lapse of time between each incident and those for which defendant was on trial created the substantial likelihood "of unfair prejudice, confusion of the issues, or misleading the jury," N.C. Gen. Stat. § 8C-1, Rule 403 (1992), so as at a minimum to necessitate exclusion of the evidence under Rule 403.

Finally, the prejudicial effect of Bryant's testimony regarding defendant was amplified by her also being allowed to relate over his objection that, before ever meeting defendant, she had been sexually molested by her grandmother's common-law husband and by her mother's live-in boyfriend. Bryant testified graphically about this abuse, including recounting an instance of being sodomized while pinned in a stand used to milk goats. These incidents, while indis-

putably reprehensible and traumatic to Bryant, were irrelevant to the charges against defendant and should have been excluded. *See State v. Coen*, 78 N.C.App. 778, 780-781, 338 S.E.2d 784, 786, *appeal dismissed*, 317 N.C. 709, 347 S.E.2d 444 (1986) ("If the proffered evidence has no tendency to prove a fact in issue in the case, the evidence is irrelevant and must be excluded."). Even assuming *arguendo* this testimony met the test of relevance, it should have been excluded under N.C. Gen. Stat. § 8C-1, Rule 403 (1992) in view of the great potential for prejudice. *See State v. Hamilton*, 77 N.C.App. 506, 335 S.E.2d 506 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986) (relevant evidence may be excluded if probative value substantially outweighed by inflammatory effect).

CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, APPELLANT v. THE TOWN OF ATLANTIC BEACH, A NORTH CAROLINA MUNICIPAL CORP.; THE COUNCIL OF THE TOWN OF ATLANTIC BEACH, NORTH CAROLINA, INCLUDING ALL MEMBERS OF THE COUNCIL OF THE TOWN OF ATLANTIC BEACH IN THEIR OFFICIAL CAPACITIES; CLAY DULANEY, IN HIS CAPACITY AS UTILITY DIRECTOR OF THE TOWN OF ATLANTIC BEACH; AND RODMAN LANCASTER, IN HIS CAPACITY AS MAYOR OF THE TOWN OF ATLANTIC BEACH, APPELLEES

No. COA94-829

(Filed 5 December 1995)

1. Contracts § 190 (NCI4th)— extension of water service to town residents—no tortious interference with contract

The trial court properly entered summary judgment for defendant town on plaintiff utility's claim of tortious interference with contract where there was no evidence that defendant intentionally induced plaintiff's water customers not to perform their contract with plaintiff and no evidence that defendant acted without justification, since defendant had the authority pursuant to N.C.G.S. § 160A-312 to extend its water lines to an annexed area when the water service being provided by plaintiff to the annexed area was no longer equal to the water service being provided by defendant to other areas within the municipal boundaries; defendant had no mandatory hook-up requirement; by offering water users in the area the option rather than the requirement to connect to defendant's water system at reduced fees, defendant was simply providing those users with the same opportunity as it had historically given to water users in other areas to which it had extended service; defendant's actions in reducing

the tap fee and waiving the impact fee would be justified as taken in furtherance of legitimate competition.

Am Jur 2d, Interference §§ 1-9, 23, 27-32, 41.

Liability of third party for interference with prospective contractual relationship between two other parties. 6 ALR4th 195.

Punitive damages for interference with contract or business relationship. 44 ALR4th 1078.

2. Unfair Competition or Trade Practices § 39 (NCI4th)— construction of water lines by town—no unfair practice

The trial court properly entered summary judgment for defendant town on plaintiff's claim of unfair trade practices based on defendant's construction of water lines and related activities, since defendant constructed its own water system for the annexed area in question pursuant to statutory authority, and, by offering water customers in the annexed area reduced fees for connection to the system, was simply treating those customers in the same manner as it had treated other new customers when extending lines in past annexations.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 477, 492, 499, 500, 508.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like. 41 ALR4th 675.

3. Estoppel § 25 (NCI4th)— providing water service—statements in annexation ordinance—statements by mayor no equitable estoppel

The trial court properly entered summary judgment for defendant town on plaintiff's equitable estoppel claim when plaintiff contended that certain language in annexation ordinances and statements made by the town mayor in 1981 led it to believe that it possessed an exclusive right to provide water service within an annexed area and that it relied upon that belief, but the language in the ordinances was required by statute to insure that residents of the area to be annexed would have access to comparable water service; it in no way served as a promise to be rightfully relied upon that defendant would not in the future con-

struct its own water lines within the annexed area or that plaintiff had the exclusive right to furnish water service there; and statements allegedly made by the mayor were not binding on defendant town, as there was no evidence that the statements were ever expressly ratified by the town council.

Am Jur 2d, Estoppel and Waiver §§ 26-52.

Application of doctrine of estoppel against government or governmental agencies. 1 ALR2d 338.

Comment Note.—Quantum or degree of evidence necessary to prove an equitable estoppel. 4 ALR3d 361.

Doctrine of apparent authority as applied to agent of municipality. 77 ALR3d 925.

Appeal by plaintiff from order entered 29 March 1994 by Judge James R. Strickland in Carteret County Superior Court. Heard in the Court of Appeals 19 April 1995.

Hunton & Williams, by Edward S. Finley, Jr., and James L. Hunt for plaintiff-appellant.

Ward and Smith, P.A., by Kenneth R. Wooten and Cheryl A. Marteney; Bryant & Stanley, by Richard L. Stanley, for defendant-appellees.

MARTIN, John C., Judge.

Plaintiff Carolina Water Service, Inc., of North Carolina is a public utility company authorized by the North Carolina Utilities Commission to furnish water service in portions of Carteret County, North Carolina. The areas served by plaintiff include areas located within the town limits of the Town of Atlantic Beach which had been annexed by the Town in 1987 and 1988. On 18 November 1992, plaintiff brought this civil action seeking injunctive relief and damages against the Town of Atlantic Beach and the individual defendants in their official capacities upon allegations of, *inter alia*, tortious interference with contract, unfair practices and equitable estoppel. These claims were based on the Town's intent to construct and provide a water utility system that would duplicate the plaintiff's water system serving the annexed areas of Atlantic Beach. Plaintiff alleged that immediate and irreparable harm would result to it from the implementation of such a system. Defendants answered, denying the mate-

rial allegations of the complaint and asserting, as affirmative defenses, that defendant Town is exempt from the provisions of Chapter 62 of the North Carolina General Statutes relating to public utilities, is exempt from the provisions of Chapter 75 of the General Statutes relating to unfair and deceptive practices, and is authorized pursuant to Chapter 160A of the General Statutes to construct and operate water utilities for its residents.

Following discovery, the parties filed cross-motions for summary judgment. Briefly summarized, the materials before the trial court showed that prior to 1988 plaintiff had entered into contracts to provide water service to Saw Grass Condominiums (now Dunescape Villas Condominiums), Island Beach and Racquet Club, Coastal Mobile Estates, and several hundred individual homeowners, all of which were located outside the then corporate limits of Atlantic Beach. Pursuant to annexation ordinances dated 2 October 1987, 2 February 1988, and 19 September 1988, the Town annexed the areas served by plaintiff's water system. At that time, plaintiff was providing water service comparable to the water service the Town was providing to users already within its municipal boundaries. The annexation ordinances stated that since comparable service was being provided by plaintiff within the annexed area, the Town would not be required to duplicate plaintiff's service and extend water and sewer lines to the annexed area.

In 1992, the Town added water softener and fluoridation to its water system, neither of which were provided by plaintiff's system. On 16 April 1992, after complaints regarding the water service provided by plaintiff and a petition from residents in the annexed area requesting that the Town extend water service to them, the Town's Board of Commissioners voted to furnish water service to the annexed area. The Town planned to install its new water lines parallel to plaintiff's existing lines. The Town also offered an early sign-up period during which time it would waive the $1,000.00 impact fee and reduce tap fees by $100.00. Similar reductions had previously been offered to residents in other areas of the Town upon annexation and extension of water service. At the time of the filing of this action, the Town had commenced implementation of its plans to install the new water lines, and at the time of the summary judgment hearing, installation of the new water lines had been completed and most of plaintiff's water customers in the annexed area had disconnected from plaintiff's water system and connected to the Town's new lines.

The trial court granted summary judgment in favor of defendants and dismissed all of plaintiff's claims. Plaintiff appeals.

G.S. § 1A-1, Rule 56(c) states that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "The party moving for summary judgment has the burden of establishing a lack of any triable issue of fact." *Varner v. Bryan*, 113 N.C. App. 697, 700, 440 S.E.2d 295, 298 (1994).

> 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 or cannot surmount an affirmative defense which would bar the claim. By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial. (Citations omitted.)

Id. at 701, 440 S.E.2d at 298, *quoting Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

I.

[1] We first consider plaintiff's claim for tortious interference with contract. In its complaint, plaintiff alleges that it had formed valid and binding contracts to furnish water service to Saw Grass Condominiums, Island Beach and Racquet Club, Coastal Mobile Estates, and several hundred individual homeowners in the annexed area, that the Town was aware of the existence of those contracts when it decided to provide water service there, and that when it offered the residents a discount to connect to its lines, they encouraged and induced those residents to breach their contracts with plaintiff, thereby "maliciously, intentionally, and unlawfully" interfering with those contracts. Plaintiff further alleges that "but for the unlawful and malicious interference of the defendants", the contractual relations between it and those residents would have continued without interruption.

In order to establish a claim for tortious interference with contract, a plaintiff must forecast evidence of the following elements:

> First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the person. Second, that the outsider had knowledge of the plaintiff's contract with the third person. Third, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. Fourth, that in so doing the outsider acted without justification. Fifth, that the outsider's act caused the plaintiff actual damages. (Citations omitted.)

Varner, *supra*, at 701, 440 S.E.2d at 298, *quoting Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954).

In the present case, plaintiff's forecast of evidence supports neither the third element necessary to support a claim for tortious interference with contract, i.e., that defendants intentionally induced plaintiff's customers in the annexed area not to perform their contracts with plaintiff, nor the fourth element, i.e., that defendants acted without justification. While there was evidence that in 1992 when the Town chose to extend its water lines into the annexed area, it gave water users in the area an opportunity to connect to its system at a reduced tap fee and no impact fee, the evidence did not show that defendant did so with intent to induce plaintiff's customers not to perform their contracts with plaintiff.

Under the public enterprise statute, G.S. § 160A-311 *et seq.*, a municipality is authorized to establish, operate and finance public enterprises. G.S. § 160A-311 defines "public enterprises" to include "[w]ater supply and distribution systems." The setting of water rates and fees, which is governed by G.S. § 160A-314(a), " 'is a matter for the judgment and discretion of municipal authorities, not to be invalidated by the court absent some showing of arbitrary or discriminatory action.' " *South Shell Inv. v. Wrightsville Beach, N.C.*, 703 F.Supp. 1192, 1206 (E.D.N.C. 1988), *quoting Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 212-13, 280 S.E.2d 490, 492 (1981), *affirmed*, 305 N.C. 248, 287 S.E.2d 851 (1982). When a municipality engages in supplying water to its citizens, it owes the duty of equal service to consumers within its corporate limits, i.e., services must be provided on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. *In re Annexation Ordinance*, 255 N.C. 633, 122 S.E.2d 690 (1961). In this case, when the water service being provided by plaintiff to the annexed area was no longer equal to the water service being provided by the Town to other areas within the municipal

boundaries, the Town had the authority, pursuant to G.S. § 160A-312, to extend its water lines to the annexed area. The overwhelming evidence showed that the Town had no mandatory hook-up requirement. By offering water users in the annexed area with the option, rather than requirement, to connect to the Town's water system at the reduced fees, the Town was simply providing those users with the same opportunity as it had historically given to water users in other areas to which it had extended service.

Even assuming, *arguendo*, that the Town's action in reducing the tap fee and waiving the impact fee should be considered as evidence of an intent on its part to induce plaintiff's customers not to perform their contracts with plaintiff, such actions would be justified as taken in furtherance of legitimate competition. *See Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992) ("interference with contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors"); *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 649, 386 S.E.2d 200, 209 (1989) ("[m]unicipally owned and operated enterprises have been permitted to engage in head-to-head competition with privately owned companies"). For interference with a contract to be tortious, "plaintiff's evidence must show that the defendant acted without any legal justification for his action . . . ." *Varner*, 113 N.C. App. at 702, 440 S.E.2d at 298 (citations omitted). *See Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976). Accordingly, defendants were entitled to summary judgment in their favor as to plaintiff's claim for tortious interference with contract.

II.

[2] Plaintiff also claimed defendants' actions constituted unfair practices. G.S. § 75-1.1(a) prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce . . . ."

> There is no precise definition of "unfair" or "deceptive." Determining whether certain acts or practices are deceptive or unfair depends upon the facts of each case and the impact of those acts or practices on the marketplace . . . . Our courts have previously held that "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscruplous (sic) or substantially injurious to consumers . . . ." Further, a practice is deceptive if it "has the

> capacity or tendency to deceive . . . . Proof of actual deception is unnecessary . . . ." (Citations omitted.)

Ken-Mar Finance v. Harvey, 90 N.C. App. 362, 365, 368 S.E.2d 646, 648, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 545 (1988).

The question of whether a municipally owned and operated water service system can permissibly engage in competition with a privately owned company has been addressed by our Supreme Court in *Power Co. v. Elizabeth City*, 188 N.C. 278, 124 S.E. 611 (1924). In *Power Co.*, Elizabeth City Water and Power Company, a privately owned company, had obtained a franchise from the City of Elizabeth City to furnish water to it and its inhabitants for a term of years. The contract expired and was not extended. The City then chose to start a "rival business" by establishing and operating its own water system. As a result, the Power Company filed a civil action against the City alleging, *inter alia*, the City's actions would seriously affect its business and create an unfair competition. The trial court granted the City's motion to dismiss the complaint.

Our Supreme Court affirmed, holding that the Power Company could not restrain the City from operating its own water system upon the ground that it would create an unfair competition under circumstances that it would destroy or impair the value of the Power Company's property. *Id.* In so holding, the Court observed:

> If the contention of plaintiff was sustained, under the facts and circumstances of this case, it would be practically impossible for a municipality ever to own a utility where a privately owned one then existed. Every rival business in every-day life affects its competitors, sometimes destructively, by having cheaper rent, better location, more efficient help, better marketable product, etc.

Id. at 285, 124 S.E. at 614.

More recently, in *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989), our Supreme Court considered the applicability of the North Carolina unfair practices act, G.S. § 75-1 *et seq.*, to municipalities engaged in a similar public enterprise—the ownership and operation of a cable television system. In that case, Madison Cablevision, a privately owned company, was operating pursuant to a twenty year franchise to provide cable television service to the City of Morganton. When the franchise expired, the City chose not to renew it and instead, began plans to establish and operate its own

cable television system. As a result, Madison Cablevision filed a civil action against the City alleging, *inter alia,* that the City's actions constituted unfair and deceptive practices, violative of G.S. § 75-1 *et seq.* In affirming summary judgment for defendant City, the Supreme Court stated:

> Because cities are authorized to own and operate cable systems and to prohibit others from doing so without a franchise and are not required to issue franchises, it is clear that the legislature contemplated that there would be situations where private corporations would be displaced by municipal cable systems which would operate without competing franchises being issued. In this situation, the legislature cannot be presumed to have intended that conduct so clearly authorized could give rise to state antitrust liability.
>
> * * *
>
> The application of the antitrust provisions of Chapter 75 to municipalities performing functions delegated to them by the legislature would have a paralyzing effect on their ability to effectuate important state policies. Where the legislature has authorized a city to act, it is free to carry out that act without fear that it will later be held liable under state antitrust laws for doing the very act contemplated and authorized by the legislature.

Id. at 655-657, 386 S.E.2d at 212-13.

Similarly, we conclude that, under the circumstances shown by the evidence before the trial court, there is no genuine issue of material fact as to whether construction of water lines and related activities by the Town of Atlantic Beach in the annexed area served by plaintiff is unfair, deceptive, or offensive to public policy. As previously noted, the Town constructed its own water system for the annexed area pursuant to statutory authority and, by offering water customers in the annexed area reduced fees for connection to the system, was simply treating those customers in the same manner as it had treated other new customers when extending lines in past annexations. Accordingly, summary judgment was proper as to plaintiff's claim for unfair practices.

III.

[3] Finally, plaintiff alleged, and contends in this Court, that defendants are estopped from operating its water system in competition

with plaintiff. Equitable estoppel arises when, by its acts, representations, admissions, or by its silence when it has a duty to speak, a party intentionally or through culpable negligence induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his detriment. *Thompson v. Soles*, 299 N.C. 484, 263 S.E.2d 599 (1980).

In the present case, plaintiff contends that certain language in the 1987 and 1988 annexation ordinances and statements made in 1981 by the Town's then mayor, Max Graff, led it to believe that it possessed an exclusive right to provide water service within the annexed area, that it relied upon that belief, and therefore, the Town is estopped to deny it this right. We disagree.

Plaintiff relies upon language in the annexation ordinances to the effect that since the water service then provided to the annexed areas by plaintiff was comparable to that provided by the Town to water users within its boundaries, the Town would not be required to appropriate funds to extend water and sewer lines to the annexed area. These statements were required by G.S. § 160A-37(e)(3) and G.S. § 160A-35(3)b to insure that residents of the area to be annexed would have access to comparable water service; in no way do they serve as a promise to be rightfully relied upon that the Town would not in the future construct its own water lines within the annexed area or that plaintiff had the exclusive right to furnish water service there. There is no serious issue of fact that the service provided by plaintiff at the time the Town undertook to extend its lines was no longer comparable to that being provided by the Town to other water users within its boundaries. Moreover, as noted above, the Town has the authority under the public enterprise statute to construct and administer its own water system, and even the authority to prevent the operation of a competing system without a franchise. *See* N.C. Gen. Stat. § 160A-311 *et seq.* (1994).

Plaintiff also relies upon statements allegedly made by Max Graff, then Mayor of Atlantic Beach, in 1981, prior to the annexations. At that time, according to evidence offered by plaintiff through the affidavit of its president, Mayor Graff stated that the Town did not intend to provide water service to Saw Grass Condominiums, that plaintiff should continue to provide service to the condominiums, and that the Town would not seek to provide water service to any of the areas contained within plaintiff's service area. According to the affidavit, Mayor Graff also agreed in 1987 that plaintiff would continue to pro-

vide water service to areas proposed to be annexed in west Atlantic Beach. Such evidence, however, does not create a genuine issue of material fact because Mr. Graff's statements, even if made, are not binding on the Town, since there was no evidence that the statements were ever "expressly ratified" by the Town Council. *See* N.C. Gen. Stat. § 160A-16 (1994); *see also* N.C. Gen. Stat. § 160A-67 (1994) (stating that "[e]xcept as otherwise provided by law, the government and general management of the city shall be vested in the council"). Accordingly, there being no action or inaction on the part of defendants upon which plaintiff could rightfully rely it had the exclusive privilege to service the residents within the annexed area, summary judgment was proper as to plaintiff's claim based upon equitable estoppel.

For the foregoing reasons, we affirm in all respects the trial court's order granting summary judgment in favor of defendants and dismissing plaintiff's claims.

Affirmed.

Judges EAGLES and WALKER concur.

GABRIELLA MURRAY HIEB AND ROBERT NELSON HIEB, PLAINTIFFS-APPELLEES V. WOODROW LOWERY, DEFENDANT-APPELLANT

No. COA94-1243

(Filed 5 December 1995)

Workers' Compensation § 85 (NCI4th)— workers' compensation benefit—lien against all UIM coverage—judgment modified by another superior court judge—error

Where one superior court judge held that defendant workers' compensation carrier could assert a lien pursuant to N.C.G.S. § 97-10.2 against *all* of the proceeds from the UIM carrier's coverage, the trial court was without authority to exercise its discretion under N.C.G.S. § 97-10.2 to determine the amount of the workers' compensation carrier's lien and to order the balance of the UIM proceeds to be paid to plaintiffs, since plaintiffs' judgment against the tortfeasor exceeded the amount necessary to reimburse the workers' compensation carrier, and the trial court could not speculate on what might happen in the future even

though the workers' compensation carrier was required to pay plaintiff workers' compensation benefits for the remainder of her life and at some point its lien might become greater than the amount of plaintiffs' judgment, and the trial court could not modify, overrule, or change the judgment of another superior court judge previously made in the same case.

Am Jur 2d, Workers' Compensation §§ 110, 451.

Unsatisfied claim and judgment statutes: validity and construction of provisions for deduction from award of sums collectible by claimant from other sources. 7 ALR3d 836.

Judge WYNN dissenting.

Appeal by defendant St. Paul Insurance Company from Order entered 14 July 1994 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 1995.

Charles G. Monnett III & Associates, by Charles G. Monnett III, for plaintiffs-appellees.

Dean & Gibson, by Rodney Dean and J. Bruce McDonald, for defendants-appellants.

JOHNSON, Judge.

Plaintiff Gabriella Hieb was involved in an automobile accident during and in the course of employment for her employer, Howell's Child Care Center. As a result of this accident, plaintiff suffered various injuries, including a frontal lobe concussion, a compression fracture at L-1, a rotator cuff tear, fractured ribs, a bruised kidney, AC joint separation, cervical strain, ankle sprain and strain, bulging discs, post-concussion syndrome, and a closed head injury. Plaintiff is now permanently and totally disabled. Plaintiffs, Gabriella Hieb and her husband, Robert Hieb, subsequently filed suit against defendant Woodrow Lowery, the driver of the vehicle that hit Mrs. Hieb in the 17 October 1989 accident. The matter came on for hearing during the 12 October 1992 civil session of Mecklenburg County Superior Court, Judge Robert E. Gaines presiding. The matter was tried to a jury verdict, awarding Mrs. Hieb the sum of One Million Two Hundred Seventy-nine Thousand Dollars ($1,279,000.00), and Mr. Hieb the sum of Forty Thousand Dollars ($40,000.00). In his 2 November 1992

Judgment, Judge Gaines made the following pertinent Findings of Fact:

> 6. St. Paul Fire and Marine contends that it is entitled to a worker's [sic] compensation lien pursuant to North Carolina General Statute[s] [s]ection 97-10.2 against any amounts payable to Plaintiff Gabriella Murray Hieb under the Hartford policy. The Plaintiffs disagree.
>
> 7. The Plaintiffs have instituted a second action against St. Paul Fire and Marine and Hartford Insurance Company (Mecklenburg County file number 91-CVS-3263) to determine the respective rights of the parties to the benefits of the Hartford underinsured motorist coverage and to determine the amount of such coverage.
>
> 8. That on or about August 28, 1992, an order was entered in that action by the Honorable Robert P. Johnston which holds that the Hartford is allowed to reduce its limits by the amount of worker's [sic] compensation paid or to be paid to Plaintiff and further holding that the proceeds of the Hartford underinsured policy are subject to the lien of St. Paul Insurance Company pursuant to North Carolina General Statute[s] [s]ection 97-10.2. That action is now on appeal to the North Carolina Court of Appeals. This Court is bound by the Order of Judge Johnston unless and until said Order is modified by the Court of Appeals or any other Court of competent jurisdiction. This Court has not addressed the issues raised in that action.

Based on these Findings of Fact, Judge Gaines concluded that "in accordance with the Order of the Honorable Robert P. Johnston, in case number 91-CVS-3263, St. Paul Fire and Marine Insurance Company is entitled to a lien against the proceeds of the Hartford underinsured motorist policy for *all amounts paid, or to be paid,* to Plaintiff Gabriella Murray Hieb as worker's[sic] compensation benefits pursuant to the provisions of North Carolina General Statutes [s]ection 97-10.2." (emphasis added). Plaintiffs gave Notice of Appeal from this Judgment, but later withdrew the notice.

Shortly after the first action was filed, plaintiffs instituted a second action against defendant St. Paul and Hartford Insurance Company (Hartford) in Mecklenburg County Superior Court, *Hieb v. St. Paul Fire & Marine Ins. Co.* to determine the respective rights of the parties to benefits provided by a Hartford UIM policy and to determine the amount of coverage available. An Order, entered in that

action by Judge Robert P. Johnston, provided that Hartford was allowed to reduce its UIM limits by the amount of workers' compensation paid or to be paid in the future to Mrs. Hieb; and that the proceeds of the Hartford UIM policy were subject to the lien of defendant St. Paul pursuant to North Carolina General Statutes section 97-10.2.

Plaintiffs appealed Judge Johnston's decision to our Court. On 2 November 1993, we issued an opinion, *Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. 502, 435 S.E.2d 826 (1993), which reversed that portion of Judge Johnston's Order allowing Hartford to reduce its limits and affirmed that portion of the Order which allowed defendant St. Paul to assert a workers' compensation lien against the UIM benefits. No further appellate review of this decision has been sought.

On or about 20 December 1993, Hartford tendered its policy limit ($475,000.00) to the Office of the Clerk of Superior Court pursuant to the Orders of Judges Johnston and Gaines. As of 18 December 1993, defendant St. Paul had paid $259,042.77 in workers' compensation benefits to Mrs. Hieb. Plaintiffs and defendant St. Paul were unable to agree as to how the Hartford UIM proceeds were to be disbursed. Defendant St. Paul contended that no portion of the Hartford money could be disbursed to either plaintiff until its workers' compensation lien was set and satisfied in full. Unable to reach an agreement with defendant St. Paul as to the disbursement of the Hartford funds, plaintiffs filed a Motion to Modify Judgment, Enforce Judgment and Set Workers' Compensation Lien. Judge Claude S. Sitton allowed this Motion by Order entered 14 July 1994, which concludes in pertinent part:

> 4. That the Court should exercise its discretion under the provisions of North Carolina General Statute[s] [s]ection 97-10.2 to determine the amount of St. Paul's compensation lien.
>
> 5. That the sum of $241,677.77 is fair and equitable for St. Paul to receive in satisfaction of its workers' compensation lien.
>
> 6. That it is fair and equitable for the balance of the Hartford UIM proceeds be paid to the Plaintiffs.

It was, therefore, ordered:

> 1. That St. Paul shall be entitled to recover the sum of $241,677.77 as full satisfaction of any workers [sic] compensation lien it may

have on account of any worker's [sic]compensation benefits paid or to be paid, to Plaintiff Gabriella Murray Hieb as a result of the automobile accident which is the subject of this action;

2. That the Plaintiffs['] attorney, Charles G. Monnett III, shall be entitled to an attorney's fee of $80,551.20 from the above sum as provided by the terms of the Judgment entered in this action on November 2, 1992.

3. That the Plaintiffs' attorney, Charles G. Monnett III[,] shall pay to St. Paul Fire and Marine, for the proceeds of the Hartford UIM policy, the sum of $161,126.57 within 5 days from the entry of this Order;

4. That the sums remaining from the Hartford UIM proceeds after the payment of the above amounts shall be paid to the Plaintiffs.

Consequently, on 28 July 1994, plaintiffs' counsel issued a check on his trust account to defendant St. Paul in the amount of $161,126.57 pursuant to Judge Sitton's Order. Defendant St. Paul appeals.

Defendant argues that Judge Sitton did not have authority to enter the 14 July 1994 Order. We must agree.

Generally, one superior court judge may not modify, overrule, or change the judgment of another superior court judge previously made in the same case, on the same issue. *Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E.2d 484 (1972); *Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980), *disc. review denied*, 302 N.C. 217, 276 S.E.2d 914 (1981). There are, however, some statutory exceptions to this rule. *See, e.g.*, North Carolina General Statutes §§ 97-10.2 (1991) and 1A-1, Rule 60 (1990).

Section 97-10.2(j) provides in pertinent part:

(j) Notwithstanding any subsection in this section, in the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier . . . either party may apply to the resident superior court judge of the county in which the action arose or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien. . . .

The facts in the instant case tend to show that Mrs. Hieb obtained a judgment from defendant Lowery in the amount of $1,279,000.00. Of this judgment, Mrs. Hieb stands to collect from insurance proceeds, only $500,000.00, which represents the $25,000.00 policy limit already tendered by defendant Lowery's insurance company, Integon Indemnity Company (Integon) and the Hartford UIM policy limit of $475,000.00 (the original policy limit of $500,000.00 minus a $25,000.00 reduction for the $25,000.00 paid by Integon), which is the subject of this dispute. Unfortunately, Mrs. Hieb may never collect the remainder of the monies awarded to her in the 14 July 1994 Judgment. In his Order, Judge Johnston held that defendant St. Paul could assert a lien pursuant to § 97-10.2 against *all* of the proceeds from Hartford's UIM coverage. Our Court affirmed this portion of Judge Johnston's Order. As of April 1994, defendant St. Paul had paid Mrs. Hieb approximately $266,400.00 in workers' compensation benefits. This situation, however, does not call section 97-10.2(j) into play, as the "judgment" (in excess of $1.25 million) exceeded any amount necessary to reimburse the workers' compensation insurance carrier. Arguably, as defendant St. Paul is required to pay Mrs. Hieb workers' compensation benefits for the remainder of her life, at some point its lien may become greater than the amount of Mrs. Hieb's judgment, at which time, section 97-10.2(j) *may* become applicable. However, at the time that Judge Sitton entered his Order, such was not the case.

It is not for Judge Sitton, nor this Court, to speculate upon what may occur in the future. Giving the statute its plain meaning, requires us to read the term "judgment" to mean just that, and to reject plaintiffs' argument that we should look only at the insurance "proceeds" that Mrs. Hieb is to receive in determining the applicability of section 97-10.2(j). In light of the foregoing, we are unable to say that Judge Sitton's actions were proper under section 97-10.2(j).

Had the judge acted pursuant to Rule 60(b) *sua sponte* or upon motion, we would have a far different result herein. *See Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991). In fact, this Court has previously held that a superior court judge has authority to grant relief under a section (b) motion without offending the rule that precludes one superior court judge from reviewing the decision of another. *Hoglen v. James*, 38 N.C. App. 728, 248 S.E.2d 901 (1978). Alas, however, plaintiff made no Rule 60(b) motion, nor did Judge Sitton purport to act pursuant to Rule 60(b) in his 14 July 1994 Order. The facts, in the case *sub judice*, though quite heartrending, present

us with little choice. We must reverse Judge Sitton's decision in this regard.

Defendant also argues that Judge Sitton's Order raises additional issues which must be addressed by our Court. Defendant contends that this Court should review the award of attorneys' fees to plaintiffs' counsel. Defendant argues that the attorneys' fees awarded to plaintiffs' attorney exceeds the one-third statutory maximum permitted in section 97-10.2(f)(1)b and that plaintiffs' attorney has violated Rule 5.1 of the North Carolina Rules of Professional Conduct.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires that a party present the trial court with a timely request, objection, or motion, in order to preserve a question for appellate review. If the party fails to appropriately preserve his question for appellate review, he is said to have waived his right to appellate review of that question. N.C. R. App. P. 10.

Notably, defendant raises these meritless contentions for the first time on appeal. As defendant has failed to adequately preserve these issues for appellate review, we need not address them at this juncture.

The decision of Judge Sitton must, nonetheless, be reversed as he was without authority under section 97-10.2 to modify another superior court judge's order.

Reversed.

Judge EAGLES concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

The dispute giving rise to this matter arises from a jury award obtained by Mrs. Hieb in an amount in excess of $1.5 million. However, the source of funds available to satisfy that judgment are the proceeds of the Hartford UIM policy in the amount of $475,000.00.

In the first appeal involving this case, this Court interpreted N.C. Gen. Stat. § 97-10.2 (1991) to allow the workers' compensation insurer, St. Paul Insurance Company, a "lien against all amounts paid or to be paid to Mrs. Hieb by Hartford pursuant to its UIM coverage."

Hieb v. St. Paul Fire & Marine Ins. Co., 112 N.C. App. 502, 507, 435 S.E.2d 826, 828 (1993).

Thus, while this Court affirmed that St. Paul was entitled to a lien, it did not determine the *amount* of the lien, nor did it consider the equitable implications of N.C.G.S. § 97-10.2(j) which provides in pertinent part:

> [I]n the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, . . . either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, *the judge shall determine, in his discretion, the amount, if any, of the employer's lien and the amount of cost of the third-party litigation to be shared between the employee and employer* . . . .

(emphasis supplied).

Following our decision in *Hieb I*, it became painfully obvious to Mrs. Hieb that since this Court had determined that St. Paul was entitled to a lien on all amounts paid or to be paid by Hartford, it only would be a matter of time before the continuing workers' compensation payments by St. Paul would erase all of the benefits that she had gained by litigating her personal injury action.

Since the prior judgment did not address the issue of the amount of the judgment, she proceeded under N.C.G.S. § 97-10.2(j) to obtain an equitable remedy. In ruling on this matter, Judge Sitton recognized that the lien, if allowed to continue to attach on continuing payments of workers' compensation, would exceed the judgment. To assume otherwise is speculation. That is why N.C.G.S. § 97-10.2(j) states that the trial court shall, in its discretion, determine the *amount* of the workers' compensation lien where the full proceeds from any judgment or settlement are insufficient to satisfy the lien.

The trial court, as a matter of law, had full authority to exercise its discretion and set the *amount* of the workers' compensation lien to be repaid and to permit the remaining funds to be disbursed to Mr.

and Mrs. Hieb. Indeed, it would be an unjust result to hold that a court has no authority to determine the subrogation amount under N.C.G.S. § 97-10.2(j) once it determines that a party is entitled to an undetermined and continuing lien amount on present proceeds.

I, therefore, respectfully dissent.

STATE OF NORTH CAROLINA v. JACKIE CRADDOCK SMITH, DEFENDANT-APPELLANT

No. COA95-178

(Filed 5 December 1995)

1. Burglary and Unlawful Breakings § 8 (NCI4th)— unoccupied dwellings—elderly residents absent due to ill health—sufficiency of evidence

Homes owned by the elderly victims were "dwelling houses of another" within the meaning of the burglary statute, even though the victims were living elsewhere due to health problems when the burglaries occurred, since a dwelling house does not lose its character merely because its elderly owner/occupant is residing elsewhere due to ill health; in this case the owners expressed an intent to return to their homes when they were able; and all of the homes contained appliances, furniture, and various personal effects belonging to the owners.

Am Jur 2d, Burglary §§ 3, 4.

Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering. 20 ALR4th 349.

2. Criminal Law § 382 (NCI4th)— trial court questioning witness—no error

The trial court did not err in questioning a prosecution witness where the judge acted merely to clarify the witness's testimony on a particular point.

Am Jur 2d, Judges § 171; Trial §§ 274, 275, 304.

Appeal by defendant from judgment entered 28 September 1994 by Judge Jerry R. Tillet in Beaufort County Superior Court. Heard in the Court of Appeals 24 October 1995.

Attorney General Michael F. Easley, by Assistant Attorney General David G. Heeter, for the State.

Seth H. Edwards for defendant-appellant.

JOHNSON, Judge.

The evidence presented at trial tended to show that on 21 November 1993, defendant Jackie Craddock Smith did break and enter, during the nighttime, several residences and one storage building located in Pinetown, North Carolina. The residences were owned by Myrtle Peele, Edith Jackson, and Noah Leggett. Mr. Leggett also owned the storage building, located near his residence, that was broken into. Additionally, the evidence showed that defendant did break and enter, during the nighttime, Starley Bell's residence in Bath, North Carolina. On each occasion, defendant was accompanied by one or more co-defendants and various items of personal property were stolen.

Co-defendants Michael Keech, Rodney Jackson, and Michael Lewis testified in regards to defendant's involvement in the events of 21 November 1993 and 4 January 1994. Defendant's daughter, Chastity Jefferson, who was also present on the above-mentioned occasions, testified as to her mother's involvement in the crimes. Ms. Jefferson was not, however, charged with any crimes.

On 21 November 1993, Edith Jackson's residence, jointly owned by son, Dallas Jackson, was unoccupied. Due to health problems, Ms. Jackson had been living in Virginia with her daughter at that time. There were, however, appliances, furniture and various other personal effects belonging to Ms. Jackson, in the residence at the time of the break-in. In her absence, Ms. Jackson's son mowed the yard and maintained the residence. A week prior to the break-in, Dallas Jackson had shown the property to some people who were interested in buying it. There was no evidence presented at trial as to how long Ms. Jackson had resided with her daughter in Virginia. Ms. Jackson died on 22 November 1993, the day after defendant broke into her home.

Noah Leggett's home was also unoccupied on 21 November 1993. Mr. Leggett, who had congestive heart problems, was, at that time, living at the Autumn Field Rest Home in Belhaven, North Carolina. Prior to moving to the rest home, however, Mr. Leggett had lived in his home in Pinetown. Mr. Leggett had resided at the rest home between

one and six months prior to the break-in. At the time of the break-in, there were various personal items belonging to Mr. Leggett in the residence. In addition, a variety of tools were stored in the shed adjacent to the residence. Mr. Leggett testified at trial that he intended to return to his home "[a]s soon as [he] was able." Mr. Leggett had, in fact, returned to his Pinetown residence for a time after leaving the rest home, before having a heart attack. Thereafter, he was hospitalized in Washington, North Carolina before moving into his daughter's home in Durham, North Carolina—where he resided at the time of trial. Mr. Leggett testified that he had spent "a lot of time away from home due to illness."

Similarly, Myrtle Peele's home was unoccupied when defendant broke into her residence on 21 November 1993, because she was living in a nursing home at that time. When questioned on voir dire to determine her competency to testify, Ms. Peele testified that, on 21 November 1993, she resided at the Beaufort County Nursing Home, and had so resided since 18 June 1993. Prior to 18 June, however, Ms. Peele had resided in her home. Further, she testified that she would return to her home "if [she] was able." When the break-in occurred, Ms. Peele's house still contained various personal items belonging to her. Her brother, who lived approximately a mile and a half away, acting on her behalf, had checked her house about two weeks prior to the evening of 21 November.

At the conclusion of the State's evidence, defendant made a Motion to Dismiss the charges against her. Specifically, defendant argued that as the homes owned by Edith Jackson, Noah Leggett, and Myrtle Peele, had been unoccupied for an extended period of time, they were not "dwelling houses" and, therefore, could not support a conviction for three of the four counts of Second Degree Burglary. Defendant's motion was subsequently denied and the trial continued to a jury verdict, which found defendant guilty of four counts of Second Degree Burglary, five counts of Felonious Larceny, and one count of Felonious Breaking and/or Entering. Consequently, defendant was sentenced by Judge Jerry R. Tillet to four consecutive twenty-year sentences in the North Carolina Department of Corrections. Defendant gave written Notice of Appeal to this Court, and thereafter, timely perfected said appeal.

[1] Defendant's first argument on appeal is that the trial court erred in denying his Motion to Dismiss three of the four counts of Second Degree Burglary because there was insufficient evidence that the

properties of Ms. Jackson, Mr. Leggett, and Ms. Peele were "dwelling houses of another." We cannot agree.

In considering a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Mlo*, 335 N.C. 353, 440 S.E.2d 98, *cert. denied, Mlo v. North Carolina*, —— U.S. ——, 129 L. Ed. 2d 841 (1994). The court must determine if the evidence, in the light most favorable to the State, shows substantial evidence of each offense charged and, further, shows that defendant committed the offense. *Id.* Substantial evidence is that amount of relevant evidence which a reasonable mind would find sufficient to support a conclusion. *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994). If there is any evidence presented at trial which tends to show that the defendant committed the offense at issue, the motion is properly denied and instead, the defendant's guilt or innocence must be left to the jury. *State v. Vinson*, 63 N.C. 335 (1869).

North Carolina General Statutes section 14-51 provides that the constituent elements of burglary are: (1) the breaking (2) and entering (3) in the nighttime (4) into the dwelling house or sleeping apartment (5) of another (6) with the intent to commit a felony therein. North Carolina General Statutes § 14-51 (1993); *State v. Hobgood*, 112 N.C. App. 262, 264, 434 S.E.2d 881, 882 (1993), *disc. review denied*, 335 N.C. 772, 442 S.E.2d 523 (1994) (*citing State v. Beaver*, 291 N.C. 137, 141, 229 S.E.2d 179, 181 (1976)). If the dwelling house is not actually occupied at the time of the crime, the burglary is in the second degree. *Id.* In order to obtain a conviction for burglary, it is paramount that the State produce substantial evidence that tends to show that the premises broken into was the dwelling house of another. *State v. Harold*, 312 N.C. 787, 325 S.E.2d 219 (1985).

Although the issue in the instant case as to whether a dwelling house loses its character merely because its elderly owner/occupant is residing elsewhere, due to ill health, is one of first impression, it is not a difficult one, requiring little more than a common-sensical analysis. The State references two cases in which North Carolina courts have addressed shorter periods of the vacancy of a dwelling which had been the subject of burglary. *See State v. Jolly*, 297 N.C. 121, 254 S.E.2d 1 (1979); *State v. Simons*, 65 N.C. App. 164, 308 S.E.2d 502 (1983). Our Courts have also addressed the burglary of dwelling houses which were unoccupied for longer periods of time in *State v. Helton*, 79 N.C. App. 566, 339 S.E.2d 814 (1986) and *State v.*

Alexander, 18 N.C. App. 460, 197 S.E.2d 272, *cert. denied*, 283 N.C. 666, 198 S.E.2d 721 and 284 N.C. 255, 200 S.E.2d 655 (1973), but these cases were decided on other grounds. In *Helton*, the house which was the subject of the burglary, had been unoccupied for an extended period during November and early December, while in *Alexander*, the burglarized, unoccupied house had a "For Sale" sign in the front yard, but still had household goods inside.

It must also be noted that both Mississippi and California courts have decided cases which are reminiscent of the facts in the instant case. In *Course v. State*, 469 So.2d 80 (Miss. 1985), it was held that the house which had been broken into, was a dwelling house, in spite of the fact that the owner had been living in a nursing home for two months prior to the time of the burglary. In *Course*, as in the instant case, the owner had left her personal possessions in her house and intended to return to her home, when her health permitted. In *People v. Marquez*, 192 Cal.Rptr. 193 (Ct. App. 1983), the court found that the defendant had burglarized an inhabited dwelling house, although a conservator had been appointed to handle the affairs of the owner. The owner had moved into a boarding house, where she had lived for more than a year before the burglary, and it was doubtful if she would return to her home. The residence was, however, being maintained by the conservator. In both of these cases, the respective courts looked at the intent of the owner/occupier or the person entitled to occupy the dwelling to see if there was evidence that the owner had ever abandoned the residence.

We also find several treatises instructive on this issue. In LaFave & Scott's treatise on Criminal Law, it is stated, "[i]f the residents are away, be it for a short time or for extended portions of the year, it will still suffice as a dwelling house." LaFave & Scott, Criminal Law § 8.13, at 796 (2d ed. 1986). Wharton's treatise on Criminal Law likewise notes, "[i]f a person leaves his dwelling house for a particular or indefinite period of time intending thereafter to return— . . . his dwelling house remains a dwelling house even during his absence." Wharton's Criminal Law, Burglary § 335, at 206-07 (14th ed. 1980).

Often, where there is no direct evidence in regards to a person's intent, we must look to surrounding circumstances to find it. In fact, Perkins and Boyce's treatise on Criminal Law explains, "no lapse of time, however great, will be sufficient where there is throughout a fixed intention of returning [to one's dwelling]." Perkins and Boyce, Criminal Law at 258-59 (3d ed. 1982). A person's intention to return to

his home is determined mainly from the condition in which the house was left, from the fact that the household effects were or were not taken away, and from the fact that the occupants had or had not established domicile elsewhere. 13 Am.Jur.2d *Burglary* § 4.

The facts in the case *sub judice*, taken in the light most favorable to the State, show that the homes of Ms. Jackson, Mr. Leggett, and Ms. Peele were all unoccupied at the time that they were burglarized. At trial, both Mr. Leggett and Ms. Peele expressed an intent to return to their respective homes as soon as their health permitted. Ms. Jackson, however, had died the day after her home was broken into, and there was no direct evidence presented at trial, in regards to her intent to return to her home. Further, though the evidence tended to show that Ms. Jackson's son had shown the house to a potential buyer during the week prior to the break-in, no sale had been consummated at the time of the break-in. On 21 November 1993, neither Ms. Jackson nor her son demonstrated any intent to abandon the house as a residence. In fact, there was testimony to the effect that *all* of the residences contained various items of personal property belonging to their owners. Moreover, in Ms. Jackson and Ms. Peele's case, the residences were being maintained by relatives until their owners could return home.

We do not think, as defendant contends, that the character of a dwelling place changes simply because its owners are absent for a time, especially where there are objects of value left in the homes and there are persons who maintain the homes in the owners' absence. Each residence contained appliances, furniture, and various personal effects belonging to their respective owners. In the ordinary course of events, one does not usually leave items of value in a property that they have abandoned or intend to abandon. The facts and attendant circumstances indicate that all of the owners had the requisite intent to return to their homes, if at all possible.

Defendant would have us believe that when elderly citizens leave their homes and, due to health problems, move to another residence until they are able to care for themselves, they have abandoned their homes or established domicile elsewhere. We find this position to be unpersuasive. As the figures of life-expectancy increase, our nation's elderly will increasingly face the need to move into residential care or nursing facilities for various periods of time. But this is not to say that their homes will lose their characteristics of being "dwelling places." It would take more than mere absence to negate the nature of the

home as being a "dwelling place." Defendant's argument to the contrary, therefore, must fail.

[2] Plaintiff also argues that the trial court erred in questioning Mr. Leggett, a State witness, about his intent to return to his house. Again, we do not agree.

Our Courts have repeatedly recognized the authority that a trial judge has in determining the manner in which a trial is conducted. His decision is to be disturbed on appeal, only in the event that there was some abuse of discretion. *State v. McCray*, 312 N.C. 519, 324 S.E.2d 606 (1985). In fact, our Supreme Court has specifically held that a judge may question a witness for the purpose of clarifying his testimony, without expressing an opinion on the evidence or witnesses. *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981). " 'It is entirely proper, and sometime necessary, that [a judge] ask questions of a witness so that the "truth, the whole truth, and nothing but the truth" be laid before the jury.' " *State v. Freeman*, 280 N.C. 622, 627, 187 S.E.2d 59, 63 (1972) (*quoting Eekhout v. Cole*, 135 N.C. 583, 589, 47 S.E. 655, 657 (1904)).

In the instant case, the trial judge, at the close of redirect examination of Noah Leggett, asked Mr. Leggett, "[w]hen you left to go to the rest home did you intend on coming back to your place in Pinetown to sleep there regularly?" Mr. Leggett replied, "[a]s soon as I was able." The judge, it seems, acted merely to clarify Mr. Leggett's testimony as to his intent to return to his Pinetown home. Such action was within the trial court's discretion, and we therefore, find no error.

In light of the foregoing, we find no error in the instant case.

No error.

Judges WALKER and SMITH concur.

JOHN PAUL TROUTMAN, EMPLOYEE-PLAINTIFF v. WHITE & SIMPSON, INC., EMPLOYER-DEFENDANT, AND EMPLOYERS MUTUAL CASUALTY COMPANY, CARRIER-DEFENDANT

No. COA95-4

(Filed 5 December 1995)

1. **Workers' Compensation § 476 (NCI4th)— seventy-one-year-old claimant—eligibility for lifetime benefits—hearing brought without reasonable ground**

The Industrial Commission did not err in concluding that defendant brought the subject hearing without a reasonable ground where defendant argued that plaintiff was not entitled to receive lifetime workers' compensation benefits because he had "retired" and therefore was receiving double recovery where the evidence showed that after reaching the age of sixty-five, plaintiff continued to work for defendant for forty hours per week at the same salary; there was no evidence that the seventy-one-year-old plaintiff would be unable to work were he not injured; and at the time of the hearing in this case, the law in North Carolina was unequivocal that a claimant's entitlement to a workers' compensation disability award is unrelated to either the claimant's eligibility to retire or his decision to retire.

Am Jur 2d, Workers' Compensation §§ 414, 725.

2. **Workers' Compensation § 476 (NCI4th)— hearing brought without reasonable ground—attorney's fees and other costs assessed against party bringing hearing**

The Industrial Commission is authorized under N.C.G.S. § 97-88.1 to assess attorney's fees and other costs for the entire case against a party prosecuting or defending a hearing without reasonable grounds. Therefore, where defendant brought this hearing without a reasonable ground, the Commission properly concluded that an award of attorney's fees of 25% of the compensation accruing to plaintiff in the future was reasonable.

Am Jur 2d, Workers' Compensation §§ 414, 725.

Appeal by employer-defendant from opinion and award entered 14 July 1994 by the North Carolina Industrial Commission, Coy M. Vance, Deputy Commissioner. Heard in the Court of Appeals 4 October, 1995.

Chandler, deBrun & Fink, by Steven B. Hayes for plaintiff-appellee.

Caudle & Spears, P.A., by Lloyd C. Caudle and Sean M. Phelan for defendants-appellants.

WYNN, Judge.

Plaintiff, John Troutman, was injured on 24 April 1991 while working as a floor sander for defendant, White & Simpson, Inc. Mr. Troutman was seventy-one years old at the time of his injury and had worked for White & Simpson, Inc. in the same position for fifty years. After reaching the age of sixty-five, he continued to work at that company for 40 hours per week, earning the same salary that he had before turning sixty-five.

Defendants acknowledged that plaintiff suffered an injury by accident arising out of and in the course of his employment, and began paying workers' compensation benefits to the plaintiff. Nonetheless, defendants requested a hearing before the North Carolina Industrial Commission contending that plaintiff was not entitled to lifetime benefits under N.C. Gen. Stat. § 97-29 (1991) because the plaintiff had already retired at the time of his injury. At the hearing on 3 November 1992, plaintiff initially testified that he "retired" at age sixty-five. Plaintiff later testified that his work schedule changed "very little if any" when he turned sixty-five.

Following the hearing, Deputy Commissioner Scott Taylor issued an Opinion and Award finding that:

> 13. Defendants brought the hearing of the above-captioned matter contending that plaintiff's age, health and status as a retired employee indicate that he would not be working for the balance of his life and, therefore, would be precluded from receiving lifetime compensation benefits under the North Carolina Workers' Compensation Act.
>
> 14. Based upon defendants' theory for bringing this matter for hearing, the undersigned finds that the hearing of this matter was brought without reasonable ground, and was based in stubborn, unfounded litigiousness.

Having found that the hearing was brought without reasonable ground, and based in stubborn, unfounded litigiousness, Deputy

Commissioner Taylor awarded attorney's fees under N.C. Gen. Stat. § 97-88.1 (1991) under the following terms:

> 1. Defendants shall pay total and permanent disability compensation for the remainder of plaintiff's life or until defendants obtain permission from the Industrial Commission to cease payment of compensation, whichever first occurs, at the rate of $281.01 per week, beginning 6 October 1992. . . .
>
> . . . .
>
> 3. A reasonable attorney fee of twenty-five percent of the compensation due plaintiff under Paragraph 1 of this AWARD is approved for plaintiff's counsel and shall be paid as follows: [I]n addition to the weekly sums due plaintiff, defendants are assessed and shall pay to plaintiff's counsel an amount equal to every fourth compensation check due plaintiff. Said assessed sums shall be paid to plaintiff's counsel concurrently with the sums due plaintiff.

Defendants appealed to the Full Commission (hereinafter Commission) which modified and affirmed the opinion of the Deputy Commissioner. The Commission found that the defendants did not stop payments to the plaintiff during the pendency of the hearing, as found by the Deputy Commissioner, and thereby reversed that portion of attorney's fee award based on payments owed as of 3 November 1992. Defendants do not challenge this portion of the Commission's opinion.

There are two issues on appeal: (I) Whether the Commission erred by finding that defendants brought this matter for hearing "without reasonable ground, and based in stubborn, unfounded litigiousness;" and (II) If not, whether the Commission exceeded its authority by awarding attorney's fees in the amount of 25% of the plaintiff's recovery. We affirm the opinion of the Commission in all respects.

I

[1] Appellant first contends that the Commission erred in finding that defendants brought the hearing before the Commission without reasonable ground. We disagree.

Whether the defendant had a reasonable ground to bring a hearing is reviewable by this Court *de novo*. *Robinson v. J.P. Stevens*, 57

N.C. App. 619, 627, 292 S.E.2d 144, 149 (1982). This requirement ensures that defendants do not bring hearings out of "stubborn, unfounded litigiousness." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990).

In the case *sub judice*, defendants argued at the hearing below that the plaintiff was not entitled to receive lifetime workers' compensation benefits because he had "retired." In support of this argument, defendant cited Larson's treatise on workmen's compensation. The section cited by defendant states:

> [I]f a workman undergoes a period of wage loss due to [physical disability, economic unemployment and old age] it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit.

4, Larson, *Workmen's Compensation Law* § 97.10. This passage deals with the situation where the plaintiff is injured and unable to work due to old age, and receives social security and workers' compensation benefits. In such a situation there is an unfair double recovery since old age is the reason for unemployment rather than an injury suffered during employment. In the instant case, there is no evidence in the record that Mr. Troutman would be unable to work were he not injured. As such, the above quoted section is inapplicable.

In addition, this Court has previously rejected an argument similar to the one presented in the instant case. In *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 349 S.E.2d 70 (1986) this Court stated what a plaintiff must prove before the Commission may award disability compensation:

> In order for the Commission to award disability compensation, the plaintiff must prove: (1) that he was incapable of earning the same wages he had earned before his injury in the same employment, (2) that he was incapable of earning the same wages he had earned before his injury in any other employment, and (3) that his incapacity was caused *by his injury* or occupational disease.

Heffner, 83 N.C. App. at 87-88, 349 S.E.2d at 74 (citations omitted; emphasis supplied). In the instant case, the defendants stipulated that the plaintiff had met this burden of proof. There, however, is no further requirement that the plaintiff's benefits be limited because of retirement. Rather, in *Heffner* the Court stated:

> Because disability measures an employee's present ability to earn wages, . . . and is unrelated to a decision to withdraw from the labor force by retirement, the Commission may not deny disability benefits because the claimant retired where there is evidence of diminished earning capacity caused by an occupational disease. So long as the disease has, in some way, diminished the employee's ability to earn wages, he may recover disability compensation.

Id. at 88, 349 S.E.2d at 74 (citations omitted). This rule of law applies to workplace injuries as well. Therefore, at the time of the hearing in this case, the law in North Carolina was unequivocal that a claimant's entitlement to a workers' compensation disability award is unrelated to either the claimant's eligibility to retire or his decision to retire.

Defendants nevertheless contended at oral argument before this Court that since they were unaware of the holding in *Heffner*, they should be excused for having advanced their position at the hearing below. That is absurd. Defendant's ignorance of a 1986 North Carolina case directly on point provides no support for their contention that grounds for requesting a hearing in 1991 were reasonable. Such a construction would encourage incompetence and thwart the legislative purpose of N.C.G.S. § 97-88.1. We affirm the Commission's conclusion that defendant brought the subject hearing without a reasonable ground. *See Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 191-92 (1990) (upholding an award of the Commission based on prosecution of a hearing without reasonable grounds).

II

[2] Defendant next contends that the Commission erred in concluding that an award of attorney's fees in the amount of 25% of the compensation accruing to the plaintiff in the future was reasonable. We disagree.

As a general rule, each side bears the cost of its own attorney's fees, and attorney's fees may only be awarded when expressly authorized by statute. *Joines v. Herman*, 89 N.C. App. 507, 510, 366 S.E.2d 606, 608 (1988).

In the instant case, there are two statutory provisions under which the Commission could have awarded payment of plaintiff's attorney's fees by defendants; N.C. Gen Stat. § 97-88 (1991), and N.C. Gen Stat. § 97-88.1 (1991). N.C.G.S. § 97-88 provides:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of *such hearing or proceedings* including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

(emphasis supplied).

N.C.G.S. § 97-88.1 provides:

> If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess *the whole cost of the proceedings* including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

(emphasis supplied).

N.C.G.S. § § 97-88 and 97-88.1 are supplementary in nature. N.C.G.S. § 97-88 allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee. *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994). There is no requirement that the appeal be brought without reasonable ground. Under N.C.G.S. § 97-88, the Commission may only award "*the cost to the injured employee of such hearings or proceedings including therein* [a reasonable attorney's fee]." Consequently, under N.C.G.S. § 97-88, the Commission is empowered to award to the injured employee attorney's fees only for the portion of the case attributable to the insurer's appeal(s).

By contrast, an award of attorney's fees under N.C.G.S. § 97-88.1 requires that the litigation be brought, prosecuted, or defended with-

out reasonable ground. The purpose of this section is to prevent "stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990). (citations omitted). In such cases, the Commission is empowered to award: *the whole cost of the proceedings including* [reasonable attorney's fees]. As such, the Commission may assess the whole costs of litigation, including attorney fees, against any party who prosecutes or defends a hearing without reasonable grounds.

It is logical that the Legislature would fashion a more encompassing remedy in N.C.G.S. § 97-88.1 than is found in N.C.G.S. § 97-88. N.C.G.S. § 97-88.1 only applies when one side brings or continues litigation before the Commission or a court without reasonable grounds. If the remedy were the same under both statutory sections, defendant insurers would have no greater disincentive to pursue frivolous appeals than that already present under N.C.G.S. § 97-88 against pursuing meritorious appeals. The Legislature must have intended that defendant insurers pursuing appeals without reasonable grounds face a potentially harsher penalty than defendant insurers pursuing appeals with reasonable grounds.

In addition, if N.C.G.S. § 97-88.1 provided the same remedy as N.C.G.S. § 97-88, then N.C.G.S. § 97-88.1 would be mere surplusage, since N.C.G.S. § 97-88 already grants the Commission the authority to award the injured employee attorney's fees without regard to whether the matter was brought on reasonable grounds. The presumption is that no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms. *Electric Service v. City of Rocky Mount*, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974).

We hold, therefore, that the Commission is authorized under N.C.G.S. § 97-88.1 to assess attorney's fees, and other costs, for the entire case, against a party prosecuting or defending a hearing without reasonable grounds. *See, e.g., Mullinax v. Fieldcrest Cannon, Inc.*, 100 N.C. App. 248, 253, 395 S.E.2d 160, 163 (1990) (requiring that defendant pay the plaintiff's attorney's fee); *Poplin v. PPG Industries*, 108 N.C. App. 55, 422 S.E.2d 353 (1992). The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award

will not be disturbed absent an abuse of discretion. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 394, 298 S.E.2d 681, 683 (1983); N.C. Gen. Stat. § 97-90 (1991).

The opinion of the Commission is,

Affirmed.

Judges JOHNSON and EAGLES concur.

WILLIAM EUGENE JOHNSON, IV, ALLEGEDLY WHOLLY DEPENDENT ADULT CHILD; JONATHAN DANIEL PHILLIPS JOHNSON, BY HIS GUARDIAN AD LITEM; WILLIAM EUGENE JOHNSON, JR., CHILD; JEREMY B. DOBBINS, ALLEGEDLY SUBSTANTIALLY DEPENDENT STEPCHILD; AND DEBORAH S. JOHNSON, ALLEGED WIDOW OF WILLIAM EUGENE JOHNSON, III, DECEASED EMPLOYEE, PLAINTIFFS v. BARNHILL CONTRACTING COMPANY, EMPLOYER; AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA94-1223

(Filed 5 December 1995)

1. Workers' Compensation § 261 (NCI4th)— computation of weekly wage—consideration of wages at last two places of employment

In computing a deceased employee's average weekly wage, the Industrial Commission erred in considering only the employee's wage with his last employer for the four months preceding his death and not his higher wages with his employer during the fifty-two weeks preceding his death, since the first employer experienced financial difficulties and ultimately bankruptcy; plaintiff was a supervisor for this employer; the subsequent employer bought some of the first employer's assets and hired the deceased employee along with other employees to complete the DOT job in progress at the time of bankruptcy; and these circumstances demonstrated a continuity between the two employments which justified consideration of the employee's weekly wages at the first employment. N.C.G.S. § 97-2(5).

Am Jur 2d, Workers' Compensation §§ 418-430.

2. Workers' Compensation § 277 (NCI4th)— employee and wife separated at time of death—wife not entitled to benefits

The Industrial Commission did not err in denying the claim of an employee's wife for death benefits where the employee and his wife had been separated for several months when he died; the evidence was sufficient to support the Commission's finding that the employee did not abandon or desert his wife; the evidence showed that defendant lived in another town during the week because he worked there, that he lived at home with his wife on weekends, and that his wife was the one who chose to move out of the marital residence; and the Commission found there was no credible evidence of a drinking problem or abusive conduct that would constitute justifiable cause for the wife to live apart from her husband.

Am Jur 2d, Workers' Compensation §§ 205, 206.

Appeal by plaintiffs from Opinion and Award of the North Carolina Industrial Commission filed 20 May 1994 and Amended Opinion and Award filed 31 May 1994. Heard in the Court of Appeals 23 August 1995.

Van H. Johnson for plaintiff-appellant Deborah S. Johnson and Pritchett, Cooke and Burch, by Stephanie B. Irvine, for plaintiffs-appellants William E. Johnson, IV. and W.E. Johnson, Jr., guardian ad litem for Jonathan Daniel Phillips Johnson.

Maupin, Taylor, Ellis & Adams, P.A., by Winston L. Page, Jr., for defendants-appellees.

LEWIS, Judge.

This is a dispute over entitlement to workers' compensation death benefits and the computation of the deceased employee's average weekly wage.

William Eugene Johnson, III ("employee") died on 11 February 1993 as a result of a workplace accident that occurred while he was working for defendant Barnhill Contracting Company ("Barnhill"). Prior to working for Barnhill, he worked for Outer Banks Contractors ("OBC") as a construction supervisor from 2 May 1988 until his discharge on 2 October 1992. While at OBC he earned a weekly wage of

$865 except for a period of time during which he earned a lower weekly wage. His job was terminated at OBC due to that company's financial difficulties and subsequent bankruptcy. While at OBC, he was the supervisor for a Department of Transportation ("DOT") project in Williamston, North Carolina, and for other DOT projects held by OBC. Barnhill bought some of OBC's assets and hired employee Johnson along with other OBC employees to complete the DOT project in Williamston. Employee accepted a position as foreman with Barnhill, but for less pay than he received at OBC. He worked in this position on the Williamston DOT project and, subsequently, on another DOT job for Barnhill in Manteo, for an average weekly wage of $584.36 from 12 October 1992 until his death on 11 February 1993. At the time of his death, employee and his wife, Deborah Johnson, were living separately. She had moved out of their home in Kill Devil Hills on 4 November 1991. Before she moved out, he was living in Williamston during the work week, and coming home on weekends.

Employee's wife, stepson, and two sons filed workers' compensation claims. Defendants and employee's sons requested that the claim be assigned for hearing for a determination of entitlement to the death benefits. The matter was heard by Deputy Commissioner Lawrence B. Shuping, Jr. on 20 July 1993. In opinion first filed 3 September 1993 and amended 10 September 1993, Deputy Commissioner Shuping awarded compensation to employee's sons, Jonathan Daniel Phillips Johnson, and William Eugene Johnson, IV ("employee's sons"), and denied compensation to his wife, Deborah Johnson, and step-son, Jeremy D. Dobbins. The compensation awarded was based solely on the average weekly wage earned by employee at Barnhill. Employee's wife and sons appealed to the full Commission which substantially adopted the opinion and award of Deputy Commissioner Shuping in its Opinion and Award filed 20 May 1994 and Amended Opinion and Award filed 31 May 1994. Employee's sons and wife appeal.

[1] Employee's sons contend that the Commission erred (1) by failing to consider evidence of employee's earnings from his prior employment at OBC during the year preceding his death and (2) by refusing to find that the circumstances of his prior employment constituted an exceptional reason to consider his weekly wages during this prior employment in addition to his weekly wages while at Barnhill. We agree.

N.C.G.S. section 97-2(5) sets forth alternative methods for determining an employee's average weekly wage. The Commission applied the second of these which provides:

> . . . 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.

N.C.G.S. § 97-2(5) (1994 Cum. Supp.). Since employee worked less than 52 weeks for Barnhill, use of the above method would ordinarily be appropriate. However, section 97-2(5) sets forth an alternative method which may be used for "exceptional reasons," to wit:

> 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.

Id.

Employee's sons request that the weekly wages earned by employee at OBC during the year prior to his death be considered in determining his average weekly wage as an alternative method "for exceptional reasons." They assert that the following unusual circumstances prior to his death are "exceptional reasons:" the bankruptcy of OBC, the assumption by Barnhill of the Williamston DOT project at which employee Johnson was construction supervisor for OBC, the assumption of other OBC DOT projects by Barnhill, and Barnhill's purchase of certain OBC assets and retention of other OBC employees. They contend that these circumstances demonstrate a continuity between his employment with OBC and Barnhill that justifies consideration of his weekly wages at OBC.

This continuity of employment is similar to that in *Honeycutt v. Carolina Asbestos Co.*, 235 N.C. 471, 70 S.E.2d 426 (1952). The employee in *Honeycutt* worked at the same plant, but successively for two different employers, in different positions, and for different wages, during the fifty-two weeks prior to becoming disabled. *Id.* at 477, 70 S.E.2d at 430. The employee was paid less wages by the second employer. Our Supreme Court held that the Commission properly considered the higher wages the employee earned with his previous

employer at the same plant because it would have been unfair to do otherwise.

It is similarly unfair to employee's sons not to consider his wages at OBC. The Commission found and concluded that "fair and just results can be obtained" by calculating employee's average weekly wage using only his earnings during the four months he worked for Barnhill. The evidence does not support this finding and conclusion. The purpose of the average weekly wage computation is to " 'measure . . . the injured employee's earning capacity.' " *Holloway v. T. A. Mebane, Inc.*, 111 N.C. App. 194, 198, 431 S.E.2d 882, 884 (1993) (quoting *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 197, 347 S.E.2d 814, 817 (1986)). Further, as Professor Larson has emphasized, the purpose of having an alternative method is to prevent unfairness and to make sure that the computation reflects what the employee would have earned absent the injury. *See Holloway*, 111 N.C. App. at 198, 431 S.E.2d at 884 (quoting Larson, *Workmen's Compensation* § 60.31(c) (1993)).

Here, as a result of the bankruptcy of OBC, employee's wages at Barnhill were depressed. He was faced with having to accept less pay with Barnhill in order to stay in the area and continue working on the Williamston project and other DOT projects assumed by Barnhill from OBC. The Commission found, based on competent evidence, that he was qualified to perform significantly higher paying positions like the one he held with OBC. Including the higher wages employee earned at OBC in addition to his wages at Barnhill is fair to both employer and employee.

Accordingly, we hold that the Commission erred by failing to consider evidence of employee's wages at OBC during the fifty-two (52) weeks preceding his death. We reverse the Commission's finding and conclusion that fair and just results to both employer and employee can be obtained by using only employee's earnings at Barnhill during the fifty-two weeks preceding his death. On remand, the Commission should calculate employee's average weekly wages in a manner which takes account of his earnings at OBC during the fifty-two weeks preceding his death as well as his earnings at Barnhill. Except for the inclusion of his OBC earnings, this method should mirror the method of computation set forth in the first sentence of N.C.G.S. section 97-2(5) as closely as possible.

[2] Employee's wife appeals the Commission's denial of her claim for death benefits. Under N.C.G.S. section 97-2(14), a widow is defined as:

> only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

N.C.G.S. § 97-2(14) (Cum. Supp. 1994). If a "widow" under this statute, an employee's wife is conclusively presumed to be wholly dependent for support on the deceased employee, N.C.G.S. section 97-39 (1991), and thus entitled to receive compensation under N.C.G.S. section 97-38 (1991). Mrs. Johnson does not assert that she qualifies as a "widow" by "living with" or being "dependent for support" on the deceased employee at the time of his death. Rather, she argues that she was "living apart for justifiable cause or by reason of his desertion."

She first assigns error to the Commission's finding that employee did not abandon or desert her. The Commission's findings of fact are conclusive on appeal if supported by competent evidence; its legal conclusions and decision are reviewable for legal error and for a determination of whether they are justified by the findings. *Roberts v. ABR Assocs., Inc.* 101 N.C. App. 135, 138, 398 S.E.2d 917, 918 (1990).

Here, there is competent evidence to support the Commission's finding that employee did not abandon or desert his wife. To the extent that this "finding" is also a legal conclusion, it is justified by the findings of fact. The findings and competent evidence show that employee lived in Williamston during the week because he worked there, that he lived at home with his wife on weekends, and that his wife was the one who chose to move out of the marital residence.

Mrs. Johnson contends that the evidence shows she was "constructively abandoned" by employee, and urges us to apply "constructive abandonment" theory in the workers' compensation context. However, we will not consider constructive abandonment because the Commission found the wife's evidence on this issue not credible. She assigns error to this credibility determination. However, credibility is a matter for the Commission, not for this Court. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Accordingly we affirm the Commission's finding on the credibility of her evidence. We also affirm its determination that employee Johnson did not abandon or desert his wife.

Mrs. Johnson further contends that the Commission applied the wrong legal standard in determining whether she was living apart from her husband for justifiable cause or because of abandonment.

She asserts that the Commission failed to apply the "totality of circumstances" analysis set forth in *Rogers v. University Motor Inn*, 103 N.C. App. 456, 405 S.E.2d 770, *disc. review denied*, 330 N.C. 120, 409 S.E.2d 600 (1991). In its Opinion and Award, the Commission distinguished *Rogers*, concluding that there was no credible evidence of a drinking problem or abusive conduct that would constitute justifiable cause for her to live apart from her husband. As stated above, the Commission dismissed the evidence presented by her on this issue as not credible. By so evaluating her evidence, the Commission has demonstrated that it considered the totality of the circumstances presented by the evidence, found her evidence lacking, and so reached its final determination. We find no error in the Commission's application of *Rogers*.

For the reasons stated, we affirm the Commission's denial of compensation to employee's wife, reverse its determination of his average weekly wage, and remand for calculation of average weekly wage in a manner consistent with this opinion.

Affirmed in Part, Reversed in Part, and Remanded.

Judges EAGLES and JOHN concur.

STATE OF NORTH CAROLINA v. CLAUDE EDWARD DAMMONS

No. COA94-1355

(Filed 5 December 1995)

1. Evidence and Witnesses § 1007 (NCI4th)— residual exception to hearsay rule—unavailability of witness—sufficiency of trial court's determination

The trial court's determination that a witness was unavailable for purposes of the residual exception to the hearsay rule was sufficient where the State had subpoenaed the witness numerous times to appear in court but she could not be located, and defendant was made aware that the State was going to use the witness's statement at trial. N.C.G.S. § 8C-1, Rule 804(b)(5).

Am Jur 2d, Evidence §§ 701-703.

Uniform Evidence Rule 803(24): the residual hearsay exception. 52 ALR4th 999.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR4th 199.

2. Evidence and Witnesses § 1009 (NCI4th)— unavailable witness—trustworthiness of statement—failure to make adequate findings and conclusions

Although the record contained sufficient evidence upon which the trial court could have made sufficient findings of fact and conclusions of law regarding the trustworthiness of a statement by an unavailable witness admitted under the residual exception to the hearsay rule, the court failed to do so, and defendant is therefore entitled to a new trial.

Am Jur 2d, Evidence §§ 701, 702.

Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial. 38 ALR4th 378.

Admissibility of statement under Rule 803(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.

Appeal by defendant from judgment entered 25 March 1994 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 26 September 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Archie W. Anders, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

JOHNSON, Judge.

The evidence presented tends to show the following: On the morning of 27 February 1993, defendant drove Elouise Headen and Mary McLaughlin around town in his car. At some point Mary told defendant that she wanted to go home but defendant refused to take her home at that time. He stopped the car at a church. Defendant and Elouise got out of the car and walked across the road to a cemetery.

Mary got out of the car and went to a nearby house to use the phone to call her husband to come get her. Upon arriving at the house, Mary and the resident at the house, Mildred Dowdy, heard three gunshots. Ms. Dowdy called the Sheriff's Department. About 2:10 p.m., Sheriff Baker responded to a call at the "Short Stop" where he found defendant in the driver's seat and Elouise slumped over in the right front seat of defendant's car. She was moaning and hollering. Sheriff Baker was advised that Elouise had been shot. A few days later, Elouise gave a statement to two law enforcement officers stating that defendant had shot her. In telling her story in the statement, Elouise admitted to a felony of possession of cocaine and to misdemeanor larceny.

Thereafter, Elouise, in approximately three letters, stated that defendant did not commit any crime, that she wished for the charges against defendant to be dropped, and that she did not desire to testify against defendant. She also stated that when she was asked to make a statement, she was "very confused, and angry, and discussed (sic)." Elouise did not appear at defendant's trial and was found to be an unavailable witness. Defendant was convicted of assault with a deadly weapon inflicting serious injury and as a habitual felon. In the judgment entered on 25 March 1994, defendant was sentenced to life imprisonment. From this judgment, defendant appeals.

Defendant argues that the trial court erred by admitting hearsay evidence of Elouise Headen's out-of-court statement to the police under the residual hearsay exception. Defendant contends that the trial court erred for the following reasons: (1) that the trial court made an insufficient determination of unavailability; (2) that the trial court made insufficient findings under the six-step analysis required for admissibility; and (3) that the trial court impermissibly relied upon corroborating evidence not included in the circumstances surrounding the making of the statement. Hence, it is defendant's contention that he was thereby denied his federal and state constitutional rights to confrontation of witnesses, to a fair trial, and to due process of law.

[1] Defendant first contends that the trial court erred in failing to make a sufficient determination that Headen was unavailable as a witness. Prior to admitting hearsay evidence under Rule 804(b)(5) and engaging in the six-part inquiry prescribed by *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), the trial court must find that Headen is unavailable as a witness. *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986). "The degree of detail required in the finding of unavailability

will depend on the circumstances of the particular case." *Id.* at 8, 340 S.E.2d at 740.

The "catchall" provision of Rule 804(b)(5) states that if hearsay evidence is sufficiently trustworthy and sufficient notice was given to the opposing party prior to trial, then the information is admissible. Unavailability of a witness includes situations in which the declarant: "Is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." Rule 804(a)(5). The evidence presented in the record shows that the State had subpoenaed Ms. Headen numerous times to appear in court, but were unable to locate her. The evidence also reveals that defendant was made aware that the State was going to use Ms. Headen's statement at trial. Thus, the trial court's determination that Ms. Headen was unavailable was sufficient.

[2] Defendant's second contention is that the trial court did not make sufficient findings in the record to determine whether Headen's statement was admissible under the six-step analysis required for admissibility under the residual hearsay exception. Having deemed a witness unavailable under Rule 804, the trial court must then engage in the six-step inquiry. *Triplett*, 316 N.C. 1, 340 S.E.2d 736; *Smith*, 315 N.C. 76, 337 S.E.2d 833.

The trial court is required to make the following determinations: (1) that proper notice was given of the intent to offer hearsay evidence under Rules 803(24) or 804(b)(5); (2) that the hearsay evidence is not specifically covered by any of the other hearsay exceptions; (3) that the hearsay evidence possesses certain circumstantial guarantees of trustworthiness; (4) that the evidence is material to the instant action; (5) that the evidence is more probative on an issue than any other evidence procurable through reasonable efforts; and (6) that admission of the evidence will best serve the interests of justice. *Id.*

When assessing "equivalent circumstantial guarantees of trustworthiness" of hearsay evidence pursuant to the residual hearsay exception under Rule 804(b)(5), the trial court should consider the following factors:

> (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability.

State v. Swindler, 339 N.C. 469, 450 S.E.2d 907, 910 (1994) (*quoting State v. Nichols*, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988)). Although hearsay evidence offered under Rule 804(b)(5) is presumptively unreliable and inadmissible, the evidence may be admitted if the evidence has been demonstrated to have "particularized guarantees of trustworthiness." *See Idaho v. Wright*, 497 U.S. 805, 817-18, 111 L. Ed. 2d 638, 653-54 (1990); *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980). A review of the statement by Ms. Headen, in light of the considerations of trustworthiness, reveals that Ms. Headen had personal knowledge of the underlying event, in that, she was personally at the scene at the time of the assault; that Ms. Headen was motivated to tell the truth at the time she was talking to the officers; and that Ms. Headen made declarations against her penal interests in her statement on which she could have been criminally charged. Although Ms. Headen later recanted her statement in three separate letters written to the defense and to the prosecution, Ms. Headen was unavailable. Our Supreme Court has stated that "if the declarant is unavailable under Rule 804(a)(2) because he '[p]ersists in refusing to testify concerning the subject matter of his statement despite a court order to do so' the court might weigh this as a factor against admitting declarant's statement." *Nichols*, 321 N.C. at 625 n. 2, 365 S.E.2d at 566-67 n. 2. A review of the evidence shows that the trial court did weigh this factor, but found that "[t]his case has duress, threats, written all over it." The evidence reveals that she only recanted after paying defendant a visit in jail.

The trial court is required to make findings of fact and conclusions of law when determining if an out-of-court hearsay statement possesses the necessary circumstantial guarantee of trustworthiness. *See State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009; *Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 741. In the instant action, the trial court stated that the statement was offered as evidence of a material fact; that the statement was more probative on the point for which it was offered than any other evidence the State could produce through reasonable efforts; that the interests of justice would be served by its admission; and that proper notice had been given such that defendant could prepare to meet the statement. In response to defendant's objection to the statement being untrustworthy, the trial court stated, "[t]o me—her statement is highly credible on that point . . . [w]hen you look at it, [it is] highly credible."

Although, it appears from the record that the trial court was sufficiently satisfied as to the trustworthiness of the statement, the trial court in the case *sub judice*, did not enunciate particularized findings of fact or conclusions of law regarding whether the statement had "equivalent circumstantial guarantees of trustworthiness." Defendant relies upon *State v. Swindler*, 339 N.C. 469, 450 S.E.2d 907 in support of its position. However, *Swindler*'s facts are distinguishable from the instant case in that the hearsay evidence offered therein was written by the defendant's cellmate who had no personal knowledge of the events depicted in the letter. The cellmate was motivated by the opportunity to strike a deal with police, refused to acknowledge that he wrote the letter which contained many inaccuracies when questioned at trial, and the cellmate may have obtained the facts mentioned while attending the probable cause hearing when he was in court.

Notwithstanding that *Swindler* is distinguishable on its facts, our Supreme Court has repeatedly stated that findings of fact and questions of law as to the trustworthiness of the statement must appear in the record. *Swindler*, 339 N.C. 469, 450 S.E.2d 907; *Smith*, 315 N.C. 76, 337 S.E.2d 833; *Triplett*, 316 N.C. 1, 340 S.E.2d 736. The trial court made no findings of fact or conclusions of law as to the trustworthiness of the statement, and his cursory statement that her statement is "highly credible" is in reference to the number of times Elouise stated that she was shot as opposed to the number of times the doctor said she had been shot. The statement of the trial judge that her statement was "highly credible" was not in reference to the court's duty to make particularized findings of fact or conclusions of law regarding whether the statement given to the police and being offered into evidence possesses "equivalent circumstantial guarantees of trustworthiness."

Although the record contains sufficient evidence upon which the trial court could have made sufficient findings of fact and conclusions of law regarding the trustworthiness of the statement, it failed to do so. Based on the Supreme Court's holding in *Swindler*, we are, therefore, bound to award defendant a new trial.

In light of our holding, we find it unnecessary to reach defendant's remaining collateral arguments.

In conclusion, because the trial court failed to show by making the requisite findings of fact and conclusions of law that the statement had "equivalent circumstantial guarantees of trustworthiness," the verdict and judgment are vacated and remanded for new trial.

New trial.

Judges EAGLES and WYNN concur.

JOHN CRAWFORD, PLAINTIFF v. GARY BOYETTE, HARRY D. STEPHENSON, CARY OIL CO., INC., A NORTH CAROLINA CORPORATION, RALPH WALDO THOMASSON AND WIFE ETHEL THOMASSON, DEFENDANTS

No. COA95-37

(Filed 5 December 1995)

Limitations, Repose, and Laches § 42 (NCI4th)— contaminated well—official notification—accrual of statute of limitations

In an action to recover for personal injuries based on nuisance, trespass, and strict liability under N.C.G.S. § 143-215.93, which allegedly resulted from contamination of plaintiff's well water by petroleum, the trial court erred in holding that plaintiff's action was barred by the three-year statute of limitations, since a mere suspicion of contamination will not begin the statute of limitations period; plaintiff took reasonable steps to determine if his well was contaminated; and plaintiff instituted this action within three years after receiving official notification that his well water was contaminated with benzene. N.C.G.S. § 1-52(16).

Am Jur 2d, Limitation of Actions §§ 112, 119-121.

Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants. 11 ALR5th 438.

Appeal by plaintiff from order entered 26 September 1994 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 5 October 1995.

Plaintiff filed this action on 3 April 1992 for personal injuries based on nuisance, trespass, and strict liability under N.C. Gen. Stat. § 143-215.93 (1993), which allegedly resulted from contamination of plaintiff's well water by petroleum.

From 1986 until 1991, plaintiff rented a house from Mae Price Realty (Price). During this time, a gas station known as Triangle Mini-Mart was located at the corner of Airport Road and Highway 54 in

Morrisville, North Carolina. The station was owned by defendant Gary Boyette and operated by defendant Cary Oil Company, Inc. (Cary Oil).

When plaintiff moved into the house, he was aware that well water in the vicinity was alkaline because of the presence of lime. Plaintiff noticed that the water had a funny smell and bad taste but attributed the odor and taste to the presence of lime in the well. Initially, plaintiff neither drank, cooked, nor bathed with the well water but only used it for the garden and to wash dishes.

In October 1987, plaintiff contacted the Wake County Health Department (WCHD) to find out if the water was suitable for bathing. Louis Vega, a county employee, conducted a chloroform bacterial analysis and suggested that plaintiff chlorinate the well. While the possibility of petroleum was discussed, no test was conducted at that time to determine the presence of petroleum products. Vega "recommended down the road getting other tests of the well but said as far as he knew it was basically okay for use . . . [f]or anything other than drinking or cooking."

On 7 October 1988, Jay Zimmerman, of the Groundwater Section of the Division of Environmental Management, visited plaintiff at home to collect a sample of plaintiff's well water. At this time, plaintiff learned that his neighbor's well was contaminated and that the Groundwater Section wanted to test his well water to determine the source of the pollution. Mr. Zimmerman told plaintiff that he was not certain whether plaintiff's well was contaminated and that a determination could not be made until the analysis was complete. Mr. Zimmerman said he would contact plaintiff regarding the results.

On 6 April 1989, plaintiff received a letter with a copy of the technical results which listed the chemical compounds present in the water and the concentration levels detected. The technical results did not specifically identify petroleum as a contaminant but noted that benzene and para dichlorobenzene were present in plaintiff's water. In a form dated 2 June 1989 entitled, "Drinking Water Health Risk Evaluation for Petroleum Products," the plaintiff received the following information:

> Your water contains a chemical (benzene) that is known to cause cancer in humans. The U.S. Environmental Protection Agency has set a maximum contaminant level of 5 ug/1 (ppb) for benzene.

> This is the level that is considered acceptable for public water supplies. Even at this level, there may be some risk of cancer. The level of benzene in this water cannot be predicted from one time to another.
>
> Based on this benzene level, this water should not be used for drinking or cooking. Prolonged bathing/showering should be avoided.
>
> . . .
>
> Chemicals indicate gasoline contamination. Benzene levels are 102 times the MCL. Because of the possibility of increased exposure by absorption or inhalation during showering, showering should be avoided if possible to reduce any health risk and bathing, although allowed, should not be prolonged.

Within three years after this official notification, plaintiff initiated this action for nuisance and trespass arising from the contamination of plaintiff's well water with gasoline. In response, defendants contend that plaintiff's claims are barred by the statute of limitations.

Kenneth N. Barnes for plaintiff-appellant.

Smith & Holmes, P.C., by Robert E. Smith; and Ransdell, Ransdell & Cline, by Phillip C. Ransdell; for defendants-appellees.

WALKER, Judge.

Plaintiff's sole assignment of error is whether the trial court erred by granting defendants' motion for summary judgment. Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). A defendant who moves for summary judgment bears the burden of establishing that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. A defendant may meet this burden by "(1) proving that an essential element of plaintiff's claim is nonexistent, or (2) showing through discovery that plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that plaintiff cannot surmount an affirmative defense which would bar the claim." *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330

S.E.2d 242, 247 (1985), *reversed on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

Defendant argues that plaintiff's claims were barred by the statute of limitations and thus defendants were entitled to summary judgment. The statute of limitations having been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period. *Hooper v. Lumber Co.*, 215 N.C. 308, 311, 1 S.E.2d 818, 820 (1939). Plaintiff's cause of action for trespass, nuisance, and personal injury are all subject to the three-year statute of limitation set forth in N.C. Gen. Stat. § 1-52 (1994). In order to determine if plaintiff's action is within this three-year period, the Court must determine when the cause of action accrued. N.C. Gen. Stat. § 1-52(16) provides:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in cases of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-52(16) (1994). Thus, the Court must determine when plaintiff's bodily harm became apparent or ought reasonably to have become apparent.

Plaintiff contends that the three-year statute of limitations did not accrue until he received official notification by letter dated 6 April 1989 from the State that his well was contaminated with petroleum. In support of his argument, plaintiff relies on the Supreme Court case *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991). In *Wilson*, plaintiffs sued defendants for gasoline contamination of their well water from underground storage tanks. *Id.* at 498, 398 S.E.2d at 588. Our Supreme Court reversed summary judgment against plaintiffs Hill and Wilson finding that such actions were not barred by the statute of limitations. There the evidence showed that plaintiffs Hill and Wilson did not discover the contamination until 1984, when tests by the Alamance County Health Department (ACHD) detected gasoline contamination. *Id.* at 512, 398 S.E.2d at 597. The defendants in *Wilson* argued that the claims of Hill and Wilson accrued when the families first began to notice there was something wrong with their well and stopped using

the water in 1982. *Id.* at 512, 398 S.E.2d at 596. The Court held that "[p]rior to the determination by the ACHD that their water was contaminated the Hills and Wilsons did not know that they had a cause of action for the contamination of their water." *Id.* at 512, 398 S.E.2d at 597. The Court reversed summary judgment against these plaintiffs, finding that the action was "less than three years after they were notified by government agents in May 1984 that test results proved that their water was contaminated with gasoline." *Id.*

This decision was followed by this Court in the recent case *James v. Clark*, 118 N.C. App. 178, 454 S.E.2d 826 (1995), *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). In *James*, plaintiffs noticed something wrong with the well water as early as 1982. *Id.* at 183, 454 S.E.2d 829. They stopped drinking the water in 1983 and stopped cooking with it the following year. *Id.* Plaintiffs filed a complaint against the defendants in 1988 that included claims of negligence, trespass, and nuisance for damages arising out of contamination of their well water. The evidence did not show that plaintiffs suspected their well was contaminated with gasoline until 1986 when they began to associate the water's bad taste with gasoline. *Id.* at 183, 454 S.E.2d 829-830. This Court held that the plaintiffs did not know the water was contaminated until it was tested by the Department of Environment, Health and Natural Resources shortly after 1986. Therefore, the Court found that plaintiff's complaint, filed 9 December 1988, was not barred by the statute of limitations. Upon examination of these cases, it is apparent that a mere suspicion of contamination will not begin the statute of limitations period. *Id.* at 184, 454 S.E.2d at 830. Rather, both cases used the date plaintiff received official notification of contamination as the date the cause of action accrued. To hold otherwise, would penalize a party for taking precautionary measures while awaiting action from state agencies.

Applying this rule to the facts in our case, the evidence shows that while plaintiff noticed the water tasted bad and smelled funny and did not use the water for drinking or cooking, he attributed the taste and odor of the water to the presence of lime in the well. Furthermore, plaintiff took reasonable steps to determine whether his well was contaminated. In October 1987, the plaintiff contacted the Wake County Health Department to determine if the water was suitable for showering. At this time, plaintiff was told that the water was "okay for use." A year later, the water was tested by an employee of the Division of Environmental Management, who told plaintiff that

he could not determine whether the water was contaminated until the results of the analysis were collected. Plaintiff was not notified of the results until he received a letter dated 6 April 1989. No warnings were provided to plaintiff regarding petroleum contamination until plaintiff received the State's detailed findings dated 2 June 1989. At this stage of the proceedings, there is sufficient evidence to support the conclusion that the limitations period did not accrue prior to 6 April 1989 when plaintiff first received official notification that his well water was contaminated with benzene. Therefore, plaintiff's complaint, filed 3 April 1992, was within the limitations period.

Having found that plaintiff filed his complaint within the three-year period, we find that the trial court erred by granting summary judgment in favor of the defendants.

Reversed.

Judges LEWIS and MARTIN, MARK D. concur.

THE FARM CREDIT BANK OF COLUMBIA, PLAINTIFF v. SETH H. EDWARDS, ADMINISTRATOR OF THE ESTATE OF MARY H. VAN DORP AND SETH H. EDWARDS, ADMINISTRATOR OF THE ESTATE OF A. H. VAN DORP, DEFENDANTS

No. COA94-1307

(Filed 5 December 1995)

1. Appeal and Error § 176 (NCI4th)— motion to dismiss appeal—jurisdiction of trial court

Plaintiff's motion to dismiss defendant's appeal was properly made in the trial court rather than in the Court of Appeals where defendants had filed notice of appeal but the appeal had not yet been filed and docketed in the Court of Appeals.

Am Jur 2d, Appellate Review § 421.

2. Executors and Administrators § 36 (NCI4th); Attorneys at Law § 29 (NCI4th)— notice of appeal—no authority by attorney

A notice of appeal filed by decedents' attorney of record from a judgment entered in an action to recover a deficiency following a foreclosure sale of decedents' property was a nullity where the decision of whether to appeal was clearly within the powers of

the administrator of decedents' estates; the administrator did not authorize the attorney to proceed with the appeal; the attorney did not notify the administrator of his decision to give notice of appeal; the administrator opposed the appeal on the ground that the appeal would not benefit the estate but would instead erode assets of the estate; and the attorney was not employed by the administrator until after the time for giving a properly authorized notice of appeal had expired. N.C.G.S. § 28A-13-3(7) and (15).

Am Jur 2d, Attorneys at Law § 141; Executors and Administrators §§ 375, 376.

Power and responsibility of executor or administrator to compromise claim due estate. 72 ALR2d 191.

3. Judgments § 36 (NCI4th)— trial judge outside county and district—appeal dismissed—defendant's request that judge settle record—defendant's failure to object

The court had the authority to dismiss an appeal while holding court outside the county and district, since defendant requested the trial judge to consider the objections to the proposed record and settle the record on appeal; one of the objections to the record concerned dismissal of the appeal; both parties participated in the hearing without objection; and defendant thus waived any objection he might have had by seeking affirmative relief.

Am Jur 2d, Judgments § 79.

4. Judgments § 8 (NCI4th)— oral motion to substitute defendant—no objection to substitution of judgment

The trial court's judgment was not void because defendant administrator was not served with process or given notice of the hearing but was made a party to the action upon oral motion, since the administrator of the estate and the attorney for the estate were present for the hearing and did not object to the administrator being substituted as a party defendant or to judgment being entered against defendant.

Am Jur 2d, Judgments §§ 27-29.

Appeal by defendants from order entered 19 August 1994 by Judge James E. Ragan, III in Craven County Superior Court. Heard in the Court of Appeals 31 August 1995.

Everett, Warren, Harper & Swindell, by Edward J. Harper, II, for plaintiff-appellee.

Lee E. Knott, Jr. for defendant-appellants.

WALKER, Judge.

This action was brought by the plaintiff, Farm Credit Bank of Columbia, to recover the deficiency following a foreclosure sale of the Van Dorp property in Hyde County. Mary H. Van Dorp and A. H. Van Dorp denied that there was any deficiency alleging that the plaintiff purchased the property at the foreclosure for substantially less than its fair market value. On 31 October 1989, Judge Thomas S. Watts found that the defendants waived their statutory defense by signing a deed of trust which contained express language of waiver and granted plaintiff a partial summary judgment.

At a hearing on 18 March 1992, Judge William C. Griffin signed a judgment outside of the county and district awarding plaintiff $164,957.85 which included the amount of the deficiency, interest, and attorneys' fees. Defendants appealed and this Court vacated the decision of the trial court in an opinion filed 6 July 1993.

A. H. Van Dorp was acting as administrator of the estate of Mary H. Van Dorp until his death on 11 November 1992. On 17 December 1993, Seth H. Edwards (Edwards), attorney, was appointed administrator of the estates of the Van Dorps. When this case was called for trial on 2 May 1994 in Hyde County Superior Court, plaintiff orally moved that Edwards, as the duly appointed administrator of the estates of Mary H. Van Dorp and A. H. Van Dorp, be substituted as a party defendant. Edwards was present at this hearing when he was substituted as a party defendant and judgment was entered for the plaintiff. Thereafter, the attorney of record for the Van Dorps, Lee E. Knott, Jr. (Knott), filed notice of appeal in the case on 22 June 1994. On 23 June 1994, Edwards met with plaintiff's counsel and learned for the first time that notice of appeal had been filed.

Plaintiff's counsel filed a motion to dismiss the appeal on 19 July 1994 which was supported by an affidavit from Edwards. In the affidavit Edwards stated that Knott was not authorized to proceed with the appeal and that an appeal "is unlikely to benefit either estate and will in fact seriously erode the assets of the estate."

On 21 July 1994, Knott filed a request to settle the record on appeal. At the hearing to settle the record on appeal, Judge James

Ragan dismissed the appeal by an order filed 19 August 1994, finding that the notice of appeal filed on 22 June 1994 was a nullity because it was not authorized by and was expressly repudiated by Edwards as administrator of both estates.

[1] By way of their first assignment of error, defendants argue that the trial court did not have jurisdiction to entertain and grant the plaintiff's motion to dismiss the defendants' appeal without notice at a hearing held for the purpose of settling the record on appeal. We disagree.

> Rule 25 of the N.C. Rules of Appellate Procedure provides that:
>
> [p]rior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court.

While Knott filed notice of appeal on 22 June 1994, the appeal was not filed in this Court until 21 November 1994 and was not docketed until 28 November 1994. Accordingly, plaintiff properly made its motion to dismiss the appeal to the trial court.

[2] Plaintiff relies on *Saieed v. Bradshaw*, 110 N.C. App. 855, 859, 431 S.E.2d 233, 235 (1993), as support for its argument that a trial court has jurisdiction to dismiss appeals for failure to comply with the N.C. Rules of Appellate Procedure or with court orders requiring action to perfect the appeal. *See Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E.2d 240 (1984). In *Bradshaw*, this Court upheld the trial judge's dismissal of an appeal when the notice of appeal was not timely filed. In this case, Edwards filed an affidavit on 13 July 1994 which expressly stated that "[a]t no time has he, as administrator of either of such decedent's estate, authorized the said Lee E. Knott, Jr., to proceed with such appeal." Furthermore, it was Edwards' opinion, as administrator of the estates, that the prosecution of such appeal would not benefit either estate but would in fact seriously erode the assets of the estates. Knott was not employed by the administrator until on or about 2 August 1994, after the time for giving a properly authorized notice of appeal had expired. This evidence supports the finding that the 22 June 1994 notice of appeal was a nullity.

In response, Knott, as attorney of record for the Van Dorps, asserts he had the authority to file the notice of appeal and that Edwards, as administrator, subsequently ratified this action by filing

an affidavit on 2 August 1994. As such, defendants apparently argue that the trial court improperly found that the notice of appeal was a nullity. This argument is without merit.

A close examination of the record reveals that Knott did not notify Edwards of his decision to give notice of appeal. Edwards first learned of the appeal on 23 June 1994 in a meeting with counsel for the plaintiff. Thereafter on 13 July 1994, Edwards gave the following sworn statement:

> 4. After an examination of the record on appeal and the briefs of the parties in a previous appeal, he, as administrator of each such estate, is of the opinion that the prosecution of such appeal is unlikely to benefit either estate and will in fact seriously erode the assets of the estate for that, even if such appeal is successful, the result could only be remanded to the Superior Court of Hyde County for trial, which would even further erode the estates' assets.

Edwards was of the opinion that such appeal was not in the best interests of the estates.

The decision of whether to appeal the judgment filed 25 May 1994 was clearly within the powers granted Edwards as personal representative under N.C. Gen. Stat. § 28A-13-3(7) (1994) which provides that an administrator shall have the authority "[t]o abandon or relinquish all rights in any property when, in the opinion of the personal representative acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit to the estate." Further, N.C. Gen. Stat. § 28A-13-3(15) grants a personal representative the authority "[t]o compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate." The record supports the trial court's findings that Knott was not employed by the administrator until on or about 2 August 1994 and was not authorized to file the notice of appeal. An attorney must be sensitive to the attorney's professional duty and assume responsibility for clearly defining attorney/client relationships and initiating necessary attorney/client communication. Accordingly, the trial court properly concluded that the notice of appeal was a nullity.

[3] In a related argument, defendants contend that the trial judge lacked the authority to dismiss the appeal while holding court outside the county and district. An exception to the general rule that a judge

may not enter orders out of session in another district, is that a judge may exercise judicial authority after the expiration of the term upon the parties' consent. *Edmundson v. Edmundson*, 222 N.C. 181, 186, 22 S.E.2d 576, 580 (1942). In this case, defendant requested the trial judge, who was holding court in another district, to consider the objections to the proposed record and settle the record on appeal. One of the objections to the record concerned the dismissal of the appeal. Both parties participated in the hearing to settle the record without objection. Defendant, by requesting the court to settle the record on appeal, consented to the court's authority.

Also, it is well established that seeking affirmative relief from a court on any basis other than lack of jurisdiction constitutes a waiver of jurisdictional objections. *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 100, 370 S.E.2d 431, 433-434 (1988). In sum, the trial judge in settling the record on appeal had the authority to consider the dismissal question as an objection to the proposed record. Further, defendants waived any objection they may otherwise have had by seeking affirmative relief.

[4] In their last assignment of error, defendants contend that the findings of fact and conclusions of law made by the court in the order dismissing the appeal entitle defendants to relief from the judgment pursuant to Rule 60(b) of the Rules of Civil Procedure. Defendants argue that the judgment filed 25 May 1994 is void because Edwards was not served with process or given notice of the hearing, but was made a party to the action upon oral motion. We disagree.

Objections to lack of jurisdiction over the person, including notice, may be waived by voluntary appearance or consent. *Glesner v. Dembrosky*, 73 N.C. App. 594, 596, 327 S.E.2d 60, 62 (1985). In the present case, Edwards and Knott were present for the hearing and did not object to the administrator of both estates being substituted as a party defendant or to judgment being entered against defendants.

Also, it is well established that when a case is on a court calendar for trial, oral motions are in order. Our Supreme Court has held that "where an oral motion is appropriately made under Rule 7, the doctrine that a party to an action has constructive notice of all orders and motions made in the cause during the session of court at which the cause is regularly calendared is preserved." *Wood v. Wood*, 297 N.C. 1, 6, 252 S.E.2d 799, 802 (1979). In sum, any objection to personal jurisdiction was waived by Edwards appearing at the hearing and con-

senting to the substitution of the administrator as party defendant and the subsequent entry of judgment against the defendants.

Accordingly, we affirm the trial court's order dismissing the appeal.

Affirmed.

Judges COZORT and McGEE concur.

STATE OF NORTH CAROLINA v. ANTONIO L. SHINE, WILLIE T. MILLER, JR., AND MISHAK R. BROWN

No. COA95-73

(Filed 5 December 1995)

1. Evidence and Witnesses § 1572 (NCI4th)— consent to search form—admissibility

The trial court did not err in denying one defendant's motion to suppress a consent to search form bearing his signature where defendant contended that he was not advised of his rights to remain silent and to have counsel before he was asked to sign the form, since defendant was not in custody on the occasion in question and none of his rights were violated.

Am Jur 2d, Searches and Seizures §§ 83, 180.

Validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases. 111 L. Ed. 2d 850.

2. Evidence and Witnesses § 1572 (NCI4th)— consent to search form—admissibility

The admission of a consent to search form bearing the signatures of two defendants was not prejudicial error because it created an impermissible inference that they controlled a motel room and, by association, the cocaine and drug paraphernalia found therein, since the consent to search form was relevant evidence on the issue of the defendants' control of the premises.

Am Jur 2d, Searches and Seizures §§ 83, 180.

Validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases. 111 L. Ed. 2d 850.

3. Narcotics, Controlled Substances, and Paraphernalia § 142 (NCI4th)— cocaine in motel room—constructive possession—sufficiency of evidence

In a prosecution of defendants for possession of a controlled substance and possession of drug paraphernalia, the evidence was sufficient to be submitted to the jury under the theory of constructive possession where it tended to show that all defendants were in a motel room where cocaine and a crack pipe were found; one defendant was the first to respond to an officer's knock at the door; the jury could infer from his behavior that he was attempting to delay the officers' entry into the room in order to give the other defendants time to hide the cocaine and drug paraphernalia; the officers, upon entering the room, observed two defendants exiting the bathroom where the contraband was later found; one defendant then refused the officers' request to search the room and inquired whether the officers had a search warrant; later that same defendant spontaneously offered to let the officers search the room; and two of the three defendants voluntarily signed the consent to search form.

Am Jur 2d, Drugs and Controlled Substances §§ 147, 188.

Conviction of possession of illicit drugs found in premises of which defendant was in non-exclusive possession. 56 ALR3d 948.

Drug abuse: what constitutes illegal constructive possession under 21 USCS sec. 841(a)(1), prohibiting possession of a controlled substance with intent to manufacture, distribute, or dispense the same. 87 ALR Fed. 309.

Appeal by defendants from judgments entered 2 May 1994 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 October 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Francis J. Di Pasquantonio, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Dean M. Beer, for defendant-appellant Antonio L. Shine.

Janet C. Thomas for defendant-appellant Willie T. Miller, Jr.

Grant Smithson for defendant-appellant Mishak Brown.

WALKER, Judge.

The State's evidence showed that on 4 August 1993, Charlotte Police Officers Hart and Heaton, acting on a tip, went to Room 325 of the Knight's Inn on Statesville Avenue. After waiting in the parking lot for five to ten minutes, the officers observed defendant Miller enter Room 325. Officer Hart then radioed for assistance, and Officers Palmertree and Ensminger arrived shortly thereafter. Upon their arrival, Officers Hart and Heaton went to Room 325, and Officer Hart knocked on the door. About one minute later, defendant Miller pulled the curtain open and looked out the window. The curtains then returned to their normal position. No one opened the door at that time.

Officer Hart again knocked on the door and received no response. After approximately one more minute, Officer Hart knocked a third time. He heard a voice ask, "Who is it?" Officer Hart identified himself and asked to talk with the occupants. After approximately 90 seconds, defendant Miller opened the door. Officer Hart asked if he could enter the room, and defendant Miller agreed. As Officer Hart entered the room, he observed defendants Shine and Brown and a juvenile coming from the bathroom.

Officer Hart asked the occupants of the room for their consent to search. Defendant Shine refused and asked Officer Hart if he had a warrant. Officer Hart did not have a warrant and left the room in order to secure one. Officers Palmertree, Ensminger, and Heaton, who had entered the room by this time, remained in the room to insure that any evidence that might be in the room would not be destroyed. Shortly after Officer Hart left the room, defendant Shine, without being asked, told Officer Ensminger he would consent to a search. Officers Palmertree and Heaton left the room, and Officer Heaton prepared a consent to search form. Officers Palmertree and Heaton then returned to the room and asked defendants if they wanted to sign the consent to search form. Defendants Shine and

Brown and the juvenile signed the form, but defendant Miller refused to sign. Officer Palmertree radioed Officer Hart to return to the room.

The officers proceeded to search the room. Officer Palmertree found and removed white rock-like substances from the inside of the toilet bowl. Officer Ensminger lifted the lid to the toilet tank and observed a pill bottle that contained white rock-like substances. Officer Palmertree retrieved the pill bottle. Officer Palmertree found a small crack pipe stuck between towels in the bathroom. The officers also located and removed two weapons from a dresser drawer. Following the seizure of the white rock-like substances (later determined to be cocaine) and the crack pipe, defendants and the juvenile were arrested.

Each defendant was found guilty of one count of possession of cocaine and one count of possession of drug paraphernalia. The trial court entered judgment in accordance with the verdicts. Defendants Shine and Brown received probationary sentences, and defendant Miller received an active sentence of two years.

[1] Defendant Shine assigns as error the denial of his motion to suppress the consent to search form bearing his signature. Defendant Shine argues that the form should have been suppressed because he was not advised of his rights to remain silent and to have counsel before he was asked to sign the form. At trial, a *voir dire* hearing was held on defendant Shine's motion, during which the officers testified that prior to the signing of the consent form, they never told defendants they were under arrest; that no interrogations occurred; that the officers never indicated that defendant Shine was not free to leave the premises; and that once defendant Shine refused the officers' initial request to search the room, no further action was taken by the officers until defendant Shine voluntarily consented to the search. Following the *voir dire* hearing, the trial court found that during the period the officers were in the motel room, defendants were free to leave and were never told they could not do so. The court found that none of the defendants were in custody on the occasion in question and therefore none of their rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966) were violated. We hold there was competent evidence to support the court's findings, and the trial court did not err in denying defendant Shine's motion to suppress.

[2] Defendants Shine and Brown argue that the admission of the consent to search form bearing their signatures was prejudicial error because it created an impermissible inference that they controlled

the room and, by association, the cocaine and drug paraphernalia found therein. We disagree. The consent to search form was relevant evidence on the issue of defendants Shine and Brown's control of the premises. *See* N.C. Gen. Stat. § 8C, Rule 401 (1992) ("relevant evidence" is "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"). Assuming *arguendo* that admission of the consent to search form may have been prejudicial to defendants Shine and Brown, our rules of evidence do not require the exclusion of *all* prejudicial evidence; rather, evidence must be excluded only when its probative value is outweighed by the danger of *unfair* prejudice. N.C. Gen. Stat. § 8C, Rule 403 (1992); *see also State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986) ("Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree."). Under the circumstances of the present case, we cannot conclude that admission of the consent to search form unfairly prejudiced defendants Shine and Brown.

[3] Finally, all three defendants argue that the trial court erred in denying their motions to dismiss the charges for insufficiency of the evidence. A motion to dismiss for insufficiency of the evidence requires the trial court to decide as a matter of law whether the State has offered substantial evidence of defendant's guilt on every essential element of the crime charged. *State v. Corbett and State v. Rhone*, 307 N.C. 169, 182, 297 S.E.2d 553, 562 (1982). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 182-83, 297 S.E.2d at 562. In ruling on the motion, the trial court must view the evidence in the light most favorable to the State, giving the State every reasonable inference of fact arising from the evidence. *State v. Hutchins*, 303 N.C. 321, 344, 279 S.E.2d 788, 803 (1981).

Defendants were charged with possession of a controlled substance and possession of drug paraphernalia. Possession may be either actual or constructive. *State v. Thorpe*, 326 N.C. 451, 454, 390 S.E.2d 311, 313 (1990). A person lacking actual physical possession may be deemed to have constructive possession of a controlled substance if he has the intent and capability to maintain control and dominion over the substance. *State v. Baize*, 71 N.C. App. 521, 529, 323 S.E.2d 36, 41 (1984), *review denied*, 313 N.C. 174, 326 S.E.2d 34 (1985). Where controlled substances are found on a premises under a defendant's exclusive control, this fact alone may be sufficient to give

rise to an inference of constructive possession and to take the case to the jury. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). However, where, as here, possession of the premises is not exclusive, constructive possession may not be inferred without evidence of other incriminating circumstances. *Id.* The State argues that it presented sufficient evidence of other incriminating circumstances as to each defendant to warrant submission of the charges to the jury on the theory of constructive possession. We agree.

The State's evidence showed that defendant Miller was the first to respond to Officer Hart's knocks on the door by looking out the window of the motel room, asking who was at the door, and ultimately opening the door to allow the officers inside the room. From this evidence, a jury could infer that defendant Miller was attempting to delay the officers' entry into the room in order to give the other defendants time to hide the cocaine and drug paraphernalia in the bathroom. Upon the officers' entry into the room, defendants Shine and Brown were observed leaving the bathroom where the cocaine and drug paraphernalia were later found. Defendant Shine then refused Officer Hart's request to search the room and inquired whether the officers had a search warrant. Later, defendant Shine spontaneously offered to let the officers search the room. Once the officers prepared the consent to search form, defendants Shine and Brown voluntarily signed the form, while defendant Miller refused to do so. The activities of the defendants within the confines of a motel room with an adjoining bathroom where cocaine and drug paraphernalia were found constitute sufficient other incriminating circumstances to support a conclusion that each defendant had the ability, alone or with others, to exercise control over the cocaine and the drug paraphernalia. *See State v. Davis*, 325 N.C. 693, 386 S.E.2d 187 (1989) (although defendant did not have exclusive possession of the mobile home where drugs were found, his presence in the home during the search, and the fact that drugs were found in the chair defendant had occupied, on the table beside the chair, and in defendant's pockets, constituted other incriminating circumstances necessary to establish constructive possession); *see also State v. Autry*, 101 N.C. App. 245, 399 S.E.2d 357 (1991) (where defendant was standing in a small room near a table containing four small packages of cocaine, and defendant claimed ownership of two other items on the table, a reasonable mind could infer that defendant had the intent to control the cocaine, and constructive possession was established). Therefore, submission of the charges to the jury on the theory of con-

structive possession was appropriate, and the trial court did not err in denying defendants' motions to dismiss. In the judgment of the trial court we find

No error.

Judges LEWIS and MARTIN, MARK D. concur.

ERTHADEAN JONES, EMPLOYEE, PLAINTIFF v. YATES MOTOR COMPANY, EMPLOYER; SELF-INSURED (SEDGWICK OF THE CAROLINAS, INC.), Servicing Agent, Defendants

No. COA95-48

(Filed 5 December 1995)

Workers' Compensation § 412 (NCI4th)— no notice of hearing—motion for relief from judgment—timeliness

Where plaintiff contended that he was not notified to appear at the hearing before the Industrial Commission on his appeal from the deputy commissioner's order, and he wrote a letter to the Commission on 24 February 1994 requesting a hearing on the ground that he was not present or notified about the 28 January 1994 hearing, plaintiff's motion for reconsideration, though made after the 15 days allowed under N.C.G.S. § 97-85, was nevertheless filed within a reasonable time, and the Commission should have considered the motion as a Rule 60(b) motion for relief from judgment. N.C.G.S. § 1A-1, Rule 60(b).

Am Jur 2d, Judgments §§ 742, 769-772; Workers' Compensation § 686.

Supreme Court's construction and application of Rule 60(b) of Federal Rules of Civil Procedure, allowing relief from judgment or order. 116 L. Ed. 2d 1045.

Appeal by defendant from the Opinion and Award filed by the North Carolina Industrial Commission 26 September 1994. Heard in the Court of Appeals 5 October 1995.

Erthadean Jones, plaintiff-appellant, pro se.

Teague, Campbell, Dennis & Gorman, by Bruce A. Hamilton and Karen K. Prather, for defendant-appellant.

WALKER, Judge.

Plaintiff was employed by defendant as a mechanic where he was responsible for working on and replacing transmissions. Plaintiff alleges that he was injured as a result of an accident arising out of and in the course of his employment when a transmission, weighing between 150 and 200 pounds, fell on his chest while he was attempting to install it in a vehicle. This case was heard on 13 August 1992 by Deputy Commissioner Gregory M. Willis, who found that plaintiff's testimony was not credible and that the alleged accident of 8 July 1991 did not occur. Accordingly, the deputy commissioner entered an Opinion and Award on 4 May 1993 concluding that plaintiff did not sustain an injury by accident arising out of and in the course of his employment with defendant-employer and denied plaintiff's claim.

On 19 May 1993 plaintiff appealed to the Industrial Commission from the deputy commissioner's Order. On the same day, plaintiff's attorney made a motion to withdraw from the case, which motion was granted. On 11 August 1993, plaintiff filed a Form 44 Application for Review with the Full Commission, but did not forward a copy to defense counsel until November 1994. Plaintiff also neglected to file an appellant's brief with the Commission. Accordingly, defendant filed a Motion to Dismiss plaintiff's appeal to the Commission on the ground that plaintiff did not file a Form 44 or an appellant's brief within 25 days from receiving the transcript as required by Rule 701 of the Rules of the North Carolina Industrial Commission.

On 28 January 1994, the Commission, without hearing argument from the parties, affirmed the deputy commissioner's Order denying plaintiff's claim for compensation finding that plaintiff had not shown good grounds for the Commission to reconsider the evidence.

On 24 February 1994, plaintiff wrote a letter to the Commission requesting a hearing on the ground that he was not present or notified about the 28 January 1994 hearing. On 23 March 1994, the Commission advised plaintiff that it received his notice of appeal to the Court of Appeals. Thereafter, on 3 May 1993, plaintiff notified the Commission that he was withdrawing his appeal to the Court of Appeals. The Commission entered an order on 31 May 1994 withdrawing plaintiff's appeal, vacating its 28 January 1994 Opinion and Award, and ordering that plaintiff's appeal to the Commission be scheduled on the next available calendar.

On 20 July 1994, the Commission heard oral argument from the defendant's counsel and allowed plaintiff to "recap . . . the case of record on his own behalf." On 26 September 1994, the Commission entered a second Opinion and Award finding plaintiff's testimony to be credible and concluding that plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer thereby reversing the deputy commissioner's decision.

On appeal defendant contends that the Commission's 28 January 1994 Opinion and Award should be reinstated because the Commission lacked the authority to vacate that opinion. Defendant argues that the Commission erred in reconsidering the evidence and reversing the findings of fact and conclusions of law contained in the 28 January 1994 Opinion and Award because plaintiff failed to file a timely motion to reconsider the evidence.

Defendant correctly states the requirements of N.C. Gen. Stat. § 97-85 as follows:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award.

N.C. Gen. Stat. § 97-85 (1991).

However, this statute is not dispositive in the present case. We find *Long v. Reeves*, 77 N.C. App. 830, 336 S.E.2d 98 (1985) to be instructive on the issue of whether the Commission had authority to vacate the earlier opinion. In *Reeves*, neither defendant nor counsel for defendant was present at a hearing where the deputy commissioner ordered defendant to pay workers' compensation to the plaintiff. *Id.* at 830, 336 S.E.2d at 99. More than 15 days after the entry of this order, defendant made a motion pursuant to N.C. Gen. Stat. § 97-85 for a new hearing on the ground that he had not received notice of the hearing before the deputy commissioner. *Id.* This Court held that the Commission should have treated defendant's motion as one made pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b), and, on remand, should conduct a hearing on whether defendant was afforded "reasonable notice." *Id.* at 831-832, 336 S.E.2d 99 (1985).

Here, plaintiff contends that he was not notified to appear before the Commission on 28 January 1994. Upon receipt of the Opinion and

Award, plaintiff immediately called the Commission where he was instructed to write a letter to Chairman Howard Bunn requesting another hearing before the Commission. Plaintiff, who apparently was unaware of the 15-day period in which to file a timely motion, made a motion for reconsideration on 24 February 1994. Although plaintiff's motion was made after the 15 days allowed under N.C. Gen. Stat. § 97-85, Rule 60(b) merely requires that a motion for relief from the judgment be filed within a reasonable time. N.C. Gen. Stat. § 1A-1, Rule 60 (1990). In this case, we cannot conclude that the time period within which plaintiff filed his motion was unreasonable. In sum, the Commission should have considered the motion as a Rule 60(b) motion for relief from the judgment. *See Long v. Reeves*, 77 N.C. App. 830, 336 S.E.2d 98 (1985). Accordingly, this case is remanded for a hearing to determine if plaintiff is entitled to relief pursuant to Rule 60(b).

In view of our treatment of defendant's first assignment of error we need not reach the remaining assignments of error. The Order dated 31 May 1994 and the Opinion and Award dated 26 September 1994 are hereby vacated and this case is remanded for a hearing to determine whether plaintiff is entitled to relief from the 28 January 1994 judgment.

Reversed and remanded.

Judges LEWIS and MARTIN, MARK D. concur.

ROBERT ALLEN WILHELM, PLAINTIFF v. CITY OF FAYETTEVILLE, A MUNICIPAL CORPORATION, AND GRANT THOMAS SMITH, DEFENDANTS

No. COA95-404

(Filed 5 December 1995)

Municipal Corporations § 446 (NCI4th)— summary judgment based on partial governmental immunity—error

The trial court erred in granting defendant city's motion for summary judgment on grounds of partial governmental immunity up to the sum of $250,000 in plaintiff's action to recover for injuries from an automobile accident where defendant presented evidence that it was self-insured up to an amount of $250,000 and held liability insurance for amounts in excess of $250,000, since

defendant's evidence of partial immunity was not an affirmative defense, as it did not operate to bar plaintiff's claim but, at best, served only to mitigate the amount of damages defendant might incur.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 1, 37-41.

Appeal by plaintiff from order granting summary judgment entered 13 December 1994 by Judge Patricia A. Timmons-Goodson in Cumberland County District Court. Heard in the Court of Appeals 13 November 1995.

Hubert N. Rogers, III for plaintiff-appellant.

Robert C. Cogswell, Jr. for defendants-appellees.

JOHNSON, Judge.

The following uncontroverted evidence was presented to the trial court: On 28 May 1991, plaintiff was operating an automobile on a public street in Fayetteville. Fayetteville Police Officer Grant Thomas Smith was on duty operating a patrol car when he drove through a flashing red light at an intersection at what plaintiff contends was an excessive rate of speed. The patrol car hit plaintiff's car and plaintiff suffered injuries as a result of the collision.

Plaintiff filed an action alleging negligence on the part of Officer Smith in Cumberland County District Court, alleging damages in excess of $10,000.00. Defendant Smith moved for a dismissal based on inadequate service of process. Defendant City of Fayetteville moved for summary judgment on grounds that plaintiff failed to state a claim upon which relief could be granted. The trial court allowed both motions. Plaintiff's appeal of the order is limited to the motion granting summary judgment in favor of defendant City of Fayetteville.

Defendant moved for summary judgment on the grounds of partial governmental immunity up to the sum of $250,000.00; the immunity waived for sums in excess of that amount. The trial court granted the motion based on plaintiff's failure to provide a forecast of evidence tending to demonstrate that his damages would be in an amount greater than the level of defendant's immunity. For the following reasons, we find that the trial court erred in granting defendant's motion for summary judgment.

Municipalities are generally immune from suits for torts committed by its officers or employees while performing a governmental function. *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). That immunity can be waived, however, by the purchase of liability insurance. North Carolina General Statutes § 160A-485(a) (1994). In the case before us, defendant presented evidence that it was self-insured up to an amount of $250,000.00, and held liability insurance for amounts in excess of $250,000.00. The method by which defendant was self-insured does not operate as a waiver of immunity, *see Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992), therefore immunity was only waived for awards in excess of the self-insured amount.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The movant can meet this burden in one of two ways: (1) by showing that an essential element of the opposing party's claim is nonexistent; or (2) demonstrating that the opposing party cannot produce evidence sufficient to support an essential element of the claim or overcome an affirmative defense which would work to bar his claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992). In the instant case, defendant offered no evidence that an essential element of the claim was nonexistent or unprovable, but limited its presentation to the existence of an insurmountable affirmative defense.

The moving party has the burden of showing that the opposing party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989). Once the moving party has met its burden, the opposing party must challenge the motion by forecasting sufficient evidence to illustrate the existence of a prima facie case for trial. *Roumillat*, 331 N.C. 57, 414 S.E.2d 339. However, it is improper for the trial court to consider whether the non-moving party offered evidence to support their claim when the moving party has failed to offer sufficient evidence to defeat the claim in its entirety and demonstrate that it is entitled to judgment as a matter of law. *Emerson v. Tea Co.*, 41 N.C. App. 715, 255 S.E.2d 768, *disc. review denied*, 298 N.C. 202. *See also, Trexler v. K-Mart Corporation*, 119 N.C. App. 406, 458 S.E.2d 720, *disc. review allowed*, 341 N.C. 424, 461 S.E.2d 769 (1995).

In the case before us, the transcript indicates that the trial court accepted defendant's presentation as an affirmative defense, then shifted the burden of responding to the motion to plaintiff. The trial court erred in so doing. Defendant's evidence of partial immunity is not an affirmative defense as defined by case law as it does not operate to *bar* plaintiff's claim. At best, the evidence of self-insurance up to an award of $250,000.00 serves only to mitigate the amount of damages defendant may incur. That amount is a question of material fact for the jury, and it cannot be said that plaintiff would fail to obtain an award greater than $250,000.00 as a matter of law. Therefore, because defendant failed to demonstrate either the nonexistence of an element of plaintiff's claim, or the existence of an insurmountable affirmative defense which would bar plaintiff's claim, the entry of summary judgment was improper.

For these reasons, we vacate the order of the trial court and remand this case for a trial on the merits.

Vacated and remanded.

Chief Judge ARNOLD and Judge MARTIN, JOHN C. concur.

STATE OF NORTH CAROLINA v. PHILLIP BOSTIC

No. COA94-1359

(Filed 19 December 1995)

1. Homicide § 226 (NCI4th)— second-degree murder—sufficiency of evidence

There was no error in the denial of defendant's motion to dismiss a charge of second-degree murder for insufficient evidence where the State presented evidence that defendant had a history of abusing the victim, that defendant had threatened to kill the victim on numerous occasions, and that he had told a witness that he planned to kill the victim in a graveyard. While that would be insufficient to show that defendant was the person who killed the victim under *State v. Lee*, 294 N.C. 299, here the State also presented evidence that defendant was seen hitting the victim near the cemetery where she was found at 4:30 a.m. the morning the police received the phone call regarding her body at 9:00 a.m.;

that defendant was overheard in jail telling another inmate that he killed the victim; and that he had told another witness that he had killed the victim.

Am Jur 2d, Homicide §§ 44, 53, 246, 260.

2. Homicide § 307 (NCI4th)— second-degree murder—evidence of malice—sufficient

There was sufficient evidence of malice in a second-degree murder prosecution in that defendant told the victim he planned to kill her in a cemetery because he thought the victim was cheating on him and had tried to have him killed; defendant had threatened to kill the victim while walking through a cemetery approximately one week before the victim's death, saying he had not done "the job right" the first time, but would the next time; there was medical testimony that the victim had died as a result of a subdural hematoma which could have been the result of a fall, a blow to the head, or a violent shaking of the body; defendant had told a witness to hit his woman only in places where there would be no physical evidence of the beatings; there was evidence that three of the victim's ribs had been fractured near the time of her death; the victim had a torn thumbnail, there were scratches on her abdomen, and she was not wearing one of her shoes; and the victim was found in a remote part of a cemetery with her hands folded across her midsection.

Am Jur 2d, Homicide §§ 50, 51, 215, 227, 438, 488.

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR2d 854.

3. Homicide § 199 (NCI4th)— second-degree murder—proximate cause of death—evidence sufficient

There was sufficient evidence in a second-degree murder prosecution that defendant's act was a proximate cause of the victim's death where defendant was seen arguing with the victim around 4:30 a.m.; defendant told the victim, "Bitch, you're going to go down to the graveyard"; defendant hit the victim in the mouth; three of the victim's ribs were fractured before but near the time the victim died; there was medical testimony that the cause of the victim's death was a subdural hematoma that could have been caused by a blow to the head, a fall, or a violent shaking of the body; and defendant had previously said he knew how

to hit his woman so that there would be no external evidence of his beating her.

Am Jur 2d, Homicide §§ 13, 454.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

4. Criminal Law § 621 (NCI4th)— second-degree murder—sufficiency of evidence—circumstantial evidence—inference on inference—permitted

Defendant erroneously argued that a jury could not have found substantial evidence of each element of second-degree murder because the State presented circumstantial evidence and the jury would have had to draw inference upon inference to conclude that defendant was guilty. The N.C. Supreme Court in *State v. Childress*, 321 N.C. 226, overruled a line of cases and held that in considering circumstantial evidence an inference may be made from an inference.

Am Jur 2d, Homicide §§ 246, 272, 426.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption. 5 ALR3d 100.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial-state cases. 36 ALR4th 1046.

5. Evidence and Witnesses § 502 (NCI4th)— second-degree murder—defendant's statement concerning plea negotiations

There was no prejudicial error in a second-degree murder prosecution where the State served defense counsel with a list of statements allegedly made by defendant, including the statement, "Yeah, I killed the bitch. I've done my time. I'll take a plea bargain and walk"; defense counsel asked the judge to rule on the admissibility of this statement, arguing that any mention of plea negotiations was prohibited; the trial court responded that N.C.G.S. § 15A-1025 did not cover the statement because it was not made during negotiations; during the trial, the court ruled that the witness could not testify to the portions of the statement that men-

tioned plea negotiations, so the witness testified only that he overheard defendant say "I killed the bitch and I'm gonna walk"; and the trial court refused to allow defendant to offer evidence of plea negotiations to explain the statement. It was clear that defendant did not admit his guilt to the other inmate in order to get a plea bargain and, because the statement did not indicate that defendant or his counsel and the prosecutor engaged in plea discussions, N.C.G.S. § 15A-1025 did not prohibit the witness from testifying to the entire statement. However, defendant has not shown that the jury would have reached a different result absent the error and, finally, defendant's attempt to offer evidence of his refusing a plea bargain flies in the face of N.C.G.S. § 15A-1025.

Am Jur 2d, Homicide §§ 270, 293, 341-344.

Applicability of attorney-client privilege to communications made in presence of or solely to or by third person. 14 ALR4th 594.

What is accused's "statement" subject to state court criminal discovery. 57 ALR4th 827.

6. Evidence and Witnesses § 701 (NCI4th)— second-degree murder—prior offenses—limiting instruction

The instruction given by the court in a second-degree murder prosecution was a proper limiting instruction pursuant to N.C.G.S. § 8C-1, Rule 105 and adequately informed the jury not to consider the N.C.G.S. § 8C-1, Rule 404 (b) evidence to show that defendant acted in conformity therewith on the occasion the victim died. *State v. Coffey*, 326 N.C. 268, provides that when evidence is competent for a restricted purpose, it is not error for the trial court to admit the evidence without a limiting instruction unless the defendant requests a limiting instruction. It does not require that the trial court give the precise instruction requested by the defendant.

Am Jur 2d, Homicide §§ 493, 496, 560.

Right to impeach credibility of accused by showing prior conviction, as affected by remoteness in time of prior offense. 67 ALR3d 824.

7. Evidence and Witnesses § 702 (NCI4th)— second-degree murder—prior offenses—limiting instruction before testimony—not given—no abuse of discretion

The trial court did not abuse its discretion in a second-degree murder prosecution by not giving a limiting instruction before each witness testified to defendant's prior acts of physical abuse against the victim. The trial court has discretion in determining whether to give instructions requested by the parties, and N.C.G.S. § 15A-1231(c) contemplates that the trial court must instruct the jury after the arguments are completed.

Am Jur 2d, Homicide §§ 493, 496, 560.

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.

Appeal by defendant from judgment and commitment entered 14 June 1994 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 26 September 1995.

This case arises from the murder of Debra McRae Sloan (hereinafter the victim), defendant's girlfriend with whom he lived at the time of her death. Defendant was arrested and tried on the charge of second degree murder.

At trial, the State's evidence tended to show that on 8 May 1992, defendant and the victim entered the Backlot Club in McColl, South Carolina between 5:00 p.m. and 6:00 p.m. and remained at the club until approximately 1:00 a.m. The victim appeared to be in good physical condition when the couple left the bar together. Defendant asked Michael Washington for a ride back to Laurinburg. Mr. Washington said he would give the couple a ride after he went to the Duke Jones Club. Defendant, the victim, and another woman rode to the Duke Jones Club with Mr. Washington. Defendant and the victim stayed in the car while Mr. Washington and the woman went into the club with some of their friends. They stayed at the club for three to four hours. Mr. Washington then drove defendant and the victim back to Laurinburg and dropped them off in front of Deberry Upholstery which is at an intersection near Cedar Grove Cemetery at approximately 4:30 a.m. As the victim got out of Mr. Washington's vehicle, defendant said "[h]urry up and get your ass on out the car." Mr. Washington testified at trial that the victim still appeared to be in

good physical condition when he left defendant and the victim by the side of the road.

Karen McCoy saw defendant and the victim walking near the Deberry intersection around 4:30 a.m. on 9 May 1992. Ms. McCoy testified at trial that defendant was "fussing at" the victim and hit her in her mouth with his fist. The victim was crying and kept telling defendant that she did not want to go down to the graveyard, but defendant said: "Bitch, you're going to go down to the graveyard."

At approximately 9:00 a.m. on 9 May 1992, Laurinburg Police Department patrolman Doug Ikner testified that he received a telephone call from a male who told him there was a body laying on the dirt road behind Cedar Grove Cemetery. Patrolman Ikner drove along the road but found no body. On 10 May 1992, after Patrolman Ikner received another call, he returned to the road and got out of his car to search for the body. He finally found the body on a little pathway at the curved portion of the dirt road. The corpse was later identified through fingerprint comparisons on file with the Laurinburg Police Department as the victim, Debra Sloan. When Patrolman Ikner discovered the victim, her hands were crossed at her midsection and her right shoe was lying on the ground "off of the right foot." She had a white substance on her right eye and in the right corner of her mouth, and there was some fuzz on the left side of her head, mouth, and on her left ear.

Dr. Karen E. Chancelor performed an autopsy on the victim on 11 May 1992. Dr. Chancelor testified at trial that the victim had been dead from one to several days at the time of the autopsy. There were several scratches on the victim's abdomen and the right thumbnail was torn. Dr. Chancelor discovered that three of the victim's ribs were fractured and opined that the fractures preceded the victim's death but occurred near the time of death. Dr. Chancelor also discovered a subdural hematoma around the victim's brain which could have been caused by a blow to the head, a fall, or a violent shaking of the body. Dr. Chancelor did not find any external abrasions or bruises that would be associated with the subdural hematoma. Dr. Chancelor opined that the cause of the victim's death was head trauma, resulting in a subdural hematoma.

The State presented several witnesses at trial who testified to a pattern of violence committed by defendant against the victim over a number of years. Ethel Rogers, the victim's mother, testified that she saw her daughter in 1989 after defendant had beaten her "with a drop

cord or belt" across her legs and her body. In addition to the injuries on her body, the victim had a gauze patch over one of her eyes. Ms. Rogers also testified that the victim was hospitalized in June 1991 for approximately eleven days as a result of being beaten. On that occasion, the victim's face was swollen, she had dried blood around her lip, her eyes were swollen shut, and she had a cigarette burn in the middle of her chest. The victim told her mother that defendant was the person who had beaten her.

Felipe Sloan, the victim's twelve-year-old son, testified that he saw defendant hit his mother with a drop cord and his fist "[a]bout five or six" times "[a]bout every other night." Felipe also stated that defendant often threatened to kill his mother. Beulah Cureton, a neighbor of defendant and the victim, testified that she heard defendant fighting with the victim and the victim screaming and pleading "don't kill me, don't kill me" approximately every other night. Lois Hennigan, another neighbor, testified that she saw defendant strike the victim a few months before the victim's death. Ms. Hennigan testified that she also had heard the victim scream and beg defendant not to kill her.

Calvin Brown testified that on a Friday evening approximately one week before the victim's death, he walked with defendant and the victim through Hillside Cemetery, which is approximately one mile away from Cedar Grove Cemetery. Defendant told Mr. Brown that he was mad because he had been in jail for not doing "the job right." Mr. Brown testified that defendant "kept telling [the victim] he was gonna kill her; that's [sic] he's gonna fix her for having to stay in jail; that he shoulda killed her the first time, but this time he [would] kill her." Defendant then began punching the victim and hit her approximately eleven times. Defendant had previously told Mr. Brown that he should always hit his "woman" in places where there would be no visible physical evidence of the beatings, like "in the back of the head." Mr. Brown testified he had witnessed defendant beating the victim on approximately five separate occasions when he was a guest at their house. Mr. Brown testified that after defendant was arrested for the victim's death and Mr. Brown was also in jail on unrelated charges, defendant offered to pay Mr. Brown if Mr. Brown "ke[pt] [his] mouth shut."

Mary Gunter testified that she heard the victim scream "four or five times a week." She would scream "[d]on't kill me, Phillip. You're gonna kill me." On one occasion, Ms. Gunter saw defendant after he

told Ms. Gunter's daughter that he was going to kill the victim. Ms. Gunter asked defendant if he was serious. Defendant laughed and responded "heh, heh, I was just joking." However, defendant then said twice "I got my time set."

Sandra Gunter-Cureton, Ms. Gunter's daughter, testified that on one occasion when she was at her parents' house, she heard defendant hitting the victim and he said "I am going to kill you." Ms. Gunter-Cureton also testified to a time when she saw defendant and asked him how the victim was. Defendant responded "I left her to die, but the bitch didn't die." Defendant then explained that he thought the victim was cheating on him and that she had tried to have him killed, "[b]ut I have my time set for her and I have the place set." He then said "I'm going to kill her in a graveyard." When Ms. Gunter-Cureton asked why in a graveyard, he said "[b]ecause there is a path in this graveyard. . . . [N]o one will hear her when she holler, and no one will see her when I kill her."

John Hennigan testified that he was incarcerated in the Scotland County jail in March 1993 and heard the defendant tell another inmate "I killed the bitch and I'm gonna walk." James Hill testified that while he was incarcerated in the Scotland County jail, he had a conversation with defendant during which defendant said he killed the victim "and she didn't holler." Mr. Hill said that he and defendant got into an argument on another date and that defendant again said he had killed the victim.

Defendant offered no evidence. The jury found defendant guilty of second degree murder and the trial court sentenced defendant to life in prison.

Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Grayson G. Kelley, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender J. Michael Smith, for defendant-appellant.

EAGLES, Judge.

I.

[1] Defendant first argues that the trial court erred in denying defendant's motions to dismiss the charge of second degree murder because the evidence presented was insufficient as a matter of law.

When a party moves to dismiss based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the crime charged. *State v. Bates*, 309 N.C. 528, 533-34, 308 S.E.2d 258, 262 (1983). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. O'Rourke*, 114 N.C. App. 435, 441, 442 S.E.2d 137, 140 (1994). The trial court must view the evidence in the light most favorable to the State and must draw every reasonable inference in its favor. *State v. Furr*, 292 N.C. 711, 715, 235 S.E.2d 193, 196, *cert. denied*, 434 U.S. 924, 54 L.Ed.2d 281 (1977). The evidence may be circumstantial, direct, or a combination of both. *State v. McKnight*, 279 N.C. 148, 153, 181 S.E.2d 415, 418 (1971). However, "if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss should be allowed." *Bates*, 309 N.C. at 533, 308 S.E.2d at 262.

"[S]econd degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Allen*, 77 N.C. App. 142, 144, 334 S.E.2d 410, 411 (1985), *disc. review denied*, 316 N.C. 196, 341 S.E.2d 579 (1986). For a defendant to be guilty of second degree murder, the State must prove beyond a reasonable doubt that: 1. defendant killed the victim; 2. defendant acted intentionally and with malice; and 3. defendant's act was a proximate cause of the victim's death. N.C.P.I., Crim. 206.31A. See *State v. Snyder*, 311 N.C. 391, 393, 317 S.E.2d 394, 395 (1984).

We first determine whether the State presented substantial evidence that defendant was the person who killed the victim. In *State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978), the State presented evidence that the defendant had beaten the victim on two separate occasions shortly before her death. *Lee*, 294 N.C. at 301, 240 S.E.2d at 450. The State also presented the testimony of a woman who stated that the defendant had told her he was going to kill the victim. *Id.* Our Supreme Court held this evidence was insufficient to show the defendant was the person who killed the victim. *Id.* at 303, 240 S.E.2d at 451.

Here, the State presented evidence that defendant had a history of abusing the victim. Defendant had threatened to kill the victim on numerous occasions. Defendant had told Ms. Gunter-Cureton that he planned to kill the victim in a graveyard. Based on these facts alone, we would be constrained by our Supreme Court's holding in *Lee*.

However, here the State also presented evidence that defendant was seen hitting the victim near the Cedar Grove Cemetery at 4:30 a.m. the morning the police received the phone call regarding her body at 9:00 a.m. In addition, the State presented evidence that after defendant was arrested for the victim's murder, Mr. Hennigan overheard defendant tell another inmate in jail that he had killed the victim. The State also presented the testimony of Mr. Hill, who said defendant told him defendant had killed the victim "and she didn't holler." We conclude this evidence was sufficient to satisfy the State's burden of offering substantial evidence to show defendant was the person who killed the victim. *See State v. Rinaldi*, 264 N.C. 701, 704, 142 S.E.2d 604, 606 (1965) (holding that the evidence, if true, was sufficient to support a verdict that the defendant was guilty of murder where the evidence included the defendant's own statement that he was the killer) (new trial granted on other grounds). *See also State v. Lambert*, 341 N.C. 36, 460 S.E.2d 123 (1995) (where our Supreme Court held that evidence of the defendant's opportunity to kill her husband combined with her inculpatory statement while leaning over his casket: "Honey, why did you make me do it?" constituted substantial evidence to show defendant was the killer).

[2] Next, we consider whether there is substantial evidence from which a reasonable juror could determine defendant acted intentionally and with malice.

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.
>
> Malice means not only hatred, ill will, or spite, as it is ordinarily understood—to be sure, that is malice—but [it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in his death, without just cause, excuse or justification] [malice also arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief].

N.C.P.I., Crim. 206.31A. *See State v. Snyder*, 311 N.C. 391, 393-94, 317 S.E.2d 394, 395-96 (1984).

Here, the State presented the testimony of Ms. Gunter-Cureton that defendant told her he planned to kill the victim in a cemetery because he thought the victim was cheating on him and had tried to have him killed. Mr. Brown testified that while he, defendant, and the victim were walking through a cemetery approximately one week before the victim's death, defendant threatened to kill the victim and said he had not done "the job right" the first time, but he would do it correctly the next time. Dr. Chancelor testified that the victim died as the result of a subdural hematoma which could have been the result of a fall, a blow to the head, or a violent shaking of the body. Mr. Brown testified that defendant had told him to hit his woman only in places where there would be no physical evidence of the beatings. There was evidence that three of the victim's ribs had been fractured near the time of her death. The victim had a torn thumbnail, there were scratches on her abdomen, and she was not wearing one of her shoes. The victim was found in a remote part of a cemetery with her hands folded across her midsection. From this evidence, we conclude the State satisfied its burden of showing that defendant acted intentionally and with malice.

[3] Finally, we must determine whether there was substantial evidence that defendant's act was a proximate cause of the victim's death. To be a proximate cause, a defendant's act does not have to be the immediate cause of death. A defendant is accountable if the victim dies as a natural result of the defendant's act. *State v. Jones*, 290 N.C. 292, 298, 225 S.E.2d 549, 552 (1976). Here, defendant was seen arguing with the victim around 4:30 a.m. on 9 May 1992. Defendant told the victim: "Bitch, you're going to go down to the graveyard." Defendant hit the victim in the mouth. Dr. Chancelor found that three of the victim's ribs were fractured before but near the time the victim died. Dr. Chancelor testified that the cause of the victim's death was a subdural hematoma that could have been caused by a blow to the head, a fall, or a violent shaking of the body. Defendant previously had said he knew how to hit his woman so that there would be no external evidence of his beating her. We conclude that a reasonable juror could have concluded from this evidence that defendant beat the victim during the early morning hours of 9 May 1992 in or near Cedar Grove Cemetery, that during this beating, defendant violently shook the victim, and that the victim died as a proximate result of these actions. Accordingly, defendant's assignment of error is without merit.

[4] We note that defendant argues that a jury could not have found substantial evidence of each element of second degree murder because the State presented circumstantial evidence and the jury would have had to draw inference upon inference to conclude defendant was guilty. Defendant relies on *State v. Byrd*, 309 N.C. 132, 305 S.E.2d 724 (1983) to argue that a jury cannot draw one inference from another. Defendant's reliance is misplaced. In 1987, our Supreme Court overruled a line of cases including *Byrd* and held that "in considering circumstantial evidence an inference may . . . be made from an inference." *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987).

II.

[5] Defendant next argues that the trial court erred by denying defendant's request to offer evidence of plea negotiations between the prosecution and himself. To understand defendant's argument, it is necessary to review some of the proceedings during the trial.

As required by G.S. 15A-903(a)(2), the State served defense counsel with a list of statements allegedly made by defendant, including the statement: "Yeah, I killed the bitch. I've done my time. I'll take a plea bargain and walk." During trial, defense counsel asked the trial court to rule on the admissibility of this statement, arguing that G.S. 15A-1025 prohibited any mention of plea negotiations and that if this statement came in, defendant's counsel would have to explain the context of defendant's remarks by going into "a complete history of every plea negotiation that was made in the matter." The trial court responded that G.S. 15A-1025 did not cover this statement because it was not made during actual plea bargain negotiations.

Defense counsel then suggested that this statement was not the only statement made by defendant that defense counsel might find objectionable and asked the State to specify the testimony of each of its witnesses so that the trial court could rule on the admissibility of all of the upcoming testimony which dealt with statements allegedly made by defendant. The prosecutor replied that he would not "let [defense] counsel stake [him] out as to what a prospective witness [would] be saying [at trial]." The trial court resolved the matter by ordering that no witnesses could mention plea negotiations in their testimony.

It later became apparent that Mr. Hennigan was the State's witness who overheard defendant tell another inmate: "Yeah, I killed the bitch. I've done my time. I'll take a plea bargain and walk." Defense

counsel once again asked the trial court to rule on the admissibility of this testimony. After conducting a voir dire of Mr. Hennigan, the trial court stated that Mr. Hennigan's testimony showed that defendant did not make his statement in order to get a plea bargain. The trial court ruled that Mr. Hennigan could not testify to the portions of the statement that mentioned plea negotiations. Accordingly, Mr. Hennigan only testified in front of the jury that he overheard defendant say: "I killed the bitch and I'm gonna walk."

Defense counsel argued at the time the trial court made its ruling and defendant argues now that if Mr. Hennigan could not mention anything about plea negotiations but could testify to the portion of the statement where defendant said "[y]eah, I killed the bitch and I'll walk," defense counsel should have been able to offer evidence that defendant "unilaterally refused a plea bargain on the basis that he refused to make an admission of guilt" and that defendant's actual statement was: "I would have to admit that I killed the bitch to take the plea bargain and walk." Defendant contends that the trial court's refusal to allow him to offer evidence of plea negotiations to explain the statement testified to at trial by Mr. Hennigan unfairly prejudiced him.

Before addressing defendant's contention, we first note that the trial court erred by not allowing Mr. Hennigan to testify to the entire statement he overheard. As the trial court stated when it made its ruling, it was clear from Mr. Hennigan's voir dire testimony that defendant did not admit his guilt to the other inmate in order to get a plea bargain. Because the statement overheard by Mr. Hennigan did not in any way indicate that "defendant or his counsel and the prosecutor engaged in plea discussions," G.S. 15A-1025 did not prohibit Mr. Hennigan from testifying to the entire statement he overheard.

G.S. 15A-1443(a) states in part: "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice . . . is upon the defendant." Here, although the trial court erred by prohibiting Mr. Hennigan from testifying to defendant's entire statement, defendant has not shown that, absent this error, the jury would have reached a different result. Several witnesses testified that they overheard defendant threaten to kill the victim. Ms. Gunter-Cureton testified that defendant told her he had the time and place set to kill the victim and that he was going to do it in

a graveyard. Ms. McCoy testified that she saw defendant hit the victim in the face around 4:30 a.m. on 9 May 1992 and that defendant told the victim: "Bitch, you're going to go down to the graveyard." Mr. Brown testified that defendant offered to pay Mr. Brown if he "just ke[pt] [his] mouth shut." Mr. Hill testified that defendant told him defendant killed the victim.

We now address defendant's contention that the trial court erred by refusing to allow defendant to admit evidence of plea negotiations to explain defendant's statement. G.S. 15A-1025 is clear. "The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings." G.S. 15A-1025. Defendant's attempt to offer evidence of his refusing a plea bargain flies in the face of G.S. 15A-1025. The trial court did not err in refusing his request. This assignment of error fails.

III.

[6] Defendant also argues that the trial court erred by failing to give, in addition to the pattern jury instruction dealing with Rule 404(b) evidence, another instruction limiting the use of evidence of defendant's prior misconduct toward the victim so that it could not be used in determining whether the victim died as the result of a criminal act and whether defendant committed the criminal act. Rule 105 of the North Carolina Rules of Evidence provides in part that when evidence is admissible for one purpose but not another purpose, the trial "court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." G.S. 8C-1, Rule 105.

Here, the trial court instructed the jury during the jury charge that the evidence of "other crimes, wrongs, or acts" was admitted only to show identity, motive, intent, plan, scheme, system or design, opportunity, absence of accident, or presence of malice. The trial court also instructed the jury regarding the Rule 404(b) evidence: "If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. Evidence of other crimes, wrongs, or acts are not admissible to prove the character of a person in order to show that he acted in conformity therewith."

Defendant cites *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), for the proposition that, if a defendant requests a particular limiting instruction, the trial court must instruct the jury accordingly.

Defendant is mistaken. *Coffey* provides that when evidence is competent for a restricted purpose, it is not error for the trial court to admit the evidence without a limiting instruction unless the defendant requests a limiting instruction. *Coffey*, 326 N.C. at 286, 389 S.E.2d at 59. *Coffey* does not require that the trial court must give the precise instruction requested by the defendant. In fact, the trial court is only required to give requested instructions when they are "a correct statement of the law" and even then, the trial court is only required to give "the requested instructions in substance." *State v. Avery*, 315 N.C. 1, 33, 337 S.E.2d 786, 804 (1985). We conclude that the instruction given by the trial court here was a proper limiting instruction pursuant to Rule 105 and adequately informed the jury not to consider the Rule 404(b) evidence to show that defendant "acted in conformity therewith" on the occasion when the victim died. Accordingly, this assignment of error fails.

IV.

[7] Defendant also argues that the trial court erred by failing to give an instruction limiting the use of Rule 404(b) evidence before each witness testified to defendant's prior acts of physical abuse against the victim. Defendant has failed to preserve this argument for appellate review. Defendant's assignment of error does not reference any exception in the transcript that deals with this argument. N.C. R. App. P. 10(c)(1). Furthermore, defendant has abandoned this argument by failing to cite any legal authority in support of his argument. N.C. R. App. P. 28(b)(5). Nevertheless, we briefly address defendant's contention.

The trial court has discretion in determining whether to give instructions requested by the parties. *See Avery*, 315 N.C. at 32-33, 337 S.E.2d at 804; *State v. Bridges*, 107 N.C. App. 668, 676, 421 S.E.2d 806, 811 (1992), *aff'd*, 333 N.C. 572, 429 S.E.2d 347 (1993). We find no authority to support defendant's contention that the trial court abused its discretion here by failing to instruct the jury before each witness testified to defendant's prior acts of misconduct toward the victim. We note that G.S. 15A-1231(c) contemplates that the trial court must instruct the jury "*[a]fter* the arguments are completed." (Emphasis added.) On this record, we find no abuse of discretion. Accordingly, defendant's argument fails.

No error.

Judges JOHNSON and WYNN concur.

HAROLD DAVIS, ADMINISTRATOR OF THE ESTATE OF PHILLIP DAVIS, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DEFENDANT

No. COA95-190

(Filed 19 December 1995)

1. State § 46 (NCI4th)— death caused by former mental health patient—negligent employee not specifically named

In an action under the Tort Claims Act to recover damages for injuries occurring when a patient was released from Cherry Hospital where he had been involuntarily committed and the patient subsequently killed plaintiff's intestate, the claim was not subject to dismissal on the ground that plaintiff's affidavit failed to include "the name of the State employee upon whose alleged negligence the claim is based" as required by N.C.G.S. § 143-297(2) because it failed to name the patient's treating physician who recommended his release where plaintiff listed the "North Carolina Department of Human Resources, Division of Mental Health, Cherry Hospital, Thomas E. Buie, Jr., M.D., Director of Clinical Services" as the state agency and employee alleged to be negligent; plaintiff's affidavit gave sufficient notice to defendant to allow it to narrow its investigation to those involved with treating the patient; at no time did defendant indicate that it was hampered in its investigation; and the object of the statute was achieved.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 661 et seq.

2. Hospitals and Medical Facilities or Institutions § 65 (NCI4th)— mental health patient—duty of defendant to exercise reasonable care to protect third parties, to advise district court

Where a mentally ill patient was involuntarily committed into the custody of a state institution, the institution had a duty to exercise reasonable care in the protection of third parties from injury by the patient, and this duty necessarily mandated the exercise of reasonable care in the advice given the district court with regard to the appropriateness of mental health commitment.

Am Jur 2d, Hospitals and Asylums §§ 14, 16.5, 19-25.

3. Physicians, Surgeons, and Other Health Care Professionals § 123 (NCI4th)— release of mental patient—failure of examining psychiatrist to exercise reasonable care

In an action to recover damages for the death of plaintiff's intestate who was killed by a patient who had been released from Cherry Hospital, the evidence was sufficient to support the Industrial Commission's finding that the examining psychiatrist failed to exercise reasonable care in his recommendation given the district court with regard to the appropriateness of mental health commitment where the evidence tended to show that the psychiatrist was aware of the patient's violent history, of his failure to take medication in the past, and of the fact that failure to take medication led to violent behavior.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 357 et seq.

4. Hospitals and Medical Facilities or Institutions § 65 (NCI4th)— former mental patient—violent acts in recent past—same as relevant past—relevant past as six months preceding hearing

In an action to recover damages for the death of plaintiff's intestate who was killed by a patient who had been released from Cherry Hospital, there was no merit to defendant's contention that the patient had not committed any violent acts within two months of the district court hearing and therefore was not, as a matter of law, dangerous to others within the meaning of N.C.G.S. § 122-58.2(1)(b), since the term "recent past" as used in that statute means "relevant past," and violent acts committed within six months prior to the hearing occurred within the relevant past.

Am Jur 2d, Hospitals and Asylums §§ 38, 44.

5. Hospitals and Medical Facilities or Institutions § 65 (NCI4th); Negligence § 22 (NCI4th)— death caused by former mental patient—release as negligence—no intervening negligence

In an action to recover damages for the death of plaintiff's intestate who was killed by a patient who had been released from Cherry Hospital, there was no merit to defendant's contention that its actions were not the proximate cause of the death because there were intervening acts, since the evidence was such that the Commission could determine that defendant could have

reasonably foreseen the subsequent acts and the resultant harm to plaintiff's intestate.

Am Jur 2d, Hospitals and Asylums §§ 38, 44; Negligence §§ 492-501.

Judge Mark D. MARTIN concurring.

Appeal by defendant from Decision and Order for the Full Commission entered 14 November 1994. Heard in the Court of Appeals 14 November 1995.

Duke & Brown, by John E. Duke, and Jonathan S. Williams, for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General William H. Borden, for defendant-appellant North Carolina Department of Human Resources.

GREENE, Judge.

The North Carolina Department of Human Resources (defendant) appeals a Decision and Order of the North Carolina Industrial Commission (Commission), awarding Harold Davis (plaintiff), as administrator of the estate of Phillip Davis (Davis), damages for injuries occurring when Dondiago Rivers (Rivers) was released from Cherry Hospital where he had been involuntarily committed, and subsequently killed Davis.

Rivers had been committed to state mental hospitals on eleven separate occasions. He had a history of aggressive, hostile behavior, and had been previously convicted for shoplifting, damage to personal property, assault on a female, trespassing and communicating threats. On 17 February 1982, Rivers pled guilty and was sentenced to six years in prison for voluntary manslaughter, after he beat a man's head against a sidewalk until the man died. On 2 October 1984, Rivers was arrested for assault on a female and carrying a concealed weapon, after he chased after his victim with a knife in hand.

By Order dated 19 October 1984, the trial court found that Rivers was incapable to stand trial, and should be involuntarily committed pursuant to N.C. Gen. Stat. § 15A-1003. On 25 October 1984, the court found Rivers mentally ill and dangerous to others and involuntarily committed him to Cherry Hospital for 30 days. Rivers was reevalu-

ated and on 15 November 1984 was recommitted to Cherry Hospital for another 180 days.

While at Cherry Hospital, Rivers got into fights, and threatened patients and staff members. He was transferred to the "high management" unit because of his fighting and anti-social behavior. Rivers was sent back to the behavior modification unit on 20 February 1985, where Dr. Perumallu saw Rivers on a weekly basis. Rivers was treated with medication to stabilize his behavior and showed improvement over the next two months. A report by Dr. Perumallu prepared 26 April 1985 stated that for the previous two months Rivers had not shown "any physical and verbal aggressive behavior" and recommended that Rivers was ready to stand trial at this time and "does not meet the criteria for commitment."

At the hearing to determine whether Rivers should be discharged to stand trial, Dr. Perumallu testified that Rivers was responding well to medication, was not a threat or danger to others, but due to his drug and alcohol problems or if he stops taking the medication, which lead to his mental and behavioral problems, he should be supervised upon being released from the hospital. Dr. Perumallu wrote in his discharge report, made only days after the release hearing, that "[i]n view of the past violence and his inability to understand his illness, inability to take medications, stress and at times taking marijuana and alcohol, even though patient denies the problems, all these factors" may cause a "crisis of violence" and "dangerousness in the community." Dr. Perumallu's prognosis for Rivers was "very guarded . . . in view of . . . his . . . stress situations, [and] altered mental state functionings."

Although Rivers was found mentally ill, he was not found to meet the criteria for commitment, and was ordered discharged from Cherry Hospital by Judge Arnold Jones, the District Court Judge presiding, who had previous knowledge of Rivers' mental state and aggressive behavior from Rivers many times in court on other charges as well as a similar commitment hearing in 1978.

Upon discharge, Rivers was released into the custody of the Wayne County Sheriff's Department. He was then evaluated at Dorothea Dix Hospital by Dr. Groce, who gave the opinion that at times Rivers was not able to tell right from wrong, and recommended that Rivers was "capable of proceeding to trial," but stated that whether he is found not guilty due to insanity or guilty, he should con-

tinue receiving treatment. Dr. Groce found that Rivers "may continue to present a danger to himself or to other people in the community."

Rivers was discharged to the Sheriff's Department with a two-week supply of medication, and a weekly follow-up plan for individual therapy at the Wayne Mental Health Center.

On 5 June 1985 Rivers pled guilty to assault on a female and carrying a concealed weapon. District Court Judge Joseph Setzer, who had once prosecuted Rivers on voluntary manslaughter, sentenced Rivers to two years in prison, but suspended it for three years, with two years of supervised probation.

On 18 August 1985, Davis was with two friends in Goldsboro. Rivers walked across an intersection in front of Davis' car pointing at the car and saying something that could not be heard. Davis got out of the car, went to the trunk and got a "tire tool," at which time Rivers ran off. Two blocks down the road, Davis and his friends stopped at a club to buy some beer. While Davis was walking back to the car, Rivers ran up from behind and hit Davis on the head with a fence post, fracturing Davis' skull and killing him.

Plaintiff brought suit before the Commission, pursuant to the North Carolina Tort Claims Act, alleging negligence by the State for releasing Rivers from Cherry Hospital when it knew or should have known that Rivers was violent and dangerous to others.

Plaintiff's affidavit, filed with the Commission pursuant to N.C. Gen. Stat. § 143-297, listed the "North Carolina Department of Human Resources, Division of Mental Health, Cherry Hospital, Thomas E. Buie, Jr., M.D., Director of Clinical Services" as the name of the department, institution or agency of the state against which the claim is asserted and the name of the state employee who was alleged to be negligent. The affidavit's statement of facts states in part that "prior to August of 1985, one Dondiago Rivers was a patient at Cherry Hospital, and has been a mental patient at Cherry Hospital for sometime . . . ; that the said department, acting by and through Thomas E. Buie, Jr., negligently caused Dondiago Rivers to be released in a violent state to his home county of Wayne County, North Carolina."

Dr. Malekpour, an expert in the field of psychiatry who had cared for Rivers at another facility, testified before the Commission that a reasonable standard of care required a report to the court that Rivers was "highly dangerous" and a person "who needed to be confined in one form or the other."

Defendant's motion for summary judgment was denied. The Commission found that as Rivers' treating physician, Dr. Perumallu

> was under a duty to exercise reasonable care in his treatment of Rivers in preparation for release to stand trial and more importantly in his recommendations to the court, who would rely thereon in determining whether Rivers was dangerous to himself or others. This duty extends to those in the community who might come to harm at the hands of Rivers if released when dangerous to himself or others.
>
> 15. Dr. Perumallu breached the above-described duty owed to Phillip Davis and others when he reported to the court that Rivers was not dangerous to himself or others. . . . Judge Jones relied on Dr. Perumallu's recommendation that Rivers was not dangerous and the end result was that Rivers was released and committed murder again . . . . Dr. Perumallu knew or should have known that Dondiego [sic] Rivers did not have a structured environment outside of the hospital and was not likely to take his medication as prescribed. Dr. Perumallu knew or should have known that while Rivers may have stabilized for a few months, he was likely to go off his medication, decompensate quickly, and likewise quickly become a danger to the community. The fact that it was Judge Jones who made the ultimate decision or that Dr. Perumallu may have assumed Rivers was going back into the criminal justice system and would hopefully receive an appropriate disposition there is irrelevant. . . .
>
> . . . .
>
> 17. Dr. Perumallu's breach was the proximate cause of Phillip Davis' death. It was reasonably foreseeable that Rivers if released would harm or murder someone else.

Plaintiff was awarded $100,000 for damages. Defendant appeals.

The issues are whether (I) the award should be dismissed because the affidavit does not name the negligent employee responsible for Davis' death; and (II) the evidence was sufficient to find negligence by the defendant, causing Davis' death.

I

[1] Defendant argues that plaintiff failed to include in his affidavit "the name of the State employee upon whose alleged negligence the

claim is based." N.C.G.S. § 143-297(2) (1993). Plaintiff's affidavit stating its claim against the State, filed with the Commission, listed "Thomas E. Buie, Jr., M.D., Director of Clinical Services" at Cherry Hospital, as the negligent employee. Defendant contends that "the evidence does not tend to show that Dr. Buie was negligent or involved in the release of Mr. Rivers," but focuses on Dr. Perumallu's negligence, who was not added to the affidavit, and therefore "this claim against the defendant should be dismissed."

The purpose of requiring a claimant to name the negligent employee of the State agency is to enable the agency to investigate the employee involved and not all employees. *Distributors, Inc. v. Dept. of Transp.*, 41 N.C. App. 548, 551, 255 S.E.2d 203, 206, *cert. denied*, 298 N.C. 567, 261 S.E.2d 123 (1979). Furthermore, although the Tort Claims Act is strictly construed, the rule of strict construction should not be replaced by one of "technical stringency." *Id.* at 550, 255 S.E.2d at 205 (holding that although affidavit named only one negligent employee of defendant, while two were involved, it gave sufficient notice of which employee or employees was/were involved so that defendant could properly confine its investigation); *see Laughinghouse v. State ex rel. Ports Ry. Comm'n*, 101 N.C. App. 375, 377, 399 S.E.2d 587, 589 (1991) (claim dismissed because negligent employees were employees of State Ports Authority, not the Ports Authority Railway Commission, as named in the affidavit).

Plaintiff's affidavit gave sufficient notice to defendant to allow it to narrow its investigation to those involved with treating Rivers. The affidavit notified defendant that Davis' death was caused by a former patient, Rivers, who had been involuntarily committed to Cherry Hospital. Plaintiff named the correct state agency, as required by section 143-297, the specific division of that agency, as well as the hospital at which Rivers was committed and where the alleged negligence took place. At no time did defendant indicate that it was hampered in its investigation. Failure to name Dr. Perumallu, therefore, did not impede defendant's investigation, and the objective of section 143-297 was achieved.

II

Defendant also contends that Dr. Perumallu did not breach any duty to Davis and that even if he did, that the breach was not a proximate cause of Davis' death. We disagree.

The elements of a cause of action based on negligence are: a duty, breach of that duty, a causal connection between the conduct and the injury and actual loss. W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 30, at 164-65 (5th ed. 1984) [hereinafter *Prosser and Keeton on Torts*]. A duty is defined as an "obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Id.* A breach of the duty occurs when the person fails to "conform to the standard required." *Id.* "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). The injurious result must have been reasonably foreseeable by a "person of ordinary prudence," although the defendant need not have foreseen the precise form of the injury. *Id.* at 233-34, 311 S.E.2d at 565. He need only have foreseen that some injury would result. *Id.* at 234, 311 S.E.2d at 565. There may be more than one proximate cause of an injury. *Id.* When there is more than one proximate cause, each negligent actor may be held liable for the injuries. *Id.*

A

DUTY

[2] The general rule is that there is no duty to protect others against harm from third persons. *King v. Durham County Mental Health Auth.*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774, *disc. rev. denied*, 336 N.C. 316, 445 S.E.2d 396 (1994). A recognized exception, however, exists where a person has been involuntarily committed for a mental illness, in which case there is a duty on the institution to exercise control over the patient "with such reasonable care as to prevent harm to others at the hands of the patient." *Pangburn v. Saad*, 73 N.C. App. 336, 338, 326 S.E.2d 365, 367 (1985); *see King* at 345-46, 439 S.E.2d at 774; *see also Currie v. United States*, 836 F.2d 209, 212-13 (4th Cir. 1987) (*citing Pangburn*). We reject the defendant's argument that its conduct must be measured "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities." N.C.G.S. § 90-21.12 (1993). The section 90-21.12 standard of care is only applicable to medical malpractice actions, *id.*, and a recommendation given a district court with regard to involuntary commitment or the capacity of a defendant to proceed is not a medical

malpractice action. *See Pangburn*, 73 N.C. App. at 338, 326 S.E.2d at 367 (*citing Bradley Center, Inc. v. Wessner*, 250 Ga. 199, 203, 296 S.E.2d 693, 696-97 (1982)); N.C.G.S. § 90-21.11 (1993) (defining medical malpractice action as one arising "out of the furnishing or failure to furnish professional services in the performance of medical . . . care by a health care provider").

In this case, Rivers was involuntarily committed into defendant's custody and it, therefore, had a duty to exercise reasonable care in the protection of third parties from injury by Rivers. This duty necessarily mandates the exercise of reasonable care in the advice given the district court with regard to the appropriateness of mental health commitment. *See Hicks v. United States*, 511 F.2d 407, 415 (D.C. Cir. 1975) (public mental hospital owed duty to court to provide report as to defendant's ability to stand trial and also to a subsequent victim of defendant).

B

BREACH

The defendant makes two separate arguments that the record does not support a finding that it breached its duty. We disagree with both.

Lack of Evidence

[3] The defendant first argues that there is insufficient evidence to support the finding that Dr. Perumallu failed to exercise reasonable care in the recommendation given the district court with regard to the appropriateness of mental health commitment. In reviewing whether the findings are supported by the evidence, we are bound by the findings of the Commission if they are supported by sufficient competent evidence in the record. *Andrews v. Fulcher Tire Sales and Service, 120* N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995). The evidence is sufficient if a reasonable mind might accept it as adequate to support the finding. *Andrews*, 120 N.C. App. at 605, 463 S.E.2d at 427.

Dr. Perumallu's report prepared for the district court stated that Rivers was mentally ill but did not meet the criteria for commitment because Rivers was not dangerous to others. At the time of the report he was aware of Rivers' violent history and that Rivers had failed to take his medication in the past, which was one factor leading to his violent behavior. Dr. Perumallu wrote in his discharge report, made only days after the release hearing, that "[i]n view of the past violence

and his inability to understand his illness, inability to take medications, stress and at times taking marijuana and alcohol, even though patient denies the problems, all these factors" may cause a "crisis of violence" and "dangerousness in the community." Dr. Perumallu's prognosis, in his discharge report, was "very guarded . . . in view of . . . his . . . stress situations, [and] altered mental state functionings." Dr. Malekpour, an expert in the field of psychiatry who had cared for Rivers at another facility, testified that a reasonable standard of care required that the treating psychiatrist report to the court that Rivers was "highly dangerous" and "needed to be confined in one form or the other."

This evidence is both competent and sufficient to support the findings of the Commission that the defendant breached its duty of exercising reasonable care in the advice given to the district court.

Matter of Law

[4] The defendant next argues that because Rivers had not committed any violent acts within two months of the district court hearing, he was not, as a matter of law, "dangerous to others" within the meaning of former N.C. Gen. Stat. § 122-58.2(1)b. 1979 N.C. Sess. Laws ch. 915, § 1 (codified as N.C.G.S. § 122-58.2(1)b) (repealed 1986). It follows, the defendant contends, that Dr. Perumallu's testimony was correct and not in breach of any duty. We disagree. "Dangerous to others" is defined to mean:

> that **within the recent past**, the person has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another or has acted in such a manner as to create a substantial risk of serious bodily harm to another, and that there is a reasonable probability that such conduct will be repeated.

Id. (emphasis added). Although the evidence is that Rivers, within two months prior to the hearing, had not exhibited any acts of violence or threats, there were violent acts prior to that two month period.

The question is whether the two months proceeding the district court hearing is the "recent past" or whether the "recent past" extends back beyond those two months. The legislature did not define the term, choosing instead to leave the issue ambiguous. The legislature did in 1985, delete the term "recent past" and substitute the term "relevant past." N.C.G.S. § 122C-3(11)b (1993). We construe this legislative amendment as an effort on the part of the legislature

to clarify the meaning of the statute, not to change the law. *See Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483-84 (1968). We therefore construe the term "recent past" to mean "relevant past" and as such determine that the violent acts committed by Rivers within the six months prior to the district court hearing to be the "relevant past." These acts are relevant because they occurred close enough in time to the district court hearing to have probative value on the ultimate question before the court of whether there was a "reasonable probability that such [violent] conduct [would] be repeated." 1979 N.C. Sess. Laws ch. 915, § 1; *see* N.C.G.S. § 8C-1, Rule 401 (1992) (defining relevant evidence). We do not attempt to define the term with any greater degree of preciseness and each case must be viewed on its own facts in determining whether violent acts are relevant to the inquiry of involuntary commitment. The courts will be the ultimate judge of whether the conduct occurs within a relevant time.

C

PROXIMATE CAUSE

[5] Defendant argues that its actions were not the proximate cause of Davis' death and plaintiff's injuries, because "[t]here are too many intervening events and intentional acts by others." We disagree.

Defendant argues that there are four separate intervening acts which would supersede any negligent action by Dr. Perumallu. First, at the commitment trial, despite testimony by Dr. Perumallu about Rivers' "anti-social personality . . . which would tend to emerge under the stress caused by alcohol, drugs, arguments, or stopping prescribed medications," and Judge Jones familiarity with Rivers' reputation for violence, Judge Jones found Rivers did not meet the criteria for commitment. Defendant argues that the sole proximate cause of the release of Rivers was the "determination by Judge Jones that the State had failed to carry it's [sic] burden of proving by clear, cogent, and convincing evidence that he was mentally ill and dangerous to himself and others."

Second, Rivers was released into the custody of the sheriff, at which point Dr. Groce determined that Rivers was stabilized and ready to stand trial. Third, Judge Setzer found Rivers competent to stand trial and "gave Rivers his freedom" when he suspended his sentence. Finally, over a month after Rivers' trial, "Davis left his car and . . . trigger[ed] the events leading to his death."

"In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it." *Hairston*, 310 N.C. at 237, 311 S.E.2d at 567. Except "in cases so clear that there can be no two opinions among men of fair minds," the question of whether the original wrongdoer had a reasonable ground to anticipate the intervening conduct is a question for the fact finder. *Id.* at 238, 311 S.E.2d at 567. In this case, the evidence is such that the Commission could determine that the defendant could have reasonably foreseen the subsequent acts and the resultant harm to Davis. Because there is evidence to support that determination, we are bound to accept the finding that the defendant's breach was the proximate cause of the death.[1]

Affirmed.

Judge McGEE concurs.

Judge MARTIN, Mark D., concurs with separate opinion.

Judge MARTIN, Mark D., concurring.

I write separately to emphasize the need for the appellate division to articulate a consistent standard of review when considering the Commission's factual findings. Compare *Andrews v. Fulcher Tire Sales and Service*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995) (this Court bound by Commission's findings if supported by "sufficient competent evidence") with *Strickland v. Carolina Classics Catfish, Inc.*, 119 N.C. App. 97, 102, 458 S.E.2d 10, 13 (1995) (this Court's review limited to determination of whether Commission's findings are supported by "any competent evidence"). The majority opinion follows the standard of review articulated in *Andrews v. Fulcher*, *supra*, and concludes there is sufficient competent evidence to uphold the Commission's findings. Because I believe the Commission's findings should be affirmed whether reviewed under the "any competent evidence" standard, or, alternatively, the "sufficient competent evidence" standard, I concur in the majority opinion.

1. It may be that because there is no evidence that the intervening acts in this case were negligent or culpable, they cannot insulate the defendant from its negligent conduct. *See Balcum v. Johnson*, 177 N.C. 213, 216, 98 S.E. 532, 534 (1919) ("usually the [intervening] act must be in itself negligent, or at least culpable"); *see also Prosser and Keeton on Torts* § 44 (discussing intervening causes). Because we have decided that the evidence can support a finding that the intervening acts were foreseeable, we need not reach the additional issue of whether those acts must be negligent or culpable. In any event, this issue was not argued by the parties.

POE v. RALEIGH/DURHAM AIRPORT AUTHORITY

[121 N.C. App. 117 (1995)]

DAN POE, JR., EMPLOYEE-PLAINTIFF v. RALEIGH/DURHAM AIRPORT AUTHORITY, SELF-INSURED, (HEWITT, COLEMAN & ASSOC.), EMPLOYER-DEFENDANT, AND/OR BRITT SERVICES COMPANY, EMPLOYER-DEFENDANT, AETNA CASUALTY & SURETY CO., CARRIER-DEFENDANT

No. COA94-1425

(Filed 19 December 1995)

1. Workers' Compensation § 117 (NCI4th)— pre-existing injury—temporary flare-up resulting from incident—incident not cause of disability

The evidence was sufficient to sustain the Industrial Commission's finding that plaintiff suffered a temporary flare-up of a pre-existing injury as a result of a lawn mowing incident and its conclusion that plaintiff was not disabled as a result of the incident.

Am Jur 2d, Workers' Compensation §§ 317-319.

Workers' compensation: liability of successive employers for disease or condition allegedly attributable to successive employments. 34 ALR4th 958.

Eligibility for workers' compensation as affected by claimant's misrepresentation of health or physical condition at time of hiring. 12 ALR5th 658.

2. Workers' Compensation § 426 (NCI4th)— change of condition warranting review—failure to Commission to find—error

The Industrial Commission erred in concluding that plaintiff did not sustain a substantial change of condition from his original compensable accident which would warrant a review by the Industrial Commission of its previous awards, and that plaintiff was not entitled to receive payment for any medical expenses incurred or to be incurred after a named date where the evidence clearly showed that plaintiff suffered a compensable work related injury and then a temporary flare-up of his pre-existing injury, and he was subsequently unable to find another job due to his severe physical restrictions, coupled with his vocational and educational limits.

Am Jur 2d, Workers' Compensation §§ 708-711.

3. Workers' Compensation § 89 (NCI4th)— designation of deputy commissioners to review appeal—no error

The Chairman of the Industrial Commission did not err in designating two deputy commissioners to participate in the review of plaintiff's appeal, since all of the panel members were duly vested with authority to render a decision, and the appointment of two deputy commissioners did not violate N.C.G.S. § 97-85.

Am Jur 2d, Workers' Compensation §§ 689, 690, 709, 710.

4. Workers' Compensation § 421 (NCI4th)— agreements for compensation—applicability of change of condition statute—liability for medical expenses

Although there had never been a hearing or an award, *per se*, by the Industrial Commission prior to the present opinion and award, this lack of formality did not prohibit application of the substantial change of condition standard of N.C.G.S. § 97-47 to plaintiff's claim where plaintiff had been paid benefits for periods of temporary total disability in the past and agreements for those benefits had been approved by the Industrial Commission. Furthermore, plaintiff was not required to make any showing of change of condition in order for his employer to be required to pay for further medical services or treatment needed as result of his compensable injury.

Am Jur 2d, Workers' Compensation §§ 435, 444.

Insured's receipt of or right to workmen's compensation benefits as affecting recovery under accident, hospital, or medical expense policy. 40 ALR3d 1012.

Applicability of other insurance benefits exclusion, from coverage of hospital or health and accident policy, to governmental insurance benefits to which insured would have been entitled by prior subscription. 29 ALR4th 361.

Appeal by plaintiff from Opinion and Award entered 15 August 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 October 1995.

Leonard T. Jernigan, Jr., P.A., by Leonard T. Jernigan, Jr. and N. Victor Farah, for plaintiff-appellant.

Gene Collinson Smith for defendant-appellee Raleigh/Durham Airport Authority.

Russell & King, P.A., by Gene Thomas Leicht and Sandra M. King, for defendants-appellees Britt Services Company and Aetna Casualty & Surety Company.

JOHNSON, Judge.

Plaintiff Dan Pope is a fifty-two (52) year old man with a fifth grade education and a learning disability. Because of his lack of education and cognitive problems, plaintiff has a severely restricted vocational status.

Plaintiff began working for defendant RDU in 1985, in defendant's janitorial and maintenance department. On 3 May 1988, plaintiff suffered an admittedly compensable injury to his lower back, by accident arising out of and in the course of his employment with defendant RDU. As a result of the May 1988 incident, plaintiff was not able to work from 5 May 1988 through 31 May 1988. During this time period, defendant RDU made temporary total disability compensation payments to plaintiff pursuant to an approved Industrial Commission Form (I.C. Form) 21 Agreement.

Plaintiff returned to work on 31 May 1988, but, in June 1988, fell into a hole while mowing grass during and in the course of employment with defendant RDU, and re-injured his lower back. Consequently, plaintiff was unable to work for approximately five weeks, beginning 22 June 1988. Defendant RDU paid plaintiff additional temporary total disability compensation pursuant to an I.C. Form 26 Agreement.

Again, plaintiff returned to work only to re-injure himself in a compensable on-the-job accident on 18 August 1988. On 31 August 1988, Dr. Stephen Boone performed surgery on plaintiff's lower back to repair a herniated disk at L4-5. Plaintiff received workers' compensation benefits pursuant to an I.C. Form 26 Agreement, until his return to work on 1 November 1988. Thereafter, plaintiff's condition failed to improve. Plaintiff continued to experience severe lower back pain and developed right leg pain and numbness—a symptom plaintiff had not experienced prior to surgery. Less than eight (8) months after the first operation, in April 1989, Dr. Boone again operated on

plaintiff's back to remove a large recurrent herniated disk at L4-5. As a result of this second operation, plaintiff was once again disabled and was paid workers' compensation benefits for this temporary total disability pursuant to an approved I.C. Form 26 Agreement, from 24 April 1989 through 2 January 1990. On 2 June 1989, Dr. Boone assigned a permanent partial disability rating of fifteen percent (15%) to plaintiff's back.

After the second surgery was performed on plaintiff's back, his complaints of lower back and right leg pain and numbness persisted. Thereafter, plaintiff was examined by Dr. Robert Price, who placed plaintiff on a work hardening program. Though the program was supposed to enable plaintiff to return to normal activities, it did not. An MRI of plaintiff's spine, performed in October 1989, revealed formation of postoperative scar tissue, but no recurrent herniation or spinal stenosis. In December 1989, Dr. Price recommended two additional weeks of work hardening. After the two additional weeks of work hardening in January 1990, due to plaintiff's persistent complaints, Dr. Price scheduled plaintiff for a series of spinal epidural injections, after which plaintiff was told that he could return to work with the restriction that he not lift more than forty (40) pounds for two months.

Plaintiff and defendant RDU entered into a fourth approved I.C. Form 26 Agreement for the payment of additional temporary total disability compensation, beginning 17 January 1990 and continuing thereafter as necessary. Despite plaintiff's complaints of lower back and right leg pain, plaintiff returned to work at RDU in February 1990, where he performed light duty tasks until he was terminated, without explanation, in April 1990.

Plaintiff contends that he was forced to return to work in February 1990. Further, plaintiff explained that he was instructed by his supervisor not to voice any further complaints about his back. Additionally, plaintiff was warned by his supervisor that his job performance would be re-evaluated and that he would have to prove himself worthy of continued employment with defendant RDU. Finally, plaintiff alleges that he was prohibited by defendant RDU from seeking any further medical treatment during work hours. At the time that plaintiff was terminated by defendant RDU, he was still experiencing back and leg pain. In fact, plaintiff was taking Darvocet, Percodan, Valium, as well as numerous over-the-counter medications for pain relief.

Approximately three weeks after being terminated by defendant RDU (late April 1990), plaintiff obtained employment with defendant Britt Services Company (Britt Services), where he worked as a mower operator. After being hired by Britt Services, plaintiff continued to experience the same complaints that he had been experiencing since his initial injury and surgery in 1988. On 6 August 1990, plaintiff ran across a metal stob while mowing the grass at work. Upon hitting the stob, the mower that plaintiff was driving, stalled, and plaintiff was thrown forward toward the steering wheel. When thrown forward, plaintiff felt a sharp pain—"an instant jerk." After this incident, plaintiff reported more pain in his back at the end of the work day. Plaintiff's right leg was still numb.

Approximately one week following the mower incident, 14 August 1990, plaintiff was treated by his family physician, Dr. Walter Minor, for lower back pain and leg numbness. Dr. Minor's notes from the 14 August visit indicate that the 6 August mower accident caused plaintiff's leg numbness and back pain. Thereafter, plaintiff did not seek any further medical treatment related to lower back and right leg complaints, until April 1991. Plaintiff testified that he continued to work through November 1990, in spite of the pain, because he needed money to make mortgage payments on his home. On 16 April 1991, plaintiff was seen by Dr. Kaspar Fuchs, a neurosurgeon, who performed a lumbar CT scan, which revealed abnormal soft tissue density in the right lateral recess of disc L4-5. A subsequent lumbar MRI scan revealed a recurrent disk herniation in plaintiff's back.

Plaintiff was referred to Dr. Samuel E. St. Clair, a neurosurgeon, who performed yet another MRI study in October 1991. Subsequently, Dr. St. Clair performed a third lumbar surgical procedure on 11 October 1991. Following that operation, an additional five percent (5%) permanent partial disability rating was issued by Dr. St. Clair to plaintiff's back. Plaintiff has not worked since he left the employ of defendant Britt Services, at the end of the grass mowing season, in November 1990.

Plaintiff re-opened his claim against defendant RDU by filing a Form 33 Request for Hearing on 15 November 1991. On 15 April 1992, the North Carolina Industrial Commission added Britt Services and its workers' compensation carrier, Aetna Casualty & Surety Company, as additional defendants, based upon the allegation that plaintiff suffered subsequent injury by accident while employed by defendant

Britt Services. Plaintiff filed a Form 18 claim against Britt Services on 8 July 1992.

This matter was heard by Deputy Commissioner Gregory M. Willis on 23 September 1993. On 2 September 1994, Deputy Commissioner Willis entered an Opinion and Award denying plaintiff's claims against defendant RDU and defendant Britt Services. Thereafter, plaintiff filed a timely Notice of Appeal to the Full Commission.

The Full Commission filed its Opinion and Award on 15 August 1994, affirming Deputy Commissioner Willis' Opinion and Award. Deputy Commissioner Charles A. Clay filed a dissenting opinion. Plaintiff filed Notice of Appeal to this Court on 16 September 1994 and the appeal was, subsequently, timely perfected.

[1] Plaintiff first assigns as error the Full Commission's Finding of Fact that he was not disabled as a result of the 6 August 1990 accident, since it was not supported by the evidence in the record. Further, plaintiff argues that the finding that there had been a "temporary flare-up" of his condition was an insupportable medical assumption. We do not agree.

On appellate review in workers' compensation cases, our Court's inquiry is limited to whether there is any competent evidence to support the Industrial Commission's findings and whether the Commission's findings support its conclusions. *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990) (*quoting Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984)). If a finding of fact is a mixed question of fact and law, the Commission's finding is not binding on appeal. *See Haponski v. Constructor's, Inc.*, 87 N.C. App. 95, 360 S.E.2d 109 (1987). In *Haponski*, this Court confronted the issue of causation where plaintiff had suffered an injury and thereafter began to suffer psychological problems. Therein, this Court held that a finding concerning causation of that plaintiff's disability was a mixed question of law and fact. *Id.* However, if there is sufficient evidence to sustain the facts involved, the North Carolina Supreme Court has found that such a mixed finding will also be conclusive on appeal. *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 403, 82 S.E.2d 410, 413 (1954) (*citing Perley v. Paving Co.*, 228 N.C. 479, 46 S.E.2d 298 (1948); *Beach v. McLean*, 219 N.C. 521, 14 S.E.2d 515 (1941); *Thomas v. Gas Co.*, 218 N.C. 429, 11 S.E.2d 297 (1940)). The

Full Commission, in its Opinion and Award, adopted and affirmed Deputy Commissioner Willis' Findings of Fact. Plaintiff takes issue with the following findings:

> 11. The incident on 6 August 1990 was an interruption of plaintiff's regular work routine by unusual circumstances which resulted in unexpected consequences, and the incident exacerbated a pre-existing condition by causing an increase in back and leg pain. However, the exacerbation was a temporary flare-up which did not cause plaintiff to be unable to be gainfully employed for any period of time.
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> . . .
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> 14. Dr. Jariwala ordered a x-ray of plaintiff's lumbar spine in January 1991, this would be between the August 1990 incident with Britt Services and the later MRI of June 1991. At the time of the January 1991 x-ray: there was mild indentation of the endplates at inferior aspects of disks L3, L4, L5, which were not of clinical significance; there was faint calcification centrally within the disk space at level L5-S1, which was also not of clinical significance; and the vertebral bodies and their appendages were outlined normally and there was no disk reduction.
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> . . .
>
> 24. The undersigned finds limited weight in the testimony and opinions of Stephen Carpenter because of his heavy reliance on restrictions placed on plaintiff's activities only days after his surgery, when it is clear that those restrictions were not intended to be permanent.

The Commission concluded, therefore, that plaintiff had not been disabled as a result of the 6 August 1990 incident and that plaintiff had not experienced a substantial change of condition from his 3 May 1988 on-the-job accident.

The evidence tends to show that plaintiff, who had a pre-existing back problem due to an admittedly compensable injury in May 1988, was engaged in the work of his employer, defendant Britt Services, when an unanticipated event occurred, throwing plaintiff forward and thus, wrenching his previously injured back. Plaintiff testified during the hearing before Deputy Commissioner Willis that he continued to work in spite of nagging pain, because he desperately needed money so that he would not lose his home. Plaintiff was seen

by his family physician, Dr. Minor, after the accident and reported that he was experiencing increased back and leg problems. Plaintiff did not, however, seek further medical treatment for these complaints until 16 April 1991, when he was seen by Dr. Fuchs, a neurosurgeon. Thereafter, plaintiff was referred to another neurosurgeon, Dr. St. Clair, who performed a third lumbar surgical procedure on plaintiff on 11 October 1991.

[2] As the evidence was sufficient to sustain the Commission's finding that plaintiff had suffered a temporary flare-up of a pre-existing injury, as a result of the 6 August 1990 incident, and its conclusion that plaintiff was not disabled as a result of the 6 August incident, we affirm the Commission's finding and conclusion in this regard. We cannot, however, agree with the Commission's conclusions that plaintiff did not sustain a substantial change of condition from his accident of 3 May 1988 which would warrant a review by the Industrial Commission of its previous awards, and that plaintiff was not entitled to receive payment for any medical expenses incurred or to be incurred after April 1991. In support of these conclusions, the Commission made the following Findings of Fact:

> 23. . . . Regarding the accident of 3 May 1988, the undersigned finds that plaintiff's physical condition after November 1990 was not a substantial change of condition caused by the accident of 3 May 1988[.] This finding is based on the following: (1) there is no opinion from an expert, to a reasonable degree of medical certainty, that plaintiff's condition after November 1990 was a natural and probable consequence of the injury by accident of 3 May 1988 and that his condition after November 1990 was a substantial change of condition from the previous accident; and (2) there was a substantial period of time between plaintiffs [sic] return to work from the first accident and the discovery of a recurrent herniated disk in June 1991.
>
> 24. The undersigned finds limited weight in the testimony and opinions of Stephen Carpenter because of his heavy reliance on restrictions placed on plaintiff's activities only days after his surgery, when it is clear that those restrictions were not intended to be permanent.
>
> 25. Any medical treatment plaintiff received after April 1991 was not necessary to effect a cure, to provide relief, or to lessen any period in which plaintiff was unable to be gainfully employed, as a result of the accident of 3 May 1988.

Whether the facts as found by the Commission amount to a change of condition pursuant to section 97-47 of the North Carolina General Statutes is a question of law and is, therefore, reviewable by our Court. *See Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 354 S.E.2d 477 (1987). Further, it is well settled that disability under the Workmen's Compensation Act speaks to a diminished capacity to earn money, not to physical infirmity. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 435, 342 S.E.2d 798, 804 (1986) (*citing Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 84, 155 S.E.2d 755, 761 (1967)). Finally, "[a] capable job seeker whom no employer needing workers will hire is not employable." *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 400, 368 S.E.2d 388, 390, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988).

The facts in the instant case indicate that plaintiff sustained an injury to his back on 3 May 1988 while performing certain tasks for his employer, defendant RDU. Defendant RDU has paid plaintiff for periods of temporary total disability pursuant to I.C. Forms 21 and 26 (five in total). Further, on 6 August 1990, plaintiff did re-injure his back during and in the course of employment with defendant Britt Services, which caused a "temporary flare-up" of plaintiff's pre-existing injury. Plaintiff was seen by his family physician after this accident and reported that he was experiencing increased back and leg problems. Plaintiff later sought further medical treatment some eight months later. On 16 April 1991, plaintiff was seen by Dr. Fuchs, a neurosurgeon. Subsequently, on 11 October 1991, Dr. St. Clair, another neurosurgeon, performed a third operation on plaintiff's injured back. Plaintiff had left the employ of defendant Britt Services in November 1990.

The evidence indicates that, after leaving Britt Services, plaintiff was unable to find another job, due to his severe physical restrictions, coupled with his vocational and educational limits. Plaintiff is a fifty-two (52) year old functional illiterate. There is an abundance of medical and other expert opinion that plaintiff is unable to earn any wages, in the kind of work he did, or any other type of job. The Commission's reliance on *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E.2d 389 (1980), is misplaced. *Click* stands for the proposition that expert medical testimony will be required to establish causation in the more complicated cases involving disc injuries.

In the case *sub judice*, the record is rife with testimony that plaintiff suffered a compensable work-related injury on 3 May 1988, which

caused damage to the lumbar region of plaintiff's back. If the Commission was able to determine that the accident on 6 August 1990 caused a "temporary flare-up" of plaintiff's pre-existing injury, it follows that plaintiff's change in wage earning capacity must be a result of that same pre-existing injury. The Commission's findings and conclusions to the contrary are unsupported by the evidence and must, therefore, be reversed.

[3] Plaintiff also argues that the Full Commission lacked jurisdiction to review his appeal, as two deputy commissioners participated in the review, in violation of North Carolina General Statutes section 97-85. For this reason, the plaintiff contends that the final Opinion and Award of the Industrial Commission is void as a matter of law. Notably, plaintiff poses this collateral attack for the first time on appeal; plaintiff failed to raise any objection to the panel's composition at the Full Commission level. We find this argument to be without merit.

"The Commission acts by a majority of votes of its qualified members at the time a decision is made," and a vote of two members constitutes a majority. *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994) (*citing Gant v. Crouch*, 243 N.C. 604, 607, 91 S.E.2d 705, 707 (1956)). North Carolina General Statutes section 97-85 states in pertinent part:

> Provided further, the chairman of the Industrial Commission shall have the authority to designate a deputy commissioner to take the place of a commissioner on the review of any case, in which event the deputy commissioner so designated shall have the same authority and duty as does the commissioner whose place he occupies on such review.

N.C. Gen. Stat. § 97-85 (1991). Plaintiff references *Estes* in support of his argument. His reliance on *Estes* is, however, misplaced. The Commission panel in *Estes* consisted of three Full Commissioners at the time of the original hearing. However, when the Opinion and Award was signed and filed, one of the Commissioners who had participated in the decision was no longer a qualified Commissioner because his term had expired. Our Court, therefore, held that the decision of the Full Commission was void as a matter of law. *Estes*, 117 N.C. App. 126, 449 S.E.2d 762.

In the instant case, the presiding panel of the Commission consisted of Chairman J. Howard Bunn, Jr., Deputy Commissioner W.

Joey Barnes, and Special Deputy Commissioner Clay. Unlike *Estes*, all of the panel members in this case were duly vested with authority to render a decision. Plaintiff argues, however, that while the Commissioner may have had authority to replace one commissioner with a designated deputy commissioner, he did not have the authority to replace two commissioners, as was the case herein. Plaintiff is correct in his statement that there is no express statutory authority for the substitution of two Commissioners, but then neither is there a statutory provision in the Workers' Compensation Act expressly prohibiting such action. We must believe that if our legislators intended such restrictions on the Commissioner's authority, they would have expressly provided for such. We simply should not interpret section 97-85 to give it such a stringent and confining meaning, which is arguably in contravention of legislative intent. Thus, we find plaintiff's argument, with regards to this issue, to be without merit.

[4] Plaintiff argues in his final assignment of error that the Commission applied an improper standard in evaluating his claim. First, plaintiff contends that North Carolina General Statutes section 97-47 does not apply to the instant case, as a final award has not been entered. Additionally and/or alternatively, plaintiff argues that additional expert testimony was not necessary to show a change in his condition.

Section 97-47, entitled "Change of condition; modification of award," provides in pertinent part:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article . . . .

N.C. Gen. Stat. § 97-47 (1991). In *Watkins v. Motor Lines*, our Supreme Court specifically stated, "[t]he Commission's authority under this statute is *limited to review of prior awards*, and the statute is inapplicable in instances where there has been no previous final award." 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971) (*citing Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E.2d 777 (1953); *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E.2d 27 (1960)). However, this Court, in *Weaver v. Swedish Imports Maintenance, Inc.*, found that the "substantial change in condition" standard in section 97-47 was

applicable, where plaintiff, who had received temporary total disability benefits under section 97-29 for a compensable heart attack, was awarded permanent partial disability under section 97-30 when he applied for modification of his prior award following three additional heart attacks. 80 N.C. App. 432, 343 S.E.2d 205 (1986), *modified*, 319 N.C. 243, 354 S.E.2d 477 (1987).

The facts in the instant case indicate that plaintiff sustained an injury to his back on 3 May 1988 while performing certain tasks for employer, defendant RDU. Defendant RDU has paid plaintiff disability benefits for periods of temporary total disability pursuant to I.C. Forms 21 and 26 (five in total). All of these agreements between plaintiff and defendant RDU have been approved by the Industrial Commission. Plaintiff filed a Form 33 Request for Hearing on 15 November 1991, after defendant RDU refused to compensate him for his disability and medical expenses after November 1990.

While there had never been a hearing or an award, per se, by the Industrial Commission prior to the Opinion and Award issued by Deputy Commissioner Willis on 2 September 1993, this lack of formality does not preclude section 97-47 from being applicable to a determination of compensation for plaintiff's disability. *See Weaver*, 80 N.C. App. 432, 343 S.E.2d 205. Plaintiff's argument does, however, strike a disconsonant chord, since our Supreme Court has specifically stated that it was not the intent of the legislature to require an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury. *See Hyler v. GTE Products Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993). Therefore, to the extent that the Commission relied on section 97-47 in its denial of payment to plaintiff for medical services or treatment after April 1991, their action was erroneous and must be reversed.

For the foregoing reasons, the Full Commission's decision must be affirmed with respect to its finding that plaintiff suffered a "temporary flare-up" of a pre-existing injury as a result of the 6 August 1990 on-the-job accident. The Commission's decision is, however, reversed with respect to the Commission's finding that plaintiff did not sustain a substantial change in condition as a result of the 6 August accident, which would warrant a review of its previous awards; and remanded for further proceedings, not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and WALKER concur.

GOLDIE KIRK, MOTHER AND NEXT OF KIN TO ALAN PATRICK KIRK (DECEASED), EMPLOYEE, PLAINTIFF v. STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION, EMPLOYER SELF-INSURED, CARRIER, DEFENDANT

No. COA94-1170

(Filed 19 December 1995)

1. **Workers' Compensation § 149 (NCI4th)— death while driving to training class—special errand for employer—accident arising out of and in course of employment**

A corrections officer who was hired to work at Caledonia Prison but who was killed while driving from his home to a training class at Halifax Community College was on a special errand for his employer, even though he was driving his own vehicle and was not compensated for any travel expense, and his accident therefore arose out of and in the course of his employment, where he was required, as a condition of his employment, to attend the training class.

Am Jur 2d, Workers' Compensation §§ 279, 301.

2. **Workers' Compensation § 260 (NCI4th)— calculation of average weekly wage—exclusion of employer's contribution to health insurance—no error**

In an action to recover death benefits under the Workers' Compensation Act, the Industrial Commission did not err in failing to include the amount paid by the employer, the State, for the employee's health insurance in the calculation of plaintiff's average weekly wage, since the health insurance was a fringe benefit the value of which could not be quantified; furthermore, the value of the employer's contribution to health insurance was not required to be included in the calculation of weekly earnings pursuant to N.C.G.S. § 97-2(5), since there was no evidence that the State's contributions to the employee's health insurance were made "in lieu of wages."

Am Jur 2d, Workers' Compensation §§ 418, 419.

Appeal by defendant from the Opinion and Award filed by the N.C. Industrial Commission 19 July 1994. Heard in the Court of Appeals 18 October 1995.

Lore & McClearen, by R. James Lore, for the plaintiff.

Attorney General Michael F. Easley, by Assistant Attorney General, Amy A. Barnes, for the defendant.

WALKER, Judge.

Alan Patrick Kirk began his employment with defendant as a correctional officer on 25 March 1991. He was assigned to work at Caledonia Correctional Institute (Caledonia) in Halifax County. As a condition of his employment, Kirk was required to complete a four-week Basic Custodial Officer's Training (BCOT) course within twelve months of his hiring. These courses were offered at various sites in North Carolina.

Prior to 8 July 1991, Kirk received a letter from the Department of Correction directing him to attend BCOT at Halifax Community College, in Weldon, North Carolina, from 8 July 1991 through 2 August 1991. The letter informed Kirk that no on-site accommodations would be provided thus making it necessary to commute to the training site each day. Kirk, and his fellow trainees, were instructed that they could drive their personal automobiles to Caledonia each morning where transportation would then be provided to take them to the training site, or they could drive their own personal cars from their respective homes directly to Halifax Community College.

It was the policy of the Department of Correction that during the training period officers received only their regular salary. No mileage or other travel expense was compensated.

All trainees, including Kirk, elected to drive from their homes to the training site. On the morning of 15 July 1991, Kirk, dressed in his correctional officer uniform, left his home in Greenville, North Carolina, and began driving his car to the training site in Weldon. When Kirk was approximately three miles from the training site, he fell asleep, crossed the center line, and was struck and killed by a truck traveling south on US 301.

Plaintiff, the mother and next-of-kin of the decedent, applied for death benefits pursuant to the terms of the Workers' Compensation

Act. Death benefits and funeral expenses were awarded to plaintiff by the Deputy Commissioner and the Full Commission affirmed.

On appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions: (1) whether the Commission's findings are supported by competent evidence and (2) whether the findings of fact justify the Commission's conclusion of law. *McBride v. Peony Corp.*, 84 N.C. App. 221, 225, 352 S.E.2d 236, 239 (1987). The primary issue raised on appeal is whether the Commission erred in concluding that Kirk sustained an "injury by accident arising out of and in the course of employment." N.C. Gen. Stat. § 97-2(6) (1994). The phrase "arising out of and in the course of" contains two distinct elements which must be satisfied in order to receive compensation. "The term 'arising out of' refers to the origin or cause of the accident, and the term 'in the course of' refers to the time, place, and circumstances of the accident." *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982).When deciding whether to grant compensation under the Workers' Compensation Act, it is well established that the Act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation." *Hall v. Chevrolet Co.*, 263 N.C. 569, 576, 139 S.E.2d 857, 862 (1965).

[1] Defendant argues that Kirk's accident did not arise out of and in the course of his employment since the injury occurred while Kirk was traveling to his regular place of employment, Halifax Community College. Defendant contends that Kirk's regular place of employment was transferred from Caledonia to Halifax Community College during the four-week training period. As such, defendant argues that the present case is controlled by the "going and coming" rule as pronounced in *Hunt v. State*, 201 N.C. 707, 161 S.E. 203 (1931). We disagree.

As a general rule "an injury suffered by an employee while going to or coming from work is not an injury arising out of and in the course of employment." *Felton v. Hospital Guild*, 57 N.C. App. 33, 34, 291 S.E.2d 158, 159, *affirmed*, 307 N.C. 121, 296 S.E.2d 297 (1982); *Hunt v. State*, 201 N.C. 707, 161 S.E. 203 (1931). However, we find *Hunt v. State* distinguishable from the present case.

In *Hunt*, the decedent was a member of the National Guard and privately employed by a pharmacist. *Id.* Decedent received orders on 13 July to report for duty at Camp Glenn in Morehead City. Decedent left his private job in Oxford on 12 July and traveled in his own vehicle directly to Morehead City. *Id.* at 708, 161 S.E. at 203. Before arriv-

ing in Morehead City, plaintiff was involved in a fatal automobile collision. The court found that the plaintiff's death did not arise out of and in the course of his employment with the State since his injury resulted from an accident while traveling to his regular place of employment. *Id.* at 711, 161 S.E. at 205. The court in *Hunt* applied the traditional "going and coming" rule after determining that servicemen, unlike civilians, have no regular situs of employment except that which is assigned on a duty-by-duty basis.

In the present case, the "going and coming" rule is inapplicable because Kirk's accident did not occur while traveling to his regular place of employment. There was competent evidence to support the Commission's finding that Kirk's regular place of employment remained at Caledonia. The Department's own records show that Kirk was hired as a corrections officer at Caledonia. Later, when the State filed its own internal documents regarding the separation of Kirk from employment due to his death, his regular place of employment continued to be listed as Caledonia. Further, the payroll records for Kirk during his training period indicated that Kirk's base of operation was Caledonia. Finally, while the Department argues that Kirk's place of employment was transferred to Halifax Community College during his training period, no form was filed as required to effect such a transfer. In sum, where competent evidence supports the Commission's finding that Kirk's regular place of employment was Caledonia, we are bound by this finding on appeal.

The facts in the present case fit the "special errand" exception to the "going and coming" rule. Under this exception:

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdiction[s] to be within the course of their employment continuously during the trip, except when a distinct [departure] on a personal errand is shown.

1 *A. Larson, Workmen's Compensation Law*, § 25.00 (1995). "When it is established that an employee is on a special errand for her employer, the declared policy of the state requires a liberal construction in favor of the employee." *Felton* at 35, 291 S.E.2d at 160. Our Supreme Court applied the special errand exception in the case of *Jones v. Trust Co.*, 206 N.C. 214, 173 S.E. 595 (1934). In *Jones*, the cashier of a bank was requested by his superior officer to attend a meeting of the cotton committee in another city for the purpose of procuring financial information for the use of the bank. *Id.* at 216, 173 S.E. at 596. En route to the meeting the cashier was injured in an auto-

mobile accident. *Id.* The court found such evidence was sufficient to support the Commission's findings that the accident arose out of and in the course of plaintiff's employment. *Id.* at 219, 173 S.E. at 598.

In the present case, Kirk was required, as a condition of his employment, to attend a four-week training seminar which was not offered at Caledonia but instead was held at Halifax Community College. Therefore, Kirk was on a special errand to attend a training course at the direction of and for the benefit of his employer.

Defendant argues that the special errand exception is inapplicable to the present case since defendant was not being compensated for mileage or other travel-related expense. This argument has been specifically rejected by this Court, *McBride v. Peony Corp.*, 84 N.C. App. 221, 352 S.E.2d 236 (1987), where the plaintiff injured her ankle while walking down a hill with her employment supervisor to look at a trailer. Although the plaintiff was not being paid during this period of time, this Court held that the injury arose out of and in the course of employment noting that plaintiff was on a "special errand" of "substantial benefit to the employer" for the purpose of cementing the relationship of all who worked at the Company. *Id.* at 225, 352 S.E.2d at 239.

In *Warren v. City of Wilmington*, 43 N.C. App. 748, 749, 259 S.E.2d 786, 787 (1979), the plaintiff was injured while traveling from a meeting to her home to write a report. Plaintiff furnished her own vehicle and did not receive a mileage allowance. *Id.* This Court held:

> Here, however, plaintiff's job required her to travel from her place of work to various places about the community. The job exposed her to the risk of travel. She was required to work nights and holidays.
>
> . . .
>
> Going to and from the meetings was a part of plaintiff's job duties for which she was paid the same as when actually in the office or at community meetings. There is no suggestion that plaintiff was on a personal errand when the accident occurred. Plaintiff's accident on a city street as she was returning home to write a report about the meeting she had just attended was an accident in the course of her employment.

Id. at 750-751, 259 S.E.2d at 788 (citation omitted).

Thus, according to *McBride* and *Warren*, plaintiff was not precluded from recovery under the "special errand" rule because Kirk was driving his own vehicle and was not compensated for any travel expense.

Defendant admits that as a general rule an employee injured or killed by accident while traveling to and from an educational or training course as directed by the State as a condition of continued employment is covered by the provisions of the Workers' Compensation Act. However, defendant contends that the general rule is inapplicable in this case because the BCOT was not designed to improve already existing skills but to provide trainees with the basic job skills necessary to be a correctional officer. We can find no authority which makes such a distinction. Accordingly, we hold that the Commission's findings are based on competent evidence and that such evidence supports the conclusion that Kirk's accident arose out of and in the course of his employment.

II.

Plaintiff argues that the trial court erred in not ordering defendant to pay attorney fees. The test to determine whether attorney fees should be awarded is "not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982). Further, the decision to award attorney fees rests within the discretion of the Commission and as such will not be disturbed on appeal in the absence of a showing of abuse of discretion. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 394, 298 S.E.2d 681, 683 (1983). After careful review of the evidence in this case, we cannot say that the Commission abused its discretion in failing to award plaintiff attorney fees.

III.

[2] Plaintiff also assigns as error the Commission's failure to include the amount paid by the State for Kirk's health insurance in the calculation of plaintiff's average weekly wage.

The controlling statute, N.C. Gen. Stat. § 97-2(5), lists five methods for computing average weekly wages. The relevant statutory provisions provide:

> [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.

. . .

[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.

N.C. Gen. Stat. § 97-2(5) (1994).

Plaintiff contends that the Commission erred by calculating Kirk's average weekly wages according to the second method and argues that the fourth provision under the statute should have been used because it is unfair to the employee not to include the employer's contributions to his health benefit in the calculation of his average weekly wages.

Where the language of the statute is clear, this Court must interpret the statute according to the plain meaning of its terms and "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*, 304 N.C. 392, 285 S.E.2d 833 (1981).

Here the statute provides that this fourth method should only be used "where for exceptional reasons the foregoing would be unfair." Accordingly, this means that method four should not be used unless the result under method two would be unjust.

This is in accord with the interpretation given by this Court in *Wallace v. Music Shop*, 11 N.C. App. 328, 181 S.E.2d 237 (1971). In *Wallace*, we stated "the 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 (citation omitted).

The U.S. Supreme Court held that the employer's contribution to the employee's health and welfare pensions should not be included as part of the employee's wages for the purpose of calculating benefits under the Longshoremen's and Harbor Workers' Compensation Act. *Morrison-Knudson Construction Co. v. U.S. Dep't of Labor*, 461 U.S.

624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983). The Court reasoned that wage means "the money rate at which service is recompensed under the contract of hiring" and not "fringe benefits that cannot be converted into a cash equivalent." *Id.*; *See 2 Larson Workmen's compensation Law*, § 60.12(b) (1995).

The same reasoning applies in the present case. We can find no case law in this State to support plaintiff's position that an unfair result is reached by not including the employer's contribution to Kirk's health care. A State employee receives the benefits of the State Health Plan only when needed. The value of this benefit cannot be quantified. After carefully considering the evidence, we cannot say that the Commission's failure to include such allowance produced an unfair result for the plaintiff. Thus, absent a finding that method two produces an unfair result, the Commission did not err by excluding the State's contributions to Kirk's Health Plan in the calculation of Kirk's average weekly wages.

Next, plaintiff argues that the employer's contribution to Kirk's health insurance should be included in the calculation of weekly earnings because of the following provision in N.C. Gen. Stat. § 97-2(5), which provides:

> Whenever allowances of any character made to an employee **in lieu of wages** are specified part of the wage contract they shall be deemed a part of his earnings.

N.C. Gen. Stat. § 97-2(5) (1994) (emphasis added).

Here, there is no evidence that the State's contributions to Kirk's health insurance were made "in lieu of wages." State employees are hired to perform a specific job at a specific pay grade which is inclusive of all wages the employee is entitled to receive. There is nothing in the conditions of employment that permits a State employee to refuse this allowance and receive wages in its place. Therefore, contributions by the State to insure an employee under a health plan is not an allowance made "in lieu of wages" within the meaning of this statute. Accordingly, we find no error in the Commission's refusal to consider this allowance as part of Kirk's average weekly wages.

Affirmed.

Judges LEWIS and MARTIN, MARK D. concur.

BERMUDA RUN COUNTRY CLUB, INC., PLAINTIFF v. HARRIS ATWELL; ALAN BARNETT; MICHAEL BRENNER; JULIA CRAWLEY; STEVE HINSHAW; RONALD HOTH; THOMAS M. HUBER; EDWARD M. MANNING, JR.; MARY ANN PREUITT; AARON M. ROSE; ROGER W. SIMMONS; AND LEWIS VAN AUKEN, DEFENDANTS

No. COA95-179

(Filed 19 December 1995)

1. Deeds § 64 (NCI4th)— covenants concerning country club dues—covenants not running with the land—plaintiff personally bound by consent to covenants

Covenants which allowed a country club board of governors to give or veto approval of increases in assessments or dues of a country club were not directly connected with the land in this case; therefore, they did not touch and concern the land and so did not run with the land. However, where the record revealed that plaintiff corporation consented to be bound by the covenants, the trial court did not err in holding that plaintiff was personally bound.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 13-15, 50.

2. Trial § 146 (NCI4th)— judicial admission—limited applicability

A stipulation by plaintiff country club owner in a prior action that it was bound by certain restrictive covenants was not a judicial admission binding on plaintiff in this action where the parties restricted the application of the stipulation to the prior action.

Am Jur 2d, Judgments § 707.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect. 91 ALR3d 1170.

Appeal by plaintiff and defendants from order entered 15 June 1994 by Judge Melzer A. Morgan, Jr. in Davie County Superior Court. Heard in the Court of Appeals 14 November 1995.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., for plaintiff.

Harrell Powell, Jr. for defendants.

JOHNSON, Judge.

In 1979, Bermuda Run, Ltd., a North Carolina corporation, executed a document entitled "Declaration of Restrictive Covenants" in connection with the resolution of a civil action brought in Davie County Superior Court entitled *Harris L. Atwell, et al. v. Bermuda Run Country Club, Ltd. and Billy R. Satterfield,* 79 CVS 2806. The document was recorded in the Office of the Register of Deeds of Davie County on 23 August 1979 in Book 108 at Page 753.

The Declaration of Restrictive Covenants provided in part that:

> Bermuda Run, Ltd. does hereby covenant and agree to and with all persons, firms and corporations presently owning or hereafter acquiring lots within the development known as Bermuda Run (the "Development") and with all present and future members of the Bermuda Run Golf and Country Club (the "Club") or any successor thereto that said lands and improvements as described in Exhibit A attached hereto (the "Lands") are hereby subjected to the following restrictive covenants as to the use of said Lands, which restrictive covenants are and shall be appurtenant thereto and run with said Lands by whomsoever owned.

The pertinent restrictive covenants in the instant action are as follows:

> 4. There shall be no increase in the monthly assessments, dues and minimum dining-room charges made by Bermuda Run, Ltd. or any subsequent owner of the Lands without the prior approval of the then Board of Governors.
>
> 5. No assessments will be made against the present or future members of the Club by Bermuda Run, Ltd. or any subsequent owner of the Lands without the express approval of the then Board of Governors. . . .

The consent judgment entered on 23 August 1979 by Judge Peter W. Hairston in the 1979 action provided, in pertinent part, that:

> Prior to the sale of any of the facilities, support utilities, amenities and real estate which serve or are a part of the Bermuda Run Golf and Country Club (the "Club"), or of any stock or assets of Bermuda Run, Ltd., Bermuda Run, Ltd. and Billy R. Satterfield shall file those certain restrictive covenants attached hereto as Exhibit A, in the Office of the Davie County Register of Deeds.

On 17 January 1984, Bermuda Run Country Club, Inc., successor in interest to Bermuda Run, Ltd., executed an Amendment to the Declaration of Restrictive Covenants. Subparagraph (2) of the Amendment provided that:

> Except as herein amended and modified, the original Declaration of Restrictive Covenants shall remain in full force and effect in accordance with its terms.

The Amendment was recorded in the Office of the Register of Deeds of Davie County on 9 February 1984 in Book 121 at Page 813.

Agreements of General Membership executed by plaintiff in connection with receiving new members upon the payment of an initiation fee provided that:

> Member agrees to pay uniform monthly dues and assessments for General Members as established from time to time by Bermuda Run with the prior approval of the Board of Governors of Bermuda Run Country Club ("Board of Governors").
>
> . . .
>
> All future monthly dues and assessments will be set by Bermuda Run, its assigns or successors, with the prior approval of the Board of Governors until 2006; provided, Bermuda Run may from time to time change the membership initiation fee for memberships without the approval of the Board of Governors.

The Bylaws of Bermuda Run Country Club, in Section 1 of Article III, stated that:

> The Board of Governors shall have the power to fine, reprimand, suspend, or expel members; approve membership applications, subject to final approval by Bermuda Run Country Club, Inc.; approve changes in monthly dues, and dining minimums; approve all assessments as provided by these Bylaws; to serve as spokesman for the Membership, and to act as necessary to implement the various duties and responsibilities given the Board of Governors by specific provisions of these Bylaws.

Plaintiff corporation owns and operates the country club facilities. The corporation also owns the common areas, such as the club house, tennis courts, golf course, and roads. Bermuda Run Country Club is a social organization, and the membership does not have the status of shareholders in the corporation.

In 1991, the Board of Governors of Bermuda Run Country Club filed suit against Bermuda Run Country Club, Inc. At the 30 November 1992 civil session of the Davie County Superior Court, the parties stipulated that the corporation was bound by the Restrictive Covenants dated 20 August 1979. In his judgment, Judge James M. Long concluded that the Board of Governors did not have the power to unilaterally increase or decrease the level of dues charged to members of the Bermuda Run Country Club; that the Board of Governors and the corporation had agreed to increase the monthly dues to $170.00 per month; and that the monthly dues would remain at the level of $170.00 until otherwise properly increased. However, Judge Long found that the Board of Governors had the power under the Restrictive Covenants to give prior approval to all proposed dues increases.

In a memorandum dated 28 December 1992 and presented to the Board of Governors at its meeting in January 1993, the corporation submitted a request that the monthly dues be increased from the $170.00 per month level. No action was taken immediately on the proposal, but it was referred to a specially appointed committee to consider the issue. After considering the condition of the premises, the quality of services provided to the membership, and the proposed budget for the country club, the Board of Governors voted unanimously to reject the proposed increase in the monthly dues.

Plaintiff filed an action alleging several claims for relief. All but the fourth claim of relief have been resolved by consent judgment. In the fourth claim for relief, plaintiff sought to have the restrictive covenants declared void and unenforceable. At a hearing, Judge Melzer A. Morgan, Jr. ruled as follows:

> As to the plaintiff's motion for partial summary judgment, the court finds that restrictive covenants four and five are covenants that are purely personal, and are not real covenants that run with and bind the land. However, the court further finds that in the Amendment to Declaration to Restrictive Covenants dated on or about January 17, 1984, by stating that "[e]xcept herein amended and modified, the original Declaration of Restrictive Covenants shall remain in full force and effect in accordance with its terms" the plaintiff became bound by the personal covenants, and restrictive covenants four and five are now the personal covenants of the plaintiff. Accordingly, the plaintiff's motion for summary judgment is allowed, and the defendants' motion for

summary judgment is denied, to the extent that this order is a judicial determination that Restrictive Covenants 4 and 5 are personal covenants that do not run with the land. The plaintiff's motion is denied, and the defendants' motion is allowed, to the extent that this order is a judicial determination that the plaintiff is bound by the personal covenants four and five.

[1] Plaintiff appeals from the order allowing in part and denying in part its motion for summary judgment and defendants appeal from the portion of the order allowing in part and denying in part their motion for summary judgment. Plaintiff argues that the trial court correctly held that covenants four and five were not real covenants which ran with the land, but that the court erred when it held that restrictive covenants four and five were personal covenants binding plaintiff. Defendants argue that the covenants are real covenants which run with the land.

Our Supreme Court in *Runyon v. Paley*, 331 N.C. 293, 416 S.E.2d 177 (1992), *appeal after remand, William v. Paley*, 114 N.C. App. 571, 442 S.E.2d 558, *disc. review denied*, 337 N.C. 699, 448 S.E.2d 541 (1994), set forth the law of restrictive covenants in North Carolina. The Court held that so long as restrictions imposed by a land owner are not contrary to public policy, the land owner may sell the land subject to any restrictions he wishes to impose. *Id.* The restrictions or covenants are either real covenants which run with the land or personal covenants.

> The significant distinction between these types of covenants is that a personal covenant creates a personal obligation or right enforceable at law only between the original covenanting parties, whereas a real covenant creates a servitude upon the land subject to the covenant ("the servient estate") for the benefit of another parcel of land ("the dominant estate") (citations omitted).

Runyon, 331 N.C. at 299, 416 S.E.2d at 182.

Covenants which run with the land must meet three essential requirements: "(1) the intent of the parties as can be determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and (3) there must be privity of estate between the parties to the covenant." *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson*, 62 N.C. App. 205, 210, 302 S.E.2d 848, 852, *cert. denied*, 309 N.C. 461, 307 S.E.2d 364 (1983) (*quoting Raintree Corp. v. Rowe*, 38

N.C. App. 664, 669, 248 S.E.2d 904, 908 (1978)). Plaintiff contends that although the intent of the parties is that the covenants run with the land, this is not enough because the other two requirements are not met. We agree.

Clear recitations of intent are not dispositive in determining if the covenant runs with the land. *See Raintree*, 38 N.C. App. at 670, 248 S.E.2d at 908. In order for a covenant to touch or concern, the covenant is not required to have a physical effect on the land. *Runyon*, 331 N.C. 293, 416 S.E.2d 177. It is sufficient that an economic impact on the parties' ownership rights occurs such that the value of the dominant estate is enhanced and the value of the servient estate is decreased; and that the covenant affects the legal rights of the covenanting parties as landowners. The covenant does not touch and concern the land if the burdens and benefits are able to exist independently from the parties' ownership interests in the land. *Id.*

Plaintiff argues that the covenant creates rights and responsibilities which exist independently of the parties' ownership interest in the land. Plaintiff also argues that whether dues are paid by members of the country club pertain to an interest in membership in the country club, rather than an interest in real property. Plaintiff cites *Raintree*, 38 N.C. App. 664, 248 S.E.2d 904, to show that a restrictive covenant, requiring a property owner to have membership in a country club and to pay dues, is a personal covenant which does not run with the land. Defendants argue, however, that the country club is located within a residential community, and thus, the residents' interests in protecting the value of their investment and membership in the club would be substantially impaired and diminished if the covenants were not upheld.

The covenants at issue here, allow the Board of Governors to give or veto approval of increases in assessments or dues of the country club. These covenants are not directly connected with the land in the instant case; therefore, they do not touch and concern the land. *See Raintree*, 38 N.C. App. at 670, 248 S.E.2d at 909. Consequently, because one of the essential requirements is absent, the covenant does not run with the land, and we need not address whether privity of estate exists.

Plaintiff's next argument is that the trial court erred in holding that the covenants were transformed into personal covenants binding plaintiff. The trial court held that in the Amendment to Declaration of

Restrictive Covenants dated 17 January 1984, that the statement: "[e]xcept as herein amended and modified, the original Declaration of Restrictive Covenants shall remain in full force and effect in accordance with its terms," plaintiff became bound by the personal covenants. Plaintiff attempts to argue that this provision only pertained to one entrance through the security fence. This argument is unpersuasive in light of our careful review of the Amendment. The record reveals that plaintiff consented to be bound by the covenant; thus, the trial court did not err in holding that plaintiff was personally bound pursuant to the Amendment dated 17 January 1984.

[2] Defendants argue that plaintiff is bound by a judicial admission to abide by the terms of the restrictive covenants. In an earlier case, *Board of Governors of Bermuda Run Country Club v. Bermuda Run Country Club, Inc.*, a case in which the parties in the instant action were litigating a controversy concerning whether the Board of Governors had approved an increase in dues to $170.00 per month, the trial judge found that:

> All parties stipulated for this action that Bermuda Run Country Club, Inc. ("BRCC") is bound by the restrictive covenants set forth in the Declaration of Restrictive Covenants dated August 20, 1979 ("Restrictive Covenants"), and more specifically . . . the Board has the limited power to approve increases or decreases in the level of dues as proposed by BRCC.

Defendants argue that this is a judicial admission which is binding on the parties since no showing of fraud, misrepresentation, undue influence, or mutual mistake has been shown in the instant action. *See Little v. Food Service*, 295 N.C. 527, 246 S.E.2d 743 (1978). This argument is without merit since the parties restricted the judicial admission's applicability to the previous action only. Stipulations and their role as judicial admissions "will not extend the operation of the agreement beyond the limit set by the parties or by the law." *Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972) (emphasis omitted) (*quoting J.L. Roper Lumber Co. v. Elizabeth City Lumber Co.*, 137 N.C. 431, 439, 49 S.E. 946, 949 (1905)).

Defendants also argue that plaintiff is collaterally estopped to deny the legal effect of the restrictive covenants. This argument is also unpersuasive in view of the requirements to be met in determining the applicability of the doctrine of collateral estoppel, as set forth in *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973). The prior

action did not litigate or determine the issue of whether covenants four and five were real covenants; thus, the doctrine of collateral estoppel is not applicable herein.

For the foregoing reasons, the decision of the trial court is affirmed.

Affirmed.

Judges WALKER and SMITH concur.

MARK ANTHONY McCRIMMON, PETITIONER v. CRIME VICTIMS COMPENSATION COMMISSION, RESPONDENT

No. COA94-1029

(Filed 19 December 1995)

Criminal Law § 1666 (NCI4th)— thief injured during crime—contributory misconduct—denial of claim under Victims Compensation Act

Respondent Commission did not err in concluding that petitioner's actions constituted "contributory misconduct" under the North Carolina Crime Victims Compensation Act and in barring pursuant to N.C.G.S. § 15B-11(b) petitioner's claim for recovery of benefits under the Act, where petitioner snatched a twenty-dollar bill from the hand of a customer in a convenience store and was shot by the store proprietor when he attempted to flee the store, and petitioner should have reasonably foreseen that consequences of a generally injurious nature were probable under all the facts as they existed.

Am Jr. 2d, Criminal Law §§ 1055-1058.

Measure and elements of restitution to which victim is entitled under state criminal statute. 15 ALR5th 391.

Appeal by petitioner from order entered 5 July 1994 by Judge Howard R. Greeson, Jr. in Moore County Superior Court. Heard in the Court of Appeals 24 May 1995.

Cunningham, Dedmond, Petersen & Smith, by Bruce T. Cunningham, Jr., for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Robert T. Hargett, for respondent-appellee.

JOHN, Judge.

Petitioner applied to the Crime Victims Compensation Commission of the North Carolina Department of Crime Control and Public Safety (the Commission) for benefits after being shot while attempting to flee a convenience store with money he stole from a customer. The Final Decision of the Commission denied petitioner's claim, ruling that his "contributory misconduct" barred recovery. Petitioner appeals the order of the trial court affirming the Commission, arguing that being shot was not a foreseeable result of his theft of the store patron's money. Respondent counters that "the Victims Compensation Fund is not a Workers Compensation fund for criminals that are injured during their illicit employment." We affirm the trial court.

Pertinent facts and procedural information include the following: On 20 March 1992 at about 4:10 p.m., petitioner drank four or five beers at the home of a friend. After leaving the residence, petitioner drove to the Hillcrest Trading Post (Hillcrest), a convenience store, to purchase some breath mints. Petitioner departed the store without incident, but eventually returned between 6:15 and 6:30 p.m. He entered and removed a bottle of soda from the "drink box," whereupon he saw a customer, Charlie Lemmonds (Lemmonds), holding a twenty-dollar bill. Petitioner made a comment to Lemmonds to distract him, then snatched the bill and ran towards the exit door, still holding the bottle of soda. Frederick E. Sineath (Sineath), the proprietor of Hillcrest, heard a customer say "he got my money." Sineath shot petitioner in the back as the latter was opening the store's exit door. In consequence of injuries received, petitioner remains paralyzed from the waist down. He was subsequently charged with larceny, while Sineath was charged with assault.

Sineath in his deposition and Lemmonds in his testimony at Sineath's probable cause hearing each stated that petitioner, prior to being shot by Sineath, turned and raised the bottle of soda towards Sineath in a threatening manner. Both men also testified Sineath then ordered petitioner to stop as the latter was opening the door.

Petitioner insisted he heard no command to stop and that he in no way threatened Sineath with the bottle.

About 21 August 1992, petitioner filed a claim with the Commission seeking benefits pursuant to the North Carolina Crime Victims Compensation Act (the Act), N.C. Gen. Stat. § 15B-1 *et seq.* (1994). On 8 June 1993, petitioner's claim was denied.

Petitioner thereafter filed a Petition for Contested Case Hearing before the Office of Administrative Hearings. He alleged that taking the twenty dollar bill from the hand of the customer did not contribute to his injuries, "since it was unforeseeable that a third person would shoot the [p]etitioner in the back" and that the "criminal act [of Sineath] should override any finding of contributory misconduct."

The matter was heard before Administrative Law Judge Brenda Becton on 4 November 1993, who subsequently filed a recommended decision allowing petitioner's claim. However, in its Final Decision of 2 February 1994, the Commission denied the claim, concluding *inter alia* that "[p]etitioner's misconduct . . . contributed to his injuries;" that "it was reasonably foreseeable to the [p]etitioner that his illegal acts could result in injury to himself;" and that "the General Assembly did not intend for a person injured during the commission of criminal acts to receive any compensation [which is] reserved for truly innocent victims of crime."

Petitioner then filed a Petition for Review in the Moore County Superior Court, which affirmed the Commission's Final Decision by order dated 5 July 1994. On 2 August 1994, petitioner gave notice of appeal to this Court.

Petitioner's single assignment of error asserts that:

> the act of Mr. Sineath was not reasonably foreseeable and therefore, by application of tort principles, [petitioner's acts did] not [constitute] contributory misconduct.

Petitioner thus essentially argues that the conclusions of the Commission that his "misconduct . . . contributed to his injuries" and that it was "reasonably foreseeable to the [p]etitioner that his illegal acts could result in injury to himself" were affected by error of law.

Under the North Carolina Administrative Procedure Act, codified at Chapter 150B of the General Statutes, if a party argues the final decision of an administrative agency is based upon error of law, ini-

tial judicial review is to be *de novo*. *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (citations omitted). *De novo* review requires a court to consider a question anew, as if not considered or decided by the agency. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). Where the initial reviewing court, here the Superior Court, should have conducted *de novo* review, this Court will also directly review the agency's decision under a *de novo* review standard. *McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363 (citation omitted). We therefore proceed to examine the Commission's decision in compliance with these rules.

The Act awards compensation to victims of "criminally injurious conduct." N.C. Gen. Stat. § 15B-4(a) (1994). The Commission "assumed without conceding" for purposes of its decision that petitioner's "injury was the result of criminally injurious conduct," and denied petitioner's claim based upon N.C. Gen. Stat. § 15B-11(b) (1994). The statute provides:

> [a] claim may be denied and an award of compensation may be reduced upon a finding of contributory misconduct by the claimant . . . .

G.S. § 15B-11(b).

However, petitioner maintains that "the act of Mr. Sineath was not reasonably foreseeable and therefore, by application of tort principles, [petitioner's attempt to steal the money] was not contributory misconduct" so as to justify reduction or denial of petitioner's claim under the statute. We believe petitioner misapprehends the purport of "contributory misconduct."

While "contributory misconduct" is not defined in the Act, this Court has previously interpreted the phrase. *Evans v. N.C. Dept. of Crime Control*, 101 N.C. App. 108, 118, 398 S.E.2d 880, 885 (1990), *temporary stay allowed*, 328 N.C. 271, 400 S.E.2d 446 (1991) (*temporary stay dissolved* 10 January 1991). "Misconduct" is behavior that is "unlawful or . . . breache[s] the standard of conduct acceptable to a reasonable person." *Id.* Further,

> in order for [a] claimant's misconduct to be contributory [under the Act] it must combine with criminal action on the part of another to become a 'real, efficient and proximate cause of the injury.'

Id. at 117, 398 S.E.2d at 885 (citation omitted). A proximate cause is one which

> in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all facts as they existed.

Id. (quoting *Hairston v. Alexander Tank Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)).

The test under *Evans*, therefore, is two-pronged, that is, 1) was there misconduct on the part of petitioner and, if so, 2) was that misconduct a proximate cause of his injury?

In the case *sub judice*, it is undisputed that shortly before being injured, petitioner snatched money from a convenience store customer without authorization to do so and attempted to flee the store with the customer's money. Theft is an unlawful act; under *Evans*, "misconduct includes unlawful conduct as a matter of law." *Id.* at 117, 398 S.E.2d at 88. Utilizing the *de novo* standard, *McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363, we hold petitioner's stealing of twenty dollars from an unsuspecting store patron constituted misconduct and that the Commission's conclusion to this effect was not error.

Petitioner nonetheless argues the Commission found he had committed "robbery" and insists at length that he "was charged with committing larceny from the person" and not robbery. Assuming *arguendo* the Commission attached an erroneous label to petitioner's actions, the misstatement is *de minimis*, *see State v. Buckom*, 328 N.C. 313, 317, 401 S.E.2d 362, 365 (1991) (citation omitted) (larceny from the person differs from robbery only in that the former "lacks the requirement that the victim be put in fear"), and surplusage. The essential and relevant conclusion for purposes of the Act is that petitioner engaged in "misconduct"; as noted above, misconduct includes commission of an unlawful act and theft constitutes an unlawful act, whether accomplished by larceny or robbery.

Regarding the element of proximate cause, petitioner takes issue with the Commission's conclusion that "it was reasonably foreseeable to the Petitioner that his illegal acts could result in injury to himself." However, this Court in *Evans* pointed out that:

> The test of foreseeability as an element of proximate cause does not require that the actor should have been able to foresee the injury in the precise manner in which it actually occurred.

Evans, 101 N.C. App. at 117, 398 S.E.2d at 885 (quoting *Adams v. Mills*, 312 N.C. 181, 193, 322 S.E.2d 164, 172 (1984)).

Therefore, petitioner need not necessarily have been able to foresee that his conduct would lead to his being shot, but only that "consequences of a generally injurious nature[] [were] probable under all the facts as they existed." *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (citations omitted). Indeed, in certain instances "the intervention of wrongful conduct may be the very risk" a person creates through his or her own misconduct, *id.* at 234, 311 S.E.2d at 565, and such intervention accordingly is foreseeable.

In this day and age, considering the circumstances of snatching a twenty-dollar bill from the hand of a customer in a convenience store and attempting to flee the premises with the money and a bottle of soda, only a thief lacking the most basic "ordinary prudence" would not reasonably foresee that "consequences of a generally injurious nature[] [were] probable under all the facts as they existed." *Id.* Petitioner's misconduct thus was a proximate cause of his injury. The Commission therefore did not err either in concluding petitioner's actions constituted "contributory misconduct" under the Act and or in its consequent decision to bar pursuant to G.S. § 15B-11(b) his claim for recovery of benefits under the Act.

The briefs of both parties also discuss whether petitioner's claim was barred by N.C. Gen. Stat. § 15B-11(a)(6) (1994), which provides "[a]n award of compensation shall be denied if . . . [t]he victim was participating in a felony or a nontraffic misdemeanor at or about the time that the victim's injury occurred." This subsection was added effective 28 February 1994 and retroactively applied to all pending claims or claims "in litigation on or after the date of ratification." North Carolina Crime Victims Compensation Act, ch. 3, sec. 2, 1994 E. Sess. 5, 6. Petitioner filed his Petition for Review with the Moore County Superior Court on 24 February 1994; his case was therefore in litigation at the time of ratification.

However, we note the question of the applicability of G.S. § 15B-11(a)(6) to petitioner's claim was not addressed in any manner below nor is it set out as an assignment of error in the record on

appeal. A contention in an appellant's brief not based upon an exception or assignment of error will not be reviewed by this Court on appeal. N.C.R. App. P. 10(b). Moreover, we have determined above that petitioner's claim was properly denied under terms of the Act less restrictive than provided in the Amendment. It is therefore both violative of our appellate rules as well as unnecessary to consider whether petitioner's recovery was also barred by G.S. § 15B-11(a)(6). Accordingly, we decline to do so.

Affirmed.

Judges COZORT and WALKER concur.

BOBBY G. STEVENS, PLAINTIFF v. RICHARD HENRY, ONE FOR ALL, INC. AND UNITEX, INC., DEFENDANTS

No. COA95-184

(Filed 19 December 1995)

1. Injunctions § 10 (NCI4th)— preliminary injunction—prohibition of disposition of secured property

The trial court properly entered a preliminary injunction in favor of plaintiff secured creditor prohibiting disposition of the secured property by the corporate debtor, its sole shareholder, and the transferee of the secured property where plaintiff showed that he is the holder of a promissory note executed by the debtor and secured by equipment and inventory; the debtor was dissolved and secured property was transferred to another corporation; and plaintiff had an agreement with the shareholder that he would not move, transfer, sell or conceal the debtor's assets without giving plaintiff ten days' notice and that a violation of the agreement would constitute an admission by the shareholder that he was acting to defraud creditors. Plaintiff thus demonstrated the likelihood of success on the merits of his action and that he would likely sustain irreparable harm if the injunction was not granted.

Am Jur 2d, Injunctions §§ 70, 71, 78.

2. Injunctions § 48 (NCI4th)— injunction—plaintiff's own bond

The trial court did not err in allowing plaintiff to post his own bond upon issuance of a preliminary injunction.

Am Jur 2d, Injunctions §§ 310 et seq.

3. Pleadings § 307 (NCI4th)— compulsory counterclaim—dismissal without prejudice

Plaintiff's claims in the present action should have been raised as a compulsory counterclaim in a previously filed action for a declaratory judgment, even though plaintiff is seeking damages, where the two actions involve the same parties; the issues arise out of the same agreement and both suits occurred because of the same set of circumstances; and plaintiff has failed to demonstrate that any of his rights would be jeopardized if the issues were adjudicated in a single action. Therefore, the trial court should have dismissed plaintiff's action without prejudice to file the claims asserted therein as a counterclaim in the pending declaratory judgment action. N.C.G.S. § 1A-1, Rule 13(a).

Am Jur 2d, Counterclaim, Recoupment, and Setoff § 3.

Appeal by defendant Unitex from Preliminary Injunction filed 17 October 1994 and Order Denying Motions to Dismiss, Stay or Transfer Action filed 14 November 1994 by Judge Clarence W. Carter in Surry County Superior Court. Heard in the Court of Appeals 14 November 1995.

Sarah S. Stevens and Gus L. Donnelly for plaintiff-appellee.

Tuggle Duggins & Meschan, P.A., by William C. Connor, for defendant-appellant Unitex.

JOHNSON, Judge.

This action was filed by Stevens against Unitex, Richard Henry (Henry) and One For All, Inc. (One For All) on 2 September 1994. Stevens alleges that he was the holder of a promissory note dated 15 January 1993 and executed by One For All which was secured by the equipment, inventory and office furniture of One For All; that the promissory note was in default with a balance due of $48,500.00; that One For All had been improperly dissolved by Henry, its sole shareholder; and that Henry had improperly transferred certain assets of

One For All to Unitex. Stevens sought to recover $48,500.00 under the promissory note, certain unspecified damages against defendants, possession of "secured property" in the possession of Unitex and the entry of a Preliminary Injunction prohibiting defendants from disposing of the secured property.

On 23 September 1994, Unitex filed an Answer which included a Motion to Dismiss or Stay this action on the grounds that a Guilford County action had previously been filed on 25 August 1994 and involved the same transactions and issues that are the subject matter of this action. In this Motion, Unitex asserted that Stevens' claim in this action should have been filed as a compulsory counterclaim in Guilford County and that this action should, therefore, be dismissed or stayed pending final conclusion of the declaratory judgment action. Unitex attached a filed, stamped copy of its Complaint in the Guilford County action as Exhibit A to its Answer. At the time Unitex was served with this action, Stevens was unaware and had no knowledge of the pending Guilford County action. Defendant filed an affidavit in support of this Motion making a general allegation that Unitex had substantial inventory and equipment which were not acquired from Henry or One For All, but admitted that some of its assets may have been provided by Henry.

On 26 September 1994, the trial court conducted a hearing upon plaintiff's request for a Preliminary Injunction. The court took the testimony of Stevens who testified that he had visited the offices owned by Henry and One for All several times. Henry and One For All's offices were first in Winston-Salem, North Carolina and later moved to Greensboro, North Carolina. When Stevens visited Henry's office, he saw part of the property in which he had a perfected security interest. He described the secured property in part as a screen printer, three design machines or computers and an embroidery machine.

On 13 October 1994, the trial court entered a Preliminary Injunction enjoining Unitex from disposing of specifically named equipment and any and all other equipment that was owned by One for All at the time of the dissolution, which was now in the possession of Unitex on 26 September 1994.

The court further ordered that the Order would not be effective until plaintiff posted with the Clerk of Court a cash or surety bond in the amount of $97,000.00. The trial judge added in his own hand that plaintiff may post his own bond.

On or about 17 October 1994, Stevens executed a surety bond in the amount of $97,000.00. He signed as both principal and surety. Pursuant to the court's Preliminary Injunction Order, the bond was accepted and filed by the Clerk of Court.

Thereafter, Unitex's Motion to Dismiss or Stay the action was calendared by the trial court for hearing on Monday, 14 November 1994. Following the hearing on the Motion conducted on 14 November 1994, the court entered an Order denying Unitex's Motion. On 14 November 1994, Unitex filed with this Court its notice of appeal from both the Preliminary Injunction Order entered on 13 October 1994 and filed on 17 October 1994, and from the Order denying Unitex's Motion to Dismiss this action entered on 14 November 1994.

Henry and One For All have not filed an Answer; and entry of default and partial judgment were entered by the Surry County Superior Court on April 1995 against Henry and One For All after completion of the record on appeal.

Trial courts may issue preliminary injunctions "where the moving party shows (1) a likelihood of success on the merits of his case and (2) that he is likely to sustain irreparable loss absent issuance or, in the opinion of the court, issuance is necessary to protect the movant's rights during the course of the litigation." *Looney v. Wilson*, 97 N.C. App. 304, 307-08, 388 S.E.2d 142, 144-45 (1990). On appeal, however, we are not bound by the findings of the trial court, and may weigh the evidence and facts anew. *Id.*

Notably, an appeal from an order granting a preliminary injunction is interlocutory, and no appeal may be had from an interlocutory order, unless a substantial right is affected. *Looney*, 97 N.C. App. 304, 388 S.E.2d 142. However, an appeal from an order denying a preliminary injunction may be heard if the moving party can show a likelihood of success on the merits and is likely to sustain irreparable harm if the injunction is not issued. *Id.*

[1] Plaintiff's evidence tended to show that the parties had an agreement which provided that defendant Henry would not move, transfer, sell, encumber or otherwise conceal the property or assets of the corporation or himself without first notifying plaintiff at least ten days prior to making the change. The agreement further provided that all of the assets were located at 618C Guilford College Road and that if Henry violated the agreement, it would constitute an admission by him that he was acting to defraud his creditors. Plaintiff's evidence

also shows that the property was transferred and was being used and held by someone other than One For All. Thus, plaintiff demonstrated the likelihood of success on the merits of his action and the likelihood that he would sustain irreparable harm if the injunction was not granted. Accordingly, the trial court properly granted the preliminary injunction.

Defendant has failed to show that it would suffer the loss of any substantial right. Therefore, the appeal from the interlocutory order was premature.

[2] Defendant next argues that the trial court erred in allowing plaintiff to post his own bond. This argument is without merit. This Court has stated that:

> [t]he [trial court] has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant "no material damage," [citations omitted] . . . and where the applicant for equitable relief has "considerable assets and [is] . . . able to respond in damages if [defendant] does suffer damages by reason of [a wrongful] injunction [citations omitted].

Keith v. Day, 60 N.C. App. 559, 562, 299 S.E.2d 296, 298 (1983) (*quoting Federal Prescription Service, Inc. et al. v. American Pharmaceutical Assoc.*, 636 F.2d 755, 759 (D.C. Cir. 1980). Thus, the trial court in its discretion could provide that plaintiff may post his own bond.

[3] Defendant's final argument is that the trial court erred in denying its Motion to Dismiss or Stay this action. A denial of a motion to dismiss on the ground that there is a prior pending action is immediately appealable. *Atkins v. Nash*, 61 N.C. App. 488, 300 S.E.2d 880 (1983). Defendant argues that a prior action was filed in Guilford County requesting a declaratory judgment as to the same transactions and issues involved in the instant action. Accordingly, defendant argues that plaintiff should have raised its claims in a compulsory counterclaim in the Guilford County action pursuant to Rule 13(a) of the North Carolina Rules of Civil Procedure.

Plaintiff contends that no similarity can be found in the nature of its action and the declaratory judgment action. Plaintiff also contends that he is not entitled to seek monetary relief or any other relief which he is seeking in the instant action in a declaratory judgment action. Thus, plaintiff argues, he would not be able to pursue a per-

sonal judgment against defendants, as the declaratory judgment action would only define "in rem" or "quasi in rem" rights. Plaintiff's argument is that the exception to compulsory counterclaims applies, that is, a party is not required to bring a compulsory counterclaim if:

> (2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

The purpose of Rule 13(a), which makes certain counterclaims compulsory, is to foster judicial economy by requiring that one court resolve all related claims in a single action. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

Plaintiff's contentions (1) that he is not entitled to seek monetary relief or any other relief which he is seeking in the instant action in a declaratory judgment action, and (2) that the exception to compulsory counterclaims is applicable, are without merit.

In *Carolina Squire, Inc. v. Champion Map Corp.*, 75 N.C. App. 194, 330 S.E.2d 36 (1985), the Court held that even though the first suit filed was for declaratory judgment and the second suit was for damages, that both claims arose out of the same agreement, both occurred because of the same set of occurrences and plaintiff had not shown that its rights would be jeopardized if the issues were adjudicated in a single action; the second action constituted a compulsory counterclaim that should have been raised in the declaratory judgment action.

We find in the instant case, as in *Squire*, that the suits are logically related, that they involve the same parties, that the issue arises out of the same agreement and both suits occurred because of the same set of circumstances, and that plaintiff has failed to demonstrate that any of his rights would be jeopardized if the issues were adjudicated in a single action. Therefore, we hold that plaintiff's claims in the present action should have been raised as a compulsory counterclaim in the previously filed declaratory judgment action.

We, therefore, hold that the trial judge should have dismissed plaintiff's action *without prejudice* to file the claims asserted in this action as a counterclaim in the pending declaratory judgment action.

This case is reversed and remanded to the trial division for the trial court to enter an order dismissing plaintiff's action *without prej-*

udice to file the claims in this action as a counterclaim in the pending declaratory judgment action in Guilford County.

Reversed and remanded.

Judges WALKER and SMITH concur.

BOBBY REX DAVIS, PLAINTIFF v. SALLY DAVIS WRENN, INDIVIDUALLY, AND AS "TRUSTEE-ADMINISTRATOR OF THE WILL OF MARY ALICE DAVIS," DEFENDANT

No. COA95-181

(Filed 19 December 1995)

Pleadings § 62 (NCI4th)— claim properly dismissed—sanctions improperly imposed

The trial court did not err in dismissing plaintiff's complaint for failure to state a claim upon which relief could be granted, since three of the claims were barred by the statute of limitations and the fourth claim had no basis in law or fact; however, the court erred in imposing Rule 11 sanctions where the court made no findings or conclusions explaining how plaintiff's conduct violated Rule 11 provisions or the appropriateness of the sanction imposed ($6,692 in attorney's fees).

Am Jur 2d, Pleading §§ 26, 226.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed. 556.

Appeal by plaintiff from order entered 25 April 1994 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 14 November 1995.

Martin & Martin, P.A., by J. Matthew Martin, for plaintiff-appellant.

Randolph L. Worth for defendant-appellee.

WALKER, Judge.

This appeal arises from a dispute over the administration of the estate of Mary Alice Davis. Ms. Davis, plaintiff's aunt, died on 9 July

1989, leaving a handwritten (holographic) will. In the will, Ms. Davis named her sister, defendant Sally Davis Wrenn, as executrix of the estate. The will's residuary clause provided that "everything (money and property) be settled and divided equally" among her nieces and nephews, including plaintiff. Defendant submitted Ms. Davis' will to the Clerk of Superior Court of Wake County on 10 July 1989, and it was duly probated.

Included in Ms. Davis' estate were various accounts and certificates of deposit (CDs), all of which were joint accounts with the right of survivorship established pursuant to N.C. Gen. Stat. § 41-2.1 naming defendant as the joint owner. In carrying out her duties as executrix of her sister's estate, defendant filed a 90 Day Inventory on 22 September 1989, properly listing only one-half of the value of the various accounts and CDs.

After the estate had been closed and defendant had been discharged, fourteen of Ms. Davis' nieces and nephews, including plaintiff, filed a "Petition" alleging that the terms of Ms. Davis' will had not been carried out properly. This "Petition" was apparently filed without aid of counsel. In April 1990, plaintiff filed a Motion for Default. The record does not reflect any disposition of this purported action although there is some indication that a hearing had been requested for 6 June 1990.

Thereafter, with aid of counsel, thirteen of Ms. Davis' nieces and nephews, including plaintiff, successfully petitioned the Clerk to reopen the estate for the purpose of verifying that all of Ms. Davis' accounts and CDs were joint accounts with the right of survivorship. As requested by the petitioners, defendant provided to their attorney the bank signature cards for all of Ms. Davis' accounts, copies of all CDs, and bank statements showing the account balances as of 9 July 1989. These documents verified that the accounts were joint accounts with the right of survivorship. The estate was ordered reclosed by order filed 7 December 1990. In the interim, on 31 October 1990, plaintiff filed another *pro se* "Motion" alleging the applicability of N.C. Gen. Stat. § 53-146.1, effective 1 July 1989, which permitted the establishment of different types of joint accounts. The record does not indicate any further action or disposition regarding this "Motion."

In late 1991, six of Ms. Davis' nieces and nephews (not including plaintiff herein) filed, through counsel, a lawsuit contending that they were entitled to the proceeds of the joint accounts and CDs, despite the fact that all of the accounts and CDs had been verified as joint

accounts with the right of survivorship. That action was settled in October 1993.

On 6 December 1993, plaintiff, on his behalf and purportedly on behalf of the other nieces and nephews of Ms. Davis as a class, filed a *pro se* complaint alleging irregularities in defendant's administration of Ms. Davis' estate. These alleged irregularities included underreporting of the value of the estate, filling out false forms with the Clerk, lying about Ms. Davis' accounts and CDs, and otherwise attempting to defeat the desires of Ms. Davis. Plaintiff's theories of relief included fraud, conversion, breach of fiduciary duty, and constructive trust. Defendant answered through counsel, moved to dismiss on various grounds, moved for sanctions, and counterclaimed. Thereafter, plaintiff made numerous other responses and demands on defendant, all of which required defendant to respond through counsel. On 25 April 1994, the trial court entered an order granting defendant's Rule 12(b)(6) motion to dismiss and imposing sanctions against plaintiff. Following plaintiff's timely notice of appeal, the trial court determined that plaintiff was the only party plaintiff to this action.

We first address plaintiff's argument that the trial court erred in dismissing his action. A dismissal pursuant to Rule 12(b)(6) should be granted when (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint reveals on its face the absence of fact sufficient to make a valid claim; or (3) some fact disclosed in the complaint necessarily defeats the plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). The trial court apparently based its order of dismissal on the third ground, concluding that "[p]laintiff's action is barred by the three year statute of limitations pursuant to N.C.G.S. § 1-52."

For purposes of this appeal, the parties agree that plaintiff's complaint, liberally construed, attempts to allege four separate causes of action: fraud, breach of fiduciary duty, and conversion (which have a three-year statute of limitations pursuant to N.C. Gen. Stat. § 1-52); and constructive trust (which has a ten-year statute of limitations pursuant to N.C. Gen. Stat. § 1-56).

As for the claims of fraud, conversion, and breach of fiduciary duty, we hold that the trial court correctly determined they were barred by the three-year statute of limitations. "Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party

did not then know the wrong had been committed." *Wilson v. Development Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970); *see also Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 594, 284 S.E.2d 188, 191 (1981), *modified on other grounds and affirmed*, 306 N.C. 364, 293 S.E.2d 415 (1982). The trial court found that the final account closing Ms. Davis' estate was signed on 23 February 1990. Thus, 23 February 1990 would have been the date that the alleged wrong was complete for purposes of bringing claims against defendant for fraud, breach of fiduciary duty, and conversion stemming from defendant's administration of Ms. Davis' estate. Since plaintiff did not file the instant action until 6 December 1993, almost ten months after the estate was first closed, these claims are time-barred. Plaintiff's novel argument that these causes of action accrued on 7 December 1990, when the estate was closed for the second and final time and "the last moment in which the Defendant had the opportunity to correct the estate accounting, and otherwise comply with applicable laws," is rejected as contrary to law and common sense.

The trial court made no finding or conclusion as to whether the ten-year statute of limitations on plaintiff's constructive trust claim had expired. However, this omission is of no consequence, since the constructive trust claim had no basis in law or fact. Indeed, we are of the opinion that none of plaintiff's allegations stated a valid claim, factually or legally. Therefore, regardless of whether any applicable statutes of limitations had run, the trial court did not err in granting defendant's motion to dismiss plaintiff's action. We now turn to plaintiff's argument that the trial court erred in imposing Rule 11 sanctions against him by ordering him to pay defendant's attorney's fees in the amount of $6,692. Rule 11 of the North Carolina Rules of Civil Procedure requires the person who signs a pleading to certify that the pleading is well grounded in fact and law and is not interposed for any improper purpose. N.C. Gen. Stat. § 1A-1, Rule 11(a) (1990). When a document is signed in violation of this rule, sanctions are mandatory. *Id.* (The court "shall impose" sanctions upon finding a Rule 11 violation). A trial court's decision whether Rule 11 sanctions are warranted is reviewable *de novo*, and this Court must determine (1) whether the 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. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

We have carefully reviewed the trial court's order in the instant case, and we conclude that the court's findings and conclusions are insufficient to support an award of sanctions. *See McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995) (a court's failure to enter findings of fact and conclusions of law on the issue of whether Rule 11 sanctions are warranted is error which generally requires remand in order for the trial court to resolve any disputed factual issues). Although the order recites that "[s]anctions are imposed against plaintiff for violation of the legal provision and improper purpose provision" of Rule 11, it contains no findings or conclusions explaining how plaintiff's conduct violated these provisions. Moreover, there is nothing in the order to explain the appropriateness of the sanction imposed ($6,692 in attorney's fees) or to indicate how the court arrived at that figure. Therefore, we reverse the trial court's imposition of sanctions against plaintiff and remand for additional findings consistent with this opinion.

Plaintiff concludes his brief with the following quotation from *Jarrett v. Green*, 230 N.C. 104, 108, 52 S.E.2d 223, 225 (1949): "We are entitled to pursue the hunt so long as we can track the fox; and not until we lose the trail are we obliged to abandon the chase, call our dogs and go home." However, it should have been apparent to plaintiff before he filed this action that it was futile to track the fox because there was no scent for the dogs to trail. Plaintiff should have long since abandoned the chase, called his dogs, and gone home.

Affirmed in part, reversed in part, and remanded.

Judges JOHNSON and SMITH concur.

CHILTOSKI v. DRUM

[121 N.C. App. 161 (1995)]

DEBRA L. CHILTOSKI AND ALVIN CHILTOSKI, PLAINTIFFS v. DAVID FLAKE DRUM, DEFENDANT

No. COA95-198

(Filed 19 December 1995)

Trial § 545 (NCI4th); Negligence § 16 (NCI4th)— automobile accident —- admission of fault by defendant—no admission as to damages—award of new trial—failure to state grounds—error

The trial court's order of a new trial after the jury awarded zero damages contravened N.C.G.S. § 1A-1, Rule 59(d) by failing to specify the grounds therefor within the order; furthermore, the court's apparent reason for issuance of the order—that defendant, by admitting fault, had necessarily admitted plaintiff suffered damages which were the proximate result of defendant's fault—was grounded upon a misapprehension of law.

Am Jur 2d, Negligence §§ 33, 424 et seq.; New Trial §§ 557-563.

Judge WYNN concurring in alternate reasoning.

Appeal by defendant from order entered 25 October 1994 by Judge John M. Gardner in Swain County Superior Court. Heard in the Court of Appeals 15 November 1995.

Mraz & Dungan, by John A. Mraz, for plaintiff-appellee.

Roberts Stevens & Cogburn, P.A., by Steven D. Cogburn and Wyatt S. Stevens, defendant-appellant.

JOHN, Judge.

Defendant appeals the award to plaintiff of a new trial pursuant to N.C.R. Civ. P. 59 (Rule 59). We reverse the trial court.

On 10 August 1992, plaintiff commenced a personal injury action against defendant. In his answer, defendant admitted that operating his automobile in such a manner as to collide with the rear of plaintiff's vehicle constituted a breach of the duty of care owed plaintiff. However, defendant specifically denied that his negligence proximately caused any bodily injury to plaintiff.

At trial, the court combined the issues of causation and damages into a single question submitted to the jury as follows: "What amount is the plaintiff entitled to recover for personal injuries?" The jury was instructed that plaintiff was required to prove she suffered damages proximately caused by the negligence of defendant as well as the amount of such damages. The jury responded with a verdict of "none."

Upon its own initiative, the trial court thereafter entered an order 25 October 1994 providing:

> The Court in its discretion, enters the following Order,
>
> IT IS ORDERED, in the discretion of the Court, that the verdict of the jury is hereby set aside, and a new trial is awarded to the plaintiff.

Defendant filed notice of appeal to this Court 14 November 1994, assigning error to the court's order.

We first consider whether the court's order was violative of the procedural mandate of Rule 59(d) which reads:

> Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and *in the order shall specify the grounds therefor.*

(emphasis added). The rationale for requiring specification of grounds has been explained as follows:

> When the new trial is granted upon motion of a party, the grounds appear in the motion, as the reasons assigned by the movant in compliance with the requirements of Rule 59(a). When the judge acts of his own initiative he must set out the grounds in his order. Otherwise, the purpose of the Rule will not be accomplished; the record will not reveal the basis upon which the order is made or permit intelligent review by an appellate court.

W. Brian Howell, *Shuford North Carolina Civil Practice and Procedure* § 59-15 (4th ed. 1992) (*quoting Fried v. McCroth*, 133 F.2d 350 (D.C. Cir. 1942)); s*ee also In re Will of Herring*, 19 N.C. App. 357, 360, 198 S.E.2d 737, 748 (1973) (citations omitted) (trial court erred in setting aside verdict and ordering new trial for "errors of law committed at trial" on its own initiative without specifying the errors

upon which order was based; without specificity, "appellate court would be forced to embark on a voyage of discovery through an uncharted record to find the errors of law referred to in the order.").

Significantly, the order at issue contains neither findings nor explication reflecting the grounds for the court's action. The trial court's order therefore lacks any basis upon which to conduct appellate review and must be reversed. *See id.* Moreover, unlike the separate concurrence, we do not read Rule 59(d) to require that *sua sponte* action by the trial court be accompanied by a statement of the reasons therefor *only* "after entry of judgment," but rather as setting forth the maximum time, *i.e.*, up to 10 days following entry of judgment, within which the court is statutorily authorized to act upon its own initiative.

In addition, we note while "voyaging through the record" that immediately following the jury verdict, the trial court excused the jury and then stated: "The verdict is zero. That is not an appropriate verdict—or legal verdict under the evidence in the case." The court also informed counsel at the jury charge conference that it would not submit an instruction on nominal damages because there had been an "admission of liability" by defendant. The court further indicated its opinion that defendant, in consequence of having conceded fault in the collision, had admitted plaintiff sustained some injury as a proximate result of defendant's negligence. According to the trial court, by admitting fault, defendant admitted plaintiff "has suffered at least some pain and suffering as a proximate result of the accident." Therefore, the court announced, "[i]f the jury comes back with zero it will be set aside. That is not a possible verdict in this case." Finally, the trial court observed:

> In a PI case the only formula is—if the case is worth trying there's going to be evidence of pain and suffering . . . . I say that every chance I get. I said it at a conference for Superior Court judges without any effect; so now I'm saying it to the Appellate Courts.

The trial court's pronouncement that the jury verdict of "none" was not a "legal verdict," when read in conjunction with the court's statements noted above, indicates that the court's apparent basis for granting a new trial on its own initiative was its belief that by admitting fault, defendant had necessarily admitted plaintiff suffered damages which were the proximate result of defendant's fault. Even considering *arguendo* the foregoing as specification of the trial court's grounds in satisfaction of the requirement of Rule 59(d), the court

acted under a misapprehension of law and its order constituted reversible error.

While an order for new trial pursuant to Rule 59 which satisfies the procedural requirements of the Rule may ordinarily be reversed on appeal only in the event of "a manifest abuse of discretion," when the trial court grants or denies a new trial "due to some error of law," then its decision is fully reviewable. *Garrison v. Garrison*, 87 N.C. App. 591, 594, 361 S.E.2d 921, 923 (1987) (citation omitted). Appellate courts thus must utilize the "abuse of discretion" standard only in those instances where there is no question of "law or legal inference." *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981) (citation omitted).

In order to establish a claim for negligence, a plaintiff must prove that:

> (1) defendant owed a duty to plaintiff, (2) defendant failed to exercise proper care in the performance of that duty, and (3) the breach of that duty was the proximate cause of plaintiff's injury, which a person of ordinary prudence should have foreseen as probable under the conditions as they existed.

Westbrook v. Cobb, 105 N.C. App. 64, 67, 411 S.E.2d 651, 653 (1992) (citations omitted).

While defendant's admissions herein relieved plaintiff of the burden of proving the first two of the foregoing elements, defendant at no point conceded that his negligence proximately caused plaintiff's injuries or that she was entitled to "some damage[s]" based solely upon his admission of fault in the collision. Even assuming *arguendo* without deciding that the trial court's "[statement] to the Appellate Courts"—nominal damages are not appropriate in personal injury cases, *but cf. The Asheville School v. Ward Construction, Inc.*, 78 N.C. App. 594, 599, 337 S.E.2d 659, 662 (1985), *disc. review denied*, 316 N.C. 385, 342 S.E.2d 890 (1986) (nominal damages "recoverable in negligence actions," in this instance for negligent repairs)—might have applicability to the circumstance where a defendant stipulates to both fault *and proximate cause* or where the jury resolves the causation issue in favor of the plaintiff prior to reaching the separately submitted issue of damages, neither instance was present in the case *sub judice*.

In sum, the trial court's order of a new trial contravened Rule 59(d) by failing to specify the grounds therefor within the order. In

addition, the trial court's apparent reasons for issuance of the order, as indicated in the record, were grounded upon a misapprehension of law. The order of the trial court is therefore reversed and the case remanded for entry of judgment upon the jury verdict rendered. *See In re Will of Herring*, 19 N.C. App. at 360, 198 S.E.2d at 740.

Reversed.

Judge LEWIS concurs.

Judge WYNN concurs with separate opinion.

Judge WYNN concurring in alternate reasoning,

I agree with the alternate reasoning offered by the majority that the trial judge's decision to award a new trial was grounded in a misapprehension of law. A verdict of zero damages is not appropriate in an instance where a defendant concedes a breach of the standard of care and that such breach caused the plaintiff an injury. In this case, however, the record indicates that the defendant did not concede causation. In fact, the trial judge instructed the jury that the plaintiff had to prove causation and the amount of the damages. While such an instruction should have lead to the submission of two issues—one on causation and a second dependent issue on the amount of damages—the trial court's instruction to the jury allowed the jury to determine that the defendant's breach was not a cause of plaintiff's injury. Therefore, a verdict of zero is a "legal verdict."

I do not agree with the majority's holding that the trial judge in this case was required to make findings of facts to support the award of a new trial. A new trial awarded under Rule 59(d) requires findings only in the instance where the trial court has made an *entry of judgment* and thereafter within 10 days of having done so, the court on its own initiative orders a new trial. *See Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 589, 176 S.E.2d 851, 853 (1970). In this case, the trial judge had not entered judgment and therefore could in its discretion award a new trial without making findings of fact.

DEBORAH BLUM AND SHELLEY BLUM, PLAINTIFFS-APPELLANTS v. ROBERT G. WORLEY AND HARRIET M. WORLEY, DEFENDANTS-APPELLEES

No. COA95-54

(Filed 19 December 1995)

Trespass §§ 28, 51 (NCI4th)— transporting mobile home across land—damage to trees and undergrowth—failure to instruct on punitive damages—error

The trial court erred in failing to give a punitive damages instruction where the evidence tended to show that defendants, who had been given permission to transport a mobile home on a road traversing plaintiffs' property, trimming small limbs if need be, in fact inflicted wholesale damages to the property by using a bulldozer to flatten numerous trees and undergrowth alongside the road; however, the court did not err in refusing to instruct the jury on damages done to the intrinsic or aesthetic value of the land where the evidence was too ephemeral to support such a damage instruction, and in refusing to instruct on criminal trespass statutes.

Am Jur 2d, Trespass §§ 148-152, 157-161.

Appeal by plaintiffs from judgment entered 16 September 1994 by Judge Julia Jones in Mitchell County Superior Court. Heard in the Court of Appeals 29 September 1995.

Shelley Blum and Deborah Blum, pro se, for plaintiff appellants.

Bailey and Bailey, by G. D. Bailey and J. Todd Bailey, for defendant appellees.

SMITH, Judge.

Plaintiffs bring forward three assignments of error based on the failure of the trial court to give requested jury instructions. The requested, but denied instructions, include those for: (1) punitive damages; (2) intrinsic value damages resulting from defendants' trespass; and (3) use of criminal statutes regarding trespass to land.

We agree the trial court erred in its refusal to charge on the punitive damages issue. Accordingly, we reverse and remand for a new trial on punitive damages. However, we find plaintiffs' other assign-

ments of error without merit and affirm the judgment of the trial court on those issues.

Defendants contracted to purchase a double-wide mobile home. The mobile home was to be delivered and set up on property owned by defendants. However, to get to defendants' property, the mobile home had to pass along a private road running across plaintiffs' property. Defendants requested and received permission to transport the mobile home across plaintiffs' property via the road. The scope of that permission is contested by the parties. Defendants argue that the permission given allowed them to "[d]o what [was] necessary to get the house up the road." Plaintiffs maintain the permission given was expressly limited to cutting tree limbs impeding passage of the mobile home; no trees were to be cut down. Plaintiffs assert that defendants assured them the road was wide enough for unobstructed passage, save for some minor tree limbs.

During the attempted delivery, it became apparent that plaintiffs' road was not wide enough to allow for unobstructed passage of the mobile home. Defendants maintain trees, undergrowth, and assorted debris on plaintiffs' property blocked passage of the mobile home. Due to the impasse created by the obstructions, defendants procured the use of a bulldozer, and flattened interfering areas alongside the road.

The amount of damage to plaintiffs' property is contested. Plaintiffs' evidence tends to show extensive damage was done to the property, including destruction of fifty young black walnut trees. Defendants admit to "taking out" three or four trees, a linden tree, and assorted debris in the course of moving the mobile home.

Plaintiffs bring forth three assignments of error. The first two assignments of error address the trial court's refusal to charge the jury on: (1) the issue of punitive damages; and (2) damages from the loss of the land's intrinsic value, i.e., the land's aesthetics, the black walnut saplings and the linden tree. Plaintiffs' third assignment of error addresses the trial court's refusal to take judicial notice of criminal statutes regarding trespass to land, and the trial court's denial of an instruction based on these same criminal statutes.

Plaintiffs' complaint alleged that defendants' acted "willfully, deliberately, intentionally and tortiously . . . damaging the quality of [plaintiffs'] land by trespassing. The complaint also alleged defendants' conduct was "in reckless disregard of plaintiff's rights." At trial,

plaintiff presented evidence indicating the bulldozer operator was told by defendant Robert Worley "to do whatever was necessary" to get the mobile home through the property. Defendant Robert Worley admits making this statement. Further, the record indicates defendant told plaintiff Deborah Blum that he "just cut three" trees, and that the trees were no bigger than a circle made by touching thumb to index finger. Testimony by the defendant indicates that he watched and directed the bulldozer operator, as the operator trammeled several trees.

Plaintiffs in this case requested punitive damages instructions twice, requests which were refused by the trial court. The rules regarding disposition of jury instruction requests are well-settled. In reviewing the trial court's decision to give or not give a jury instruction, the preliminary inquiry is whether, in the light most favorable to the proponent, the evidence presented is sufficient to support a reasonable inference of the elements of the claim asserted. *Anderson v. Austin*, 115 N.C. App. 134, 443 S.E.2d 737, 739, *disc. review denied*, 338 N.C. 514, 452 S.E.2d 806 (1994).

Once a party has aptly tendered a request for a specific instruction, correct in itself and supported by the evidence, failure of the trial court to render such instruction, in substance at least, is error. *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972); 28 Strong's N.C. Index 4th *Trial* § 300 (1994). Further,

> [i]t is the *duty* of the trial court to charge the law applicable to the substantive features of the case arising on the evidence, without special requests, and to apply the law to the various factual situations presented by the conflicting evidence.

Faeber, 16 N.C. App. at 430, 192 S.E.2d at 2 (emphasis added); *Austin*, 115 N.C. App. at 136, 443 S.E.2d at 739; 28 Strong's N.C. Index 4th *Trial* § 311 (1994).

Plaintiffs' cause of action, in common law trespass against defendants, is based on the following:

> "[o]ne who enters upon the land of another with the consent of the possessor may, by his subsequent wrongful act in excess or abuse of his authority to enter, become liable in damages as a trespasser."

Blackwood v. Cates, 297 N.C. 163, 167, 254 S.E.2d 7, 9 (1979) (quoting *Smith v. VonCannon*, 283 N.C. 656, 660, 197 S.E.2d 524, 528 (1973)).

The jury in the instant case found the defendants culpable of this civil offense. However, commission of this sort of trespass, in and of itself, would not justify a punitive damages instruction. *Lee v. Bir*, 116 N.C. App. 584, 449 S.E.2d 34, 38 (1994), *cert. denied*, 340 N.C. 113, 454 S.E.2d 652 (1995). In *Bir*, this Court held that when "more than a scintilla of evidence exist[s] from which the jury could find that defendant's trespass was accompanied by a reckless disregard for [the landowner's] rights," a punitive damages charge is warranted. *Bir*, 116 N.C. App. at 589, 449 S.E.2d at 36.

The evidence presented by plaintiffs, viewed in a light most favorable to them, showed more than mere common law trespass. Plaintiffs' evidence tended to reinforce allegations in their complaint, pointing toward property damage " 'done knowingly and of set purpose.' " *King v. Allred*, 76 N.C. App. 427, 431, 333 S.E.2d 758, 761, *disc. review denied*, 315 N.C. 184, 337 S.E.2d 857 (1985) (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929) (citations omitted)). The evidence tends to show that defendants went far beyond the scope of permission given by plaintiffs, resulting in extensive harm to plaintiffs' property.

After inflicting wholesale damage to the property, the evidence indicates defendants' description of that damage to plaintiffs was disingenuous at best. Such acts, viewed favorably toward plaintiffs, support the view that defendants conducted themselves in "reckless disregard for plaintiff[s'] rights." *Lee v. Bir*, 116 N.C. App. at 589, 449 S.E.2d at 38. Further, plaintiffs have shown more than a "scintilla" in support of their requested punitive damages instruction. The evidence presented by plaintiffs is of a kind from which reasonable jurors could infer that defendants' damage was "wilful" or "deliberate." *King*, 76 N.C. App. at 431, 333 S.E.2d at 761.

Based on this evidence, and other testimony in the record, we find that plaintiffs presented sufficient evidence to support a charge for punitive damages. Thus, the trial court should have given a punitive damages instruction.

Next, plaintiffs appeal from the trial court's decision not to instruct the jury on damages done to the "intrinsic value" of the land. Instructions on damage done to the intrinsic or aesthetic value of land are appropriate in certain circumstances. *Bir*, 116 N.C. App. at 590-91, 449 S.E.2d at 36. Again, the rule is that an instruction request must be preceded by evidence sufficient to support the desired charge. *Austin*, 115 N.C. App. at 136, 443 S.E.2d at 739.

In *Bir*, the proponents of an instruction on intrinsic or aesthetic value presented an expert witness to buttress their damage claim. *Bir*, 116 N.C. App. at 591, 449 S.E.2d at 39. There, an architect testified that the "cutting of trees affected the aesthetic value of [plaintiff's] property" by making the defendant's house more visible and proximate to the plaintiff's residence and property. *Id.* In the instant case, no such authoritative evidence was presented.

In their brief, plaintiffs argue that plaintiff Deborah Blum's testimony about being a "steward on the land" is enough to support the aesthetic value instruction requested. It is long-settled that damages will not be had where the evidence is purely speculative or conjectural. *Godwin v. Vinson*, 254 N.C. 582, 587, 119 S.E.2d 616, 620 (1961). Plaintiff Blum's testimony, unsupported by anything more, is too ephemeral to support such a damage instruction. The trial court did not err in refusing this instruction.

Plaintiffs' final assignment of error concerns the trial court's refusal to take judicial notice of, and to give instructions based on, criminal trespass statutes. Plaintiffs have not supported this assignment of error with any case law remotely on point. The Court has reviewed the only case cited in support of this assignment, *Moye v. Thrifty Gas Co.*, 40 N.C. App. 310, 252 S.E.2d 837, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979). *Moye* does not discuss the use of criminal statutes in a relevant fashion in any meaningful sense. Therefore, plaintiffs' assignment of error is deemed abandoned. *See Byrne v. Bordeaux*, 85 N.C. App. 262, 265, 354 S.E.2d 277, 279 (1987); N.C.R. App. P. 28(b)(5) (1995).

In summary, we find error in the trial court's failure to give a punitive damages instruction, as the evidence supported plaintiffs' request. Thus, we grant a new trial on punitive damages. We affirm the trial court on the remaining two assignments of error.

New trial on the punitive damage issue. On remaining issues, the trial court is affirmed.

Chief Judge ARNOLD and Judge GREENE concur.

EDEN'S GATE, LTD., D/B/A AWAY WE GO TRAVEL, PLAINTIFF-APPELLEE v. AVIS KEOWN LEEPER AND DAVID LEEPER, JR., DEFENDANTS-APPELLANTS

No. COA95-236

(Filed 19 December 1995)

Judgments § 156 (NCI4th); Pleadings § 280 (NCI4th)— pre-answer motion to dismiss—no responsive pleading under Rule 12—entry of default judgment proper

The trial court did not err in granting plaintiff's motion for default judgment since defendants' pre-answer motion to dismiss was not a responsive pleading within the purview of Rule 12 of the North Carolina Rules of Civil Procedure preventing the entry of default judgment pursuant to Rule 55.

Am Jur 2d, Judgments §§ 284.

Appeal by defendants from Order and Judgment entered 9 August 1994 by Judge Zoro J. Guice, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 December 1995.

Andrew D. Taylor, Jr. & Associates, by Andrew D. Taylor, Jr., plaintiff-appellee.

DeVore & Acton, P.A., by Troy J. Stafford, for defendants-appellants.

JOHNSON, Judge.

Plaintiff Eden's Gate, Ltd., d/b/a Away We Go Travel is a corporation organized and existing under the laws of the state of North Carolina, and doing business in Charlotte, North Carolina. On or about 30 October 1992, defendants Avis Keown Leeper and David Leeper, Jr., acting as agents for a corporation entitled Away We Go, Inc., began to negotiate with plaintiff corporation for the purchase of the remaining seventy-one percent (71%) of Away We Go Travel from Eden's Gate, Ltd. Away We Go Travel, Inc. had previously acquired twenty-nine percent (29%) percent of the travel agency business, Away We Go Travel.

After some negotiation, a purchase price of $62,500.00 was agreed upon and plaintiff corporation and defendants subsequently entered into an Installment Sale Note and Agreement for Sale of Assets of Away We Go Travel (hereinafter "Installment Sale Note and

Agreement). Thereafter, on or about 15 February 1993, defendants moved in, took possession of, and operated the business known as Away We Go Travel as their own business, engaging in a course of conduct which demonstrated that they had purchased plaintiff corporation.

On 14 October 1993, however, defendants notified plaintiff corporation that they no longer wished to purchase Away We Go Travel. Defendants subsequently vacated the premises and failed to make payments under the Installment Sale Note and Agreement.

On 5 January 1994, plaintiff corporation filed a Complaint, alleging breach of contract, fraud and conversion, and unfair and deceptive trade practices. The Complaint was served on defendants on 20 January 1994. Upon receiving the Complaint, defendants consulted Attorney John F. Rudisill, but did not retain him. Defendants also consulted a Mecklenburg County Assistant Clerk of Court about the proper procedure to follow in seeking an extension of time in which to file an answer. After obtaining a copy of a form of a Motion and Order for Extension of Time from the Mecklenburg County Law Library, Mr. Leeper completed the forms, writing in the pertinent information in the spaces provided. In fact, Mr. Leeper wrote in the name of Attorney John F. Rudisill as attorney of record in the space provided on the forms. The Motion and Order for Extension of Time to Answer (until 21 March 1994) was subsequently signed by an Assistant Clerk of Court and entered into the record on 16 February 1994.

Upon being notified that his name was on the Motion and Order for Extension of Time filed by defendants, Attorney Rudisill petitioned the court, with the consent of defendants, to withdraw as counsel of record for defendants. Attorney Rudisill was permitted to withdraw as counsel for defendants by Court Order dated 20 March 1994.

On or about 18 March 1994, defendants contacted Attorney Troy J. Stafford in order to discuss this case. Notably, Attorney Stafford did not, however, file a Notice of Appearance until 28 July 1994. During the course of the discussion with defendants about the merits of this case, Attorney Stafford contacted counsel for plaintiff corporation and requested an extension of time beyond 21 March 1994 to answer the Complaint. After Attorney Stafford's conversation with plaintiff's counsel, he told defendants that they had until 24 March 1994 to file a responsive pleading. It was subsequently determined,

however, that plaintiff's counsel had not agreed to an extension of time to 24 March 1994, but, instead, had told Attorney Stafford, "get whatever you've got in as soon as you can." On 24 March 1994—after the 21 March deadline, provided by the 16 February Order—defendants, pro se, filed a Motion to Dismiss pursuant to Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure. The matter was calendared for hearing.

On or about 21 July 1994, plaintiff corporation filed a Motion for Default Judgment, a Motion to Dismiss, a Motion to Strike, and a Motion for Sanctions. These matters were subsequently heard before Judge Zoro J. Guice, Jr. on 1 August and 8 August 1994 in Mecklenburg County Superior Court. An Order was filed on 9 August 1994, granting plaintiff entry of default and default judgment. Consequently, on or about that same date, defendants stated that they filed a Motion for Relief from Judgment and a Motion to Set Aside the Entry of Default. However, reference to these two motions were not in the Record on Appeal.

Defendants filed Notice of Appeal from Judge Guice's 9 August Order with this Court on 18 August 1994. After filing its Record on Appeal, defendants, with plaintiff's consent, filed a Motion to Withdraw and Substitute Record on Appeal. This Motion was granted by this Court by Order entered 27 April 1995.

Defendants' sole argument on appeal is that the trial court erred in granting plaintiff's Motion for Default Judgment, Motion to Dismiss, Motion to Strike, and Motion for Sanctions. In their argument, defendants liken their pre-answer Motion to Dismiss to an answer, arguing that the Motion to Dismiss would be a responsive pleading within the confines of Rule 12 of the North Carolina Rules of Civil Procedure, preventing the entry of default judgment pursuant to Rule 55 of these same Rules. We cannot agree.

Rule 12 of the North Carolina Rules of Civil Procedure provides in pertinent part,

> (a)(1) When Presented.—A defendant shall serve his answer within 30 days after service of the summons and complaint upon him. . . . Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:
>
> a. The responsive pleading shall be served within 20 days after notice of the court's action in ruling on the

> motion or postponing its disposition until the trial on the merits; . . . .

N.C. Gen. Stat. § 1A-1, Rule 12 (1990). Rule 55 of the North Carolina Rules of Civil Procedure provides that default judgment may be entered against a party who has failed to plead, by judge or clerk of court. N.C. Gen. Stat. § 1A-1, Rule 55 (Cum. Supp. 1994). Generally, default judgments are not favored. For example, our Courts have held that defaults may not be entered after a responsive pleading is filed, even though the pleading is late, as defaults should not be entered, even though technical default is clear, if justice may be served otherwise. *See Peebles v. Moore*, 302 N.C. 351, 275 S.E.2d 833 (1981); *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985). The complaint, answer, and reply have been denominated as pleadings. N.C. Gen. Stat. § 1A-1, Rule 7 (1990).

The facts in the instant case tend to show that defendants were served with plaintiff's Complaint on 20 January 1994. Further, on 16 February 1994, prior to the expiration of the thirty-day time period in which defendants had to answer, defendants filed a Motion and Order for Extension of Time to File an Answer. Subsequently, notwithstanding defendants' writing in the name of an attorney who did not represent their interests, an Assistant Clerk of Court for Mecklenburg County entered an Order allowing defendants until 21 March 1994 to answer plaintiff's Complaint. Defendants thereafter filed a Motion to Dismiss, pro se, on 24 March 1994, after the date provided by the 16 February Court Order, and asked that said Motion be calendared for hearing. Finally, plaintiff corporation filed a Motion for Default Judgment, along with other motions, on 21 July 1994. Plaintiff's motions were subsequently granted by presiding Judge Guice.

In spite of defendants' arguments to the contrary, "pleadings" are quite different from "motions" in this context. Sections (a) and (b) of Rule 7 of the North Carolina Rules of Civil Procedure clearly delineate the difference between pleadings and motions. *See* N.C. Gen. Stat. § 1A-1, Rule 7(a),(b). Moreover, defendants' reliance on *Fieldcrest Cannon Employees Credit Union v. Mabes*, 116 N.C. App. 351, 447 S.E.2d 510 (1994), and *Peebles*, 302 N.C. 351, 275 S.E.2d 833, in support of their argument to the contrary is misplaced. In both of these cases, the defendants had filed tardy *answers*, which are considered pleadings within the confines of Rule 12 of our Rules of Civil Procedure, not tardy *pre-answer motions*, as in this case.

Defendants would have us overlook the fact that, not only was the 16 February 1994 Court Order granted upon questionable circumstances, but also that their Motion to Dismiss—and not a responsive pleading—was filed after the date provided in the questionably obtained 16 February 1994 Court Order. In the interest of justice, we simply cannot do so.

For these reasons, we affirm the trial court's entry of default judgment.

Affirmed.

Judges WALKER and SMITH concur.

CHARLES S. HURSEY, & WIFE, ELLEN HURSEY, PLAINTIFFS-APPELLEES v. HOMES BY DESIGN, INC., MELISA (LISA) G. WOODS, RAYMOND LEWIS WOODS, WOODS AND ASSOCIATES, WOODS AND ASSOCIATES HOMES BY DESIGN, AND DAVID B. LAWSON, DEFENDANTS-APPELLANTS

No. COA95-69

(Filed 19 December 1995)

Discovery and Depositions § 68 (NCI4th)— failure to comply with discovery order—dismissal of counterclaims with prejudice—appropriate sanction

Where defendants failed to comply with the trial court's ruling compelling production of documents, and plaintiffs moved for sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure, the trial court's dismissal of defendants' counterclaims with prejudice was clearly the result of a reasoned decision and was an appropriate imposition of sanctions. N.C.G.S. § 1A-1, Rule 37(b)(2).

Am Jur 2d, Depositions and Discovery § 385-388.

Sanctions available under Rule 37, Federal Rules of Civil Procedure, for grossly regligent failure to obey discovery order. 49 ALR Fed. 831.

Appeal by defendants from order entered 25 August 1994 by Judge Orlando F. Hudson in Alamance County Superior Court. Heard in the Court of Appeals 20 October 1995.

Carruthers & Roth, P.A., by Kenneth R. Keller, for plaintiffs-appellees.

Loflin & Loflin, by Thomas F. Loflin, III, for defendants-appellants.

WALKER, Judge.

Plaintiffs filed this action seeking to recover money damages and to impose constructive trusts on real property held by defendants based on defendants' alleged fraud, conversion, breach of contract, breach of fiduciary duty, and an unlawful conspiracy to conceal and misappropriate sums owed by defendants to plaintiffs. All defendants answered and counterclaimed except defendant David B. Lawson, against whom a judgment of default was entered on 21 January 1994.

On 26 January 1994, in an attempt to obtain records needed to document defendants' alleged misuse of plaintiffs' funds, plaintiffs served upon defendants their First Interrogatories and Request for Production of Documents. Defendants did not respond within the allotted time. On 31 March 1994, plaintiffs filed a Motion to Compel Discovery. On 11 April 1994, at the hearing on the motion, defendants responded to the interrogatories propounded by plaintiffs, and the parties agreed to remove the motion from the calendar. After reviewing the responses and documents provided by defendants, plaintiffs requested defendants' counsel to provide voluntary supplementation to the responses. This request was ignored. Plaintiffs thereupon filed a second Motion to Compel Discovery on 9 May 1994.

On 19 May 1994, plaintiffs served upon defendants a Second Request for Production of Documents. When defendants failed to respond, plaintiffs filed another Motion to Compel Discovery on 7 July 1994. On 15 August 1994, the trial court issued a ruling compelling defendants to produce certain designated documents by 18 August 1994. Defendants failed to comply with this ruling, and plaintiffs moved for sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. Following a hearing on the Motion for Sanctions on 23 August 1994, the trial court issued an order striking defendants' counterclaims and dismissing them with prejudice. Defendants filed their *pro se* written notice of appeal on 22 September 1994.

North Carolina General Statutes § 1A-1, Rule 37(b)(2) provides that where parties to an action fail to obey an order to provide or per-

mit discovery, the court in which the action is pending "may make such orders in regard to the failure as are just," including:

> (c) *An order striking out pleadings or parts thereof,* or staying further proceedings until the order is obeyed, *or dismissing the action or proceeding or any part thereof,* or rendering a judgment by default against the disobedient party . . . .

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c) (1990) (emphasis added). Sanctions under Rule 37 are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion. *Vick v. Davis*, 77 N.C. App. 359, 361, 335 S.E.2d 197, 199 (1985), *affirmed*, 317 N.C. 328, 345 S.E.2d 217 (1986). A trial court may be reversed for abuse of discretion only upon a showing that its ruling 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).

In support of its order, the trial court made the following findings of fact:

> 1. Plaintiffs' Second Request for Production of Documents . . . was served on defendants by serving their then counsel of record by certificate dated May 19, 1994.
>
> 2. The defendants have not served a written response to Plaintiffs' Second Request for Production of Documents.
>
> 3. On August 15, 1994, pursuant to notice, the undersigned Judge Presiding heard the plaintiffs' Motions to Compel Discovery filed July 7, 1994, May 9, 1994, March 31, 1994, and July 7, 1994 [sic]. After considering the record, arguments of counsel for the plaintiffs and arguments of the defendants, the Court ordered the defendants to produce, by Thursday, August 18, 1994, those documents requested in Plaintiffs' Second Request for Production of Documents . . . and all documents from which defendants obtained the information set forth in their answers to Interrogatory 1(b), 1(c) and 2(a) of their "Answers to First Set of Interrogatories and Request for Production of Documents" served by their then counsel of record on April 11, 1994.
>
> 4. Defendants have not produced the documents as ordered.
>
> 5. The defendants have represented to the Court that these documents are not within their possession, but are within the possession of their accountant or the State Bureau of Investigation.

6. Counsel for the plaintiffs tendered to the Court certified copies from the Clerk of Superior Court of Alamance County of Inventory of Seized Property itemizing all property of the defendants seized by the State Bureau of Investigation. With certain minor exceptions, the documents requested by the plaintiffs do not appear on this inventory . . . .

7. The defendants stated in open court that the documents are not in the possession of their accountants.

8. On April 11, 1994, subsequent to the SBI seizure of the aforesaid property, the defendants, through counsel, served answers to Plaintiffs' First Set of Interrogatories and Request for Production of Documents, setting forth specific figures in their answers to Interrogatories 1(b), 1(c), and 2(a). Defendants failed to produce documentation from which those figures were obtained.

9. On May 12, 1994, subsequent to the seizure of documents by the SBI, defendants supplemented their answers to interrogatories by producing copies of Central Carolina Bank bank statements on an account in the name of Homes By Design, Inc., along with a number of checks on this Homes By Design, Inc. account written to Charles S. Hursey. However, plaintiffs [sic] did not produce the bank statements on other accounts or copies of the other checks written on the Homes By Design, Inc. account.

10. On August 12, 1994, in a civil action pending in the General Court of Justice, Superior Court Division of Alamance County as "Charles S. Hursey and Ellen Hursey, Plaintiffs vs. Homes By Design, Inc. and Lisa G. Woods, Defendants", [sic] . . . defendants filed a response to a summary judgment motion attaching documents which included a copy of a Homes By Design, Inc. check and a copy of a check written to defendants by plaintiffs' business, which checks had not been previously produced.

11. The defendants are or should be aware of the potential consequences of failing to respond to discovery requests since in April, 1994, as appears of record in the office of the Clerk of Superior Court of Alamance County in a certain civil action entitled "Christine L. Leath and Lula B. Albright, Plaintiffs vs. Raymond L. Woods and Lisa G. Woods d/b/a Woods and Associates Homes By Design and Homes By Design, Inc.", [sic] . . . the Honorable D. Marsh McLelland heard a similar Motion for Sanctions on behalf of the plaintiffs in that case against these

same defendants for failure by these same defendants to provide discovery. Judge McLelland entered an order striking the counterclaim asserted by the defendants in that case.

We have carefully reviewed the record, and we find plenary evidence therein to support the trial court's thorough findings. Because the court's imposition of sanctions was clearly the result of a reasoned decision, we find no abuse of discretion in the court's order.

Defendants concede that Rule 37(b)(2) permits the trial court, in its discretion, to dismiss claims with prejudice when it is "just" to do so. *See Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 275, 362 S.E.2d 868, 869 (1987) (specifically rejecting plaintiff's argument that North Carolina courts should adhere to the rule adopted in the federal courts that dismissal with prejudice is a last resort and is generally proper only where less drastic sanctions are unavailable). However, relying on *Goss v. Battle*, 111 N.C. App. 173, 432 S.E.2d 156 (1993), defendants argue that the trial court's order striking and dismissing their counterclaims was error because it does not reflect that the court considered imposing less severe sanctions. In *Goss*, a divided panel of this Court held that before dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions. *Id.* at 177, 432 S.E.2d at 159. The *Goss* court noted that in that case, neither the transcript of the hearing on the motion for sanctions nor the court's order indicated that the trial court considered a less severe sanction before dismissing the plaintiff's action. *Id.*

In the present case, the transcript of the hearing on the Motion for Sanctions indicates that plaintiffs asked the trial court to strike defendants' answer and counterclaims, or, alternatively, to strike defendants' counterclaims only and to enter an order requiring defendants to pay plaintiffs' expenses in obtaining documents directly from banks and medical providers. After hearing arguments, the court chose not to impose the more severe sanction requested by plaintiffs. Instead, the court entered an order imposing the less severe sanction of striking only the counterclaims, thereby allowing defendants to contest liability as well as damages. We believe it may be inferred from the record that the trial court considered all available sanctions, including the two alternatives proposed by plaintiffs, in arriving at its decision, and the trial court's action did not violate the rule set forth in *Goss*. We hold that the sanctions imposed were appropriate in light of defendants' actions in this case.

We have carefully examined defendants' remaining arguments, and we find them to be without merit. The order of the trial court is

Affirmed.

Judges LEWIS and MARTIN, MARK D. concur.

WILLIAM E. NORTHINGTON AND NORTHINGTON REALTY COMPANY, PLAINTIFFS
JOHN MICHELOTTI AND ADVANTAGE REAL ESTATE, INC., DEFENDANTS

No. COA95-79

(Filed 19 December 1995)

Contracts § 11 (NCI4th)— handwritten document signed by parties—contract or agreement to agree—genuine issue of fact—summary judgment improper

In an action for breach of contract concerning the ownership and operation of real estate franchises, the trial court erred in granting summary judgment for plaintiffs where a genuine issue existed as to whether a document handwritten by plaintiff and signed by plaintiff and defendant reflected a "meeting of the minds" between the parties as to all essential terms of their agreement or whether it merely amounted to an understanding or an "agreement to agree."

Am Jur 2d, Contracts §§ 26, 35.

Appeal by defendants from order entered 19 October 1994 by Judge Lester P. Martin, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 24 October 1995.

White and Crumpler, by Dudley A. Witt, for plaintiffs-appellees.

Jacobson & Beavers, by Kenneth R. Jacobson and Robert E. Boydoh, Jr., for defendants-appellants.

WALKER, Judge.

Plaintiff Northington Realty Company (Northington Realty) is a Winston-Salem corporation owned by plaintiff William E. Northington (Northington) and his wife. In April, 1993, the corporation was operating as a Century 21 real estate franchise. Defendant John Michelotti

(Michelotti) was the sales manager and broker-in-charge of Northington Realty until his resignation on 19 April 1993. Michelotti stayed on at Northington Realty as an independent contractor/sales agent through the end of the month.

In May 1993, Michelotti sought to purchase an existing Century 21 franchise, but Northington opposed such a purchase. On 20 May 1993, following negotiations regarding future business dealings, Northington and Michelotti signed a document prepared by Northington in his own handwriting. The document read as follows: This Agreement of Understanding entered into by Mr. John N. Michelotti and Mr. William E. Northington documents an agreement that they have entered into. The agreement is as follows:

> 1) Michelotti and his wife are operating a Century 21 Real Estate Franchize [sic] known as Century 21 Advantage. Michelotti and his wife will incorporate this franchize [sic] as soon as possible since time is of the essence. The stock issued will be as follows—Northington to receive 65% of the stock and Michelotti to receive 35% of the stock.
>
> 2) Northington is operating a Century 21 real estate office known as Century 21 Alliance through a corporation known as Northington Realty. In exchange for the 65% ownership of Century 21 Advantage Northington will transfer . . . 35% of their shares to Michelotti. Thus the distribution of the outstanding shares of Northington Realty will be Michelotti 35% and the Northington's [sic] 65%.
>
> 3) It is also agreed between the parties that there shall exist an understanding between the parties . . . that addresses the issue of:
>
> a) Buy out of one stock holder of the other.
>
> b) [A] non compete agreement between the parties.
>
> c) That ownership in any future business activities in the area of real estate, construction, insurance or real estate support services will be on a 50/50 ownership.

Thereafter, on 28 May 1993, Michelotti formed defendant Advantage Real Estate, Inc. (Advantage Real Estate) as a Century 21 franchise. Plaintiffs immediately began transferring the majority of

the corporate assets of Northington Realty to Advantage Real Estate. On 9 June 1993, after meeting with Michelotti and Northington, Michelotti's attorney, Mr. W. McNair Tornow, faxed to Northington's attorney a document labeled "Letter of Intent." This document contained terms reflecting the general information found in the handwritten document of 20 May 1993, along with specific terms regarding the issues raised in Paragraph 3 of the handwritten document. The "Letter of Intent" also contained a provision regarding Northington's agreement to be a passive investor in Advantage Real Estate.

On 2 July 1993, the parties executed a Department of the Treasury Internal Revenue Service Form 2553, requesting the federal government to grant Advantage Real Estate "S corporation" status for tax purposes. This form reflected that Northington owned 65% of Advantage Real Estate and Michelotti owned 35%.

After the Form 2553 was executed, Northington informed Michelotti that he did not agree with the contents of the "Letter of Intent" and that he would not sign it. No stock was ever transferred between the parties.

Plaintiffs instituted this action on 4 November 1993, alleging breach of contract, unjust enrichment, breach of fiduciary duty, a claim for dividends, and punitive damages. Michelotti filed a counterclaim seeking compensation from Northington Realty based on his services as sales manager and broker-in-charge of that corporation. Plaintiffs filed a motion for partial summary judgment on their breach of contract claim. Following a hearing, the trial court granted plaintiffs' motion and ordered that the shares of stock in defendant Advantage Real Estate be issued in accordance with the agreement. Summary judgment is appropriate only when there is no genuine issue of material fact to be resolved, thereby entitling the movant to judgment as a matter of law. *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986). Defendants claim that summary judgment was improper here because there existed a genuine issue of fact as to whether the 20 May 1993 handwritten document constituted the final understanding between the parties. We agree.

In support of their motion for summary judgment, plaintiffs offered the handwritten agreement of 20 May 1993, which they claim clearly and unambiguously provided that Northington would receive 65% and Michelotti 35% of the issued and outstanding shares of

defendant corporation. Plaintiffs also submitted a letter from Michelotti to property management clients of Century 21 Alliance dated 28 May 1993 announcing the formation of Century 21 Advantage. Plaintiffs claim this letter indicates that defendants believed they had a contract with plaintiffs, thereby refuting defendants' argument that the 20 May 1993 document was merely an "agreement to agree." Plaintiffs also submitted the IRS Form 2553 signed by both parties and Michelotti's deposition testimony that when he signed the form he was aware that it recited a 65-35 split of Advantage Real Estate's stock. Finally, plaintiffs submitted the purported "Letter of Intent" prepared by Michelotti's attorney, which plaintiffs claim contains "material inconsistencies and substitutions" from the 20 May 1993 document. Plaintiffs argue that the "Letter of Intent" represented nothing more than Michelotti's attempt to renegotiate the terms of the original "contract," in which he had agreed to be a minority shareholder, in order to obtain rights not normally associated with minority shareholder status.

In opposition to plaintiffs' motion, defendants offered the affidavit of Michelotti. Michelotti opined therein that while he and Northington did discuss the ownership of Northington Realty and Advantage Real Estate, "no oral contract was ever reached and he and I never agreed upon the material terms of a future business relationship." Michelotti stated that Northington asked him to sign the handwritten document "to make him [Northington] feel better until an attorney could prepare a formal document." According to Michelotti, it was not the intention of either party at the time the handwritten document was signed that it would constitute a contract or complete understanding and agreement.

Michelotti further averred that there were terms agreed to by the parties during their negotiations that were omitted from the handwritten document (e.g., that Northington would be a passive investor in Advantage Real Estate and that Michelotti would obtain a 50% ownership interest at some future date). He stated that the parties had agreed to have an attorney prepare a formal contract; to that end, Michelotti's attorney prepared the "Letter of Intent" which Northington ultimately refused to sign. Michelotti's affidavit concluded with the statement, "Paragraph 3 of [the handwritten document] stated that Plaintiff Northington and I would reach an understanding and agreement addressing three issues. No such agreement was ever reached."

Defendants also submitted the "Letter of Intent" prepared by Michelotti's attorney. This document states in part,

> WHEREAS, the parties hereto after several discussions and negotiations by and among themselves have certain understandings as to the arrangement and relationship between the parties henceforth; and
>
> WHEREAS, the parties are desirous of reducing their understandings to writing via this Letter of Intent, with the further understanding and condition that additional legal documents will be effectuated and executed subsequently . . . .

Finally, defendants submitted the deposition testimony of Northington, in which he acknowledged that at the time the handwritten document was signed, he contemplated that he and Michelotti would "subsequently . . . execute an attorney-prepared formal document covering [the] points and possibilities" outlined in Paragraph 3 of the handwritten document.

It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement. *O'Grady v. Bank*, 296 N.C. 212, 221, 250 S.E.2d 587, 594 (1978).

> To constitute a valid contract, the parties "must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement."

Boyce v. McMahan, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (citation omitted); *see also* 1 Joseph M. Perillo, *Corbin on Contracts*, § 2.8(a) (revised edition 1993) (as long as the parties know there is an essential term not yet agreed upon, there is no contract). Where the parties agree to make a document or contract which is to contain any material term that is not already agreed on, no contract has been made; "a so-called 'contract to make a contract' is not a contract at all." *Corbin*, *supra* at § 2.8(a). Whether mutual assent has been established and whether a contract was intended between the parties are questions for the trier of fact. *Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980).

The materials submitted by the parties present a genuine issue as to whether the handwritten document reflected a "meeting of the minds" between the parties as to all essential terms of their agree-

ment or whether it merely amounted to an "understanding" or an "agreement to agree." Under our case law, this issue should have been left to the jury to resolve, and the trial court erred in granting summary judgment to plaintiffs on their breach of contract claim. The trial court's order must therefore be reversed and this cause must be remanded for trial. Having thus decided, we need not address the remaining assignments of error brought forward by defendants.

Reversed and remanded for proceedings consistent with this opinion.

Judges JOHNSON and SMITH concur.

PATRICIA MEDLIN RUSS, AMY S. ROBINSON, TAMELA BROWN, TERILYN L. STAFFORD, SANDRA SIDES, SAUNDRA POWERS, AND DONNA JEFFREYS, PLAINTIFFS V. GREAT AMERICAN INSURANCE COMPANIES, ROYAL INSURANCE COMPANY OF AMERICA AND WILLIAM F. HEDGECOCK, D/B/A TRIAD BUSINESS FORMS, DEFENDANTS

No. COA94-1294

(Filed 19 December 1995)

1. Insurance § 1084 (NCI4th)— sexual harassment by employer—no "accident"—no coverage under bodily injury insurance policy

Since sexual harassment is substantially certain to cause injury to the person harassed, intent to injure may be inferred as a matter of law from the intent to act for the purpose of determining coverage under an insurance policy; thus, under both policies in question, the injuries sustained by plaintiffs as a result of their employer's acts of sexual harassment, as a matter of law, were not "accidents" and thus not bodily injuries caused by "occurrences."

Am Jur 2d, Insurance §§ 708-710, 721.

Accident insurance: death or injury intentionally inflicted by another as due to accident or accidental means. 49 ALR3d 673.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

2. Insurance § 1084 (NCI4th)— invasion of privacy not alleged in prior action—no recovery against insurer for personal injury

Neither defendant was obligated pursuant to the personal injury portions of their policies to pay for damages and costs obtained by plaintiffs in their action against their employer for intentional infliction of emotional distress and battery arising out of sexual harassment by the employer, since those torts were not enumerated in the personal injury provisions of the policies; plaintiffs claimed that the employer violated their rights to privacy, which was a tort enumerated in the policy; but in their prior suit plaintiffs neither alleged nor recovered for the invasion of their privacy rights.

Am Jur 2d, Insurance §§ 708-710, 721.

Accident insurance: death or injury intentionally inflicted by another as due to accident or accidental means. 49 ALR3d 673.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

Appeal by plaintiffs from judgment entered 9 May 1994 by Judge James A. Beaty, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 13 September 1995.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Annie Brown Kennedy, Harold L. Kennedy, III, Harvey L. Kennedy, and Lauren M. Collins, for plaintiffs-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Richard T. Boyette and Edward C. LeCarpentier III, for defendant-appellee Great American Insurance Companies; and Smith Helms Mulliss & Moore, L.L.P., by J. Donald Cowan, Jr. and Erik Albright, for defendant-appellee Royal Insurance Company of America.

LEWIS, Judge.

This appeal presents the issue of whether defendant insurance companies are obligated under policies issued by them to pay damages and costs awarded in a judgment obtained by plaintiffs against the insured.

Defendant Royal Insurance Company of America ("Royal") issued a business liability insurance policy to defendant William F. Hedgecock, d/b/a/ Triad Business Forms ("Hedgecock") for the period of 1 September 1988 to 1 September 1989. Defendant Great American Insurance Companies ("Great American") issued a similar policy for the period of 1 September 1989 to 1 September 1990. On 21 January 1992, all plaintiffs obtained judgments for damages and costs against Hedgecock for intentional infliction of emotional distress resulting from sexual harassment committed by him while all were employed at Triad Business Forms. Plaintiffs Russ, Sides, Stafford, Brown, and Jeffreys also obtained judgments for damages and costs against Hedgecock for battery incident to this sexual harassment.

Both insurance companies refused to represent Hedgecock in the underlying action from which the judgments resulted. On 12 July 1993, plaintiffs filed this declaratory judgment action against both companies and Hedgecock seeking a declaration that the companies are obligated by their policies to pay for damages and costs awarded in the judgment and for costs awarded in order dated 13 November 1992. The case was heard on 11 April 1994 on plaintiffs' motion and defendants' cross-motions for summary judgment. On 9 May 1994, Judge James A. Beaty, Jr. denied plaintiffs' motion for summary judgment and entered summary judgment in favor of defendants Great American and Royal. Plaintiffs appeal.

[1] The central issue in this case is whether the injuries sustained by plaintiffs were bodily injuries covered by the Royal and Great American policies. The Royal policy provides coverage when

> . . . a claim is made or SUIT is brought against an INSURED for BODILY INJURY or PROPERTY DAMAGE caused by an OCCURRENCE to which this coverage applies.

The policy then defines "occurrence," in applicable part, as

> an *accident*, including continuous or repeated exposure to the same conditions, which results in BODILY INJURY . . . *which the INSURED neither expected nor intended to happen.*

(Emphasis added).

The Great American policy provides coverage for "bodily injury" during the policy period and caused by an "occurrence" defined as an

"accident." The Great American policy also contains an exclusion for "*bodily injury . . . expected or intended from the standpoint of the insured.*" (Emphasis added).

Neither policy defines "accident." Our Supreme Court has held that when the term "accident" is not defined in an insurance policy, "accident" includes "injury resulting from an intentional act, *if the injury is not intentional or substantially certain to be the result of the intentional act.*" *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 709, 412 S.E.2d 318, 325 (1992) (emphasis added). In *Stox*, a store employee (Owens) pushed another employee (Stox) who fell and fractured her arm. The Court held that competent evidence supported the trial court's finding that the injury to Stox was an unintended injury resulting from an intentional act and thus was covered as an "occurrence" or "accident" under the policy. *Id.* The Court also upheld the trial court's conclusion that an exclusion for expected or intended injury did not bar coverage. *Id.* at 706, 412 S.E.2d at 324.

Stox dealt, *inter alia*, with coverage for a battery claim. Actions for battery protect against "intentional and unpermitted contact with one's person." *Dickens v. Puryear*, 302 N.C. 437, 445, 276 S.E.2d 325, 330 (1981). The intent required to prove battery is intent to act, i.e., the intent to cause harmful or offensive contact, not the intent to injure. *See* William S. Haynes, North Carolina Tort Law Battery § 4-2(A) (1989) (citing *Andrews v. Peters*, 75 N.C. App. 252, 256, 330 S.E.2d 638, 641 (1985), *aff'd*, 318 N.C. 133, 347 S.E.2d 409 (1986)). Our Supreme Court concluded in *Stox* that the intent to injure was not inherent in Stox's battery complaint. *Stox*, 330 N.C. at 707, 412 S.E.2d at 324.

This case is quite different factually from *Stox*. The injuries sustained by plaintiffs here were the result of sexual harassment. When confronted with this issue, other states have held that acts of sexual harassment are so nearly certain to cause injury that intent to injure can be inferred as a matter of law. *E.g.*, *Continental Ins. Co. v McDaniel*, 772 P.2d 6 (Ariz. Ct. App. 1988); *Greenman v. Michigan Mut. Ins. Co.*, 433 N.W.2d 346 (Mich. Ct. App. 1988). *Stox* supports this approach by stating that an injury that is intentional or *substantially certain to be the result of an intentional act* is not an "accident." *Stox*, 330 N.C. at 709, 412 S.E.2d at 325 (emphasis added).

We took a similar approach in a case concerning whether an insurance policy *exclusion* for expected or intended bodily injuries barred coverage for injuries arising out of sexual molestation of a

minor. *Nationwide Mutual Ins. Co. v. Abernathy,* 115 N.C. App. 534, 445 S.E.2d 618 (1994). After citing cases that infer intent to injure in cases of child sexual abuse, this Court held, as a matter of law, that the insured " 'knew it was probable' " that his actions would cause mental and emotional injury to the child because of "the close relationship between an act of child sex abuse and resulting harm to the child." *Id.* at 540, 445 S.E.2d at 621.

We conclude that since sexual harassment is substantially certain to cause injury to the person harassed, intent to injure may be inferred as a matter of law from the intent to act for the purpose of determining coverage under an insurance policy. This inference applies despite the insured's testimony, as here, that he did not intend injury. Thus, under both the Great American and Royal policies, the injuries sustained by plaintiffs as a result of Hedgecock's acts of sexual harassment, as a matter of law, are not "accidents" and thus not bodily injuries caused by "occurrences." In addition, we hold that this inference of his intent to harm applies to Great American's specific *exclusion* for "expected or intended injury" and Royal's limitation in its definition of "occurrence" to accidents resulting in bodily injury *which the insured neither expected nor intended to happen.* Neither policy provides coverage for either the intentional infliction of emotional distress or battery claims.

This inference applies to preclude coverage under both policies even if the jury found intentional infliction of emotional distress based on a level of intent rising to reckless indifference. We reject plaintiffs' argument to the contrary. In order to prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove that the defendant engaged in "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear,* 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). The second element may also be proven by a showing that the defendant acted with "reckless indifference to the likelihood" that his or her acts "will cause severe emotional distress." *Id.* In describing the recklessness standard for showing intent, our Supreme Court stated that a defendant is liable if he " 'acts recklessly . . . in deliberate disregard of a high degree of probability that emotional distress will follow.' " *Id.* at 449, 276 S.E.2d at 333. Given the high probability and substantial certainty that harm will result from sexual harassment, we reject plaintiffs' assertion that the policies cover the judgments against Hedgecock for intentional infliction of emotional distress under a reckless indifference theory.

We also reject plaintiffs' assertion that our courts have refused to infer intent to harm in sexual harassment cases. In support of this argument, plaintiffs cite *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992) and *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990). In *Waddle*, our Supreme Court held that a plaintiff had not presented enough evidence showing severe emotional distress to survive summary judgment. *Waddle*, 331 N.C. at 85, 414 S.E.2d at 28. Our holding here is not contrary to *Waddle* or *Brown*. This is not an inference that a plaintiff has actually suffered severe emotional distress as required by the third element of the tort of intentional infliction of emotional distress. Rather, the inference applies to the second element concerning the defendant's intent to cause the distress. Furthermore, we note that neither *Waddle* or *Brown* dealt with the issue of insurance coverage nor dealt with the restrictions of a policy.

[2] Plaintiffs also argue that they should recover pursuant to the "personal injury" coverage provided in both policies. Plaintiffs' argument for personal injury coverage against both companies is based solely on their claims that Hedgecock violated their rights of privacy. The Great American policy covers damages the insured is legally obligated to pay for personal injury arising from certain enumerated offenses, including the tort for invasion of privacy. Specifically, this policy provides coverage for

> sums the insured becomes legally obligated to pay as damages because of . . . PERSONAL INJURY . . . .

"Personal injury" is defined, in pertinent part, as

> injury, other than "bodily injury", arising our of one or more of the following offenses: . . . e. *Oral or written publication of material that violates a person's right of privacy.*

(Emphasis added).

The Royal policy also covers damages the insured is legally obligated to pay pursuant to claims or suits for personal injury arising from certain enumerated torts, including that of invasion of privacy. Specifically, this policy provides coverage for damages for which the insured is legally liable

> if a claim is made or a SUIT is brought against an INSURED for PERSONAL INJURY . . .

"Personal injury" is defined, in relevant part, as

> injury which arises out of one or more of the following acts committed during the policy period: . . . *invasion of privacy which is the result of a written or spoken statement* . . . .

(Emphasis added).

Courts in other jurisdictions have construed personal injury policy provisions that cover enumerated torts as providing coverage *only if plaintiffs have alleged or recovered for one of the enumerated torts.* These courts have held that sexual harassment is not "personal injury" in such policies. *For e.g. Lindsey v. Admiral Ins. Co.*, 804 F. Supp. 47, 51-2 (N.D. Cal. 1992); *Nichols v. American Employers Ins. Co.*, 412 N.W.2d 547, 550-51 (Wis. Ct. App. 1987); *Hamlin v. Western Nat. Mut. Ins. Co.*, 461 N.W.2d 395, 398 (Minn Ct. App. 1990)). We agree with this approach. In their complaint in this action, plaintiffs request a declaratory judgment that defendants are obligated to pay for damages and costs awarded in the 21 January 1992 judgment and subsequent order against Hedgecock. In that suit, plaintiffs neither alleged nor recovered for the invasion of their privacy rights, an enumerated tort under the policies. Plaintiffs only alleged and recovered for the torts of intentional infliction of emotional distress and battery, torts not enumerated in the personal injury provisions of the policies. Accordingly, neither defendant is obligated pursuant to the personal injury portions of their policies to pay for damages and costs obtained in the 21 January 1992 judgment and 13 November 1992 order against Hedgecock.

For the reasons stated, summary judgment in favor of defendants Royal and Great American is affirmed.

Judges EAGLES and JOHN concur.

GARRETT v. GARRETT

[121 N.C. App. 192 (1995)]

MARGARET ANN GARRETT, (KAYLEY ROSE RADEL), PLAINTIFF v. DONALD F. GARRETT, DEFENDANT

No. COA94-1421

(Filed 19 December 1995)

1. Contempt of Court § 25 (NCI4th)— civil contempt without notice and hearing—error

The trial court erred in finding civil contempt by plaintiff where the court determined that plaintiff's failure to appear at a child custody modification hearing created the jeopardy of contempt, then immediately found plaintiff to be in actual contempt; the court did not hold a proceeding pursuant to N.C.G.S. § 5A-23; and plaintiff was not given any notice of the contempt proceeding.

Am Jur 2d,Contempt §§ 5, 7, 180, 181, 193-203.

Contempt proceedings as violating procedural due process-Supreme Court cases. 39 L. Ed. 2d 1031.

2. Divorce and Separation § 365 (NCI4th)— change of mother's residence—failure to show adverse effect on children—change of custody erroneous

The trial court erred in finding that substantial and material changes had occurred since the parties' post-separation custody order which warranted a change in custody from the mother to the father, since the court found that plaintiff mother's residence had changed from North Carolina to New Mexico, but the court did not demonstrate a nexus between the change of circumstances and a concomitant adverse effect on the children involved.

Am Jur 2d, Divorce and Separation §§ 988, 989.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights. 10 ALR4th 827.

Propriety of awarding custody of child to parent residing or intending to reside in foreign country. 20 ALR4th 677.

GARRETT v. GARRETT

[121 N.C. App. 192 (1995)]

Appeal by plaintiff from orders entered 29 June 1994 and 30 August 1994 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 29 September 1995.

Robert E. Riddle, P.A., by Robert E. Riddle, for plaintiff appellant.

Devere Lentz & Associates, by David B. Thornton, for defendant appellee.

SMITH, Judge.

Plaintiff Kayley Rose Radel argues the trial court erred in finding her in civil contempt of court, and in its decision to change custody of her children from her to her former husband. Plaintiff asserts the finding of contempt is improper because it was initiated by the trial court without the required statutory notice. Plaintiff argues next that the trial court erred by divesting her of custody through conclusory findings, without applying the "adverse effect" and "best interest" analyses required by case law. We agree with plaintiff's contentions. Accordingly, we vacate the trial court's 29 June 1994 contempt judgment, reverse the trial court's custody order of 30 August 1994, and remand for rehearing consistent with this opinion.

Plaintiff and defendant were married on 6 July 1974. Three children were born of the marriage. The parties separated on 24 March 1989, and were subsequently divorced. Plaintiff was awarded primary custody of the three minor children by the trial court's judgment and order (Order) of 15 February 1990. This Order established a visitation schedule, and included the following provision:

> (j) The Defendant shall transport the children for visitation purposes; however, if either party moves a distance greater than ten (10) miles, then the parties agree to renegotiate for transportation . . . .

At the time of the Order, plaintiff, defendant and the children resided in Old Fort, North Carolina. On 17 April 1994, plaintiff informed defendant by letter of her intent to relocate to Santa Fe, New Mexico, with the children. On or about 8 May 1994, plaintiff moved to Santa Fe, for the purpose of attending graduate school. After the move, the children were enrolled in the Santa Fe school system, where they finished the 1994 school year, and progressed to the next grade.

Defendant filed a motion for change of custody on 29 April 1994. In response, the trial judge entered an order, which was served on plaintiff 3 June 1994, requiring plaintiff and children to appear in Buncombe County District Court on 27 June 1994. On 14 June 1994, plaintiff filed a motion requesting a continuance. Neither plaintiff nor the children appeared on 27 June 1994, though plaintiff's counsel did appear. On 29 June 1994 the trial court entered an order denying the motion for continuance, finding plaintiff in contempt of court, and ordering plaintiff to deliver temporary custody of the children to defendant. Pursuant to this order, defendant went to Santa Fe on 4 July 1994, where he assumed custody of the children. A hearing to determine permanent custody was held on 15-16 August 1994.

At the permanent custody hearing, defendant testified about his relationship with the children and discussed the nascent economic and emotional stability of his household. Defendant also offered evidence of his good character and fitness as a father. For instance, one friend of defendant described him as "encouraging and caring." Defendant's present wife expressed her desire to care for the children.

Plaintiff testified about her reasons for seeking the move to New Mexico and about the children's positive academic, emotional and social progress there. Plaintiff also offered the testimony of several of the children's former teachers from Old Fort. This testimony tended to show plaintiff's active involvement with the children's education, and the children's responsiveness to plaintiff. Other witnesses for plaintiff included friends and neighbors, all of whom characterized plaintiff as having exceptional parenting skills. These witnesses generally emphasized plaintiff's focus on the needs of the children, and plaintiff's cultivation of the children's intellectual growth.

In its permanent custody decision, the trial court found that substantial and material changes had occurred since the post-separation custody order, and awarded father primary custody. The trial court made this custody switch defeasible, holding that primary custody would return to plaintiff if plaintiff came back to Old Fort "within a reasonable length of time."

[1] We first address the trial court's finding of civil contempt by the plaintiff in its 29 June 1994 order (June order). In its June order, the trial court found as a fact "that Plaintiff's failure to appear places the [Plaintiff] in jeopardy of being found in contempt of [the trial court]."

The trial court then concluded and decreed plaintiff to be "in willful contempt of this Court."

The rules regarding civil contempt are delineated by N.C. Gen. Stat. § 5A-21 through § 5A-25 (1986). The trial court has not abided by these rules, and has thus erred as a matter of law in finding plaintiff in contempt. *Glesner v. Dembrosky*, 73 N.C. App. 594, 596, 327 S.E.2d 60, 62 (1985). A finding of civil contempt by a trial court must be accompanied by notice and a dedicated proceeding. N.C. Gen. Stat. § 5A-23 (1986 & Cum. Supp. 1994). The trial court must either order

> the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt or [give notice] that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown.

Id.

On its face, the June order demonstrates noncompliance with § 5A-23. First, the trial court determines that plaintiff's failure to appear creates the jeopardy of contempt, then it immediately finds plaintiff to be in actual contempt. No § 5A-23 proceeding is contemplated by the order, giving rise to an inference that the trial court's action was, at best, summarial.

Moreover, the instantaneous determination of contempt by the trial court makes obvious the lack of statutory notice to plaintiff. Notice is not optional under § 5A-23, therefore the trial court's imposition of contempt is error. *Glesner*, 73 N.C. App. at 596, 327 S.E.2d at 62. The trial court's finding of civil contempt is thus vacated as contrary to statute.

[2] We now address the change of custody issue. Once custody of minor children has been judicially determined, that court's order cannot be modified absent a substantial change of circumstances affecting the welfare of the child. *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E.2d 140, 144 (1969); N.C. Gen. Stat. § 50-13.7(a) (1987). To qualify as substantial, circumstances must have "so changed that the welfare of the child will be adversely affected unless the custody provision is modified." *Rothman*, 6 N.C. App. at 406, 170 S.E.2d at 144. The burden of showing substantially changed circumstances is on the

moving party. *Searl v. Searl*, 34 N.C. App. 583, 587, 239 S.E.2d 305, 308 (1977).

Once the substantial change is demonstrated, it is incumbent upon the trial court to request production of evidence probative on the "best interest" issue. *Thomas v. Thomas*, 259 N.C. 461, 467, 130 S.E.2d 871, 875 (1963). There is no burden of proof, *per se*, upon one party or the other in the best interest context. *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675, 678 (1992). Instead, the parties to the case are obligated to bring forth evidence dispositive as to the best interests of the children involved. *Id.* The best interest analysis is rendered nugatory if the party requesting the custody change does not meet its burden on the substantial change of circumstances issue. *Id.*

In the case at bar, the trial court listed the following factors, ostensibly constituting the substantial material changes justifying a change of custody: (1) plaintiff's "estrangement from her family which she has imposed on the children"; (2) plaintiff's decision to take the children from Old Fort to New Mexico; (3) the demands of plaintiff's graduate work, in addition to her part-time employment; (4) the stable marriage of defendant and his present wife; (5) the eldest son's over-identification with his mother; and (6) plaintiff's "philosophy" that the children do not need the consistent involvement of their father in their everyday lives.

These findings, in and of themselves, do not form a sufficient basis for the conclusion that a substantial change of circumstances has occurred. It is settled law that, "when the trial court fails to find the material facts to dispose of the issues the case must be remanded for a new trial." *Lawing v. Jaynes*, 20 N.C. App. 528, 536, 202 S.E.2d 334, 340, *cert. allowed*, 285 N.C. 234, 204 S.E.2d 24, *modified on other grounds*, 285 N.C. 418, 206 S.E.2d 162 (1974); *see also* N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (1990) (trial judge in a custody case must find the facts specially before entering an appropriate judgment). For the reasons that follow, a new custody hearing is necessary.

The mere fact that a custodial parent's residence has changed is not, *ipso facto*, a factual circumstance justifying modification of a custody order. *Barker*, 107 N.C. App. at 78, 418 S.E.2d at 679. Further, the trial court must demonstrate, in its fact findings, a nexus between the changes of circumstances and a concomitant adverse effect on the children involved. *Id.* Conclusory statements regarding parental behavior, such as those above, are no substitute for findings of fact

" 'tailor-made' to settle the matter at issue between the parties." *Peoples v. Peoples*, 10 N.C. App. 402, 408, 179 S.E.2d 138, 142 (1971).

The factual factors listed by the trial court as dispositive on the substantial change of circumstance requirement are oriented toward parental fitness, not adverse alterations of the children's welfare. The factors enumerated are bare observations of plaintiff's or defendant's actions, not examples of how those actions adversely impact the children. For instance, the court cites the "stable marriage of the Defendant and his present wife," and "the mother's need to make a career change," as factors supporting a finding of substantial change. Such findings, without more, do not meet the *Rothman* standard. No connection is made between these factors and any resulting adverse impact on the children.

The trial court has failed to discern the *Rothman* nexus. "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence . . . . Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function . . . ." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). Here, that logic gap is apparent, as the trial court's conclusion that a substantial change has occurred, meaning an adverse effect on the involved children, is not supported by the evidence or the findings of fact.

We note well that trial courts are to be given deference in child custody matters. *Barker*, 107 N.C. App. at 80, 418 S.E.2d at 680. After all, the trial court has the "unique opportunity to see and hear the parties, the witnesses, and the child." *Id.* However, trial courts should not interpret this deference as justifying oblique findings of fact and conclusions of law. *Benedict v. Coe*, 117 N.C. App. 369, 377-78, 451 S.E.2d 320, 324-25 (1994).

In *Coe* this Court explicitly set forth its expectations with regard to findings of fact and conclusions of law in a custody modification setting. *Id.* First, a substantial change of circumstances is unequivocally a conclusion of law. This phrase is a term of art, meaning that a change has occurred among the parties, and that change has affected the welfare of the *children* involved. *Id.* The trial court must make "those findings of fact [necessary] to form a valid basis for the conclusions of law . . . ." *Coe*, 117 N.C. App. at 377, 451 S.E.2d at 324. Findings of fact which are the equivalent of " 'speculation or conjecture that a detrimental change may take place' " will not support a

change of custody. *Coe*, 117 N.C. App. at 378, 451 S.E.2d at 325 (quoting *Barker*, 107 N.C. App. at 78, 418 S.E.2d at 679).

Having determined that the trial court's findings of fact do not support its conclusion of law that a substantial change has occurred, it is unnecessary to reach the best interest analysis mandated in *Barker*. *Barker*, 107 N.C. App. at 77, 418 S.E.2d at 778.

In summary, we vacate the trial court's finding of civil contempt, as not applied in accordance with applicable statutes; we reverse the trial court's change of custody for the reasons set forth herein, and we remand for a rehearing of the custody issue consistent with this opinion.

Finding of contempt vacated. Order changing custody reversed and remanded for rehearing.

Chief Judge ARNOLD and Judge GREENE concur.

LEE ANNE JARRELL, ADMINISTRATRIX OF THE ESTATE OF ROBERT E.L. JARRELL, II, DECEASED, AND JOHN LEE JARRELL, BY AND THROUGH CAROLE B. MCCULLOUGH, HIS GUARDIAN AD LITEM, PLAINTIFFS V. COASTAL EMERGENCY SERVICES OF THE CAROLINAS, INC., F/K/A COASTAL EMERGENCY SERVICES OF DURHAM, INC., D/B/A PERSON EMERGENCY PHYSICIANS, COASTAL EMERGENCY SERVICES, INC., PERSON COUNTY MEMORIAL HOSPITAL, INC. AND JAMES N. FINCH, M.D., DEFENDANTS

No. 94-1312

(Filed 19 December 1995)

Appeal and Error § 116 (NCI4th)— interlocutory appeal—no substantial right affected—dismissal proper

Plaintiffs' appeal is dismissed as interlocutory where the trial court's order dismissed all claims against certain defendants and some claims against others, but there were no factual issues common to the claims determined and the claims remaining so that no substantial right was affected.

Am Jur 2d, Appellate Review §§ 120, 166.

Appeal by plaintiffs from orders entered 12 May, 13 May, 16 May, and 20 May 1994 by Judge Robert H. Hobgood in Person County Superior Court. Heard in the Court of Appeals 31 August 1995.

Plaintiffs filed this action on 6 May 1992 seeking recovery from defendants under the theories of wrongful death by medical malpractice and negligent infliction of emotional distress. In a series of orders issued 12-20 May 1994, the trial court granted summary judgment for defendants Coastal Emergency Services of the Carolinas, Inc. (CES-Carolinas), Coastal Emergency Services, Inc. (CES), and Person County Memorial Hospital. Partial summary judgment was granted for defendant James Finch on the issue of plaintiff John Lee Jarrell's claim of negligent infliction of emotional distress. The trial court also allowed defendants' motion *in limine* to prohibit reference to any contracts between the defendants, and granted motions to quash subpoenas directing David Singley, David Moye, and Dr. Cherri Campbell to appear and produce certain documents. From these orders, plaintiffs appeal.

Bentley & Kilzer, P.A., by Charles A. Bentley, Jr., and Susan B. Kilzer, for plaintiff-appellants

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, John D. Madden, and James Y. Kerr, II, for defendant-appellees Coastal Emergency Services, Inc., Coastal Emergency Services of the Carolinas, Inc., and James N. Finch, M.D.

Yates, McLamb & Weyher, by Bruce W. Berger, for defendant-appellee Person County Memorial Hospital, Inc.

Moore & Van Allen, PLLC, by William E. Freeman, for appellee Cherri Campbell, M.D.

McGEE, JUDGE

Following the filing of the record and briefs in this case, appellees filed a motion to dismiss the appeal, arguing it is interlocutory with no immediate right to appeal. After reviewing the record and transcripts, we agree and dismiss the appeal.

The trial court's orders completely dismissed the actions against defendants CES, CES-Carolinas, and Person County Memorial Hospital, and dismissed plaintiff John Jarrell's negligent infliction of emotional distress claim against defendant James Finch. Plaintiff Lee Anne Jarrell voluntarily dismissed her negligent infliction of emotional distress claim against Finch. However, the wrongful death action against Finch survives. Orders which do not dispose of the action as to all parties are interlocutory. *Cunningham v. Brown,* 51

N.C. App. 264, 267, 276 S.E.2d 718, 722 (1981). Ordinarily, there is no right of appeal from interlocutory orders. N.C.R. Civ. P. 54(b) (1990); *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993).

However, there are two instances where a party may appeal interlocutory orders: 1) if there has been a final determination as to one or more of the claims and the trial court certifies there is no just reason to delay the appeal; or 2) if delaying the appeal would prejudice a substantial right. Rule 54(b); N.C. Gen. Stat. § 1-277 (1983); N.C. Gen. Stat. § 7A-27 (1989); *Liggett Group*, 113 N.C. App. at 23-24, 437 S.E.2d at 677. As appellants admit, the trial court made no certification. Therefore, appellants have no right to appeal the interlocutory orders absent a showing that a substantial right will be affected by not allowing the appeal prior to entry of final judgment.

Our courts have found a substantial right to be affected where a judgment "creates the possibility of inconsistent verdicts on the same issue—in the event an appeal eventually is successful," *DeHaven v. Hoskins*, 95 N.C. App. 397, 399, 382 S.E.2d 856, 858, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989), and where there is the possibility of two trials on the same issues, *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). However, if there are no factual issues common to the claim determined and the claims remaining, no substantial right is affected. *See Britt v. American Hoist and Derrick Co.*, 97 N.C. App. 442, 445, 388 S.E.2d 613, 615 (1990).

Contrary to appellants' contentions, their claims do not present identical factual issues which create the possibility of two trials on the same issue. The remaining claims against Finch involve negligence and wrongful death. Appellants stipulated that they abandoned any claims of independent acts of alleged negligence on the part of CES, CES-Carolina, and Person County Memorial Hospital. Therefore, any cause of action against those defendants is based solely upon a theory of *respondeat superior*. If appellants successfully prove the negligence of Finch at trial, and then successfully appeal the grant of summary judgment for the other defendants, a second trial would only involve the issue of a master/servant relationship between the defendants. The primary liability of Finch would have already been established in the first trial. If appellants fail to prove their claim at trial, then they may appeal that judgment and have all issues determined at the same time.

Likewise, John Jarrell's claim for negligent infliction of emotional distress involves the issue of Finch's negligence as well as the separate factual issues of the existence of severe emotional distress and foreseeability of injury. If at trial a jury determines Finch's conduct to be negligent, then John Jarrell would only have to prove severe emotional distress and foreseeablity of injury at a second trial in the event of a proper successful appeal. Since a second trial would not require appellants to retry the negligence issue, there are no overlapping issues to justify an immediate appeal of the interlocutory order. *See Green*, 305 N.C. at 607-08, 290 S.E.2d at 596. Once the issue of Finch's negligence has been resolved at trial, these claims will be properly before this Court, and we will be able to fully determine all issues.

This appeal is interlocutory and falls under no applicable exception. Therefore, it is in violation of G.S. 1-277, G.S. 7A-27, and Rule 54(b) and must be dismissed. This rule promotes judicial economy by avoiding fragmentary, premature and unnecessary appeals and permits the trial court to fully and finally adjudicate all the claims among the parties before the case is presented to the appellate court. *Sportcycle Co. v. Schroader*, 53 N.C. App. 354, 358, 280 S.E.2d 799, 801-02 (1981). The appeal is dismissed, the writ of supersedeas staying the trial of the remaining claims is dissolved, and the case is remanded for trial.

Dismissed, Writ Dissolved, and Remanded.

Judges COZORT and WALKER concur.

IN THE MATTER OF: SAPHIRE ROSE REINHARDT

No. COA95-224

(Filed 19 December 1995)

1. Infants or Minors § 120 (NCI4th)— dependent and neglected child—diminished capacity of mother—sufficiency of evidence

Though the evidence was insufficient to support the finding of the trial court in a review hearing following a dependency determination that the mother of the minor child in question had a psychological problem, it was sufficient to support a finding that the mother had a diminished capacity which inhibited her

from making appropriate decisions for the juvenile's care where such evidence tended to show that the mother was vulnerable to the influence of others and did not produce her own opinions, and she continued to live in a trailer which had the smell of kerosene, the very problem which gave rise to the original removal of the minor child from the home. N.C.G.S. § 7A-657(a)

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 45-51, 104.

Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.

2. Infants or Minors § 121 (NCI4th)— efforts to reunite family—order to cease—no authority of trial court to enter

The trial court was without authority to order that reasonable efforts to reunite the parents and a dependent and neglected minor child should cease. N.C.G.S. § 7A-657(e); N.C.G.S. § 7A-651(c)(2).

Am Jur 2d, Infants § 16; Juvenile Courts and Delinquent and Dependent Children §§ 1-13, 50.

Appeal by respondent from order entered 18 August 1994 in Burke County District Court by Judge Nancy L. Einstein. Heard in the Court of Appeals 16 November 1995.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.

Russell R. Becker for respondent-appellant.

GREENE, Judge.

Respondent mother Angela Reinhardt (mother) appeals a district court order providing for continued placement of her minor child Saphire Rose Reinhardt (minor child) with the Burke County Department of Social Services (DSS).

On 30 December 1993 DSS filed a petition alleging dependency of the minor child. DSS amended the petition on 5 January 1994 alleging neglect on the grounds that the minor child did "not receive proper care from her parents and live[d] in an environment injurious to her welfare."

On 3 February 1994 Judge Nancy L. Einstein adjudged the minor child neglected and dependent, and ordered the minor child be placed in the custody of DSS. Regular periodic reviews of the placement, pursuant to N.C. Gen. Stat. § 7A-657, were conducted by the trial court, with the last review being held on 18 August 1994. At that hearing the trial court found as a fact that the mother "suffer[s] from diminished capacity and/or psychological problems which inhibit[s] [her] from making appropriate decisions for the juvenile's care." The trial court concluded that the "best interests of the juvenile would be served" by continuing custody with DSS. The trial court further concluded that all reasonable efforts to reunify the parents and child "shall cease."

The relevant evidence before the trial court, at the review hearing, reveals that, on 29 April 1994, the mother was evaluated by a psychologist who opined that there was not "any psychological evidence of psychopathology that would prevent [the mother] from being able to provide care for her infant daughter." He further stated that she was "rather naive and vulnerable to the influence of others . . . and tended to mirror her husband[']s volatile, verbal outrages." The mother was living in a trailer which had a "smell of a kerosene-like substance." The trailer was the same residence the mother occupied at the time the child was removed from the home, when it was discovered that there was a fuel leak "which caused the trailer to become saturated with fuel . . . [and] be a fire hazard." The mother has refused to find other housing, although assisted in this effort by DSS, on the grounds that she did not want to move from the area and there was nothing else available in that area.

The issues presented are whether (I) the evidence supports the finding that the mother suffers from diminished capacity and/or psychological problems; and (II) the trial court has authority to order that reasonable efforts to reunite the family cease.

I

[1] Once a child is removed from the custody of her parents because of abuse, neglect or dependency, the trial court is required to conduct periodic reviews of that placement. N.C.G.S. § 7A-657(a) (1989). At the review hearing, the child is to be returned to the parent(s) from whom custody was taken "if the trial court finds sufficient facts to show that the child 'will receive proper care and supervision' from the parent(s) . . . [and that] 'placement . . . is deemed to

be in the best interest of the [child].' " *In re Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984). It remains the responsibility of the trial court to solicit the presentation of evidence that will enable it to make this determination, as neither the parent(s) or DSS has the burden of proof at this hearing. *In re Shue*, 311 N.C. at 597, 319 S.E.2d at 573.

Any findings entered by the trial court must be supported by competent evidence in the record. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). The evidence in this case does not support the finding of the trial court that the mother has a psychological problem. The evidence from the psychologist in fact supports a contrary finding. The evidence, however, can support a finding that the mother has a "diminished capacity . . . which inhibit[s] [her] from making appropriate decisions for the juvenile's care." It is not necessary, as the mother suggests, that there be evidence of mental retardation, mental illness, organic brain syndrome, or some other degenerative mental condition. Such evidence would be required in a termination of parental rights determination, where the termination is sought pursuant to subsection 7. *See* N.C.G.S. § 7A-289.32(7) (Supp. 1994) (requirements for termination of parental rights). The evidence is sufficient, in this section 657 review hearing, if it evinces a lack of "[a]bility to perform mentally" and that lack of ability impedes the mother's child care decisions. *Taber's Cyclopedic Medical Dictionary* 278 (16th ed. 1989) (defining capacity). In this record, there is evidence that the mother is "vulnerable to the influence of others" and does not "produce her own opinion[s]." Furthermore, she continues to live in a trailer that has the "smell of . . . kerosene," the very problem that gave rise to the original removal of the minor child from the home, and has resisted efforts of DSS to locate new housing.

II

[2] DSS has an affirmative statutory obligation to make reasonable efforts "to prevent or eliminate the need for placement of the juvenile in foster care." N.C.G.S. § 7A-657(e); N.C.G.S. § 7A-651(c)(2) (Supp. 1994); *see* 42 U.S.C.A. § 671(a) (West 1995). The statutes do not permit the trial court to relieve DSS of this duty and indeed at each review hearing, the trial court is required to make findings as to the efforts of DSS to reunify the family. N.C.G.S. § 7A-657(e); N.C.G.S. § 7A-651(c)(2). Accordingly, the directive attempting to relieve DSS of its obligation to make reasonable efforts to reunite the family must be eliminated from the 18 August 1994 order. At the next review hearing,

the trial judge may properly evaluate the reasonableness of the efforts by DSS in light of the needs of the parents and their responsiveness to the efforts.

Modified and affirmed.

Judges MARTIN, Mark D., and McGEE concur.

NAEGELE OUTDOOR ADVERTISING, INC., D/B/A FAIRWAY OUTDOOR ADVERTISING, PETITIONER-APPELLEE v. R. SAMUEL HUNT, III, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT-APPELLANT

No. COA95-232

(Filed 19 December 1995)

Highways, Streets, and Roads § 32 (NCI4th)— outdoor advertising—spot zoning

Summary judgment was properly granted for plaintiff in an action involving billboards where permits were granted for three signs to be located in Davidson County, then revoked when NCDOT learned that the property had recently been rezoned from Rural-Agricultural to Highway Commercial. Although defendant contended that the rezoning was spot zoning in violation of 23 C.F.R. § 750.708(b), N.C.G.S. § 136-129(4) is controlling, and the record indicates that the Davidson County Board of Commissioners rezoned the relevant area from agricultural to commercial in accordance with State Law.

Am Jur 2d, Zoning and Planning §§ 146-159.

Spot zoning. 51 ALR2d 263.

Appeal by respondent-appellant from judgment entered 30 November 1994 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 17 November 1995.

Michael F. Easley, Attorney General, by Sarah A. Fischer, Associate Attorney General, for the State.

Wilson & Waller, P.A., by Betty S. Waller, for petitioner-appellee.

WYNN, Judge.

Respondent-appellant, R. Samuel Hunt III, as Secretary of Transportation of the State of North Carolina (hereinafter "Secretary"), appeals the trial court's judgment denying appellant's motion for summary judgment and granting summary judgment in favor of appellee, Naegele Outdoor Advertising Inc., d/b/a Fairway Outdoor Advertising (hereinafter "Fairway"). We affirm.

On 16 June 1993, Fairway submitted applications for outdoor advertising permits for three billboards to be erected on property owned by Rodney Bryce Owens and Mitchell Henry Leonard ("Owens/Leonard property") located in Davidson County, North Carolina. The proposed sign structures were to be located within 660 feet of Interstate 85 in accordance with N.C. Gen. Stat. § 136-129.1 (1993) of the North Carolina Advertising Control Act.

On 8 July 1993, the North Carolina Department of Transportation ("NCDOT") issued permits to Fairway for the three sign locations. However, NCDOT later learned that the Owens/Leonard property recently had been rezoned from RA-1 (Rural-Agricultural) to HC (Highway Commercial). Based on this discovery, NCDOT concluded that the parcel had been "spot zoned" to permit outdoor advertising structures in violation of 23 C.F.R. § 750.708(b) (April 1991). Consequently, NCDOT revoked Fairway's three permits pursuant to N.C. Admin. Code tit. 19A, r. 2E.0210(1) (March 1993) for "mistake of material facts by the issuing authority for which had the correct facts been made known, the outdoor advertising permit(s) in question would not have been issued." Fairway appealed this ruling to the Secretary.

On 20 December 1993, the Secretary upheld the permit revocations in accordance with T19 NCAC § 2E.0210(1) and 23 C.F.R. § 750.708(b). Thereafter, Fairway filed a petition for review in Wake County Superior Court. Following a *de novo* hearing, judgment was entered denying the Secretary's motion for summary judgment and granting Fairway's motion for summary judgment. The Secretary appealed.

We note at the outset that the standard of review for a summary judgment motion is whether the pleadings, depositions, answers to interrogatories, and submitted affidavits show there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990);

Meadows v. Cigar Supply Co., 91 N.C. App. 404, 371 S.E.2d 765 (1988).

With the foregoing in mind, we now turn to the appellant's contentions. The Secretary contends that the trial court erred in granting summary judgment in favor of Fairway because the rezoning of the property violated 23 C.F.R. § 750.708. We disagree.

23 C.F.R. § 750.708(b) and (d) provide in relevant part:

> State and local zoning actions must be taken pursuant to the State's zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes.
>
> . . . .
>
> A zone in which limited commercial or industrial activities are permitted as incident to other primary land uses is not considered to be a commercial or industrial zone for outdoor advertising control purposes.

The Secretary argues that the rezoning of the parcel of land from a residential classification to a highway commercial zone, in which outdoor advertising is permissible, violates 23 C.F.R. § 750.708(b) because the zoning was not part of a comprehensive plan and constituted "spot zoning," and violates 23 C.F.R. § 750.708(d) because the area is not truly commercial. We find this argument to be without merit.

Federal law allows the erection and maintenance of outdoor advertising within 660 feet of the right-of-way in areas which have been zoned commercial or industrial "under authority of State law." 23 U.S.C.S. § 131(d). Similarly, N.C.G.S. § 136-129(4) utilizes the same language as the federal provision and provides in pertinent part:

> 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 . . . except the following:
>
> . . . .
>
> (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.

(emphasis supplied).

We find N.C.G.S. § 136-129(4) to be controlling. Therefore, outdoor advertising in conformity with the rules and regulations promulgated by NCDOT is permitted "in areas which are zoned industrial or commercial under authority of State law."

The record on appeal indicates that the Davidson County Board of Commissioners rezoned the relevant area from agricultural to commercial in accordance with state law. Indeed, the Davidson County Board of Commissioners has full statutory authority for zoning actions in Davidson County. *See* N.C. Gen. Stat. § 153A-340 (1991); *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971). In fact, there is no dispute that the highway commercial zone is commercial or industrial as defined in T19 NCAC § 2E.0201(b).

Furthermore, the Board of Commissioners adopted a comprehensive zoning plan and ordinance. The zoning enabling statutes of North Carolina require that all zoning actions in this state *must* be accomplished in accordance with a comprehensive plan. N.C.G.S. § 153A-341 (emphasis supplied); *see also Nelson v. City of Burlington*, 80 N.C. App. 285, 341 S.E.2d 739 (1986).

Having zoned the property as a highway commercial zone under authority of state law and in accordance with a comprehensive plan, we find that the trial court properly concluded as a matter of law that the Secretary's revocation of the permits exceeded his authority under the statutory mandate of N.C.G.S. § 136-129(4) which expressly allows advertising "in areas which are zoned industrial or commercial under authority of State law."

For the foregoing reasons, the judgment of the trial court is,

Affirmed.

Judges LEWIS and JOHN concur.

STATE OF NORTH CAROLINA v. CLYDE GILBERT HODGE

No. COA95-100

(Filed 19 December 1995)

Arson and Other Burnings § 6 (NCI4th)— burning of unoccupied mobile home—second-degree arson

The malicious and willful burning of a mobile home which is used as a dwelling and which is unoccupied at the time of the burning constitutes second-degree arson. N.C.G.S. §§ 14-58.1, 14-58.2.

Am Jur 2d, Arson and Related Offenses §§ 32, 36.

Appeal by defendant from judgment entered 5 October 1994 by Judge Thomas W. Ross in Davidson County Superior Court. Heard in the Court Of Appeals 17 October 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Benjamin G. Philpott for defendant-appellant.

MARTIN, John C., Judge.

Defendant was charged in a bill of indictment with second degree arson. The State's evidence tended to show that defendant and a co-defendant intentionally burned a 12' x 70' mobile home belonging to James Baity. The mobile home, which was not occupied at the time it was burned, was located near High Rock Lake in Davidson County and was used by Mr. Baity as a weekend vacation residence. A jury found defendant guilty as charged and a judgment was entered upon the verdict imposing an active twelve year prison sentence. Defendant appeals.

The sole question presented by this appeal is whether the intentional burning of an unoccupied mobile home constitutes the crime of second degree arson. Defendant argues that although G.S. § 14-58.2 provides that the willful and malicious burning of an occupied mobile home constitutes first degree arson, the Legislature has made no provision for the burning of an unoccupied mobile home to constitute second degree arson. Therefore, he argues, the common law definition of arson still applies to second degree arson and an unoccupied

mobile home is not a dwelling house for the purposes of a charge of arson. We reject his argument and find no error in his trial.

Arson is defined at common law as the "willful and malicious burning of the dwelling house of another person." *State v. Jones*, 110 N.C. App. 289, 291, 429 S.E.2d 410, 412 (1993). In 1974, the Legislature enacted G.S. § 14-58.1, providing that, as used in the statutes relating to arson and other burnings, "the terms 'house' and 'building' shall be defined to include mobile and manufactured-type housing and recreational trailers," and G.S. § 14-58.2 providing that "[i]f any person shall willfully and maliciously burn any mobile home or manufactured-type house or recreational trailer home which is the dwelling house of another and which is occupied at the time of the burning, the same shall constitute arson."

In 1979, in connection with the passage of G.S. § 15A-1340.1 *et seq.*, the Fair Sentencing Act (repealed by Session Laws 1993, c. 538, s. 14 effective 1 October 1994), the General Assembly amended G.S. § 14-58 to establish two degrees of arson:

> There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burning, the offense is arson in the first degree . . . . If the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second degree . . . .

Thus, second degree arson is defined as the willful and malicious burning of the dwelling of another which is unoccupied at the time of the burning. *Jones*, 110 N.C. App. 289, 429 S.E.2d 410.

In 1979, the General Assembly also amended G.S. § 14-58.2 to add the words "in the first degree" to the end of the statute. (Session Laws 1979, c. 760, s. 6). Defendant argues that because the General Assembly did not redefine "dwelling," as used in the 1979 amendment to G.S. § 14-58, to include mobile homes, and expressly limited the 1979 amendment to G.S. § 14-58.2 to first degree arson, it clearly did not intend that the crime of second degree arson would include the burning of an unoccupied mobile home. We disagree.

The title of a bill may be considered in determining legislative intent. *State ex rel Cobey v. Simpson*, 333 N.C. 81, 423 S.E.2d 759 (1992). Chapter 1374 of the 1973 Session Laws, enacting G.S. § 14-58.1 and G.S. § 14-58.2, was entitled "An Act to Define the Terms House and Building as Used in the Arson and Other Burnings Statutes to Include Mobile Homes and to Make the Crime of Arson Include the

Burning of a Mobile Home." "Where possible, statutes should be given a construction which, when practically applied, will tend to suppress the evil which the Legislature intended to prevent." *State v. Vickers*, 306 N.C. 90, 98-99, 291 S.E.2d 599, 605 (1982) (quoting *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978)). "[A]rson is an offense against the security of the habitation." *Id.* at 100, 291 S.E.2d at 606.

It is clear that the intent of the Legislature in enacting G.S. § 14-58.1 and G.S. § 14-58.2 was to extend protection against willful and malicious burning to mobile and manufactured housing, and it is equally clear that it did not intend to remove that protection when, in 1979, it amended G.S. § 14-58 and G.S. § 14-58.2 to classify the crime of arson in separate degrees for sentencing purposes. It is certainly common knowledge that many of our citizens inhabit mobile homes and manufactured housing and we hold the words "dwelling" and "dwelling house" apply to those structures as surely as those made of lumber and brick. Therefore, we hold that the malicious and willful burning of a mobile home which is used as a dwelling and which is unoccupied at the time of the burning constitutes second degree arson. Defendant's assignments of error are overruled.

No error.

Judges JOHN and McGEE concur.

CHARLES A. TORRENCE COMPANY, T/A TORRENCE BLUEPRINT & GRAPHICS CO. v. MOODYE R. CLARY, ET AL., T/A CLARY, MARTIN, MCMULLEN & ASSOCIATES, INC.

No. COA95-186

(Filed 19 December 1995)

Corporations § 104 (NCI4th)— corporate charter suspended— officer not personally liable for debts of corporation

An officer of a corporation whose charter has been suspended has no personal liability for debts incurred by the corporation during the period of suspension where the offier had no knowledge, at the time the debts were incurred, that the corporate charter had been suspended.

Am Jur 2d, Corporations, §§ 1190 et seq.

Appeal by plaintiff from judgment filed 3 December 1994 in Mecklenburg County District Court by Judge Philip F. Howerton, Jr. Heard in the Court of Appeals 14 November 1995.

Harkey, Lambeth, Nystrom & Fiorella, by Philip D. Lambeth, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by Richard A. Elkins and Paul P. Browne, for defendant-appellee.

GREENE, Judge.

Charles A. Torrence Company, t/a Torrence Blueprint & Graphics Co. (plaintiff), appeals the dismissal of its claim against Moodye R. Clary (defendant), on a claim by plaintiff for money owed on an account.

The undisputed facts show that plaintiff provided services to Clary, Martin, McMullen & Associates, Inc. (the Corporation), between 24 April 1991 and 26 March 1992, upon which there remains an account balance of $14,230.49, plus interest. The Corporation's charter was suspended on 17 November 1989, pursuant to N.C. Gen. Stat. § 105-230, for failure to pay franchise taxes and remained in a state of suspension through the date of the trial of this action. The defendant, a shareholder, president and director of marketing of the Corporation, did not learn of the corporate charter suspension until September 1992. All invoices and statements for monies due to plaintiff were sent to the Corporation and not to any of its owners, including defendant. The defendant did not guarantee any of the Corporation's debt owed to plaintiff. The trial court concluded that because the defendant had no knowledge that the charter had been suspended at the time the debt was incurred, the defendant could not be held personally liable for the Corporation's debt to plaintiff.

The dispositive issue is whether an officer of a corporation whose charter has been suspended has any personal liability for debts incurred by the corporation during the period of suspension.

Our legislature has provided that any person who "shall exercise or by any act attempt to exercise any powers, privileges, or franchises under articles of incorporation or certificate of authority after the same are suspended . . . shall pay a penalty." N.C.G.S. § 105-231 (1992). Our statutes are silent on whether the shareholders, directors and officers have any personal liability for debts incurred on behalf of

a corporation during the time the charter is suspended. The general rule is that the shareholders of a corporation whose charter has been suspended "are not made individually liable for its debts incurred during the suspension." 19 Am. Jur 2d *Corporations* § 2887 (1986). "The 'corporate veil' is not pierced, because the suspension was only designed to put 'additional bite' into the collection of franchise taxes, but not to deprive the shareholders of the normal protection of limited liability." *Id.* On the other hand, directors and officers are personally liable for corporate obligations incurred by them on behalf of the corporation, or by others with their acquiescence, if at that time they were aware that the corporate charter was suspended. *Id.*; *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77 N.C. App. 411, 414, 335 S.E.2d 30, 31-32 (1985); *see* N.C.G.S. § 55-8-30(c) (1990); N.C.G.S. § 55-8-42(c) (1990). Shareholders, directors and officers "of a pretended corporation which is neither a *de jure* nor a *de facto* corporation are generally held personally and individually liable . . . for the debts of the pretended corporation . . . without any reference to whether the persons sought to be held liable, actively participated in contracting the debt." *Supply Co. v. Reynolds*, 249 N.C. 612, 616, 107 S.E.2d 80, 83 (1959).

In this case, the evidence is that the defendant was an officer of a lawful corporation but had no knowledge, at the time the debt was incurred on behalf of the Corporation, that the corporate charter was suspended. Accordingly, the defendant has no personal liability for the Corporation's debt to the plaintiff and the trial court correctly dismissed the complaint.

Affirmed.

Judges MARTIN, Mark D., and McGEE concur.

SHAWNA McADAM SWORD, PLAINTIFF v. STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA95-9

(Filed 19 December 1995)

Torts § 12 (NCI4th)— general release—applicability to State

A general release which contains the language "all other firms, persons, corporations, associations, or partnerships"

releases the State of North Carolina even though the State is not specifically named in the release.

Am Jur 2d, Release §§ 28-30.

Appeal by plaintiff from Decision and Order of the North Carolina Industrial Commission filed 26 September 1994. Heard in the Court of Appeals 4 October 1995.

Donald J. Dunn, P.A., by Donald J. Dunn, for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Don Wright, for the State.

JOHNSON, Judge.

Plaintiff Shawna McAdam Sword was seriously injured in an automobile accident that occurred on 19 May 1991. Plaintiff was a passenger in a motor vehicle driven by her brother, Robert Barry McAdam. The accident occurred when the McAdam vehicle slid out of control and into the path of a vehicle in the oncoming lane of traffic. At the time, Robert McAdam was operating his vehicle at approximately 55 miles per hour.

On 2 December 1991, plaintiff settled her claim against her brother and executed a release, releasing Robert McAdam and "all other persons, firms, corporations, associations or partnerships" from all claims arising out of the accident of 19 May 1991.

Plaintiff filed this action seeking to recover damages from the State of North Carolina Department of Transportation (DOT) for negligent design, maintenance and failure to warn of the improper grade of N.C. Highway 55 in the area where the accident occurred. DOT responded through counsel denying the allegations and affirmatively pleading a release signed by plaintiff.

On 2 November 1993, plaintiff filed her Response to defendant's Motion to Dismiss. On 11 January 1994, an Opinion and Award was filed by Deputy Commissioner Gregory M. Willis in favor of defendant. Plaintiff appealed to the Full Commission which also ruled in favor of defendant. From this decision, plaintiff appeals.

The issue presented by the instant action is whether a general release which contains the language "all other firms, persons, corporations, associations or partnerships" releases the State of North

Carolina even though, the State is not specifically named in the release. A recent decision by this Court, *Allen v. N.C. Dept. of Transportation*, 120 N.C. App. 627, 463 S.E.2d 275 (1995), is dispositive in this case.

Plaintiff argues that the release was not intended to release any claims against the State, and that the State is not a "person" within the terms of the release. Our Court in *Allen* stated, "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 . . . would be a 'person' as contemplated by the release executed by plaintiff." Accordingly, the North Carolina Department of Transportation is a "person" within the language of the release.

Thus, the Commission did not err in holding that the North Carolina Department of Transportation was released in the general release from any claim by plaintiff. Therefore, the Decision and Order is affirmed.

Affirmed.

Judges EAGLES and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 DECEMBER 1995

AMOS v. MOREHEAD MEMORIAL HOSPITAL No. 94-953	Ind. Comm. (902652)	Reversed and Remanded
CHAPPELL v. THOMAS, KNIGHT, TRENT, KING & CO. No. 94-1378	Durham (91CVS00997)	Affirmed
CORNETT v. PATTERSON BUICK No. 94-1449	Ind. Comm. (932409)	Affirmed
CUMMINS v. FOGLEMAN No. 95-395	Mecklenburg (94CVM24997)	Dismissed
D.C. ENTERPRISES v. MABE No. 95-118	Forsyth (89CVD2991)	Reversed
GATHINGS v. DAWSON CONSUMER PRODUCTS No. 94-1174	Anson (92CVS289)	Affirmed
KANE v. KANE No. 95-463	Guilford (94CVD6535)	Dismissed
KEEN v. KEEN No. 94-1414	Wilson (92CVS711)	No Error
KROMBOS v. BROWN No. 95-77	Lee (93CVS00326)	No Error
MCCLURE v. TOWN OF CANTON No. 95-160	Haywood (93CVS335)	Affirmed
NORTHAMPTON COUNTY v. BRICKELL No. 94-1227	Northampton (93CVD269)	Affirmed in Part, Remanded in Part
PARSONS v. THE PANTRY, INC. No. 94-1053	Cumberland (92CVS6531)	Affirmed
POTTER v. MOORE REGIONAL HOSPITAL No. 95-624	Ind. Comm. (375292)	Reversed
REYNOLDS v. N.C. STATE UNIV. DEPT. OF PUBLIC SAFETY No. 95-553	Wake (94CVS10152)	Affirmed
SMITH v. PUBLIC SERVICE CO. No. 95-112	Ind. Comm. (141490)	Affirmed

SPEARS v. SPEARS No. 94-1305	Guilford (73CVD13079)	Affirmed
STATE v. BACK No. 95-402	Cabarrus (93CRS6042)	No Error
STATE v. BOZEMAN No. 95-245	New Hanover (91CRS20804) (91CRS20805) (91CRS20806) (91CRS20807) (91CRS20808) (91CRS20809)	No Error
STATE v. CHERRY No. 95-337	Mecklenburg (94CRS2094)	No Error
STATE v. CRENSHAW No. 95-302	Wayne (93CRS17214)	No Error
STATE v. DOUGLAS No. 95-570	Cabarrus (94CRS149) (94CRS3509)	No Error
STATE v. GATHINGS No. 95-505	Guilford (94CRS22242)	Affirmed
STATE v. GRAHAM No. 95-161	Pitt (94CRS13218) (94CRS13368) (94CRS13369) (94CRS13370) (94CRS13371) (94CRS14050) (94CRS14051)	Sentences in judgments 94CRS13218, 94CRS13368, 94CRS13369, 94CRS13370, 94CRS13371, 94CRS14050 and 94CRS14051 are vacated and remanded for resentencing
STATE v. HAMILTON No. 95-99	Union (93CRS6443) (93CRS4533) (93CRS6444) (93CRS5051)	In Case Nos. 93CRS6443 and 93CRS4353 (defendant Hamilton), no prejudicial error on the convictions; new sentencing hearing. In Case No. 93CRS6444 and 93CRS5051 (defendant Irvin), no prejudicial error.

STATE v. HARMON No. 95-431	Hertford (94CRS2208) (94CRS4511)	No Error
STATE v. HARRIS No. 94-1061	Edgecombe (93CRS13658)	No Error
STATE v. JACKSON No. 95-469	Lenoir (94CRS2822) (94CRS8485)	No Error
STATE v. JEFFERSON No. 94-447	Forsyth (94CRS3722)	No Error
STATE v. KING No. 95-438	Mecklenburg (94CRS18658) (94CRS18676)	Affirmed
STATE v. LAMM No. 95-619	Wake (93CRS34071) (93CRS34072) (93CRS34073) (94CRS59511)	No Error
STATE v. McEACHIN No. 95-336	Harnett (93CRS12627)	No Error
STATE v. MILLS No. 95-180	Durham (94CRS17601) (94CRS18685) (94CRS18686)	No Error
STATE v. RHODES No. 95-436	Rowan (93CRS2984)	No Error
STATE v. RICE No. 95-268	Madison (92CRS1556)	No Error
STATE v. RORIE No. 95-28	Guilford (93CRS70002) (93CRS70003) (93CRS70005) (93CRS70008)	Affirmed
STATE v. STEELE No. 95-90	Granville (94CRS1358) (94CRS1360)	No Error
STATE v. TUCKER No. 95-519	Randolph (93CRS15509)	No Error
STATE v. WILSON No. 95-163	Forsyth (93CRS27722)	No Error
STATE v. WINBUSH No. 95-536	Rutherford (94CRS3478) (94CRS3665)	No Error

STATE ex rel. UTILITIES COMM. v. SKI-SLOPE 1 CONDOMINIUM ASSN. No. 94-1290	Utilities Commission EC(T)-51,SUB7	Dismissed
SWEAT v. ANCHOR MOTOR FREIGHT No. 94-1197	Ind. Comm. (862818)	Reversed & Remanded
TANNER v. NAEGELE OUTDOOR ADVERTISING No. 95-227	Ind. Comm. (551959)	Affirmed

FILED 19 DECEMBER 1995

BROWN v. TOLLES No. 95-648	Mecklenburg (92CVS8078)	Affirmed
BRYANT v. STATE FARM MUT. AUTO. INS. CO. No. 95-211	Randolph (93CVS1592)	Affirmed
BURTON-JUNIOR v. BURTON No. 95-47	Wake (94CVD06624)	Affirmed
CARTER v. GAMBRELL No. 95-187	Catawba (92CVS750)	No Error
CLARK v. ROWAN-SALISBURY SCHOOL SYSTEM No. 95-106	Ind. Comm. (126274)	Affirmed
CLARK v. SPRAY COTTON MILLS No. 95-215	Ind. Comm. (154557)	Affirmed
COE v. SMOUSE No. 95-246	Forsyth (94CVD4184)	Reversed and Remanded
DAVIS v. DAVIS No. 95-81	Alexander (93CVD311)	Affirmed
DESIGN SURFACES v. MOYER No. 95-130	Wake (91CVS2487)	Affirmed
GOOLSBY v. GOOLSBY No. 95-556	Henderson (91CVD1350)	Dismissed
HILL v. THOMAS BUILT BUSES No. 95-197	Guilford (93CVS1798)	Affirmed
IN RE SCHACKNER No. 95-88	Durham (90J132)	Affirmed

IN RE VANHOY No. 95-621	Randolph (93J139)	Affirmed
KITCHEN DISTRIBUTORS OF THE SOUTH v. REID No. 95-158	Mecklenburg (94CVS2892) (94CVD2986DSC) (94CVS2850)	Affirmed
LIN v. CITY OF GOLDSBORO No. 95-657	Wayne (94CVS860)	Affirmed
LOWERY v. BARNHILL CONTRACTING CO. No. 94-1088	Cumberland (94CVS2084)	Dismissed
McDOUGAL v. McDOUGAL No. 95-417	Durham (91CVD36)	Affirmed
MEYERS v. MASHBURN No. 94-1462	Mecklenburg (93CVS11060)	Reversed and Remanded
OXENDINE v. SMITH No. 95-515	Robeson (92CVS2273)	Affirmed
RHODES v. WORTHINGTON No. 94-1191	Polk (93CVS3)	Affirmed
STATE v. ALLEN No. 95-541	Bertie (93CRS2305)	No Error
STATE v. BARNES No. 95-618	Wayne (92CRS13588)	No Error
STATE v. BEAVER No. 95-794	Gaston (94CRS4837)	Affirmed
STATE v. BLANTON No. 95-173	Wake (93CRS27929) (93CRS27930) (93CRS27931)	No Error
STATE v. BOSTON No. 95-574	Guilford (94CRS36177)	No Error
STATE v. DUNCAN No. 95-674	Gaston (92CRS24388)	Affirmed
STATE v. LESTER No. 95-682	Warren (94CRS1831)	No Error
STATE v. PRIDE No. 95-2	Wayne (93CRS16963) (93CRS16964) (94CRS3547)	No Error

STATE v. SHOEMAKER No. 95-599	Catawba (93CRS12008) (93CRS12010)	No Error
STATE v. VEREEN No. 95-203	Durham (93CRS30364) (94CRS08449)	No Error
STATE v. WARDLOW No. 95-635	Orange (93CRS836)	No Error
THOMPSON v. QUICK No. 95-521	CumberlandAffirmed (89CVS1550)	
TOLER v. FORSYTH No. 95-303	Harnett (85CVD680)	Affirmed
TOWERY v. JARMAN No. 95-30	Gaston (93CVS1800)	No Error
WILLIAMS v. BURLINGTON INDUSTRIES No. 95-567	Ind. Comm. (903692)	Affirmed

ALAMANCE COUNTY BOARD OF EDUCATION, ALBEMARLE CITY BOARD OF EDUCATION, BRUNSWICK COUNTY BOARD OF EDUCATION, CABARRUS COUNTY BOARD OF EDUCATION, CALDWELL COUNTY BOARD OF EDUCATION, DARE COUNTY BOARD OF EDUCATION, DAVIDSON COUNTY BOARD OF EDUCATION, ELIZABETH CITY-PASQUOTANK BOARD OF EDUCATION, HALIFAX COUNTY BOARD OF EDUCATION, HENDERSON COUNTY BOARD OF EDUCATION, HICKORY CITY BOARD OF EDUCATION, LEXINGTON CITY BOARD OF EDUCATION, MACON COUNTY BOARD OF EDUCATION, MADISON COUNTY BOARD OF EDUCATION, MARTIN COUNTY BOARD OF EDUCATION, NEW HANOVER COUNTY BOARD OF EDUCATION, ORANGE COUNTY BOARD OF EDUCATION, PAMLICO COUNTY BOARD OF EDUCATION, RANDOLPH COUNTY BOARD OF EDUCATION, REIDSVILLE CITY BOARD OF EDUCATION, RICHMOND COUNTY BOARD OF EDUCATION, SCOTLAND COUNTY BOARD OF EDUCATION, SURRY COUNTY BOARD OF EDUCATION, SWAIN COUNTY BOARD OF EDUCATION, TRANSYLVANIA COUNTY BOARD OF EDUCATION, TYRRELL COUNTY BOARD OF EDUCATION, WAKE COUNTY BOARD OF EDUCATION, WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION, PLAINTIFFS v. BOBBY MURRAY CHEVROLET, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. GENERAL MOTORS CORPORATION, THIRD-PARTY DEFENDANT

No. 9422SC668

(Filed 2 January 1996)

Sales § 50 (NCI4th)— supply of school buses—discontinued by factory—commercial impracticality—summary judgment for plaintiffs

Summary judgment was properly granted for plaintiffs in an action for excess costs resulting from the purchase of school buses from another source where defendant, a General Motors franchisee, placed a bid which was accepted to provide approximately 1200 school bus chassis; the chassis were described as "Chevrolet" in the bid but were to be manufactured by GM Truck; the EPA enacted changes in emissions standards for heavy duty diesel engines, rendering the engine described in the bid out of compliance; GM had tendered an extension of time for ordering chassis, which was accepted; GM shortly thereafter requested that the cut-off date for orders be moved forward, which was accepted; GM subsequently notified defendant that the chassis order placed during the reduced extended period would not be filled due to the unavailability of transmissions; and defendant notified the Division of Purchase and Contract of the N.C. Department of Administration, which assumes responsibility for contracting with various vendors on behalf of the boards of education, that the chassis could not be supplied. Although defendant contends that its lack of performance should be excused pur-

suant to N.C.G.S. § 25-2-615, there is no record evidence that plaintiffs had knowledge that defendant's sole source of supply was General Motors; defendant assumed the risk of its failure to supply the vehicles; governmental regulations do not excuse performance under a contract where a party has assumed the risk of such regulation, which defendant did; defendant did not act as an agent of GM in accepting orders during the extended period; and there was no apparent agency in that no evidence establishes that GM represented defendant to be its agent or permitted defendant to represent itself as GM's agent.

Am Jur 2d, Contracts §§ 676, 684.

Modern status of the rules regarding impossibility of performance as defense in action for breach of contract. 84 ALR2d 12.

Impracticability of performance of sales contract as defense under UCC § 2-615. 93 ALR3d 584.

Appeal by defendant from judgment entered 18 April 1994 by Judge F. Fetzer Mills in Davidson County Superior Court. Heard in the Court of Appeals 23 February 1995.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Walter F. Brinkley and S. Ranchor Harris, for plaintiffs-appellees.

Gulley, Kuhn & Taylor, L.L.P., by Jack P. Gulley and David J. Kuhn, for defendant-appellant.

JOHN, Judge.

Defendant Bobby Murray Chevrolet, Inc. (Bobby Murray) appeals the trial court's entry of summary judgment in favor of plaintiffs, a number of North Carolina school boards (plaintiffs; school boards), on their respective claims for breach of contract. Defendant contends application of N.C.G.S. § 25-2-615 (1995) regarding commercial impracticability operates under the facts of the case *sub judice* to excuse its performance under the contracts with plaintiffs. We disagree.

Pertinent factual and procedural information is as follows: Bobby Murray, a General Motors franchisee, received an invitation on or about 7 April 1989 to bid on approximately 1200 school bus chassis from the North Carolina Department of Administration's Division of

Purchase and Contract (the Division). The Division assumes responsibility for contracting with various vendors of supplies and equipment on behalf of state entities, including boards of education. As is customary, the Division on this occasion sent bid invitations containing the required chassis specifications to a number of motor vehicle dealers.

After consulting with the GMC Truck Division (GM Truck) of defendant General Motors Corporation (GM) regarding prices and availability, Bobby Murray proposed to supply several different sizes of chassis at specified prices. The chassis were described as "Chevrolet" brand in the bid, but were to be manufactured by GM Truck.

Bobby Murray's bid was accepted by the Division, and the initial deadline for orders pursuant to the contract was set at 31 July 1990. All orders submitted prior to this date were properly filled by Bobby Murray and are not the subject of the instant litigation.

On 26 July 1990, the Environmental Protection Agency (EPA) enacted Federal Emissions Standards changes for heavy duty diesel engines, thereby rendering the 8.2N diesel engine described in Bobby Murray's bid out of compliance with the regulations effective 1 January 1991.

In mid-July 1990, GM tendered an extension of time for ordering chassis from 31 July to 31 August 1990. Bobby Murray conveyed this option to the Division, which accepted the extension. Shortly thereafter, GM requested the cut-off date for orders be moved forward to 14 August. The Division agreed and plaintiffs' orders were transmitted to Bobby Murray between 1 August 1990 and 14 August 1990. There is no contention these orders were not timely received by Bobby Murray or GM.

On 10 August 1990, Bobby Murray received a message from GM through its Dealer Communication System (DCS), a computer network linking GM with its dealers, setting the final chassis buildout date at the week of 10 December 1990, but warning that estimated production dates could be pushed back due to a potential shortage of the requisite brand of automatic transmission (Allison automatic transmissions). On 24 August 1990, in a DCS message to Bobby Murray, GM reiterated that due to "the uncertainty of major component availability," no further orders for school bus chassis would be accepted.

On 30 November 1990, another DCS message to Bobby Murray indicated that the chassis orders placed between 1 August and 14 August 1990 would not be filled due to unavailability of Allison automatic transmissions. Bobby Murray contacted GM Truck on or about 11 December 1990 and learned that none of the chassis were to be built prior to the end of December because the Allison transmissions would not be provided until February or March 1991. At that point, however, installation of the 8.2N diesel engines would be illegal in consequence of the modified EPA regulations. On or about 11 December 1990, Bobby Murray notified the Division the chassis could not be supplied.

On or about 23 January 1991, the Division informed Bobby Murray the chassis were being purchased from another source, and that it intended to hold Bobby Murray liable for any excess in cost. The substitute chassis were later obtained by plaintiffs, who subsequently filed suit against Bobby Murray for a total of $150,152.94, representing the difference between the bid prices and the actual amounts expended by plaintiffs in purchasing similar chassis. In its answer and third-party complaint against GM, Bobby Murray claimed, *inter alia*, that GM breached its contract with Bobby Murray to provide the chassis at issue and that Bobby Murray had merely been acting as an agent of GM. Thereafter, both the plaintiffs and GM filed motions for summary judgment.

Summary judgment was entered against Bobby Murray and in favor of plaintiffs 18 April 1994 by Judge F. Fetzer Mills in the amount of $150,152.94 plus interest at 8% per annum from 11 December 1990 until paid. A 19 April 1994 order entered by Judge Mills denied GM's motion for summary judgment. The latter order is not a subject of the present appeal and we express no opinion herein as to the merits of Bobby Murray's claim against GM. Bobby Murray's notice of appeal to this Court was timely filed 21 April 1994.

Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1 Rule 56(c) (1990). The burden of establishing the lack of a triable issue rests with the moving party, and the facts will be viewed in a light most favorable to the non-moving party. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985).

Bobby Murray admits the bus chassis ordered by plaintiff school boards were never delivered. However, Bobby Murray contends its lack of performance should be excused pursuant to N.C.G.S. § 25-2-615 (1995) which reads:

> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale *if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation* or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

(emphasis added).

Bobby Murray asserts two arguments based upon the foregoing statute. It contends the failure of GM to supply the bus chassis was "a contingency the nonoccurrence of which" was a basic assumption of the underlying contracts between Bobby Murray and plaintiffs. Second, Bobby Murray claims governmental regulation prohibiting the installation of the 8.2N engine after 1 January 1991 was an intervening factor which should operate as an excuse.

In 1965, North Carolina adopted the Uniform Commercial Code (U.C.C.) as Chapter 25 of the General Statutes, thereby creating N.C.G.S. § 25-2-615 as identical to U.C.C. § 2-615. A significant purpose behind enactment of the U.C.C. was to make uniform the laws among various jurisdictions with regards to commercial transactions. N.C.G.S. § 25-1-102(2)(c) (1995). To this point, no appellate decisions in North Carolina have interpreted or applied N.C.G.S. § 25-2-615. However, case law from outside jurisdictions interpreting the U.C.C., while not conclusive, affords guidance to this Court. *Evans v.*

Everett, 10 N.C.App. 435, 179 S.E.2d 120, *rev'd on other grounds*, 279 N.C. 352, 183 S.E.2d 109 (1971).

U.C.C. § 2-615 has its roots in the relatively recent common law doctrines of impossibility of performance and frustration of purpose, which evolved from the original common law rule that parties to a contract were to be held absolutely to its terms. Thomas R. Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C. Section 2-615*, 54 N.C. L. Rev. 545, 549 (1976). The official comments to § 2-615 indicate that both doctrines were intended to be embraced within a U.C.C. concept denominated "commercial impracticability." *Id.* at 554.

Commentators have asserted that the drafters of the U.C.C. intended "commercial impracticability" to allow a more liberal standard in releasing promisors from contracts than the common law had afforded, but have also noted that courts generally have declined to heed such alleged intent. Paula Walter, *Commercial Impracticability in Contracts*, 61 St. John's L. Rev. 225, 227 (Winter 1987).

In order to be excused under § 2-615, a seller of goods must establish the following elements:

(1) performance has become "impracticable";

(2) the impracticability was due to the occurrence of some contingency which the parties expressly or impliedly agreed would discharge the promisor's duty to perform;

(3) the promisor did not assume the risk that the contingency would occur;

(4) the promisor seasonably notified the promisee of the delay in delivery or that delivery would not occur at all[.]

Hurst, *supra*, at 553-554.

Utilizing the foregoing criteria as well as the official commentary to § 2-615 and case law from other jurisdictions, we now consider Bobby Murray's arguments on appeal.

Initially, Bobby Murray contends an implied condition of its contract with plaintiffs was the ability of GM to manufacture and supply the ordered bus chassis. We agree that when an exclusive source of supply is specified in a contract or may be implied by circumstances to have been contemplated by the parties, failure of that source may excuse the promisor from performance. N.C.G.S. § 25-2-615, Official

Comment 5. However, neither contingency is reflected in the record herein.

Bobby Murray insists in its brief that "[a]ppellant disclosed in the bid that the chassis would be manufactured by Chevrolet and Plaintiff-Appellees had knowledge that Appellant's sole source of supply was General Motors." However, Bobby Murray points to no record evidence of such knowledge on the part of plaintiffs, and appears to rely solely upon its status as a GM franchisee to support its assertion.

By contrast, we note that the "General Contract Terms and Conditions" on Form TC-1, incorporated into the bid document, contain the following section entitled "MANUFACTURER'S NAMES":

> Any manufacturers' names, trade names, brand names, information and/or catalog numbers used herein are for purpose(s) of description and establishing general quality levels. Such references are not intended to be restrictive and products of any manufacturer may be offered.

Further, no clause in the contract between plaintiffs and Bobby Murray conditioned the latter's performance on its ability to obtain bus chassis from its manufacturer. *See* William H. Henning & George I. Wallach, *The Law of Sales Under the Uniform Commercial Code*, ¶ 5.10[2], S5-4 (1994 Supplement) (generally, where seller fails to make contract with buyer contingent on adequate supply, courts reluctant to excuse seller). Plaintiffs aptly point to Richard M. Smith and Donald F. Clifford, Jr., *North Carolina Practice, Uniform Commercial Code Forms Annotated*, Vol. 1, § 2-615, Form 3 (1968), which indicates a seller of goods may limit its liability by inclusion of the following "Single Source Clause":

> It is expressly understood that the seller has available only one source, [*name of single source*], of [*address*], for the [*name or identify the raw materials obtained by the seller from the single source*] used by the seller in the manufacture of the goods for the buyer under this contract. In the event of any interference or cessation of the supply from the seller's source of supply, the seller shall be temporarily, proportionately, or permanently relieved of liability under this contract, depending upon whether the interruption of the source of supply is a temporary interruption, a reduced delivery of materials, or a permanent cessation of supply.

Moreover, assuming *arguendo* GM *was* contemplated by the parties as Bobby Murray's exclusive source, the record reflects that Bobby Murray assumed the risk of its failure to supply the vehicles, as it was foreseeable that GM might not supply the bus chassis. Failure to make express provision for a foreseeable contingency in a sales contract implicitly places the burden of loss on the seller when the contingency comes to fruition. *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 659 (Minn. 1978) (contingency that seller would be unable to procure truck from General Motors "was clearly . . . foreseen . . . before entering the contract," and thus seller not excused).

Foreseeability under § 2-615 is an objective standard; it matters not whether the seller thought a certain event would or would not occur, but what contingencies were reasonably foreseeable at the time the contract was made. Henning & Wallach, *supra*, at ¶ 5.10[2], 5-36 (1992). Examination of the record reveals that cancellation of chassis orders by GM was a risk reasonably foreseeable to Bobby Murray.

For example, the "Dealer Sales and Service Agreement" between Bobby Murray and GM provides as follows:

> Dealer's order for . . . Motor Vehicles are not binding on . . . [GM] until accepted by [GM] . . . . Orders are accepted by [GM] when Released to Production.

Vehicle orders thus bind GM only upon "Release to Production" of the subject vehicles. The bus chassis at issue herein were never "released to production."

The same document also suggests numerous factors which might affect the availability of vehicles, including "component availability" and "governmental regulations," and indicates that GM reserved the discretion to distribute vehicles based upon its own judgment.

Official Comment 5 of N.C.G.S. § 25-2-615, regarding failure of sources of supply, warns: "There is no excuse under this section, however, unless the seller has employed all due measures to assure himself that his source will not fail." The comment cites *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*, 179 N.E. 383 (1932), in which a middleman contracted to supply a buyer with molasses. When the middleman's source was unable to deliver the required amount of molasses, the former claimed the excuse of impossibility. The court declined "to accept this defense because the middleman

had not even bothered to obtain a contract from the refinery to cover his obligations." Henning & Wallach, *supra*, at ¶ 5.10[1], 5-35 (1992); *cf. Lane v. Coe*, 262 N.C. 8, 136 S.E.2d 269 (1964) (when defendant's ability to perform depends upon cooperation of third party, defendant cannot rely on third party's later refusal to cooperate to claim impossibility).

Similarly, the record herein contains no evidence of a contract between Bobby Murray and GM to ensure delivery of the ordered chassis. Robin J. Fleming, fleet sales manager of Bobby Murray, in deposition simply claimed GM had never before failed to produce vehicles for which it had taken orders while he had been with Bobby Murray, notwithstanding provisions in the "Dealer Sales and Service Agreement" to the effect that orders did not bind GM until the vehicles were "Released to Production" and that certain specified factors might affect production.

Moreover, during the time orders were accepted from plaintiffs, Bobby Murray also received a DCS message revealing that GM was experiencing shortages of Allison automatic transmissions. Bobby Murray therefore also had actual notice its source of supply might fail.

We next examine Bobby Murray's contention its performance should be excused in consequence of intervening governmental regulations. Generally, governmental regulations do not excuse performance under a contract where a party has assumed the risk of such regulation. Henning & Wallach, *supra*, at ¶ 5.10, 5-33 (1992). The contract between the parties *sub judice*, in its "General Contract Terms and Conditions", Form TC-1, provided as follows:

> GOVERNMENTAL RESTRICTIONS: In the event any Governmental restrictions may be imposed which would necessitate alteration of the material, quality, workmanship or performance of the items offered on this proposal prior to their delivery, it shall be the responsibility of the successful bidder to notify this Division at once, indicating in his letter the specific regulation which required such alterations. The State reserves the right to accept any such alterations, including any price adjustments occasioned thereby, or to cancel the contract.

Bobby Murray, by terms of the parties' agreement, accepted responsibility for keeping abreast of governmental regulations bearing upon the contract.

In addition, Bobby Murray was on notice 26 July 1990 that new emissions standards would preclude, effective 1 January 1991, production of bus chassis using the 8.2N engine specified in its bid. Nothing in the record indicates that this information was conveyed to plaintiffs. Bobby Murray was further notified 10 August 1990 that production dates could be pushed beyond December 1990. The record contains no evidence that Bobby Murray explored with plaintiffs, or otherwise, alternative methods of meeting its contractual obligations. Under these circumstances, equity dictates that excuse by governmental regulation be unavailable to Bobby Murray. *See* N.C.G.S. § 25-1-103 (1995) ("Unless displaced by the particular provisions of this chapter, the principles of law and equity . . . shall supplement its provisions."). "The absence of fault is . . . an important part of a Section 2-615 defense." Henning & Wallach, *supra*, at ¶ 5.10[1], 5-34 (1992). In sum, governmental regulations do not supervene in this case.

Bobby Murray also argues that there is a material issue of fact whether seasonable notice was given plaintiffs that Bobby Murray would be unable to perform. However, in that we have determined Bobby Murray does not succeed under N.C.G.S. § 25-2-615(a), it is unnecessary to address N.C.G.S. § 25-2-615(c), dealing with the requirement that timely notice be given a buyer.

Lastly, Bobby Murray contends it should not be held liable for default because it was acting merely as an agent of GM when it accepted orders from plaintiffs. Bobby Murray appears to argue in its brief that while it is not normally an agent of GM, it became such an agent as a result of GM's extending the period for bus chassis orders from July 31 to August 31. It claims that orders between 31 July and 31 August were taken on behalf of GM by Bobby Murray as agent:

> The approval of the extension period created a relationship between General Motors and Appellant as Principal and agent, not as franchisor/franchisee and any franchise agreement between Appellant and General Motors is not applicable to deny a contractual relationship between General Motors and Plaintiff-Appellees.

The "Dealer Sales and Service Agreement" between Bobby Murray and GM specifies, "This Agreement does not make either party the agent or legal representative of the other for any purpose, nor does it grant either party authority to assume or create any obligation on behalf of or in the name of the others [sic]." In response,

Bobby Murray correctly insists that such labelling is not necessarily conclusive on the issue of whether Bobby Murray acted as an agent of GM on a particular occasion. *See* 3 Am. Jur. 2d *Agency* § 21 (1986) ("The manner in which the parties designate the relationship is not controlling, and if an act done by one person in behalf of another is in its essential nature one of agency, the one is the agent of such other notwithstanding he is not so called.").

Whether an agency relationship was created in this case is determined by "the nature and extent of control and supervision retained and exercised by [GM] over the methods or details of conducting the day-to-day operation [of Bobby Murray]." *See Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 277, 357 S.E.2d 394, 397, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 87 (1987). We do not believe extension of the date by which Bobby Murray could place orders for school bus chassis in any way constituted an exercise of day-to-day control by GM over the operation of its franchisee. For example, Robin Fleming admitted Bobby Murray is an "independent dealership" and stated GM "is not involved at all with the amount of profit that Bobby Murray determines . . . that we want to make."

Bobby Murray further contends that even in the absence of actual agency, an apparent agency existed.

> Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact.

Id. at 278, 357 S.E.2d at 397 (quoting *Fike v. Bd. of Trustees*, 53 N.C. App. 78, 80, 279 S.E.2d 910, 912, *disc. review denied*, 304 N.C. 194, 285 S.E.2d 98 (1981)). No evidence establishes that GM represented Bobby Murray to be its agent or permitted Bobby Murray to represent itself as GM's agent. Thus, Bobby Murray's apparent agency argument also fails.

In sum, taking the evidence presented in the light most favorable to Bobby Murray, we hold there exists no genuine issue of material fact as to plaintiffs' respective claims of breach of contract against Bobby Murray, and Bobby Murray's arguments to the contrary are unavailing. The trial court thus properly granted plaintiffs' summary judgment motion.

Affirmed.

Judges JOHNSON and MARTIN, Mark D. concur.

FRANK ROBERTS, PLAINTIFF-APPELLANT v. MADISON COUNTY REALTORS ASSOCIATION, INC., JEANNE T. HOFFMAN, CATHERINE DICKINSON, AND DIANA SCHOMMER, DEFENDANTS-APPELLEES

No. COA94-1217

(Filed 2 January 1996)

1. Corporations § 201 (NCI4th)— merger of realty associations—affidavits opposing defendants' motion for summary judgment

Summary judgment for defendants was not appropriate (but was moot) in an action contesting the merger of two realty associations where plaintiff presented affidavits showing that plaintiff and the other affiants had not received the final Articles of Merger or summary of the final Articles of Merger ten days in advance of the meeting at which the Plan was approved, as required by N.C.G.S. § 55A-40(a)(1) and § 55A-31; that defendants failed to follow the applicable bylaws; and that plaintiff was not allowed to share material information which would have negated one of the primary reasons for considering a merger, in violation of the bylaws. With the exception of one paragraph, all of the affidavits are in accordance with N.C.G.S. § 1A-1, Rule 56(e) in that all of the affiants were members of the defendant Association, were privy to events transpiring during the merger process, and made their statements based on their knowledge of events as members of defendant Association. That their knowledge was gathered from business records or communications of party-opponents is not fatal to the averments of the affidavits.

Am Jur 2d, Corporations §§ 2620, 2623; Summary Judgment § 18.

2. Injunctions § 7 (NCI4th)— merger of realty associations—merger complete—appeal moot

A claim that summary judgment was improperly granted in an action arising from the merger of two realty associations was moot where plaintiff filed a complaint seeking a temporary restraining order, preliminary injunction, and permanent injunction to enjoin the proposed merger; temporary restraining orders were granted; the second temporary restraining order was dis-

solved and the motion for a preliminary injunction was denied after a hearing; the articles of merger were filed immediately afterwards; plaintiff then filed a motion to amend his complaint to add as a defendant the Asheville Board of Realtors, into which plaintiff's board was merging; that motion was granted; defendants thereafter filed a motion for summary judgment; and that motion was granted. A court cannot issue a mandatory injunction to prevent that which has already been consummated. It would work an injustice to now mandate that the merged entity be dissolved and ask parties who were not involved in the action to relinquish their responsibilities to the new organization. There would be a different result had plaintiff appealed the dissolution of the TRO and the denial of the motion for a Preliminary Injunction and/or sought an order to stay the trial court's judgment, dissolving the TRO, or a writ of supersedeas to the Court of Appeals.

Am Jur 2d, Injunctions § 355.

Judge WYNN dissenting.

Appeal by plaintiff from Order entered 12 July 1994 by Judge Claude Smith in Madison County District Court. Heard in the Court of Appeals 19 October 1995.

Manning, Fulton & Skinner, P.A., by Cary E. Close, for plaintiff-appellant.

Moore & Van Allen, PLLC, by George V. Hanna, III and Mary Elizabeth Erwin, for defendants-appellees.

JOHNSON, Judge.

This case arises from a dispute between plaintiff Frank Roberts and several members of defendant Madison County Realtors Association, Inc. (hereinafter "defendant Association") regarding the validity of a merger of defendant Association with the Asheville Board of Realtors (hereinafter "Asheville Board") pursuant to Chapter 55A of the North Carolina General Statutes (hereinafter "The Nonprofit Corporation Act").

Plaintiff, who had been a member of defendant Association for approximately ten (10) years, was appointed to a special committee charged with the negotiation of the proposed merger of defendant

Association with the Asheville Board. Before the terms of the merger were finalized, defendant Diana Schommer, at a 30 March 1993 membership meeting, made a motion for members to vote on the proposed merger. Edward Krause, attorney for defendant Association, intervened, informing the membership that the statutory prerequisites to an official merger vote had not been satisfied and, therefore, a vote could not be taken at that time. Defendant Schommer then amended her motion to call for a tentative vote to show the "sense of the membership." This vote resulted in a count of six (6) members in favor and five (5) members opposed to the terms of the proposed merger.

Thereafter, on 14 May 1993, defendant Jeanne Hoffman, defendant Association's president, and defendant Catherine Dickinson, defendant Association's secretary, submitted an application for the merger of defendant Association and the Asheville Board, which would be voted on at a board meeting of the North Carolina Association of Realtors, Inc. (hereinafter "North Carolina Board of Realtors") on 4 June 1993. As a part of the application, defendants Hoffman and Dickinson were required to submit a copy of the minutes from the general membership meeting of defendant Association showing *official* approval of the proposed merger. The minutes of the 30 March 1993 membership meeting submitted by defendants Hoffman and Dickinson, however, reflected only the tentative vote, taken to show the "sense of the membership." Despite this defect in the application, the merger was approved by the Board of Directors of the North Carolina Board of Realtors on 4 June 1993 and by the Board of Directors of the National Association of Realtors on 15 November 1993.

On 8 November 1993, the Board of Directors of defendant Association approved the Plan of Merger of defendant Association and the Asheville Board. Defendant Association's Board of Director's resolution approving the Plan of Merger directed that the Plan of Merger be submitted to a vote at a meeting of the members of defendant Association. Subsequently, defendant Hoffman called for an official vote of the membership on the merger. Twenty-five (25) members of defendant Association were represented in person or by proxy at this 23 November 1993 meeting. The Plan of Merger was approved by an eighteen (18) member majority of defendant Association.

Plaintiff notes that, contrary to the requirements delineated in North Carolina General Statutes sections 55A-40(a)(1) and 55A-31, several members of defendant Association, including himself, had not

received a copy of the Plan of Merger or summary of the Plan of Merger ten days in advance of the meeting. Additionally, plaintiff protests that, contrary to meeting protocol, he was not allowed to convey important information, that he had recently obtained regarding the National Realtor's new "Board of Choice" policy, to defendant Association's membership. This new policy changed prior policy and, for the first time, allowed those members of defendant Association who wished to transfer their membership to the Asheville Board, to do so, while, at the same time, allowing those members who wished to remain a part of defendant Association, to do so. This policy change had not been shared with members of defendant Association at any time during discussion in regards to the proposed merger, despite the fact that its implementation negated one of the primary reasons for considering a merger of defendant Association with the Asheville Board.

Frustrated by defendants' failure to comply with statutory guidelines and defendant Association's own bylaws, plaintiff filed a *pro se* Complaint seeking a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction to enjoin the proposed merger. Plaintiff was granted an ex parte Temporary Restraining Order by Judge Raymond H. Lacey on 29 December 1993, preventing defendants from consummating the merger with the Asheville Board. Defendants filed an Answer and Counterclaim and thereafter, plaintiff obtained a second ex parte Temporary Restraining Order from Judge Claude Smith on 25 March 1994, enjoining the consummation of the merger.

At a hearing on plaintiff's second Temporary Restraining Order and Motion for Preliminary Injunction on 4 April 1994, Judge Robert H. Lacy found that plaintiff failed to show a reasonable apprehension of irreparable loss, injury, or harm. Judge Lacy, therefore, ordered the Temporary Restraining Order dissolved and denied plaintiff's Motion for Preliminary Injunction. Immediately thereafter, defendants and the Asheville Board filed Articles of Merger of defendant Association into the Asheville Board. Plaintiff then filed a Motion to Amend his Complaint to add the Asheville Board as a defendant. This Motion was subsequently granted. Thereafter, on 31 May 1994, defendants filed a Motion for Summary Judgment. Following a hearing on defendants' motion, the trial court concluded that, as a matter of law, there was no genuine issue of material fact in dispute as to the issue of defendants' liability under the claims set forth in plaintiff's Complaint, and therefore, defendants were entitled to Summary

Judgment as a matter of law pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The court ordered Judgment in favor of defendants and plaintiff appeals.

[1] Plaintiff assigns as error the trial court's decision to grant defendants' Motion for Summary Judgment, arguing that the court had before it competent evidence showing the existence of genuine issues of material fact and that the case was not moot. Plaintiff argues that the trial court should have denied defendants' Motion for Summary Judgment and proceeded to trial for plaintiff's Motion for a Permanent Injunction. We cannot agree.

Summary judgment is a mechanism designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed. *Hall v. Post*, 85 N.C. App. 610, 355 S.E.2d 819 (1987), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988). However, because it is such a drastic remedy, summary judgment is to be utilized with caution and only when the movant is clearly entitled thereto. *Houck v. Overcash*, 282 N.C. 623, 193 S.E.2d 905 (1973). In making its decision on such a motion, the trial court should carefully examine the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). It is the moving party who bears the burden of showing that summary judgment is appropriate. *Id.* A moving party is entitled to summary judgment if it can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense or legal bar to the claim. N.C.R. Civ. P. 56(c); *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276; *Wilder v. Hobson*, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

On appeal, a trial court's grant of summary judgment is fully reviewable. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 343 S.E.2d 188, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). Appellate review of a trial court's grant of summary judgment addresses the trial court's conclusions as to whether, viewing the evidence in the light most favorable to the non-moving party, (1) there is no genuine issue of material fact, and (2) the moving party was entitled to judgment as a matter of law. *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (*citing* N.C.R. Civ. P. 56(c); *Vassey v. Burch*, 301 N.C. 68, 269 S.E.2d 137 (1980)). If the Appellate Court determines that the trial court's conclusions as to these two questions

of law were correct, then summary judgment was properly granted. *Id.*

A provision in a corporation's bylaws is a contract between that corporation and its shareholders and among shareholders. *See Ellis v. Institution*, 68 N.C. 423 (1873). Additionally, corporate officers, possessing superior knowledge, may not mislead any shareholders/members by use of corporate information to which the latter is not privy. Security Exchange Act of 1934 §§ 10(b), 32, 15 U.S.C.S. §§ 78j(b), 78ff (1983).

In the instant case, defendant Association is a corporation under the auspices of North Carolina's Nonprofit Corporation Act. *See* North Carolina Nonprofit Corporation Act, ch. 55A (1990 & Cum. Supp. 1995). As such, defendant Association was bound to act within the provisos of its own bylaws. Failure to do so was a breach of contract with its shareholders/members—in this case, plaintiff. Further, defendant Board members, as corporate officers and fiduciaries, were bound to disclose any material information known to them, but unknown to the general membership, that may have affected defendant members' vote on the merger with the Asheville Board. *See* Security Exchange Act of 1934 §§ 10(b), 32, 15 U.S.C.S. §§ 78j(b), 78ff.

The evidence tends to show that plaintiff submitted his own and two other defendant Association members' affidavits, which alleged that defendants failed to comply with provisions of North Carolina General Statutes section 55A-40 (now section 55A-11-03)—plaintiff and the other affiants had not received the final Articles of Merger and/or summary of the final Articles of Merger ten days in advance of the 23 November 1993 meeting. Further, plaintiff's affidavit asserts that defendants failed to follow the provisions of the National Association of Realtors' and defendant's own bylaws, when defendant Association failed to "submit minutes from a general membership meeting of the Board which included the official action taken in approving the merger." Moreover, plaintiff alleged that he was not allowed to share material information regarding the "Board of Choice" policy that had been adopted by the National Association of Realtors, in derogation of defendant Association's bylaws. The two other affiants alleged that they were not apprised of this information that would have negated one of the primary reasons for considering a merger with the Asheville Board. These two affiants also noted that plaintiff was prohibited from disclosing information about the change

in the "Board of Choice" policy, in derogation of defendant Association's own bylaws.

Defendants argue, however, that the affidavits offered by plaintiff in opposition to defendants' Motion for Summary Judgment contained incompetent evidence in violation of Rule 56(e) of the North Carolina Rules of Civil Procedure. Rule 56(e) mandates that affidavits opposing a motion for summary judgment be made on personal knowledge, set forth facts that would be admissible into evidence, and show that the affiant is competent to testify as to the matters stated therein. N.C.R. Civ. P. 56(e); *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988).

With the exception of paragraph 12 of plaintiff's affidavit, all of the affidavits submitted by plaintiff in opposition to defendants' Motion for Summary Judgment are in accordance with the requirements of Rule 56(e). All of the affiants were members of defendant Association, and were privy to events transpiring during the merger process involving defendant Association and the Asheville Board. They made statements in their affidavits, based on this knowledge of these events, as members of defendant Association. That the affiants' knowledge was gathered from business records or communications of party-opponents is not fatal to the averments of the affidavits submitted by plaintiff in opposition to defendants' Motion for Summary Judgment. *See* N.C.R. Evid. 801(d)(C)(D), 803(6).

[2] Plaintiff's and the two other affidavits presented at the hearing on defendants' Motion for Summary Judgment certainly present some evidence which tends to show that there were questionable events which occurred during the merger of defendant Association with the Asheville Board. Defendants argue, however, that they were entitled to summary judgment as a matter of law, because plaintiff's claim is now moot. While we are mindful of defendants' rather transparent circumvention of procedural and statutory protections, set in place to guard against the very thing that has occurred in instant case, regrettably, we must agree with defendants' contention that plaintiff's claim is now moot.

Inasmuch as the merger had occurred at the time of the 8 June 1994 hearing before Judge Smith, in the light most favorable to plaintiff, there was no genuine issue of material fact and defendants were indeed entitled to Summary Judgment as a matter of law. Although we do not condone the allegedly wrongful activities of defendants, our Supreme Court has long held that a court cannot issue a mandatory

injunction to prevent that which has already been consummated. *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 453-54, 168 S.E.2d 401, 410 (1969); *Fulton v. Morganton*, 260 N.C. 345, 347, 132 S.E.2d 687, 688 (1963); *see also Ratcliff v. Rodman*, 258 N.C. 60, 127 S.E.2d 788 (1962) (denial of plaintiff's writ of mandamus and dismissal of appeal where primary election had been held at the time of the hearing of the appeal); *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E.2d 143 (1939) (denial of injunctive relief to prevent damage by trespass when it appeared that the damage had already been done). In *Nicholson*, the plaintiff sought injunctive relief to prevent alleged "unlawful" activities by the defendant, State Education Assistance Authority, which included the spending of funds. The Supreme Court held that the Court could not issue a mandatory injunction to enjoin the spending, after the funds were spent, and could not require nonparties to return funds that they had already received. *Nicholson*, 275 N.C. 439, 168 S.E.2d 401. Similarly, in *Fulton*, the Supreme Court held that a mandatory injunction could not be issued to prevent the defendants from holding an election, which had already been held. *Fulton*, 260 N.C. 345, 132 S.E.2d 687.

Inescapably, this Court cannot enter a mandatory injunction to dissolve the merger between defendant Association and the Asheville Board. After consummation of the merger, members of defendant Association became members of the merged entity. They have paid dues, joined new committees, and started new projects as members of this merged entity. It would work an injustice to now mandate that this merged entity be dissolved and ask parties, who were not involved in this action, to relinquish their responsibilities to the new organization.

Had plaintiff appealed Judge Lacy's dissolution of the Temporary Restraining Order and denial of the Motion for Preliminary Injunction and/or sought an order to stay the trial court's Judgment, dissolving the Temporary Restraining Order, or a writ of supersedeas to this court, we would have a far different result. *See* N.C.R. App. P. 3, 23(a)(1), 23(e). In balancing the equities, on these facts, however, we must affirm the trial court.

Affirmed.

Judge EAGLES concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

The majority contends that the trial court's grant of summary judgment in favor of defendants was proper because plaintiff's claim is now moot. I respectfully disagree, and therefore dissent.

The majority cites *Nicholson v. State Educ. Assist. Auth.*, 275 N.C. 439, 168 S.E.2d 401 (1969), and *Fulton v. City of Morganton*, 260 N.C. 345, 132 S.E.2d 687 (1963), for the proposition that a court may not issue a mandatory injunction to undo what has already been done. However, there is a contrary line of cases. In *R.R. v. R.R.*, 237 N.C. 88, 74 S.E.2d 430 (1953), our Supreme Court held:

> [A court of equity] may, by its mandate, compel the undoing of those acts that have been illegally done, as well as it may, by its prohibitive powers, restrain the doing of illegal acts. The court may compel the restoration to the plaintiff of that which was wrongfully taken from him. A mandatory injunction based on sufficient allegations of wrongful invasion of an apparent right may be issued to restore the original situation.

Id. at 94, 74 S.E.2d at 434 (citations omitted). *See also Crabtree v. Jones*, 112 N.C. App. 530, 435 S.E.2d 823 (1993), *disc. review denied*, 335 N.C. 769, 442 S.E.2d 514 (1994); *Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 416 S.E.2d 4 (1992); *Wrightsville Winds Townhouses Homeowners' Ass'n. v. Miller*, 100 N.C. App. 531, 397 S.E.2d 345 (1990), *disc. review denied*, 328 N.C. 275, 400 S.E.2d 463 (1991).

Contrary to the majority's assertion, plaintiff's claim is not moot simply because the merger has occurred. As the majority opinion implicitly recognizes, a court may, in an appropriate case, issue a mandatory injunction undoing acts which were illegally done.

In the instant case, there are issues of material fact regarding whether the defendants caused the merger outside of the statutory authority to do so. Accordingly, I would reverse the grant of summary judgment and remand for a trial to determine whether, in fact, the merger occurred outside of the authority to merge nonprofit corporations granted by N.C. Gen. Stat. § § 55A-40(a)(1) (1990) (recodified N.C. Gen. Stat. § 55A-11-03(b) (1993)) and 55A-31 (1990) (recodified N.C. Gen. Stat. § 55A-7-05 (1993)), and if so, whether justice demands that the merger be undone. *See Crabtree v. Jones*, 112 N.C. App. at 534, 435 S.E.2d at 825 (holding that when summary judgment was improperly granted against a plaintiff seeking a mandatory injunc-

tion, this Court should remand for a determination whether the balancing of the equities demands the issuance of the injunction rather than deciding for ourselves).

Moreover, the record indicates that the subject merger had not occurred at the time of the 4 April 1994 hearing on the preliminary injunction. According to the defendants' motion for summary judgment, the Articles of Merger were filed with the Secretary of State on 29 April 1994, some 3 weeks after the 4 April 1994 hearing. Hence, the merger was completed after the denial of the preliminary injunction but before the 8 June 1994 hearing on defendants' motion for summary judgment which is the subject of the instant appeal.

By determining that a merger completed after the denial of a preliminary injunction, but before a hearing on the permanent injunction results in the plaintiff's claim being moot, the majority in essence renders the preliminary injunction determination to be the final decision in cases like this one. A preliminary injunction is only intended to preserve the *status quo* pending trial on the merits. *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 14, 431 S.E.2d 828, 834 (1993), *motion to dismiss allowed and disc. review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *cert. denied*, 114 S.Ct. 2783, 129 L. Ed. 2d 894 (1994). The preliminary injunction determination should not be the end of the case.

Finally, the majority opinion changes the longstanding rule discouraging appeals from the denial of a preliminary injunction. As a general rule, the grant or denial of a preliminary injunction is interlocutory, and no appeal lies unless a substantial right is affected. *N.C. Elec. Membership Corp. v. N.C. Dept. of Econ. & Comm. Development*, 108 N.C. App. 711, 716, 425 S.E.2d 440, 443. However, in the instant case, the majority opinion requires appeal from the denial of a preliminary injunction, lest the subject matter be consummated rendering the action moot because the act cannot be undone. Doubtlessly, the majority opinion will encourage interlocutory appeals from the denial of preliminary injunctive relief.

PHILIP B. CATES AND DURHAM COUNTY v. NORTH CAROLINA DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S OFFICE, AND NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

No. COA94-1352

(Filed 2 January 1996)

1. Sanitation and Sanitary Districts § 5 (NCI4th)— sanitarian—soil evaluation—defense by Attorney General

Although the statute providing for defense of sanitarians by the Attorney General, N.C.G.S. § 143-300.8, did not become effective until 1987 and the preliminary soil evaluation at issue here was done in 1986, the statute applies because the obligation of the Attorney General to provide a defense did not accrue until the filing of the action, which was after the effective date of the statute.

Am Jur 2d, Attorney General § 12.

2. Sanitation and Sanitary Districts § 5 (NCI4th)— sanitarian—defense of—best interests of State

Although the Attorney General argues that defending a sanitarian who conducts a preliminary soil evaluation is not in the best interests of the State under N.C.G.S. § 143-300.8 because the sanitarian was not enforcing the rules of the Commission for Health Services in that those rules do not provide for the use of a preliminary evaluation, there is no dispute that the evaluation was conducted consistent with the criteria established by the Commission, there is no requirement in the rules prohibiting the procedure, and, although the Attorney General has great discretion in determining whether providing a defense would be in the best interests of the State, the fact that the sanitarian's preliminary soil evaluation was not required by the rules of the Commission for Heath Resources is not a reason supported in law and the Attorney General thus had an obligation to provide a defense.

Am Jur 2d, Attorney General § 12.

3. Sanitation and Sanitary Districts § 5 (NCI4th); Attorney General § 11 (NCI4th)— sanitarian—refusal to defend—sovereign immunity

Any claim for reimbursement of costs incurred in the Attorney General's failure to defend a sanitarian under N.C.G.S.

§ 143-300.8 is barred by sovereign immunity because the Department of Justice is a state agency and the statute does not specifically provide for damage awards against it.

Am Jur 2d, Attorney General § 12.

4. Administrative Law and Procedure § 32 (NCI4th)— refusal of Attorney General to defend sanitarian—damages—joinder refused—administrative action

The trial court properly refused to permit joinder of DEHNR as a party respondent in an administrative appeal from the refusal of the Attorney General to defend a sanitarian because any action pursuant to N.C.G.S. § 143-300.8 to enforce DEHNR's obligation to pay a judgment or settlement is in the nature of a civil action. In any event, the trial court did not abuse its discretion in denying the request to join DEHNR because this new claim was asserted four years after the original petition.

Am Jur 2d, Administrative Law § 291.

Judge WYNN dissenting.

Appeal by plaintiffs from order entered 29 September 1994 in Wake County Superior Court by Judge Henry W. Hight, Jr. Heard in the Court of Appeals 12 September 1995.

Womble Carlyle Sandridge & Rice, by Johnny M. Loper, for plaintiff-appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

GREENE, Judge.

Philip B. Cates (Cates) and Durham County (collectively petitioners) appeal an Order entered 29 September 1994 in Wake County Superior Court denying Durham County's motion to intervene as a party petitioner, denying Cates' motion to join the North Carolina Department of Environment, Health and Natural Resources (DEHNR) as a party respondent, finding that the question of state responsibility is moot, and ordering that Cates' Petition for Judicial Review be dismissed.

Cates was employed as a Registered Sanitarian by the Environmental Health Division of the Durham County Health

Department. On 17, 18 and 21 July 1986, at the request of H&W Developers (H&W), Cates conducted a preliminary soil evaluation on a tract of land in Durham County. H&W filed a negligence suit against Cates and Durham County (the H&W litigation) on 13 July 1989 alleging that Cates was negligent in the conducting and issuance of the preliminary soil analysis and alleging that Durham County was negligent in "failing to ensure that Defendant Cates complied with the County policy."

Durham County had in effect at the time of the alleged negligent acts a $1,000,000 liability insurance policy covering its employees. The policy included a $100 deductible clause and obligated the company to defend any action against the insured or its employees.

On 17 October 1989, the Attorney General's office, pursuant to N.C. Gen. Stat. § 143-300.8, was requested to provide Cates with a defense in connection with the H&W litigation. Cates was informed by letter dated 9 February 1990 from Assistant Attorney General Gayl Manthei that the case was "not one where representation by the Attorney General's Office is appropriate." According to Ms. Manthei, the acts by Cates were done in 1986, prior to passage of section 143-300.8, and in any event Cates was not "enforcing the rules of the Commission for Health Services when conducting [the] preliminary site evaluations," and therefore did not fall under section 143-300.8.

Pursuant to N.C. Gen. Stat. Chapter 150B, on 30 March 1990 Cates petitioned for administrative review of the Attorney General's denial to provide him with a defense in the H&W litigation. In that petition, Cates requested that the Attorney General be "required to defend" the H&W litigation. Evidence presented indicates that Cates, acting on behalf of the Durham County Health Department, performed a "preliminary soils analysis" and made a preliminary evaluation of the suitability for sewage disposal of properties owned by H&W. The preliminary evaluation indicated that all but one of the fifty proposed lots were suitable for on-site septic systems. A final permit was never issued. In performing the preliminary analysis, Cates utilized the factors listed in the rules of the Commission.

In its Final Agency Decision, Attorney General Michael Easley concluded that Cates had no right to legal representation in this instance. The reasons given were: (1) the "defense of this action would not be in the best interest of the State because the preliminary site evaluation work done by [Cates] is not required by or even mentioned in State rules"; (2) "G.S. § 143-300.8 is not retroactively effec-

tive for acts or omissions which occurred prior to its enactment"; (3) Cates was not enforcing the rules of the Commission at the time he performed the preliminary soil analysis; and (4) the claim is moot because the underlying action has been settled. At some point prior to the issuance of the Final Agency Decision, the H&W litigation was settled for $495,000. With the exception of the $100 deductible paid by Durham County, the settlement was paid in full by the liability insurance company. Pursuant to N.C. Gen. Stat. § 150B-43, Cates and Durham County, on 7 March 1994, petitioned the Superior Court of Wake County for judicial review of the Final Agency Decision, requested that Durham County be allowed to intervene as a party petitioner, requested that DEHNR be joined as a party respondent, and that DEHNR be required to pay the settlement entered in Cates and Durham County's behalf.

The issues presented are (I) whether the Attorney General had an obligation to provide Cates a defense in the H&W litigation; (II) if so, whether the failure to provide a defense gives rise to any liability on the part of the Department of Justice; and (III) whether it was error to deny the petitioners' motion to join the DEHNR as a party respondent.

Because the issues raised in this appeal are alleged errors of law, our review of the agency decision is *de novo*. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

I

The Attorney General makes three arguments in support of its contention that it had no obligation to provide a defense to Cates pursuant to section 143-300.8. This statute provides that:

> Any local health department sanitarian enforcing rules of the Commission for Health Services under the supervision of the Department of Environment, Health, and Natural Resources pursuant to G.S. 130A-4(b) shall be defended by the Attorney General, subject to the provisions of G.S. 143-300.4, and shall be protected from liability in accordance with the provisions of this Article in any civil or criminal action or proceeding brought against the sanitarian in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of enforcing the rules of the Commission for Health Services. The Department of Environment, Health and Natural

> Resources shall pay any judgment against the sanitarian, or any settlement made on his behalf, subject to the provisions of G.S. 143-300.6.

N.C.G.S. § 143-300.8 (1993).

Retroactive

[1] The first argument is that because the statute did not become effective until 1987, it has no application to "act[s] done or omission[s] made" by Cates in 1986 and that to hold otherwise would be to apply the law retroactively. We disagree. A law is retroactively applied only when it operates "upon rights which have been acquired . . . prior to its passage." *Wood v. Stevens & Co.*, 297 N.C. 636, 646, 256 S.E.2d 692, 699 (1979). In this case, the affirmative obligation on the Attorney General to provide certain sanitarians a legal defense did not accrue or become fixed until the filing of the "civil or criminal action or proceeding brought against the sanitarian." N.C.G.S. § 143-300.8. Because the civil action against Cates was filed after the effective date of the statute, the rules against retroactive application are not violated and the statute applies.

Enforcing Rules

[2] The Attorney General next argues that the statute does not apply because Cates was not, at the time of the alleged negligent acts, "enforcing the rules of the Commission for Health Services." N.C.G.S. § 143-300.8. The rules of the Commission for Health Services (Commission) were promulgated pursuant to N.C. Gen. Stat. § 130A-335(e). These rules allow the local county health departments to issue permits "only after it has determined that the [sewage] system is designed and can be installed so as to meet the provisions" of the rules. 15A NCAC 18A .1937(b) (June 1995). The rules further provide that prior to issuance of the permit the local health department "shall investigate each proposed site" and evaluate the site in light of several listed factors. 15A NCAC 18A .1939(a) (June 1995). The rules make no provision for, nor do they prohibit, the use of preliminary soil evaluations.

The Attorney General argues that because the rules of the Commission do not provide for the use of preliminary soil evaluations, a local sanitarian is not "enforcing the rules of the Commission" when it conducts such an evaluation. We disagree. There is no dispute that the evaluation was conducted consistent with the criteria established by the Commission. Furthermore, there is no requirement in

the rules of the Commission that prohibit the procedure utilized by Durham County.

Refuse to Defend

Accordingly, the Attorney General had a duty, "subject to the provisions of G.S. 143-300.4" to defend Cates in the H&W litigation. Section 143-300.4 does permit the Attorney General, in four different circumstances, to refuse to provide a defense. One circumstance, and the only one argued by the Attorney General, is that "[d]efense of the action or proceeding would not be in the best interests of the State." N.C.G.S. § 143-300.4(a)(4) (1993). The statute further provides that the determination of whether the providing of a defense would be in the best interest of the State "shall be made by the Attorney General." N.C.G.S. § 143-300.4(b) (1993). The Attorney General is thus given great discretion in this decision and can be reversed only upon a showing that the decision is arbitrary and capricious. N.C.G.S. § 150B-51(b)(6) (1991). If the discretion is exercised in good faith and in accordance with the law, it is not arbitrary and capricious. *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989). In this case, the fact that the preliminary site evaluation was not required by the rules of the Commission (the reason given by the Attorney General to support its decision that providing a defense was not in the best interest of the State) is not, as we have determined in this opinion, a reason supported in the law. The Attorney General thus had an obligation to provide Cates a defense in the H&W litigation.

II

[3] Because the Attorney General did not provide Cates a legal defense to the H&W litigation, which has now been settled, does the Department of Justice (Department), which the Attorney General heads, N.C.G.S. § 143A-49 (1994), have any liability? Cates argues that the Department should "reimburse [him], Durham County, and their insurers for legal fees" incurred in defending the H&W litigation. Although this argument represents sound logic, because the Department is a state agency and the statute does not specifically provide for damage awards against it, any claim for reimbursement is barred by the doctrine of sovereign immunity. *See Teer Co. v. Highway Comm'n*, 265 N.C. 1, 9, 143 S.E.2d 247, 253 (1965) (state agency immune from liability unless immunity waived). Therefore, this claim was properly dismissed.

III

[4] Cates finally contends that the trial court erred in failing to join DEHNR as a party respondent. We disagree. Any action, pursuant to N.C. Gen. Stat. § 143-300.8, to enforce DEHNR's obligation to pay a judgment or settlement is in the nature of a civil action, with original jurisdiction vested in the trial courts. Accordingly, the trial court properly refused to permit the assertion of this claim in an administrative appeal. In any event, even assuming that Cates' claim against DEHNR is within the scope of the Administrative Procedure Act, N.C. Gen. Stat. Chapter 150B, because this new claim was asserted four years after the original petition, the trial court did not abuse its discretion in denying the request to join DEHNR. *See* N.C.G.S. § 1A-1, Rule 21 (1990); W. Brian Howell, *Shuford North Carolina Civil Practice and Procedure* § 21-3 (4th ed. 1992) (order denying motion to add a party "is made in the court's discretion"). The only claim made by Cates in his petition for a contested case hearing was that the Attorney General should be "required to defend" him in the underlying action. There was no claim asserted against DEHNR until 7 March 1994, when Cates requested the trial court permit the joinder of DEHNR.

Because of our holding, it is unnecessary to address the question of whether the trial court erred in denying Durham County's motion to intervene. Otherwise, the Order of the trial court is

Affirmed.

Chief Judge ARNOLD concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I disagree with the majority's determination that nothing flows from the Attorney General's failure to fulfill its statutory duties under N.C. Gen. Stat. § 143-300.8 (1993).

Petitioner Phillip B. Cates, a registered sanitarian as defined by N.C. Gen. Stat. § 90A-50 (1992), was employed by the Environmental Health Division of the Durham County Health Department. He and Durham County appeal the trial court's order denying their Petition for Judicial Review, denying their Request for Declaratory Judgment, which included Durham County's Motion to Intervene and petitioner's

request to make the Department of Environment, Health and Natural Resources (DEHNR) an additional party, and holding that the question of state responsibility was moot. I would reverse and remand.

I.

The trial court erred by dismissing the Petition for Judicial Review, finding that the Attorney General did not have a duty to defend Mr. Cates in the H&W lawsuit under N.C.G.S. § 143-300.8, and finding the issue of state responsibility moot.

N.C.G.S. § 143-300.8 contains a very specific mandate—a sanitarian enforcing the rules of the Commission for Health Services shall be defended by the Attorney General in a lawsuit brought against the sanitarian for an act or omission made in the scope of enforcing such rules. Thus, if Mr. Cates enforced the rules of the Commission at the time he performed the preliminary soil evaluation, N.C.G.S. § 143-300.8 required the Attorney General to defend him subject to the provisions of N.C.G.S. § 143-300.4.

Affidavits in the record establish that in 1986, preliminary soil evaluations were done in Durham County as a part of the overall septic tank approval process required by the state. Durham County sanitarians and soil scientists followed the criteria set forth in 10 N.C.A.C. 10A .1934 (1990) the only procedure for conducting preliminary soil evaluations used by Durham County. In fact, the state mandated using these procedures for preliminary soil evaluations.

When Mr. Cates enforced the state's sewage regulations, he enforced the rules of the Commission. *See* 57 N.C. Atty. Gen. Rep. 2, 3 (1987); *see also* 49 N.C. Atty. Gen. Rep. 12, 14 (1979) (stating that the Department has authorized sanitarians employed by local health departments to enforce state health laws and rules and sanitarians act as authorized agents of the Department).

In short, N.C.G.S. § 143-300.8 required the Attorney General to defend Mr. Cates in this lawsuit because of a state interest. The trial court erred by dismissing the Petition for Judicial Review, upholding the Attorney General's refusal to defend Mr. Cates, and finding the question of state responsibility was moot.

II.

The trial court further erred by denying—A) Durham County's Motion to Intervene in the judicial review proceeding and, B)

Petitioners' request to make DEHNR a party to the declaratory judgment proceeding.

A.

Durham County moved to intervene in this proceeding. N.C. Gen. Stat. § 150B-46 (1991) provides that during the judicial review process, "[a]ny person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A, Rule 24." Rule 24 provides that anyone shall be permitted to intervene who claims an interest relating to the property or transaction which is the subject of the action and his absence may impair or impede his ability to protect that interest. N.C.R. Civ. P. 24(a)(2) (1990).

Durham County is an aggrieved party claiming an interest relating to the property or transaction which is the subject of the action. The County expended funds, including its own deductible, on its liability policy. Additionally, the County's absence may impair or impede its ability to protect its interest in obtaining contribution on the damages paid for this lawsuit. The trial court erred by failing to allow Durham County's motion to intervene.

B.

Petitioners requested that DEHNR be made a party to the declaratory judgment proceeding. Petitioners notified DEHNR of its indemnification claim by service of process dated 17 October 1989.

The Attorney General's obligation to defend Mr. Cates arises from the connection between his service as a sanitarian and the language of N.C.G.S. § 143-300.8 which mandates that "[DEHNR] *shall* pay . . . any settlement made on his behalf, subject to the provisions of G.S. 143-300.6." (Emphasis supplied.) To conclude that DEHNR should not be made a party is to overlook the the fact that N.C.G.S. § 143-300.8 obligates DEHNR to pay the damages even if it is not a named party. Simply put, the Attorney General represents the interests of DEHNR in these actions.

Having previously determined that Mr. Cates' actions fell within the purview of N.C.G.S. § 143-300.8, I would reverse and remand to the trial court for entry of an order granting Mr. Cates' request that DEHNR be made a party to this action.

III.

DEHNR should reimburse Durham County's insurer for—A) the attorney's fees incurred in defending the lawsuit; and B) the amount of the settlement.

A.

By defending Mr. Cates, Durham County's insurer simply fulfilled its contractual obligation to defend under terms of the insurance policy. It is entitled to no reimbursement for performing a duty that it had contracted to do. Moreover, the Attorney General's duty to defend is now a moot issue since the litigation is now concluded.

B.

However, the duty to pay damages resulting from Mr. Cates' acts of negligence is a present obligation on the part of both DEHNR and the insurer for Durham County. DEHNR is statutorily required to pay the damages under N.C.G.S. § 143-300.8, and the insurer is contractually required to pay the damages under the provisions of their policy for Durham County. Nonetheless, there can be only one recovery for the plaintiff in the original action (H&W); and, it stands to reason that this recovery should be paid jointly by Durham County through its insurance policy and DEHNR, subject to N.C.G.S. § 143-300.6.

On remand, the trial court would first determine whether the evidence sufficiently supports Durham County's determination that Mr. Cates was negligent; and if so, whether the settlement amount paid by the insurer was fair and reasonable. Upon satisfying these two determinations, the trial court would next apportion between DEHNR and Durham County the fair and reasonable contribution that each would make towards the settlement. Although I believe that Durham County is not entitled to a direct reimbursement of its attorney's fees, I would allow the trial court, in its discretion, to consider as a factor in the determination of the amount of contribution, that the State incurred no expense in defending the negligence action, and that Durham County incurred legal expense in bringing the action to a close.

In sum, I would reverse and remand this matter to the trial court for a determination of the amount of contribution that DEHNR must make towards the settlement subject to the limitations set forth in N.C.G.S. § 143-300.6.

RICHARD L. GAINEY v. NORTH CAROLINA DEPARTMENT OF JUSTICE

No. 95-312

(Filed 2 January 1996)

1. Public Officers and Employees § 67 (NCI4th)— SBI agent—dismissal—just cause

There was just cause for the dismissal of an SBI agent where the agent was dismissed for not meeting reporting deadlines and the State Personnel Commission found that plaintiff was able to meet the requirement when he made an effort to do so, but that no effort was made until two months prior to his dismissal. These findings support the conclusion that plaintiff was dismissed for just cause.

Am Jur 2d, Civil Service § 63.

What constitutes unfair labor practice under state public employee relations acts. 9 ALR4th 20.

2. Public Officers and Employees § 66 (NCI4th)— SBI agent—dismissal—procedure

The conclusion by the State Personnel Commission that plaintiff's dismissal was procedurally correct was supported by the findings where the SBI made specific findings that plaintiff's dismissal was recommended, a pre-dismissal conference was scheduled, plaintiff attended the conference, there is uncontradicted evidence in the record that the specific reasons for dismissal were reviewed with plaintiff during the conference and that he was given an opportunity to respond to the allegations, although there are no specific findings, and, although there are no findings and no evidence that plaintiff received advance written notice of the pre-dismissal conference, it is clear that the purposes of the conference were met in that plaintiff attended the conference, and plaintiff has not argued nor put forth evidence that any failure to receive written notice prejudiced him in any way.

Am Jur 2d, Civil Service §§ 52 et seq.

What constitutes unfair labor practice under state public employee relations acts. 9 ALR4th 20.

3. Public Officers and Employees § 67 (NCI4th)— SBI agent—dismissal—failure to meet reporting deadline—deadline reasonable

There was evidence in an action by an SBI agent dismissed for failing to meet reporting deadlines that the deadlines were reasonable where the rule was promulgated for the purpose of providing timely written reports to district attorneys, to aid in prosecution, and to enhance the credibility of the testimony of SBI agents, and the rule provides that the five-day requirement could be extended for legitimate reasons.

Am jur 2d, Civil Service § 63.

4. Public Officers and Employees § 66 (NCI4th)— SBI agent—dismissal—due process

A dismissed SBI agent's pre-dismissal conference met the requirements of procedural due process where there were findings supported by substantial evidence that plaintiff was given both oral and written notice of the charges against him, and that he knew that the evidence consisted of reviews of his reports over a period of approximately four years; that plaintiff was given an opportunity to respond to the allegations and that plaintiff submitted a memo suggesting ways he could improve his performance in the future; and plaintiff never disputed that he did not maintain his records in accord with SBI policy or meet the reporting deadline.

Am Jur 2d, Civil Service §§ 52 et seq.

5. Public Officers and Employees § 66 (NCI4th)— SBI agents—dismissal—one rehired—equal protection

There was no violation of equal protection where plaintiff was dismissed as an SBI agent for not meeting reporting deadlines, while another agent who had not met the deadlines resigned and was rehired, but both agents had been given the option of resigning and re-applying and plaintiff chose not to resign. Nothing in the record suggests that plaintiff was singled out for dismissal or treated differently than the other agent. Furthermore, there is no evidence that plaintiff has re-applied.

Am Jur 2d, Civil Service §§ 52 et seq.

6. Public Officers and Employees § 66 (NCI4th)— SBI agent—dismissal—warnings two years old

It was not improper for the North Carolina Department of Justice to dismiss plaintiff SBI agent based on warnings which were two years old. There is no requirement that the warnings occur within some period of time prior to the dismissal. Moreover, the violations here related to the very reasons for which the employee was dismissed.

Am Jur 2d, Civil Service §§ 52 et seq.

Appeal by petitioner from judgment filed 27 October 1994 in Wake County Superior Court by Judge E. Lynn Johnson. Heard in the Court of Appeals 5 December 1995.

Young Moore and Henderson, P.A., by John A. Michaels, for petitioner-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General John H. Watters, for respondent-appellee State.

GREENE, Jupdge.

Richard L. Gainey (plaintiff) appeals from a judgment of the trial court filed 27 October 1994, affirming the final decision of the State Personnel Commission (SPC), which determined that plaintiff's discharge by the North Carolina Department of Justice (Justice) was procedurally correct and for just cause.Plaintiff was dismissed from his position as a special agent for the State Bureau of Investigation (SBI) after a pre-dismissal conference, which followed a series of warnings, because plaintiff repeatedly failed to meet reporting deadlines. Pursuant to N.C. Gen. Stat. § 150B-23, on 19 April 1991, plaintiff filed a petition with the Office of Administrative Hearings for a contested case hearing, alleging that his dismissal was procedurally incorrect, because the warnings preceding his dismissal were too old, and substantively incorrect, because Justice did not consider plaintiff's improvement in filing his paperwork. In his petition and in appeals from the SPC, plaintiff has sought reinstatement with back pay and benefits.

After review by an administrative law judge, pursuant to N.C. Gen. Stat. § 150B-32, on 9 February 1993, the SPC found as fact that

plaintiff had worked for Justice from 17 November 1980 until 31 January 1991. In 1985, Robert Morgan (Morgan), the new director of the SBI, instituted standardized operating procedures which required that all reports "be dictated within five days of the activity[,] unless an extension" was approved by the agent's supervisor. The reporting deadline was instituted because Morgan "was concerned about the timeliness and quality of SBI reports." Morgan's concern resulted from complaints by district attorneys that they were unable to "try . . . cases because the [SBI] reports were not" in their case files and the credibility concerns that result from reports made months after investigative interviews. Plaintiff's files were reviewed periodically until his dismissal and he received a series of warnings from July 1986 through December 1988, when plaintiff received a final written warning. The warnings were issued because plaintiff did not comply with SBI reporting deadlines. During these same years plaintiff received satisfactory ratings on his performance evaluations, but in each evaluation it was noted that plaintiff failed to comply with reporting deadlines.

On 11 September 1989, it was noted that plaintiff had improved in his reporting, but "was still disorganized and failed to follow up on cases." After this noted improvement, plaintiff requested that his supervisor expunge the final warning from his personnel file. Although plaintiff's supervisor responded that plaintiff "had made improvement and had 'turned the corner,' " his supervisor stated that it would take a six-month period of continuous improvement for his supervisor to bring plaintiff's request to Morgan's attention. Although, again plaintiff "received an overall rating of good on his performance evaluation for the period" of 1 January 1990 through 30 June 1990, it was noted that plaintiff "still needed improvement in the timeliness and correctness of administrative reports."

Upon review by the assistant director of the SBI of investigative files in plaintiff's area, the assistant director recommended to Morgan that both plaintiff and Special Agent Walter House (House) be dismissed. The assistant director stated that House failed to comply with the five-day reporting deadline in most of his files and that although plaintiff had improved, "the level of improvement was not near to satisfactory performance." After this review, plaintiff met with Morgan on 19 November 1990. Following this meeting, plaintiff "paid special attention to finding and correcting the reporting deficiencies and 'need-to-do's' in all of his files." Plaintiff also arranged for his supervisor to do a special case file review, which revealed that everything

in plaintiff's file was in order on 30 November 1990. On 16 January 1991, plaintiff and House had a pre-dismissal conference with Morgan, during which both were given the option of resigning and reapplying. It is undisputed that the day after this conference, plaintiff submitted a letter suggesting a method for improving his reporting. When plaintiff refused to resign, he was discharged, by letter on 30 January 1991. House, however, chose to resign and was rehired in July 1991. Plaintiff's review for the period 1 July 1990 through 21 January 1991 noted that he had improved in the area of meeting deadlines, but "that not all reports were completed within the designated reporting period." The SPC finally found that plaintiff's "job performance was deficient in terms of his often failing to comply with the SBI's requirement that investigative activity be dictated within five (5) working days of the activity." The SPC further found [1] the plaintiff "was able to meet the [reporting deadline] when he made an effort to do" so but that no effort was made until after November 1990, some two months prior to his dismissal. The SPC also found that the reporting deadline was reasonable and that neither the SBI nor any investigation or prosecution was adversely affected by plaintiff's failure to comply with the reporting deadline.

The SPC then made the following relevant conclusions of law:

> 9. The [plaintiff's] persistent failure to comply with SBI's reporting deadlines constituted just cause for dismissal on the basis of inadequate job performance.
>
> . . . .
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> 12. If the [plaintiff's] situation had been one where there had been only occasional lapses that had resulted in disciplinary action, then utilizing the [agency's policy that "serious consideration should be given to starting the disciplinary process over again with an oral warning" where warnings are more than 24 months old] would be appropriate. The [plaintiff's] violation of the reporting deadlines was, however, [an] ongoing problem. This [is] not the type of situation where the violations were so unrelated that the age of the violations would indicate that it was [appropriate] to start the disciplinary process anew.
>
> . . . .
>
> 14. The [plaintiff's] discharge was procedurally correct.

1. Although denominated as a conclusion of law, we treat this conclusion as a finding of fact because its determination does not involve the application of legal principles. *Coble v. Coble*, 300 N.C. 708, 713, 268 S.E.2d 185, 189 (1980).

Pursuant to N.C. Gen. Stat. § 150B-43, plaintiff filed a petition for judicial review of the SPC's decision, and on 27 October 1994, the trial court affirmed the decision of the SPC.

The issues are whether (I) the SPC's conclusion of law that plaintiff was dismissed for just cause is supported by the findings of fact; (II) the conclusion that plaintiff's dismissal was procedurally correct is supported by the findings of fact; (III) the SPC's finding that the reporting deadline requirements were reasonable is supported by the evidence; (IV) plaintiff's pre-dismissal conference lacked procedural due process; (V) plaintiff's dismissal deprived him of equal protection of the law; and (VI) plaintiff's prior warnings, which occurred two years prior to his dismissal, can provide a procedural basis for his dismissal.

Standard of Review

A final agency decision may be reversed or modified, by either a superior court or this Court (both of which sit as appellate courts under the Administrative Procedure Act), *see Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980), if "the agency's findings, inferences, conclusions or decisions are:"

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

N.C.G.S. § 150B-51(b) (1991). In determining whether to reverse or modify a decision, an appellate court reviews the agency's decision either *de novo* or pursuant to the whole record test, depending upon the error that is alleged and limited by the exceptions and assignments of error as set forth during the pendency of the action. *Brooks v. Ansco & Assocs.*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994); *In re Ramseur*, 120 N.C. App. 521, 524, 463 S.E.2d 254, 256 (1995); *Dockery v. North Carolina Dept. of Human Resources*, 120 N.C. App.

827, 830, 463 S.E.2d 580, 582 (1995); *see Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987) (review is limited to errors preserved through entire process), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). "Where it is alleged [that] the agency's [findings, inferences, conclusions or] decision [are] not supported by substantial evidence or are arbitrary and capricious," then the agency's decision is reviewed pursuant to the whole record test. *Ansco & Assocs.*, 114 N.C. App. at 716, 443 S.E.2d at 92. This test requires that the reviewing court "examine all competent evidence in the record, including that which detracts from the agency's decision . . . to determine if the agency's decision was supported by substantial evidence." *Id.* " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Watson*, 87 N.C. App. at 639, 362 S.E.2d at 296 (*quoting Lackey v. North Carolina Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)). All other errors raised pursuant to section 150B-51(b) require *de novo* review. *See Ansco & Assocs.*, 114 N.C. App. at 716, 443 S.E.2d at 92.

I

[1] A career State employee may be dismissed only for "just cause." N.C.G.S. § 126-35 (1993); *Walker v. North Carolina Dept. of Human Resources*, 100 N.C. App. 498, 504, 397 S.E.2d 350, 355 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). Just cause may be supported by either unsatisfactory job performance or personal misconduct which is detrimental to State service. *Amanini v. North Carolina Dept. of Human Resources*, 114 N.C. App. 668, 679, 443 S.E.2d 114, 120 (1994). Unsatisfactory job performance is defined as "[w]ork-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency." N.C. Admin. Code tit. 25, r. 1J.0614(j) (Sept. 1995); *Amanini*, 114 N.C. App. at 678, 443 S.E.2d at 120 (administrative rules, promulgated pursuant to statutory authority, have effect of law). A conclusion that an employee has been dismissed for just cause[2] based upon failure to satisfy "job requirements" must be supported by findings that the "job requirements were *reasonable*[3], and if so, that the employee made no

2. "Just cause" is a legal basis, set forth by statute, for the termination of a State employee, and requires the application of legal principles. Thus, its determination is a question of law. *Coble v. Coble*, 300 N.C. 708, 713, 268 S.E.2d 185, 189 (1980).

3. The determination of "reasonableness" and "reasonable efforts" does not require the application of legal principles and is therefore a question of fact. *Coble*, 300 N.C. at 713, 268 S.E.2d at 189.

reasonable effort to meet them" during his employment. *See Walker*, 100 N.C. App. at 504, 397 S.E.2d at 355 (emphasis in original).

The SPC found that the five day reporting deadline was reasonable. It further found that the plaintiff "was able to meet the [requirement] when he made an effort to do" so but that no effort was made until after November 1990, some two months prior to his dismissal. These findings support the SPC's conclusion that plaintiff was dismissed for just cause.

II

[2] The plaintiff also argues that the SPC's conclusion that his discharge was procedurally correct is unsupported by the findings of fact. The procedure for dismissing a State employee requires:

- Recommendation of dismissal by a supervisor.
- Scheduling of a pre-dismissal conference.
- Advance written notice to the employee of the time and location of the pre-dismissal conference and reason for the dismissal recommendation.
- Pre-dismissal conference where recommendation for dismissal is reviewed with employee, including specific reasons for dismissal, and employee is given an opportunity to put forth information and reasons not to dismiss him.
- Management review after the conference and consideration of employee's responses. If dismissal decision is reached, a dismissal letter containing the reason for dismissal, effective date of dismissal and appeal rights must be written.

See N.C. Admin. Code tit. 25, r. 1J.0613(4) (Sept. 1995). The purposes of the procedural requirements are to "prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal" and to allow the employee to "effectively appeal his discharge." *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 351, 342 S.E.2d 914, 922-23, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986).

The SPC made specific findings that plaintiff's dismissal was recommended, a pre-dismissal conference was scheduled and held and plaintiff attended the conference. Although there are no specific findings that the specific reasons for the dismissal were reviewed with plaintiff during the conference or that he was given an opportunity to

respond to the allegations, there is uncontradicted evidence of this in the record. *See Dockside Discotheque v. Board of Adjustment of Southern Pines*, 115 N.C. App. 303, 308, 444 S.E.2d 451, 454 (failure to make findings not fatal where uncontradicted record evidence would support requisite findings), *disc. rev. denied*, 338 N.C. 309, 451 S.E.2d 634 (1994). There are, however, no findings, nor is there evidence, that plaintiff received advance *written* notice of the pre-dismissal conference. This is not fatal in the present case, because it is clear that the purposes of the pre-dismissal conference were met, the plaintiff attended the conference, providing the clear inference that he had notice of the conference, and plaintiff has not argued, nor put forth any evidence, that any failure to receive advance written notice prejudiced him in any way. Accordingly, the conclusion that plaintiff's dismissal was procedurally correct is supported by the findings and the record.

III

[3] Plaintiff argues that the finding that the reporting deadline was reasonable is not supported by substantial evidence. We disagree. Reasonable is defined as what is "[f]air, proper, just, moderate [or] suitable under the circumstances." *Black's Law Dictionary* 1265 (6th ed. 1990). The purpose of the rule and whether it serves its purpose are appropriate considerations in evaluating its reasonableness.

In this case the rule was promulgated for the purpose of providing timely written reports to district attorneys, to aid in prosecution, and to enhance the credibility of the testimony of SBI agents. The requirement that the dictation occur within five days of the activity serves the stated purpose. The rule also provided that for legitimate reasons, the five day requirement could be extended. This evidence is such that a reasonable mind might accept as adequate to support a determination that the deadline was reasonable under the circumstances.

IV

[4] Plaintiff argues that his pre-dismissal conference did not meet the requirements of procedural due process.

It is not disputed that plaintiff had a property interest in his employment by the State which is protected by due process. *Bishop v. North Carolina Dept. of Human Resources*, 100 N.C. App. 175, 177, 394 S.E.2d 702, 703 (1990). To comply with due process requirements in dismissing a state employee, the agency must provide "oral or writ-

ten notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity[, which is meaningful in time and in manner,] to present his side of the story." *Id.*

In this case, there were findings, which are supported by substantial evidence, that plaintiff was given both oral and written notice of the charges against him and that he knew that the evidence consisted of reviews of his reports over a period of approximately four years. There is undisputed evidence in the record that plaintiff was given an opportunity to respond to the allegations during the 16 January meeting and that plaintiff submitted a memo on 17 January suggesting ways that plaintiff could improve his performance in the future. Plaintiff never disputed that prior to October 1990 he did not maintain his records in accord with SBI policy or meet the reporting deadline. Thus, plaintiff's 16 January meeting with Morgan met due process requirements.

V

[5] Plaintiff argues that the action of Justice in allowing House to resign and then rehiring House and allowing plaintiff to be dismissed denied him equal protection under the law.

Equal protection guards citizens from being treated differently under the same law from others who are similarly situated. *United States v. Falk*, 479 F.2d 616, 618-19 (7th Cir. 1973); *Walters v. Blair*, 120 N.C. App. 398, 400, 462 S.E.2d 232, 233-34 (1995). Disparate treatment, which occurs when an employer treats one employee less favorably than others, and disparate impact, which is a discriminatory result from some employment practice both violate equal protection. *North Carolina Dept. of Correction v. Hodge*, 99 N.C. App. 602, 611, 394 S.E.2d 285, 290 (1990); *Mallory v. Booth Refrigeration Supply Co.*, 882 F.2d 908, 912 (4th Cir. 1989). Plaintiff argues that he was treated differently from House, thus raising the question of disparate treatment. *See Hodge*, 99 N.C. App. at 611, 394 S.E.2d at 290.

The undisputed evidence and findings of the SPC, however, reveal that both plaintiff and House were disciplined for not maintaining their files pursuant to SBI policy. Both plaintiff and House had pre-dismissal conferences and were given the option of resigning or being dismissed. Nothing in the evidence suggests that plaintiff was singled out by Morgan for dismissal or treated any differently than House. Plaintiff and House made different choices among the same that were provided to both. Furthermore, even assuming that plain-

tiff's argument raises the question of whether the practice of allowing he and House to choose between options resulted in House's being rehired and plaintiff not being rehired, there is no evidence that plaintiff has applied for a new position with Justice. Accordingly, the plaintiff's equal protection rights were not violated.

VI

[6] The plaintiff argues that it was improper for Justice to base his dismissal on warnings which were more than two years old. We disagree.

Although an employee is entitled to receive disciplinary warnings prior to dismissal for unsatisfactory job performance, *Jones v. Department of Human Resources*, 300 N.C. 687, 691, 268 S.E.2d 500, 502 (1980); N.C. Admin. Code tit. 25, r. 1J.0605(b) (Oct. 1990) (amended Oct. 1995), there is no requirement that the warnings occur within some period of time prior to the dismissal. North Carolina Office of State Personnel, *State Personnel Manual*, § 9 at 8.2 (Feb. 1985) (amended Oct. 1995). Thus the SPC did not err in affirming the dismissal based on warnings that occurred two years prior to the actual dismissal, especially when the earlier violations, as here, related to the very reasons for which the employee was dismissed.

We have reviewed plaintiff's other assignments of error and overrule them.

Affirmed.

Judges MARTIN, Mark D., and McGEE concur.

CAROL GURLEY MASSEY, Plaintiff v. BEN FINCH MASSEY, JR., Defendant

No. 9410DC405

(Filed 2 January 1996)

1. Divorce and Separation § 548 (NCI4th); Trial § 227 (NCI4th)— separation, reconciliation, subsequent separation—child custody and support—voluntary dismissal

The trial court had the authority to enter an order voiding the parties' earlier Stipulation of Dismissal of all claims and counterclaims in a divorce and child custody action where an order was

filed awarding child custody to plaintiff and ordering defendant to pay child support; the parties reconciled and filed a Stipulation of Dismissal executed in accordance with N.C.G.S. § 1A-1, Rule 41(a); following a second separation plaintiff filed a new action which included claims for custody, child support, and divorce; and the trial court ruled that the Stipulation of Dismissal was void, consolidated the second custody action with the first, and treated the complaint as a motion for custody based on changed circumstances. The express language of N.C.G.S. § 1A-1, Rule 41 states the parties may voluntarily dismiss an "action" or "claim" by stipulation; nothing in Rule 41 grants authority to the parties in a lawsuit, without action by the trial court, to vacate by stipulation an order previously entered in the action to which they are parties. For purposes of Rule 41(a), the trial court's first order resolving matters of permanent custody and support constituted a final judgment. The parties may have been at liberty to appeal the order, but were not free under Rule 41(a) to dismiss voluntarily the finally determined issues of child custody and support, even though the court maintains continuing jurisdiction over these issues and they could be modified subsequently upon a proper showing of change of circumstances.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 10, 19; Divorce and Separation §§ 1016, 1079.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree. 100 ALR3d 1129.

2. Trial § 115 (NCI4th)— child custody and support—actions before and after reconciliation—joinder

There was no abuse of discretion by the trial court in consolidating two divorce and child custody actions, one before a reconciliation and one after. It has been held in *Walker v. Walker*, 59 N.C. App. 485, that while reconciliation voids alimony provisions and terminates separation agreements, the courts are open after a reconciliation and second separation to whatever child support relief may be justified, the original cause at all times pending; because of the continuing jurisdiction of the court over child custody and support matters, any prior action in which a permanent order has been entered remains pending; a court has the discretionary power to consolidate actions for trial; when the consolidation of actions for the purpose of hearing is assigned as error,

the appellant must show injury or prejudice arising therefrom; and no injury or prejudice by suffered by defendant could be discerned.

Am Jur 2d, Actions § 132.

Appeal by defendant from order filed 4 March 1994 by Judge Anne B. Salisbury in Wake County District Court. Heard in the Court of Appeals 1 February 1995.

No brief filed on behalf of plaintiff-appellee.

Ragsdale, Kirschbaum & Nanney, P.A., by William L. Ragsdale and Connie E. Carrigan, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's order voiding the parties' earlier Stipulation of Dismissal. He contends the court lacked authority to enter the order. We uphold the trial court.

Relevant background information is as follows: Plaintiff and defendant were married 30 November 1985 and separated 1 March 1991. Two children were born of the marriage, Ben Finch Massey, III, born 31 March 1986, and Brandon Clay Massey, born 4 March 1988.

On 11 September 1991, plaintiff filed a complaint (91 CVD 9542) seeking temporary and permanent custody of the two minor children, temporary and permanent child support, counsel fees, divorce from bed and board, temporary and permanent alimony, equitable distribution of marital property, and a temporary restraining order and injunction enjoining the waste, transfer or disposition of marital assets. Defendant answered and counterclaimed for child custody, child support, and equitable distribution 18 October 1991.

In a detailed and extensive order filed 25 November 1991, Judge Anne B. Salisbury awarded "exclusive care, custody and control of the minor children" to plaintiff, subject to specified visitation by defendant, and ordered defendant to pay child support and plaintiff's counsel fees.

However, in March 1992 when the parties reconciled, they signed and filed a "Stipulation of Dismissal," executed "in accordance with Rule 41(a)," which purportedly dismissed "all claims and counterclaims asserted by them" in case 91 CVD 9542. Following a second separation, plaintiff filed a new action (93 CVD 10481), seeking cus-

tody of the minor children, child support, counsel fees, and absolute divorce from defendant. In her complaint, plaintiff acknowledged the stipulation of dismissal filed earlier in case 91 CVD 9542. Defendant answered and counterclaimed for child custody, child support, counsel fees, and absolute divorce.

On 4 March 1994, the trial court ruled *sua sponte* that the Stipulation of Dismissal in case 91 CVD 9542 was void, and further ordered as follows:

> The new custody action, Case No. 93 CVD 10481, is hereby consolidated with Case No. 91 CVD 9542 and the Complaint filed therein is treated as a Motion for Custody based on changed circumstances, that being the subsequent re-separation of the parties.

Defendant gave notice of appeal to this Court 15 March 1994.

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[1] Defendant contends in his sole assignment of error that the trial court improperly voided the parties' stipulated dismissal of the court's previously entered child custody and support order. We disagree.

Rule 41 of the North Carolina Rules of Civil Procedure states in pertinent part:

> (a) *Voluntary dismissal; effect thereof.*—
>
> (1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.
>
> . . . .
>
> (c) *Dismissal of counterclaim; crossclaim, or third-party claim.*—The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

N.C. Gen. Stat. § 1A-1, Rule 41 (1990).

When statutory language is clear and unambiguous, it must be held to mean what it plainly expresses, "keeping in mind that non-technical statutory words are to be construed in accordance with their common and ordinary meaning." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980) (citation omitted). Thus, "[s]tatu-

tory 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) (citing *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)).

The express language of Rule 41 states the parties may voluntarily dismiss an "action" or "claim" by stipulation. An "action" is defined as "a formal complaint within the jurisdiction of a court of law." Black's Law Dictionary 28 (6th ed. 1990). A "claim" is a "demand for money or property" or a "cause of action." *Id.* at 247.

By contrast, an "order" is a "direction of a court or judge made or entered in writing" which "decides some matter litigated by the parties," *i.e.*, the *claim* or *action* brought by a party. *Id.* at 1096. In the case *sub judice*, an *order* of the trial court awarding plaintiff permanent custody and obligating defendant to pay $546.00 in permanent child support was rendered 25 November 1991. Nothing in Rule 41 grants authority to the parties to a lawsuit, without action by the trial court, to vacate by stipulation *an order* previously entered in the action to which they are parties.

Moreover, *Collins v. Collins*, 18 N.C. App. 45, 196 S.E.2d 282 (1973), relied upon heavily by defendant, likewise does not operate to invest such authority in the parties. Defendant points to the following language of this Court:

> [P]laintiff's voluntary dismissal of the prior action . . . was a final termination of that action and . . . no valid order could be made thereafter in that cause.

Id. at 50, 196 S.E.2d at 286. While taking no quarrel with our previous holding, we point out that the decision in *Collins* indicated neither that the trial court's order was *vacated* nor that the action was *dismissed*, regardless of whatever phraseology may have been employed by the parties. Rather we determined the action to have been *terminated*, albeit the order remained intact, and that no valid subsequent orders might be entered therein, including adjudications of contempt for violation of the extant order. *Id.* at 51, 196 S.E.2d at 286. In addition, *Collins* is distinguishable on its facts.

In *Collins*, plaintiff filed a complaint seeking temporary and permanent alimony, child custody and support and counsel fees. *Id.* at 47, 196 S.E.2d at 284. Following a hearing on plaintiff's claim for temporary support, the trial court entered an order awarding her temporary custody and support for the minor child. *Id.* Plaintiff subse-

quently filed a voluntary dismissal of her action, but four days later initiated a new complaint again asserting claims to, *inter alia*, temporary and permanent alimony, and custody and support for the child. Following defendant's answer and a hearing, the court awarded plaintiff permanent child custody and support. *Id.* at 46-47, 196 S.E.2d at 283-84. Both parties appealed. *Id.* at 48, 196 S.E.2d at 284.

The issue before this Court concerned the validity of plaintiff's voluntary dismissal and the procedural effect of such dismissal. *Id.* at 49, 196 S.E.2d at 285. We stated that pursuant to Rule 41(a)(1), " 'plaintiff has an absolute right to a voluntary, non-prejudicial dismissal up to the time he rests his case.' " *Id.* at 50, 196 S.E.2d at 285. Thus, the voluntary dismissal taken after the order awarding plaintiff temporary custody and support—but prior to plaintiff's "rest[ing her] case" on the claim for permanent custody—constituted a "final termination" of the action and the court was without authority to enter further orders therein. *Id.* at 50, 196 S.E.2d at 286.

Our decision in *Wood v. Wood*, 37 N.C. App. 570, 246 S.E.2d 549 (1978), *rev'd on other grounds*, 297 N.C. 1, 252 S.E.2d 799 (1979) is instructive. Plaintiff therein filed notice of voluntary dismissal after judgment of divorce had been rendered in her favor. *Id.* at 571, 246 S.E.2d at 550. In holding the dismissal to be of "no legal efficacy," *id.* at 575, 246 S.E.2d at 552, we emphasized that

> a voluntary dismissal under Rule 41 will lie only prior to entry of *final judgment*. After *final judgment*, any correction, modification, amendment, or setting aside can only be done by the court.

Id. at 574-75, 246 S.E.2d at 552 (emphasis added); see N.C.G.S. §§ 1A-1, Rule 59 (amendment of judgments) and Rule 60 (relief from judgment or order).

However, defendant insists the 25 November 1991 order was not a "final" judgment. Citing, *inter alia*, *Stanback v. Stanback*, 266 N.C. 72, 145 S.E.2d 332 (1965) and *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992), defendant maintains that "[o]nce custody and support are brought to issue there can be 'no final judgment in that case, because the issue of custody and support remain *in fieri* until the children have become emancipated.' " *Brooks*, 107 N.C. App. at 46, 418 S.E.2d at 536 (quoting *In re Holt*, 1 N.C. App. 108, 112, 160 S.E.2d 90, 93 (1968)).

We agree that our statement in *Brooks* accurately characterizes the law. Indeed, this Court has consistently upheld the continuing

jurisdiction of the trial court over child custody and support actions and has often reiterated that the "jurisdiction of the court 'to protect infants is broad, comprehensive and plenary.' " *Latham v. Latham*, 74 N.C. App. 722, 724, 329 S.E.2d 721, 722 (1985) (quoting *Spence v. Durham*, 283 N.C. 671, 687, 198 S.E.2d 537, 547 (1973), *cert. denied*, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974); *see also Stanback*, 266 N.C. 72, 75, 145 S.E.2d 332, 334 (1965) ("in divorce actions, . . . jurisdiction over custody of the unemancipated children of the parties . . . . continues even after divorce.") However, defendant misapprehends the application of these principles to the issue *sub judice.*

In a subsequent case brought by the same parties to the earlier *Stanback* decision, *Stanback v. Stanback*, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975), for example, our Supreme Court explained that "[a] judicial decree in a child custody and support matter is subject to alteration upon a change of circumstances affecting the welfare of the child and, therefore, is not final *in nature.*" (emphasis added.)

Our later decision in *Coleman v. Coleman*, 74 N.C. App. 494, 328 S.E.2d 871 (1985), provides additional guidance. Defendant therein contended on appeal that the trial court had erred by denying his G.S. § 1A-1, Rule 60(b) motion for relief from an order requiring him to pay child support, alimony *pendente lite*, and counsel fees. *Id.* at 496, 328 S.E.2d at 872. Plaintiff responded that Rule 60(b) applies only to " 'final' orders of judgments, and an order for payment of child support . . . is not final since it may be subsequently modified . . . ." *Id.* We held that

> a custody order was a 'final' order within the meaning of G.S. 1A-1, Rule 60(b) even though it could be modified subsequently upon a proper showing of change of circumstances under G.S. 50-13.7. The same rationale applies to orders for child support. Like custody orders, child support orders are not 'final' orders *only* in the sense that they may be modified subsequently upon a motion in the cause and a showing of change of circumstances as provided in G.S. 50-13.7.

Id. at 496, 328 S.E.2d at 872 (emphasis added).

We further observed that alimony *pendente lite*,

> [b]y definition[,] . . . is a temporary award, made during the pendency of a judgment that will be final except for the possibility of modification for change of circumstances.

Id. at 497, 328 S.E.2d at 873. Concluding, this Court held the child support award to be a final order, there being no indication it was to provide for temporary child support during the pendency of the litigation; the order was therefore properly subject to defendant's Rule 60(b) motion. *Id.*

In a similar vein, our decision in *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986), held plaintiff's appeal to be interlocutory, as the trial court's order from which he appealed

> does not finally determine the issue involved, but only provides for *temporary* custody until an August hearing date for further proceedings preliminary to a *final* decree.

(emphasis added). *See also Berkman v. Berkman*, 106 N.C. App. 701, 702, 417 S.E.2d 831, 832 (1992) (citing *Dunlap*).

We also note numerous references by this Court and our Supreme Court to permanent—as distinguished from temporary—awards of child custody and child support as "final judgments." *See, e.g., Sikes v. Sikes*, 330 N.C. 595, 599, 411 S.E.2d 588, 590 (1992) (N.C. Gen. Stat. § 50-13.10 does not apply until a "final order" of child support is entered); *Broyhill v. Broyhill*, 81 N.C. App. 147, 148, 343 S.E.2d 605, 606 (1986); *Stevens v. Stevens*, 68 N.C. App. 234, 234, 314 S.E.2d 786, 787, *disc. review denied*, 312 N.C. 89, 321 S.E.2d 908 (1984); *Schrock v. Schrock*, 89 N.C. App. 308, 309, 365 S.E.2d 657, 658 (1988); *Brookshire v. Brookshire*, 89 N.C. App. 48, 49, 365 S.E.2d 307, 308 (1988).

We conclude that for purposes of Rule 41(a), the trial court's 25 November 1991 order in case 91 CVD 9542, resolving the matters of permanent custody and support, constituted a "final judgment." *Wood*, 37 N.C. App. at 574-75, 246 S.E.2d at 552; *Coleman*, 74 N.C. App. at 497, 328 S.E.2d at 873 ("final order"). While the court maintains continuing jurisdiction over these issues in order to "protect infants," *Latham*, 74 N.C. App. at 724, 329 S.E.2d at 722, the order was not "interlocutory," as would be a temporary order of custody and support, *Dunlap*, 81 N.C. App. at 676, 344 S.E.2d at 807, but was indeed " 'final' . . . even though it could be modified subsequently upon a proper showing of change of circumstances under G.S. 50-13.7." *Coleman*, 74 N.C. App. at 496, 328 S.E.2d at 872. While the parties may have been at liberty to appeal the 25 November 1991 order, they were not free under Rule 41(a) to dismiss voluntarily the "finally

determined" issues of child custody and support. The trial court therefore did not err in ruling that the "Stipulation of Dismissal" filed in case 91 CVD 9542 by the parties was void and of no effect as to the child custody and child support issues previously resolved by "final judgment." *Wood*, 37 N.C. App. 574-75, 246 S.E.2d at 552. As defendant has not raised on appeal the effect of the stipulation upon his obligation to pay plaintiff's counsel fees under the 25 November 1991 order, we do not address this question. *See* N.C.R. App. P. 28(a).

Defendant also objects that upholding the trial court's action herein

> would be contrary to public policy of this State in that it would interpret this ruling to mean that married persons who are separated may not agree to dismiss a custody and support *action* after reconciling their differences. Such a rule would be inconsistent with the objective of re-establishment of the family for the benefit of both the children and the parents.

We disagree. Our holding provides that under Rule 41(a) and existing case law, parties may not voluntarily dismiss a *final* custody and child support order. This ruling neither prevents nor interferes with reconciliation following entry of a final order on the issues of child custody and child support. Instead, we have simply determined that voluntary dismissal under Rule 41(a) is inappropriate in such instance.

We note in this context that the record herein reflects execution by the parties, prior to entry of the "Stipulation of Dismissal," of a notarized "Consent Agreement" [AOC Form No. 615] subsequently *signed by a District Court Judge*. This Agreement provided that the "Supporting Parent [defendant] may temporarily suspend his support payments to the Clerk of Superior Court" until action seeking reinstatement by the parent receiving support. The effect of the previous order was thus properly stayed and the case considered inactive for purposes of child support enforcement. Similarly, consent agreements *approved by the Court* might also address earlier custody orders.

[2] Plaintiff's final argument challenges the trial court's consolidation of the two actions (case no. 91 CVD 9542 and case no. 93 CVD 10481) and treatment of the second as a motion for modification based upon changed circumstances. The trial court did not err in taking this procedural stance.

First, in *Walker v. Walker*, 59 N.C. App. 485, 488-89, 297 S.E.2d 125, 127 (1982), this court held that while reconciliation voids alimony provisions and terminates separation agreements,

> this principle has not been applied to void, as a matter of law, a *judgment* ordering payment of child support . . . . "If, after the order . . . there was a reconciliation and the wife and . . . children resumed the family group and lived together with the defendant-husband, the necessity for the [child] support payments . . . ceased . . . . If thereafter there was a subsequent separation and need for [child] support payments . . ., the courts are open for whatever relief may be justified by the situation then existing. The original cause was at all times pending . . . ." (quoting *Jackson v. Jackson*, 14 N.C. App. 71, 74-75, 187 S.E.2d 490, 493 (1972).)

Next, because of the continuing jurisdiction of the court over child custody and support matters noted above, *Stanback*, 266 N.C. at 75, 145 S.E.2d at 334, any prior action in which a permanent order has been entered "remains pending . . . . [and] works an abatement of a subsequent action . . . ." *Brooks*, 107 N.C. App. at 46-47, 418 S.E.2d at 536 (citation omitted). *See also Jackson v. Jackson*, 68 N.C. App. 499, 501-02, 315 S.E.2d 90, 91 (jurisdiction of court over custody and support issues raised in pleadings continues "even when the issues are *not* determined by the judgment" (emphasis added)), and *Latham*, 74 N.C. App. at 724-25, 329 S.E.2d at 722-23 (court in which divorce action is brought "acquires jurisdiction over the custody of the unemancipated children of the parties," and "[i]n actions for custody and support only majority of the child or death of a party fully and completely determines the cause"; therefore, remarriage of parties who subsequently again separate does not terminate continuing jurisdiction of earlier divorce court over minor child which court acquired in previous divorce proceeding.)

Additionally, Rule 42 of the North Carolina Rules of Civil Procedure states in pertinent part:

> (a) *Consolidation.*—When actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

" 'A trial court has the discretionary power, even *ex memo motu*, to consolidate actions for trial,' " *Board of Education v. Evans*, 21 N.C. App. 493, 496, 204 S.E.2d 899, 901, *cert. denied*, 285 N.C. 588, 206 S.E.2d 862 (1974) (quoting 7 Strong, N.C. Index 2d, *Trial*, § 8, p. 265-66), and actions of the trial judge within judicial discretion will not be disturbed unless a clear abuse of discretion is shown, *Whaley v. Rhodes*, 10 N.C. App. 109, 112, 177 S.E.2d 735, 737 (1970) (citation omitted). Moreover, when the consolidation of actions for the purpose of hearing is assigned as error on appeal, the appellant must show injury or prejudice arising therefrom. *In re Moore*, 11 N.C. App. 320, 322, 181 S.E.2d 118, 120 (1971) (citation omitted).

In view of our holding affirming the trial court's voiding of the parties' Stipulation of Dismissal and because of the court's continuing jurisdiction acquired in consequence of its rendering the original child custody and support order, *i.e.*, 91 CVD 9542, we discern no abuse of discretion on the part of the trial court in its order of consolidation and no injury or prejudice suffered by defendant. The only proper course for defendant in any event would have been a motion in the original cause, which course was effected by the court's order of consolidation. The trial court may thereafter "grant whatever relief might be justified by the situation then existing." *Jackson*, 14 N.C. App. at 75, 187 S.E.2d at 493. Defendant will have the opportunity to be heard and present evidence on plaintiff's motion to modify child custody and child support. *See* N.C. Gen. Stat. § 50-13.7 (1987).

Affirmed.

Judges JOHNSON and MARTIN, MARK D. concur.

STATE OF NORTH CAROLINA v. WILLIAM HENRY ROGERS, JR.

No. COA94-797

(Filed 2 January 1996)

1. Evidence and Witnesses § 1460 (NCI4th)— cocaine and heroin—chain of custody—sufficient

The chain of custody was sufficient in an action arising from the sale of heroin and cocaine where there is a discrepancy as to who delivered the drugs to the detective who mailed them to the

SBI, but there is no dispute that the item delivered was the bag of drugs received from defendant.

Am Jur 2d, Evidence §§ 946, 947.

2. Evidence and Witnesses § 2841 (NCI4th)— narcotics—testimony of purchaser—use of detective's notes—refreshing memory

The trial court did not abuse its discretion in a prosecution arising from the sale of narcotics by allowing a witness to testify using a detective's notes to refresh his memory. The record in the case does not indicate that the testimony was a mere recitation of the refreshing memorandum and the testimony was therefore properly presented to the jury.

Am Jur 2d, Criminal Law §§ 725, 961; Witnesses §§ 771-776, 790.

Refreshment of recollection by use of memoranda or other writings. 82 ALR2d 473.

3. Criminal Law § 41 (NCI4th)— heroin and cocaine—presence at sale

The defendant was not entitled to a "mere presence" instruction in a prosecution arising from the sale of cocaine and heroin where a State's witness testified that on several occasions defendant directed the drug transactions by signalling others to obtain drugs. The evidence does not reasonably support an inference that defendant was merely present and not an active participant in the drug transactions.

Am Jur 2d, Trial §§ 1295, 1400.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial—State cases. 36 ALR4th 1046.

4. Criminal Law § 798 (NCI4th)— sale of heroin and cocaine—instructions on aiding and abetting—presence

There was no error in a prosecution arising from the sale of cocaine and heroin where defendant contended that the jury was not given an explanation of the law regarding aiding and abetting and acting in concert but the court gave an instruction on acting in concert from the Pattern Jury Instructions, the court essentially complied with defendant's request on criminal intent, and a

charge on presence was not required because the evidence in the record is sufficient to establish defendant's presence and participation in the various transactions.

Am Jur 2d, Trial § 1256.

5. Evidence and Witnesses § 2461 (NCI4th)— sale of heroin and cocaine—witnesses testifying under allegedly defective immunity

There was no error in a prosecution arising from the sale of cocaine and heroin where defendant argued that two of the State's witnesses testified under defective grants of immunity and that allowing those witnesses to testify prejudiced defendant and deprived him of a fair trial, but the court read to the jury one witness's agreement with the State and the other was extensively cross-examined about his belief that he was testifying under limited immunity. Additionally, the court reminded the jury during the charge that several of the witnesses had testified under immunity and that the jury should examine that testimony with great care and caution.

Am Jur 2d, Trial §§ 1401, 1412; Witnesses §§ 146-150.

Prosecutor's power to grant prosecution witness immunity from prosecution. 4 ALR4th 1221.

Appeal by defendant from judgment and commitment entered 18 November 1993 by Judge Frank R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 21 March 1995.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas B. Wood, for the State.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by Thomas R. Sallenger, for defendant-appellant.

McGEE, Judge.

On 8 November 1993, defendant, William Henry Rogers, Jr., was tried upon Bills of Indictment charging him with conspiracy to traffic in heroin, conspiracy to traffic in cocaine, four counts of possession of heroin with intent to sell and deliver, four counts of sale and delivery of heroin, three counts of possession of cocaine with intent to sell and deliver, three counts of sale and delivery of cocaine, and continuing criminal enterprise.

State's evidence included tape recordings of various drug transactions as well as the often conflicting testimony of Paul Parrish, a confessed drug user with a criminal record who was working for the Wilson Police Department to earn credit towards his community service obligation. Parrish testified about a number of different drug transactions he conducted for the Wilson police throughout the summer of 1992, many of which were tape recorded.

The drug transactions most pertinent to this appeal include the following. Parrish testified that on the afternoon of 16 July 1992, he met detective M. C. Raper of the Wilson Police Department at the Holiday Inn. Parrish was then wired with a tape recorder and transmitter. He went to a house on Claremont Circle attempting to trade a television provided by the police for drugs from defendant. Several men were present at the house when Parrish approached to make the exchange. Parrish and defendant allegedly discussed the drug transaction and defendant directed a man by the name of William X. to give Parrish two $50.00 bags of heroin by looking at William X. and saying, "Go." In return, Parrish put the television down on the ground beside defendant, who pointed to the television, looked at William X., nodded his head and said, "Put it in there" [indicating a red Toyota automobile].

Parrish next testified that on 4 August 1992, he had two conversations with defendant regarding the purchase of drugs. During one of the conversations, Parrish stated he walked up to defendant and said, "Hey, man, what you need?" Defendant responded, "I need money." Parrish then offered defendant $40.00 and in response, defendant looked at another man, Gerald McCray, and nodded his head. McCray went between two houses and returned with drugs.

The State also questioned Parrish about his transactions with defendant on 5 August 1992. Parrish testified the police outfitted him with a tape recorder and gave him a VCR to trade for drugs. He found defendant gambling with several individuals. Parrish advised defendant that he had a "four-headed VCR" and asked, "What will you give me for it? . . . can I pay you the twenty-five dollars I owe you, with the VCR and a bag of dope." Defendant nodded his head to an individual named Tom and told him to get the "bag of dope."

During the course of his testimony, it was discovered that Parrish was testifying from a set of notes which Detective Raper made from the transcripts of the various tape recorded conversations with defendant. Parrish stated he was using Raper's notes because his own

original notes were lost and the second set of notes he made based on Raper's notes were illegible. Defense counsel objected and a voir dire hearing was held. The court denied defendant's motion to strike all of Parrish's testimony and to direct verdicts in favor of defendant, but stated it would "take under advisement" defendant's motion for a mistrial. When the jury returned to the courtroom, counsel for the defendant was allowed to thoroughly cross-examine Parrish regarding the use of these notes.

Detective Raper testified about his work with Parrish on a number of drug transactions. Raper stated that after the 16 July drug purchase, Parrish met Raper at the Holiday Inn and handed him the heroin, which Raper mailed to the State Bureau of Investigation for testing. During the drug transactions on the 4th and 5th of August, Raper testified Parrish was accompanied by Detective Taylor Gaskins of the Raleigh Police Department. After each of these transactions was completed, Raper testified Gaskins recovered the heroin from Parrish and handed it to Raper, who mailed the heroin to the SBI for testing. Detective Gaskins, called by the State as a witness, confirmed Raper's testimony. She testified that on each day she worked with Parrish, he gave her the drugs as soon as he arrived at their car, and each day they met Raper at the Holiday Inn where Gaskins turned over the heroin to Raper.

The jury found defendant guilty of feloniously conspiring to sell heroin and cocaine and guilty of possession of heroin with intent to sell and deliver and guilty of selling heroin on 16 July 1992, 4 August 1992, and 5 August 1992. The trial court sentenced defendant on 18 November 1993 to fifteen years imprisonment with a suspended sentence of ten years with probation to begin upon completion of defendant's active term with a corrected judgment entered 5 April 1994. Defendant appeals from the 18 November 1993 judgment and commitment, bringing forward six assignments of error.

I. Chain of Custody

[1] Defendant's first two issues involve chain of custody questions related to the controlled substances which defendant purportedly sold to Parrish. Defendant contends the trial court erred in admitting the State's evidence which showed the substance collected from the 5 August 1992 drug transaction was heroin because the State "failed to establish a chain of custody from the moment the alleged heroin was purchased by the informant until the time it appeared in the courtroom." Defendant argues this failure results in there being insuf-

ficient evidence to convict defendant of the 5 August 1992 charges of possession of heroin with intent to sell and deliver and of selling heroin. Consequently, defendant contends he was prejudiced and received an unfair trial. We disagree.

There is sufficient evidence to establish that on 5 August 1992, Parrish and defendant engaged in a drug transaction with defendant constructively delivering the heroin to Parrish by directing another individual to give Parrish the drugs. On the day in question, Parrish was accompanied by Detective Gaskins who waited in Parrish's automobile while Parrish conducted the drug transaction with defendant. Gaskins testified the car was parked so that her view was obstructed and she was unable to see the drug transfer. However, Parrish provided the following testimony as to defendant's involvement:

> Q. Would you tell the conversation you had with him [defendant]?
>
> A. On August 5th?
>
> Q. Yes, sir.
>
> A. Like I said, I pulled up on Finch Street, walked across Powell, and Bay Bay [defendant] and Gerald and Larry Batts and Tom was [sic] playing craps. They were all sitting around playing craps.
>
> I walked up to Bay Bay [defendant], and I asked Bay Bay [defendant], I said, "Bay Bay, I've got a four-headed VCR." I said, "[w]hat will you give me for it?" I said, "[w]ill you give me—can I pay you the twenty-five dollars I owe you, with the VCR and a bag of dope."
>
> He nodded his head to Tom, told Tom to get the bag of dope, and Gerald went to get the VCR out of my vehicle.

Parrish then testified he returned to his car with the heroin he purchased from defendant. He and Detective Gaskins drove to the Holiday Inn where he delivered the heroin to Raper. This testimony was disputed by Gaskins who testified that Parrish returned to the car with the heroin and immediately gave the drugs to her. They then proceeded to the Holiday Inn, where Gaskins delivered the drugs to Raper.

At the Holiday Inn, both Raper and Gaskins labeled the material with the date and their initials and Raper mailed the substance to the SBI for testing. Evidence technician Roosevelt Riles testified he

received the material, placed his markings on it, and delivered it to SBI Chemist Linda Farren for analysis. Farren confirmed the materials contained the Schedule I controlled substance heroin and Schedule II controlled substance cocaine, with the total weight being less than one-tenth of a gram.

The above summary of the chain of custody of the substance Parrish obtained from defendant demonstrates an adequate chain of possession, delivery, transporting and safekeeping of the controlled substance. Even though there is a discrepancy as to whether it was Parrish or Gaskins who delivered the drugs to Raper, there is no dispute that the item delivered to Raper was the bag of drugs Parrish received from defendant. The officers who handled the drugs and the SBI technicians who analyzed the substance positively identified the exhibits and established a clear chain of identity between the substance obtained by Parrish and that which the SBI tested. This chain of custody was sufficient to prove that the test results testified to at trial were in fact the results of tests performed on the controlled substance Parrish received from defendant. Defendant's showings of "potential weak spots in the chain of custody relate then only to the weight to be given this testimony." *State v. Detter*, 298 N.C. 604, 634, 260 S.E.2d 567, 588 (1979). These assignments of error are overruled.

II. Parrish's Testimony

[2] Defendant next contends he was prejudiced when the court improperly allowed witness Glenn Paul Parrish to testify using Detective Chris Raper's notes to refresh his memory. Defendant argues that since the court should not have allowed Parrish's testimony using Raper's notes, the court erred by denying his motion to strike Parrish's testimony and by denying his motion for a mistrial. We disagree.

Since there are limitations to a witness's ability to recall, two doctrines have developed in the law to allow the witness to be aided in his recollections: past recollection recorded and present recollection refreshed. *State v. Smith*, 291 N.C. 505, 516, 231 S.E.2d 663, 670 (1977). "In present recollection refreshed the evidence is the testimony of the witness at trial, whereas with a past recollection recorded the evidence is the writing itself." *State v. Gibson*, 333 N.C. 29, 50, 424 S.E.2d 95, 107 (1992), *overruled on other grounds in State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349, 353 (1993). In *Smith*, our Supreme Court noted that "[b]ecause of the independent origin of the testimony actually elicited, the stimulation of an actual present rec-

ollection is not strictly bounded by fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present." *Smith*, 291 N.C. at 516, 231 S.E.2d at 670-71. The Court went on to stress:

> [i]t is not required that the memory aid be prepared by the witness himself . . . . "If upon looking at *any* document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, *for it is not the memorandum that is the evidence but the recollection of the witness.*"

Smith, 291 N.C. at 516-17, 231 S.E.2d at 671 (quoting *Henry v. Lee*, 2 Chitty 124 (1810)). Thus, the question to be answered is not whether Parrish refreshed his recollection using Raper's notes, but "whether the spirit of the rule of present recollection refreshed has been violated by testimony which was not the product of a refreshed memory, but clearly nothing more than a recitation of the witness' notes." *Gibson*, 333 N.C. at 50, 424 S.E.2d at 107.

In *Smith*, our Supreme Court stated the rule:

> Where the testimony of the witness purports to be from his refreshed memory but is *clearly a mere recitation of the refreshing memorandum*, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge. *Where there is doubt* as to whether the witness purporting to have a refreshed recollection is indeed testifying from his own recollection, the use of such testimony is dependent upon the credibility of the witness and is a question for the jury.

Smith, 291 N.C. at 518, 231 S.E.2d at 671-72 (emphasis added) (citations omitted). The following exchange took place in the presence of the jury following a voir dire hearing which focused on the origin of the notes which Parrish was consulting during earlier testimony:

> Q. Yesterday when you were testifying, regardless of whose notes you were using, were you testifying from the notes or were you testifying from your memory?
>
> A. Basically my memory.
>
> Q. And, were you using your notes in the morning to refresh your memory?
>
> A. Not really, basically memory, really.

Q. In the afternoon when you were testifying using Detective Raper's notes, were they to refresh your memory?

A. At some point, yes, sir.

Q. And, you used the transcript some yesterday to refresh your memory, didn't you?

A. Yes, sir.

The record in the case before us does not indicate that the testimony is "clearly a mere recitation of the refreshing memorandum." Therefore, Parrish's testimony was properly presented to the jury. The trial court, in its discretion, denied defendant's motions to strike Parrish's testimony and to declare a mistrial; and this exercise of discretion will be upheld absent a showing of abuse. *See Smith*, 291 N.C. at 518, 231 S.E.2d at 672. We find no abuse of discretion and conclude the trial court properly denied defendant's motions.

III. Jury Instructions

[3] Defendant contends it was prejudicial error for the trial court not to give his requested jury instructions on mere presence, aiding and abetting, and acting in concert. He argues the evidence only showed he was present during the transactions and never showed he passed the heroin directly to Parrish or any other agent and, therefore, defendant contends it is possible the jury could have concluded he was merely present during the deals. Additionally, he contends the jury was not given "a clear and accurate explanation of the law regarding aiding and abetting and acting in concert." We disagree.

It is the duty of the court to decide any legal questions and to instruct the jury on the law arising from the evidence presented at trial. *State v. Canipe*, 240 N.C. 60, 63, 81 S.E.2d 173, 176 (1954). The purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case. *State v. Cousin*, 292 N.C. 461, 464, 233 S.E.2d 554, 556 (1977). If a party requests special instructions, they must be in written form and submitted before the court begins the charge to the jury. *State v. Harris*, 47 N.C. App. 121, 123, 266 S.E.2d 735, 737 (1980), *cert. denied*, 305 N.C. 762, 292 S.E.2d 577 (1982). "If a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). However, the court is not required to follow

any particular form in giving instructions to the jury. *State v. Mundy*, 265 N.C. 528, 529, 144 S.E.2d 572, 573 (1965).

The court properly declined to instruct the jury on mere presence. While we agree that defendant's presence at the scene of a crime does not make him guilty of the offense charged, we note the facts of this case indicate substantially more evidence against defendant than his mere presence at the scene of the crime. A review of the evidence demonstrates defendant actually participated in the drug transactions. State's witness, Paul Parrish, testified that on several occasions, defendant directed the drug transactions by signaling others to obtain drugs for Parrish. The evidence does not reasonably support an inference that defendant was merely present and not an active participant in the drug transactions. Therefore, defendant was not entitled to a "mere presence" instruction. *See State v. Brower*, 289 N.C. 644, 656, 224 S.E.2d 551, 560, *reconsideraton denied*, 293 N.C. 259, 243 S.E.2d 143 (1978) (where there was evidence tending to establish actual participation by defendant in a robbery, instruction on "mere presence" was not required).

[4] Defendant's second argument that the jury was not given an explanation of the law regarding aiding and abetting and acting in concert is without merit. Specifically, defendant requested the court instruct the jury that the State must show that defendant was "actually or constructively present at the scene of the crime and that he shared the criminal intent of the perpetrator to commit the crime."

The record discloses that during the charge to the jury, the court gave the following instruction:

> The Court instructs you that for a person to be guilty of a crime it is not necessary that he, himself, do all the acts necessary to constitute the crime. If two or more persons act together with a common purpose to possess a controlled substance with the intent to sell or deliver it, or to sell a controlled substance each of them is held responsible for the acts of the others done in the commission of possession of a controlled substance with the intent to sell and deliver, or in the sale of a controlled substance.

This language on acting in concert comes from the Pattern Jury Instructions for criminal cases and under these facts, it was a proper jury instruction. The court essentially complied with defendant's request on criminal intent when it instructed the jury that there must have "been a common purpose to possess a controlled substance with

the intent to sell or deliver it . . . ." As to the request to instruct the jury on presence at the scene of the crime, "[i]t 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." *State v. Hunt*, 339 N.C. 622, 651, 457 S.E.2d 276, 292-93 (1994), *reconsideration denied*, 339 N.C. 741, 457 S.E.2d 304 (1995). The evidence in the record before us was sufficient to establish defendant's presence and participation in the various drug transactions. Therefore, a charge on presence was not required and this assignment of error is overruled.

IV. Immunity

[5] Defendant argues that two of the State's witnesses, Mark Rook and Gary Francis, testified at defendant's trial under defective grants of immunity. Defendant contends allowing these witnesses to testify prejudiced him and deprived him of a fair trial. We disagree.

Article 61 of the Criminal Procedure Act on witness immunity contains provisions which are safeguards to protect against unreliable witnesses who have entered into some type of arrangement with the State in exchange for their testimony. *State v. Morgan*, 60 N.C. App. 614, 617?, 299 N.C. S.E.2d 823, 826 (1983). "These safeguards are aimed at ensuring that the jury be made aware that the witness is testifying under a grant of immunity or some other arrangement." *Id.* Under these facts, it was clear to the jury that Rook and Francis believed they were testifying under some form of immunity. During Francis' testimony, the court read to the jury Francis' agreement with the State and during Rook's cross-examination, defense counsel extensively questioned Rook about his belief that he was testifying under limited immunity. Additionally, during the charge to the jury, the court reminded the jury that several of the witnesses had testified under immunity and that the jury should examine these witnesses' testimony "with great care and caution in deciding whether or not to believe it." Defendant suffered no prejudice as a result of these allegedly defective grants of immunity and we therefore overrule this assignment of error.

We hold that defendant received a fair trial free from prejudicial error.

No error.

Judges JOHNSON and COZORT concur.

JOHN ROBERT GIBSON v. THE MUTUAL LIFE INSURANCE CO. OF NEW YORK AND RICHARD HINSON

No. COA95-59

(Filed 2 January 1996)

1. Limitations, Repose, and Laches § 46 (NCI4th)— insurance manager—dismissed—allegations of dishonesty—statute of limitations

The trial court did not err by granting defendants' summary judgment motions dismissing plaintiff's claims for defamation where the action was filed in state court on 18 November 1993, so that only those statements made on or after 18 November 1992 are actionable under the one year statute of limitations of N.C.G.S. § 1-54(3). Although plaintiff contends that the statute of limitations was tolled by the discovery rule, the fraudulent concealment rule, or the continuing tort exception, plaintiff did not allege fraudulent concealment in his complaint, plaintiff cites no authority for his continuing tort exception, and there is authority in *Price v. Penny Co.*, 26 N.C. App. 249, that the action accrues at the date of the publication. Even assuming that plaintiff's action relates back to his original lawsuit filed in federal court, any defamatory statements must have been committed on or after 25 November 1990 to be actionable, and the majority of the statements occurred before or immediately after plaintiff's February 1990 departure from MONY and are therefore barred.

Am Jur 2d, Libel and Slander §§ 421-423, 427.

What constitutes "publication" of libel in order to start running of period of limitations. 42 ALR3d 807.

2. Libel and Slander § 42 (NCI4th)— terminated employee—summary judgment

The trial court correctly granted summary judgment on four potential defamation actions against defendant MONY and one possible claim against defendant Hinson where two of the claims against MONY are based on affidavits which do not establish a particular individual who made the defamatory statement and which involve statements made after plaintiff was terminated which cannot be imputed to MONY, or refer to a statement made in 1991 which is barred by the statute of limitations. The third statement was actionable *per quod* and there was no evidence of

special damages, and the final incident involves communications made during a break in the course of a deposition, and are protected by the absolute privilege of judicial proceedings.

Am Jur 2d, Libel and Slander §§ 467-469, 496.

Pleading or raising defense of privilege in defamation action. 51 ALR2d 552.

Appeal by plaintiff from summary judgment in favor of defendants entered 31 October 1994 by Judge W. Steven Allen, Sr. in Iredell County Superior Court. Heard in the Court of Appeals 19 October 1995.

Allman Spry Leggett & Crumpler, P.A., by David C. Smith and Linda L. Helms and Kilgore & Kilgore, by W.D. Masterson for plaintiff-appellant.

Kennedy, Covington, Lobdell & Hickman, by William C. Livingston and Vinson & Elkins L.L.P. by Douglas E. Hamel and Shadow Sloan for defendant-appellee, The Mutual Life Insurance Company of New York.

Bennett & Blancato, L.L.P., by William A. Blancato and Stanley P. Dean for defendant-appellee, Richard Hinson.

McGEE, Judge.

The evidence, in the light most favorable to plaintiff, John Robert Gibson, establishes the following facts. From March 1984 until February 1990, plaintiff was employed by defendant Mutual Life Insurance Company of New York (MONY) as the agency manager of its Charlotte, North Carolina office. Prior to assuming this position, plaintiff had been employed by MONY for fifteen years in various positions and had a superior employment record. In a September 1989 meeting, MONY's regional vice president, Robert Kramer, removed plaintiff from his managerial position, without cause. Kramer also represented to plaintiff that he would be considered for other jobs and that his salary would be continued until February 1990. Plaintiff alleged that during this meeting, Kramer called him a "liar" and claimed he could not be trusted. In February 1990, plaintiff was told that he could only remain with the company as a salesman. Plaintiff rejected this offer and his contract was terminated.

Plaintiff alleges Kramer, as well as defendant Richard Hinson, an agent with MONY since 1956, defamed him by making statements which were intended to "destroy plaintiff's reputation so he would not be able to compete with MONY and Hinson after being driven from MONY's agency." Specifically, plaintiff alleges "defendants have told other persons that plaintiff was dishonest, had stolen $600,000, was under investigation by the IRS [Internal Revenue Service], was fired for theft, drank too much, was never at work, was guilty of nepotism and was a crook."

Plaintiff filed his complaint against defendants MONY and Hinson seeking damages for defamation on 18 November 1993 in Iredell County Superior Court. Defendants filed separate answers in January of 1994 denying liability and contending plaintiff's complaint was barred by the statute of limitations as well as the doctrines of absolute or qualified privilege. In July and September of 1994 defendants Hinson and MONY, respectively, filed motions for summary judgment. On 31 October 1994 the trial court granted defendants' summary judgment motions, dismissing plaintiff's claims with prejudice. From this order, plaintiff appeals.

A trial court may grant a motion for summary judgment only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1990); *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 290 (1978). In order to prevail on a summary judgment motion, the moving party must show either "(1) an essential element of plaintiff's claim is nonexistent . . . [2] plaintiff cannot produce evidence to support an essential element of his claim, or . . . [3] plaintiff cannot surmount an affirmative defense which would bar the claim." *Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37, (quoting *Shuping v. Barber*, 89 N.C. App. 242, 244, 365 S.E.2d 712, 714 (1988)) *review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). The trial court must construe all evidence in the light most favorable to the non-moving party, allowing the non-moving party to be given all favorable inferences as to the facts. *Moye v. Gas Co.*, 40 N.C. App. 310, 314, 252 S.E.2d 837, 841, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979).

[1] Defendants argue this Court should affirm the trial court's summary judgment order because plaintiff cannot overcome the statute of limitations and privilege defenses. We agree.

The statute of limitation for defamation is one year under N.C. Gen. Stat. § 1-54(3) (1983). In November 1991, plaintiff filed a complaint in federal court against MONY concerning his termination from the company. However, the action filed by plaintiff in state court alleging MONY and Hinson defamed him was not filed until 18 November 1993. Therefore, only those defamatory statements made on or after 18 November 1992 are actionable.

As to defendant Hinson, plaintiff contends "the discovery rule, fraudulent concealment rule, or continuing tort exception" tolls the statute of limitations. We disagree. Plaintiff did not allege fraudulent concealment in his complaint and that issue cannot be considered for appellate review. *See Leffew v. Orrell*, 7 N.C. App. 333, 336, 172 S.E.2d 243, 245-46 (1970) (a party is not allowed to argue a different theory on appeal). Additionally, we note that although plaintiff's brief mentions a continuing tort exception, he cites no authority for this proposition and we need not consider this argument under N.C.R. App. P. 28(b)(5). In fact, our Courts have stated that each publication of defamatory material is a separate tort. *See Sizemore v. Maroney*, 263 N.C. 14, 21, 138 S.E.2d 803, 808 (1964). We also disagree with plaintiff's argument that the statute of limitations will be tolled until plaintiff discovers that defamatory statements have been made. This Court said in *Price v. Penney Co.*, 26 N.C. App. 249, 216 S.E.2d 154, *cert. denied*, 288 N.C. 243, 217 S.E.2d 666 (1975):

> To escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, G.S. 1-54(3), and *the action accrues at the date of the publication of the defamatory words*, regardless of the fact that plaintiff may discover the identity of the author only at a later date.

Price, 26 N.C. App. at 252, 216 S.E.2d at 156 (citation omitted) (emphasis added). Since none of the doctrines plaintiff addresses will toll the statute of limitations, we find that any action by Hinson which occurred before 18 November 1992 is time barred.

Plaintiff also argues his defamation claim against MONY relates back to his original lawsuit filed in federal court on 25 November 1991. Assuming, *arguendo*, that plaintiff's 18 November 1993 defamation claim relates back to his original lawsuit, any defamatory statements by MONY must have been committed on or after 25 November 1990 in order to be actionable.

[2] We have examined the statements plaintiff alleges are defamatory and we agree with defendants' arguments that the majority occurred before or immediately after plaintiff's February 1990 departure from MONY and are therefore barred by the statute of limitations. Under the most liberal limitations period (25 November 1990 for MONY and 18 November 1992 for Hinson) there are four potential actions against MONY and one possible claim against Hinson to be addressed.

Evidence of two of the allegations implicating MONY is found in affidavits filed by Clay Smitherman, a field underwriter employed by the MONY Charlotte office for twenty-six weeks during 1991, and by John Morrill, a retired MONY employee who continues to work in the Charlotte MONY office as a consultant. Morrill's affidavit states, "I have occasion to be in the office of MONY's Charlotte Agency, where I have continued to this date [14 October 1992] to hear defamations of Mr. Gibson, including the allegation that he is a 'crook'." Smitherman claims, "I heard Mr. Richard Hinson state that John Robert Gibson was dishonest and that Mr. Gibson had cheated Mr. Hinson. One of the ladies in the agency defamed Mr. Gibson by calling him a crook."

Neither Morrill's nor Smitherman's affidavit establishes a basis upon which MONY can be held liable. Only Smitherman actually identifies a particular individual, Hinson, who allegedly made a defamatory statement. Hinson cannot be held liable for this particular incident because it occurred sometime in 1991 and is therefore barred by the statute of limitations. In Morrill's case, no facts, dates or identity of the person making the statements are included in the affidavit. As MONY points out, all of the statements were made after plaintiff was terminated and therefore, the alleged defamation cannot be imputed to MONY. *See Stutts v. Power Co.*, 47 N.C. App. 76, 81, 266 S.E.2d 861, 865 (1980) (as a matter of law, defamatory remarks made by an employee in the months after plaintiff's discharge were not made within the employee's scope of employment and therefore are not attributable to defendant).

A third affidavit containing evidence implicating MONY was filed by Dale Abshire, a MONY employee who, like Gibson, was terminated from the company. Abshire's affidavit states, "Following my discharge by MONY on January 9, 1991, I called Bob Kramer . . . and asked him to intercede on my behalf. In the course of this conversation Mr. Kramer told me that Bob Gibson had lied to him and could not be trusted." MONY contends this statement is protected under the doc-

trine of qualified privilege. Even if Abshire's statements are not protected by a qualified privilege, we find that the statements are actionable *per quod* and since there is no evidence of special damages attributable to this particular statement, plaintiff cannot prevail on his defamation claim based on the Abshire affidavit.

Slander may be actionable *per se* or *per quod*. "Defamatory charges which are actionable *per se* raise a *prima facie* presumption of malice and a conclusive presumption of legal injury and general damage, entitling plaintiff to recover nominal damages at least without specific allegations or proof of damages." *Stewart v. Check Corp.*, 279 N.C. 278, 284, 182 S.E.2d 410, 414 (1971). Slander *per quod* arises where the defamation is "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." *Beane v. Weiman Co., Inc.*, 5 N.C. App. 276, 277, 168 S.E.2d 236, 237 (1969).

Among the statements considered actionable *per se* are: (1) an accusation of criminal wrongdoing or an offense involving moral turpitude; (2) a statement impeaching one's trade or profession; and (3) an allegation imputing to one a loathsome disease. *Gibby v. Murphy*, 73 N.C. App. 128, 131, 325 S.E.2d 673, 675 (1985). With respect to a trade or profession, the statement must "touch the plaintiff in his special trade or occupation, and . . . contain an imputation necessarily hurtful in its effect on his business." *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955).

Our Courts have consistently held that "alleged false statements . . . calling plaintiff 'dishonest' or charging that plaintiff was untruthful and an unreliable employee, are not actionable *per se*." *Stutts*, 47 N.C. App. at 82, 266 S.E.2d at 865. The alleged slander in the Abshire affidavit was "Kramer told me that Bob Gibson had lied to him and could not be trusted." Under *Stutts*, this language is not actionable *per se*. *Id.* Abshire's affidavit states his conversation with Kramer occurred in January 1991. Plaintiff's own testimony reveals he began working for Acacia, one of MONY's competitors, on 1 March 1990 where he served as the agency manager for approximately four years. During his tenure as the agency manager at Acacia, plaintiff testified that the agency grew from eight agents to between sixteen and twenty-five and the operation grew between two and three hundred percent. This testimony does not suggest plaintiff suffered any pecuniary loss as a result of Kramer's discussion with Abshire. Since plaintiff has not demonstrated he suffered any special damages resulting

from this conversation, he cannot prevail on his defamation claim as to this incident.

The final incident which plaintiff alleges implicates both MONY and Hinson involves communications made during the course of a deposition on 11 May 1993. On that date Hinson, a defendant in a separate lawsuit filed by another MONY manager, was being deposed in connection with that lawsuit. During the deposition, one of the attorneys asked Hinson a series of questions about his relationship with plaintiff (Gibson). After Hinson responded that the relationship was friendly in the beginning but "[t]owards the end, it was a very bad relationship," Hinson was asked the reasons for the deterioration of the relationship. Hinson responded, "He was fired for dishonesty, and I have learned some other things about him that caused him to eventually get fired." The attorney then asked Hinson if he had proof of the dishonesty or if there was ever an audit conducted to explore the matter.

After Hinson answered that he believed there had been some sort of audit, a short break was requested. It was during this break in the deposition proceedings that Hinson allegedly stated plaintiff was "involved in the embezzlement of approximately $600,000 from MONY and that [he] had reported Gibson to the Internal Revenue Service."

Upon returning to the deposition proceedings, the attorney continued asking Hinson about plaintiff's dishonesty. He asked Hinson if he knew the plaintiff had filed a defamation claim against MONY and he followed this up by asking, "Do you have a personal opinion as to whether or not he [plaintiff] was dishonest . . . [b]y dishonest, I mean, did he steal money from the agency or misappropriate funds." Hinson answered in the affirmative to both questions. The attorney also asked Hinson, "Did you ever contact the Internal Revenue Service with regard to Mr. Gibson?" Hinson responded that someone from the IRS had contacted him. Soon after that question, Hinson declined to answer further questions on this matter.

We hold that under the circumstances, even if Hinson did make the alleged statements, they were protected under the doctrine of absolute privilege. In *Rickenbacker v. Coffey*, 103 N.C. App. 352, 405 S.E.2d 585, *disc. review denied*, 330 N.C. 120, 409 S.E.2d 600 (1991), this Court examined the doctrine of absolute privilege as it relates to judicial proceedings. Quoting *Jarman v. Offutt*, 239 N.C. 468, 472, 80

S.E.2d 248, 251 (1954), we said, "The general rule is that a defamatory statement made in due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice." *Rickenbacker*, 103 N.C. App. at 356, 405 S.E.2d at 587. In *Burton v. NCNB*, 85 N.C. App. 702, 355 S.E.2d 800 (1987), our Court addressed the question of whether out-of-court communications between parties or their attorneys during the course of judicial proceedings are privileged. Our Court stated that "if an out-of-court statement is (1) between parties to a judicial proceeding or their attorneys and (2) relevant to the proceeding, it is absolutely privileged and not actionable on the grounds of defamation." *Burton*, 85 N.C. App. at 706, 355 S.E.2d at 803. The question of whether the statement is relevant to the proceeding is a question of law for the court to decide and "the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." *Harris v. NCNB*, 85 N.C. App. 669, 672, 355 S.E.2d 838, 841 (1987) (emphasis omitted) (quoting *Scott v. Veneer Co.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954)).

The 11 May 1993 statements satisfy the requirements set forth in *Rickenbacker*. They were made between parties to a judicial proceeding or their attorneys in that the statements were made during a break, in a conference room in which the parties to the lawsuit and their attorneys were located. Additionally, the statements meet the relevance requirement as they were made in connection with numerous questions Hinson was asked during the course of the deposition. Furthermore, the material was not "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." *Id.*

The trial court did not err in granting summary judgment for defendants.

Affirmed.

Judges MARTIN, John C., and JOHN concur.

WILSON v. WILSON

[121 N.C. App. 292 (1996)]

PATRICIA PARKER WILSON, (NOW SLOMANSKI), PLAINTIFF v. RANDALL EDWARD WILSON, BONEY EDWARD WILSON, JR. AND GLENN L. WILSON, DEFENDANTS

No. COA95-219

(Filed 2 January 1996)

Divorce and Separation § 499 (NCI4th)— child custody and visitation—original action in N.C.—child moves to Va.—jurisdiction for subsequent orders

The trial court properly dismissed plaintiff-mother's motion to dismiss a child custody matter for lack of jurisdiction where plaintiff and defendant-father had instituted divorce proceedings; they agreed that plaintiff would have primary custody and defendant would have specified visitation privileges; in response to a motion by defendant for modification of his visitation schedule, a district court judge in North Carolina found that plaintiff would be moving to Richmond, Va. and taking the child with her, and ordered that the child be transported by air between Richmond and Wilmington, N.C., for visits with her father on the first weekend of each month; defendant subsequently moved to find plaintiff in contempt for petitioning the court in Virginia to modify the order requiring air transportation; the Virginia judge declined to exercise jurisdiction in a telephone conversation with the North Carolina judge; the North Carolina judge found plaintiff in willful contempt; defendant moved the court to require that the child fly for all of her visits with him; plaintiff moved for dismissal, contending that the North Carolina courts no longer had subject matter jurisdiction since the child's home state was now Virginia; the North Carolina judge found that North Carolina had continuing jurisdiction; and the Virginia judge assumed jurisdiction on behalf of the state courts of Virginia and suspended the requirement that the child fly for her visits. While a North Carolina court in seeking to modify the decree of another court would first need to meet the jurisdictional prerequisites of N.C.G.S. § 50A-3 before determining whether it is a more convenient forum under N.C.G.S. § 50A-7, the trial court here had already acquired initial jurisdiction and maintained jurisdiction by entering several orders. Additionally, the father and grandparents, who are parties to the action, remain in North Carolina.

Am Jur 2d, Divorce and Separation §§ 232-234.

Right to punish for contempt for failure to obey custody order either beyond power of jurisdiction of court or merely erroneous. 12 ALR2d 1095.

Obtaining long-arm jurisdiction over nonresident parent in filiation or support proceeding. 76 ALR3d 708.

When does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 ALR4th 742.

Judge GREENE concurring in the result.

Appeal by plaintiff from order entered 26 October 1994 by Judge Jacqueline Morris-Goodson in New Hanover County District Court. Heard in the Court of Appeals 16 November 1995.

Shipman & Lea, by J. Albert Clyburn and James W. Lea, III, for plaintiff-appellant.

Johnson & Lambeth, by Carter T. Lambeth and Maynard M. Brown, for defendant-appellee.

WYNN, Judge.

Plaintiff, Patricia Parker Wilson (now Slomanski), appeals the trial court's denial of her motion to dismiss for lack of subject matter jurisdiction. We affirm.

Ms. Slomanski and defendant Randall Edward Wilson ("the parties") are the parents of a minor daughter, Patricia Grace Wilson, the subject of this custody dispute.[1] In 1989, after instituting divorce proceedings, the parties agreed to joint custody of Patricia by giving Ms. Slomanski primary custody and Mr. Wilson specified visitation privileges.

In April 1992, in response to a motion by Mr. Wilson for modification of his visitation schedule, District Court Judge Jacqueline Morris-Goodson found as a fact that "effective June 15, 1992, the Plaintiff will be moving to Richmond (Virginia) and taking [Patricia] with her." Based on this finding, the court ordered that Patricia be transported by air between Richmond and Wilmington, North Carolina for visits with her father on the first weekend of each month.

1. The child's paternal grandparents, Boney Edward Wilson, Jr. and his wife, Glenn L. Wilson were added as parties.

In February 1993, Mr. Wilson moved the court to find Ms. Slomanski in contempt for petitioning the Juvenile and Domestic Relations District Court of the County of Henrico in the Commonwealth of Virginia ("Juvenile Court") to modify Judge Morris-Goodson's order requiring air transportation for Patricia's first weekend visits. In a telephone conversation with Judge Morris-Goodson, Judge William G. Boice, Juvenile Court Judge for Henrico County, Virginia declined jurisdiction over the matter. Thereafter, Judge Morris-Goodson found Ms. Slomanski in willful contempt of court. This Court, in an unpublished opinion, reversed that order.

In September 1994, Mr. Wilson moved the court to require that Patricia fly for *all* of her visits with him. Ms. Slomanski responded by moving for dismissal contending that the North Carolina courts no longer had subject matter jurisdiction since Patricia's home state was now Virginia. Judge Morris-Goodson found that North Carolina had continuing jurisdiction over the matter and granted Mr. Wilson's motion. (On 7 December 1994, Judge Boice assumed jurisdiction on behalf of the state courts of Virginia and modified Judge Morris-Goodson's order by suspending the requirement that Patricia fly for her visits with Mr. Wilson).

From Judge Morris-Goodson's order, Ms. Slomanski appeals to this Court.

Ms. Slomanski contends that the trial court erred in refusing to relinquish jurisdiction over custody issues involving Patricia because the Commonwealth of Virginia was a more appropriate forum for the resolution of such issues under N.C. Gen. Stat. § 50A-7 (1990). We disagree.

Questions concerning subject matter jurisdiction in interstate custody disputes are generally governed by the Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA"). *See also* 28 U.S.C.A. § 1738A (1995) commonly referred to as the "Parental Kidnapping Prevention Act" (PKPA). The UCCJA has been codified in North Carolina under Chapter 50A of the North Carolina General Statutes. *See also* Va. Code § 20-126(A) (1995) (codifying the UCCJA for Virginia).

N.C.G.S. § 50A-7(a) provides:

> 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.

(emphasis supplied).

Thus, N.C.G.S. § 50A-7(a) allows the trial court in its discretion to decline jurisdiction in instances when it determines that it is an inconvenient forum. In determining whether it is an inconvenient forum, the court may take into account the following factors:

> (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;
>
> (4) If the parties have agreed on another forum which is no less appropriate; and
>
> (5) If the exercise of jurisdiction by a court of this State would contravene any of the purposes stated in G.S. 50A-1.

N.C.G.S. § 50A-7(c).

The record on appeal indicates that the trial court made fifteen detailed findings of fact essentially finding that "the Courts of North Carolina retain jurisdiction over the issues of child custody and support by virtue of the fact that support was paid by the Defendant in North Carolina and three of the four parties in this action live in Wilmington, North Carolina, and by virtue of the fact that the Plaintiff was moving to Virginia allegedly to go to school." The court then concluded that "it is in the present best interests of the minor child that this court retain jurisdiction over the issue of custody . . . ," and that "the court further finds that there has been no material or substantial change of circumstances surrounding the parties or subject matter of this proceeding which would warrant divesting of this Court of jurisdiction and that Plaintiff's Motion to Dismiss jurisdiction should be denied." These findings of fact are sufficient to show that North Carolina was a convenient forum for the continued exercise of jurisdiction under N.C.G.S. § 50A-7.

Moreover, we held in *Davis v. Davis*, 53 N.C. App. 531, 538, 281 S.E.2d 411, 415 (1981), that there is a strong bias toward allowing the state in which a decree has been entered to retain jurisdiction. In *Davis*, a case involving an issue quite similar to the one at hand, we quoted with approval the Uniform Law Commission's commentary on continuing jurisdiction:

> Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) [G.S. 50A-14(a)] declares that other states will defer to the continuing jurisdiction of another state as long as that state has jurisdiction under the standards of this act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3 [G.S. 50A-3].

Davis, 53 N.C. App. at 539, 281 S.E.2d at 415, quoting, 9 Uniform Laws Ann. 115, 292 (1968) (citations omitted).

Contrary to the separate concurring opinion, N.C.G.S. § 50A-3 is not the controlling statute for determining continuing jurisdiction in this case. N.C.G.S. § 50A-3 empowers courts of this state with "jurisdiction to make a child custody determination by initial or modification decree . . . ." Thus, a North Carolina court in seeking to *modify* the decree of another court, such as a Virginia court, would first need to meet the jurisdictional prerequisites of N.C.G.S. § 50A-3 before determining whether it is a more convenient forum under N.C.G.S. § 50A-7. In the subject case, however, the trial court of North Carolina had already acquired *initial* jurisdiction under N.C.G.S. § 50A-3 when Ms. Slomanski filed her complaint in New Hanover County District Court on 11 May 1989. *See In re Scearce*, 81 N.C. App. 531, 539, 345 S.E.2d 404, 409, *cert. denied*, 318 N.C. 415, 349 S.E.2d 589 (1986) (once jurisdiction of the court attaches to a child custody matter, it exists for all time, until the cause is fully and completely determined). Thereafter, the trial court maintained jurisdiction by entering several orders: an order which set forth a visitation schedule with the minor children after Mr. Wilson filed a motion to modify the parties' prior interim separation agreement; an order modifying the prior orders of

the court with reference to Mr. Wilson's visitation schedule and requiring the parties to split the cost of a round-trip airplane ticket from Richmond to Wilmington for transportation of the minor child; an order finding Ms. Slomanski in willful contempt of court for attempting to seek jurisdiction in Virginia; and an order requiring the minor child to be transported by air for all visitations with her father. The North Carolina court also communicated with the Virginia court by phone and exchanged information pertinent to the assumption of jurisdiction. During this telephone conference, the Virginia court declined jurisdiction and allowed jurisdiction to remain in North Carolina. *See Davis v. Davis*, 53 N.C. App. at 538, 281 S.E.2d at 414-15 (the trial court may communicate with a court of another state to "exchange information pertinent to the assumption of jurisdiction by either court with a view toward assuring that jurisdiction will be exercised by the more appropriate court . . . ."). Additionally, the father and grandparents remain residents of North Carolina.

We find that there is sufficient evidence that the North Carolina court did not decline jurisdiction and made the appropriate findings under N.C.G.S. § 50A-7; accordingly, we conclude that the New Hanover District Court properly entered its order of 26 October 1994.

The trial court's order is,

Affirmed.

Judge McGEE concurs.

Judge GREENE concurs in the result in a separate opinion.

Judge GREENE concurring in the result.

I agree that the findings of fact in this case "are sufficient to show that North Carolina was a convenient forum" for the disposition of this interstate custody modification hearing. The convenience of the forum, however, is not dispositive of whether the New Hanover District Court had jurisdiction to enter the 26 October 1994 order. The dispositive question is whether North Carolina has continuing jurisdiction to modify the original child custody order earlier entered in North Carolina. Although the issuance of the initial custody order provides continuing jurisdiction in *intrastate* child custody disputes, *Tate v. Tate*, 9 N.C. App. 681, 177 S.E.2d 455, 457 (1970), the initial

custody order is not dispositive of continuing jurisdiction in *interstate* child custody disputes. In *interstate* child custody disputes, continuing jurisdiction exists in North Carolina only if, at the time of the modification request, it "has sufficient contact with the case to satisfy [N.C. Gen. Stat. § 50A-3]." *Davis v. Davis*, 53 N.C. App. 531, 539, 281 S.E.2d 411, 415 (1981); N.C.G.S. § 50-13.7(a) (1995) (modification of a child custody decree is "[s]ubject to the provisions" of the UCCJA); N.C.G.S. § 50A-7(a) (1989) (if the court has jurisdiction it "may decline to exercise" it).

In this case, because the child had resided in Virginia for some twenty months prior to October 1994, section 50A-3(a)(2) is the only portion of section 50A-3 that could vest North Carolina with jurisdiction. This section is known as the "significant connection" provision and requires that "the child and the child's parents, or the child and at least one contestant, have a significant connection with this State." N.C.G.S. § 50A-3(a)(2) (1989). This "significant connection" provision is satisfied as long as either parent or contestant remains in the state issuing the initial custody decree. *See Kumar v. Superior Court of Santa Clara County*, 652 P.2d 1003, 1010 (Cal. 1982); *see also* Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand. L. Rev. 1207, 1237 (1969). This reading is consistent with the stated purposes of the UCCJA, i.e., to avoid re-litigation of custody decisions in other states, to avoid jurisdictional competition, and to deter unilateral removal of children. N.C.G.S. § 50A-1(a) (1989). This construction is also consistent with the express language of the PKPA which provides that jurisdiction of the initial decree state "continues as long as . . . such State remains the residence of the child or of any contestant." 28 U.S.C.A. § 1738A(d) (West 1994). Furthermore, to construe the "significant connection" provision otherwise would permit one parent to possibly divest jurisdiction from the state entering the initial decree simply by moving the child into another state for a period of time of at least six months. *Cf.* N.C.G.S. § 50A-8 (court may decline to exercise jurisdiction if the child has wrongfully been taken from another state).

Because the father was a resident of North Carolina at the time of the initial custody decree and at the time of the modification request, although the mother and the child had moved to Virginia, the New Hanover District Court had jurisdiction, pursuant to section 50A-3(a)(2), to enter its 26 October 1994 Order. For these reasons, I would affirm.

STATE OF NORTH CAROLINA v. DEBORAH SUZANNE FLOWERS

No. COA94-993

(Filed 2 January 1996)

1. Evidence and Witnesses § 1298 (NCI4th)— second-degree murder—confession—waiver of rights—emotional condition of defendant

The trial court did not err in a second-degree murder prosecution by admitting defendant's inculpatory statements where defendant argued that she was impaired by an allergic reaction to prescription narcotics and by post-traumatic stress disorder so as to render any responses to police interrogation unknowing and involuntary. The trial court found that defendant was not hysterical, was not crying but was upset during the period prior to questioning and that defendant's tape-recorded statements were demonstrative of a person answering questions thoughtfully and responsively. Defendant's claim of incapacity is simply not borne out by the trial court's findings or the record.

Am Jur 2d, Trial § 1357.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs. 25 ALR4th 419.

Validity or admissibility, under Federal Constitution, of accused's pretrial confession as affected by accused's mental illness or impairment at time of confession—Supreme Court cases. 93 L. Ed. 2d 1078.

2. Evidence and Witnesses § 1268 (NCI4th)— second-degree murder—confession—subsequent waiver not obtained

Miranda warnings given to a murder defendant retained vitality where defendant was advised of her rights prior to any custodial interrogation; she signed a waiver of those rights in close temporal proximity to the actual explanation of the warnings; the record shows that the initial warnings, and defendant's signing of the waiver, took place over a period of approximately eight minutes, from 7:31 p.m. to 7:38 p.m.; the taped questioning, and defendant's statement arising therefrom, began at 8:30 p.m.; defendant was presented the next morning with a transcription of

her recorded statement, which explicitly referred to her *Miranda* rights; and defendant acknowledged the transcript.

Am Jur 2d, Trial § 1357.

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

3. Evidence and Witnesses §§ 2292, 2152 (NCI4th)— confession—mental capacity to waive rights—expert psychiatric testimony excluded—no error

The trial court did not err in a murder prosecution by refusing to allow defendant's expert psychiatric witness to testify on the substantive issue of defendant's capacity to waive her constitutional rights under *Miranda* based on claims of PTSD and drug impairment where the court allowed the testimony only to the extent necessary to corroborate defendant's testimony. Under *State v. Daniels*, 337 N.C. 263, a witness may not testify as to whether the defendant had the capacity to waive *Miranda* rights.

Am Jur 2d, Expert and Opinion Evidence §§ 6, 41.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs. 25 ALR4th 419.

Appeal by defendant from judgment entered 6 July 1993 by Judge Beverly T. Beal in Cleveland County Superior Court. Heard in the Court of Appeals 16 October 1995.

Attorney General Michael F. Easley, by Assistant Attorney General John F. Maddrey, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellant Defender J. Michael Smith, for defendant appellant.

SMITH, Judge.

Defendant appeals her conviction for second degree murder on two grounds. First, defendant argues the trial court erred in its denial of a motion to suppress, based on an alleged wrongful police interrogation. Second, defendant assigns error to the trial court's decision to limit the scope of testimony by defendant's expert witness. We find no error, and affirm defendant's conviction.

Evidence presented at the suppression hearing tended to show the following facts. On 21 February 1991, police officers responded to a phone call reporting a shooting at the home of defendant and her husband, Forrest Flowers. Upon arrival at defendant's residence, Cleveland County Detective Jerry L. White observed defendant standing in the yard. Detective White entered the house and observed Forrest Flowers dead on the floor. Detective White also observed a hole in decedent's chest, and a shotgun in the bedroom of the house. Detective White surmised the hole must have come from a large caliber weapon or shotgun blast.

Detective White then returned to the yard and spoke with defendant. Defendant told Detective White that she had been loading a shotgun across the room from decedent when an accidental discharge occurred. This discharge struck decedent, killing him. Defendant's demeanor at the time of this investigatory inquiry is a matter of dispute. Detective White described defendant's emotional state as "upset," or "somewhat upset," but not "hysterical or in tears." Other witnesses at the scene of the shooting observed the defendant as upset, but rational.

Defendant was then transported to the Cleveland County Law Enforcement Center by Detective White. Once at the station, defendant was apprised of her *Miranda* rights. As defendant was read these rights, Detective White repeatedly paused and asked whether she understood those rights. Defendant responded by stating she understood her rights. Defendant then waived those rights and signed a written waiver. The waiver included the following statement:

> I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promise or threats have been made to me . . . .

The waiver was signed by defendant at 7:38 P.M. on 21 February 1991, and was witnessed by Detective Brian Hawkins.

After the waiver was signed and acknowledged, Detective White began questioning defendant. Shortly thereafter, Detective Raymond Hamrick arrived. With Detective Hamrick present, Detective White resumed the questioning of defendant. Detective White questioned the veracity of defendant's version of events surrounding the shooting. Specifically, Detective White found defendant's accidental discharge story inconsistent with the nature of the shotgun wound

inflicted upon the decedent. Given the relatively small size of the entry wound, Detective White concluded the shotgun's discharge must have come from close range, not across the room as defendant claimed at the shooting scene.

Defendant was asked by Detective White to explain this apparent anomaly, stating it "could not have happened the way you told me that it happened." In response to Detective White's question, and in the presence of Detective Hamrick, defendant retorted, "Well, okay, I shot him." At this point, Detective White asked defendant if she would recapitulate her admission while being tape-recorded. Defendant agreed.

Defendant then repeated her story to Detective White while being tape-recorded. The tape recording took place at 8:30 p.m., 21 February 1991, and was witnessed by Detective Hamrick. In the transcript of the tape, the defendant affirms she was "advised of [her] constitutional rights" prior to making the recorded statement.

Defendant's recorded statement elaborated upon her earlier admission of culpability. In her recorded statement, defendant admits shooting the decedent because she "had had all she could take." Further, defendant explains how she selected a red shell, loaded the shell into the breech of the shotgun, and shot decedent from a distance of approximately two feet, while he was asleep on the couch. Defendant described the shooting as "a way out," apparently meaning a way out of the marriage.

The next morning, 22 February 1991, at 10:02 A.M., defendant read and signed a transcript of her recorded statement, affirming the transcript to be her "entire statement."

At trial, the defense theory was premised upon defendant's purported inability to form the capacity necessary to knowingly and voluntarily waive her constitutional rights prior to interrogation. The evidence offered by defendant to support a defense based on incapacity centered on expert psychiatric testimony. The ostensible reason for the psychiatric testimony was to show that defendant "was impaired by an allergic reaction to prescription narcotics and post-traumatic stress disorder (PTSD) so as to render any responses to police interrogation unknowing and involuntary." The State objected to the use of psychiatric testimony as substantive evidence of defendant's lack of capacity, and the trial court sustained the objection. In ruling on

the objection, the trial court allowed defendant's use of psychiatric testimony only for the limited purpose of corroboration.

We note preemptively that defendant has not set out all of her assignments of error in her brief on appeal. As such, those assignments of error are deemed abandoned. *State v. Ledford*, 41 N.C. App. 213, 218, 254 S.E.2d 780, 782 (1979); N.C.R. App. P. 28(b)(5) (1995). Defendant's remaining assignments of error address the trial court's failure to suppress defendant's inculpatory statements, and the trial court's limitations on defendant's expert psychiatric testimony.

[1] Defendant maintains the trial court improperly allowed admission of her inculpatory statements, in derogation of the rules set forth in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966). The purpose of *the Miranda* holding is to ensure "the use of procedural safeguards effective to secure the [constitutional] privilege against self-incrimination." *Id.* at 443, 16 L.Ed.2d at 706. Accordingly, defendant attempted to suppress her inculpatory statements, but that motion was denied by the trial court.

Defendant's *Miranda*-based theory is twofold. Defendant argues "she was impaired by an allergic reaction to prescription narcotics and post-traumatic stress disorder (PTSD) so as to render any responses to police interrogation unknowing and involuntary." Otherwise stated, defendant asserts she lacked capacity to waive her *Miranda* protections. Next, defendant argues *Miranda* warnings should have been given at each stage of the interrogation process, not just at the initial period of questioning. Because repeated warnings were not given, defendant asserts the original *Miranda* warnings became stale at the point the tape-recorded statement was made.

Appellate courts reviewing the voluntariness of a confession must apply a totality of the circumstances test. *State v. Smith*, 328 N.C. 99, 114, 400 S.E.2d 712, 720 (1991). Application of this totality test is based upon scrutiny of the " 'findings of fact made by the trial judge following a *voir dire* hearing on the voluntariness of a defendant's confession [which are] conclusive on appeal if supported by competent evidence in the record.' " *State v. Richardson*, 316 N.C. 594, 598-99, 342 S.E.2d 823, 827 (1986) (quoting *State v. Baker*, 312 N.C. 34, 39, 320 S.E.2d 670, 674 (1984)). Conclusions of law flowing from the trial court's findings are a proper matter for review. *Smith*, 328 N.C. at 114, 400 S.E.2d at 720.

In the instant case, the trial judge's order denying defendant's motion to suppress is replete with findings supported by competent evidence. Those findings justify a legal conclusion that defendant's inculpatory statements were voluntary. Defendant's arguments that she lacked capacity are belied by her actions indicative of rationality. For instance, the trial court found that "defendant was not hysterical, was not crying but was upset" during the period prior to questioning. Further, the trial court found defendant's tape-recorded statements demonstrative of a person answering questions "in a clear manner generally, thoughtfully, responsively generally." Defendant's claim of incapacity, based on PTSD or an allergic reaction to drugs, is simply not borne out by the trial court's findings or the record. Based on the enumerated examples herein, and others extant in the trial court's findings, there was "plenary competent evidence" to support the conclusion that the confession was voluntary. *State v. Corley*, 310 N.C. 40, 52, 311 S.E.2d 540, 547 (1984). Defendant's signed waiver of her rights was therefore in accord with *Miranda*.

[2] Defendant's claim that the initial *Miranda* warnings were inadequate, or stale, with regard to defendant's recorded statement (and the signing of the transcript therefrom) is ill-founded. The test for staleness is whether the *Miranda* warnings initially given were adequate to ensure defendant's awareness of her rights during subsequent interrogations. *Smith*, 328 N.C. at 113, 400 S.E.2d at 719. A determination of adequacy is made by considering the totality of the circumstances. *Id.*

The record discloses that defendant was advised of her *Miranda* rights prior to any custodial interrogation. Defendant signed a waiver of those rights in close temporal proximity to the actual explanation of the warnings. The record shows the initial warnings, and defendant's signing of the *Miranda* waiver, took place over a period of approximately eight minutes, from 7:31 P.M. to 7:38 P.M. on 21 February 1991. The record is also clear that the taped questioning, and defendant's statement arising therefrom, commenced at 8:30 P.M., 21 February 1991.

Prior to the substantive portion of defendant's recorded statement, Detective White had the following tape-recorded colloquy with defendant:

> Detective White: And did you understand all of those [*Miranda*] rights as I read them to you?

Defendant: Yes.

Detective White: And are you willing to answer questions and make a statement at this time, having these rights in mind?

Defendant: Yes.

The next morning, on 22 February 1991 at 10:02 A.M., defendant was presented with a transcription of her recorded statement. Defendant acknowledged the transcript, by affirming through signature the following annotation: "I, [defendant], have read the material contained herein and attest to the fact that it is my entire statement . . . ." The transcribed statement included the colloquy with Detective White above, explicitly referring to defendant's *Miranda* rights. Simply put, defendant was reminded at least twice of the rights she now claims to lack memory of.

"Many courts have considered the question whether *Miranda* warnings must be repeated at subsequent interrogations when they have been properly given at the initial one." *State v. McZorn*, 288 N.C. 417, 433, 219 S.E.2d 201, 212 (1975), *vacated in nonrelevant part*, 428 U.S. 904, 49 L.Ed.2d 1210 (1976). The *McZorn* Court answered this question, holding that *Miranda* warnings retain efficacy, so long as

> no inordinate time elapses between interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning . . . .

McZorn, 288 N.C. at 433, 219 S.E.2d at 212.

The trial court found and concluded defendant "was advised of her rights . . . at an appropriate time and in an appropriate manner . . . [and] [t]hat the rights of the defendant . . . were not violated by her detention, interrogation, or arrest[.]" This conclusion is well supported by the trial court's findings that the tape-recorded statements were made in "a clear manner generally," and were "thoughtful[]" and "responsive[] generally." From these circumstances, it cannot be said that "defendant was so intellectually deficient or emotionally unstable that [s]he had forgotten [her] constitutional rights that had been fully explained to [her] a short time earlier." *McZorn*, 288 N.C. at 435, 219 S.E.2d at 212. As such, the initial warnings given the instant defendant retained vitality throughout the questioning at issue here, *i.e.*, the warnings were not stale.

[3] Finally, defendant argues the trial court erred by limiting the testimony of her expert witness. The trial court refused to allow defendant's expert witness to testify on the substantive issue of defendant's capacity to waive her constitutional rights under *Miranda*, based on claims of PTSD and drug impairment. The trial court allowed the psychiatric testimony only to the extent necessary to corroborate defendant's testimony.

The North Carolina Supreme Court made clear in *State v. Daniels*, 337 N.C. 243, 263, 446 S.E.2d 298, 311 (1994), that a witness "may not testify as to whether the defendant had the capacity to waive [her] rights [under *Miranda*]." Just as the rule is clear, so is the result here. Defendant's brief argues the testimony of the "expert witnesses on PTSD and psychogenic shock . . . [was] for the purpose of showing that the defendant lacked the capacity to understandingly and voluntarily waive her rights and confess." Defendant's position ineluctably runs afoul of *Daniels*, and is without merit.

In summary, we conclude defendant had the capacity to waive her rights under Miranda; that such rights were properly explained to defendant by Detective White. We further hold that the *Miranda* warnings were not stale at the time of defendant's recorded statements, or at the time the transcript of the recordings was signed by defendant. As well, the testimony of the defendant's expert psychiatrist was properly limited by the trial court to corroborative purposes only.

No error.

Chief Judge ARNOLD and Judge GREENE concur.

STATE OF NORTH CAROLINA v. JAMES ALBERT BASS

No. COA94-1098

(Filed 2 January 1996)

1. Evidence and Witnesses § 123 (NCI4th)— sexual abuse of child—previous abuse by another person—not admissible

The trial court did not err in a prosecution for taking indecent liberties with a child and first-degree sexual offense by denying defendant's motion to present evidence concerning prior similar

abuse of the victim by another person. Defendant introduced no evidence that the victim's prior accusations were false, alleges no prior inconsistent statements, and makes no allegation that the proffered evidence would be relevant to show that someone other than defendant committed the assault. Although defendant contended that the information was relevant to the witness's credibility merely because it would show that she had some of the requisite information she would need to lie, that contention would substantially restrict the effect of N.C.G.S. § 8C-1, Rule 412. Absent some opening of the door, evidence of prior abuse such as in this case is inadmissible.

Am Jur 2d, Evidence § 504; Rape §§ 55, 86.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR4th 283.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts. 83 ALR4th 685.

2. Criminal Law § 546 (NCI4th)— indecent liberties and first-degree sexual offense—evidence of prior abuse of child by another party excluded—argument that child would have no knowledge but for this abuse allowed—mistrial

The trial court abused its discretion in a prosecution for taking indecent liberties with a child and first-degree sexual offense by denying defendant's objections to the prosecutor's closing argument that the victim would have no knowledge of these things but for this abuse and by denying defendant's motion for a mistrial after previously denying defendant's motion to introduce evidence of similar abuse by another party. Although lack of knowledge but for this abuse can be fairly implied, and the jury could draw such an inference in this case, the prosecutor may not properly argue to the jury that the inference would be correct where the prosecutor is aware that the contrary is true.

Am Jur 2d, Trial §§ 611, 632.

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

STATE v. BASS

[121 N.C. App. 306 (1996)]

Appeal by defendant from judgments and commitments entered 15 June 1994 by Judge Robert L. Farmer in Cumberland County Superior Court. Heard in the Court of Appeals 17 October 1995.

Defendant is a neighbor of the victim in the trailer park in which both reside. Defendant was charged and tried for taking indecent liberties with a child in violation of G.S. 14-202.1(a)(1) and first degree statutory sexual offense in violation of G.S. 14-27.4(a)(1). The jury found defendant guilty of both charges.

The State's evidence at trial tended to show the following. The victim was six years old when the abuse occurred. The victim testified that she knew the defendant and that he had given her candy and other treats on many occasions. On the day in question, the victim testified that defendant invited her inside his trailer and gave her apple pie. After eating the pie, the victim looked around to see what defendant was doing. She found defendant in the bedroom with his pants open. Defendant proceeded to masturbate in front of her. She then testified that defendant ordered her to undress and licked her "front." Afterward, defendant allowed her to dress but then demanded that she touch his "front." Defendant told her "that's not right" and proceeded to show her "how to do it."

The victim testified that, at this point, her mother could be heard calling her. She testified that defendant then released her, but told her that he would kill her mother if she told anyone. When the victim got home, however, she reluctantly told her mother what had happened. The next morning, she repeated her account of the events to Dr. George Pantelakos and Investigator Ann E. Birch.

Dr. Pantelakos examined the victim and found evidence of external inflammation in her vaginal area. Dr. Pantelakos testified that he could not be certain as to the cause of the inflammation, but he testified that the inflammation was consistent with the victim's account of the abuse. Investigator Ann Birch also interviewed the victim. The victim first gave Investigator Birch her account of the abuse, and Investigator Birch then used diagrams that allowed the victim to identify relevant anatomical parts. Ms. Birch's testimony fully corroborated the victim's testimony.

Defendant testified to knowing the victim, but denied ever assaulting her in any way. Prior to trial, defendant filed a motion and affidavit seeking an *in camera* hearing pursuant to Rule 412. Defendant sought to introduce evidence that the victim had been

assaulted in a similar manner some three years earlier. After briefly hearing arguments from counsel, Judge Robert L. Farmer denied defendant's motion.

Subsequently, during closing arguments, the prosecuting attorney argued in essence that the victim could not have fabricated her story because she would have had no other way of knowing about sexual matters had the defendant not assaulted her. Defendant objected to the prosecution's argument and moved for mistrial. Defendant asserted that he was being unfairly prejudiced by the prosecution's argument because the evidence of prior sexual abuse of the victim had been excluded. The court overruled defendant's objection and denied defendant's motion.

Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Diane G. Miller, for the State.

Jonathan E. Broun for defendant-appellant.

EAGLES, Judge.

I.

[1] Defendant first assigns as error the trial court's denial of defendant's motion to present evidence concerning alleged prior sexual abuse of the victim. Defendant sought to introduce evidence that the victim here had been similarly abused by her uncle when she was three years old, some three years before the alleged assault by defendant. The trial court denied defendant's motion after hearing argument that Rule 412 barred introduction of the evidence in question. G.S. 8C-1, Rule 412 (1983). Defendant contends that this was error because the evidence of prior abuse, if introduced, would show that the victim had prior knowledge of sexual matters and therefore had the ability to lie. We disagree.

Rule 412 prohibits the introduction of evidence concerning the "previous sexual activity of a complainant in a rape or sex offense case." *State v. McCarroll*, 336 N.C. 559, 563, 445 S.E.2d 18, 20 (1994). Any " 'sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial . . .' " is deemed irrelevant unless an exception applies. *State v. Wright*, 98 N.C. App. 658, 661, 392 S.E.2d 125, 127 (1990) (quoting G.S. 8C-1, Rule 412(a) (1983)). We conclude that the prior abuse alleged here is "sexual activity" within

the ambit of Rule 412. *See State v. Ollis*, 318 N.C. 370, 374, 348 S.E.2d 777, 780 (1986).

Our determination that the prior abuse here is sexual activity does not end our inquiry, however, as Rule 412(b) lists four exceptions under which prior sexual activity may still be deemed relevant and therefore admissible. G.S. 8C-1, Rule 412(b) (1983). Moreover, our Supreme Court has "held that Rule 412 is not the sole gauge in determining if evidence is admissible . . ." in cases of sexual misconduct. *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854 (citing *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982)), *disc. review denied*, 333 N.C. 793, 431 S.E.2d 28 (1993). A victim's statements about prior specific sexual activity are sometimes admissible for impeachment purposes even though the statements do not fall within one of the Rule 412(b) exceptions. *Id.*

With regard to the exceptions contained in Rule 412(b), we conclude and defendant concedes that those exceptions to the general rule of inadmissibility are inapplicable here. Additionally, we conclude that neither *Younger*, nor its progeny, require admission of proffered evidence in this case. In *Younger*, the prosecutrix had made prior inconsistent statements to her attending physician concerning her recent sexual history. *Younger*, 306 N.C. at 695-97, 295 S.E.2d at 455-56. Reversing the exclusion of the prosecutrix's prior inconsistent statements, the Supreme Court concluded that "the statute was not designed to shield the prosecutrix from the effects of her own inconsistent statements which cast a grave doubt on the credibility of her story." *Id.* at 697, 295 S.E.2d at 456. Similarly, in *State v. Anthony*, 89 N.C. App. 93, 96, 365 S.E.2d 195, 197 (1988), this court recognized that prior accusations of abuse were inadmissible under Rule 412 unless there was evidence that the prior accusations were false. Where the prior accusations were false, the defendant has a fundamental right to cross-examine the witness on such "subject matter relevant to the witness' credibility." *State v. McCarroll*, 109 N.C. App. 574, 578, 428 S.E.2d 229, 231 (1993), *rev'd on other grounds*, 336 N.C. 559, 445 S.E.2d 18 (1994). In other words, where the probative value of the proffered evidence in challenging the witness' credibility is high, and the degree of prejudice present by virtue of reference to previous sexual activity is low, the proffered evidence is relevant and therefore defendant has a right to use the evidence for at least impeachment purposes. *Younger*, 306 N.C. at 697-99, 295 S.E.2d at 456-58.

Here, the proffered evidence fails this balancing test. Defendant here introduced no evidence that the victim's prior accusations were false. Defendant alleges no prior inconsistent statements. Moreover, defendant makes no allegation that the proffered evidence would be relevant to show that someone other than defendant committed the assault. *State v. Holden*, 106 N.C. App. 244, 247-48, 416 S.E.2d 415, 417-18, *disc. review denied*, 332 N.C. 669, 424 S.E.2d 413 (1992). Consequently, we agree with the trial court that the proffered evidence here is irrelevant and therefore inadmissible for any purpose under Rule 412.

Defendant's only contention is that the proffered evidence is relevant to the witness' credibility merely because it would show that the witness had some of the requisite information that she would need to have in order to lie if she so desired. Defendant's contention is contrary to Rule 412 and unsupported by the law of this jurisdiction. To agree with defendant's contention would be to substantially restrict the effect of Rule 412, and allow admission of a wide variety of previous sexual activities over Rule 412 objection. A defendant could argue in a similar manner for admission of evidence concerning almost any prior sexual abuse. Accordingly, we conclude that, absent some "opening of the door," evidence of prior abuse such as we have here is inadmissible under Rule 412. We find no error, constitutional or otherwise, in the trial court's decision, standing alone, to deny defendant's motion to present evidence concerning alleged prior sexual abuse of the victim.

II.

[2] Defendant next challenges the trial court's denial of defendant's motion for mistrial made during the prosecution's closing argument. Defendant's assignment of error here stems from the following relevant portion of the prosecutor's closing argument made over defendant's objection:

> And what do you say to the folks who say children fantasize? Your common sense tells you what we fantasize about. We fantasize about things that are in our realm of knowledge, don't we? For example, we fantasize about what we would do if we won the lottery; and what we would do with all that money. We fantasize about what we would do if we had long vacations, and where we would go. And these are all things within what? Our realm of knowledge.

Do we fantasize about things that are not—that are out of our realm of knowledge? No. Because we don't have a basis for fantasy. What do children fantasize about? An elephant that has wings and can maybe fly? A child knows what an elephant is.

. . . .

And I ask you to keep in mind what I was just talking to you about. I said what does your common sense tell you? What do you observe in your everyday life about children's fantasies? They fantasize about people. They fantasize about animals. But they fantasize in what way? They'll have an elephant having the ability to fly. They will have a situation where you'll have a magic wand to change a frog into a prince. The story-type things that you see, the fantasy things. Fantasize—they don't know to fantasize. It's not in their realm of knowledge, is it, to fantasize about masturbation? About these sorts of things to someone else. Massaging his front . . . that's her best description of it to you. That's how she understands it, in her child-like way, massaging his front. Touching his front.

You remember the part where she said he asked her how many hairs her mother had on her front? It's not in a child's realm, is it? Think about your life experiences. Think about what you know from the children that you know. Think about that. Think about all the things she said. And think about how she told you things.

Did she describe things in a child's innocent six-year-old way? His penis felt like wet chicken skin to her. She even told the investigator that. She said in her words, "He had a drop of pee on his front thing." And again, is that the sort of thing a child knows without seeing it?

. . . .

Does she have any basis? Do you know of any children? Think about what children fantasize about.

Defendant here made three separate objections during this portion of the prosecutor's closing argument. All of these objections by defendant were overruled and defendant's accompanying motion for mistrial was denied. Moreover, having overruled defendant's objections, the trial court gave no curative instruction to the jury so as to avoid prejudice.

Defendant assigns as error the trial court's failure to sustain his objections and its refusal to grant his motion for mistrial. Defendant argues that, since all evidence of prior abuse was excluded, these arguments by the prosecutor were so prejudicial to defendant that a new trial is necessary. We agree, and accordingly are compelled to remand for a new trial.

"Trial counsel are allowed wide latitude in jury arguments." *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 39-40, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d. 547 (1994). Counsel, however, are not allowed to advance arguments "calculated to mislead or prejudice the jury." *State v. Riddle*, 311 N.C. 734, 738, 319 S.E.2d 250, 253 (1984). "[A]n attorney may not make arguments based on matters outside the record but may, based on 'his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.' " *State v. Wilson*, 335 N.C. 220, 224, 436 S.E.2d 831, 834 (1993) (quoting G.S. 15A-1230 (1988)). Whether an attorney's closing argument extends beyond the latitude allowed is a "matter ordinarily left to the sound discretion of the trial court." *State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468, *cert denied.*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988). We review the trial court's rulings for abuse of discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991).

Here, we conclude that the trial court abused its discretion in overruling defendant's objections and denying defendant's motion for mistrial. We conclude that the prosecutor's argument was "calculated to mislead or prejudice the jury." *Riddle*, 311 N.C. at 738, 319 S.E.2d at 253. The prosecutor here was aware that defendant had offered proof of the victim's prior abuse by an uncle. Defendant's Rule 412 motion had attached to it an affidavit by defendant's attorney stating that the victim could testify that her uncle "used to do the same things to her that the defendant had done the previous day." The State's own file contained evidence that the victim had been previously abused. Moreover, arguing against defendant's pretrial motion, the prosecutor acknowledged evidence of prior abuse of the victim. The prosecutor did not argue that the prior abuse did not occur; instead, the prosecutor argued against admission of that evidence because there was no indication that the allegations of prior abuse were false.

While the trial court here did not err in excluding the evidence of prior abuse of the victim, the trial court did err and abuse its discretion in allowing the prosecutor to use this absence of evidence of the victim's prior abuse to mislead the jury. That a six-year-old child

would know nothing of sexual activity but for defendant's alleged abuse can be fairly implied. The jury could draw such an inference from the evidence before it in this case. Nevertheless, the prosecutor may not properly argue to the jury that the inference would be correct where the prosecutor is aware that the contrary is true. We conclude that the error here is prejudicial.

New trial.

Judges WYNN and SMITH concur.

ADOLPH A. JUSTICE, JR., PETITIONER-APPELLANT v. N.C. DEPT. OF TRANSPORTATION, RESPONDENT-APPELLEE

No. COA95-114

(Filed 2 January 1996)

Administrative Law and Procedure § 44 (NCI4th)—Commission's refusal to adopt Administrative Law Judge's recommended decision—failure to explain decision—inability of court to review

A decision of the State Personnel Commission declining to adopt the recommended decision of the Administrative Law Judge that petitioner's termination should be reversed because improper procedure was followed by the Department of Transportation failed to comply with the statutory requirement that the agency state the specific reasons why the recommended decision was not adopted where the Commission adopted all of the Administrative Law Judge's findings of fact but refused to adopt the decision because some of its conclusions were "inaccurate statements and [were] not supported by the substantial evidence in the record," but the Commission did not explain its decision with enough specificity to allow the reviewing court to determine from the record whether the legal conclusions underlying the agency's decision represented a correct application of the law. N.C.G.S. § 150B-51(a).

Am Jur 2d, Administrative Law §§ 522, 532, 542.

Power of administrative agency to reopen and reconsider final decision as affected by lack of specific statutory authority. 73 ALR2d 939.

Judge JOHNSON dissenting.

Appeal by petitioner from judgment entered 7 November 1994 by Judge W. Osmond Smith, III, in McDowell County Superior Court. Heard in the Court of Appeals 26 October 1995.

John R. Mull for petitioner appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hal F. Askins and Assistant Attorney General Bryan E. Beatty, for the State.

SMITH, Judge.

Petitioner appeals a superior court judgment affirming a decision and order of the State Personnel Commission (Commission) entered 28 February 1994. Petitioner alleges that the superior court judge erred in failing to appropriately review the decision and order of the Commission pursuant to N.C. Gen. Stat. § 150B-51(a). After careful review of the record, we agree. Accordingly, we remand.

Petitioner was formerly employed by the Department of Transportation (DOT), most recently in the capacity of Inspector I with the Division of Motor Vehicles, Enforcement Section. Petitioner's duties included various enforcement activities involving car dealerships, such as investigation of odometer rollback violations. In one such investigation conducted in September 1989, petitioner was part of a group of enforcement employees who discovered, confiscated from a car dealer, and stored for evidence of rollback violations, twelve vehicles. One of the confiscated vehicles was a 1985 gold Nissan 300 ZX (300 ZX).

On 28 June 1990, petitioner returned to the garage where the vehicles were stored and signed for and removed the 300 ZX. He maintained that he wanted to check the vehicle to determine if it was salvaged or stolen. Three months later, the owner of the garage called the DMV to inquire about the 300 ZX because she had not been paid storage fees as promised, and she was no longer in possession of the automobile. On the same day petitioner denied any knowledge of the location of the vehicle, an investigator from the office of the Director of Enforcement discovered the vehicle parked in the driveway of petitioner's home. The odometer reading was 1834 miles higher than that recorded at the time the vehicle was placed in storage.

Petitioner was first advised that he was being investigated for alleged misconduct on 19 September 1990. On 8 October 1990 he received a termination letter, effective 12 October 1990, from the director of the Enforcement Section. Petitioner sent a timely "Notice of Appeal" of his dismissal to Mr. Larry Billings, Personnel Director of the Department of Transportation, dated 10 October 1990. Mr. Billings responded by letter dated 18 October 1990, noting that petitioner had filed a timely appeal. By letter dated 2 April 1991, Mr. Billings advised petitioner that a hearing on the matter would be held before the Employee Relations Committee on 17 April 1991. On 14 August 1991, petitioner received a letter from the Secretary of the DOT adopting the Committee's recommendations and upholding petitioner's termination.

The Department of Transportation's Procedures Manual specifies that within ten days after receipt of an appeal of termination by an employee, the Employee Relations Committee shall schedule a hearing and inform the parties of the date, location and time of such hearing. In the event an employee is unable, within a reasonable time, to obtain a final decision from the head of a department, he may appeal to the State Personnel Commission. N.C. Gen. Stat. § 126-35(a) (1993). In this case, the Employee Relations Committee did not schedule a hearing within ten days, pursuant to the Department's procedures manual. In fact, the Committee waited over 5 months before scheduling a hearing in petitioner's case. During this interim, however, petitioner did not attempt to appeal his termination to the State Personnel Commission pursuant to N.C. Gen. Stat. § 126-35(a). Further, it is not clear that petitioner has shown that the result of the Committee review hearing would have been different, but for the DOT's failure to follow internal procedure. *See Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986).

Petitioner appealed the decision of the Secretary of the DOT and filed a Petition for Contested Case hearing with the Office of Administrative Hearings on 9 September 1991. On 23 and 24 November 1992, an administrative hearing was held before Administrative Law Judge (ALJ) Sammie Chess, Jr. On 19 July 1993 ALJ Chess issued a recommended decision in petitioner's favor, concluding that petitioner's termination should be reversed because improper procedure was followed by the DOT. The recommended decision was forwarded to the State Personnel Commission in accordance with the provisions of N.C. Gen. Stat. § 150B-36(b).

On 8 December 1993, the State Personnel Commission heard arguments on petitioner's appeal. Through a Decision and Order issued 28 February 1994, the Commission adopted all of the ALJ's findings of fact, finding them supported by substantial evidence in the record. However, the Commission excepted to several provisions of the recommended decision labeled "Conclusions of Law." Based upon those exceptions, the Commission declined to adopt the recommended decision and upheld petitioner's termination.

Pursuant to N.C. Gen. Stat. § 150B-43, *et seq.*, petitioner appealed the Decision and Order of the State Personnel Commission to the Superior Court of McDowell County. Superior Court Judge Osmond Smith issued an order upholding the Decision and Order on 19 October 1994. From that order, petitioner appeals.

Petitioner first assigns error to the court's failure to properly review the Commission's decision pursuant to N.C. Gen. Stat. § 150B-51(a). That subsection requires the reviewing court to make two initial determinations:

> First, the court shall determine whether the agency heard new evidence after receiving the recommended decision. . . . Second, if the agency did not adopt the recommended decision, the court shall determine whether the agency's decision states the specific reasons why the agency did not adopt the recommended decision.

If the court finds that the agency did not state specific reasons why it did not adopt a recommended decision, the court must reverse the decision or remand the case to the agency to enter the specific reasons. N.C. Gen. Stat. § 150B-51(a) (1991).

The Commission did not hear new evidence in this case. However, it did decline to adopt the recommended decision of the ALJ and gave the following rationale for so doing:

> 2. The Commission declines to adopt the second and third sentence of Procedural Conclusion of Law 3 because they are inaccurate statements and are not supported by the substantial evidence in the record.
>
> 3. The Commission also declines to adopt Procedural Conclusion of Law 4, the Summary of Decision of the [ALJ] because they are inaccurate statements and are not supported by the substantial evidence in the record.

4. The Commission declines to adopt the portion of the Conclusion, page 21 which states, **"but the dismissal violated Petitioner's procedural rights"** because it is inaccurate and is not supported by the substantial evidence in the record.

5. The Commission declines to adopt the Observation and Recommended Decision of the [ALJ] because they are inaccurate statements and are not supported by the substantial evidence in the record.

The Administrative Procedure Act, Chapter 150B, while giving Administrative Law Judges "many of the powers and duties generally regarded as necessary to the independent function of our courts," *Ford v. N.C. Dept. of Envir., Health, and Nat. Resources*, 107 N.C. App. 192, 197, 419 S.E.2d 204, 207 (1992), still gives the interested agency the authority to make its own findings of fact, conclusions of law and decision. *Id.* at 199, 419 S.E.2d at 208. The agency may decline to adopt the ALJ's recommended decision in whole or in part, but must offer specific reasons for doing so. N.C. Gen. Stat. § 150B-36(b) (1991).

If the agency declines to adopt the ALJ's recommended decision, the reviewing court, on appeal, must first determine whether the agency stated specific reasons for its decision in compliance with § 150B-36(b). N.C. Gen. Stat. § 150B-51(b). These statutory sections do "not require a point-by-point refutation of the Administrative Law Judge's findings and conclusions," *Webb v. N.C. Dept. of Envir., Health and Nat. Resources*, 102 N.C. App. 767, 770, 404 S.E.2d 29, 31 (1991), however, they do require that the agency explain its decision with enough specificity to allow the reviewing court to determine from the record whether the legal conclusions underlying the agency's decision represent a correct application of the law.

In this case, the only reasons given by the Commission for failing to adopt the ALJ's recommended decision were that the conclusions to which the agency objected were "inaccurate statements and [were] not supported by the substantial evidence in the record." We note that conclusions of law should be supported by findings of fact, which in turn should be supported by competent substantial evidence in the record. The Commission, which adopted all of the ALJ's findings of fact, failed to give any explanation why the ALJ's conclusions of law were "inaccurate," or more appropriately, why the ALJ's findings of fact did not support his conclusions of law. The requirement that the agency give specific reasons for failing to adopt a recommended deci-

sion is not a mere formality. While it is not the reviewing court's role to determine whether the Commission's reasons for declining to adopt the recommended decision are correct, *Oates v. N.C. Dept. of Correction*, 114 N.C. App. 597, 600, 442 S.E.2d 542, 544 (1994), the Commission is still required to state its rationale specifically so that the reviewing court may determine whether the Commission engaged in a proper legal analysis. The rationale provided by the Commission here is simply not specific enough for such a determination to be made by this Court or the superior court. Furthermore, most of the "conclusions" and "observations" as well as the "summary of decision," which the Commission declined to adopt, were nonessential to the decision rendered by the ALJ and were duplicative of other parts of the decision. Their accuracy or inaccuracy was not a proper basis for failing to adopt the recommended decision.

Based upon our ruling herein, it is not necessary to address petitioner's other assignments of error. For the reasons stated, the case is remanded for further proceedings in accordance with this opinion.

Remanded.

Judge WALKER concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the majority's opinion which reverses and remands the trial court's order.

I find that the Commission did in fact state a specific reason as to why it declined to adopt the ALJ's conclusions; that is, that the conclusions of law "are inaccurate statements and are not supported by the substantial evidence in the record." The uncontroverted evidence in the record reveals that petitioner, without authority and knowing that it was against his department's guidelines, took the 300ZX from storage; and converted it to his own personal use for three months, during which time the vehicle was driven some 1834 miles. The evidence is also uncontroverted that petitioner, when confronted, initially denied taking the vehicle from storage, and only returned the vehicle when his employer discovered that petitioner had removed the vehicle from storage and converted it to his own personal use. Thus, there is substantial competent evidence in the record which

supports the findings of fact of the ALJ, adopted by the Commission, which in turn, supports the conclusions of law reached by the Commission. The findings support only one conclusion which is contrary to the ALJ's conclusions of law.

I find no merit in petitioner's issues regarding the procedural violations because petitioner is unable to show that a different result would have been reached, had the internal procedures been followed. *See Leipart v. N.C. School of Arts*, 80 N.C. App. 339, 342 S.E.2d 914, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986).

Accordingly, the trial court's holding that (1) the findings of fact in the Decision and Order of the ALJ were supported by competent and substantial evidence in view of the whole record, and (2) the findings of the ALJ adopted by the Commission support the Commission's conclusions of law were correct. Therefore, I vote to affirm.

SANDRA ENGLISH, PETITIONER v. C. ROBIN BRITT, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, AND MARY DEYAMPERT, DIRECTOR, DIVISION OF SOCIAL SERVICES, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, IN THEIR OFFICIAL CAPACITIES, RESPONDENTS

No. COA95-123

(Filed 2 January 1996)

Social Services and Public Welfare § 23 (NCI4th)— institutionalized spouse—spousal support terminated—insufficiency of evidence to support termination

The final decision of the Department of Social Services upholding termination of the spousal allowance for the wife of an institutionalized person receiving Medicaid was not supported by substantial competent evidence in the record, since there was evidence that the institutionalized spouse wanted his "money," but there was no evidence that he intended to apply all of his income, exceeding his personal needs allowance, to his nursing care rather than toward the support of his wife.

Am Jur 2d, Welfare Laws § 40.

Appeal by petitioner from order entered 14 November 1994 by Judge W. Osmond Smith, III, in McDowell County Superior Court. Heard in the Court of Appeals 26 October 1995.

Legal Services of the Blue Ridge, Inc., by Samuel F. Furgiuele, Jr., for petitioner appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Belinda A. Smith, for the State.

SMITH, Judge.

This pauper appeal involves Medicaid law and regulations which pertain to persons who are institutionalized, receiving Medicaid benefits, and have spouses still residing in the community (community spouse). An institutionalized spouse, at his discretion, may provide some amount of income for the support of his community spouse, instead of having all of his income applied to the cost of the institutionalized care. 42 U.S.C. § 1396r-5(d)(1)(B) (1995).

In this case, Sandra English, petitioner, is the community spouse of Herdie English, an institutionalized Medicaid recipient. Mr. English entered McDowell Nursing Center in May 1992. At that time, Mrs. English filed an application with the McDowell County Department of Social Services (DSS) for medical assistance for Mr. English. Based upon his income, Mr. English qualified for Medicaid. Except for a "personal needs allowance" of $30.00 per month for Mr. English's personal use, the rest of his income, $508.00 per month Veterans Administration benefits and $404.80 per month social security benefits, was established as Mrs. English's community spouse allowance. Mr. English was, therefore, not required to pay any of the cost of his nursing care. In January 1993 Mr. English received a cost of living increase in his income. As a result, his personal patient liability was assessed to be $20.00 per month.

In the spring of 1993, Mr. English complained to nursing center personnel that he was not receiving any money. The complaint was reported to the McDowell County DSS on 1 April 1993. Medicaid caseworker, Leah Robertson, visited Mr. English in the nursing center. After discussing with Mr. English the failure of his wife to provide him his personal needs allowance, Ms. Robertson directed nursing center personnel to prepare two letters for Mr. English's signature. The letters redirected his Veterans Administration check and his social security check, previously mailed to Mrs. English, to the nursing center. On 10 September 1993, the McDowell County DSS was appointed guardian over Mr. English and his estate, after he was determined to be incompetent.

Ms. Robertson interpreted Mr. English's request for money as an instruction to cut off Mrs. English's spousal allowance and took the necessary steps to ensure that the spousal allowance was terminated. As a result, Mr. English's patient liability of $20.00 per month was increased to $834.00 per month which was all of his remaining income, except his personal needs allowance. The increase was effective in May 1993.

On 14 July 1993, Mrs. English filed an administrative appeal, contesting termination of her spousal allowance. After a 19 July 1993 hearing a decision upholding termination of the spousal allowance was issued. Mrs. English appealed that decision to the North Carolina Department of Human Resources (DHR). A hearing was conducted on 17 September 1993 before hearing officer Clarissa Brady. Officer Brady upheld termination of the spousal allowance by decision dated 1 November 1993. Mrs. English appealed Officer Brady's decision to Ms. M. Vicki Thaxton, Interim Chief Hearing Officer of the DHR, Division of Social Services, who by decision dated 3 January 1994, upheld the allowance termination. Mrs. English then appealed to the Superior Court of McDowell County. The case was heard on 17 October 1994. The superior court issued an order dated 14 November 1994 upholding the allowance termination. From that order, petitioner, Mrs. English, appeals. She contends that the final decision of the DHR, Department of Social Services, upholding termination of spousal allowance was not supported by substantial competent evidence in the record, in that there was no substantial evidence of intention by Mr. English to terminate such support.

Our review, as well as that of the superior court, is governed by N.C. Gen. Stat. § 150B-51. That section provides that the court reviewing an agency decision may affirm or remand the case. It may also reverse or modify the agency's decision if the substantial rights of petitioner may have been prejudiced if, among other reasons, the agency's decision was unsupported by substantial evidence in the record. N.C. Gen. Stat. § 150B-51(b)(5) (1991). *See Dockery v. N.C. Dept. of Human Resources*, 120 N.C. App. 827, 463 S.E.2d 580 (1995); *In re Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995); *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 372 S.E.2d 342 (1988).

The appropriate standard of review depends upon the basis of the petitioner's challenge. Allegations that the agency decision is affected by errors of law require *de novo* review. *Id.* When petitioner alleges that a final agency decision is not supported by substantial evidence

in the record, the reviewing court must apply the whole record test. *Walker v. North Carolina Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990). Petitioner's contention in this case that the DHR decision is unsupported by substantial competent evidence requires application of the whole record test. The whole record test dictates that the reviewing court "examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). "Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion." *Walker*, 100 N.C. App. at 503, 397 S.E.2d at 354.

At the hearing, Officer Brady made the following pertinent finding of fact and conclusion of law, which were adopted and upheld by Interim Chief Hearing Officer Thaxton:

> 11. Mary Manley [*sic*] and the caseworker testified at the hearing that Mr. English stated on April 1, 1993 that he wanted all his money to be used for his cost of care at the nursing home.
>
> * * * *
>
> CONCLUSIONS
>
> . . . . The county did not appear to influence his opinion but informed him of his possible options due to their not being able to contact his wife, Sandra after several efforts. Mr. English made the decision that was in his best interest at that time.

After careful review of the entire record in this case, we can find no substantial evidence to support decisive finding of fact number 11. Further, there is no evidence to support the above conclusion of law, better labeled a finding of fact, that Mr. English was informed of his possible options. In fact, all the evidence is to the contrary. If he had been apprised of all available options, he would have realized terminating the spousal allowance and redirecting his checks was not in his best interest because payment delays resulting from such action put him at risk of being discharged from the nursing center. Because we can find no substantial evidence to support the decision of the DHR, we reverse.

At the hearing before Officer Brady, the McDowell County DSS, as Mr. English's interim guardian, attempted to ratify his "decision" to terminate spousal allowance to his wife, stating that they were "going

by his wishes." The DSS failed to bring Mr. English to the hearing; however, four witnesses testified concerning alleged statements he had made regarding his wishes: Leah Robertson, the DSS caseworker; Mary Maney and Gwen Conley, employees of the nursing center; and Mrs. English. Ms. Robertson testified twice during the hearing. Initially, she described her conversation with Mr. English as follows:

> He seemed calmed, and he had just stated to me that he was tired of not having any money. And I explained to him that the money could be deemed to his wife, or that the money could go for his cost of care at the nursing home. That he was entitled to $30.00 a month for personal needs, and he said I want my money.

Ms. Robertson's statements did not represent all of the options available to Mr. English. Ms. Robertson admitted during the hearing that Mr. English could have had all of his checks redirected to the nursing center to assure receipt of his personal needs allowance, without terminating Mrs. English's spousal allowance. However, she failed to explain that fact to him during their conversation. Furthermore, it was not explained that, by cutting off the spousal allowance, he exposed himself to greater patient liability for nursing care costs or that delay in rerouting his checks would place him at risk of being discharged from the facility for lack of prompt care payment.

Mr. English's statement, "I want my money," in no way suggests that he wished to terminate the spousal allowance. Mr. English may very well have been referring to his personal allowance.

When nursing center employee, Mary Maney, was asked to describe the conversation she heard between Ms. Robertson and Mr. English in every detail, she described the following exchange:

> And she was asking him and he was telling her that, you know, he wasn't getting any money. He wasn't happy about it, and she asked him if he wanted his money to come to the nursing home, and he stated yes.

When asked whether Mr. English expressed any desire about his wife's spousal allowance, Ms. Maney admitted that she did not explain to Mr. English that his wife would not receive her spousal allowance because she did not know it herself.

Gwen Conley, another nursing center employee, described conversations she had with Mr. English as follows:

> Ms. Conley: I had talked to him and I asked him before. I said, "Would you like your money to come to you?" And he said "yes." And I told him that I would try to arrange it to where his checks could be sent to him directly at the nursing center. Would he like that, and he said "yes." So, we had the letters typed up, and then I read the letters to him and asked him if he understand [*sic*] and he said "yes" and went and signed them.
>
> Mr. Lynch: Just from based on your own recollection do you remember whether it was explained to him that once he sent these letters that she would not be receiving any money?
>
> Ms. Conley: I didn't know at the time.

Ms. Robertson, the DSS caseworker, testified again following the testimony of Ms. Maney and Ms. Conley, changing her account of the conversation she had with Mr. English. She described the conversation as follows:

> He stated to me that he wanted his money. I explained to him that he was only entitled to $30.00 of the money he received, that the money was going to Mrs. English and that she was accountable for the $30.00. He said he wasn't getting any money, and he wanted all his money to come there. I said, do you want your money to come to you to be used for your cost here at the nursing home, and he said "yes."

Assuming *arguendo*, that Ms. Robertson's second description is accurate, there is still no showing that Mr. English intended to terminate spousal allowance to Mrs. English or that he understood the consequences of such action. There is no mention of spousal allowance in this statement, nor is there an explanation of the phrase, "used for your cost here at the nursing home." It is not clear from Ms. Robertson's first or second version of her conversation with Mr. English that he knowingly expressed any desire to discontinue the spousal allotment.

Finally, Mrs. English's uncontradicted testimony regarding her husband's reaction when she told him what had happened to her allowance was as follows:

> Mr. Furgiuele: Okay. What I'm asking is has he ever said to you whether he wanted you to have any of this money to use?

Mrs. English: No, he didn't say until later. He found out that they were taking the income. He was very upset about it.

Mr. Furgiuele: What did he say to you?

Mrs. English: He wanted to give me some money, and I told him . . . . (ellipsis in original)

The record is clear that Mr. English wanted his "money." However, the record is devoid of any substantial evidence that he intended to apply all of his income, exceeding his personal needs allowance, to his nursing care, rather than towards the support of his wife. Mrs. English testified that he was upset when he found out what had happened to her allowance. Without substantial, competent evidence in the record supporting Mr. English's alleged decision to terminate Mrs. English's spousal allowance, the DHR decision cannot be upheld. For the reasons stated herein, the final decision of the DHR is reversed. Based on the foregoing, it is unnecessary to address petitioner's other assignments of error.

Reversed.

Judges JOHNSON and WALKER concur.

JOHNSON NEUROLOGICAL CLINIC, INC., PLAINTIFF v. WILLIAM ARTHUR KIRKMAN, DEFENDANT

No. 9418DC553

(Filed 2 January 1996)

1. Limitations, Repose, and Laches § 55 (NCI4th)— continuing medical treatment—accrual of cause of action for collection of payment

Absent a contract stipulating the date when payment is due, a cause of action for collection of payment for continuing medical treatment arises at the time the last treatment is provided. In this case, there was a genuine issue of material fact as to when the last medical services were provided to defendant for purposes of determining when the statute of limitations began to run, and the trial court therefore erred in entering summary judgment for plaintiff.

Am Jur 2d, Limitation of Actions § 100; Physicians, Surgeons, and Other Healers § 390.

Limitation of actions: physician's claim for compensation for medical services or treatment. 99 ALR2d 251.

When statute of limitations begins to run against action based on unwritten promise to pay money where there is no condition or definite time for repayment. 14 ALR4th 1385.

2. Limitations, Repose, and Laches § 13 (NCI4th)— settlement statement—insufficient acknowledgment to toll statute of limitations

A settlement statement signed by defendant in his personal injury claim was not a sufficient acknowledgment of a debt for medical treatment to toll the statute of limitations where defendant's statement that he "plan[ned] to re-file this on my insurance and [handle] the balance myself" indicated that his payment was conditioned upon whatever the insurance coverage did not pay, was not a definite and unqualified intent to pay, and failed to show the nature and amount of the debt owed.

Am Jur 2d, Limitation of Actions §§ 325-337.

Necessity and sufficiency, in order to toll statute of limitations as to debt, of statement of amount of debt in acknowledgment or new promise to pay. 21 ALR4th 1121.

3. Limitations, Repose, and Laches § 10 (NCI4th)— statute of limitations—defendant not equitably estopped from pleading

Defendant was not equitably estopped from pleading the statute of limitations as a bar to recovery of costs for medical services rendered by plaintiff to defendant, since the evidence tended to show that, even if plaintiff had relied upon defendant's representations and had foregone collection efforts, such reliance ended when defendant settled his personal injury claim and forwarded a copy of his settlement statement to plaintiff; plaintiff thereafter wrote defendant a letter demanding that defendant begin making monthly payments; and plaintiff subsequently threatened collection efforts.

Am Jur 2d, Limitation of Actions §§ 431-438, 445.

Promises to settle or perform as estopping reliance on statute of limitations. 44 ALR3d 482.

Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations. 44 ALR3d 760.

4. Accounts and Accounts Stated § 5 (NCI4th)— claim for medical treatment—account stated—partial payment

Although a review of the record shows circumstances which could entitle plaintiff to judgment on its claim for medical services rendered to defendant upon theories of account stated and partial payment on account, summary judgment is inappropriate because those theories require that factual determinations be made.

Am Jur 2d, Accounts and Accounting § 51.

Account stated based upon check or note tendered in payment of debt. 46 ALR3d 1325.

Appeal by defendant from order granting summary judgment to plaintiff entered 19 March 1994 by Judge Donald L. Boone in Guilford County District Court. Heard in the Court of Appeals 21 February 1995.

Defendant William Kirkman engaged the services of plaintiff, Johnson Neurological Clinic, Inc., in July 1988 for treatment of injuries sustained in an automobile collision. The treatment, including physical therapy and later surgery, continued until sometime in mid-1989. Kirkman's health insurance carrier covered all but $163.63 of the charges until the surgery in April 1989. Kirkman incurred an additional $5,895.50 in charges for the surgery and follow-up treatment. These charges were never paid by Kirkman's insurance carrier.

On 6 July 1989, plaintiff received a letter from Kirkman's attorney advising that he would be representing Kirkman in a personal injury action arising out of the automobile collision. Plaintiff provided the attorney with Kirkman's medical records for use in settlement negotiations. After the contact with Kirkman's attorney, plaintiff made no further effort to collect the amount owed by Kirkman until late 1990.

On 16 November 1990, plaintiff contacted Kirkman's attorney about the status of Kirkman's personal injury claim. In response to this inquiry, on 3 December 1990 the attorney forwarded a copy of a

portion of the settlement statement signed by Kirkman on 25 July 1990. Under the settlement, Kirkman received $42,500.00, of which $33,196.30 was paid directly to him. The settlement statement reads, in part:

> I, William A. Kirkman has [sic] requested my attorney not to pay Johnson Neurological out of this settlement. My plans are to refile this on my insurance and handled [sic] the balance myself.
>
> s/ William A. Kirkman
> William A. Kirkman

After receiving this statement, plaintiff sent a letter to Kirkman dated 4 December 1990 requesting that he begin making monthly payments towards his unpaid balance. On 11 March 1991 plaintiff sent another letter to Kirkman, characterized as a "FINAL REQUEST for payment" threatening collection efforts unless payment was received on or before 19 March 1991.

Plaintiff filed this action against Kirkman on 6 July 1992, seeking judgment for the amount owed plus interest. Kirkman filed an answer denying the allegations of the complaint and asserting the statute of limitations as an affirmative defense. Both parties moved for summary judgment and filed supporting affidavits. Based upon the pleadings, affidavits, and memoranda submitted by counsel, the trial court entered summary judgment for plaintiff in the amount of $6,059.13, plus interest and costs. Kirkman appeals from this judgment.

Keziah, Gates, & Samet, L.L.P., by Jan H. Samet, for plaintiff-appellee.

Baker & Boyan, P.L.L.C., by Robert S. Boyan and Jeffrey L. Mabe, for defendant-appellant.

McGEE, Judge.

Defendant Kirkman argues the entry of summary judgment in favor of plaintiff was improper. Because we find there is a genuine issue of material fact regarding whether the statute of limitations had expired, we agree.

I.

[1] Defendant first argues the trial court erred by entering summary judgment for plaintiff and by not entering judgment for Kirkman, claiming the three-year statute of limitations had expired before the

filing of plaintiff's complaint. Because it is not clear when the statute of limitations began to run, it is also unclear whether or not the action was timely filed.

Unless otherwise provided by statute, there is a three-year limitation on actions upon contracts, obligations, or liabilities arising out of a contract, whether express or implied. N.C. Gen. Stat. § 1-52(1) (1994 cumm. supp.). Because this action was filed on Monday 6 July 1992, any claim arising before 4 July 1989 would be time barred. *See* N.C.R. Civ. Pro. 6(a) (In computing any time prescribed by statute, the last day is included "unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday.")

Although neither party discusses the issue in their brief, North Carolina courts have yet to address the question of when a cause of action begins to run for collection of payment for medical services provided. When faced with this same issue, the Appellate Court of Connecticut held a hospital's right of action to collect for unpaid medical bills arose upon completion of the services rendered to the patient, and not at the time the patient was admitted or during the time the patient was treated. *Gaylord Hosp. v. Massaro*, 499 A.2d 1162 (Conn. App. Ct. 1985). The court held that where a physician is retained to render continuous and related services, usually related to a particular affliction, then the contract for medical services is deemed to be an indivisible contract against which the statute of limitations does not begin to run until all services are terminated. *Gaylord Hosp.*, 499 A.2d at 1163-64. The court also analogized the issue to medical malpractice cases, where under a continuous course of treatment doctrine the statute does not begin to run until the treatment is terminated. *Gaylord Hosp.*, 499 A.2d at 1164. Since the defendant's treatment was continuing and indivisible, the hospital's cause of action arose upon the completion of the treatment. *Id.*

We find the court's reasoning in *Gaylord Hosp.* to be persuasive and applicable to North Carolina law. North Carolina also recognizes the continued course of treatment doctrine in medical malpractice actions, whereby "the action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action." *Horton v. Carolina Medicorp, Inc.*, 119 N.C. App. 777, 779, 460 S.E.2d 567, 568, *disc. review allowed*, 341 N.C. 649, 462 S.E.2d 511 (1995). Further, this doctrine has been

expanded to apply to hospitals as well. *Horton*, 119 N.C. App. at 781, 460 S.E.2d at 569. We also find a similar analogy with materialmen's liens. Although a lien may be filed at anytime after the maturity of the underlying obligation, it is not time barred until 121 days after the last furnishing of labor or materials or the last improvement made by the claimant. N.C. Gen. Stat. § 44A-12(b) (1995). Therefore, we hold that, absent a contract stipulating the date when payment is due, a cause of action for collection of payment for continuing medical treatment arises at the time the last treatment is provided.

In this case, Kirkman received continuing treatment from plaintiff for injuries suffered in an automobile accident. Therefore, plaintiff's cause of action arose at the time the last medical services were provided to Kirkman. However, there is a genuine issue of material fact as to whether the last medical services were provided to Kirkman before or after 4 July 1989.

Kirkman's affidavit states: "I was a patient of Johnson Neurological Clinic, Inc., from July 27, 1988 through July 5, 1989." A supplemental bill contained in the record also indicates Kirkman received treatment on 5 July 1989. However, a letter contained in the record from plaintiff to Kirkman dated 4 December 1990 states Kirkman's last visit to Johnson Neurological Clinic occurred on 12 June 1989. This date also corresponds to the last visit shown on the account statement for which Kirkman incurred charges. Because a genuine issue of material fact exits as to the date of Kirkman's last visit for purposes of determining when the statute of limitations began to run, summary judgment is inappropriate.

II.

[2] However, plaintiff argues that regardless of the exact date on which the statute of limitations began to run, the settlement statement Kirkman executed on 25 July 1990 served as an acknowledgment sufficient to revive its claim within the applicable statutory period. We disagree.

In *American Multimedia, Inc. v. Freedom Distributing, Inc.*, 95 N.C. App. 750, 384 S.E.2d 32 (1989), *disc. review denied*, 329 N.C. 46, 389 S.E.2d 84 (1990), this Court said such acknowledgments must be in writing and "must manifest a definite and unqualified intention to pay the debt in order for the writing to effectively toll the statute of limitations." *American Multimedia*, 95 N.C. App. at 752, 384 S.E.2d at 34. Such phrases as "we plan to pay" and "we expect to pay" the debt

were held to be conditional expressions of defendant's willingness to pay the plaintiff and were not sufficiently precise to amount to an unequivocal acknowledgment of the original amounts owed. *Id.* Here, Kirkman's statement that he "plan[ned] to re-file this on my insurance and [handle] the balance myself" indicates his payment was conditioned upon whatever the insurance coverage did not pay. It is not a "definite and unqualified" intent to pay and fails to show the nature and amount of the debt owed. At best, it demonstrates a willingness to pay only whatever amount would be left after refiling the claim with his insurance company. Therefore, the statement fails as an acknowledgment sufficient to toll the statute of limitations.

III.

[3] Plaintiff next argues Kirkman is equitably estopped from pleading the statute of limitations as a bar to recovery, citing *Duke University v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987). In *Stainback*, our Supreme Court held the plaintiff had been induced by defendant's conduct to reasonably believe it would be paid for medical services once defendant's lawsuit against his insurance carrier was concluded, thereby foregoing pursuit of its legal remedy. *Stainback*, 320 N.C. at 341, 357 S.E.2d at 693. However, plaintiff's reliance on *Stainback* is misplaced.

The services for which defendant incurred charges in *Stainback* were provided in 1977. Defendant's lawsuit against the insurance company did not come to trial until 1981 and was not final until this Court's decision in 1983. As a result, by the time the plaintiff discovered it would not be paid from the suit's proceeds, as it had been led to believe, the statute of limitations had run. In this case, plaintiff claims it was induced to forego efforts to collect on Kirkman's bill. However, even if plaintiff had been misled by Kirkman and his attorney in such a way to give rise to an estoppel claim, any expectations plaintiff had of receiving payment directly from the personal injury proceeds ended upon receipt of the 3 December 1990 letter containing a copy of Kirkman's settlement statement.

Equitable estoppel arises when a party has been induced by another's acts to believe that certain facts exist, and that party "rightfully relies and acts upon that belief to his detriment." *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E.2d 599, 602 (1980). Here, there is no showing of reliance rising to estoppel. Even if plaintiff had relied upon Kirkman's representations and had foregone collection efforts,

such reliance ended upon receipt of the settlement statement. This is shown by plaintiff's letter of 4 December 1990 demanding Kirkman begin making monthly payments towards his balance. Further, in March 1991 plaintiff threatened collection efforts if Kirkman did not make immediate payment. Had plaintiff brought this action as threatened in 1991, the action would have been filed within the statute of limitations. Because plaintiff was on notice it would not be directly paid from the personal injury proceeds, it could not rightfully rely on Kirkman's assertions to prevent it from being able to timely file this action. Plaintiff's position is distinguishable from the plaintiff in *Stainback* and equitable estoppel is not available.

IV.

[4] Nevertheless, these issues are not necessarily determinative of the appeal. If there are any grounds upon which to sustain the granting of summary judgment, then this Court must affirm. *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). A review of the record shows circumstances upon which plaintiff could be entitled to judgment upon the theories of the existence of an account stated or a partial payment on account. However, because these theories require that factual determinations be made, summary judgment is inappropriate. *See Mahaffey v. Sodero*, 38 N.C. App. 349, 247 S.E.2d 772 (1978) (whether by retention without objection of statement of account defendant agreed account was correct and agreed to pay was a jury question); *Electric Service, Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977) (part payment operates to toll statute if made under circumstances warranting an inference debtor recognizes his debt and acknowledges his willingness or obligation to pay); *Hartness v. Penny*, 22 N.C. App. 75, 205 S.E.2d 319 (1974) (mere entry on statement showing payment by insurance does not, standing alone, constitute part payment tolling the statute of limitations.)

Because we find there is a genuine issue of material fact, summary judgment for plaintiff is reversed and the case is remanded for trial.

Reversed and remanded.

Judges EAGLES and WALKER concur.

SMITH v. SMITH

[121 N.C. App. 334 (1996)]

ANN TWISDALE SMITH (HALL), PLAINTIFF v. DONALD E. SMITH, JR., DEFENDANT

No. COA95-122

(Filed 2 January 1996)

1. **Appeal and Error § 326 (NCI4th)— findings of fact as narration of evidence—settlement of record on appeal—no error**

The trial court did not err in adopting the findings of fact contained in its order as a narration of the evidence presented at trial when it settled the record on appeal, since defendant provided no narration of evidence which contradicted that found by the trial court.

Am Jur 2d, Appellate Review §§ 662, 663.

Power of trial court, on remand for further proceedings, to change prior fact findings as to matter not passed upon by appellate court, without receiving further evidence. 19 ALR3d 502.

2. **Divorce and Separation § 424 (NCI4th)— consent judgment for child support—civil contempt—sufficiency of evidence**

The evidence was sufficient to support the trial court's findings and those findings were sufficient to support its conclusion that defendant was in contempt of court for failing to pay his child's college expenses pursuant to a consent judgment because they included out-of-state tuition where the evidence tended to show that defendant had agreed to "pay for the higher education of the minor child"; defendant had the capability to comply with the consent judgment; there was no limitation in the consent judgment regarding the cost of tuition or the location of a college; and defendant had sent the child money to complete high school in the state in which the college was located.

Am Jur 2d, Contempt §§ 144, 145.

Pleading and burden of proof, in contempt proceedings, as to ability to comply with order for payment of alimony or child support. 53 ALR2d 591.

Who may institute civil contempt proceeding arising out of matrimonial action. 61 ALR2d 1095.

Power of divorce court, after child attained majority, to enforce by contempt proceedings payment of arrears of child support. 32 ALR3d 888.

3. Divorce and Separation § 545 (NCI4th)— consent judgment for child support—failure to comply—civil contempt—authority of court to award attorney's fees

In this civil contempt case where plaintiff alleged that defendant failed to comply with a consent order in which he agreed to pay for his child's higher education, maintain a life insurance policy, and provide health insurance, the trial court erred in concluding that it had no authority to award attorney's fees.

Am Jur 2d, Contempt §§ 241-246.

Allowance of attorney's fees in civil contempt proceedings. 43 ALR3d 793.

Appeal by defendant from order entered 25 October 1994 by Judge Timothy S. Kincaid in Caldwell County District Court. Heard in the Court of Appeals 26 October 1995.

Tate, Young, Morphis, Bach & Taylor, L.L.P., by Thomas C. Morphis and Paul E. Culpepper, for plaintiff-appellee.

Paul W. Freeman, Jr. for defendant-appellant.

WALKER, Judge.

The plaintiff, Ann Smith, and the defendant, Donald Smith, were married on 18 June 1966 and had a child, Brook Smith, on 19 September 1975. The parties separated on 6 August 1979 and a consent order was entered on 13 February 1980 whereby plaintiff was awarded custody of the child. On 22 January 1991 the parties entered into a consent judgment. This judgment included provisions whereby the defendant agreed to pay for the child's education and support after high school.

On or about 11 February 1994 plaintiff filed a motion for contempt against defendant for failure to comply with the 22 January 1991 consent order, with regard to the child's higher education. On 25 October 1994, the district court found defendant to be in contempt after finding "that defendant has the means and ability to comply with the Order or to take reasonable measures to comply with the terms of this Order." The court then issued the following order:

that he [defendant] comply with the terms of the Consent Order entered into by the parties and in particular Paragraph 3 of the Consent Order. Defendant shall pay within thirty (30) days of the receipt or demand any educational expense, invoice, or bill, said date of receipt being deemed to be the date of hand delivery or three (3) days after said expense, invoice or bill is mailed to his last known address.

[1] On appeal, defendant argues that the trial court erred in adopting the findings of fact contained in the 1 November 1994 Order as a narration of the evidence presented at trial when it settled the record on appeal.

Defendant presented a narration of the evidence which was objected to by opposing counsel on the grounds that there was no recording or transcription of the evidence. Plaintiff proposed that the findings of fact of the court be used as the narration of the evidence. In adopting its own findings of fact, the court stated "at this time [the Court] cannot recall with sufficient specificity the evidentiary nature of the aforesaid hearing which would allow the Court to make a ruling as to the accuracy or lack of accuracy of the proposed Narration of Evidence." Even though defendant included his narration of the evidence in the record, he has failed to direct us to any portion thereof which would contradict that found by the trial court. Therefore, defendant has not shown that he was prejudiced by the trial court's procedure in settling the record.

[2] By his next assignment of error, defendant argues that the trial court erred in finding the defendant in contempt of court and ordering defendant to pay the sum of $8,349.54 to purge himself of this contempt.

Pursuant to N.C. Gen. Stat. § 5A-21 (1986), in order to find a litigant in civil contempt, the Court must find: (1) the order remains in force; (2) the purpose of the order may still be served by compliance with the order; and (3) the person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order. While the statute does not expressly require that defendant's conduct be willful, our courts have interpreted the statute to require an element of willfulness. *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983).

In reviewing the trial court's finding of contempt, this Court is limited to a consideration of "whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment." *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 136 (1985). For the sake of clarity, we have renumbered and paraphrased the findings of fact which the defendant claims are unsupported by the evidence. They include the following:

> (1) The child (Brook) was accepted at the University of Montana. Defendant was notified regarding Brook's acceptance to college in Montana in an attempt to work out financial arrangements.
>
> (2) Plaintiff incurred $8,349.54 that was directly related to educational expenses while Brook was attending the University of Montana.
>
> (3) On two occasions, defendant was requested by plaintiff to pay for these expenses. Despite these communications, defendant failed and refused to pay any of these expenses.
>
> (4) Defendant refused to pay these expenses because he thought they were unreasonable. The tuition at the University of Montana was an out-of-state tuition. The Court found as an ultimate fact that Brook's attendance at the University of Montana was not unreasonable in light of the facts and circumstances.

Defendant also contends that the court's conclusion that he was in willful contempt is unsupported by the evidence.

Plaintiff introduced evidence tending to show that under the consent judgment, defendant agreed to "pay for the higher education of the minor child which shall include college, technical school or other educational opportunities past the high school level." That for the purposes of the judgment, educational expenses expressly included "fees, tuitions, lodging, books, travel, clothing and other necessary and reasonable expenses, which would customarily be incurred in the pursuit of higher education."

Furthermore, the record demonstrates that defendant had the capability to comply with the consent judgment. The evidence showed that defendant was a practicing dentist whose average earnings were between $5,000-$6,000 a month in 1993. The same year defendant had a net worth of $498,000.

Despite defendant's refusal to pay such expenses, the evidence tended to show that such expenses were reasonable and directly related to the educational needs of Brook. The consent judgment provided numerous examples of "higher education" expenses which included tuition. Defendant contends that Brook's expenses were unreasonable because they included out-of-state tuition. We find no limitation in the consent judgment regarding the cost of tuition or the location of a college. Furthermore, the record shows that the defendant, far from discouraging Brook from moving to Montana, sent him money to complete high school in that state. After carefully reviewing the record, we find that there was competent evidence to support the court's findings and conclusion that the defendant was in contempt of the consent judgment pursuant to N.C. Gen. Stat. § 5A-21(a).

Defendant next assigns as error the court's order that defendant "pay within thirty (30) days of receipt or demand any educational expense, invoice, or bill" on the ground that the court exceeded its authority and effectively modified the consent order of 22 January 1991.

Rule 10(c)(1) of the Rules of Appellate Procedure requires that "[e]ach assignment of error shall, so far as practical, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. App. Rule 10(c). The legal basis preserved on appeal by defendant's assignment of error is that the court's order is ambiguous and an abuse of discretion. However, defendant now attempts to argue that the court's order modified the terms of the parties' consent judgment. We conclude that defendant has failed to properly preserve this question for appellate review because it has not been made the subject of an assignment of error. It is therefore beyond our scope of review and we decline to address it.

[3] On appeal, plaintiff argues that the trial court erred by failing to order defendant to pay attorney's fees. We agree.

Under the law of this State attorney's fees are not recoverable either as an item of damages or of costs absent express statutory authority. *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973). In *Tape Corp.*, this Court squarely held that neither the provisions of N.C. Gen. Stat. § 6-18 (1986) (when costs allowed to plaintiff as a matter of course) nor the provisions of N.C. Gen. Stat. § 6-20 (1986) (allowance of costs in discretion of

court) are applicable to an action for civil contempt. *Id.* at 188, 196 S.E.2d at 602.

However, a trial court may properly award attorney's fees to a plaintiff who prevails in a civil contempt action. This Court has approved the allowance of attorney's fees in contempt actions where such fees were expressly authorized by statute as in the case of child support. *See Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971) (holding that attorney's fees were properly awarded in a civil contempt action to enforce a child support order since attorney's fees could have been awarded in the original action for child support).

Also, this Court has recently upheld the awarding of attorney's fees under the court's broad contempt powers to enforce equitable distribution awards where attorney's fees were not expressly authorized by statute. *See Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570, *appeal dismissed and disc. review denied*, 327 N.C. 482, 397 S.E.2d 218 (1990), *affirmed*, 328 N.C. 729, 403 S.E.2d 307 (1991); *Conrad v. Conrad*, 82 N.C. App. 758, 348 S.E.2d 349 (1986).

Defendant argues that the court is without authority to award attorney's fees in this case. As support for this argument defendant relies on *Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991). We find *Powers* distinguishable from the case at hand. In *Powers*, the parties entered into a consent judgment wherein the defendant agreed to "provide and pay for four years of college education for Jennifer [child] at a college to be selected by the Husband [defendant] and Jennifer, provided however that the Husband shall not unreasonably withhold his consent to Jennifer's selection of a college." *Id.* at 699, 407 S.E.2d at 271. The defendant was found in contempt for not complying with this provision in the consent judgment. *Id.* at 700, 407 S.E.2d at 271. However, limiting its decision to the facts of that case, this Court declined to grant attorney's fees to the plaintiff finding that the provision involved "neither a child support order (the child support provision under the consent judgment expired when the child reached 18 years of age and the provision here was made separate and apart from the child support provision) nor an equitable distribution award." *Powers* at 707, 407 S.E.2d at 276.

In the present case, defendant agreed to support Brook beyond the age of 18 in the following ways:

> 3. The Defendant shall pay for the higher education of the minor child which shall include college, technical school or other edu-

cational opportunities past the high school level. For the purposes of this Judgment, expenses of higher education, shall include fees, tuitions, lodging, books, travel, clothing and other necessary and reasonable expenses, which would customarily be incurred in the pursuit of higher education.

4. The Defendant shall maintain a life insurance policy with the minor child, **Brook Smith**, as beneficiary, in the sum of **Fifty Thousand ($50,000.00) Dollars**, which policy shall be continuously maintained until the minor child obtained the age of twenty-five years or has completed undergraduate school. . . .

5. The Defendant shall provide health insurance for the minor child through age twenty-five or completion of his pursuit of higher education. . . .

Defendant argues that the above provisions are not in the nature of child support. In support of this argument defendant apparently relies on N.C. Gen. Stat. § 48A-2 (1984), which defines a minor as "any person who has not reached the age of 18 years," and N.C. Gen. Stat. § 50-13.4 (c) (1994), which provides that parental support obligations terminate when a child reaches 18.

However, under the facts of this case we find that neither of the above statutes are controlling. The law of this State establishes that "a parent can assume contractual obligations to his child greater than the law otherwise imposes." *Williams v. Williams*, 97 N.C. App. 118, 122, 387 S.E.2d 217, 219 (1990). "[A] parent can bind himself by contract to support a child after emancipation and past majority, and such a contract is enforceable as any other contract." *Church v. Hancock*, 261 N.C. 764, 765, 136 S.E.2d 81, 82 (1964). Pursuant to the consent judgment, the defendant agreed to pay for the "higher education of the minor child which shall include . . . fees, tuitions, lodging, books, travel, clothing and other necessary and reasonable expenses. . .;" to provide life insurance for Brook "until the minor child obtained the age of twenty-five or has completed undergraduate school;" and to "provide health insurance for the minor child through age twenty-five or completion of his pursuit of higher education." Therefore, defendant failed to comply with the above child support provisions and we find that the trial court erroneously concluded that it had no authority to award attorney's fees. Accordingly, this case is remanded for an order awarding attorney's fees consistent with findings made by the trial court.

Affirmed in part and reversed in part.

Judges JOHNSON and SMITH concur.

PREMIER FEDERAL CREDIT UNION, PLAINTIFF-APPELLEE v. DOROTHY DOUGLAS, DEFENDANT-APPELLANT

No. COA94-1001

(Filed 2 January 1996)

Consumer and Borrower Protection § 19 (NCI4th)— open- or closed-end account—compliance with Truth in Lending Act—genuine issues of fact—summary judgment improper

The trial court erred in granting summary judgment for plaintiff where genuine issues of material fact existed as to whether the automobile loan transaction between the parties was an open-end "loanliner" plan or a closed-end extension of credit and as to whether the loan transaction complied with federal regulations promulgated under the Truth in Lending Act.

Am Jur 2d, Consumer and Borrower Protection §§ 7-15, 35-38.

Appeal by defendant from judgment entered 8 June 1994 by Judge William A. Vaden in Guilford County District Court. Heard in the Court of Appeals 16 October 1995.

Johnson, Tanner, Cooke, Younce & Moseley, by Charles P. Younce, for plaintiff appellee.

Central Carolina Legal Services, Inc., by Janet McAuley-Blue, for defendant appellant.

SMITH, Judge.

In this case of first impression, the sole issue on appeal is whether the trial court properly granted plaintiff's motion for summary judgment. Defendant argues that genuine issues of material fact exist on two pivotal aspects of its case precluding summary judgment. First, defendant asserts that an issue of fact exists as to whether the loan transaction between plaintiff Premier Federal

Credit Union (Credit Union), and defendant Dorothy Douglas, was an open-end or closed-end extension of credit. The second purported issue of fact is whether the loan transaction between the parties complied with federal regulations promulgated under the Truth in Lending Act (TILA), 15 U.S.C.A. §§ 1601-1666 (West 1982 & Supp. 1995). With regard to both questions, we find that genuine issues of material fact exist, and reverse the trial court's grant of summary judgment to plaintiff.

On 22 May 1987, defendant entered into a loan agreement with plaintiff in the amount of $9,828.24. The purpose of the loan was to provide funds for the purchase of an automobile. By the terms of the loan agreement, defendant provided plaintiff with a security interest in the automobile in exchange for the loan proceeds.

Defendant subsequently defaulted on the loan, resulting in the repossession and sale of the automobile by plaintiff. The proceeds of the sale were credited toward the balance owed the Credit Union by defendant. However, the proceeds gleaned from the sale were insufficient to pay the balance owed by defendant on the loan. As a result, plaintiff brought a deficiency suit against defendant for $5,576.98, representing the amount outstanding on the loan after the sale of the car by the Credit Union.

Defendant counterclaimed against plaintiff, alleging plaintiff failed to disclose required financial information on the loan, thereby violating the federal Truth in Lending Act, 15 U.S.C.A. §§ 1601-1666 (West 1982 & Supp. 1995). Defendant contends "she should be entitled to recoup from plaintiff all or part of [the Credit Union's] recovery in damages pursuant to TILA." Only the issues raised in defendant's counterclaim are pertinent to this appeal.

Summary judgment is a mechanism designed to dispose of " 'cases where there is no genuine issue of fact [and to] eliminate formal trials where only questions of law are involved.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)). The moving party's " 'papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded.' " *Id.* (quoting 6 Moore's Federal Practice (2d ed. 1971) § 56.15[8], at 2439-40). In the instant case, plaintiff has failed to establish a lack of material fact with regard to defendant's claims of plaintiff's noncompliance with TILA.

The Truth in Lending Act was established to ensure adequate disclosure of loan terms to consumers, in order to effectuate informed decisions regarding the cost of credit. Accordingly, the Act states:

> It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C.A. § 1601(a); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559, 63 L.Ed.2d 22, 27-28 (1980).

With this goal in mind, TILA sets forth mandatory regulations regarding loan disclosure criteria. 15 U.S.C.A. § 1601, *et seq.* Authority to regulate under and interpret TILA rests with the Board of Governors of the Federal Reserve System. *Milhollin*, 444 U.S. at 559-60, 63 L.Ed.2d at 27-28; 15 U.S.C.A. § 1604(a). Regulations promulgated by the Federal Reserve are commonly known as Regulation Z. *Id.* Defendant's appeal rests upon the premise that a question of fact exists as to whether plaintiff has violated TILA and Regulation Z.

Defendant contends the loan agreement was not an "open end credit plan," as defined by TILA and as argued by plaintiff. Open-end credit is defined by Regulation Z in the following manner:

> (20) *Open-end credit* means consumer credit extended by a creditor under a plan in which:
>
> (i) The creditor reasonably contemplates repeated transactions;
>
> (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and
>
> (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

12 C.F.R. § 226.2(a)(20) (1994) (Regulation Z). Thus, the *quid pro quo* of an open-end loan is a financing structure aligned with the above regulation.

A loan transaction that is not open-ended is known as a "closed-end" loan. Closed-end loans are defined by Regulation Z as "consumer

credit other than open-end credit." 12 C.F.R. § 226.2(a)(10). Generally speaking, the central regulatory distinction between an open- and closed-end loan is the amount and character of the financial disclosures required. In *Maes v. Motivation for Tomorrow, Inc.*, 356 F.Supp. 47 (N.D. Cal. 1973), the Court noted that

> the term 'open end credit,' as it is used in these regulations, is intended to distinguish single purchase credit transactions, which are subjected to more stringent disclosure requirements, from transactions made under a revolving or continuing credit arrangement, such as under credit card or charge accounts, where such extensive disclosures are not practicable.

Id. at 50.

In the instant case, plaintiff alleges its loan agreement was unequivocally open-ended, and thus subject to a reduced disclosure standard under TILA. Plaintiff maintains the loan was made pursuant to an open-ended account, known as a "Loanliner." Plaintiff describes a Loanliner plan as

> a one-time agreement to establish a [Credit Union] member's loan account [which] may be used to access both secured and unsecured credit . . . sav[ing] loan processing time [and] repetitious loan processing steps . . . .

Plaintiff maintains it made all disclosures required by law for credit extended pursuant to an open-ended loan transaction.

In *Frost v. Central Credit Union of Illinois*, No. 93 C 1253, 1993 W.L. 335796 (W.D.N.Y. 1993), the federal district court was faced with facts similar to those at hand on a motion for summary judgment. The Credit Union in *Frost* articulated an argument identical to the one now posited by plaintiff, that "the car loan was merely a subaccount which was part of a multifeatured open end consumer plan", *i.e.*, a Loanliner. *Id.* The Credit Union in *Frost* asserted that, "whether it reasonably contemplated repeated transactions [pursuant to the Loanliner] is a question of fact to be decided in the context of its business and its relationship with [the Credit Union]." *Id.* We agree. The case here is nearly identical to *Frost*, except that now it is the borrower, rather than the Credit Union, arguing about whether repeated transactions were contemplated.

Defendant admits that it entered into a previous open-ended Loanliner relationship with plaintiff in 1984. However, defendant

maintains that the auto loan entered into in 1987 was not open-ended, but was a discrete one-time transaction. In support of this argument defendant has presented evidence which, if true, would indicate the term of the car loan to be nine years. Further, defendant argues that an automobile loan is not the type of transaction in which a creditor would reasonably contemplate repeated transactions with the average consumer. *Vines v. Hodges*, 422 F.Supp. 1292, 1297, 1298 n.10 (1976). These two assertions of fact, taken as true, necessarily raise an inference that the loan transaction at issue was not open-ended. 12 C.F.R. § 226.2(a)(20) (Regulation Z).

Plaintiff maintains that defendant's signature on the Loanliner Advance (which constituted the car loan) settles the factual issue regarding whether repeated transactions were contemplated by the parties. Plaintiff characterizes the Advance as evidence that a subaccount of Defendant's preexisting open-ended account was being used for the car purchase by defendant.

Plaintiff is mistaken. In *Maes*, the Court stated

> that more is required to establish that a purchase is made under an 'open-end' credit arrangement than the recitations in the agreement . . . . If it were otherwise, a creditor could easily exempt what is in reality a single credit sale from the disclosures required under [Regulation Z] and thereby frustrate the Congressional purpose of providing meaningful disclosure of credit terms to the consumer merely by including such language in the agreement of sale—when in fact no continuing or revolving credit was contemplated by the parties.

356 F.Supp. at 50. We find the *Maes* analysis persuasive.

Plaintiff's motion for summary judgment is premised on the loan made to defendant operating as an open-ended credit transaction. Plaintiff states that it made all disclosures required for open-ended loans under Regulation Z. It is undisputed that other, more stringent disclosure rules apply if the transaction is closed-ended. *Id.* Defendant has presented evidence, which, if true, would tend to define the loan transaction between the parties as closed-ended. Further, plaintiff admits that the disclosures made were only those necessary for an open-ended account. It is thus axiomatic that plaintiff has not made the type of disclosures required for provision of closed-end credit.

As a result, genuine issues of material fact exist as to whether repeated credit transactions were contemplated by the parties. Equally in question is the type of credit provided defendant, closed-end or open-end; this question can only be decided by the factual "context of the [Credit Union's] business and relationship with defendant." *Frost*, 1993 W.L. 335796 at *1. These questions raise multiple factual issues as to whether the Truth in Lending Act was violated.

Therefore, we find that the trial court improvidently granted summary judgment to plaintiff, and we

Reverse and remand.

Chief Judge ARNOLD and Judge GREENE concur.

SHARON BALLAS AND SHELLEY BURTT, PETITIONERS v. THE TOWN OF WEAVERVILLE AND THE TOWN OF WEAVERVILLE ZONING BOARD OF ADJUSTMENT, RESPONDENTS

No. COA95-222

(Filed 2 January 1996)

Zoning § 71 (NCI4th)— denial of permit for bed and breakfast—failure to include specific reasons for denial—court unable to review

There was competent and adequate evidence that the bed and breakfast proposed by petitioners would substantially impair property values within the neighborhood, but there was no evidence that water and sewer facilities were inadequate; therefore, because respondent board of adjustment's written decision did not include any findings to identify the specific reasons for denying petitioners a special use permit, it is impossible for the court on appeal to effectively review the validity of the board's decision.

Am Jur 2d, Zoning and Planning §§ 803-806.

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.

BALLAS v. TOWN OF WEAVERVILLE

[121 N.C. App. 346 (1996)]

Appeal by petitioners from order entered 15 November 1994 in Buncombe County Superior Court by Judge Claude S. Sitton. Heard in the Court of Appeals 16 November 1995.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Albert L. Sneed, Jr. and Craig Dixon Justus, for petitioner-appellants.

Roberts Stevens & Cogburn, P.A., by William Clarke, for respondent-appellees.

GREENE, Judge.

Sharon Ballas and Shelley Burtt (petitioners) appeal an order affirming the Town of Weaverville Zoning Board of Adjustment's (the Board) denial of petitioners' request for a special use permit.

Petitioners applied for a special use permit in the Town of Weaverville (Town), which would allow them to locate and operate a bed and breakfast in a residential area on Hamburg Mountain. Zoning Ordinance § 17-111 (section 17-111) provides that seven criteria must be met before the Board may approve a special use permit. The two relevant sections state:

> (2) The special exception will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted nor substantially diminish and impair property values within the neighborhood.
>
> . . . .
>
> (5) Adequate utilities, access roads, drainage and/or other necessary facilities have been or are being provided.

At the public hearing, petitioners stated that they were going to convert a "derelict building into a residence compatible with those in the subdivision" and "provide such a facility that the neighborhood residents" would recommend it to their "out-of-town friends." Several neighbors stated that they were in favor of the bed and breakfast because petitioners did an excellent job of renovating the home, and it would be "an attribute to the community." A general certified real estate appraiser who had examined the property and surrounding area and compared it to what happened in another community, presented evidence that the bed and breakfast would lower surrounding property values from 11-23%. The petitioners further offered that the "public water and sewer lines have been installed . . . and serve the subject property."

After the public hearing was closed, the Town manager informed the Board that the roads and utilities had not yet been accepted by the Town for maintenance. The Board voted 4-1, denying petitioners' request for the special use permit. In denying the request the Board found that the "proposed plans . . . [do] not meet the specific design or other criteria as defined in Section 17-111 Standards of the Town of Weaverville Zoning Ordinance."

Pursuant to N.C. Gen. Stat. § 160A-388(e), petitioners appealed the decision to superior court. After consideration of all the available evidence, the court affirmed the Board's decision, concluding that "[p]etitioners failed to produce competent, material, and substantial evidence to show compliance with Section 17-111 of the . . . Zoning Ordinance."

The issues are (I) whether there is substantial, competent, and material evidence to support a finding that the petitioners failed in their burden of showing compliance with Section 17-111; and if so, (II) whether the decision of the Board is deficient because of its lack of findings of fact.

Although not governed by the North Carolina Administrative Procedure Act (the Act), N.C.G.S. § 150B (1995), the principles of the Act are "highly pertinent" to this Court's review of decisions of a town board. *Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 625, 265 S.E.2d 379, 382 (1980). Consistent with the principles of the Act, the duty of this Court includes:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Id. at 626, 265 S.E.2d at 383. This duty of review, however, is limited to those errors "which [are] alleged to have occurred." *Brooks v. Ansco & Assocs.*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994); *see*

Watson v. N.C. Real Estate Comm'n, 87 N.C. App. 637, 640, 362 S.E.2d 294, 296 (1987) ("review is limited to assignments of error to the superior court's order"), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). "Where it is alleged that the [Board's] decision was based upon an error of law, *de novo* review [by this Court] is required." *Brooks*, 114 N.C. App. at 716, 443 S.E.2d at 92.

> Where it is alleged the [Board's] decision is not supported by substantial evidence, or is arbitrary and capricious, review is to be conducted under the "whole record" test, which requires [this Court] to examine all competent evidence in the record, including that which detracts from the [Board's] decision . . . to determine if the [Board's] decision was supported by substantial evidence.

Id. (citations omitted); *see Dockery v. North Carolina Dept. of Human Resources*, 120 N.C. App. 827, 830, 463 S.E.2d 580, 583 (1995); *Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383 (appellate court determines "whether the evidence before the town board was supportive of its action").

I

The petitioners first argue that they presented "competent, material, and substantial evidence" on each of the conditions required by the ordinance and that because there is no contrary evidence, the Board erred in denying the special use request. The Board contends that the petitioners did not present "competent, material, and substantial evidence" on the effect of the proposed bed and breakfast on the value of adjacent properties and the adequacy of water and sewer lines.

Section 17-111(2) of the Town ordinance requires the petitioner to show that the granting of the special use permit will not "substantially diminish and impair property values within the neighborhood." The petitioners' evidence on this point, that the bed and breakfast would be an "attribute to the community," supports an inference that it would not impair the property values in the neighborhood. *See Watt v. Housing Auth.*, 264 N.C. 127, 130, 141 S.E.2d 11, 13 (1965) ("inferences may be drawn if a proper factual basis exist for them"). Thus, on this issue the petitioners did present a *prima facie* case supporting issuance of the permit and denial of the permit on this basis can be sustained only upon "findings contra which are supported by competent, material, and substantial evidence." *See Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). On this issue,

the testimony of a real estate appraiser that the bed and breakfast would lower the value of the surrounding property from 11-23%, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Rector v. N.C. Sheriff's Educ. and Training Standards Comm'n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991), and is thus substantial evidence. In other words, this testimony *could* support a finding that the bed and breakfast will "substantially diminish and impair property values within the neighborhood." This evidence, however, does not mandate such a finding.

On the question of the adequacy of the water and sewer, the petitioners presented evidence that these facilities had been installed and were serving the property. Because the evidence is that these facilities are in fact operational, there is a reasonable inference that they are adequate. Thus, on this issue the petitioners did present a *prima facie* case supporting issuance of the permit and denial of the permit on this basis can be supported only upon contrary findings supported by substantial, competent and material evidence. *Id.* In this record, there is no contrary evidence on this point. The record does reveal that after the public hearing was closed, the Town manager informed the Board that the water and sewer had not yet been accepted by the Town for maintenance. This information, however, because it was not revealed at the public hearing and therefore not subject to refutation by the petitioners, is not competent evidence and cannot support a finding that these utilities were not adequate. *See Refining Co. v. Bd. of Alderman*, 286 N.C. 170, 173-74, 209 S.E.2d 447, 449 (1974) (party must be given opportunity to "meet" evidence considered by Board).

II

The petitioners next argue that even if the evidence can support a finding that they failed in their burden of showing that the values of the property "within the neighborhood" would not be adversely affected, the Board made no such finding and the decision must therefore be reversed.

As a general rule, zoning boards, "in allowing or denying the application of use permits," are required to "state the basic facts on which [they] relied with sufficient specificity to inform the parties, as well as the court, what induced [their] decision." *Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 365, 219 S.E.2d 223, 226-27 (1975). This is so even though the ordinance does not include such a requirement, as in this case. *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C. App. 420, 423, 458 S.E.2d 510, 512 (1995). The fail-

ure to make findings of fact is not, however, fatal if "the record sufficiently informs [the court] of the basis of decision of the material issues . . . or if the facts are undisputed [and different inferences are not permissible]." *Dockside Discotheque v. Bd. of Adjustment of Southern Pines*, 115 N.C. App. 303, 308, 444 S.E.2d 451, 454, *disc. rev. denied*, 338 N.C. 309, 451 S.E.2d 634 (1994). In this case, the Board's written decision does not include any findings to identify the specific reasons for denying the permit. Furthermore, we cannot determine from the record the basis of the decision and some of the relevant evidence is in dispute. It therefore is impossible to effectively review the validity of the Board's decision. *Shoney's*, 119 N.C. App. at 424, 458 S.E.2d at 512. For example, if the denial was based on section 17-111(5), the decision cannot be sustained if it was based on the fact that the water and sewer had not been accepted for Town maintenance. If the denial was based on section 17-111(2), the denial could be sustained if the Board found persuasive the evidence that the bed and breakfast would adversely affect the property values in the neighborhood.

The order of the superior court must therefore be reversed and this cause remanded to the superior court for further remand to the Board for the entry of a new decision with the required findings of fact. We have reviewed the other assignments of error asserted by the petitioners and either reject them or find it unnecessary to address them in light of our holding.

Reversed and remanded.

Judges MARTIN, Mark D., and McGEE concur.

ANDRU EARL WALL, PLAINTIFF v. CITY OF RALEIGH AND GARRY BAKER, INDIVIDUALLY, DEFENDANTS

No. COA95-218

(Filed 2 January 1996)

Municipal Corporations § 445 (NCI4th)— parking fines and late fees—governmental function—immunity not waived by city

Defendant city was immune from plaintiff's claims for violation of N.C.G.S. Chapter 75, Article 2 entitled "Prohibited Acts by Debt Collectors," since collection of parking fines and late fees is

a governmental function, and the city did not waive its governmental immunity by participating in a local government risk pool which had a $500,000 deductible which the city was responsible for paying.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 40.

What is "motor vehicle" or the like within statute waiving governmental immunity as to operation of such vehicles. 77 ALR2d 945.

Appeal by defendants from order entered 4 December 1994 in Wake County District Court by Judge Jerry Leonard. Heard in the Court of Appeals 16 November 1995.

Hatch, Little & Bunn, L.L.P., by William D. Young, IV, and Tina L. Frazier, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., Patricia L. Holland and Kari L. Russwurm, for defendant-appellants.

GREENE, Judge.

The City of Raleigh and Garry Baker (collectively defendants) appeal from an order entered 4 December 1994 denying their motion for summary judgment.

Andru Earl Wall (plaintiff) filed a complaint against defendants on 27 April 1993. It alleged that the City of Raleigh (City) and Garry Baker (Baker), supervisor for the Division of Parking Violations for the City, violated Article 2 of Chapter 75 of the North Carolina General Statutes (Article 2) entitled "Prohibited Acts by Debt Collectors" when defendants attempted to collect parking fines and late fees from plaintiff for on-street parking violations. Specifically, plaintiff claims that defendants "threaten[ed] to accuse Plaintiff of a crime or of conduct that would tend to cause disgrace, contempt or ridicule upon Plaintiff[,]" "engag[ed] . . . in a course of conduct the natural consequence of which was to oppress, harass and abuse Plaintiff," "attempt[ed] to collect a debt . . . by unconscionable means[,]" and "unreasonably publiciz[ed] information regarding a civil debt" when Baker revealed plaintiff's name and amount of his debt to Evelyn Wooten (Wooten), plaintiff's supervisor. Plaintiff alleges that at all times relevant, the City had purchased liability

insurance which waives any governmental immunity. Pursuant to N.C. Gen. Stat. § 75-56, plaintiff requested damages of "at least $8,000.00" and reasonable attorney fees.

Defendants filed for summary judgment. The evidence, viewed in the light most favorable to the plaintiff, *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 101 N.C. App. 1, 4, 398 S.E.2d 889, 890 (1990), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991), reveals that the City maintains and regulates an on-street parking system. Plaintiff violated on-street parking ordinances, incurring parking fines, which he failed to pay in a timely fashion and consequently incurred late fees. In the process of trying to collect the fines and late fees levied against plaintiff, defendants engaged in a course of conduct which included: filing a summons and complaint against plaintiff in small claims court; meeting with plaintiff to try and arrange a payment schedule, until plaintiff indicated he would not pay the late fees; receiving a judgment against plaintiff; sending a letter to plaintiff to inform him that he had 20 days to pay the fines and fees after judgment was entered; revealing plaintiff's work address to the Sheriff's department at their request for purposes of service; and revealing to Wooten plaintiff's name and amount of debt.

At all times relevant, the City was a member of the Interlocal Risk Financing Fund of North Carolina, a local government risk pool, which indemnified the City for claims up to two million dollars. As a member of the risk pool, the City was responsible for paying a $500,000 deductible on each claim.

At the summary judgment hearing the trial court found that although the actions complained of "arise out of the performance of a governmental function" and the doctrine of governmental immunity is applicable, the City waived immunity by the purchase of insurance as authorized by N.C. Gen. Stat. § 160A-485. The trial court also found that Article 2 was applicable to this case and that with regards to the actions of the City, under Article 2, the plaintiff was a "consumer" and the City was a "debt collector." From a denial of summary judgment, defendants appeal.

The issues are whether (I) collection of parking fines and late fees is a governmental function; and (II) the City waived its governmental immunity by the participation in a local government risk pool which had a $500,000 deductible that the City was responsible for paying.

I

Because the City's grounds for summary judgment are based in part on governmental immunity, the denial of its motion for summary judgment is immediately appealable, although interlocutory. *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).

The City contends on appeal it is immune from plaintiff's claims because "enforcement of the City of Raleigh's ordinances—in this case, parking ordinances" was "clearly *governmental* in nature." We agree.

The doctrine of governmental immunity protects a municipality from suit for torts committed while its employees or officers are performing governmental functions. *Young v. Woodall*, 119 N.C. App. 132, 135, 458 S.E.2d 225, 228, *disc. rev. allowed*, 341 N.C. 424, 461 S.E.2d 770 (1995). The collection of a tax is a governmental function, 18 Eugene McQuillin, *McQuillin Mun. Corp.* § 53.54, at 388 (James Perkowitz-Solheim et al. eds., 3d ed., Clark Boardman Callaghan 1993) (1904) [hereinafter 18 *McQuillin Mun. Corp.*], and the coins required to operate an on-street parking meter are in the nature of a tax. *Britt v. Wilmington*, 236 N.C. 446, 452, 73 S.E.2d 289, 294 (1952). Similarly, the collection of parking fines and late fees, imposed for parking violations, is a governmental function. This is so because the collection of these fines and fees is necessary to enforce the parking regulations. *See* 63 C.J.S. *Municipal Corporations* § 782, at 91 (1950) (the enforcement of ordinances regulating the use of streets are governmental powers); 18 *McQuillin Mun. Corp.* § 53.22.40, at 286 (enforcement of ordinances is a legislative function which is immune from tort actions).

II

The City argues that it has not waived its immunity with respect to plaintiff's claim because although the City is a member of a local government risk pool, the City is not insured for claims of less than $500,000. We agree.

A city waives governmental immunity to the extent that the city is indemnified from tort liability through the purchase of liability insurance or participation in a local government risk pool. N.C.G.S. § 160A-485(a) (1994). However, to the extent a city does not purchase liability insurance or participate in a local government risk pool pursuant to section 160A-485, "a city generally retains immunity from civil liability in its governmental capacity." *Jones v. Kearns*, 120 N.C. App. 301, 303, 462 S.E.2d 245, 246 (1995).

During the time the City was attempting to collect parking fines and late fees from plaintiff, the City was indemnified for claims in excess of $500,000 through its participation in a local government risk pool. Any claims for less than that amount were not indemnified because there was a $500,000 deductible for which the City was solely responsible. Therefore, for claims of $500,000 or less the City retains its immunity. *See Jones*, 120 N.C. App. at 303, 462 S.E.2d at 246 (City did not waive immunity for claims of $250,000 or less because its liability policy had a $250,000 "retention per incident" and was entitled to summary judgment).

Although the prayer for relief will not dictate what relief will ultimately be awarded, *Holloway v. Wachovia Bank and Trust Co.*, 339 N.C. 338, 346, 452 S.E.2d 233, 237 (1994), because Article 2 limits an award to $2,000 per violation, N.C.G.S. § 75-56 (1994), and plaintiff claims only four violations, plus reasonable attorney fees, any damages plaintiff seeks cannot exceed $500,000, *see Holloway*, 339 N.C. at 348, 452 S.E.2d at 239 (punitive damages are not recoverable under Chapter 75), and summary judgment for the City on this basis is proper. *See Wilhelm v. City of Fayetteville*, 121 N.C. App. 87, 90, 464 S.E.2d 299, 301 (1995) (summary judgment not proper where plaintiff may receive an award in excess of City's immunity). We need not, therefore, address the question of whether Article 2 applies to the facts of this case. The trial court's Order denying summary judgment is

Reversed.

Judges MARTIN, Mark D., and McGEE concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. MICHAEL LOCKLEAR, DEFENDANT

No. 94-1410

(Filed 2 January 1996)

1. Constitutional Law § 193 (NCI4th)— same evidence used to support two convictions—judgment arrested on one

The trial court erred in failing to arrest judgment on the conviction of assault upon a law enforcement officer because the same evidence was relied on to prove the charge of assault with a deadly weapon inflicting serious injury.

Am Jur 2d, Criminal Law § 279.

2. Evidence and Witnesses § 2511 (NCI4th)— statement overheard by witness—no knowledge of speaker—evidence properly excluded

The trial court in an assault case did not err in refusing to allow the testimony of a witness who allegedly overheard one of the State's witnesses make a statement inconsistent with his trial testimony, since the witness could not identify the speaker and did not have personal knowledge of his voice. N.C.G.S. § 8C-1, Rule 602.

Am Jur 2d, Witnesses §§ 178, 180.

3. Weapons and Firearms § 10 (NCI4th)— possession of firearm by felon in his own home—defendant not in his home at time of offense

The trial court did not err in refusing to dismiss a charge of possession of a handgun by a felon based on the exception of N.C.G.S. § 14-415.1(a) which allows a felon to possess a firearm within his own home, since defendant in this case was in the yard of a trailer which he owned but did not live in; he had plainly surrendered dominion and control of the property to another family; and it was thus not his "home" within the meaning of the statute.

Am Jur 2d, Weapons and Firearms §§ 24, 26.

Appeal by defendant from judgments and commitments entered 13 May 1994 by Judge James C. Spencer, Jr. in Hoke County Superior Court. Heard in the Court of Appeals 3 October 1995.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

LEWIS, Judge.

Defendant was convicted by jury verdict of assault with a deadly weapon inflicting serious injury, assault with a deadly weapon on a law enforcement officer, possession of a handgun by a felon and resisting, delaying or obstructing an officer. Judge Spencer sentenced him to ten years and five years respectively for the assault convic-

tions. The other convictions were consolidated for punishment and a two year sentence was imposed. Defendant appeals.

At trial the State's evidence tended to show that on 29 August 1992 defendant agreed to rent a trailer he owned to the Knight family. On that day he gave them a key and permission to move in immediately. On 3 September 1992 Carol Jane Knight and defendant's girlfriend got into an altercation in which the girlfriend displayed a gun. Deputy Murchison, a member of the Hoke County Sheriff's Department, arrived and after separating the women, focused his attention on defendant who had appeared on the property and taken the gun from his girlfriend. Deputy Murchison testified that since defendant was "very agitated," he attempted to calm him down. Attempting to get him under control, Deputy Murchison grabbed defendant by the arm. Defendant struggled to get free. Deputy McLamb, another member of the Hoke County Sheriff's Department, arrived and joined Deputy Murchison in trying to control defendant. During this struggle, defendant shot Deputy McLamb. Deputy Murchison then fired a shot at defendant.

Defendant testified that he had agreed to rent his trailer but changed his mind the same day once he found out more people were moving in than he had previously understood. He explained that he let the Knight family move in only until they found another place to live. He also testified that he did not shoot Deputy McLamb. Witnesses for the defendant corroborated his testimony by stating that defendant's hands were in the air at the time Deputy McLamb was shot.

We first note that defendant made nineteen assignments of error, only five of which he argues in his brief. The other fourteen are therefore deemed abandoned. N.C.R. App. P. 28(b)(5) (1995).

[1] Defendant first argues the trial court erred in not arresting judgment on the conviction of assault upon a law enforcement officer because the same evidence was relied on to prove both assault convictions. We agree. In reaching this result, we are bound by this Court's decision in *State v. Byrd*, 50 N.C. App. 736, 275 S.E.2d 522, *disc. review denied*, 303 N.C. 316, 281 S.E.2d 654 (1981). In *Byrd*, the defendant was convicted of and sentenced for assault with a deadly weapon inflicting serious injury and assault on a law enforcement officer with a deadly weapon. *Id.* at 737-38, 275 S.E.2d at 523-24. This Court arrested judgment in one of the convictions since the elements of assault on a law enforcement officer are included in the offense of

assault with a deadly weapon inflicting serious injury. *Id.* at 740, 275 S.E.2d at 525. The Court stated, "Although it was not error to charge and try defendant for both offenses, the constitutional guarantee against double jeopardy protects defendant from multiple punishment for the same offense." *Id.* We are bound by our decision in *Byrd* and therefore arrest judgment in the conviction for assault with a deadly weapon on a law enforcement officer.

Defendant next argues that the trial court erred by not permitting him to cross-examine one of the State's witnesses concerning misrepresentations he made on an employment application. We are unable to address this issue since the excluded evidence was not preserved. In order to preserve excluded evidence for appellate review, an offer of proof must be made if the content of the witness' answer cannot be determined by the record. *State v. Hester*, 330 N.C. 547, 555, 411 S.E.2d 610, 615 (1992). In this case, it is unclear from the record what the witness' responses would have been. The only offer of proof made by defendant was his attorney's own statements as to what he believed the witness might say. This is not an offer of proof. "Defense counsel's statements are not adequate to preserve the excluded evidence for our review." *State v. Long*, 113 N.C. App. 765, 768-69, 440 S.E.2d 576, 578, *disc. review denied*, 336 N.C. 317-18, 445 S.E.2d 399 (1994).

[2] In defendant's third argument, he contends that the trial court erred in not allowing testimony of a witness who allegedly overheard one of the State's witnesses make a statement inconsistent with his trial testimony. We disagree. The defense witness was prepared to testify that she and Deputy McLamb were taken to the same hospital the night of the shooting and while there she heard him say that he did not know what happened, although he testified about the evening in detail at trial. However, the defense witness and Deputy McLamb were in different rooms separated by curtains. She was unable to identify him and did not express any familiarity with his voice. The trial judge ruled that there was insufficient identification and sustained the State's objection.

The North Carolina Rules of Evidence state that: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C.R. Evid. 602. In *State v. Riddick*, our Supreme Court allowed a witness to testify as to statements she overheard. 315 N.C. 749, 756-57, 340 S.E.2d 55, 59-60 (1986). However, in that case as distinguished from

the one before us, the witness personally knew the person speaking and lived in the same household. She knew his voice. In this case, the witness could not identify the speaker, nor did she have personal knowledge of his voice. We affirm the trial court's decision to exclude the testimony.

[3] Defendant also argues that the trial court erred in refusing to dismiss the charge of possession of a handgun by a felon. He contends that the exception stated in N.C. Gen. Stat. section 14-415.1(a) which allows felons to possess a firearm "within his own home" applies to his situation. At the time in question defendant was in the yard of a trailer which he owned, but did not live in. In fact, another family was currently living there with his consent. We must decide whether this constitutes his "home" for purposes of applying N.C.G.S. section 14-415.1 (a) We hold that it does not.

In *State v. McNeill*, 78 N.C. App. 514, 337 S.E.2d 172 (1985), *disc. review denied*, 316 N.C. 383, 342 S.E.2d 904 (1986), this court defined the meaning of "home" in the statute:

> By using the words "within his own home" in the exception, as opposed to some broader terminology, the Legislature clearly expressed its intent to limit the applicability of the exception to the confines and privacy of the convicted felon's own premises, over which he has dominion and control to the exclusion of the public.

Id. at 516, 337 S.E.2d at 173. Under the facts in the record, defendant had plainly surrendered dominion and control of the trailer property. We hold that it was not his "home" for purposes of N.C.G.S. section 14-415.1 (a) and affirm the trial court's denial of defendant's motion to dismiss.

Judgment arrested in defendant's conviction for assault with a deadly weapon on a law enforcement officer.

Otherwise, no error.

Judges WYNN and MARTIN, Mark D. concur.

REBECCA DUNKLEY, PLAINTIFF v. LEE H. SHOEMATE, ERIC B. MUNSON, DAVID S. JANOWSKY, PRESTON A. WALKER, MARY F. LUTZ AND DOE ONE, DOE TWO, AND DOE THREE, DEFENDANTS

No. COA95-279

(Filed 2 January 1996)

Limitations, Repose, and Laches § 119 (NCI4th)— mental disability—plaintiff not required to plead in avoidance of statute of limitations

Plaintiff not required to plead mental disability in avoidance of the affirmative defense of the statute of limitations. Even though plaintiff was not required to plead mental disability, she set forth allegations that should have put defendants on notice that she may have been prevented from filing her claims because of mental disability where she alleged that she entered UNC Hospital to receive treatment for depression and debilitating psychological illness and was undergoing outpatient treatment at the time defendant psychiatric resident had nonconsensual sex with her, that defendant resident threatened to commit her to a psychiatric hospital if she told, and that she required additional psychiatric hospital admissions as a result of the resident's actions.

Am Jur 2d, Limitations of Actions §§ 178, 179, 186-190.

Time of existence of mental incompetency which will prevent or suspend running of statute of limitations. 41 ALR2d 726.

Appeal by plaintiff from order entered 3 November 1994 by Judge B. Craig Ellis in Orange County Superior Court. Heard in the Court of Appeals 5 December 1995.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., and Law Office of Glenn C. Veit, by Glenn C. Veit, for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay, Donna R. Rutala, and G. Lawrence Reeves, Jr., for defendant-appellee Shoemate; Yates, McLamb & Weyher, L.L.P., by Bruce W. Berger, for defendants-appellees Munson, Janowsky, and Lutz; Young, Moore, and Henderson, P.A., by M. Lee Cheney and Glenn C. Raynor, for defendant-appellee Walker.

LEWIS, Judge.

This appeal is from a Rule 12(b)(6) dismissal of plaintiff's claim. N.C.R. Civ. P. 12(b)(6). For Rule 12(b)(6) purposes, plaintiff's allegations are taken as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 83, 221 S.E.2d 282, 290 (1976).

Plaintiff alleges the following: She was hospitalized at University of North Carolina Hospital in Chapel Hill (UNC Hospital) on 25 September 1989 "for care and treatment of depression and debilitating psychological illness." After her discharge on 10 October 1989, defendant Lee H. Shoemate was assigned to provide her with psychiatric outpatient treatment. Shoemate had been employed as a resident in psychiatry at UNC Hospital since 18 July 1989. On 14 August 1990 Shoemate engaged in non-consensual sexual intercourse with plaintiff. On 1 October 1990, Shoemate resigned upon the discovery that he had misrepresented his credentials. On his residency application, he had falsely claimed to be a student at Harvard Medical School who would graduate in August 1989. However, he had never attended Harvard Medical School and was not a medical doctor. Plaintiff claims that the other named defendants were negligent in hiring and retaining Shoemate and seeks to impute his tortious conduct to them. She seeks compensatory and punitive damages for her injuries.

On 13 July 1994, plaintiff filed this action asserting claims for battery, assault, intentional infliction of emotional distress, fraud, and negligence. Defendants Shoemate and Walker answered asserting that the statutes of limitations had run on all of plaintiff's claims. Defendants Walker, Munson, Janowsky, and Lutz moved to dismiss plantiffs' complaint. By order filed 3 November 1994, Judge B. Craig Ellis dismissed plaintiff's claims for failure to file within the applicable statutes of limitations. Plaintiff appeals.

The dispositive issue is whether plaintiff was required to plead mental disability in avoidance of the affirmative defense of statute of limitations.

A complaint should not be dismissed under Rule 12(b)(6) unless the complaint on its face shows an insurmountable bar to recovery. *Lyon v. Continental Trading Co.*, 76 N.C. App. 499, 502, 333 S.E.2d 774, 776 (1985) (quoting *Piatt v. Doughnut Corp.*, 28 N.C. App. 139, 142, 220 S.E.2d 173, 175 (1975), *disc. review denied*, 289 N.C. 299, 222 S.E.2d 698 (1976)). Defendants assert that plaintiff's complaint shows that her claims for assault and battery are barred by the one year

statute of limitations, *see* N.C.G.S. section 1-54(3) (Cum. Supp. 1995), and that her claims for negligence, fraud, and intentional infliction of emotional distress are barred by three year statute of limitations. *See* N.C.G.S. 1-52(5),(9) and (16) (Cum. Supp. 1995).

Plaintiff asserts that the statutes of limitations were tolled by her mental disability. Mental disability tolls a statute of limitations until after the disability is removed. The disability statute, in pertinent part, provides:

> (a) A person entitled to commence an action who is at the time the action accrued either (1) Within the age of 18 years; or (2) Insane; or (3) Incompetent as defined in G.S. 35A-1101(7) or (8) may bring his action within the time herein limited, after the disability is removed . . . .

N.C.G.S. § 1-17(a) (Cum. Supp. 1995). N.C.G.S. section 35A-1101(7) defines an "incompetent adult" as

> an adult or emancipated minor who lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C.G.S. § 35A-1101(7) (1995). The standard for determining whether a plaintiff is "insane" for the purposes of tolling the statute or limitations is similar to the definition under section 35A-1101(7), i.e., whether one has the "mental competence to manage one's own affairs". *Cox v. Jefferson-Pilot Fire and Casualty Co.*, 80 N.C. App. 122, 125, 341 S.E.2d 608, 610, *cert. denied*, 317 N.C. 702, 347 S.E.2d 38 (1986).

The statute of limitations is an affirmative defense that must be pled in a responsive pleading. See N.C.R. Civ. P. 8(c) (1990) (listing various affirmative defenses). Rule 8(d) of the Rules of Civil Procedure deems affirmative defenses in the answer as being denied or avoided if a reply is neither required or permitted. N.C.R. Civ. P. 8(d) (1990); *Brown*, 60 N.C. App. at 577, 299 S.E.2d at 281. The issue is joined without further pleadings, and discovery may proceed. Rule 7(a) of the Rules of Civil Procedure does not permit a party to file a reply to an affirmative defense asserted in an answer unless the court

orders the reply, *see* N.C.R. Civ. P. 7(a), and a party is not required to seek permission to plead matters in avoidance of an affirmative defense. *Brown v. Lanier*, 60 N.C. App. 575, 577, 299 S.E.2d 279, 281 (1983) (citing *Vernon v. Crist*, 291 N.C. 646, 231 S.E.2d 591 (1977)).

Thus, in this case, defendants' affirmative defense of the statute of limitations is deemed avoided, the issue joined, and discovery may proceed. No reply pleading was required or permitted, and plaintiff was not required to plead mental disability in her complaint.

We recognize that this approach may effectively preclude the use of a 12(b)(6) dismissal when replies to affirmative defenses are neither required nor permitted. It would seem to set the stage for an "ambush" and leave untended the idea of notice pleading. Nevertheless, in this case, we are bound by *Brown v. Lanier* and must deem the statute of limitations defenses as pled in avoidance.

Furthermore, even though plaintiff was not required to plead mental disability, she has set forth allegations that should put defendants on notice that she may have been prevented from filing her claims because of mental disability. Plaintiff alleges that she entered UNC Hospital to receive treatment for "depression and debilitating psychological illness" and that she was undergoing outpatient treatment with Shoemate at the time of the alleged sexual contact. She further alleges that Shoemate threatened to commit her to a psychiatric hospital if she told, and that plaintiff required additional psychiatric hospital admissions as a result of Shoemate's actions.

It must be determined by the facts whether plaintiff's condition rises to the level of "insanity" or incompetence under the statute. If so, the statutes of limitations were tolled while that condition prevailed.

Since *Brown* controls, we must reverse and remand.

Judges WYNN and JOHN concur.

GUY T. FUNK, PLAINTIFF v. MARSHA S. MASTEN, INDIVIDUALLY; MARSHA S. MASTEN, SUCCESSOR TRUSTEE UNDER THE HARRIETT B. FUNK REVOCABLE LIVING TRUST; AND MARSHA S. MASTEN, EXECUTRIX OF THE ESTATE OF HARRIETT B. FUNK, DECEASED, DEFENDANT

No. COA95-249

(Filed 2 January 1996)

Appeal and Error § 167 (NCI4th)— no justiciable issue— appeal dismissed

There was no justiciable issue for appeal, and defendant's appeal from the trial court's ruling that the value of property owned as tenants by the entirety did not pass to plaintiff husband as a result of his wife's death is dismissed, where the record is bare of any recitation of the values of properties passing to plaintiff under and outside his wife's will which are necessary to determine if plaintiff could dissent from his wife's will, and it contained no findings or conclusions as to plaintiff's right to dissent, since any opinion issued at this juncture would be advisory.

Am Jur 2d, Appellate Review §§ 640, 641.

Appeal by defendant from Order entered 25 October 1994 by Judge James D. Llewellyn in Davie County Superior Court. Heard in the Court of Appeals 4 December 1995.

Canady, Thornton & Brown, by Gordon H. Brown and Shelia J. Cox, for plaintiff-appellee.

Martin, Van Hoy, Smith & Raisbeck, L.L.P., by Robert H. Raisbeck, Jr., for defendant-appellant.

JOHNSON, Judge.

Plaintiff Guy T. Funk filed a Dissent From Will, dissenting from his deceased wife's (Harriett B. Funk's) will, on 9 December 1993. On that same day, plaintiff filed a Complaint against defendant Marsha S. Masten, individually, as Successor Trustee under the decedent's Revocable Living Trust, and as Executrix of decedent's estate. On 14 April 1994, defendant filed an Answer and Counterclaim. By Order entered 22 September 1994, Davie County Clerk of Court, Kenneth D. Boger, transferred the issues raised in plaintiff's Dissent From Will to the Superior Court Calendar. Consequently, this matter came on for hearing before Judge James D. Llewellyn at the 26 September 1994 civil session of Davie County Superior Court. After hearing arguments

of counsel for both parties, Judge Llewellyn concluded that the property held by plaintiff and decedent as tenants by the entirety should not be included in the computation of the value of the property or interest in property passing to plaintiff as a result of decedent's death. Judge Llewellyn, however, failed to make findings of fact as to the valuation of decedent's net estate or properties that would pass to plaintiff under and/or outside of decedent's will. In addition, Judge Llewellyn failed to make any conclusions of law as to whether plaintiff would have the right to dissent from decedent's will. Defendant now appeals.

On appeal, defendant agrees that pursuant to North Carolina General Statutes section 30-1, the value of property owned as tenants by the entirety, which was actually contributed by plaintiff, should not be included in the calculation of property passing outside of decedent's will to plaintiff; but argues that the increase in the value of that property, from the date of purchase to the date of decedent's death, should be included in that calculation. On the record before us, we are unable to address defendant's argument on appeal since this appeal does not present a justiciable issue.

The legislature has created a two-step process to be used when a surviving spouse attempts to dissent from a deceased spouse's will: the first step is to determine if the surviving spouse has the right to dissent, and the second step is to determine the consequences of that dissent. *In re Estate of Francis*, 327 N.C. 101, 394 S.E.2d 150 (1990). This first step requires that there be a determination of which properties are to be included in the computation of the value of property passing under and outside of the decedent's will to the surviving spouse. Further, this step also requires that these properties' values be assessed. If it is determined that the value of the property passing to the surviving spouse under the will and the property passing to the surviving spouse outside of the will is less than the amount passing to the surviving spouse under the North Carolina Intestate Succession Act, a surviving spouse has a right to dissent. [VALUE OF PROPERTY PASSING UNDER THE WILL + VALUE OF PROPERTY PASSING OUTSIDE OF THE WILL < ½ AMOUNT PASSING UNDER INTESTATE SUCCESSION ACT] N.C. Gen. Stat. § 30-1(a)(3) (1992); *See In re Estate of Francis*, 327 N.C. 101, 394 S.E.2d 150.

As the record in the instant case is bare of any recitation of the values necessary to determine if plaintiff can indeed dissent from decedent's will, and contains no findings or conclusions as to plain-

tiff's right to dissent, this issue is not ripe for resolution by this Court; and is, therefore, nonjusticiable. We are unable to determine as a matter of law whether defendant will indeed suffer any harm if the interest in the property owned by plaintiff and decedent as tenants by the entirety is not included in the calculation of property passing outside of decedent's will. Thus, any opinion issued at this juncture would be advisory, in contravention of well-settled case law. Until there has been an adjudication of plaintiff's right to dissent, we cannot address defendant's arguments on appeal. As such, this appeal is dismissed.

Dismissed.

Judges WALKER and SMITH concur.

JAMES H. BROWN, EMPLOYEE-PLAINTIFF v. DAVID BOOKER D/B/A BOOKER EXPRESS AND U.S. INTERMODAL CORPORATION OF SOUTH CAROLINA, EMPLOYERS-DEFENDANTS AND LIBERTY MUTUAL INS. CO., INC., CARRIER-DEFENDANT

No. COA94-875

(Filed 2 January 1996)

Workers' Compensation § 437 (NCI4th)— default judgment set aside—no hearing on the merits—appeal premature

Because the Industrial Commission set aside the default judgment, this action requires a hearing on the merits, and plaintiff's appeal therefore is premature and is dismissed.

Am Jur 2d, Appellate Review § 300.

Appeal by plaintiff from Opinion and Award filed 16 March 1994 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 27 September 1995.

Seth M. Bernanke for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Mika Z. Savir, for defendants-appellees U.S. Intermodal Corporation of South Carolina and Liberty Mutual Insurance Company, Inc.

Per Curiam.

On 22 November 1991, plaintiff was involved in a motor vehicle accident in the truck he was driving for his employers in Candler

County, Georgia. Plaintiff suffered numerous injuries which required extensive treatment. On 5 December 1991, plaintiff was released by Dr. Hassanyheh of Metter, Georgia, to continue his care in North Carolina. He continued his care at Carolinas Medical Center in Charlotte, North Carolina.

Plaintiff filed a Form 18 claiming disability due to the accident. On the Form 18, plaintiff listed as his employer Booker Express/U.S. Intermodal Container Corporation of South Carolina, a transport company headquartered in Savannah, Georgia. Defendant U.S. Intermodal filed a response with the Georgia State Board of Workers' Compensation alleging improper jurisdiction. A copy of the Georgia form was also filed with the North Carolina Industrial Commission (Commission).

Plaintiff subsequently filed a Form 33 Request for Hearing. Defendants U.S. Intermodal and Liberty Mutual filed a Form 33R with the North Carolina Industrial Commission claiming that plaintiff was an employee of Booker Express, not U.S. Intermodal, and that the Commission did not have subject matter jurisdiction over the claim. The Form 33R was served on 24 July 1992. Plaintiff's counsel had previously asked the (former) Executive Secretary of the North Carolina Industrial Commission to enter a default judgment against defendants. The Executive Secretary signed and filed, on 28 July 1992, a judgment entering default and default judgment. Defendants U.S. Intermodal and Liberty Mutual filed notice of appeal to the Full Commission.

The Full Commission vacated the Opinion and Award finding that a default judgment is improper; that Rule 55 of the Rules of Civil Procedure is not applicable; that there is no provision in the Workers' Compensation Act itself that allows for default judgment; that the entry by the Executive Secretary purported to make findings of fact where there had been no hearing, nor evidence or facts stipulated to by the parties; and that subject matter jurisdiction does not exist.

There has not been an evidentiary hearing in this case, and no medical records or other documents have been stipulated into the Record. The Commission's Record consists only of the Form 18, Georgia State Board Form 33, Form 33R and the Opinion and Awards in this case.

We note that the Commission ruled, though unclearly, that it did not have subject matter jurisdiction and remanded the case for hear-

ing before the deputy commissioner. It appears that the Commission's conclusion that it lacked subject matter jurisdiction was based on the fact that the parties neither stipulated that subject matter jurisdiction existed, nor had a hearing been conducted by a deputy commissioner in which such an issue would have been determined. The Commission, therefore, ruled that there was no subject matter jurisdiction and remanded the case to the deputy commissioner presumably to determine all issues on the next available date.

Defendants U.S. Intermodal Corporation of South Carolina and Liberty Mutual Insurance Company, Inc. have been dismissed from the appeal pursuant to a settlement agreement. Defendant David Booker d/b/a Booker Express is the sole remaining defendant.

The Opinion and Award from which plaintiff appeals is interlocutory. An appeal does not lie from an interlocutory order of the North Carolina Industrial Commission. *Lynch v. Construction Co.*, 41 N.C. App. 127, 254 S.E.2d 236, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). Because the Full Commission set aside the default judgment, the instant action has not been disposed of and requires further action, that is, a hearing on the merits of the case. *See Horne v. Nobility Homes, Inc.*, 88 N.C. 476, 363 S.E.2d 642 (1988). As no substantial right is involved in the instant action, nor will injury result if this action is not heard at this time, plaintiff is not entitled to an immediate appeal. Because the appeal is premature, it is subject to dismissal.

For the reason stated herein, the appeal from the Opinion and Award of the Full Commission is dismissed.

Appeal Dismissed.

Panel consisting of:

Judges JOHNSON, EAGLES and WYNN.

REA CONSTRUCTION COMPANY, Plaintiff v. THE CITY OF CHARLOTTE, Defendant

No. COA94-1374

(Filed 2 January 1996)

Unfair Competition or Trade Practices § 6 (NCI4th)— unfair and deceptive trade practices—no action against city

A claim for unfair and deceptive trade practices under N.C.G.S. § 75-1.1 may not be brought against a city.

Am Jur 2d, Consumer and Borrower Protection § 285; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Scope and exemptions of state deceptive trade practice and consumer protection acts. 89 ALR3d 399.

Appeal by plaintiff from order entered 28 September 1994 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 September 1995.

Johnston, Taylor, Allison & Hord, by Steele B. Windle, III, Gary J. Welch, and Bret P. Holmes, for plaintiff-appellant.

Horack, Talley, Pharr & Lowndes, P.A., by Robert B. McNeill, for defendant-appellee.

LEWIS, Judge.

This appeal arises from a dispute between a contractor and the City of Charlotte over the construction of a road extension.

In June 1989, Rea Construction Company ("Rea") and the City of Charlotte ("the City") entered into a contract for construction of an extension to Westinghouse Boulevard in Charlotte. In January 1992, Rea filed this suit against the City for breach of contract, or in the alternative, for recovery in *quantum meruit* and *quantum valebant*. By subsequently filed Amended Complaint, Rea added claims for estoppel and unfair and deceptive trade practices. The City answered both complaints.

All disputes in the action, except for the unfair and deceptive trade practices claim, were submitted to and resolve through binding arbitration. On 14 September 1994, the City moved for summary judgment on Rea's unfair and deceptive trade practices claim. By order

entered 28 September 1994, Judge Robert M. Burroughs granted summary judgment in favor of the City. Rea appeals.

The dispositive issue on this appeal is whether a claim for unfair and deceptive trade practices under N.C.G.S. section 75-1.1 *et seq.* ("Chapter 75") may be brought against a city. We have previously held that

> [t]he consumer protection and antitrust laws of Chapter 75 of the General Statutes do not create a cause of action against the State, regardless of whether sovereign immunity may exist.

Sperry Corp. v. Patterson, 73 N.C. App. 123, 125, 325 S.E.2d 642, 644 (1985). "An incorporated city or town is an agency created by the State." *State v. Furio*, 267 N.C. 353, 356, 148 S.E.2d 275, 277 (1966); *see* generally N.C.G.S. Chapter 160A (1994) (granting powers to cities and towns). Thus, in accord with *Sperry*, we hold that, as an agency of the State, a city may not be sued under Chapter 75. The trial court did not err in granting summary judgment to the City.

Affirmed.

Judges EAGLES and JOHN concur.

RICHARD G. CHEEK v. SAMUEL H. POOLE, INDIVIDUALLY AND AS A GENERAL PARTNER OF JOHNSON, POOLE, WEBSTER, & BOST

No. COA95-253

(Filed 16 January 1996)

1. Discovery and Depositions § 62 (NCI4th)— untimely service of discovery responses—no grounds for sanctions if served before motion for sanctions made or served

The untimely service of discovery responses cannot support sanctions if the discovery responses are served prior to the making or service of a motion requesting sanctions; in this case where plaintiff's untimely responses to the discovery requests were served on the same day that defendants served or made their motion requesting sanctions, the responses were not served or made before the making of the motion for sanctions, and the trial court had authority to enter sanctions for the untimely discovery responses. N.C.G.S. 1A-1, Rule 37(b)(2).

Am Jur 2d, Depositions and Discovery § 373.

2. Discovery and Depositions § 68 (NCI4th)— dismissal of plaintiff's action—appropriate sanction

The sanction of dismissal was not an abuse of discretion in this case since plaintiff never objected to discovery requests; it was determined that he had established a pattern of disregarding due dates for responding to discovery; the sanction of dismissal is specifically authorized by Rule 37; the trial court indicated that it considered less severe sanctions; and defendant was not required to show that it was prejudiced by plaintiff's actions in order to obtain sanctions.

Am Jur 2d, Depositions and Discovery § 385.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories. 56 ALR3d 1109.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects. 27 ALR4th 61.

Sanctions for failure to make discovery under Federal Civil Procedure Rule 37 as affected by defaulting party's good faith attempts to comply. 2 ALR Fed. 811.

Judge MARTIN (Mark D.) concurring.

Appeal by plaintiff from order filed 2 December 1994 in Moore County Superior Court by Judge Narley L. Cashwell. Heard in the Court of Appeals 5 December 1995.

Evans and Riffle Law Offices, by Patrick W. Currie and John B. Evans, for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Ronald C. Dilthey and Charles George, for defendant-appellees.

GREENE, Judge.

Richard G. Cheek (plaintiff) appeals from the trial court's order, in which the trial court determined that plaintiff violated the North Carolina Rules of Civil Procedure regarding discovery and, as a sanction, dismissed plaintiff's action with prejudice.

Plaintiff filed an action against Samuel H. Poole and Johnson, Poole, Webster & Bost (defendants) on 9 September 1987, alleging legal malpractice, and filed a voluntary dismissal of that action on 4 October 1993. During the pendency of plaintiff's first action, plaintiff failed to comply with discovery requests by defendant and a portion of plaintiff's claim for damages against defendant was dismissed with prejudice. Plaintiff filed a new complaint on 6 January 1994. After receiving defendants' "First Interrogatories and Request for Production of Documents" on 7 June 1994, plaintiff requested and received an extension of time within which to answer defendants' discovery requests. Plaintiff's deadline to answer defendants' discovery was extended until 10 July 1994, and plaintiff did not answer the discovery requests by this date. On 13 October 1994, defendants served plaintiff, by mail, with a motion to compel plaintiff's responses to defendants' discovery requests, which in the alternative sought the imposition of sanctions on plaintiff or dismissal of plaintiff's claim. On 14 October 1994, defendants filed this same motion to compel with the trial court. Plaintiff served defendants, by mail, with his responses to defendants' discovery requests on 13 October 1994.

After a hearing on defendants' 13 October motion, the trial court entered an order on 2 December 1994, dismissing plaintiff's claim with prejudice as a sanction for plaintiff's failure to timely reply to defendants' discovery requests. The trial court made findings that plaintiff "has established a pattern of disregarding due dates for responding to discovery from opposing parties and ignoring orders of [the] Court requiring plaintiff to respond fully and in a timely manner to discovery requests by opposing parties." The trial court further stated that it had "considered lesser sanctions than dismissal with prejudice; however, this Court, in its discretion, finds that less drastic sanctions than dismissal will not suffice nor would lesser sanctions be appropriate under the facts of this case."

The issues are (I) whether this action may be dismissed pursuant to Rule 37 of the Rules of Civil Procedure where responses to discovery requests were untimely filed; and if so, (II) whether the trial court abused its discretion by entering the sanction of dismissal of the complaint.

I

[1] Rule 37(d) provides that sanctions may be imposed if a party fails "to serve answers or objections to interrogatories submitted under

Rule 33, after proper service of the interrogatories or . . . to serve a written response to a request for inspection [of documents] submitted under Rule 34." N.C.G.S. § 1A-1, Rule 37(d) (1990). As a general rule, the discovery responses are due within thirty days after service of the request. N.C.G.S. § 1A-1, Rule 33(a) (1990); N.C.G.S. § 1A-1, Rule 34(b) (1990). If a party fails to respond to discovery requests, "the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request." N.C.G.S. § 1A-1, Rule 37(a)(2). If a party, ordered to provide discovery, fails to do so, "a judge of the court in which the action is pending may make such orders in regard to the failure as are just," including the dismissal of the action. N.C.G.S. § 1A-1, Rule 37(b)(2). An order directing compliance with discovery requests, however, is not a prerequisite to the entry of sanctions for failure to respond to discovery requests. N.C.G.S. § 1A-1, Rule 37(d); *First Citizens Bank v. Powell*, 58 N.C. App. 229, 230, 292 S.E.2d 731, 731 (1982) ("issuance of court order is the more common procedure"), *aff'd*, 307 N.C. 467, 298 S.E.2d 386 (1983).

The plaintiff argues that although he did not timely respond to the discovery requests, because he did respond "prior to the filing of the Defendant's [sic] motion . . . asking for sanctions," the defendant waived any right he had to "insist upon strict adherence to [the] discovery rules." There is merit to the premise of this argument but it fails on the facts of this case. Our courts have held that "defaults [pursuant to Rule 55] may not be entered after [an] answer has been filed, even though the answer be late." *Peebles v. Moore*, 302 N.C. 351, 356, 275 S.E.2d 833, 836 (1981); N.C.G.S. § 1A-1, Rule 55(a) (Supp. 1994). We see no reason to construe Rule 37 differently from Rule 55 and therefore hold that the untimely service of discovery responses cannot support sanctions if the discovery responses are served *prior to* the making[1] or service of a motion requesting sanctions. It follows, of course, that untimely discovery responses served *after* the service of a motion seeking sanctions on this basis can support sanctions.

1. A motion seeking sanctions is made on the day it is served provided it is filed "with the court either before service or within five days thereafter." N.C.G.S. § 1A-1, Rule 5(d) (Supp. 1994); *Beckstrom v. Coastwise Line*, 13 F.R.D. 480, 482 (D. Alaska 1953) (where rule requires service, the motion is made on the date of service and not the date of filing); *see* 2 James W. Moore, *Moore's Federal Practice* § 5.10 (2d ed. 1995) (recognizing importance of service requirements in motions). In this case, the motion was filed with the court within one day of its service and thus was made on the day of service.

Segrest v. Gillette, 96 N.C. App. 435, 442, 386 S.E.2d 88, 92 (1989), *rev'd on other grounds*, 331 N.C. 97, 414 S.E.2d 334 (1992).

In this case the plaintiff's untimely responses to the discovery requests were served on the same day that the defendants served or made their motion requesting sanctions. Thus the responses were not served or made before the making of the motion for sanctions and the trial court had authority to enter sanctions for the untimely discovery responses.

II

[2] The plaintiff also argues that the sanction of dismissal was an abuse of discretion. We disagree. The determination of whether to dismiss an action because of noncompliance with discovery rules, "involves the exercise of judicial discretion" and should not be disturbed unless "manifestly unsupported by reason." *Miller v. Ferree*, 84 N.C. App. 135, 136-37, 351 S.E.2d 845, 847 (1987); *American Telephone and Telegraph Co. v. Griffin*, 39 N.C. App. 721, 727, 251 S.E.2d 885, 888 ("broad discretion must be given to the trial judge with regard to sanctions"), *disc. rev. denied*, 297 N.C. 304, 254 S.E.2d 921 (1979).

In this case, the plaintiff never objected to the discovery requests. He did obtain one extension of time to comply, but failed to respond within the extended time and failed to request an additional extension. Furthermore, it was determined that plaintiff had "established a pattern of disregarding due dates for responding to discovery."[2] The sanction of dismissal is specifically authorized by Rule 37. Under these circumstances, we cannot say that the decision of the trial court to dismiss the complaint was manifestly unsupported by reason. This Court has repeatedly refused to reverse dismissals entered under similar circumstances. *See Silverthorne v. Coastal Land Co.*, 42 N.C. App. 134, 137-38, 256 S.E.2d 397, 399-400, *disc. rev. denied*, 298 N.C. 300, 259 S.E.2d 302 (1979); *Hammer v. Allison*, 20 N.C. App. 623, 202 S.E.2d 307, *cert. denied*, 285 N.C. 233, 204 S.E.2d 23 (1974); *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 275-76, 362 S.E.2d 868, 869 (1987). Moreover, the trial court indicated in its order, as it must, that it considered less severe sanctions. *Foy v. Hunter*, 106 N.C. App. 614, 620, 418 S.E.2d 299, 303 (1992).

2. The issue of whether the trial court may impose sanctions based upon a party's action in a previous filing of the same claim is not raised by the plaintiff in this case. Thus, we do not decide the propriety of the trial court's use of those actions as a basis for sanctions in the present action.

The plaintiff also argues that the order must be reversed because the defendants have not shown "any prejudice to [their] case because of any alleged failure of [the plaintiff] to make discovery." We disagree. "Rule 37 does not require the [movant] to show that it was prejudiced by the [nonmovant's] actions in order to obtain sanctions." *Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 37, 392 S.E.2d 663, 668 (1990), *disc. rev. denied*, 328 N.C. 93, 402 S.E.2d 418 (1991).

Affirmed.

Judge McGEE concurs.

Judge MARTIN, Mark D., concurs with separate opinion.

Judge MARTIN, Mark D., concurring.

I believe the trial court's reliance on plaintiff's actions in a voluntarily dismissed case (case I) to support, in any manner, its dismissal with prejudice of plaintiff's present case (case II), was inappropriate.

The trial court, in its order dismissing case II with prejudice, found "[p]laintiff has established a pattern of disregarding due dates for responding to discovery . . . and ignoring orders of Court requiring plaintiff to respond fully and in a timely manner to discovery requests by opposing parties." (emphasis added). To find that a "pattern" existed in the present case, the trial court must necessarily have considered both cases I and II as it concluded in its order, "plaintiff has again willfully violated . . . the North Carolina Rule of Civil Procedure." (emphasis added).

Cases I and II are related to the extent case I, voluntarily dismissed on 4 October 1993, was refiled on 6 January 1994 as case II. Nevertheless, case I was terminated by the voluntary dismissal and case II is, therefore, not a continuation of case I. *See Ward v. Taylor*, 68 N.C. App. 74, 78, 314 S.E.2d 814, 818-819, *disc. review denied*, 311 N.C. 769, 321 S.E.2d 157 (1984) (after plaintiff files a voluntary dismissal, that action terminates and no suit is pending in the court); 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 41-2 (1989) (voluntary dismissal constitutes the final termination of a case). Rather, case II is an independent cause of action and, as such, the trial court must determine sanctions based solely on plaintiff's actions during the prosecution of case II. *Goss v. Battle*, 111 N.C. App. 173, 177, 432

S.E.2d 156, 159 (1993) (proper sanction under N.C.R. Civ. P. 37(d) to be determined from the facts and circumstances of each case) (Greene, J., concurring). Therefore, I believe the majority should have clearly determined whether plaintiff's actions in case II, alone, supported the dismissal of case II with prejudice.

Considering only plaintiff's actions in case II, I believe plaintiff's failure to respond to certain discovery requests despite a court order is, standing alone, sufficient to support the trial court's dismissal of case II with prejudice. *See, e.g., Silverthorne v. Land Co.*, 42 N.C. App. 134, 137-138, 256 S.E.2d 397, 399-400, *disc. review denied*, 298 N.C. 300, 259 S.E.2d 302 (1979). Accordingly, I concur in the result of the majority opinion.

MICHAEL E. GROUSE, EMPLOYEE/PLAINTIFF v. DRB BASEBALL MANAGEMENT, INC., D/B/A WINSTON-SALEM SPIRITS AND/OR DENNIS R. BASTIEN, (IND.) EMPLOYER/DEFENDANTS

No. COA94-977

(Filed 16 January 1996)

1. **Workers' Compensation § 19 (NCI4th)— four or more employees—defendants subject to jurisdiction of Industrial Commission**

Defendants were subject to the Industrial Commission's jurisdiction where the evidence tended to show that they regularly employed four or more employees during the year plaintiff was injured, even if there were fewer than four employees on the particular day plaintiff was injured.

Am Jur 2d, Workers' Compensation § 120.

2. **Workers' Compensation § 22 (NCI4th)— plaintiff as employee and not independent contractor—sufficiency of evidence**

The evidence was sufficient to support the conclusion that plaintiff was not an independent contractor but was engaged in an employer-employee relationship with defendants where it tended to show that plaintiff was hired by defendants as assistant general manager of a minor league baseball team and was instructed as to what tasks to perform and how to perform them; plaintiff was paid a set salary plus a sales commission on a bi-

monthly basis; plaintiff was not empowered to hire anyone and could have been terminated by defendants at any time if he had not performed his duties properly; and the fact that plaintiff initially signed an "independent contractor's agreement" with defendants was of no consequence under these facts, as the parties later altered the agreement when plaintiff requested that defendants change his status from independent contractor to employee and begin withholding taxes from his compensation.

Am Jur 2d, Workers' Compensation §§ 167-172.

Appeal by defendants from decision and order of the North Carolina Industrial Commission filed 12 April 1994. Heard in the Court of Appeals 22 May 1995.

Orbock Bowden & Ruark, PLLC, by Barbara E. Ruark, for plaintiff-appellee.

Hatfield Mountcastle Deal Van Zandt & Mann, L.L.P., by John P. Van Zandt, III and Jeffrey I. Hrdlicka, for defendant-appellants.

McGEE, Judge.

In January 1987, defendant Dennis R. Bastien, owner and operator of DRB Baseball Management, Inc. (DRB), hired plaintiff, Michael E. Grouse, as assistant general manager of the Winston-Salem Spirits minor league baseball team. Plaintiff began full-time employment with defendants on 2 January 1987, initially handling sales and marketing. Once the baseball season opened, plaintiff performed manual labor, including mowing, painting, and stadium repairs.

On 27 September 1987, plaintiff was mowing the grass at the stadium when the riding mower fell over, pinning him on the ground for approximately five hours. Plaintiff suffered severe injuries as a result of the accident. He spent eight weeks in the intensive care unit at Forsyth Memorial Hospital and was eventually transferred to Truman Medical Center in Kansas City for rehabilitation, which continued on an outpatient basis until June 1988. Plaintiff estimated his medical bills as a consequence of this accident exceeded $120,000.00.

Defendants received notice of plaintiff's injury on 28 September 1987 and plaintiff filed a form 18 Notice of Accident to Employer in early June 1988. Deputy Commissioner Richard B. Ford heard plaintiff's claim in the summer of 1990 and on 16 March 1993, he filed an opinion concluding, among other things, that the North Carolina

Industrial Commission has jurisdiction over the parties and subject matter of this claim and awarding compensation and medical benefits to plaintiff. Defendants appealed to the Full Commission. On 24 February 1994, the Full Commission reviewed the matter and on 12 April 1994, it filed an opinion and award affirming the Deputy Commissioner's conclusion that the Commission has jurisdiction in this matter. However, it ordered the case be reset for a hearing "in due course" regarding plaintiff's claim for workers' compensation benefits because the only issues the Commission should have considered were the jurisdictional issues. From this decision, defendants now appeal to this Court arguing: (1) defendants did not regularly employ enough people to bring it within the jurisdiction of the Commission and (2) plaintiff was an independent contractor and therefore not entitled to receive workers' compensation benefits.

I. Regularly Employed Workers

[1] Whether an employer had the required number of employees to be subject to the Workers' Compensation Act (the Act) is a question of jurisdiction and this Court is required to review the evidence and make an independent determination. *Durham v. McLamb*, 59 N.C. App. 165, 168, 296 S.E.2d 3, 5 (1982). Although current law mandates that an employer with three employees is bound by the Act, the statute in effect at the time of plaintiff's accident on 27 September 1987 provided that employers who regularly employed four or more persons were subject to the Act. N.C. Gen. Stat. § 97-2.

Defendants contend they do not come under the Commission's jurisdiction because they "at no time regularly employed four or more employees." They admit to periodically paying extra people to work in ticket sales, concessions and stadium maintenance. However, defendants reason that baseball is seasonal, lasting from early April until late August, and only during the season did defendants hire these extra people to keep the operation running. These laborers worked only two or three nights weekly and were paid by the game or hourly with no taxes being withheld. During the off-season, defendants claim Bastien and his wife, Lisa, were the only regularly employed workers of DRB Baseball and since DRB regularly employed only two people, it was not subject to the Commission's jurisdiction under the law in force at the time of plaintiff's accident. We disagree.

If defendants did not regularly employ four or more employees, they are not subject to the Act. The term, "regularly employed" is not

defined in the statute. This Court in *Patterson v. Parker & Co.*, 2 N.C. App. 43, 162 S.E.2d 571 (1968) examined the meaning of "regularly employed", stating:

> We believe that the term "regularly employed" connotes employment of the same number of persons throughout the period with some constancy. It would not seem that the purpose of the Act would be accomplished by making it applicable to an employer who may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number required by the Act.

Patterson, 2 N.C. App. at 48-9, 162 S.E.2d at 575. In considering whether defendants had four or more regularly employed workers, "the fact that [the employer] fell below the minimum requirement on the actual date of injury would not preclude coverage." *Patterson*, 2 N.C. App. at 48, 162 S.E.2d at 574.

There is evidence that defendants employed "with some constancy" at least four people for the year 1987, even though there were only three regularly employed workers on the day plaintiff was injured. In their brief, defendants acknowledge both Bastien and his wife were regularly employed by DRB throughout the year. At the hearing before the Deputy Commissioner, plaintiff testified defendants hired him to work full-time beginning in early January 1987 and he continued in this capacity until the day he was injured. Defendant Bastien effectively conceded plaintiff was regularly employed by DRB when he testified plaintiff was kept on as a full-time employee after the season ended.

Tim Cahill was a fourth "regularly employed" DRB employee. Cahill began full-time work for defendants as assistant general manager in charge of operations on 2 January 1987, the same day plaintiff was employed. In fact, he and plaintiff shared many of the same duties. In the off-season, Cahill handled sales and promotions and during the season, he maintained the stadium and was involved with concessions. During Cahill's deposition, he testified he had worked full-time for defendants an average of six and a half days a week.

In early September 1987, Cahill temporarily left DRB because he "had to finish [his] last semester" of college. When asked if he intended to return to work with defendants, Cahill responded, "To answer your question, when I left, I was under the understanding that I would have a job come January 2nd of 1988 with Dennis Bastien." In

fact, Cahill did return to work for defendant on 2 January 1988 and remained there until 17 October 1988.

There is evidence that for much of 1987, defendants regularly employed more individuals than the four mentioned above. Randy Vestal came to work full-time as an intern in January 1987 and two months later, he moved into the position of grounds keeper which he held until July 1987. Todd Adams worked full-time as assistant to the president from mid-May until the end of August 1987. During the baseball season, defendants hired a number of other people on an hourly or per game basis to handle concessions and ticket distribution during the games.

Finally, we note that Bastien's wife, DRB's business manager, testified there were a substantial number of times in 1987 when at least four people were working for defendants:

> Q: All right. How about four of them?
>
> A: Four of them would have been there at one time, that's correct. And—
>
> Q: All right. And that would have been all times except for, if Mr. Cahill left two days before the end of the season, is that right?
>
> A: From **January until the end of August**.

Since there is evidence that defendants regularly employed four or more employees during the year 1987, we hold defendants are subject to the Commission's jurisdiction and we therefore overrule this assignment of error.

II. Independent Contractor Status

[2] Defendants' second argument that plaintiff was not entitled to workers' compensation coverage because he was an independent contractor is without merit.

In *Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), our Supreme Court set forth the following factors in considering whether a person is an independent contractor:

> The 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.

Id. at 16, 29 S.E.2d at 140. The Court also stated the test is "whether the party for whom the work is being done *has the right 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 conforming to the contract." *Scott v. Lumber Co.*, 232 N.C. 162, 165, 59 S.E.2d 425, 426-27 (1950) (emphasis added).

Plaintiff testified he obtained his job with defendants after having sent resumes to most of the minor and major league teams across the country seeking "an entry level executive position." Defendant Bastien hired plaintiff as assistant general manager and instructed him as to what tasks to perform and how to accomplish them. During the off-season when plaintiff was handling sales and promotions, Bastien and plaintiff met daily to discuss the results of the sales calls for that day. Once the season began, Bastien taught plaintiff how to maintain the stadium and playing field, and when plaintiff was to use the public address system, Bastien provided him with the text of the announcements. Plaintiff was paid a set salary plus a sales commission on a bi-monthly basis. As to hiring and discharge authority, plaintiff testified he was not empowered to hire anyone and he could have been terminated by defendants at any time if he had not performed his duties properly.

The fact that plaintiff initially signed an "independent contractor's agreement" with defendants is of no consequence under these facts since the parties later altered this agreement in May 1987 when plaintiff requested that defendants change his status from independent contractor to employee and begin withholding taxes from his compensation. However, even if the agreement had not been modified, our Courts have consistently held that employers may not absolve themselves of responsibility by contractual arrangement if the injured individual would otherwise be covered under the Act. *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 507-08, 293 S.E.2d 807, 811 (1982). Our Courts generally look beyond the contract to the actual relationship of the parties to determine the question of whether or not one is an independent contractor. *See Watkins v. Murrow*, 253 N.C. 652, 657, 118 S.E.2d 5, 8-9 (1961).

The evidence in this case clearly supports the conclusion that plaintiff was not an independent contractor but was engaged in an employer-employee relationship with defendants. Therefore, plaintiff is an employee within the meaning of the Act and is entitled to protection under the Act.

The opinion and award of the Full Commission is affirmed.

Chief Judge ARNOLD and Judge LEWIS concur.

PATRICIA GRAHAM, PLAINTIFF-APPELLANT v. HARDEE'S FOOD SYSTEMS, INC., DEFENDANT-APPELLEE

No. 9418SC449

(Filed 16 January 1996)

1. **Judgments § 268 (NCI4th); Trial § 226 (NCI4th)— second dismissal against employee—derivative claims against employer barred**

Plaintiff's second voluntary dismissal against defendant employee operated to bar her derivative claims against defendant employer, including a claim for negligent supervision and retention. N.C.G.S. § 1A-1, Rule 41(a)(1)(ii).

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 73-77.

What dismissals preclude a further suit, under federal and state rules regarding two dismissals. 65 ALR2d 642.

2. **Labor and Employment § 68 (NCI4th)— constructive wrongful discharge—insufficient evidence**

The North Carolina courts have not yet adopted the tort of constructive wrongful discharge. Assuming the existence of such a cause of action, the trial court did not err by dismissing plaintiff's claim where there was no evidence of intolerable conditions deliberately created by the employer to force plaintiff to leave her job.

Am Jur 2d, Job Discrimination §§ 1091-1099; Wrongful Discharge § 8.

Modern status of rule that employer may discharge at-will employee for any reason. 12 ALR4th 544.

Circumstances in Title VII employment discrimination cases (42 USCS secs. 2000e et seq.) which warrant finding of "constructive discharge" of discriminatee who resigns employment. 55 ALR Fed. 418.

When is work environment intimidating, hostile, or offensive, so as to constitute sexual harassment in violation of Title VII of Civil Rights Act of 1964, as amended (42 USCS secs. 2000e et seq.). 78 ALR Fed. 252.

3. Negligence § 6 (NCI4th)— negligent infliction of emotional distress—insufficient evidence

Plaintiff's claim against her former employer for negligent infliction of emotional distress must fail where plaintiff's second dismissal of her claim against a district manager relieved the employer of liability under a theory of ratification of the district manager's improper conduct, and plaintiff presented no evidence of extreme and outrageous conduct by the employer.

Am Jur 2d, Fright, Shock, and Mental Disturbance § 44.5; Wrongful Discharge § 159.

Liability of employer, supervisior, or manager for intentionally or recklessly causing employee emotional distress. 52 ALR4th 853.

Appeal by plaintiff from order entered 2 December 1993 by Judge Russell G. Walker in Guilford County Superior Court. Heard in the Court of Appeals 21 March 1995.

Plaintiff filed suit 3 June 1991 against defendants Hardee's Food Systems, Inc. (Hardee's) and Ronald Rogers, a Hardee's district manager, for assault and battery, intentional infliction of emotional distress, wrongful termination, and negligent hiring and retention of an employee. Plaintiff based her claims upon alleged sexual advances, untoward comments, and uninvited touchings made by Rogers. Plaintiff took a voluntary dismissal without prejudice as to both defendants on 27 November 1991.

Plaintiff refiled against both defendants on 4 November 1992, asserting the same causes of action as the earlier complaint, with the addition of a claim for punitive damages. After extensive discovery,

Hardee's moved for summary judgment. Before the hearing on Hardee's motion, plaintiff voluntarily dismissed her claim against Rogers. The trial court granted Hardee's motion for summary judgment on all claims in an order filed 2 December 1993. From this order, and an earlier order granting Hardee's motion to suppress plaintiff's changes to deposition testimonies, plaintiff appeals.

Joseph Edward Downs and Jeffrey S. Lisson, for plaintiff-appellant.

Blakeney & Alexander, by W. T. Cranfill, Jr., and Michael V. Matthews, for defendant-appellee.

McGEE, Judge.

[1] The crucial issue in this case is whether plaintiff's second voluntary dismissal against Ronald Rogers operates to bar her derivative claims against Hardee's. We hold that it does and affirm the granting of summary judgment for Hardee's.

"[A] notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim." N.C.R. Civ. P. 41(a)(1)(ii). Such a dismissal is with prejudice, and it operates as a disposition on the merits and precludes subsequent litigation in the same manner as if the action had been prosecuted to a full adjudication against the plaintiff. *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974). As our Supreme Court has said:

> "It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter. . . . (W)hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed."

Masters v. Dunstan, 256 N.C. 520, 523-24, 124 S.E.2d 574, 576 (1962) (citations omitted). Since plaintiff twice dismissed her claims against Rogers, this served as an adjudication in his favor upon the merits. Plaintiff is precluded from retrying these issues or calling into question any alleged wrongdoing by Rogers in her action against Hardee's based upon the conduct of Rogers.

Plaintiff argues the trial court erred in granting summary judgment for Hardee's on her claims of negligent supervision and retention, wrongful discharge, negligent infliction of emotional distress, and punitive damages, claiming these actions are independent of her claims against Rogers. However, contrary to plaintiff's contentions, each of these claims as presented by plaintiff is dependant upon the alleged tortious conduct of Rogers. Since Rogers has been adjudicated not liable for the alleged conduct as a result of plaintiff's second voluntary dismissal of her claims against him, the remaining claims against Hardee's must also fail.

As to plaintiff's first claim, before an employer will be held liable for the tort of negligent retention and supervision of an employee, "plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 495, 340 S.E.2d 116, 124, *disc review denied*, 317 N.C. 334, 346 S.E.2d 141 (1986). The only tortious conduct by an employee of Hardee's that plaintiff has alleged is the acts of Rogers which were the basis of her claims against him. As a result of the second dismissal of her claims against Rogers, it has been judicially determined that Rogers is not liable for any tortious conduct. Therefore, plaintiff has not shown that an employee of Hardee's committed a tortious act and this cause of action fails.

[2] Plaintiff next argues the trial court erred in dismissing her claim for wrongful discharge. Plaintiff admits she quit her job and was never fired by Hardee's. However, she claims Hardee's is liable for wrongful discharge because they made her working conditions "intolerable," resulting in a "constructive discharge."

We first note that North Carolina courts have yet to adopt the employment tort of constructive discharge. The Fourth Circuit Court of Appeals, which does recognize constructive discharge as a cause of action, has said that a plaintiff alleging constructive discharge "must demonstrate that the employer deliberately made working conditions intolerable and thereby forced [the plaintiff] to quit." *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936, 944 (4th Cir. 1992). "Deliberateness exists only if the actions complained of 'were intended by the employer as an effort to force the employee to quit' ". *Id.* (Citations omitted).

Assuming, *arguendo*, we accept the existence of a cause of action for constructive discharge, the record on appeal contains no evidence of intolerable conditions deliberately created by Hardee's to force plaintiff to leave her job. "[W]hen the moving party presents an adequately supported motion [for summary judgment], the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment." *Connor Co. v. Spanish Inns*, 294 N.C. 661, 675, 242 S.E.2d 785, 793 (1978). We note plaintiff has made several unsuccessful attempts to have additional materials added to the record which she claims contain evidence of acts by Hardee's to create intolerable working conditions. However, the transcript shows these materials were not properly tendered for consideration on defendant's motion for summary judgment and were not considered by the trial court. They are not part of the official record, and therefore, are not properly before us and we may not consider them. *See* N.C.R. App. P. 9 ("[R]eview is solely upon the record on appeal and the verbatim transcript of proceedings. . . .") The only forecast in the record of intolerable conditions is the allegations contained in the complaint. Further, the record contains no evidence these alleged conditions were deliberately created or allowed to continue by Hardee's in an attempt to force plaintiff to quit. Plaintiff has no cause of action under a theory of constructive discharge.

Even if plaintiff could prove a constructive discharge, in order to state a claim for a wrongful discharge as an at-will employee, she would still have to prove the discharge was in contravention of North Carolina public policy or statute. *See Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989). The only allegations made by plaintiff which could show a violation of public policy or statute involve the claims against Rogers for which it has been judicially determined he is not liable. Since plaintiff cannot prove a constructive discharge, and she was never fired by Hardee's, her claim for wrongful discharge fails.

[3] Likewise, plaintiff's claim for negligent infliction of emotional distress must also fail. As plaintiff admits in her brief, her second dismissal of Rogers relieved Hardee's of liability under a theory of ratification of Roger's conduct. To show an independent cause of action against Hardee's, plaintiff needed to present facts showing Hardee's engaged in extreme and outrageous conduct intended to cause, and which did in fact cause, severe emotional distress. *See Bryant v.*

Thalhimer Brothers, Inc., 113 N.C. App. 1, 7, 437 S.E.2d 519, 522 (1993), *disc. review denied and appeal dismissed*, 336 N.C. 71, 445 S.E.2d 29 (1994). As discussed above, plaintiff, as the non-movant, must come forward with facts to counter a proper motion for summary judgment. The official record contains no factual evidence showing Hardee's engaged in extreme or outrageous conduct. The only forecast of evidence concerning Hardee's conduct is the allegation in the complaint that Hardee's "sanctioned, condoned, and ratified Rogers' improper, illegal, and tortious conduct." Since plaintiff presented no evidence of extreme and outrageous independent acts of Hardee's, summary judgment for defendant on plaintiff's claim for negligent infliction of emotional distress was proper.

Plaintiff's brief did not contain an argument concerning her assignment of error involving the grant of defendant's motion to suppress changes to deposition testimony, and this assignment of error is deemed abandoned. N.C.R. App. P. 28(a). Because of our holding, we need not discuss plaintiff's remaining assignments of error and arguments. The trial court's grant of summary judgment in favor of Hardee's is affirmed.

Affirmed.

Judges JOHNSON and COZORT concur.

MADELINE M. COUNTS, EMPLOYEE, PLAINTIFF v. BLACK & DECKER CORPORATION, EMPLOYER; CIGNA PROPERTY & CASUALTY COMPANY, CARRIER; DEFENDANTS

No. COA95-210

(Filed 16 January 1996)

Workers' Compensation § 233 (NCI4th)— work-related shoulder injury—nonwork-related arthritis—resulting total disability

The Industrial Commission did not err in finding plaintiff permanently and totally disabled and awarding her compensation pursuant to N.C.G.S. § 97-29 where there was competent evidence before the Commission to support its finding that plaintiff's work-related shoulder injury combined with her nonwork-related arthritis condition to render her totally disabled. Furthermore, plaintiff was entitled to full compensation where there was no

evidence from which the Commission could apportion the award between the work-related and nonwork-related causes.

Am Jur 2d, Workers' Compensation § 387.

Appeal by defendants from the Opinion and Award entered 9 November 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 1995.

A. Maxwell Ruppe for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, by Bruce A. Hamilton and Karen K. Prather, for defendant-appellants.

MARTIN, John C., Judge.

Defendants appeal from an Opinion and Award of the Industrial Commission finding plaintiff permanently and totally disabled, and awarding her compensation pursuant to G.S. § 97-29.

The evidence before the Commission tended to show that plaintiff, who is now 67 years of age, was employed by defendant Black & Decker Corporation as an assembly line worker for approximately twelve years; her final day of work was 9 May 1990. During her last five years of employment at Black & Decker, plaintiff worked in the "carousel" position which required her to lift circular saws weighing seven to nine pounds from an assembly line, place the saw into a test fixture, test the saw, and then place it onto a carousel. In an eight hour shift, plaintiff was required to lift approximately 1,500 saws, handling each saw twice.

On 2 February 1990, plaintiff experienced pain in her arms and shoulders and complained to Black and Decker's plant nurse. In March 1990, she was referred to Dr. Stanley Gilbert, an orthopedic surgeon, who eventually diagnosed rotator cuff tears in both of plaintiff's shoulders. She underwent surgery for repair of the rotator cuff injuries in August and November 1990, and was deemed to have reached maximum medical improvement as of 31 May 1991. Dr. Gilbert assigned a twenty percent permanent partial disability rating to the use of both arms due to plaintiff's rotator cuff problem and released her to return to work full-time as of 24 June 1991, with the restriction that she perform no overhead work above shoulder height and limit her lifting to no more than ten pounds.

Because she was no longer able to perform her former job, Black and Decker offered plaintiff three jobs, two of which were within the restrictions imposed by Dr. Gilbert. However, plaintiff declined to accept any of these jobs due to diffuse osteoporosis of her hands, an arthritic condition causing deformity of her fingers, which was not job-related.

The Commission found:

> 3. Defendant has offered plaintiff three jobs which are within her restrictions if only the condition of her arms is considered. However, due to a combination of the continuing impairment to her arms and an unrelated, severe arthritic condition of both hands, plaintiff is unable to perform the jobs offered to her and is unable to be gainfully employed at any other occupation. The condition of plaintiff's arms and hands is stable; however, the condition will deteriorate over time, rather than improve.

The Commission concluded that plaintiff is permanently and totally disabled and awarded her compensation pursuant to G.S. § 97-29.

Defendants appeal, contending that the evidence does not support the foregoing finding, and that the Commission misapplied the applicable law in concluding that plaintiff is entitled to compensation for permanent total disability pursuant to G.S. § 97-29. Defendants argue that plaintiff's shoulder injury did not cause, or contribute to, her total and permanent incapacity to work, and that plaintiff's incapacity is due solely to the non-job-related arthritic condition of her hands, and is therefore not compensable. We reject their argument and affirm the Opinion and Award of the Commission.

Appellate review of an Opinion and Award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions. *Watkins v. City of Asheville*, 99 N.C. App. 302, 392 S.E.2d 754, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). The Commission is the sole judge of the credibility of the witnesses and the weight of the evidence, and its determination is binding on appeal, if supported by competent evidence, even though the evidence might also support contrary findings. *Id.*

There was competent evidence before the Commission to support its finding that plaintiff's work-related shoulder injury combined with

her non-work-related arthritic condition to render her totally disabled. Although plaintiff's arthritic hand condition had not prevented her from doing the "carousel" work which she performed prior to her shoulder injury, that job did not involve fine hand work or pressure to her hands. After her surgery, plaintiff could no longer perform the "carousel" work due to the restrictions on the use of her arms and shoulders; the three jobs offered plaintiff after her recovery from surgery each involved some fine hand work and pressure to her hands, which she could not do because of the arthritis. Although Dr. Gilbert candidly admitted that he could not be certain, he testified: "I think chances are fairly good that she probably could not have done these type of jobs if she was offered . . ." prior to her shoulder surgery. Likewise, Dr. Gwenesta Melton, a rheumatologist who treated plaintiff for her arthritis beginning in February 1991, testified that plaintiff's osteoarthritis pre-existed her shoulder injury and that, due to the combination of her illnesses, plaintiff was rendered unable to do repetitive motions in an assembly line setting.

The Commission's finding supports its conclusion that plaintiff is entitled to compensation for total permanent disability pursuant to G.S. § 97-29. Our courts have held that where a claimant is rendered totally unable to earn wages, partially as a result of a compensable injury and partially as a result of a non-work-related medical condition, the claimant is entitled to an award for total disability under G.S. § 97-29. *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 354 S.E.2d 477 (1987); *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 415 S.E.2d 583 (1992).

In the alternative, defendants contend that the Commission should have apportioned the award of compensation. Apportionment of an award of compensation for permanent total disability has been allowed by our courts where, as here, only a portion of a claimant's total disability is caused by the compensable injury and a portion is caused by a non-work-related infirmity, which is neither accelerated nor aggravated by the compensable injury. *Weaver*, 319 N.C. 243, 354 S.E.2d 477; *Errante*, 106 N.C. App. 114, 415 S.E.2d 583; *Gray v. Carolina Freight Carriers, Inc.*, 105 N.C. App. 480, 414 S.E.2d 102 (1992). However, even in such cases, apportionment is not proper where the evidence before the Commission renders an attempt at apportionment between work-related and non-work-related causes speculative, *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 366 S.E.2d 47 (1985); or where there is no evidence attributing a percentage of the claimant's total incapacity to her compensable injury, and

a percentage to the non-compensable condition. *Errante*, 106 N.C. App. 114, 415 S.E.2d 583.

Though Dr. Gilbert assigned plaintiff a twenty percent permanent partial disability rating for both arms, the rating does not address the question of what percentage of her total disability to earn wages was attributable to her compensable arm and shoulder injury and what percentage was attributable to her non-compensable osteoarthritic condition. Thus, there was no evidence from which the Commission could apportion the award and plaintiff is entitled to full compensation for her total and permanent disability. *Harrell*, 314 N.C. 566, 366 S.E.2d 47; *Errante*, 106 N.C. App. 114, 415 S.E.2d 583.

Affirmed.

Chief Judge ARNOLD and Judge EAGLES concur.

GERALDINE BALLARD, FOR HERSELF AND AS GUARDIAN AD LITEM FOR ROMIQUE INGRAM, AND HELEN POTTER, FOR HERSELF AND AS GUARDIAN AD LITEM FOR BLAINE TRIVETT, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS v. JERRY D. WEAST, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE GUILFORD COUNTY PUBLIC SCHOOLS, AND THE GUILFORD COUNTY BOARD OF EDUCATION, A CORPORATION, DEFENDANTS

No. COA94-1328

(Filed 16 January 1996)

Appeal and Error § 166 (NCI4th)— challenge to school admission policy—changes in residence and age—issues moot

Plaintiffs' challenge to the school admission policy of the Guilford County Schools was moot where one child's mother moved to Guilford County while the action was pending and so the child became eligible to attend Guilford County schools, and the other child attained the age of eighteen while the suit was pending and so could establish domicile in Guilford County independent of the residence of his parents.

Am Jur 2d, Appellate Review §§ 640-645.

Appeal by plaintiffs from orders entered 18 October 1994 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 3 October 1995.

Central Carolina Legal Services, Inc., by Stanley B. Sprague and Brenda F. Bergeron, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, by Richard T. Rice, and Brooks, Pierce, McLendon, Humphrey & Leonard, by Jill R. Wilson, for defendants-appellees.

LEWIS, Judge.

In this case, plaintiffs seek to challenge the school admissions policy of the Guilford County Schools.

On 19 April 1993, The Guilford County Board of Education adopted a policy ("April policy") which provides that the Guilford County Schools ("Schools") will furnish a tuition free education to otherwise qualified students "residing" in the school district. Under this policy, "the residence of students under 18 years of age is the permanent residence of the parents, legal guardian, or legal custodian as defined by the General Statutes of North Carolina." On 16 November 1993, The Guilford County Board of Education revised this policy by, *inter alia,* substituting the term "domiciled" for "residing" and by adding a provision that allows discretionary tuition free admission of non-domiciled students who demonstrate extraordinary financial hardship ("November policy"). Under both versions of the policy, students 18 years of age or older may establish a residence (April policy) or domicile (November policy) independent of that of their parents, legal guardian, or legal custodian.

In the fall of 1993, two minors, Romique Ingram and Blaine Trivett, were denied tuition free admission to the Schools because they did not reside in Guilford County pursuant to the Schools' policy (April policy). On 6 September 1993 Romique moved from her home in Massachusetts, where her mother lived, and began living with her aunt, Geraldine Ballard. When she tried to enroll in Ferndale Middle School, she was denied admission unless her aunt, Ms. Ballard, obtained legal custody or legal guardianship, or unless she paid tuition. Sometime prior to 4 August 1994, Romique's mother moved from Massachusetts to Guilford County.

On 1 October 1993, Blaine Trivett moved out of his mother's home in Davidson County, North Carolina, and began living with his grandmother, Helen Potter, in High Point, North Carolina. On 4 October 1993, he tried to enroll in High Point Central High School in Guilford County but was denied admission because he did not reside in

Guilford County pursuant to the Schools' admission policy (April policy). He was advised that he could not attend unless his grandmother was appointed as his legal custodian or legal guardian.

On 20 September 1993, Geraldine Ballard filed this action on behalf of her niece Romique Ingram. By amended complaint filed on 13 October 1993, Helen Potter, on behalf of her grandson Blaine Trivett, was added as a plaintiff. Pursuant to consent agreements executed by the parties, both Romique and Blaine were temporarily admitted to the Schools, without paying tuition, until the resolution of this case on its merits or until circumstances changed. Both plaintiffs and defendants moved for summary judgment, and a hearing on these motions was held during the 9 September 1994 civil session of superior court. By orders entered 18 October 1994, Judge Peter M. McHugh denied plaintiffs' motion for summary judgment and granted summary judgment to defendants. Plaintiffs appeal.

Plaintiffs assign error to the court's summary judgment ruling. They assert that the Schools' notice procedures and admissions policy violate their rights under our federal and state constitutions. Plaintiffs also contend that N.C.G.S. section 115C-366.1 does not permit schools to charge tuition to students who reside in the school district. They further assert that N.C.G.S. section 115C-366 should be construed to permit minors to rebut the presumption that their domicile is that of their parents, legal guardian, or legal custodian.

Defendants contend that plaintiffs' claims are moot. We agree. The exclusion of moot questions in North Carolina state courts 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). This principle applies 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.

Romique Ingram's claims are moot because she now resides (April policy) and is domiciled (November policy) in Guilford County in accord with the Schools' policy. Under the policy, Romique's residence (April policy) or domicile (November policy) is that of her mother. Her mother moved from Massachusetts to Guilford County

after this suit was filed. Because of her mother's move, Romique now is entitled to attend Guilford County Schools without paying tuition.

Because he is no longer a minor, Blaine Trivett's claims are also moot. In his deposition he stated that his birthday was 6 October 1976. He turned eighteen (18) on 6 October 1994, twelve days before the summary judgment orders were entered in this case, and he is now 19 years old. Once a person turns eighteen, he is no longer a minor. N.C.G.S. § 48A-2 (1984). Under the November policy, a student who is eighteen or older may establish a domicile independent of his or her parents, legal guardian, or legal custodian. Thus, under this policy, Blaine is entitled to establish his domicile in Guilford County, regardless of where his parents live. He would be similarly entitled if the April policy were still in effect because that policy permitted students 18 years of age or older to establish a "residence" independent of their parents, legal guardians, or legal custodians. Under either version of the policy, his claims are now moot.

Of course, cases which are technically moot may be considered if they are " 'capable of repetition yet evading review.' " *In re Jackson*, 84 N.C. App. 167, 170-71, 352 S.E.2d 449, 452 (1987). Such cases are distinctive in that

> (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).

Romique's and Blaine's claims are not capable of repetition yet evading review. If Romique's mother had not moved to Massachusetts, her case would probably not be moot because of her age because she was only 14 when this action was filed. Thus, in cases like hers, the challenged action is not necessarily too short in its duration to be fully litigated prior to its cessation or expiration. Further, her problem is not likely to recur because her mother has moved to Guilford County.

The fact that Blaine turned eighteen during the pendency of this action does not make his case capable of repetition yet evading review. A younger plaintiff would have had ample time to prosecute the action, including any appeals. Since he is no longer a minor, it is

also not possible that Blaine will be subjected to the same action again.

Not only are plaintiffs' claims moot now, but they were moot when the summary judgment orders were entered on 18 October 1994. Romique's claims were moot before the summary judgment hearing held during the 9 September 1994 session. The record shows that Romique's mother moved to Guilford County sometime before 4 August 1994, prior to the September 1994 summary judgment hearing. Blaine turned eighteen (18) on 6 October 1994, twelve days before the court's order was entered on 18 October 1994. Thus, at the time the summary judgment order was entered, the claims of both Romique and Blaine were moot and the cases should have been dismissed at that time.

For the reasons stated, the summary judgment order is vacated and the appeal is dismissed.

Judges WYNN and MARTIN, Mark D. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 JANUARY 1996

ARTIS v. OCCIDENTAL LIFE INS. CO. No. 95-134	Wake (93CVS5285)	No error in judgment entered on jury verdict and grant of partial summary judgment affirmed
BARLOW v. BARLOW No. 95-322	Lenoir (92CVS866)	Reversed and Remanded
BUCK v. PITT COUNTY MEMORIAL HOSPITAL No. 95-267	Pitt (92CVS1448)	No Error
CAROLINA WATER SERVICE v. SUGAR MTN. RESORT No. 94-503	Utilities Commission (W-354, SUB 116)	Affirmed in part, Vacated in part,
C.W.&P. PARTNERSHIP v. PATE No. 95-310	Johnston (93CVS634)	Affirmed
HORTON v. PILOT RACK CO. No. 95-10	Ind. Comm. (183798)	Affirmed
HUDSON v. FLAMINGO'S, INC. No. 95-206	Pitt (93CVS815)	Affirmed
IN RE CLARK No. 94-1158	Wake (92J324)	Reversed
JAREO v. N.C. FARM BUREAU MUT. INS. CO. No. 94-312	Pender (90CVS00472)	No Error
JOHNSON v. FARR COMPANY No. 94-1370	Ind. Comm. (144447)	Affirmed in part, reversed in part and remanded
MARSHBURN v. N.C. FARM BUREAU MUT. INS. CO. No. 95-214	Craven (91CVS483)	No Error
MID-SOUTH ERECTORS v. BASTON COOK OF ATLANTA No. 95-289	Mecklenburg (94CVS683)	Affirmed
NATIONWIDE MUTUAL INS. CO. v. KALLAM No. 95-275	Mecklenburg (94CVS437)	Affirmed
PACK v. RANDOLPH OIL CO. No. 94-693	Guilford (92CVS3827)	Remanded

PROTECTIVE LIFE INS. CO. v. N.C. DEPT. OF TRANS. No. 95-264	Wake (94CVS09020)	Reversed and Remanded
SKILTON v. PINEWILD, INC. No. 95-194	Moore (93CVS404)	Affirmed
STATE v. LINEBERGER No. 95-159	Richmond (93CRS8715)	No error, but remanded for written findings and resentencing.
STATE v. LOCKLEAR No. 94-1083	Cumberland (89CRS22377) (89CRS25468)	Vacated & Remanded

FILED 16 JANUARY 1996

CAPE FEAR SUPPLY CO. v. PRICE No. 94-720	Cumberland (92CVD7346)	Affirmed
CONNER v. ICENHOUR No. 95-704	Burke (92CVD1256)	Appeal Dismissed
DEPT. OF TRANSPORTATION v. NELSON COMPANY No. 95-549	Durham (92CVS3760)	Dismissed
HASTY v. WEBB No. 95-298	Robeson (91CVD1451)	Affirmed
KIBLER v. KIBLER No. 95-109	Brunswick (93CVD242)	Affirmed
LOCKLEAR v. BROOKS No. 95-121	Robeson (94CVS0018)	Affirmed
LYLES v. FOREST HILLS LUMBER CO. No. 94-1465	Ind. Comm. (824665)	Affirmed
NOEL v. BACKBONE PRODUCTIONS No. 95-629	Iredell (92CVD01755)	Affirmed
R. F. LONDON, INC. v. CURRITUCK COUNTY BD. OF ADJUST. No. 95-592	Currituck (94SP78)	Appeal Dismissed
RANDELL v. RANDELL No. 94-1394	Iredell (85CVD286)	Affirmed in Part, Reversed in Part and Remanded

REESE v. BOONE ART GALLERIES No. 95-111	Lee (93CVD418)	Affirmed
SIMPSON v. SASCO ELECTRIC No. 95-101	Cabarrus (92CVS1055)	Affirmed
STATE v. BERRY No. 95-420	Alamance (94CRS19801)	No Eror
STATE v. BROWN No. 95-875	Orange (94CRS2879)	Remanded for Resentencing
STATE v. CARTER No. 95-681	Guilford (92CRS44953)	No Error
STATE v. DISCUA No. 95-689	Wake (94CRS14000) (94CRS14001)	No Error
STATE v. EDGE No. 95-736	Cumberland (94CRS4004)	No Error
STATE v. GARNER No. 95-856	Buncombe (93CRS65015)	Affirmed
STATE v. HAMILTON No. 95-507	Mecklenburg (94CRS32700) (94CRS32701)	No Error
STATE v. HAMPTON No. 95-737	Guilford (94CRS21014)	No Error
STATE v. HAWKINS No. 95-484	Wilkes (92CRS5922)	No Error
STATE v. HOLMES No. 94-1454	Martin (93CRS837) (93CRS838)	No Error
STATE v. JACKSON No. 95-601	New Hanover (90CRS17992)	No Error
STATE v. KSOR No. 95-661	Wake (94CRS9629) (94CRS9630)	No Error
STATE v. PHELPS No. 95-697	Washington (93CRS1619) (93CRS1622)	As to defendant Phelps: No Error. As to defendant Selby: Appeal Dismissed
STATE v. RAGAIN No. 95-465	Mecklenburg (93CRS79792)	No Error
STATE v. RICHARDSON No. 95-662	Cumberland (94CRS42757)	No Error

STATE ex rel. HOWES v. PARKER No. 95-625	Wake (93CVS11397)	Appeal Dismissed
WEATHERBY HEALTH CARE v. CLARK-DARTMOUTH CLINIC No. 95-213	Moore (93CVS396)	Affirmed
WILLIEN v. CONE MILLS No. 95-237	Ind. Comm. (202058)	Affirmed
WILSON REALTY & CONST. v. RANDOLPH COMM. COLLEGE No. 94-1050	Randolph (93CVS725)	Affirmed
YOUNG v. YOUNG No. 95-654	Bladen (94CVS485)	Affirmed

JOHN B. McNAMARA, D/B/A McNAMARA JEWELERS, PLAINTIFF/APPELLEE v. WILMINGTON MALL REALTY CORP., DEFENDANT/APPELLANT

No. COA95-176

(Filed 6 February 1996)

1. Landlord and Tenant § 13 (NCI4th)— lease of mall space—constructive eviction—breach of covenant of quiet enjoyment—sufficiency of evidence

The trial court did not err in denying defendant's motions for directed verdict and JNOV on plaintiff's constructive eviction claim and claim for breach of covenant of quiet enjoyment where the evidence tended to show that plaintiff leased mall space from defendant for the purpose of operating a jewelry store; about six months after the jewelry store opened, an aerobics studio opened next door; plaintiff immediately began to complain about the noise; although defendant made efforts to remedy the situation and informed plaintiff in May 1992 that it considered the matter closed, plaintiff continued to lodge complaints with defendant's leasing agent into the fall of 1992 in an effort to resolve the situation; in mid-October plaintiff called a security officer to abate the noise; six weeks later plaintiff abandoned the property; and the jury thus could find that plaintiff abandoned the premises within a reasonable time and that the abandonment was the result of defendant's failure to remedy the noise from the studio.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 71, 94, 96, 115; Landlord and Tenant § 734.

Breach of covenant for quiet enjoyment in lease. 41 ALR2d 1414.

Modern status of rules as to existence of implied warranty of habitability or fitness for use of leased premises. 40 ALR3d 646.

Implied warranty of fitness or suitability in commercial leases—modern status. 76 ALR4th 928.

2. Landlord and Tenant § 13 (NCI4th)— breach of lease agreement—failure to pay rent—no bar to action for breach

There was no merit to defendant's contention that, even if its actions did amount to a constructive eviction or a breach of the

covenant of quiet enjoyment, plaintiff's failure to pay rent amounted to a waiver of his right to assert such claims, since defendant took no action regarding plaintiff's complaints after April or May 1992; for the purposes of plaintiff's claims, defendant's failure to abate the noise constituted a constructive eviction as of that time; plaintiff had a reasonable time within which to abandon the premises, which he did; and plaintiff's failure to pay rent in the intervening period was not a bar to his breach of contract claims, notwithstanding the language in the parties' lease which defendant alleged expressly conditioned plaintiff's right to quiet enjoyment upon his payment of the rent.

Am Jur 2d, Landlord and Tenant §§ 729, 804.

Landlord's duty, on tenant's failure to occupy, or abandonment of, premises, to mitigate damages by accepting or procuring another tenant. 21 ALR3d 534.

Constructive eviction by another tenant's conduct. 1 ALR4th 849.

Implied warranty of fitness or suitability in commercial leases—modern status. 76 ALR4th 928.

3. Landlord and Tenant § 27 (NCI4th)— breach of contract—lost profits—failure to meet burden of proof

In an action for breach of contract based upon the theories of constructive eviction and breach of the covenant of quiet enjoyment, plaintiff failed to meet his burden of proving lost profits with reasonable certainty where plaintiff did not have an established history of profits; his evidence of lost profits consisted entirely of the testimony of a professor at UNC-Wilmington who was a specialist in "entrepreneurship"; the witness based his estimate of lost profits on the assumption that during the remaining term of the lease plaintiff's sales would have risen in a linear fashion to the point where they matched the average sales of independent national jewelers; the witness made virtually no effort to obtain sales figures and other financial data from small custom jewelry stores like plaintiff's or from other jewelers in the Wilmington area; the witness's reliance on data from independent national jewelers without ascertaining whether these jewelers bore any similarities to plaintiff's business rendered his calculations too conjectural to support an award of lost profits; plaintiff owner's lack of business experience could be a relevant factor in

assessing the future profitability of his new business, a factor which the witness failed to consider; and thus the witness's calculations were not based upon standards which allowed the jury to determine the amount of plaintiff's lost profits with reasonable certainty.

Am Jur 2d, Damages §§ 902, 913, 939, 962-964.

Recovery of anticipated lost profits of new business. 55 ALR4th 507.

4. Evidence and Witnesses §§ 1994, 2010 (NCI4th)— evidence of prior lease negotiations—inadmissibility to prove breach of lease—admissibility to prove fraud and unfair and deceptive trade practices

Though evidence of prior lease negotiations was not admissible to prove breach of the lease, since terms such as "shopping center" and "mall" in the lease agreement did not create an ambiguity and the parol evidence rule therefore prevented evidence of prior negotiations from coming in to contradict the terms of the lease, such evidence was admissible to prove fraud and unfair and deceptive trade practices.

Am Jur 2d, Fraud and Deceit §§ 451-453.

Coverage of leases under state consumer protection statutes. 89 ALR4th 854.

Appeal by defendant from judgment entered 27 July 1994 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 14 November 1995.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellee.

Murchison, Taylor, Kendrick, Gibson & Davenport, L.L.P., by Michael Murchison, for defendant-appellant.

WALKER, Judge.

In late spring 1991, plaintiff John B. McNamara became interested in leasing space at Long Leaf Mall (the Mall) to house a retail custom jewelry store. The Mall was at all relevant times owned by defendant Wilmington Mall Realty Corp. and managed by Great Atlantic Real Estate-Property Management (Great Atlantic). Plaintiff approached Newby Toms (Toms), a leasing agent for Great Atlantic, and brief

negotiations followed. As a result of these negotiations, plaintiff and defendant, through Great Atlantic, executed a five-year lease for store space 26 in the Mall. Thereafter, plaintiff renovated the store space at his own expense and commenced operations in August 1991.

In January or February 1992, Toms informed plaintiff that he was proposing to locate an aerobics studio in the space adjacent to plaintiff's store. Toms informed plaintiff that under the terms of the lease with the aerobics studio, the studio was required to do soundproofing and could be relocated if necessary. On 17 February 1992, the studio commenced operating.

Plaintiff immediately began objecting to Toms that the music coming from the aerobics studio was too loud and could be heard in his store. He also complained to Nancy Arnoux, the owner of the studio. By letter dated 26 February 1992, plaintiff notified defendant that he was dissatisfied with defendant's lack of efforts to remedy the situation and demanded a resolution of the matter within seven (7) days of defendant's receipt of the letter. After receiving no response, plaintiff contacted an attorney, who notified Great Atlantic by letter dated 12 March 1992 that plaintiff would be depositing his current rental payment into an escrow account until the nuisance was abated. In response, Toms directed the studio to install insulation as required by the terms of the studio's lease. The insulation was promptly installed, but plaintiff continued to complain that the noise from the studio was disrupting his business. Great Atlantic informed plaintiff by letter dated 31 March 1992 that remedial action had been completed and it considered the matter closed. Great Atlantic demanded payment of the March and April rent within five (5) days of plaintiff's receipt of the letter. By letter dated 9 April 1992, plaintiff's attorney notified Great Atlantic that plaintiff disagreed that the matter was resolved. He stated that plaintiff would pay Toms his customary April rent but would continue to hold the March rent in escrow until the matter was resolved. In late April or early May, Great Atlantic agreed to pump insulation into the wall space between plaintiff's store and the aerobics studio. After this was done, Great Atlantic told plaintiff it considered the matter closed and demanded that plaintiff begin paying rent. Plaintiff paid no rent after April 1992, and on 24 December 1992, plaintiff abandoned his space in the Mall.

On 29 September 1992, plaintiff sued defendant for breach of contract based upon the theories of constructive eviction and breach of the covenant of quiet enjoyment. Defendant counterclaimed for past

due rent. Plaintiff later amended his complaint to allege damages for fraud, negligent misrepresentation, and unfair and deceptive trade practices.

At trial, after the close of all the evidence, the trial court granted defendant's motion to dismiss the fraud, negligent misrepresentation, and unfair and deceptive trade practices claims. The jury thereafter returned a verdict for plaintiff in the amount of $110,000 on the breach of contract claim. The trial court denied defendant's motions for judgment notwithstanding the verdict (JNOV), new trial, remittitur, and amendment of the judgment.

I.

We first address defendant's argument that the trial court erred in denying its motions for directed verdict and JNOV on plaintiff's breach of contract claim. Specifically, defendant argues that the evidence was insufficient as a matter of law to support plaintiff's constructive eviction claim.

A motion for directed verdict tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the nonmovant. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977). In ruling on a defendant's motion for directed verdict, the evidence must be viewed in the light most favorable to the plaintiff. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). All conflicts in the evidence must be resolved in the plaintiff's favor, and he must be given the benefit of every reasonable inference that can be drawn in his favor. *Id.* Only where the evidence is insufficient to support a verdict in the plaintiff's favor should the defendant's motion be granted. *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 606 (1985). If there is a scintilla of evidence supporting the plaintiff's *prima facie* case, then the motion should be denied. *Burris v. Shoemate*, 77 N.C. App. 209, 211, 334 S.E.2d 514, 515-16 (1985). A motion for JNOV is essentially the renewal of a prior motion for directed verdict, and the same rules regarding the sufficiency of the evidence apply. *Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 306, 319 S.E.2d 290, 292, *review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984).

At the outset it must be noted that plaintiff had two theories of recovery on his breach of contract claim: constructive eviction and breach of the covenant of quiet enjoyment. Although the trial court instructed the jury on both theories, a single issue was submitted to

the jury which read, "Did the Defendant, Wilmington Mall Realty, breach the lease agreement with the Plaintiff?" On appeal, defendant does not challenge the issue as submitted. Therefore, if there was more than a scintilla of evidence to support *either* constructive eviction *or* breach of the covenant of quiet enjoyment, then the court properly denied defendant's motions for directed verdict and JNOV on the issue of breach of contract.

[1] Constructive eviction is defined as "[a]n act of 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, *review denied*, 327 N.C. 636, 399 S.E.2d 328 (1990). Stated another way, constructive eviction occurs "when a landlord breaches a duty under the lease which renders the premises untenable. . . ." *Id.* As the trial court correctly instructed the jury here, a tenant seeking to establish a claim for constructive eviction has the burden of showing that he abandoned the premises within a reasonable time after the landlord's wrongful act and that the abandonment was proximately caused by the landlord's breach. *Thompson v. Shoemaker*, 7 N.C. App. 687, 690, 173 S.E.2d 627, 630 (1970); *see also* 49 Am. Jur. 2d, *Landlord & Tenant* §§ 644-647 (1995). Defendant argues that plaintiff made neither of these required showings.

Plaintiff first complained of noise in February 1992. Although defendant informed plaintiff in May 1992 that it considered the matter closed, plaintiff continued to lodge complaints with defendant's leasing agent into the fall of 1992 in an effort to resolve the situation. In mid-October plaintiff called a security officer to abate the noise, and six weeks later plaintiff abandoned the property.

Defendant argues that even given the benefit of the time period during which repairs were made, plaintiff's abandonment of the premises some seven to eight months later was not within a reasonable time as a matter of law. While defendant directs us to cases from other jurisdictions which it claims support its position, we are unable to conclude that the time frame for plaintiff's abandonment was unreasonable as a matter of law. What constitutes a reasonable time for abandonment depends on the circumstances of each case and is an issue of fact for the jury. *See Marina Food Assoc.*, 100 N.C. App. at 92-93, 394 S.E.2d at 830 (evidence was sufficient to support constructive eviction claim even though landlord's alleged wrongful acts

occurred prior to March 1985 and tenant did not abandon the premises until January 1986). We find that the above facts, viewed in the light most favorable to plaintiff, constituted sufficient evidence to support a jury finding that plaintiff abandoned the premises within a reasonable time and that the abandonment was the result of defendant's failure to remedy the noise from the studio. Thus, we hold the trial court did not err in denying defendant's motions for directed verdict and JNOV on plaintiff's constructive eviction claim.

The trial court also instructed the jury on breach of the covenant of quiet enjoyment. North Carolina law provides that a lease, in the absence of a provision to the contrary, carries with it an implied covenant that the tenant will have the quiet and peaceable possession of the leased premises during the term of the lease. *Marina Food Assoc.*, 100 N.C. App. at 92, 394 S.E.2d at 830; *Dobbins v. Paul*, 71 N.C. App. 113, 117, 321 S.E.2d 537, 541 (1984) (*citing Produce Co. v. Currin*, 243 N.C. 131, 135, 90 S.E.2d 228, 230 (1955)), *overruled on other grounds*, *Stanley v. Moore*, 339 N.C. 717, 454 S.E.2d 225 (1995). Our courts have held that where a tenant has been constructively evicted, the covenant of quiet enjoyment has been breached. *Marina Food Assoc.*, 100 N.C. App. at 92, 394 S.E.2d at 830 (*citing Dobbins*, 71 N.C. App. at 117-18, 321 S.E.2d at 541). Since we have determined that plaintiff's evidence established a claim for constructive eviction, it follows that the evidence was also sufficient on plaintiff's claim for breach of the covenant of quiet enjoyment, and the trial court correctly denied defendant's motions for directed verdict and JNOV on that claim.

[2] Defendant attempts to persuade this Court that even if its actions did amount to a constructive eviction or a breach of the covenant of quiet enjoyment, plaintiff's failure to pay rent amounted to a waiver of his right to assert such claims. We note that defendant did not request an instruction that plaintiff's failure to pay rent operated as a waiver; this argument is asserted for the first time in defendant's brief to this Court.

In support of its argument, defendant points to Section 16 of the parties' lease, which reads as follows:

> SECTION 16. QUIET ENJOYMENT. Tenant, upon paying the rent and performing all the other covenants and conditions aforesaid on Tenant's part to be observed and performed under this Lease, shall and may peaceably and quietly have, hold and enjoy the

> Demised Premises . . . free from disturbance by Landlord or anyone claiming by, through or under Landlord. . . .

Defendant claims that the terms of this express covenant of quiet enjoyment take precedence over any implied right of quiet enjoyment and that by its language, this provision expressly conditions plaintiff's right to quiet enjoyment upon his payment of the rent.

It is undisputed that plaintiff did not pay rent after April 1992; however, we disagree that this fact operates to bar plaintiff's breach of contract claims. If, as defendant admits, it took no action regarding plaintiff's complaints after April or May 1992, then for purposes of plaintiff's claims, defendant's failure to abate the noise constituted a constructive eviction as of that time. The trial court correctly instructed the jury that plaintiff had a reasonable time within which to abandon the premises, and the jury found that he did so. Therefore, plaintiff's failure to pay rent in the intervening period is not a bar to his breach of contract claims, notwithstanding the language of Section 16.

II.

[3] We next address defendant's arguments regarding the issue of damages. At the charge conference, defendant requested a peremptory instruction on damages which was denied. Defendant assigns this denial as error and also argues that its motions for directed verdict and JNOV should have been granted because plaintiff did not meet his burden of proof with respect to damages. In the alternative, defendant seeks a new trial on the issue of damages.

A plaintiff who has been constructively evicted may recover general damages measured by the value, at the time of eviction, of the unexpired term of the lease, less any rent reserved. *Marina Food Assoc.*, 100 N.C. App. at 93, 394 S.E.2d at 831. Plaintiff presented no evidence of the value of the remainder of the lease, confining his proof of damages solely to the issue of lost future profits. "Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach." *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 446, 361 S.E.2d 608, 613 (1987) (*citing Perkins v. Langdon*, 237 N.C. 159, 170, 74 S.E.2d 634, 643 (1953)), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d 416 (1988). To recover lost profits, the claimant must prove such losses with "reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585, reh'g *denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). Although absolute certainty is not required, damages for lost profits will not be awarded based on hypothetical or

speculative forecasts. *Mosley*, 87 N.C. App. at 446, 361 S.E.2d at 613 (when prospective profits are conjectural, remote, or speculative, they are not recoverable); *see also Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 561, 234 S.E.2d 605, 607 (1977).

In *Olivetti*, our Supreme Court recognized that "lost future profits are difficult for a new business to calculate and prove. . . ." *Olivetti*, 319 N.C. at 546, 356 S.E.2d at 585. However, the Court refused to adopt a *per se* "New Business Rule" that would preclude an award of damages for lost profits where the allegedly damaged party has no recent record of profitability, holding instead that such businesses, like established businesses, must prove lost profits with reasonable certainty. *Id.* at 545-46, 356 S.E.2d at 585. The Court stated that the burden of proving such damages is on the party seeking them, and as part of this burden, that party must show "that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Id.* at 547-48, 356 S.E.2d at 586.

Plaintiff here did not have an established history of profits. His evidence of lost profits consisted entirely of the testimony of Dr. Craig Galbraith, a professor of management at the University of North Carolina at Wilmington and a specialist in "entrepreneurship." Dr. Galbraith prepared two reports in connection with his calculation of plaintiff's lost profits. The first report, which Dr. Galbraith characterized as a "preliminary report," was dated 9 February 1993 and projected a loss of $15,200. Six days later, after meeting with plaintiff and his attorney to go over the "preliminary report," Dr. Galbraith prepared a second report which projected losses of $124,000 ($17,300 in lost earnings from 17 February 1992 to 24 December 1992, $97,000 in lost fair market value, and $9,000 in lost personal wages). Defendant argues that Dr. Galbraith's calculations are "inherently speculative or otherwise flawed" and that plaintiff has failed to prove lost profits with the requisite degree of certainty.

Defendant first claims Dr. Galbraith's testimony failed to establish a causal connection between the noise from the studio and the lost profits sought by plaintiff. We have carefully examined the record, including Dr. Galbraith's testimony, and we find that the evidence of such a connection, while not overwhelming, was sufficient to withstand a motion for directed verdict. The trial court properly instructed the jury that in order to recover lost profits, plaintiff had to prove that *except for defendant's breach of the lease agreement*, such

profits would have been realized. We cannot conclude that plaintiff's lost profits claim fails for lack of proximate cause.

However, we agree with defendant that Dr. Galbraith's calculations were not based upon standards that allowed the jury to determine the amount of plaintiff's lost profits with reasonable certainty. *See Olivetti*, 319 N.C. at 547-48, 356 S.E.2d at 586. We have carefully examined Dr. Galbraith's testimony, and we find it is deficient in a number of respects. First, Dr. Galbraith based his estimate of plaintiff's lost profits on the assumption that from January 1992 through the remaining term of the lease, plaintiff's sales would have risen in a linear fashion to the point where they matched the average sales of independent national jewelers. There was no evidence presented to support such an assumption.

Second, Dr. Galbraith made virtually no effort to obtain sales figures and other financial data from small custom jewelry stores like plaintiff's or from other jewelers in the Wilmington area. Rather, he relied exclusively on data from independent national jewelers without ascertaining whether these jewelers bore any similarity to plaintiff's business. We hold that under the circumstances of this case, Dr. Galbraith's reliance on this data rendered his calculations too conjectural to support an award of lost profits.

In *Iron Steamer, Ltd. v. Trinity Restaurant*, 110 N.C. App. 843, 431 S.E.2d 767 (1993), the defendant lessee sought lost profits resulting from the plaintiff lessor's alleged breach of lease. The lessee opened a resort restaurant in April 1989 and ceased operations in November 1989. The lessee's gross revenues for August through November were lower than the revenues for May through July. The trial court found that but for the lessor's breach of contract, " 'the gross sales figures for a restaurant of that type and location, for the month of August, should have been similar to the gross sales figures for the month of July.' " The court further found that since September, October, and November are good fishing months, the restaurant's revenues " 'should have been similar to, or better than, the gross sales figures for the months of May or June.' " *Iron Steamer*, 110 N.C. App. at 848, 431 S.E.2d at 771. The court based its findings solely on the testimony of Mr. Cantor, one of the defendants, who assumed that August would have been a more profitable month than July and based his calculations of lost profits for August through November on this assumption. *Id.* at 848-49, 431 S.E.2d at 771. Mr. Cantor's bases for estimating the lost profits at this restaurant were his brief experience

at a restaurant in another city and his experience as a cook at a nearby hotel. *Id.* at 849, 431 S.E.2d at 771. This Court reversed the award of lost profits to the lessee, stating that "Mr. Cantor's estimation of lost profits is based on assumptions that are purely speculative in nature." *Id.* Likewise, we find that Dr. Galbraith's assumption that plaintiff's sales would rise to meet the average sales of independent national jewelers is conjectural and speculative and cannot support the award of lost profits in this case. *See also Weyerhaeuser*, 292 N.C. at 560, 234 S.E.2d at 607 (where plaintiff's business suffered a net loss in its first year, evidence that the budget had projected a profit of $80,000 for that year provided no basis for an award of lost profits since any estimate of plaintiff's expected profits was based solely on speculation); *McBride v. Camping Center*, 36 N.C. App. 370, 372, 243 S.E.2d 913, 915 (where any estimate of plaintiff's expected profits was, on the evidence presented, based solely on speculation, there was no basis for an award of lost profits), *review denied*, 295 N.C. 550, 248 S.E.2d 727 (1978).

The *Iron Steamer* court concluded its opinion by emphasizing that the lessee's business was an unestablished resort restaurant. In that context, the Court noted that

> the relationship between lost profits and the income needed to generate such lost profits is peculiarly sensitive to certain variables including the quality of food, quality of service, and the seasonal nature of the business. Therefore, proof of lost profits with *reasonable certainty* under these circumstances requires more specific evidence and thus a higher burden of proof. While difficult to determine, "damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analysis, and business records of similar enterprises."

Iron Steamer, 110 N.C. App. at 849, 431 S.E.2d at 771 (emphasis in original) (*quoting* 22 Am. Jur. 2d *Damages* § 627 (1988)). In the instant case, as in *Iron Steamer*, plaintiff's business was unestablished (it was only five months old when the aerobics studio moved in and the alleged breach occurred) and, by Dr. Galbraith's own testimony, was "peculiarly sensitive to certain variables" such as the quality of plaintiff's custom jewelry work, the extent of plaintiff's advertising and marketing efforts, and the seasonal nature of the jewelry business. Thus, plaintiff was required to come forward with more spe-

cific evidence to support his claim for lost profits. As the *Iron Steamer* court recognized, sales figures from businesses which are similar in size, location, and type of product sold are an important source of such specific evidence; however, Dr. Galbraith failed to obtain such figures and to include them in his calculations.

Plaintiff relies on *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 361 S.E.2d 608 (1987), in support of his claim that Dr. Galbraith's method of calculating lost profits was reasonably certain. In *Mosley*, a retail store selling nuts was wrongfully evicted from a shopping mall two years after it moved into the mall. Upon relocation, the store failed to turn a profit. *Id.* at 440, 361 S.E.2d at 609-10. In support of its claim for lost profits against the landlord, the store relied on evidence of the sales of its successor tenant at the mall, a national franchise which sold products similar to those sold by the plaintiff's store. *Id.* at 445, 361 S.E.2d at 613. The defendant challenged the admission of this evidence, claiming that differences in marketing and management practices of the two stores rendered the evidence unreasonably speculative. *Id.* at 446, 361 S.E.2d at 613. This Court accepted the evidence, noting that differences in marketing and management practices of the two stores went only to the weight and not the admissibility of the evidence. *Id.* Plaintiff argues that under *Mosley*, any differences between plaintiff's business and the independent national jewelers upon whose sales data Dr. Galbraith relied should not render his testimony speculative and therefore inadmissible.

We find that *Mosley* is distinguishable from the instant case and, in fact, supports our conclusion here. In *Mosley*, the plaintiff's store was profitable at the time of the eviction and had successfully conducted its business for such length of time that its profits were reasonably ascertainable. *Id.* Furthermore, the successor store sold similar merchandise in the same location as plaintiff's store, and its sales figures were therefore relevant to show what sales the plaintiff's store might have expected in the future had it not been evicted. *Id.* Thus, in *Mosley* the expert was drawing comparisons between an established store with a history of profits, and a similar store at the same location. Here, by contrast, plaintiff's store had no history of profits, and Dr. Galbraith drew comparisons to much larger stores in different locations selling products other than custom jewelry.

Also, at the time plaintiff opened his store at the Mall, he had virtually no experience owning and operating a jewelry store. Dr.

Galbraith acknowledged that start-up businesses such as plaintiff's have "relatively high failure rates." However, he stated that he did not consider this factor relevant in calculating plaintiff's lost profits. With regard to his prior experience in the jewelry business, plaintiff testified that he worked at a custom design jewelry store in Wilmington for two years (1986 and 1987) and then in sales and management at a large chain jewelry store in Allentown, Pennsylvania, for a year. He also testified that he worked for Atlantis Gold Crafters in Wilmington from fall 1990 until early spring 1991, where his activities were limited to "making the jewelry and doing some repair" for about four hours a day. He stated he had no ownership interest in Atlantis and considered his work there a "hobby." Thus, plaintiff's own testimony established that plaintiff had no prior experience owning or operating a custom jewelry business. Dr. Galbraith, however, failed to consider this inexperience in his analysis. We believe that the owner's prior business experience (or lack thereof) could be a relevant factor in assessing the future profitability of a new business.

In sum, we hold that plaintiff failed to meet his burden of proving lost profits with reasonable certainty. We therefore vacate the portion of the trial court's judgment awarding plaintiff $110,000 in damages, and we remand this cause to the trial court for a new trial on the issue of damages. *See McBride*, 36 N.C. App. at 373, 243 S.E.2d at 915 (this Court has discretionary authority to award partial new trial on issue of damages where it is clear that error in assessing damages did not affect determination of issue of liability). In light of this decision, we decline to address defendant's remaining assignments on the issue of damages.

III.

[4] Finally, defendant argues that the trial court erred in its decisions on two evidentiary matters. We disagree.

Plaintiff attempted to prove at trial that defendant breached its lease with plaintiff by allowing tenants other than retail establishments to locate in the Mall and by failing to attract other retail stores to the Mall. Over defendant's objection, plaintiff was allowed to introduce evidence of statements made during the course of lease negotiations regarding the Mall's desire to attract other retail tenants. The evidence was admitted under the holding of *IRT Property Co. v. Papagayo, Inc.*, 112 N.C. App. 318, 435 S.E.2d 565 (1993), *reversed*, 338 N.C. 293, 449 S.E.2d 459 (1994), in which this Court held that the

use of the words "shopping center," "mall," and "galleria" in a commercial lease could be interpreted as requiring the shopping center to rent only to retail stores and that evidence of representations made prior to the execution of the lease could be admitted to explain the ambiguous terms of the lease. *Id.* at 324-26, 435 S.E.2d at 568-69. However, following the trial of the instant case, our Supreme Court reversed this Court's decision in *Papagayo*, holding that terms such as "shopping center" and "mall" in the lease agreement did not create an ambiguity and the parol evidence rule therefore prevented evidence of prior negotiations from coming in to contradict the terms of the lease. *IRT Property Co. v. Papagayo, Inc.*, 338 N.C. 293, 296-97, 449 S.E.2d 459, 461 (1994).

Here, plaintiff offered the evidence of prior negotiations for two purposes: to prove breach of the lease and to prove fraud and unfair and deceptive trade practices. Although the *Papagayo* case prevented the evidence from coming in to prove breach of the lease, the evidence was properly admitted to prove fraud and unfair and deceptive trade practices. *See Parker v. Bennett*, 32 N.C. App. 46, 50-51, 231 S.E.2d 10, 13 (citation omitted) (" 'Parol evidence is admissible to show that a written contract was procured by fraud, for the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms. . . .' "), *review denied*, 292 N.C. 266, 233 S.E.2d 393 (1977); *Love v. Keith*, 95 N.C. App. 549, 553, 383 S.E.2d 674, 677 (1989) (parol evidence admissible to show unfair and deceptive trade practices), *overruled in part on other grounds, Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 463 S.E.2d 199 (1995). Thus, the trial court did not err in admitting this evidence.

Plaintiff also offered evidence of numerous complaints lodged against defendant by other tenants of the Mall. This evidence was introduced to support plaintiff's claims for fraud and unfair and deceptive trade practices on the theory that defendant had an affirmative duty to disclose these complaints during the lease negotiations. Defendant argued that this testimony was irrelevant and unfairly prejudicial, but the court, after hearing the arguments of both parties, admitted the evidence. The trial court ultimately granted defendant's motion for a directed verdict on these claims. Defendant now contends the admission of this evidence was improper. The decision whether to exclude evidence due to the potential for unfair prejudice, confusion, or misleading the jury is within the sound discretion of the trial court and will not be disturbed absent a showing that the ruling was so arbitrary it could not have been the result of a reasoned

decision. *Smith v. Pass*, 95 N.C. App. 243, 250, 382 S.E.2d 781, 786 (1989); *see also* N.C. Gen. Stat. § 8C-1, Rule 403 (1992). Defendant has not shown that the trial court abused its discretion in admitting the contested evidence or that defendant was prejudiced by its admission.

IV.

In a cross-assignment of error, plaintiff argues that the trial court erred in dismissing his claims for fraud and unfair and deceptive trade practices. We note that plaintiff's argument should have been presented as a cross-appeal rather than a cross-assignment of error. *See U v. Duke University*, 91 N.C. App. 171, 185, 371 S.E.2d 701, 710, *review denied*, 323 N.C. 629, 374 S.E.2d 590 (1988) (directed verdict on abuse of process and malicious prosecution claims could only be challenged by cross appeal, not cross-assignments); *Cherry, Bekaert & Holland v. Worsham*, 81 N.C. App. 116, 118, 344 S.E.2d 97, 99 (1986) (dismissal of unfair and deceptive trade practices claim, injunctive relief, and claim for specific performance could only be challenged by cross-appeal). Nevertheless, we have carefully reviewed plaintiff's argument, and we conclude the trial court did not err in dismissing those claims.

Affirmed in part, vacated in part, and remanded for a new trial on the issue of damages.

Judges JOHNSON and SMITH concur.

JOHN D. HOGAN AND WIFE, JANET S. HOGAN, PLAINTIFFS v. THE CITY OF WINSTON-SALEM, DEFENDANT

No. COA95-305

(Filed 6 February 1996)

Retirement § 9 (NCI4th); Constitutional Law § 143 (NCI4th)—amendment to retirement code—unconstitutional impairment of disabled officer's contract

Plaintiff police officer's contractual rights were unconstitutionally impaired by defendant city's amendment of its retirement code after plaintiff's injury which took away the unqualified right of an officer to obtain retirement disability benefits when an injury prevented the officer from performing his sworn duties and

permitted defendant to transfer the officer to unsworn duties since (1) plaintiff, who had worked for more than twenty years as a sworn police officer of defendant, had vested contractual rights in the retirement plan after five years of creditable service; (2) plaintiff and his wife would suffer significant reductions in their retirement allowances as a result of the amendment; and (3) the impairment was not reasonable and necessary to serve an important public purpose, as defendant's evidence was only relevant to show that the amendment was to benefit and to allow officers to remain employed in nonsworn duties rather than retire upon their disability, but this purpose was not reasonable and necessary as it pertained to this plaintiff.

Am Jur 2d, Constitutional Law §§ 592, 597, 690; Municipal Corporations, Counties, and Other Political Subdivisions §§ 495, 500, 852.

Vested right of pensioner to pension. 52 ALR2d 437.

Judge WALKER concurring in part and dissenting in part.

Appeal by plaintiffs and defendant from Order entered 29 December 1994 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 6 December 1995.

James and Jones, P.L.L.C., by Randolph M. James and Howard C. Jones II, for plaintiffs.

Womble Carlyle Sandridge & Rice, by Roddy M. Ligon, Jr., Gusti W. Frankel, and Steven D. Draper, for defendant.

JOHNSON, Judge.

Defendant City appeals from that part of the Order entered on 29 December 1994 granting plaintiffs' motion for summary judgment as to plaintiffs' seventh cause of action and declaring that the 20 August 1990 Amendment to Chapter 15, Article II of the Retirement Code of the City of Winston-Salem is unconstitutional as applied to plaintiffs. Plaintiffs appeal from that part of the Order granting defendant's motion for summary judgment as to plaintiffs' first, second, third, fourth, fifth and sixth causes of action.

The facts are as follows: Plaintiff was a sworn officer of the Winston-Salem Police Department for over twenty years and made mandatory payments into the City's Retirement Plan (the Plan) for

police officers for over twelve years. Plaintiff's wife, Janet S. Hogan, became a beneficiary under the Plan in 1978. On 2 August 1989, plaintiff injured his back while working for the police department and during the scope of his employment.

On 20 August 1990, subsequent to plaintiff's injury, the Board of Aldermen enacted an ordinance to amend Chapter 15, Article II of the City Code which governs the Plan. Prior to the Amendment, and on the date of plaintiff's injury, the Retirement Code provided that if an officer was disabled from performing his duties, he was entitled to retire under the Retirement Code, and that the City "did not have the ability to transfer these members to other police duties."

Defendant's interpretation and application of the Amendment to plaintiff took away the unqualified right of a disabled officer to obtain retirement when an injury prevented the officer from performing his sworn duties, instead, the City may transfer a disabled officer to other "unsworn duties within the police department."

Paragraph (g) of Section 16 of the Amendment provides the following:

> Upon the recommendation of the Police Chief and/or the Personnel Director, subject to the review and recommendation of the Retirement Commission to the City Manager, an employee disabled for the purposes of sworn employment may be transferred to other sworn and nonsworn duties within the Police Department. Should a member of the plan desire transfer to a non-sworn position outside of the Police Department, the City will assist with the transfer, insofar as possible and practicable. The following provisions will apply to a transfer to another position under this section:
>
> > (i) In the opinion of the medical review board the employee is capable of satisfactorily performing the new duties;
> >
> > (ii) The compensation of the new position is at least five (5) per cent higher than the employee's sworn compensation if the employee elects to remain an active member of the plan. The compensation of the new position is equal to the present compensation, if the employee elects to terminate from the city plan.
> >
> > (iii) The same rules for vesting of benefits and transfer of benefits are applied as in section 15-58.

(iv) A disabled employee transferred to a non-sworn or other sworn position of lower pay range than the sworn position, will not be subject to limitations on merit pay increases applicable to the non-sworn position.

(v) The City plan will reimburse to the City operating fund any cost differential resulting from the provisions of Section 16(g).

On 7 March 1991, Dr. Thomas opined that plaintiff was "totally and permanently disabled to return to his . . . usual occupation." On 15 March 1991, plaintiff submitted an application for retirement due to disability with the Retirement System Division of the Department of State Treasurer, State of North Carolina. On 15 March 1991, plaintiff also submitted an application for disability retirement from the Police Department, effective 1 June 1991. On 3 June 1991, plaintiff's treating orthopedic surgeon, Dr. Holthusen, rated plaintiff's permanent partial disability to his back at fifty percent. On 25 June 1991, Dr. Holthusen concluded that plaintiff was "totally and permanently disabled to return to his . . . usual occupation."

Defendant alleged that the "Police Chief offered Mr. Hogan three non-sworn positions." However, defendant admitted that "on June 16, 1991, the City and plaintiff John D. Hogan received notice from Dr. B.R. Thomas that John D. Hogan was unable to perform any of the alternative employee positions recommended by the City."

On 24 July 1991, plaintiff received notice from the State of North Carolina that his Disability Retirement was approved. Prior to the Amendment, a disabled officer whose retirement was approved under the State Plan would also be approved under the City Plan. The City denied plaintiff's request for retirement due to disability pursuant to an Amendment to the Plan which occurred after plaintiff's injury. The City used the Amendment to deny plaintiff his right to receive retirement benefits when he became unable to perform his sworn duties. Plaintiff alleges that he received no opportunity for a hearing regarding the City's decision.

During plaintiff's employment, he was repeatedly told by the Chief of Police and other officers that defendant would look after him and that if he was injured "in the line of duty" he would be allowed to retire with "no questions asked." When defendant failed to honor these promises after plaintiff's injury, plaintiff felt like defendant had abandoned him. Plaintiff began to have suicidal thoughts, began drinking heavily, and became very distraught. Plaintiff sought treat-

ment for the distress he suffered from Dr. Jerry Noble, a licensed, practicing clinical psychologist in North Carolina. Dr. Noble's diagnosis of plaintiff was "major [d]epression, single episode without psychotic features; generalized anxiety disorder; alcohol abuse intermittent, insomnia; and chronic pain."

Plaintiffs filed suit against defendant, alleging seven causes of action: (1) Arbitrary and Capricious Conduct and Lack of Due Process under the United States Constitution, the North Carolina Constitution, the laws of the United States and the State of North Carolina; (2) Breach of Contract; (3) Intentional Infliction of Emotional Distress; (4) Negligent Infliction of Emotional Distress; (5) Failure to Notify Plaintiffs of their Continuation Rights under COBRA; (6) Bad Faith and Breach of Duty of Good Faith; and (7) Request for Declaration that the 20 August 1990 Amendment of Chapter 15, Article II of the Retirement Code of the City of Winston-Salem is Unconstitutional as Applied for Interference with Plaintiffs' Contractual Rights.

The first issue to be addressed in this appeal is whether the trial court erred in granting plaintiffs' motion for summary judgment as to their seventh cause of action and declaring that the 20 August 1990 Amendment of Chapter 15, Article II of the Retirement Code of the City of Winston-Salem was unconstitutional as applied to plaintiffs in this case.

Article I, Section 10, Clause 1 of the United States Constitution states, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." This prohibition is applicable to municipalities. *Northern P. R. Co. v. Minnesota ex rel. Duluth*, 208 U.S. 583, 52 L. Ed. 630 (1908). In determining whether the Amendment in the case *sub judice* unconstitutionally impairs plaintiffs' contractual rights, this Court in *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988), adopted a three-step inquiry which became the basis for determining if the State, or in this case, the City, violated the Contract Clause. We must consider the following: (1) whether a contractual obligation arose under the statute; (2) whether the State's actions impaired an obligation of the State's contract; and (3) whether the impairment, if one existed, was "reasonable and necessary to serve an important public purpose." *Id.* at 225, 363 S.E.2d at 94.

Our first inquiry is to determine whether plaintiffs had contractual rights in the Plan. Our Court has held that public employees have contractual rights in their pension funds. *See Simpson*, 88 N.C. App. 218, 363 S.E.2d 90; *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 424 S.E.2d 420, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993); *Woodard v. Local Governmental Employees' Retirement System*, 108 N.C. App. 378, 424 S.E.2d 431, *aff'd per curiam*, 335 N.C. 161, 435 S.E.2d 770 (1993). Defendant City argues that plaintiffs' contractual rights in the Plan did not vest because plaintiff had not been approved for retirement benefits pursuant to disability on the date that the Amendment was passed. However, the Court in *Simpson* stated that "[i]n North Carolina the right of members of the Retirement System to retirement benefits vests after five years of creditable service." *Simpson*, 88 N.C. App. at 219, n. 2., 363 S.E.2d at 91, n. 2. *See also* North Carolina General Statutes § 128-27(c) (1994) (a member of the State plan must have "five or more years of creditable service" before eligibility for disability retirement unless injured in an accident in the line of duty). As it is undisputed that plaintiff had attained more than five years of creditable service before his injury, before the date of the Amendment and before the date he submitted his application for disability retirement, defendant's argument is without merit. Further, Section 15-56 of defendant City's Plan requires a member to have "five (5) or more years of creditable service" prior to becoming eligible for disability retirement. This Court has stated that:

> [a] public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs . . . had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.

Simpson, 88 N.C. App. at 224, 363 S.E.2d at 94.

Defendant City contends that in accordance with *Griffin*, they can amend or make changes in the Retirement Disability Plan and apply the Amendment to members who had not yet retired on disability retirement at the time the change became effective. *Griffin v. Bd. of Com'rs. of Law Officers Retirement Fund*, 84 N.C. App. 443, 352 S.E.2d 882, *dismissal allowed and disc. review denied*, 319 N.C. 672, 356 S.E.2d 776 (1987) (rights do not vest until the date of disability retirement). Defendant's argument that this Court's previous

opinion in *Griffin* is more applicable than the Supreme Court's per curiam affirmation of this Court's decision in *Simpson* is without merit.

Our second inquiry is whether the Amendment impaired plaintiffs' contractual rights. Defendant's argument that plaintiffs suffered no impairment of their contractual rights is unpersuasive. Although it is evident that plaintiffs will not suffer significant reductions in the retirement allowances, plaintiffs will, however, suffer an impairment, in that, they would be denied their right to retirement benefits—a right that they were entitled to on the date plaintiff was injured within the course of his employment, and a right upon which they had relied upon prior to the Amendment. In finding that an impairment of contractual benefits has occurred, it must be shown that there were "significant reductions" in the retirement benefits. *See Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94; *Faulkenbury*, 108 N.C. App. at 371, 424 S.E.2d at 427. The Amendment at issue in the instant case completely deprives plaintiff of his right to disability retirement upon being injured in the line of duty. Plaintiff would be required to perform nonsworn duties even though his physician has concluded that he is unable to perform in the three nonsworn positions that defendant offered. This is a significant reduction or impairment of plaintiffs' rights in that they would be denied benefits that they would have received prior to the Amendment. Accordingly, the second prong was met.

Our third inquiry is whether the Amendment was reasonable and necessary to serve an important public purpose. Defendant City's, Finance Director, Loris Colclough, in an affidavit, stated that the purpose of the Amendment was to permit disabled officers to transfer to another position so that they could continue to have productive employment with the City at the same salary and pay increases that they would have received in their sworn position. The City has not presented any evidence that the Amendment was reasonable and necessary to protect an important state interest in relation to the facts of this case, particularly in reference to this plaintiff who has been employed with the City for over twenty years and became vested in the retirement system prior to the time the policy changes were enacted. Rather, the City's evidence is only relevant to show that the Amendment was to benefit and to allow officers to remain employed in nonsworn duties rather than retire upon their disability. Although commendable, this purpose is not reasonable and necessary as it pertains to this plaintiff. In *Simpson*, the Court stated that it was not per-

suaded by the explanation given by the Deputy Treasurer and Director of the Retirement Systems Division in an affidavit which stated that the changes made to the retirement requirements were made to correct inequities in the system and that the changes were reasonable and necessary to serve an important state interest. *Simpson*, 88 N.C. App. 218, 363 S.E.2d 90. Likewise, the evidence in this action does not show that the Amendment was necessary and reasonable to protect an important state interest where an officer has become vested prior to its enactment. The Amendment is unreasonable as pertains to plaintiffs because they are being denied an unequivocal right to disability retirement upon being disabled, by an Amendment which became effective after plaintiff's injury occurred. While there may be an issue of material fact as to whether the Amendment was reasonable and necessary in relation to officers who had not become vested at the time of its enactment, there is no genuine issue of material fact as to whether the Amendment was reasonable and necessary as to an officer who had become vested prior to its enactment. Accordingly, as there was no genuine issue as to any material fact, plaintiffs were properly granted summary judgment as a matter of law.

Plaintiffs also argue that the Amendment violated the due process guarantees of the United States and North Carolina Constitutions; however, we need not address this argument in light of our holding that plaintiffs' grant of summary judgment was without error.

Plaintiffs' cross-appeal from that portion of the trial court's Order granting summary judgment in favor of defendant, and dismissing plaintiffs' first, second, third, fourth, fifth and sixth causes of action.

Plaintiffs first argue that the trial court erred by granting summary judgment on its second claim for breach of contract. We disagree. Defendant may amend ordinances so long as the amendment is not unconstitutional. As we have affirmed the trial court's decision that the Amendment herein is unconstitutional as applied to plaintiff in that his contractual rights have been impaired, no breach of contract occurs until the Retirement System fails to deliver plaintiffs' vested benefits according to the previous unamended contract. Thus, summary judgment was properly granted on this claim.

Plaintiffs next argue that the trial court erred by granting summary judgment on plaintiffs' claim for breach of duty of good faith. Plaintiffs contend that defendant breached its "covenant of good faith and fair dealing" by passing the Amendment and depriving plaintiffs

of benefits. Plaintiffs' claim for breach of an implied covenant of good faith and fair dealing is without merit. *See Phillips v. J. P. Stephens & Co., Inc.*, 827 F. Supp. 349, 352 (M.D.N.C. 1993); *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 359, 416 S.E.2d 166, 173 (1992).

Plaintiffs also argue that the trial court erred by granting summary judgment on their claim for arbitrary and capricious conduct and lack of due process under the United States Constitution, the North Carolina Constitution and the laws of the United States and the State of North Carolina. A review of the evidence reveals that plaintiffs were not denied due process as they received notice and had an opportunity to be heard, and they have failed to show that the denial of the benefits was arbitrary or capricious. Additionally, as plaintiffs failed to allege a claim under § 1983 in their complaint and to argue this claim before the trial court, they may not argue this claim on appeal. *See Gilbert v. Thomas*, 64 N.C. App. 582, 586, 307 S.E.2d 853, 856 (1983). Thus, summary judgment was properly granted.

Plaintiffs argue that the trial court erred by granting summary judgment on their claim for failure to notify plaintiffs of their continuation rights under COBRA. Our review of the record reveals that plaintiff had notice of his rights concerning coverage; therefore, this argument is without merit.

Plaintiff also argue that the trial court erred by granting summary judgment on plaintiffs' claim for intentional infliction of emotional distress and negligent infliction of emotional distress. These arguments must also fail in that plaintiffs failed to produce a sufficient forecast of evidence to survive summary judgment on these claims.

For the foregoing reasons, the trial court's Order is affirmed.

Affirmed.

Judge WYNN concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I respectfully dissent from the majority's opinion affirming the trial court's granting of plaintiffs' motion for summary judgment as to plaintiffs' seventh cause of action and declaring that the 20 August

1990 Amendment of Chapter 15, Article II, of the Retirement Code of the Code of the City of Winston-Salem was unconstitutional.

The question of whether an act unconstitutionally impairs the right to contract and violates the United States Contract Clause is one courts must resolve on a case by case basis. *Bailey v. State of North Carolina*, 330 N.C. 227, 244, 412 S.E.2d 295, 305 (1991), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 547 (1992). Not every impairment of contractual obligations by a state violates the Contract Clause. *Maryland State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353, 1360 (D. Md. 1984). In acting to protect the general welfare of its citizens and in exercising its police power, a state may constitutionally impair its contractual obligations. *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 224, 363 S.E.2d 90, 94, *aff'd*, 323 N.C. 362, 372 S.E.2d 559 (1988).

While I agree with the majority that determining whether a state unconstitutionally impairs the Contract Clause involves the application of a tripartite test that was elucidated by the United States Supreme Court and adopted by the *Simpson* Court, I disagree with the majority's application of this test.

Under this test, the court first ascertains whether or not a statute creates a contractual obligation. *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94. The *Simpson* Court has already answered that question for us, and we accordingly hold that a contractual obligation exists. *Id.*; *see also Faulkenbury v. Teachers' and State Employees' Retirement System*, 108 N.C. App. 357, 424 S.E.2d 420, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993). Second, the court must determine if the actions of the state legislature impaired the obligation of the state's contract. *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94. Again, *Simpson* guides us in our present holding that there is an impairment of rights "as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge." *Id.*

Finally, the court must determine whether the impairment was reasonable and necessary to serve an important public purpose. *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94. In *Simpson*, the Court remanded for a "proper resolution" on this third part of the test.

In applying the third prong of the tripartite test, we are guided by the opinion in *Baltimore Teachers Union v. Mayor and City of Baltimore*, 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, —— U.S. ——, 127

L.Ed.2d 435 (1994). In *Baltimore Teachers Union*, the court emphasized that the judiciary must give "at least some deference to legislative policy decisions to modify these contracts in the public interest. . . ." *Id.* at 1019. The Court explained:

> The Contract Clause, however, does not require the courts—even where public contracts have been impaired—to sit as superlegislatures . . . . Not only are we ill-equipped even to consider the evidence that would be relevant to such conflicting policy alternatives; we have no objective standards against which to assess the merit of the multitude of alternatives. . . . "Merely to enumerate the elements that have to be considered [in determining whether the public welfare decision was reasonable] shows that the place for determining their weight and their significance is the legislature, not the judiciary."

Id. at 1021-22 (*quoting East New York Sav. Bank v. Hahn*, 326 U.S. 230, 234, 90 L. Ed. 34, 37 (1945)).

In the present case, defendants offered an affidavit from the City's Finance Manager, Ms. Colclough, tending to show that the goal of the amending ordinance was to "protect the financial stability of the retirement plan" as well as to permit a disabled officer to continue productive employment with the City at the same salary for performing unsworn duties. Instead of losing benefits by being forced to retire early, police officers were guaranteed the right to work as long as they were physically able to perform any work for the Police Department or the City. The plaintiff has not produced any evidence to show that the amendment was unreasonable and unnecessary. Based on this record, I would find that there is a genuine issue of material fact regarding whether the amending ordinance was reasonable and necessary. Accordingly, I would reverse the trial court's granting of summary judgment and remand the case for a determination on this issue.

DAVID A. HALL, BRENDA G. HALL, AND K. LEE McENIRY, GUARDIAN AD LITEM OF JOHN DAVID ALLEN HALL, JR., AN INFANT v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC., D/B/A CAPE FEAR VALLEY MEDICAL CENTER

No. COA95-286

(Filed 6 February 1996)

Discovery and Depositions § 10 (NCI4th)— Rule 26(b) claims not adjudicated—error

Where defendant contended from the beginning of the discovery process that the materials at issue were not discoverable because they were prepared in anticipation of litigation, covered by attorney-client privilege, and represented work product, and defendant raised these issues before the judge who entered the order to compel production of documents and before the trial judge, the trial court erred by releasing those materials to plaintiffs without making determinations as to (1) whether the documents were prepared in anticipation of litigation, (2) if so, whether plaintiffs were in "substantial need" of the materials and were unable without "undue hardship" to obtain the substantial equivalent by other means, (3) whether the documents included "mental impressions, conclusions, opinions, or legal theories" of defendant's attorney or other representative of defendant concerning the litigation at issue, (4) whether the documents represented the "work product" of defendant's attorney, and (5) whether the documents represented communications between defendant and its attorneys. N.C.G.S. § 1A-1, Rules 26(b1) and (b3).

Am Jur 2d, Depositions and Discovery §§ 50 et seq.

Protection from discovery of attorney's opinion work product under Rule 26(b)(3), Federal Rules of Civil Procedure. 84 ALR Fed. 779.

Judge WYNN dissenting.

Appeal by defendants from judgment entered 19 August 1994 in Cumberland County Superior Court by Judge Wiley F. Bowen. Heard in the Court of Appeals 10 January 1996.

Rose, Ray, Winfrey, O'Connor & Leslie, P.A., by Ronald E. Winfrey and Pamela S. Leslie, and John Michael Winesette and Angela M. Hatley, for plaintiff-appellees.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay and Mark E. Anderson, for defendant-appellant.

Harris, Shields and Creech, P.A., by C. David Creech, on behalf of the North Carolina Chapter of the American Society for Healthcare Risk Management, amicus curiae.

Haywood, Denny & Miller, L.L.P., by George W. Miller, Jr. and John R. Kincaid, on behalf of the North Carolina Hospital Association, amicus curiae.

Roberts Stevens & Cogburn, P.A., by Isaac N. Northup, Jr., on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

GREENE, Judge.

Cumberland County Hospital System, Inc., doing business as Cape Fear Valley Medical Center (defendant), appeals a jury verdict and judgment finding that its negligence caused injury and damage to John David Allen Hall, Jr. (John), and that he and his parents (collectively plaintiffs) are entitled to damages in the amount of $5,212,000.00 plus interest and attorney fees.

Plaintiffs filed a complaint against defendant on 11 February 1993 alleging that the agents and employees of defendant were negligent in their judgment and "application of their knowledge and skill; failed to possess the requisite degree of skill, training and experience; and, failed to act in compliance with standards of health care required by law" in their overall treatment of John. Defendant denied any negligence on the part of its employees or agents.

On 24 November 1993, the plaintiffs, pursuant to Rule 34 of the Rules of Civil Procedure, served the defendant with a Request for Production of Documents requesting, among other things:

> Any other documentation generated at the Defendant Hospital, including any correspondence, having anything to do with the treatment of John David Allen Hall or his mother, Brenda Green.

On 24 January 1994, the defendant responded to the request:

> Objection. To the extent that this request seeks the production of correspondence or other documentation covered by the attorney-client privilege or the work product doctrine, or the privilege of self-critical analysis, defendant objects to the production of any such documents.

On 28 April 1994, the plaintiffs, pursuant to Rule 37 of the Rules of Civil Procedure, filed a Motion to Compel Discovery of these documents and requested that the trial court "examine these materials so as to rule upon whether any are privileged in nature." On 29 May 1994, the defendant filed a response to the plaintiffs' Motion to Compel. In its response, the defendant alleged that it should not be required to produce the documents requested because they are protected by the privileges previously asserted in its response to the Request for Production of Documents. On 8 June 1994, Judge A. Leon Stanback, Jr. (Judge Stanback) entered an order allowing the plaintiffs' Motion to Compel "under the terms and conditions set forth." The "terms and conditions" required the defendant

> to identify and list these documents, to advise of the nature and date and author of the documents . . . so as to allow the Court to rule upon a claim of privilege or otherwise Order an *in camera* inspection.

On 22 July 1994, the plaintiffs, pursuant to Rule 37 of the Rules of Civil Procedure, filed a motion for sanctions alleging that "much of the documentation Ordered to be produced [by Judge Stanback] has not been produced." The plaintiffs requested that the trial court order the defendant "to present to the Court for an *in camera* inspection, any and all documents to which Defendant objects to producing." On 26 July 1994, the plaintiffs' attorney, pursuant to Rule 45 of the Rules of Civil Procedure, issued a subpoena directing one of defendant's employees to produce its "entire Risk Management file" for an "*in camera* inspection." On 3 August 1994, the defendant filed a Motion to Quash the subpoena alleging that "production of such sensitive and privileged information is inappropriate."

On 3 August 1994, the case was called for trial before Judge Wiley F. Bowen (trial judge). The trial judge indicated that he would have "to [prior to ruling on the motions to quash and for sanctions] look at the file . . . because I'm sure [the defendant has] . . . statutory claims of a privilege." The defendant then gave the documents to the trial judge who "conducted an in-camera inspection" and determined that the plaintiffs were entitled to "inspect and copy" certain of the docu-

ments. The trial judge then provided those documents to the plaintiffs. The following exchange occurred between the trial judge and the defendant's attorney:

> [Defendant] I'm a little unclear about exactly what Your Honor is ruling on now. I had thought that the purpose of this being handed to you yesterday was in aid of their motion for sanctions in order to determine whether or not there is material that we should have given up.
>
> [The Court] No. I said I was not going to rule on the—I was not going to deal with the motion for sanctions because it's [sic] got so many entanglements that we're going to have to deal with that later.
>
> [Defendant] What is this—I mean, what motion is before the court that the court is granting that?
>
> [The Court] For discovery.
>
> [Defendant] I'm not aware of a discovery motion before the court. Is there a discovery motion?
>
> [The Court] Well, if you want me to get into the merits of the motion for sanctions, because I understand that Judge Stanback ruled that certain documents be discovered and I was trying to stay away from that motion at this time as it regarded sanctions.
>
> . . . .
>
> [Defendant] In order to lay a foundation for further consideration in this matter we need to know how the court is construing our file and when there is reasonable anticipation of litigation. If it is something other than when a litigation lawyer who specializes in malpractice contacts the hospital and the hospital writes down, "We anticipate litigation at this point" and notifies its insurance carrier, if it's something other than that time, then we need to preserve that as a —
>
> [Court] I'll let you make whatever record you need to make to protect your position without prejudice.
>
> . . . .
>
> [Defendant] I would like the record to reflect that the defendant objects and excepts to the court's ruling turning over part of this defendant's Risk Management files to counsel for plaintiff

. . . in which the court physically gave possession of those articles to counsel for plaintiff on the basis that, number one, there is no motion pending under which the court might do so. . . .

And further, that the court has exceeded the bounds of discovery in what it has allowed counsel to have. A portion of the materials that were turned over were materials that were produced and generated after counsel for the defense was involved in this case, and there were a portion of the materials that were generated after the lawsuit was filed and are certainly protected under the work product and work done in anticipation of litigation . . . .

And I believe that the court's action has prejudiced the defense of this case to the point that at this point we would move for a mistrial, or if that's not appropriate because the jury has not yet been impaneled, then move for a continuance on the basis that the court's action has unalterably prejudiced the defense in this case.

. . . .

[Court] Motion for mistrial is denied. Motion for continuance is denied. Motion that the court rule on the motion for sanctions is denied. Any other motions?

[Defendant] I had moved that the court make a finding of fact as to the time when the defendant could reasonably have anticipated litigation.

[Court] The court is disinclined to do that at this time.

During the trial the plaintiffs used the information contained in the documents to cross-examine witnesses concerning conflicts between their testimony and information contained in the documents, in some instances severely impairing their credibility. After the jury returned with a verdict, the trial judge ruled on the motion for sanctions. The trial judge stated:

[A]fter having seen what had gone on in the file, and the conflicts, [I] thought in the interest of justice that it would be appropriate for the documents . . . to be delivered to the plaintiffs. I was convinced then that it was in the interest of justice to do so. I am more convinced after having heard all of the evidence in the case that it was appropriate to do so, whether it was done so on a ruling for sanctions or on a ruling for—-and that is, sanctions under

a proper order, or whether it was done in denial of the motion to quash of all the documents except those that were delivered. And that's what the court has done. In order to—whether it was right or whether it was wrong, I'll let somebody else decide that.

The motion for sanctions, first off, requiring a valid order before you can proceed with sanctions, gives me some concerns. Also, given the history of the total discovery in this, I'm not sure that if sanctions were due, that sufficient sanctions have already—that the reasons for the sanctions would be, of course, to secure the documents, the appropriate documents, and the documents have been furnished. So, for the record the motion for sanctions is denied.

The dispositive issue is whether the trial judge erred in releasing the documents to the plaintiffs without addressing the defendant's Rule 26(b) claims.

A party is entitled to the discovery of documents "otherwise discoverable under subsection (b)(1)" if "prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." N.C.G.S. § 1A-1, Rule 26(b)(3) (1990). The court may not, however, "permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action." *Id.*; *see Willis v. Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976). The court is also precluded from requiring disclosure of any privileged communication between the attorney and the client. N.C.G.S. § 1A-1, Rule 26(b)(1) (1990); *see Brown v. Green*, 3 N.C. App. 506, 512, 165 S.E.2d 534, 538 (1969). A party may not avoid the requirements of Rule 26(b) by issuance of a subpoena for the production of documents. The trial court shall quash, upon motion of the objecting party, any subpoena for the production of documents that seeks discovery of materials protected by Rule 26(b). N.C.G.S. § 1A-1, Rule 45(c) (1990) (subpoena cannot require production of "privileged communication"); *see Vaughan v. Broadfoot*, 267 N.C. 691, 697, 149 S.E.2d 37, 41 (1966) (upon motion to quash the trial court is to determine "the right of the witness to withhold production" upon any ground).

In this case the plaintiffs sought discovery of certain documents in the possession of the defendant. The defendant claimed they were privileged and refused to disclose the documents. Subsequent to the plaintiffs' motion to compel discovery, Judge Stanback ordered the defendant to "identify and list the documents" in a manner that would permit the trial court to "rule upon a claim of privilege." The plaintiffs thereafter moved for sanctions, alleging that the defendant had failed to comply with Judge Stanback's order, and issued a subpoena for the documents. The trial judge, after conducting an *in camera* hearing, released the documents to the plaintiffs.

The defendant contends that release of the documents was not supported by a valid order. We agree. It was the defendant's contention from the very beginning of the discovery process that the materials at issue were not discoverable because they were prepared in anticipation of litigation, covered by attorney-client privilege and represented work product. The defendant raised these issues not only before Judge Stanback but also before the trial judge. Indeed the trial judge acknowledged that the defendant had asserted "statutory claims of a privilege" in the documents. The defendant was therefore entitled to a determination by the trial court as to (1) whether the documents were prepared in anticipation of litigation, (2) if so, whether the plaintiffs were in "substantial need" of the materials and that they were unable without "undue hardship" to obtain the substantial equivalent by other means, (3) whether the documents included "mental impressions, conclusions, opinions, or legal theories" of the defendant's attorney or other representative of the defendant concerning the litigation at issue, (4) whether the documents represent the "work product" of the defendant's attorney, and (5) whether the documents represent communications between the defendant and its attorneys.[1] The trial judge erred in not making these determinations and in refusing to enter any findings of fact when requested to do so by the defendant. *See* N.C.G.S. § 1A-1, Rule 52(a)(2) (1990) (findings required on motions "when requested by a party"). After the trial was completed, the trial judge did indicate that he released the documents in his possession to the plaintiffs because

1. If the trial court had determined that the defendant did not have a valid Rule 26 claim, the proper procedure would have been to direct the defendant to release the documents to the plaintiffs pursuant to Judge Stanback's order. If the defendant had failed to comply, the trial court could have held the defendant in contempt of court or entered other orders consistent with Rule 37. This order would have been immediately appealable. *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554-55, 353 S.E.2d 425, 426 (1987).

he "was convinced . . . that it was in the interest of justice to do so." Whether the release of the documents was in the interest of justice is not relevant in the face of the defendant's Rule 26(b) claims.[2]

Because the issue of the validity of the defendant's Rule 26(b) claims has not been addressed by the trial court, because we cannot adjudicate this issue for the first time on appeal, *see Willoughby v. Wilkins*, 65 N.C. App. 626, 636, 310 S.E.2d 90, 97 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E.2d 697-98 (1984), and because the plaintiffs' use of the documents at trial probably influenced the verdict of the jury, *see Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *disc. rev. denied*, 314 N.C. 336, 333 S.E.2d 496 (1985), remand to the trial court is necessary. *See State v. Booker*, 306 N.C. 302, 313, 293 S.E.2d 78, 84 (1982) (where there is prejudicial error, appellate court may remand "to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial"). On remand, the trial court must review the documents at issue and determine, consistent with this opinion, the validity of the defendant's Rule 26(b) claims. If it is determined that the Rule 26 claims are valid, a new trial will be required. If it is determined that the Rule 26 claims are not valid, the jury verdict previously entered in this case will be affirmed. Either party will be entitled to appeal the Rule 26 determination.

We have reviewed the defendant's remaining assignments of error and determine they do not justify a new trial.

Remanded.

Judge McGEE concurs.

Judge WYNN dissents.

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2. This case is distinguishable from *Crist v. Moffatt*, 326 N.C. 326, 337, 389 S.E.2d 41, 48 (1990), where the Supreme Court affirmed an order forcing the defendant's attorney to reveal to the plaintiff the substance of all private conversations between defense counsel and the plaintiff's nonparty treating physicians. The defendant complained that this was work product under Rule 26(b)(3) and thus not discoverable. The Supreme Court in rejecting the defendant's argument held that the trial court acted within its "broad, inherent, discretionary power . . . so as to prevent injustice." *Id.* In the *Moffatt* case, however, the information ordered disclosed had been unlawfully obtained by the defendant. In this case, there is no suggestion that the defendant unlawfully obtained the documents it seeks not to disclose.

Judge WYNN dissenting.

I do not view this case as a question of whether particular documents should be discoverable because of privilege. Rather, this case presents an issue of whether the trial judge abused his discretion in allowing the discovery of materials in the interest of justice. Because I find no abuse by the trial judge, I respectfully dissent from the majority's determination.

In *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990), our Supreme Court addressed the propriety of a trial judge's disclosure of "privileged" material by stating:

> Assuming, without deciding, that plaintiff impliedly waived her physician-patient privilege by her pretrial conduct, we overrule this assignment of error and uphold the finding and order entered by the trial court on grounds distinct from that of physician-patient privilege. *We hold that the trial court did not abuse its broad discretionary power to ensure justice in entering the order. Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940) (within trial court's discretion to take any action within the law "to see to it that each side has a fair and impartial trial"); *see also State v. Britt*, 285 N.C. 256, 271-72, 204 S.E.2d 817, 828 (1974) ("paramount duty" of trial court to control course of trial so as to prevent injustice to any party; trial court possesses broad discretionary powers in exercise of this duty).

Id. at 331-32, 389 S.E.2d at 44-45 (emphasis supplied). To emphasize that its ruling was based on the exercise of the trial court's discretion, the Supreme Court concluded by stating: "We affirm the order on this basis and on the basis of public policy grounds discussed below." *Id.* Still, the Court later reiterated the basis by stating:

> [The order] was within the broad, inherent, discretionary power of the trial court to control the course of a trial so as to prevent injustice to a party.

Id. Even later, the Court concluded by stating:

> We have held that the trial court acted within its broad discretionary powers in ordering disclosure by defense counsel.

Id. at 337, 389 S.E.2d at 48. Thus, the Court made it clear that even if there is a privilege to be asserted, the trial court in its discretion may nonetheless allow disclosure in the interests of justice. This is true,

contrary to the majority's footnote number two, regardless of how the party obtained the material.

In the subject case, the trial judge reasoned that it allowed the material to be discovered because he "thought in the interests of justice that it would be appropriate for the documents . . ., [to] be delivered to the plaintiffs. I was convinced then that it was in the interest of justice to do so. I am more convinced after having heard all of the evidence in the case that it was appropriate to do so . . . ."

In my view, this case is only about whether Judge Bowen abused his discretion. The record indicates that he did not. There is evidence in the record to support his determination that the documents were released in the interest of justice. As in *Moffatt*, I would conclude that the disclosure in this case was allowed within the broad, inherent, discretionary power of the trial court to control the course of a trial so as to prevent injustice to a party.

MICHAEL DWIGHT JONES, PLAINTIFF-APPELLEE v. MAYUMI J. PATIENCE, DEFENDANT-APPELLANT

No. COA95-270

(Filed 6 February 1996)

1. Parent and Child § 19 (NCI4th)— custody dispute between parents and non-parents—ruling applied retroactively

The Supreme Court's ruling in *Petersen v. Rogers*, 337 N.C. 397, should be applied retroactively to ensure appropriate custody and visitation rulings.

Am Jur 2d, Parent and Child §§ 23 et seq.

2. Illegitimate Children § 52 (NCI4th); Divorce and Separation § 377 (NCI4th)— child born during marriage—presumed product of marriage—presumption not rebutted—standing of plaintiff to seek visitation rights

In the context of a custody dispute between the mother and her husband or former spouse concerning a child born during their lawful marriage, the marital presumption that such child is the product of the marriage is rebuttable only upon a showing that another man has formally acknowledged paternity or has been adjudicated to be the father of the child; in this case the

marital presumption had not been rebutted, the trial court erred in finding otherwise, and plaintiff thus had standing under N.C.G.S. § 50-13.1(a) to seek visitation rights with the child.

Am Jur 2d, Bastards § 48; Divorce and Separation §§ 1098-1100.

3. Divorce and Separation § 377 (NCI4th)— plaintiff as presumed father—Petersen presumption inapplicable—best interests of child standard appropriate

The presumption of *Petersen v. Rogers*, 337 N.C. 397, as to custody disputes between parents and those who are not natural parents did not apply in this case since plaintiff, as presumed father, was the parent of the child; accordingly, the trial court did not err by applying the "best interests of the child" standard in awarding visitation rights to plaintiff.

Am Jur 2d, Divorce and Separation §§ 1143-1145.

4. Divorce and Separation § 378 (NCI4th)— child visitation—reliance on psychological evaluations—sufficiency of independent findings to support conclusions

Even if the trial court erroneously relied on the findings of psychological reports, the court did not delegate the award of visitation rights to a third party where the court made independent findings of fact sufficient to support its conclusions that plaintiff was a fit and proper person for visitation with the child and that visitation was in the best interests of the child.

Am Jur 2d, Divorce and Separation §§ 1143-1145.

5. Appeal and error § 156 (NCI4th)— failure to make timely objection—no consideration on appeal

Defendant failed to make timely objection to the introduction of psychological reports and to the testimony concerning their contents; therefore, the admission of the reports was not assignable as error.

Am Jur 2d, Appellate Review §§ 84 et seq.

6. Divorce and Separation § 337 (NCI4th); Discovery and Depositions § 48 (NCI4th)— court ordered counseling for mother and child—authority of court to order

If custody of the child had been adjudicated by the trial court, and in the absence of any pending motion in the cause, court

ordered counseling for defendant or the child was not supportable under N.C.G.S. § 1A-1, Rule 35 or in the exercise of the court's inherent authority; however, if custody had not been fully adjudicated, the court did possess authority to subject defendant and the child to court ordered counseling where it found animosity and hostility on the part of defendant which were potentially harmful and damaging to the child.

Am Jur 2d, Depositions and Discovery §§ 282 et seq.; Divorce and Separation §§ 963 et seq.

Appeal by defendant from orders entered 18 August 1994 and 1 November 1994 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 5 December 1995.

Karro, Sellers, Langson & Gorelick, by Marshall H. Karro, and Lana P. Poynor, for plaintiff-appellee.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellant.

MARTIN, Mark D., Judge.

Defendant appeals from award of visitation rights to plaintiff and denial of defendant's motion for a new trial or altered judgment under N.C.R. Civ. P. 59.

The trial court's findings may be summarized as follows: plaintiff and defendant were married on 10 May 1981. Edward Michael Jones (child) was born during the marriage on 9 August 1989. Plaintiff, defendant, and the child lived together as a family unit. Plaintiff and defendant separated on 23 November 1991 and divorced on 19 July 1993.

Defendant knew, prior to the birth of the child, plaintiff was not the child's biological parent. Until early 1992 plaintiff believed he was the child's biological parent. For example, plaintiff was present at defendant's side during the delivery of the child; was involved in daily care and nurture of the child; and continued his relationship with the child after separation.

In February or March 1992, over two and one-half years after the child's birth, defendant advised plaintiff he was not the biological father of the child and unilaterally terminated plaintiff's visitation with the child.

On 18 August 1992 plaintiff filed a complaint seeking visitation with the child, alimony pendente lite, and equitable distribution. Based on the results of a voluntary blood grouping test which excluded plaintiff as the biological father, plaintiff alleged the child was born "out of wedlock." On 28 December 1992 defendant filed an answer and counterclaim seeking, in part, custody of the child. In her answer defendant asserted, "plaintiff is not the biological father of the child."

On 11 January 1993 the trial court issued an order resolving the issues of alimony pendente lite and equitable distribution. In that same order, the trial court, prior to awarding visitation, required the parties to submit to psychological evaluations. On 7 July 1993 the trial court granted temporary visitation to plaintiff and ordered periodic psychological evaluations of the child. The trial court also ordered plaintiff and defendant to submit to prospective psychological counseling as necessary.

On 18 August 1994 the trial court, conducting a "review of plaintiff's visitation privileges," found plaintiff had "not missed a scheduled visitation" during the preceding twelve-month period and, applying the best interests of the child standard, awarded visitation rights to plaintiff. In its order the trial court found as fact the child was born "out of wedlock." The trial court also found that blood grouping tests had excluded plaintiff as the biological father of the child.

The trial court further indicated, in its visitation order, defendant had represented to the court that Ed Greble was the biological father. The trial court found, however, that no blood grouping tests had been conducted to determine whether Greble was the father; that Greble had not executed an acknowledgement of paternity; and that the child's birth certificate had not been amended to reflect Greble as the biological father. Nevertheless, in the same order, the trial court directed defendant to "take appropriate steps to establish the paternity of the minor child so as to protect the child's legal rights."

On 23 August 1994 defendant filed a motion for a new trial or altered judgment under Rule 59. On 1 November 1994 the trial court denied defendant's Rule 59 motion.

On appeal defendant contends, among other things, that the trial court erred by: (1) awarding visitation rights to plaintiff in the absence of a finding that defendant is unfit to have custody of the child in violation of *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901

(1995) and the First and Fourteenth Amendments to the United States Constitution; (2) delegating a judicial function by relying on psychological reports to support its conclusion visitation is in the best interests of the child; (3) admitting the psychological reports into evidence in the absence of their preparers, thereby denying defendant's right of cross-examination; (4) requiring defendant to undergo psychological counseling after the trial court adjudicated the visitation action; and (5) denying defendant's motion for a new trial or altered judgment from the order granting visitation to plaintiff.

I.

[1] Defendant first contends the trial court erred by failing to give retroactive effect to the Supreme Court's ruling in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994).

It is well-settled that judicial decisions "are presumed to operate retroactively." *MacDonald v. University of North Carolina*, 299 N.C. 457, 462, 263 S.E.2d 578, 581, *reh'g denied*, 300 N.C. 380, — S.E.2d — (1980). Because *Petersen* clarifies an area of law, *Bivens v. Cottle*, 120 N.C. App. 467, 468, 462 S.E.2d 829, 830 (1995), we believe it should be applied retroactively to ensure appropriate custody and visitation rulings. Accordingly, we conclude the trial court erred by failing to give *Petersen* retroactive effect.

Based on *Petersen* and the First and Fourteenth Amendments to the United States Constitution, defendant alleges the trial court erred in awarding visitation to plaintiff where there was no finding defendant was unfit to have custody of the child.

Plaintiff, on the other hand, contends the child was born during the marriage and, therefore, under North Carolina law, he was presumed to be the child's father. Consequently, plaintiff argues granting reasonable visitation rights to him does not implicate *Petersen*, as he is not a stranger to the child, and, accordingly, visitation should be awarded in the best interests of the child.

A.

[2] At the outset we must determine whether plaintiff has standing to seek visitation with the child under N.C. Gen. Stat. § 50-13.1(a). Section 50-13.1(a) provides:

> Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as

> hereinafter provided. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

N.C. Gen. Stat. § 50-13.1(a) (1995).

The threshold question for our consideration is whether plaintiff is a "parent" under section 50-13.1(a).

North Carolina courts have long recognized that children born during a marriage, as here, are presumed to be the product of the marriage. *Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E.2d 562, 568 (1968); 3 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 250 (4th ed. 1981). "[T]he presumption is universally recognized and considered one of the strongest known to the law." *In re Legitimation of Locklear*, 314 N.C. 412, 419, 334 S.E.2d 46, 51 (1985); 3 LEE, NORTH CAROLINA FAMILY LAW § 250. The marital presumption reflects the force of public policy which seeks to prevent "parent[s] from bastardizing [their] own issue." *State v. Rogers*, 260 N.C. 406, 408, 133 S.E.2d 1, 2 (1963).

The trial court found, in its visitation order, the child was born "out of wedlock." The trial court also found blood grouping tests excluded plaintiff as the child's biological father. Noting defendant contends Ed Greble is the biological father, the trial court nonetheless acknowledged: that no blood grouping tests had been conducted to determine whether Greble was the father; that Greble had not executed an acknowledgement of paternity; and that plaintiff remains listed as the natural father on the child's birth certificate.

We note, as the trial court properly recognized, that the marital presumption ordinarily may be rebutted by evidence of blood grouping tests excluding a putative father as the biological father. N.C. Gen. Stat. § 8-50.1(b1) (Cum. Supp. 1995); *Wright v. Wright*, 281 N.C. 159, 172, 188 S.E.2d 317, 326 (1972). Nevertheless, in the context of a custody dispute between the mother, and her husband or former spouse, concerning a child born during their lawful marriage, the marital presumption is rebuttable only upon a showing that another man has formally acknowledged paternity, see N.C. Gen. Stat. § 110-132 (1995), or has been adjudicated to be the father of the child, see N.C. Gen. Stat. § 49-12.1 (Cum. Supp. 1995). C*f. In re Boyles v. Boyles*, 466 N.Y.S.2d 762, 765 (N.Y. App. Div. 1983) (spouse precluded from bastardizing child to further own self-interest in custody dispute); *Nelson v. Nelson*, 10 Ohio App. 3d 36, 39, 460 N.E.2d 653, 655 (1983) (court prevented illegitimation of child where, among other things, "child ha[d]

not been declared illegitimate by bastardy proceedings."). *See also Michael H. v. Gerald D.*, 491 U.S. 110, 124, 105 L. Ed. 2d 91, 106 (1988) (irrebuttable statutory presumption of paternity upheld because "Constitution protects the sanctity of the family"). To permit the marital presumption to be rebutted in this context, absent a determination that another man is the father of the child, would illegitimate the child in violation of the public policy of this State. *See Settle v. Beasley*, 309 N.C. 616, 621, 308 S.E.2d 288, 291 (1983) (child's "right[] to support, inheritance, and custody" and "mental health, outlook, attitude, and personality" may be directly affected by illegitimation); 1 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 3.02 (2d ed. 1987) (public policy prevents illegitimation "especially where there is no declaration of paternity by the natural father . . . .").

In the present case, there is no evidence another man has either been adjudicated the father of the child or acknowledged his paternity. Accordingly, the marital presumption—that plaintiff is the natural father of the child—has not been rebutted and the trial court erred in finding otherwise. The plaintiff thus has standing under section 50-13.1 to seek visitation rights with the child.

B.

[3] As plaintiff has standing under section 50-13.1(a) to seek visitation rights, we must now determine whether the trial court erred in awarding visitation to plaintiff.

In *Petersen* the Supreme Court held that "in custody disputes between parents and those who are not natural parents . . . 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." *Petersen*, 337 N.C. at 403-404, 445 S.E.2d at 905. Because plaintiff, as presumed father, is the parent of the child, the *Petersen* presumption, by its very definition, is not implicated in the present case. Accordingly, the trial court did not err by applying the "best interests of the child" standard, see *Phelps v. Phelps*, 337 N.C. 344, 354, 446 S.E.2d 17, 23, *reh'g denied*, 337 N.C. 807, 449 S.E.2d 750 (1994), and awarding visitation to the plaintiff.

We summarily reject defendant's contention that visitation between plaintiff and the child violates the First and Fourteenth Amendments to the United States Constitution.

II.

[4] Defendant next alleges the trial court erred by delegating the award of visitation rights to a third-party by relying on psychological reports to support its conclusion that visitation is in the best interests of the child.

At the outset we note the scope of our review does not include the 7 July 1993 order because defendant only assigned error to the 18 August 1994 order. N.C.R. App. P. 10(a).

"[T]he award of visitation rights is a judicial function," which the trial court may not delegate to a third-party. *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985), (citing *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)). In awarding custody the trial court's "order . . . must include findings of fact which support the determination of what is in the best interests of the child." N.C. Gen. Stat. § 50-13.2(a) (1995). This also applies to an order for visitation, which is a subset of custody. N.C. Gen. Stat. § 50-13.2(b); *see Clark v. Clark*, 294 N.C. 554, 575-576, 243 S.E.2d 129, 142 (1978) (explaining visitation is simply "a lesser degree of custody"). In addition, when awarding visitation the trial court must also include findings to support its determination the party awarded visitation is a "fit" person. *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E.2d 26, 29 (1977).

In an order for custody, "where there is competent evidence to support a judge's finding of fact, a judgment supported by such findings will not be disturbed on appeal. [Even so, the] facts found must be adequate for the appellate court to determine that the judgment is substantiated by competent evidence." *Green v. Green*, 54 N.C. App. 571, 573, 284 S.E.2d 171, 173 (1981) (citations omitted).

We conclude, after careful review of the record, that even if the trial court erroneously relied on the findings of the psychological reports, the trial court, nevertheless, made independent findings of fact sufficient to support its conclusions that (1) plaintiff is a fit and proper person for visitation with the child; and (2) visitation is in the best interests of the child.

III.

[5] Defendant further contends the trial court erred by admitting psychological reports into evidence in the absence of their preparers, thereby allegedly denying defendant's right of cross-examination.

The "scope of review on appeal is confined to a consideration of those assignments set out in the record on appeal." N.C.R. App. P. 10(a). Because defendant did not assign error to the 21 June 1993 hearing, our review is limited to the introduction of the psychological reports at the 28 July 1994 hearing.

The failure to object or make a timely objection "to the introduction of evidence is a waiver of the right to do so, and 'its admission, even if incompetent, is not a proper basis for appeal.' " *State v. Lucas*, 302 N.C. 342, 349, 275 S.E.2d 433, 438 (1981) (quoting *State v. Hunter*, 297 N.C. 272, 278-279, 254 S.E.2d 521, 525 (1979); *see* N.C.R. App. P. 10(b)(1).

Although the reports were never formally tendered, the transcript reveals testimony about their contents by both plaintiff and defendant and discussion of the reports by counsel and the trial court. The transcript reveals one objection by defendant concerning the reports. The objection was made after testimony by plaintiff on direct examination discussing the reports and their contents, after the admission of the reports into evidence by plaintiff, and after extensive testimony by the defendant on cross-examination about the contents of the reports. Further, the objection did not go to the admissibility of the reports but rather to defendant's testimony concerning the content of the reports. In the instant action, defendant failed to timely object to the introduction of the reports into evidence and to the testimony concerning their contents. Therefore, the admission of the reports is not assignable as error and we do not address the merits.

IV.

[6] Defendant also contends the trial court erred by ordering defendant to submit to psychological counseling and obtain periodic psychological assessments of the child.

This Court has previously upheld court-ordered psychiatric examinations of parent and child prior to final adjudication of custody, *see Williams v. Williams*, 29 N.C. App. 509, 510, 224 S.E.2d 656, 657, *disc. review denied*, 290 N.C. 667, 228 S.E.2d 458 (1976) (dismissing appeal as interlocutory, Court noting court-ordered psychiatric examination permitted under N.C. Gen. Stat. § 1A-1, Rule 35), and visitation rights, *see Rawls v. Rawls*, 94 N.C. App. 670, 676-677, 381 S.E.2d 179, 183 (1989) (affirming court-ordered consultation with psychiatrist or psychologist as exercise of inherent judicial authority premised upon court's statutory duty to promote interest and welfare of child).

In its 18 August 1994 order the trial court found the "animosity and hostility" of defendant were "potentially harmful and damaging to the child" and ordered defendant to "continue to receive [psychological] counseling . . . . Her counselor . . . is to provide a report to [the trial court after six months from the entry of the order detailing her progress]."

In the present case, assuming custody of the child has been adjudicated by the trial court, and in the absence of any pending motion in the cause, we do not believe court-ordered counseling for defendant or the child is supportable under Rule 35 or in the exercise of the trial court's inherent authority.[1] If custody has not been fully adjudicated, however, it is clear the trial court possesses authority to subject defendant and the child to court-ordered counseling. *Id.* We therefore remand for application of these guidelines to the record before the trial court.

V.

Defendant also contends the trial court erred by denying her Rule 59(a) motion for a new trial or altered judgment from the 18 August 1994 order which granted visitation to plaintiff. Defendant contends the trial court should have granted her a new trial under subsections (8) and (9) of the rule.

Under Rule 59 the trial court may grant a new trial for "(8) [an e]rror in law occurring at the trial and objected to by the [movant]," or "(9) [a]ny other reason heretofore recognized as grounds for new trial." The trial court may also amend its findings of fact and conclusions of law. N.C. Gen. Stat. § 1A-1, rule 59(a) (1990).

In *Eason v. Barber*, 89 N.C. App. 294, 365 S.E.2d 672 (1988), this Court held where the trial court commits an error of law, the movant is entitled to a new trial. However, on appeal, where the trial court's ruling is correct upon any theory of law, the judgment of the lower court stands. *Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 555, 317 S.E.2d 408, 411 (1984).

1. The record before this Court does not reflect adjudication of defendant's counterclaim for custody. It is beyond question, however, that the existence of prospective "animosity or hostility" on the part of either party, after entry of any custody or visitation decree, may subsequently be used to establish a change of circumstances sufficient to justify modification of custody or visitation as necessary to protect the best interests of the child. See *In re Jones*, 62 N.C. App. 103, 106, 302 S.E.2d 259, 261 (1983).

The trial court denied defendant's Rule 59 motion on the grounds that (1) *Petersen* did not apply retroactively; (2) the law was applied correctly; (3) defendant failed to object to plaintiff's standing as the child's non-biological father; and (4) plaintiff was married to defendant at the time of the child's birth and was not a stranger to the child within the meaning of *Petersen*.

Because we have determined *Petersen* applies retroactively, we likewise conclude the trial court erred in denying defendant's Rule 59 motion on that ground. Nevertheless, we affirm the trial court's denial of defendant's Rule 59 motion as we hold the trial court's ruling does not implicate *Petersen*. *See Phelps*, 337 N.C. at 354, 446 S.E.2d at 23.

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit.

Affirmed in part, reversed in part, and remanded.

Judges GREENE and McGEE concur.

DENNIS WILLOUGHBY, PETITIONER v. THE BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM, RESPONDENT

No. COA94-1066

(Filed 6 February 1996)

1. Administrative Law and Procedure § 65 (NCI4th)— state agency's interpretation of statutory term affirmed by trial court—standard of review on appeal

When the issue on appeal is whether the trial court erred in affirming a state agency's interpretation of a statutory term, the Court of Appeals applies *de novo* review.

Am Jur 2d, Administrative Law §§ 614-618.

2. Public Officers and Employees § 59 (NCI4th)— State disability benefits—reduction by amount of SSA benefits—net rather than gross amount offset

Under N.C.G.S. § 135-106(b), the amount by which petitioner's long term State disability benefits should be offset due to petitioner's receipt of Social Security disability benefits should not be the gross amount of those benefits but should instead be the net amount of those benefits after deduction of attorney's fees

and costs associated with obtaining the disability insurance benefits from the Social Security Administration. As used in § 135-106(b), the word "primary" refers to benefits directly received by the disabled person, and petitioner was not "entitled" to the portion of disability benefits statutorily reserved for his attorney.

Am Jur 2d, Civil Service § 48; Social Security and Medicare § 240.

Appeal by petitioner from order entered 25 July 1994 by Judge Jack A. Thompson in Brunswick County Superior Court. Heard in the Court of Appeals 17 October 1995.

Petitioner, Dennis Willoughby, was formerly employed by the State of North Carolina before a disabling illness forced him to retire. Upon becoming disabled, petitioner applied for and began receiving long term disability benefits pursuant to G.S. 135-106(b). Petitioner also sought disability insurance benefits from the Social Security Administration ("SSA") pursuant to 42 U.S.C. § 423.

G.S. 135-106(b) provides that long term disability benefits are subject to a reduction in the amount of primary Social Security Disability Benefits received from the SSA. The SSA denied petitioner's initial application for disability benefits. Petitioner's claim was again denied upon his request for reconsideration by the SSA. Petitioner then requested that his claim be heard before an SSA Administrative Law Judge. In preparing for hearing, petitioner retained attorney Kathleen Shannon Glancy to represent his interests and agreed that attorney Glancy would receive a reasonable attorney's fee of twenty-five percent of any past due benefits in the event that petitioner's claim was approved by the SSA. Petitioner also agreed to reimburse attorney Glancy for any costs incurred while pursuing petitioner's claim.

After the hearing, petitioner's claim was approved. The attorney's fee amounting to one-quarter of petitioner's past due benefits, or $3,445.25, was not paid to petitioner, but was withheld for petitioner's attorney pursuant to 42 U.S.C. § 406. Attorney Glancy then petitioned the SSA on her own behalf seeking disbursement of the $3,445.25 attorney's fee. Attorney Glancy's petition was approved and the SSA paid the funds directly to attorney Glancy. Petitioner then directly reimbursed attorney Glancy $219.00 for costs incurred in pursuing petitioner's claim.

Upon approval of petitioner's claim by the SSA, the Retirement Systems Division of the Department of the State Treasurer, which administers the State Disability Income Plan, calculated the amount by which petitioner's State disability benefits should be offset due to petitioner's receipt of SSA disability benefits. The offset applied to future benefits, but also included the past due benefits awarded to petitioner. With regard to the past due benefits, the Retirement Systems Division calculated the offset based on the gross amount of past due benefits awarded rather than the net amount after the attorney's fees were withheld.

Petitioner requested an administrative hearing pursuant to G.S. 135-106(b), alleging that the Retirement Systems Division erred in calculating the offset. On 20 September 1993, Administrative Law Judge Thomas R. West recommended that the agency find that it erred in calculating the offset applicable to petitioner. On 8 November 1993, however, the agency issued its final decision holding that it had correctly determined petitioner's offset. Petitioner appealed to the Brunswick County Superior Court, which affirmed the final agency decision.

Petitioner appeals.

Kathleen Shannon Glancy, P.A., by Barbara von Euler and James William Snyder, Jr., for petitioner-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for respondent-appellee.

EAGLES, Judge.

Petitioner's appeal is before us pursuant to G.S. 150B-52 and 7A-27. We are cognizant of the decision of this Court in *Dockery v. N.C. Dept. of Human Resources*, 120 N.C. App. 827, 463 S.E.2d 580 (1995), which indicates that this Court might be applying two different standards of review of administrative decisions. In *Dockery*, Arnold, C.J., speaking for this Court, stated that:

> 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).

Dockery, 120 N.C. App. at 829, 463 S.E.2d at 582. It appears that the different approaches referred to in *Dockery* culminated in the filing of two divergent decisions of this Court on the same day. Compare *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) *with Brooks v. Ansco Associates*, 114 N.C. App. 711, 443 S.E.2d 89 (1994).

One line of cases has determined that our scope of review, as well as that of the superior court, is governed by G.S. 150B-51. *See Dockery*, 120 N.C. App. at 829, 463 S.E.2d at 582; *In re Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254, 256 (1995); *Brooks v. Ansco Associates*, 114 N.C. App 711, 716, 443 S.E.2d 89, 91-92 (1994). According to that analysis, the scope of review applied by the superior court and this Court depends upon the question presented.

> 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 524, 463 S.E.2d at 256.

The second line of cases holds that this Court reviews the superior court decision for errors of law just as in any other civil case. *See Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994); *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). According to that analysis, our review "is limited to whether the Superior Court made any errors in law in light of the record as a whole." *Scroggs v. N.C. Crim. Justice Standards Comm.*, 101 N.C. App. 699, 702, 400 S.E.2d 742, 744 (1991), (citing *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988)).

We are also aware that one panel of this Court may not overrule a decision rendered by any previous panel. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). As a result we have carefully reviewed the instant case in accordance with each of the standards referred to and have determined that the outcome of this case is the same under both.

The sole issue here is whether under G.S. 135-106(b) the amount of the offset should be the gross amount of disability insurance benefits under the SSA or the net amount of those benefits after deduction of attorney's fees and costs associated with obtaining the disability insurance benefits from the SSA. G.S. 135-106(b) provides in pertinent part:

> After the commencement of benefits under this section, the benefits payable under the terms of this section shall be equal to sixty-five percent (65%) of 1/12th of the annual base rate of compensation last payable to the participant or beneficiary prior to the beginning of the short-term disability period as may be adjusted for percentage increases as provided under G.S. 135-108, plus sixty-five percent (65%) of 1/12th of the annual longevity payment to which the participant or beneficiary would be eligible, to a maximum of three thousand nine hundred dollars ($3,900) per month *reduced by any primary Social Security disability benefits and by monthly payments for Workers' Compensation to which the participant or beneficiary may be entitled.*

G.S. 135-106(b) (1993) (emphasis added). The trial court affirmed without opinion the final agency decision of the Board of Trustees of the Teachers' and State Employees' Retirement System ("Board") which held that the outcome of this case hinged on the interpretation of the word "primary" in G.S. 135-106(b). Specifically, the Board made the following pertinent conclusions of law:

> 4. "Primary" is defined as "first or highest in rank or importance; first in order of any series, sequence, etc.: first in time, earliest; original, not derived or subordinate, fundamental, basic." The Random House Dictionary of the English Language, 1142 (Unabridged ed. 1966).
>
> 5. Applying the "ordinary meaning test" to the word "primary" in G.S. 135-106(b), the General Assembly must be presumed to have meant by the term "primary Social Security disability benefits" the original, basic benefits, prior to any offset, available to a disabled person.
>
> 6. The fact that the Social Security Act, for the convenience of the applicant and of attorneys, requires that one-quarter of retroactive benefits be withheld from the applicant and paid directly to the attorney as attorney fees does not change the fact that such withheld benefits are still a portion of the total benefits that the

applicant should have received had the disability application been approved initially.

7. By requiring that long-term disability benefits be offset by "any primary Social Security benefits . . . to which the participant or beneficiary may be entitled . . ." the General Assembly has clearly indicated its intent that the offset be in the amount of the gross benefit payable to the Petitioner, prior to any withholding for payment of attorney fees.

Respondent argues that the Board's interpretation of G.S. 135-106(b) was correct and therefore that the trial court did not err in affirming the Board's final decision. We disagree.

[1] An incorrect statutory interpretation constitutes an error of law. When the issue on appeal is whether the trial court erred in affirming a state agency's interpretation of a statutory term, we apply de novo review. *Amanini*, 114 N.C. App. at 678, 443 S.E.2d at 120. *But see Dockery*, 120 N.C. App. at 829, 463 S.E.2d at 582. When a statute is ambiguous, as it is here, the "primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533, 459 S.E.2d 27, 30 (1995) (citing *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 196, 347 S.E.2d 814, 817 (1986)). "To determine this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id.* We must ensure that "the purpose of the legislature in enacting [the statute], sometimes referred to as legislative intent, is accomplished." *Commissioner of Insurance v. Automobile Rate Office*, 293 N.C. 365, 392, 239 S.E.2d 48, 65 (1977).

[2] The statute in question here, G.S. 135-106(b), is a part of the Disability Income Plan of North Carolina. G.S. 135-100(b) states that the purpose of the Disability Income Plan as a whole "is to provide equitable replacement income for eligible teachers and employees who become temporarily or permanently disabled for the performance of their duty prior to retirement . . . ." G.S. 135-100(b) (1987). Accordingly, we recognize that G.S. 135-106(b) is a remedial statute, and we construe the statute liberally so as to best effectuate the stated remedial goal of providing equitable replacement income for disabled employees. *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762 (1989).

We first address respondent's contention that the term "primary" essentially means "gross" with respect to primary Social Security disability benefits that must be offset pursuant to G.S. 135-106(b). Respondent asserts that "primary" should be given its ordinary meaning of "first or highest in rank or importance . . . ." *The Random House Dictionary of the English Language*, 1142 (Unabridged ed. 1966). Given this ordinary meaning, respondent then contends that in the context of G.S. 135-106(b), "primary" benefits are those "original, basic benefits, prior to any withholding . . . ." We disagree.

"Where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or clearly indicated by the context in which they are used." *State v. Koberlein*, 309 N.C. 601, 605, 308 S.E.2d 442, 445 (1983) (citing *Transportation Service v. County of Robeson*, 283 N.C. 494, 502, 196 S.E.2d 770, 775 (1973)). Here, we recognize that the term "primary" has acquired a sort of technical meaning. Nevertheless, we conclude that any technical meaning of "primary" does not conflict with the ordinary dictionary meaning of "primary." We conclude that "primary" as used in G.S. 135-106(b) refers to benefits directly received by the disabled person. *See Redden v. Celebrezze*, 370 F.2d 373, 375 (4th Cir. 1966). This is as opposed to "secondary" benefits, which are derivative benefits that may be paid to a disabled worker's spouse, children, or family under certain circumstances.

This primary/secondary distinction is recognized elsewhere in the law as well. For example, one who signs a loan is primarily or directly liable, while a guarantor on that loan is only secondarily or derivatively liable because the guarantor's secondary liability is contingent on the actions or omissions of the primarily liable party. *E.g.*, *Forsyth Co. Hospital Authority v. Sales*, 82 N.C. App. 265, 266-67, 346 S.E.2d 212, 214, *disc. review denied*, 318 N.C. 415, 349 S.E.2d 594 (1986). The same is true in the disability context. For those beneficiaries who would receive secondary benefits, their receipt of benefits is contingent on the disabled status of the injured worker. *See* 42 U.S.C. § 402(b)-(d) (1988 & Supp. 1995).

Even under a strict "ordinary meaning" analysis, respondent's argument would fail. Certainly, benefits received by the worker who actually suffered the disability would qualify as benefits that are "first or highest in rank or importance." This is especially true in light of the statutory purpose of providing equitable replacement income for dis-

abled employees. *Sutton*, 325 N.C. at 263, 382 S.E.2d at 762. Moreover, the term "primary" would not ordinarily be used unless there was also a "secondary" classification. Respondent does not contend that "secondary" benefits are "net" benefits, nor does such a contention seem plausible. Accordingly, we conclude that "primary," as it is used in G.S. 135-106(b), describes those benefits accruing directly to the disabled worker.

Having concluded that "primary" is not synonymous with "gross," we recognize that the crucial word here is "entitled." As we have noted, G.S. 135-106(b) requires that a claimant's State disability payments be "reduced by any primary Social Security disability benefits . . . to which the participant or beneficiary may be entitled." G.S. 135-106(b) (1993). Here again, we must determine whether the term has acquired a technical meaning. If it has not, we must give the term its ordinary meaning as it comports with the context of the statute. *Koberlein*, 309 N.C. at 605, 308 S.E.2d at 445.

In the Workers' Compensation context, the term "entitle" has been construed in accordance with its ordinary meaning. *Blackmon v. N.C. Dep't of Correction*, 118 N.C. App. 666, 670, 457 S.E.2d 306, 309 (1995). The *Blackmon* court defined the ordinary meaning of "entitle" as to " 'qualify (one) for something' or to 'furnish with proper grounds for seeking or claiming something.' " *Id.* (quoting *Webster's Third New International Dictionary* 758 (1966)). We conclude that "entitle" has acquired no technical meaning in G.S. 135-106(b), and that "entitle" accordingly must be given its ordinary meaning here as well.

Applying this ordinary definition, it is clear that upon approval of his application by the SSA, petitioner became entitled to receipt of at least a portion of the Social Security disability benefits in question. The question remains, however, as to whether petitioner must be deemed entitled to the full amount of disability benefits despite the fact that petitioner had no right to possess the twenty-five percent portion of his benefits that was statutorily reserved for petitioner's attorney. We conclude that petitioner was not "entitled" to the portion of disability benefits statutorily reserved for petitioner's attorney.

One who is "entitled" has a right superior to all others. For example, while third parties may assert claims against petitioner for SSA funds to which petitioner is entitled, so long as that third party claim must be made against petitioner in order to recover, petitioner must

still be deemed entitled to the funds. The distinction is one of priority. In other words, where a third party claimant's right to a portion of petitioner's benefits is contingent upon petitioner first possessing the benefits in question, petitioner remains entitled to the benefits. Where a third party claimant can bypass petitioner in the hierarchy, however, and successfully assert its claim directly with the SSA, the third party claimant has a right to that portion of the disability benefits superior to petitioner's right and therefore petitioner is not "entitled" to that portion within the meaning of G.S. 135-106(b). Accordingly, since petitioner's attorney here has a right superior as against petitioner to the attorney's fee and since petitioner's attorney must claim her fee directly from the SSA, petitioner is not entitled within the meaning of G.S. 135-106(b) to the amount statutorily reserved for the attorney's fee.

Note that we distinguish between attorney's fees and costs of litigation. 42 U.S.C. § 406 does not provide for costs to be withheld and paid directly to petitioner's attorney. Petitioner must pay those costs, $219.00 in this case, out of petitioner's own funds regardless of source. Petitioner's attorney's claim is against petitioner for those costs. Accordingly, petitioner is deemed entitled under G.S. 135-106(b) to the $219.00 he must ultimately expend for costs in this case.

This construction of G.S. 135-106(b) is consistent with the statutory intent of providing equitable replacement income to disabled North Carolina teachers and state employees. For the reasons stated, we reverse and remand for entry of a decision consistent with this opinion.

Reversed and remanded.

Judges WYNN and SMITH concur.

LOU RITA HICKS, EMPLOYEE-PLAINTIFF v. LEVITON MANUFACTURING COMPANY, EMPLOYER, SELF-INSURED (CRAWFORD & COMPANY), DEFENDANT

No. COA94-1228

(Filed 6 February 1996)

Workers' Compensation §§ 199, 247 (NCI4th)— permanent lung damage due to silicosis—benefits under two statutory provisions—right of employee to choose more favorable compensation

A claimant who has sustained permanent lung damage due to occupational silicosis and has received benefits pursuant to N.C.G.S. § 97-61.5, but is not disabled so as to be eligible for additional benefits under N.C.G.S. § 97-61.6, is entitled to a determination by the Industrial Commission as to whether she is entitled to an award for permanent damages to her lungs pursuant to N.C.G.S. § 97-31(24), and to select the more favorable award; however, if the claimant selects compensation under N.C.G.S. 97-31(24), the employer shall receive a credit on any amount previously paid the employee pursuant to N.C.G.S. § 97-61.5.

Am Jur 2d, Workers' Compensation §§ 326, 400-405.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 27 June 1994. Heard in the Court of Appeals 30 August 1995.

Cox, Gage and Sasser, by Robert H. Gage, for plaintiff-appellant.

Patrick, Harper & Dixon, by Gary F. Young, for defendant-appellee.

MARTIN, John C., Judge.

Plaintiff began working for defendant-employer, a manufacturer of electrical parts, in 1972. For nearly fifteen years, she worked in ceramics where she was exposed to silica dust. As a result, she contracted pulmonary silicosis. On 5 August 1986, plaintiff had a pulmonary examination and was rated as having a Class I impairment. On 16 August 1986, plaintiff was transferred from her ceramics job to a position sorting and inspecting plastics, where she was paid the same wages and was not exposed to silica dust. Plaintiff underwent a second pulmonary examination on 3 February 1988 in which she was

diagnosed with probable simple pulmonary silicosis, but showed no significant impairment in lung function.

In June 1988, the parties concluded a Form 21 agreement providing for payment of 104 weeks of compensation, totalling $19,524.96, pursuant to G.S. § 97-61.5. As required by statute, the Commission ordered that plaintiff undergo two further pulmonary examinations. At her 13 July 1989 examination, plaintiff was found to still have a Class I impairment; however, her 22 May 1990 examination revealed a "progressive massive fibrosis from silicosis" and "a Class II impairment with a 10-20% impairment of the whole person," with total lung capacity, residual volume and functional residual capacity all reduced.

In the summer of 1990, plaintiff claimed to have been again exposed to ceramic dust. She alleged that her employer cut holes and installed fans in her work area which drew ceramic dust into the area, covering her glasses and causing her to cough. After plaintiff complained, the fans were removed and the holes were covered. Plaintiff subsequently developed pleurisy in her lungs. In early 1991, plaintiff saw her own pulmonary specialist who was of the opinion that plaintiff had suffered a 10% disability of the whole person due to lung disease. Plaintiff, however, has been able to continue her work as a plastics sorter.

The deputy commissioner found that plaintiff had a compensable occupational lung disease and awarded her continuing medical expenses and $20,000.00 for loss of an organ under G.S. § 97-31(24). On appeal to the Full Commission, the matter was heard by a commissioner and two deputy commissioners. In an Opinion and Award, the Commission concluded that plaintiff was entitled to "reasonable medical treatment for her lung disease" but was not entitled to additional compensation under G.S. § 97-31(24) because "compensation under such section 'shall be in lieu of all other compensation . . .' [and] [p]laintiff has already been paid compensation under N.C.G.S. 97-61.5, which compensation is paid for damage to 'bodily parts' and not for wage loss." In its award the Commission denied additional compensation, allowed an expert witness fee, but neglected to make any provision for plaintiff's continuing medical treatment. Plaintiff appeals.

The primary issue presented in this case is whether an employee who has sustained permanent lung damage due to occupational sili-

cosis, but who has sustained neither actual incapacity to work nor loss of wages by reason thereof, may recover benefits under G.S. § 97-31(24) for such damage to her lungs after having accepted benefits under G.S. § 97-61.5. For the reasons stated below, we hold that the acceptance of benefits under G.S. § 97-61.5 does not necessarily preclude an award under G.S. § 97-31(24) and we therefore reverse the Commission's decision and remand this case to the Commission for further consideration.

G.S. § 97-60 provides for the compulsory examination of employees engaged in certain occupations which expose them to the hazards of asbestosis or silicosis. When an employee and the Industrial Commission are advised that the employee may have contracted either disease, G.S. §§ 97-61.1 *et seq.* establish a procedure for a series of examinations and reports by an advisory medical committee and an initial hearing by the Commission after the first such report. G.S. § 97-61.5(b) provides that if the Commission determines, at the first hearing, that a worker has asbestosis or silicosis, the Commission:

> shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis . . . provided, that if the employee is removed from the industry the employer shall pay or cause to be paid as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six and two thirds percent (66 2/3%) of his average weekly wages before removal from the industry, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 or less than thirty dollars ($30.00) a week, which compensation shall continue for a period of 104 weeks. Payments made under this subsection shall be credited on the amounts payable under any final award in the cause entered under G.S. 97-61.6.

After a third examination, G.S. § 97-61.6 provides for a final determination of additional compensation, if any, due the employee for total or partial incapacity for work or death resulting from silicosis. However, the statute does not provide for additional compensation in situations such as the present case where an employee's condition has worsened, but the employee has suffered no loss in wages.

In *Roberts v. Southeastern Magnesia and Asbestos Co.*, 61 N.C. App. 706, 710, 301 S.E.2d 742, 744-45 (1983), this Court stated:

> We recognize that the intent of the Legislature in providing for an automatic 104 installment payments was to encourage employees to remove themselves from hazardous exposure to asbestos and to provide for employee rehabilitation, *Honeycutt v. Carolina Asbestos Co.*, 235 N.C. 471, 70 S.E.2d 426 (1952). We also recognize that G.S. 97-61.5(b) which authorizes this award, has as an additional purpose the compensation of employees for the incurable nature of the disease of asbestosis. *See Honeycutt v. Carolina Asbestos Co., supra; Pitman v. L.M. Carpenter & Associates*, 247 N.C. 63, 100 S.E.2d 231 (1957). (Emphasis added.)

Thus, this Court has previously concluded that the Legislature intended compensation under G.S. § 97-61.5(b) as compensation for permanent damage to the employee's lungs due to asbestosis as well as for switching trades. Because asbestosis and silicosis are treated identically under the statute, this statement logically applies to silicosis as well.

G.S. § 97-31 provides for payment of compensation for scheduled injuries specified in the twenty-four subdivisions of the section. The statute provides that payment thereunder "shall be in lieu of all other compensation." Subdivision (24), under which plaintiff advances her claim in this case, provides for compensation for "loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section." Awards under subdivision (24) are equitable in nature and the amount of such an award is within the discretion of the Commission, subject to the statutory maximum of $20,000.00 for the loss of, or permanent injury to, an organ or body part. *Little v. Penn Ventilator Co.*, 317 N.C. 206, 345 S.E.2d 204 (1986); *Grant v. Burlington Industries*, 77 N.C. App. 241, 335 S.E.2d 327 (1985). Compensation is payable for a loss scheduled under G.S. § 97-31 "even if a claimant does not demonstrate loss of wage-earning capacity." *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52 (1985). Moreover, "loss as used in G.S. 97-31(24) includes loss of use," and an award for partial lung function due to occupational disease has been held to fall within the scope of subsection (24). *Id.* at 577, 336 S.E.2d at 53.

The Commission concluded that because plaintiff had accepted compensation for 104 weeks pursuant to G.S. § 97-61.5, the "in lieu of all other compensation" clause contained in G.S. § 97-31 precluded an award under subsection 24. It is true that the "in lieu of" clause of G.S.

§ 97-31 is intended to "prevent double recovery of benefits under different sections of the Workers' Compensation Act, but it does not provide for an exclusive remedy." *Mitchell v. Fieldcrest Mills, Inc.*, 84 N.C. App. 661, 662, 353 S.E.2d 638, 639 (1987), (citing *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986)). To allow plaintiff to recover full benefits under both G.S. § 97-61.5 and § 97-31(24) would undeniably permit such a double recovery and would run afoul of the "in lieu of" clause.

However, if plaintiff had contracted an occupational lung disease other than asbestosis or silicosis that resulted in partial loss of her lungs but did not cause a loss of her wage-earning ability, she would be eligible for compensation under G.S. § 97-31(24). *See Harrell*, 314 N.C. 566, 336 S.E.2d 47. Significantly, the amount of compensation plaintiff could receive under G.S. § 97-31(24) is potentially greater than the 104 weeks of compensation provided for by G.S. § 97-61.5.

Our Supreme Court has instructed that the Industrial Commission and the courts are to construe the Workers' Compensation Act liberally in favor of the injured worker, and " 'that the benefits thereof shall not be denied upon technical, narrow, and strict interpretation,' " *Cates v. Construction Co.*, 267 N.C. 560, 563, 148 S.E.2d 604, 607 (1966) (citation omitted). Moreover, "[t]he purpose of [§ 97-31] was to expand, not restrict, the employee's remedies." *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 99, 348 S.E.2d 336, 342 (1986). Consistent with these principles, the Supreme Court has also held that a claimant entitled to benefits for either incapacity to work or for a scheduled injury under G.S. § 97-31 may select the more favorable remedy. *See Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E.2d 674 (1987); *Whitley*, 318 N.C. 89, 348 S.E.2d 336; 1C Arthur Larson, *The Law of Workmen's Compensation* § 58.25 (1995).

We believe these principles to be applicable here as well. Plaintiff has sustained permanent lung damage due to occupational silicosis, but such damage has resulted in neither actual incapacity to work nor loss of wages so as to entitle her to the additional benefits recoverable pursuant to G.S. § 97-61.6, after the third examination required by G.S. § 97-61.4. Consistent with the rationale of *Gupton* and *Whitley*, we hold that a claimant who has received benefits pursuant to G.S. § 97-61.5, but is not disabled so as to be eligible for additional benefits under G.S. § 97-61.6, is entitled to a determination by the Commission as to whether she is entitled to an award for permanent

damage to her lungs pursuant to G.S. § 97-31(24), and to select the more favorable award. If the claimant selects compensation under G.S. § 97-31(24), the employer shall receive a credit on any amount previously paid the employee pursuant to G.S. § 97-61.5. Further, the remaining provisions of G.S. § 97-61.5 providing for loss of other benefits "if the employee thereafter engages in any occupation which exposes him to the hazards of asbestosis or silicosis without having obtained the written approval of the Industrial Commission as provided in G.S. 97-61.7" must still apply.

Under any other interpretation, a plaintiff whose lung impairment is due to silicosis or asbestosis, rather than another occupational lung disease, would be denied access to potential compensation provided by G.S. § 97-31(24), a result which appears to us to be patently unfair and possibly constitutionally infirm. *See, e.g., Walters v. Blair*, 120 N.C. App. 398, 462 S.E.2d 232 (1995) (holding a workers' compensation statute unconstitutional because it treats persons with asbestosis differently than persons with other occupational diseases and does so without any valid reason).

By a separate assignment of error, plaintiff contends that the Commission, in considering an award pursuant to G.S. § 97-31(24), should treat each of her lungs as a separate organ. Since the Commission concluded that it could not make an award under G.S. § 97-31(24), it did not consider plaintiff's contention and did not decide the question. Plaintiff may advance her contentions to the Commission upon remand, and we will not address her argument in this opinion because it is our function to review, rather than anticipate, decisions made by the Commission.

Plaintiff also contends the Commission erred when it failed to determine the date of her last exposure to silica dust in her employment. "It is the duty and responsibility of the full Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). Section 97-61.6 of the General Statutes provides for compensation should death result from asbestosis or silicosis or from a secondary infection or diseases developing from asbestosis or silicosis within certain time limits of the date of the employee's last exposure. Plaintiff contends her date of last exposure was in the summer of 1990; the Commission, however, made no determination as to the date of plaintiff's last exposure

to silica dust. Upon remand, the Commission is directed to determine the date of plaintiff's last exposure to silica dust or silicates.

Plaintiff also contends the Commission erred by failing to order, in its award, that defendant provide for her future medical treatment, after finding and concluding that plaintiff will require future medical treatment to provide relief from her lung disease. G.S. § 97-59 provides, in pertinent part:

> Medical compensation shall be paid by the employer in cases in which awards are made for disability or damage to organs as a result of an occupational disease after bills for same have been approved by the Industrial Commission.

N.C. Gen. Stat. § 97-59 (1991) (emphasis added). Since an award has been made in this case, defendant is required by the statute to pay plaintiff's medical bills upon approval by the Commission; it is unnecessary for the Commission to include such an order in its Award.

Finally, in view of our decision to remand this case to the Commission for further consideration of plaintiff's claim for benefits under G.S. § 97-31(24) and for a finding as to the date of her last exposure to silica dust, we deem it unnecessary to address the plaintiff's final assignment of error relating to the composition of the panel of the Commission which reviewed the award of the deputy commissioner.

In summary, we remand this case to the Commission for its determination of whether plaintiff is entitled to an award of compensation, pursuant to G.S. § 97-31(24), for permanent injury to her lungs due to her occupational silicosis and, if so, the amount thereof. Plaintiff will then be entitled to elect between any such award and benefits previously awarded pursuant to G.S. § 97-61.5, subject to any credits to which her employer may be entitled. The Commission is also directed, upon remand, to determine the date of plaintiff's last injurious exposure to silica dust.

Reversed and remanded.

Judges GREENE and WYNN concur.

PATRICIA GRAHAM, PLAINTIFF-APPELLANT v. RONALD ROGERS AND HARDEE'S FOOD SYSTEMS, INC., DEFENDANTS-APPELLEES

No. 9418SC400

(Filed 6 February 1996)

1. **Judgments § 38 (NCI4th)— verbal order entered after hearing—subsequent written order not entered out of district and term**

When a trial court, after a hearing, then and there enters a verbal order into the record in open court, a later written version of such order which merely reduces the prior verbal order to writing is not an order improperly entered out of district and out of term.

Am Jur 2d, Judgments §§ 79-82.

2. **Discovery and Depositions § 59 (NCI4th)— order to compel discovery—attorney's fees properly awarded**

The trial court did not err in awarding defendants $1,000 in attorney's fees incurred in obtaining an order to compel discovery where plaintiff did not argue that her opposition to the motion to compel was substantially justified, plaintiff failed to show that an award of attorney's fees was unjust under the circumstances, and the amount was not excessive in light of the number of hours, travel expenses, and travel time spent by the attorneys in pursuing the motion to compel.

Am Jur 2d, Depositions and Discovery §§ 369 et seq.

Taxation of costs and expenses in proceedings for discovery or inspection. 76 ALR2d 953.

3. **Appeal and Error § 291 (NCI4th)— denial of petition for certiorari**

In an appeal from an order awarding defendant attorney's fees incurred in obtaining an order to compel discovery, the Court of Appeals denied plaintiff's petition for a writ of certiorari seeking to have the Court consider that plaintiff's counsel inadvertently neglected to assign as error defendant's alleged stonewalling of discovery as a circumstance making an award of attorney's fees unjust since plaintiff failed to show that the right to appeal had been lost by failure to take timely action or that no right to appeal from an interlocutory order existed; no challenge

to the trial court's settlement of the record on appeal was involved; and the petition did not concern an assignment of error but was simply an attempt by plaintiff to add additional facts to the record. N.C. R. App. P. 21(a)(1).

Am Jur 2d, Certiorari §§ 5-14 .

Appeal by plaintiff from order filed 19 November 1993 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 21 March 1995.

Joseph Edward Downs and Jeffrey S. Lisson for plaintiff-appellant.

Blakeney & Alexander, by W.T. Cranfill, Jr., and Jay L. Grytdahl, for defendant-appellee Hardee's Food Systems, Inc.

McGEE, Judge.

Plaintiff appeals from an order granting defendant Hardee's Food Systems, Inc.'s (Hardee's) motion to compel discovery and ordering attorney's fees of $1,000 be paid by plaintiff to the defendants. We find no error and affirm the order.

Plaintiff first argues the trial court committed reversible error by entering the order out of district and out of term without the consent of the parties. This argument is without merit.

[1] The hearing on Hardee's motion to compel discovery occurred on 11 June 1993, with the written order filed 15 November 1993, which plaintiff argues makes the order entered out of district, out of session, and out of term. However, the transcript clearly shows the trial court made findings of fact and conclusions of law and entered its order in open court at the close of the 11 June hearing. The hearing was held within district and in term. When a trial court, after a hearing, then and there enters a verbal order into the record in open court, a later written version of such order which merely reduces the prior verbal order to writing is not an order improperly entered out of district and out of term. *See State v. Smith*, 320 N.C. 404, 415-16, 358 S.E.2d 329, 335 (1987); *State v. Horner*, 310 N.C. 274, 278-79, 311 S.E.2d 281, 285 (1984). *See also Turner v. Hatchett*, 104 N.C. App. 487, 489, 409 S.E.2d 747, 748 (1991) ("We are aware of the case law that allows written orders to be entered out of session in those situations where the trial court made an oral ruling in open court and in session.") Therefore, the trial court's order is valid.

[2] Plaintiff next argues the trial court committed reversible error and abused its discretion in awarding defendants $1,000 in attorney's fees. We disagree.

On 2 March 1993, defendant Hardee's served plaintiff with its First Set of Interrogatories and First Request for Production of Documents. After plaintiff failed to respond to the requests, Hardee's sent plaintiff's counsel a reminder letter dated 14 April 1993. The letter advised plaintiff the discovery requests were due 5 April 1993 and if plaintiff failed to promptly respond, Hardee's would seek an order compelling discovery under N.C.R. Civ. P. 37(a). Plaintiff still did not respond and Hardee's served plaintiff with a Motion To Compel Discovery on 6 May 1993. Plaintiff faxed unverified answers to defendants' interrogatories and some of the documents requested on 30 May 1993, with the defendants receiving the hard copies on 3 June 1993. At the time of the hearing, plaintiff had still not produced the medical records nor back tax records requested by the defendants.

When a party fails to answer interrogatories or produce documents in response to a proper request for discovery under the rules of civil procedure, the proponent of the discovery request may move for an order compelling an answer or production of documents. N.C.R. Civ. P. 37(a)(2). As plaintiff's counsel admitted at the hearing, plaintiff had not properly complied with the discovery requests. The transcript shows the following remarks by plaintiff's counsel: "First off, Your Honor, no doubt we delayed in responding to the Defendants' discovery;" and later, "Judge, I'm not arguing with the Motion to Compel, and as I stated at the beginning, they are entitled to an order compelling discovery." The trial court correctly granted Hardee's motion to compel.

Once a motion to compel is granted, the court shall require the party or deponent whose conduct necessitated the motion to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that party's opposition to the motion was substantially justified or if circumstances make an award of expenses unjust. N.C.R. Civ. P. 37(a)(4). Plaintiff does not argue that her opposition to the motion to compel was substantially justified. Therefore, defendants were entitled to attorney's fees unless plaintiff proved such an award was unjust under the circumstances.

Plaintiff argues the award of attorney's fees was unjust because plaintiff "substantially complied" with the discovery requests prior to

the hearing. There is no merit to this argument. Although plaintiff had tendered answers to Hardee's interrogatories prior to the hearing, she had not produced the requested medical records. Plaintiff's counsel expressed there had been a problem in getting the medical records from one of plaintiff's seven doctors, but he gave no explanation for the delay in producing the other records. As he stated at the hearing: "The question is whether we responded sufficiently to the Request for Production of Documents. Again, no doubt we have not." The award of attorney's fees is not unjust under these circumstances. Further, even if plaintiff "substantially complied" with the discovery request, she would not avoid operation of the statute. For purposes of Rule 37(a), "an evasive or incomplete answer is to be treated as a failure to answer." N.C.R. Civ. P. 37(a)(3).

In her brief, plaintiff presents several other arguments alleging circumstances making an award of attorney's fees unjust. However, we need not decide whether these circumstances are sufficient to avoid paying the mandatory fees. Plaintiff presented no evidence of these circumstances at the hearing and raised them for the first time in letters addressed to the trial judge after the decision had been rendered. The transcript of the hearing contains the following exchanges between the court and plaintiff's counsel:

THE COURT: "Why didn't you comply with the discovery like you were supposed to?"

MR. LISSON: "Your Honor, at the time we received and responded—I can't tell the Court right now why that wasn't complied with in time."

and:

THE COURT: "Why are we having this hearing? When they sent you a notice that we're going to have a hearing to compel discovery, did it ever occur to you to call up and say, Look, I know you're entitled to discovery. . . . Why didn't you just call them up and say, Look, let's don't go up there [for the motions hearing], and give me ten more days. Did it ever occur to you or to Mr. Downs that you could do that?"

MR. LISSON: "It did, Your Honor, and I can't answer you why it wasn't done."

The only possible suggestion presented at the hearing of special circumstances justifying delay came in response to defendants' counsels' concern that the plaintiff was in Tennessee and was not serious about pursuing the lawsuit. Plaintiff's counsel stated the plaintiff was in North Carolina, but had been in Tennessee for a family emergency. No further evidence or explanation was given. While plaintiff's counsel claims in the brief that defendants' counsel were notified by phone of plaintiff's alleged reason for delay, no evidence is presented in the record that the defendants were ever notified of any reason or received any explanation prior to the hearing for the failure to timely comply with discovery requests.

[3] In an attempt to show "other circumstances" she claims makes an award of attorney's fees unjust, plaintiff filed a petition for a writ of certiorari seeking to have this Court "consider . . . that [plaintiff's counsel] inadvertently neglected to assign as Error the fact that Hardee's stonewalled discovery by providing totally black and illegible copies of documents in its purported responses to Plaintiff's Requests to Produce in some instances, and flatly refusing to respond to discovery requests in other instances." Although the comment to Rule 37 suggests such circumstances could make an award unjust, we must refuse to grant plaintiff's petition. Under the Rules of Appellate Procedure, a writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where the right to appeal has been lost by failure to take timely action or where no right to appeal from an interlocutory order exists. N.C.R. App. P. 21(a)(1). Additionally, our Supreme Court has said: "[A] challenge to the trial court's settlement [of the record on appeal] may be preserved by an application for certiorari made incidentally with the perfection of the appeal upon what record there is." *Craver v. Craver*, 298 N.C. 231, 237 n.6, 258 S.E.2d 357, 361 (1979). Plaintiff's request fails to meet these criteria.

Further, this request does not concern an assignment of error but is simply an impermissible attempt by plaintiff to add additional facts to the record. These facts were not presented for consideration at the hearing on the motion to compel, are not part of the official record, and may not be considered by this Court. N.C.R. App. P. (9)a. Also, it appears these acts by Hardee's occurred after the order compelling discovery in this case had been entered in open court and could not have affected the order.

Plaintiff also sought a writ of certiorari in the event this appeal was interlocutory. Since the notice of appeal from the order granting the motion to compel and awarding attorney's fees was not filed until after summary judgment had been entered in the underlying case, this appeal is not interlocutory.

A party wishing to avoid sanctions for non-compliance with discovery requests has the burden of proving the non-compliance was justified. *Hayes v. Browne*, 76 N.C. App. 98, 101, 331 S.E.2d 763, 764-65 (1985), *disc. review denied*, 315 N.C. 587, 341 S.E.2d 25 (1986). Plaintiff failed to meet this burden, and the trial court properly awarded attorney's fees to defendants.

Finally, plaintiff argues the trial court erred by awarding an excessive amount for attorney's fees. A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion. *See, e.g., Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239, (1992), *affirmed*, 334 N.C. 303, 432 S.E.2d 339 (1993). Here, we find no abuse of discretion.

Defendant submitted a "Statement of Fees and Costs" alleging that over forty hours of time was spent by three attorneys preparing the motion to compel and participating in the hearing. Even if we accept plaintiff's argument that this includes time not properly spent on this motion, there remains approximately 10 hours of time spent by attorney Jay Grytdahl and approximately 4 hours spent by attorney Brent Patterson that are directly related to the motion to compel and the 11 June 1993 hearing. Further, Grytdahl incurred $70.28 in travel expenses to attend the hearing. Since Patterson bills at $125.00 per hour and Grytdahl bills at the rate of $150.00 per hour, we cannot say that an award of $1000 for 14 hours to prepare the motion, travel to the hearing from Charlotte to Greensboro and return, and to argue the motion is excessive.

Plaintiff also complains the award was excessive because the trial court granted attorney's fees for defendant Rogers, who did not file the motion to compel. However, Roger's attorney also attended the hearing and the trial court ordered both defendants' attorney's to share the $1,000 award for fees. Since we have already determined the award was not excessive based upon the time spent by Hardee's attorneys preparing and arguing the motion to compel, we fail to see how plaintiff is prejudiced by Hardee's having to share the award with Rogers. We find no merit to this argument.

We also find no merit to plaintiff's argument the trial court's award of $1000 impermissibly punished plaintiff for matters outside of the motion to compel. A review of the order shows the award was only for "preparation of this Motion and hearing of said Motion."

For the reasons stated above, we find the trial court did not err or abuse its discretion in granting Hardee's' Motion to Compel and awarding $1000 in attorney's fees. Because we have chosen to address the merits of plaintiff's appeal, and because of our holding in defendants' favor, we need not address the merits of Hardee's' motion to dismiss and the motion is denied. Plaintiff's petition for a writ of certiorari is also denied. The order of the trial court is affirmed.

Affirmed.

Judges JOHNSON and COZORT concur.

LESLIE B. HEDRICK, AND BETSY B. MARLOWE, CO-EXECUTORS FOR THE ESTATES OF LESLIE L. BALDWIN AND GERTRUDE BALDWIN, PLAINTIFFS V. HAROLD RAINS, COLUMBUS COUNTY SHERIFF, AND COLUMBUS COUNTY, DEFENDANTS

No. COA94-1387

(Filed 6 February 1996)

1. Appeal and Error § 103 (NCI4th)— governmental immunity claimed—immediate appeal allowed

Although a party generally has no right to immediate appellate review of an interlocutory order, an order denying defendant's motion for judgment on the pleadings grounded on the defenses of governmental immunity and the public duty doctrine are immediately reviewable as affecting a substantial right.

Am Jur 2d, Appellate Review § 162.

Appealability of order overruling motion for judgment on pleadings. 14 ALR2d 460.

2. Sheriffs, Police, and Other Law Enforcement Officers § 20 (NCI4th)— wrongful death action against sheriff—public duty doctrine—no pleading of special relationship

In plaintiffs' wrongful death action against defendant sheriff who allegedly negligently released a named person from custody who subsequently murdered decedents, the trial court erred in

denying defendant's motion for judgment on the pleadings, since the pleadings revealed no special relationship between defendant and decedents which imposed a duty on defendant to control a third person so as to prevent him from harming others, as there was no allegation that the third person possessed dangerous or violent propensities, that defendant knew of such propensities, or that there was any special relationship between defendant and decedents whereby defendant promised protection to decedents.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90, 94.

Immunity of public officer from liability for injuries caused by negligently released individual. 5 ALR4th 773.

Appeal by defendant Harold Rains from order entered 23 August 1994 by Judge Knox V. Jenkins in Columbus County Superior Court. Heard in the Court of Appeals 19 September 1995.

James and Jones, P.L.L.C., by Randolph M. James and Howard C. Jones, II, for plaintiff-appellees.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Allan R. Gitter and Ursula M. Henninger; and Hill & High, by James E. Hill, Jr., for defendant-appellant.

MARTIN, John C., Judge.

Leslie and Gertrude Baldwin were murdered on 30 November 1991 by Norfolk Junior Best. Plaintiffs, co-executors of their estates, brought this wrongful death action against Columbus County and its elected sheriff, Harold Rains, alleging that their negligence proximately caused the deaths of the decedents. Specifically, plaintiffs alleged that Sheriff Rains and/or his deputies arrested Norfolk Junior Best for a probation or parole violation prior to 30 November 1991 and then negligently and unlawfully released him from custody, enabling Best to come into contact with the decedents and murder them. In a separate claim for relief, plaintiffs alleged that defendant Rains was grossly negligent, and, in an amended complaint, plaintiffs alleged that defendant Rains had released Best in violation of various statutory provisions. In the amended complaint, plaintiffs also alleged that defendant Rains had secured a sheriff's bond from an unnamed surety and that they were entitled to recover upon the bond.

Defendants answered, denying plaintiff's allegations of negligence and asserting, as affirmative defenses, *inter alia*, governmen-

tal immunity and North Carolina's public duty doctrine. Defendants also moved, pursuant to G.S. § 1A-1, Rule 12(c), for judgment on the pleadings. The trial court granted the motion with respect to the claims asserted against Columbus County, but denied the motion with respect to the claims asserted against defendant Rains. Defendant Rains gave notice of appeal.

I.

[1] Plaintiffs have moved to dismiss defendant Rains' appeal as interlocutory. Although a party generally has no right to immediate appellate review of an interlocutory order, we have held that orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right. *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993); *Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142, *disc. review and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993); *Corum v. University of North Carolina*, 97 N.C. App. 527, 389 S.E.2d 596 (1990), *affirmed in part, reversed in part on other grounds*, 330 N.C. 761, 413 S.E.2d 276, *U.S. cert. denied*, 121 L.Ed.2d 431 (1992). The substantial right exception has been specifically applied to the assertion of the public duty doctrine as an affirmative defense. *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 442 S.E.2d 75, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994). Plaintiffs' motion to dismiss the appeal as interlocutory will be denied.

II.

[2] Defendant Rains' sole assignment of error is directed to the denial of his motion for judgment on the pleadings. The function of a motion for judgment on the pleadings pursuant to G.S. § 1A-1, Rule 12(c) "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). A party who moves for judgment on the pleadings admits two things: (1) the truth of all well-pleaded facts in the non-movant's pleading, together with all permissible inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the non-movant's pleading. *Garrett v. Winfree*, 120 N.C. App. 689, 463 S.E.2d 411 (1995). Because judgments on the pleadings are summary proceedings and are final judgments, they are not favored in the law, and the movant is held to a strict standard to show that there is no material

issue of fact and that he is entitled to judgment as a matter of law. *Ragsdale*, 286 N.C. 130, 209 S.E.2d 494.

Plaintiffs base their claims against defendant Rains in negligence. Actionable negligence arises when there is a violation of some legal duty owed by a defendant to a plaintiff, *Mattingly v. R.R.*, 253 N.C. 746, 117 S.E.2d 844 (1961), and in the absence of any such duty owed the injured party by the defendant, there can be no liability. *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988).

In general, there is no duty to prevent harm to another by the conduct of a third person. *King v. Durham County Mental Health Authority*, 113 N.C. App. 341, 439 S.E.2d 771, *disc. review denied*, 336 N.C. 316, 445 S.E.2d 396 (1994), (citing *Prosser and Keeton on the Law of Torts* 56 (5th ed. 1984)). An exception to the general rule exists where there is a special relationship between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, *Id.*, (citing *Restatement (Second) of Torts* § 315(a) (1965)); or a special relationship between the defendant and the injured party which gives the injured party a right to protection. *Restatement (Second) of Torts*, § 315(b) (1965).

Plaintiffs contend a special relationship existed between defendant Rains and Norfolk Best which imposed a duty on defendant Rains to control Best so as to prevent him from harming others, including decedents. The existence of such a relationship is recognized by the *Restatement (Second) of Torts*, § 319 (1965), which provides:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

However, knowledge of the person's propensity for violence is required to impose liability under the foregoing special relationship. *King*, 113 N.C. App. 341, 439 S.E.2d 771. In this case, the complaint alleges no facts from which it may be inferred that Norfolk Best possessed dangerous or violent propensities, or that, if he did, defendant Rains knew or had any reason to know of those propensities. Thus, no issue of fact arises from the pleadings with respect to any duty owed by defendant Rains, under the special relationship exception contained in §§ 315(a) and 319 of the *Restatement (Second) of Torts*,

to control Best to prevent him from harming others. *See Marshall v. Winston*, 389 S.E.2d 902 (Va. 1990).

Likewise, the pleadings do not disclose the existence of the special relationship, a duty of protection owed by defendant Rains specifically to decedents, recognized in § 315(b) of the *Restatement (Second) of Torts*. In negligence claims against public officials, particularly those engaged in law enforcement, our courts have drawn a distinction between the duties owed to the general public and those owed to specific individuals. *See Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897, *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992); *Clark*, 114 N.C. App. 400, 442 S.E.2d 75; *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991); *Martin v. Mondie*, 94 N.C. App. 750, 381 S.E.2d 481 (1989). As a general rule of common law, specifically adopted in North Carolina, known as the "public duty doctrine", law enforcement officials and agencies are deemed to act for the benefit of the general public rather than specific individuals. *Braswell*, 330 N.C. 363, 410 S.E.2d 897. Thus, ordinarily, no duty is owed, and there can be no liability to specific individuals. *Id.*

As adopted in this State, the public duty doctrine is subject to two generally recognized exceptions: "[f]irst, where there is a special relationship between the injured party and the [agency], and second, where the '[agency] . . . creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise is causally related to the injury suffered.' " *Sinning v. Clark*, 119 N.C. App. 515, 519, 459 S.E.2d 71, 74, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995) (citations omitted). However, as plaintiffs candidly concede in their brief, they failed to allege any facts which, taken as true, would impose liability under either exception. With respect to the duties owed by defendant Rains as sheriff, plaintiffs alleged only that defendant Rains was "to provide protection for the county's citizens; to train and supervise the various deputies and employees of the Columbus County Sheriff's Department, and to plan, organize, direct, and follow through on all activities of the Department in the maintenance of law enforcement and in the prevention of crime", which are undeniably duties to the general public. The complaint is absolutely devoid of any allegation of a special relationship between defendant Rains and decedents which would create any special duty owed by him to them; plaintiffs allege only that as a result of defendant Rains' negligent release of

Best, "the Decedents [sic] came in contact with Mr. Best and were murdered by him." Moreover, plaintiffs' allegations that defendant Rains was grossly negligent are insufficient to avoid judgment on the pleadings; the public duty doctrine also applies to bar claims of gross negligence. *See Sinning*, 119 N.C. App. 515, 459 S.E.2d 71. Finally, with respect to plaintiffs' allegations that defendant Rains violated various provisions of Chapter 15A of the North Carolina General Statutes in releasing Best, we note that the duties imposed by those statutes are duties owed to the general public, and create no special duties owed by defendant Rains to the individual decedents. *Id.*

We conclude that the pleadings in this case disclose that defendant Rains owed no duty to plaintiffs' decedents for which liability may arise, and that he has, therefore, established that he is entitled to judgment as a matter of law. In view of our decision, we neither discuss nor decide whether such claims are barred by governmental immunity. Furthermore, we decline to address the parties' arguments concerning the potential liability of any surety on the sheriff's official bond, as neither those arguments nor the surety are properly before us in this appeal. The trial court's order denying defendant Rains' motion for judgment on the pleadings is reversed and this cause is remanded for entry of judgment in accordance with this opinion.

Reversed and remanded.

Judges WALKER and McGEE concur.

WALTER T. WEEKS, JR., ET ALS, PETITIONERS v. TOWN OF COATS, RESPONDENT

No. COA95-212

(Filed 6 February 1996)

Municipal Corporations § 80 (NCI4th)— annexation—failure to follow topographic features—proposed ordinance null and void

The trial court did not err in making findings of fact and conclusions of law that respondent town violated N.C.G.S. § 160A-36(d) by attempting to annex three areas without following natural topographic features where practical, and the court

therefore did not err in declaring respondent's proposed annexation ordinances null and void.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 55 et seq.

Appeal by both parties from order and judgment entered 17 August 1994 by Judge Donald L. Smith in Harnett County Superior Court. Heard in the Court of Appeals 16 November 1995.

Bain & McRae, by Edgar R. Bain, for petitioners.

E. Marshall Woodall and Christopher L. Carr for respondent.

WALKER, Judge.

The Town of Coats (the Town) proposed the annexation of four areas adjacent to the Town boundary. After conducting a public hearing, the Town Board of Commissioners (the Board) adopted an ordinance on 13 May 1993 annexing each of the four areas proposed. Property owners in three of the areas appealed. The fourth area was not appealed and its annexation has become final.

In establishing annexation boundaries, the Town divided a number of single tracts of land into smaller tracts and then annexed only a portion of the original tract. The Southwest Annexation Area (the Southwest Area) contains a corridor 130 feet wide and 2,737 feet long which connects two areas proposed to be annexed (project map 1 and project map 2). The Southwest Area would not meet the statutory requirements for annexation without the 2,737 foot corridor. In addition, it was necessary to split 22 tracts out of 146 parcels in the Southwest Area in order for the annexed area to have satisfied the requirement that one-eighth of the total aggregate external boundaries of the area coincide with present municipal boundaries.

The East Annexation Area A (the East Area) boundaries create two distinct islands which are not annexed but which are surrounded by the Town. Here, the Town split 18 out of 63 parcels into two parcels in order for this area to satisfy the requirement that one-eighth of the total aggregate external boundary distance coincides with existing municipal boundaries.

At trial, evidence was introduced to explain the Town's method of establishing boundaries. Testimony from the Town's surveyor and Mayor tended to show that the Town did not attempt to follow natural

topographic features in establishing boundaries but instead established boundaries to satisfy statutory requirements. The Mayor testified that tracts of land were split and the boundaries were established in order to satisfy the subdivision test of N.C. Gen. Stat. § 160A-36(c) (1994). In addition, the Town's surveyor, Rambeau, admitted that he did not inspect the areas to be annexed to see if natural topographic features existed. However, Rambeau testified that he was not aware of any topographic features that could have been used in establishing boundaries.

Based on this evidence, the trial court made the following relevant findings:

> 44. The Town, in adopting the annexation ordinance [for the East Area], has not attempted, when practical, to follow topographical features such as ridge lines, property lines, streams, creeks or streets as natural boundaries. Only 811.24 feet follow any natural boundary out of a total distance of 3,756.76 feet. Only 21.59 percent follows any natural boundary.
>
> . . .
>
> 58. The Town, in adopting the annexation ordinance [for the Southwest Area], has not attempted, when practical, to follow topographical features such as ridge lines, property lines, streams, creeks or streets as natural boundaries. Only 4,581.63 feet follow any natural boundaries out of a total distance of the annexed area of 44,935.64 feet, so that only 10.19 percent of the total boundary follows any topographical feature. There are natural boundaries such as roads which the Town could have practically used in establishing boundary lines, and such were not used.

The court then concluded that the proposed annexation plans and ordinance violated the applicable statutory provisions of N.C. Gen. Stat. § 160A.

Review by this Court is limited to the following two inquiries: (1) whether the findings of fact are supported by competent evidence and (2) whether the findings, in turn, support the court's conclusion. Findings of fact, if supported by competent evidence, are binding; conclusions of law, however, are reviewable *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

On appeal the Town brings forth the following assignments of error: (1) the trial court erred in making findings of fact and conclu-

sions of law that the Town violated N.C. Gen. Stat. § 160A-36(d) by failing to follow, where practical, natural topographic features as boundaries; (2) the trial court erred by implicitly finding that the statute prohibited tract splitting; (3) the trial court erred in making findings of fact and conclusions of law that the Town violated the statutory provisions of § 160A-36(c) by considering areas of land not within the "area to be annexed;" (4) the trial court erred in making findings of fact and conclusions of law that the Town violated N.C. Gen. Stat. § 160A-36(b)(2) when the Town included a 130 foot wide by 2,737 foot long strip for the purpose of complying with the one-eighth coincidence test; and (5) the trial court erred by making findings of fact wherein the court implied that the creation of "islands" of non-annexed property which resulted from tract-splitting would be improper. Petitioner cites as error the court's failure to find the Town in violation of N.C. Gen. Stat. § 160A-35 (1994) relating to the extension of sewer service.

We now turn our attention to the Town's argument that the trial court erred by finding that the Town violated N.C. Gen. Stat. § 160A-36(d) by failing to follow natural topographic features. N.C. Gen. Stat. § 160A-36(d) provides the following directive:

> In fixing new municipal boundaries, a municipal governing board shall, **wherever practical**, use natural topographic features such as ridge lines and streams and creeks as boundaries, and may use streets as boundaries. Some or all of the boundaries of a county water and sewer district may also be used when the entire district not already within the corporate limits of a municipality is being annexed.

N.C. Gen. Stat. § 160A-36(d) (1994) (emphasis added).

When the record submitted in superior court demonstrates on its face substantial compliance with the annexation statute, "the burden falls on the petitioners to show by competent and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which materially prejudiced their substantive rights." *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987), *aff'd per curiam*, 321 N.C. 589, 364 S.E.2d 139 (1988). This Court has recognized that in order to establish non-compliance with N.C. Gen. Stat. § 160A-36(d), petitioners must show two things: (1) that the boundary of the annexed area does not follow natural topographic features, and (2) that it would have been practical for the boundary to follow such features. *Lowe v.*

Town of Mebane, 76 N.C. App. 239, 244, 332 S.E.2d 739, 743 (1985) (*citing Greene v. Town of Valdese*, 306 N.C. 79, 291 S.E.2d 630, 633 (1982)).

Specifically, the Town contends that the petitioner failed to meet its burden in establishing that the Town violated N.C. Gen. Stat. § 160A-36(d). As support for its argument the Town relies on *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985) and *Rexham Corp. v. Town of Pineville*, 26 N.C. App. 349, 216 S.E.2d 445 (1975). We find these cases to be distinguishable from the case at hand.

In *Lowe*, the petitioners argued that the Town failed to follow natural topographic features as boundaries and failed to include developed land on both sides of the streets used as boundaries. *Lowe*, 76 N.C. App. at 244, 332 S.E.2d at 743. The Town presented evidence that it prepared its annexation plan using natural topographic features as boundaries whenever it was reasonable to do so. The Town's plans were based upon tax maps, subdivision plats and direct inspection of the area involved. *Id.* at 242, 332 S.E.2d at 742. The court held that petitioners failed to show that the boundaries as drawn violated applicable law. *Id.* at 244, 332 S.E.2d at 743.

Similarly, in *Rexham* petitioners argued that the Town violated N.C. Gen. Stat. § 160A-36(d) where the proposed boundaries split several tracts of land and did not follow natural topographic features. *Rexham*, 26 N.C. App. 356-357, 216 S.E.2d at 450. The court stated:

> While we can conceive of problems which might arise as a result of tract splitting, we believe that the statutory requirement contained in G.S. 160A-36(d) that a municipality use natural topographic features wherever practical in setting an annexation boundary demonstrates a legislative intent to the contrary. Obviously, since the boundaries of lots and tracts of land do not necessarily follow 'natural topographic features' it would be impossible for an annexation ordinance to follow 'natural topographic features' without splitting lots or tracts.

Id. at 357-358, 216 S.E.2d at 451. The court then concluded that petitioner had not met its burden in establishing non-compliance with N.C. Gen. Stat. § 160A-36(d) where the evidence showed that the annexation boundary followed two natural draws and one ridge line and the only evidence of any natural topographic feature not used as a boundary was a tree line which was located outside the original area to be annexed. *Id.* at 357, 216 S.E.2d at 451.

Unlike *Lowe* and *Rexham*, in the present case petitioners offered evidence of natural topographic features which were not used as boundaries. Within the proposed annexation area, evidence showed that a creek and several roads were present which could be used as boundaries. The Town's surveyor testified that there was at least one road that the Town could have used in establishing the new boundaries.

Furthermore, the record demonstrates that the Town did not attempt to comply with the requirements of N.C. Gen. Stat. § 160A-36(d). The Mayor testified that boundaries were established by splitting tracts of land because including the entire tract or parcel would disqualify the areas for annexation under the statute.

More importantly, the Town's surveyor, Rambeau, testified that he did not inspect the property to determine if there were any topographic features that could be used as a natural boundary. Unlike *Lowe* and *Rexham*, the proposed boundary lines in the present case were established using only recorded deeds and recorded survey maps. Where petitioner shows that the municipality made no attempt to follow natural topographic features, as in this case, we hold that petitioners have satisfied their burden of establishing noncompliance with N.C. Gen. Stat. § 160A-36(d). We interpret *Lowe* and *Pineville* to apply only in those cases where there is *prima facie* evidence that the Town attempted to comply with the applicable statutory provisions.

In sum, we find that there is sufficient evidence to support the court's conclusion that the Town did not attempt to follow natural topographic features in violation of N.C. Gen. Stat. § 160A-36(d). Accordingly, we affirm the trial court's order declaring the proposed annexation ordinances regarding the Southwest Area and the East Area null and void. Having determined that the above ordinances are null and void we need not reach the remaining assignments of error.

Affirmed.

Judges JOHNSON and GREENE concur.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, PLAINTIFF-APPELLANT v. DANIEL M. JOHNSON, AND BARBARA CARPENTER, ADMINISTRATRIX OF THE ESTATE OF DANIEL A. HIMES, DEFENDANTS-APPELLEES

No. COA95-292

(Filed 6 February 1996)

1. Insurance § 822 (NCI4th)— decedent electrocuted while operating cherry picker—coverage under homeowner's policy—coverage not barred by vehicle exclusion

Coverage for the accident in this case was not barred by the vehicle exclusion in the homeowner's insurance policy provided by plaintiff where decedent was killed when he raised the boom and cherry picker on a truck owned by the insured at the insured's home and came into contact with electrical wires; the policy excluded coverage for accidents arising out of the use of a motor vehicle, but did not exclude coverage for accidents arising out of the operation of equipment; the policy did not define motor vehicle to include equipment such as a boom and cherry picker; at the time of the accident the truck was stationary, and its motor was not engaged; the boom and cherry picker were operated independently of the truck; and the use of the equipment was a non-vehicle proximate cause of decedent's death.

Am Jur 2d, Insurance §§ 1504 et seq.

2. Insurance § 819 (NCI4th)— decedent electrocuted at employer's home—coverage not excluded under "business pursuits" provision

The "business pursuits" provision of a homeowner's policy did not exclude coverage for an accident which occurred when decedent was electrocuted while operating a boom and cherry picker attached to the insured's truck since the accident occurred at insured's home on a day when there was no work to be performed; decedent and the insured's other employees were not receiving remuneration in any form; employees often congregated at the homeowner's home and engaged in leisure activities when there was no work available; and there was no evidence to indicate that decedent was training since he represented to the insured that he knew how to use the equipment.

Am Jur 2d, Insurance §§ 1504 et seq.

Construction and application of "business pursuits" exclusion provision in general liability policy. 48 ALR3d 1096.

Appeal by plaintiff from order entered 16 December 1994 by Judge Henry A. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 December 1995.

Bailey & Dixon, L.L.P., by David S. Coats, for plaintiff-appellant.

Holmes & McLaurin, by Edward S. Holmes, for defendant-appellee Daniel M. Johnson.

Ervin, Gates & Kelso, by Winfred R. Ervin, Jr., for defendant-appellee Barbara Carpenter.

WALKER, Judge.

On 28 October 1993 plaintiff Nationwide Mutual Fire Insurance Company (Nationwide) commenced this action to determine the rights of the parties under a homeowner's policy. Specifically, Nationwide seeks a declaration that it has no obligation under the policy for any claims brought by decedent's estate arising from the accident which occurred on the property of defendant Johnson.

On 15 September 1992 the decedent, a part-time employee of Johnson's painting company, called Johnson to see if there was any work available. After Johnson explained that there was no work to be done, decedent replied, "Well, come on up and get me, we'll do something another [sic]." Johnson then picked up the decedent and they went to a repair shop to see Johnson's newly purchased 1971 GMC truck which was equipped with a boom and cherry-picker. Later, Johnson's son drove the truck home and parked it under the power line.

Two employees were pitching horseshoes when they returned from the repair shop. The decedent climbed into the basket and began operating the boom and cherry-picker. Johnson testified that he thought the decedent was aware of the power line because he had been to Johnson's property before and the decedent reassured him that he knew what he was doing. While Johnson was inside answering a telephone call, the decedent raised the boom and cherry-picker, came in contact with a live wire, and was electrocuted.

Prior to the accident, Johnson secured a contract to paint a bridge. For the purpose of painting this bridge, Johnson purchased a 1971 GMC truck on 4 September 1992 which had a boom and cherry-picker permanently affixed to it. The cherry-picker was fueled by the truck's main gasoline tank but operated by its own motor which was bolted in the bed of the truck. Two sets of controls could be used to raise and lower the cherry-picker—one set was bolted to the back of the truck, the other set was located inside the bucket.

On the date of the accident, the truck was not registered with the Department of Motor Vehicles nor covered by motor vehicle insurance. Prior to the accident, the truck had only been driven from the repair shop to Johnson's home. When the accident occurred the truck was stationary and the truck's motor was not running.

Nationwide's sole argument on appeal is that the trial court erred in granting defendants' motion for summary judgment. Specifically, Nationwide argues that coverage for the accident is excluded under the "motor vehicle" and "business pursuits" provisions in Johnson's homeowner's policy. The policy provides coverage for claims involving bodily injury or property damage against the insured caused by an occurrence. Coverage is excluded for bodily injury or property damage arising out of the business pursuits of an insured as well as the following:

> 1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:
>
> . . .
>
> e. arising out of:
>
> (1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured; (2) the entrustment by an insured of a motor vehicle or any other motorized land conveyance to any person (emphasis added).

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 that 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). 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). All inferences of fact at the summary judgment hearing must be drawn against the moving party and in favor of the party opposing the motion. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

I.

[1] Plaintiff first argues that it is entitled to summary judgment because the evidence establishes that the claim by decedent's estate arises out of "the ownership, maintenance, use, loading, or unloading of the truck, as well as the entrustment of the truck" and therefore coverage is excluded. We disagree.

The crucial issue in this case turns on a determination of the meaning given to the language "arising out of the use" in the homeowner's policy exclusion. In construing the provisions of an insurance contract, "[e]xclusionary clauses are interpreted narrowly while coverage clauses are interpreted broadly to provide the greatest possible protection to the insured." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 542-543, 350 S.E.2d 66, 71 (1986).

In *State Capital*, the Supreme Court interpreted a similar homeowner's exclusion provision. The Court held that the homeowner's policy afforded coverage for injuries incurred when a rifle stored behind the seat of the truck discharged when the insured attempted to remove it from the vehicle. *Id.* at 547, 350 S.E.2d at 74. In reaching its decision, the Court relied on the rule of construction "that all ambiguities in exclusion provisions are construed against the insurer and in favor of coverage." *Id.* at 541, 350 S.E.2d at 70. The Court then noted that "there can be little doubt that the terms 'use' and 'loading and unloading' are ambiguous. . . ." *Id.* at 544, 350 S.E.2d at 72. In construing the policy at issue, the Court applied the following two principles:

> (1) ambiguous terms and standards of causation in exclusion provisions of homeowners policies must be strictly construed against the insurer, and (2) homeowners policies provide coverage for injuries so long as a non-excluded cause is either the sole or concurrent cause of the injury giving rise to liability. Stating the second principle in reverse, the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy.

Id. at 546, 350 S.E.2d at 73.

The Court concluded that "when strictly construed the standard of causation applicable to the ambiguous 'arising out of' language in a homeowners policy exclusion is one of proximate cause." *Id.* at 547, 350 S.E.2d at 74. The Court found that the negligent mishandling of the rifle was a non-vehicle proximate cause for which coverage was afforded. *Id.*

In a similar case, *Nationwide Mutual Ins. Co. v. Davis*, 118 N.C. App. 494, 455 S.E.2d 892, *disc. review denied*, 341 N.C. 420, 461 S.E.2d 759 (1995), a child exited the insured's van and was struck by a truck while walking into a store. The homeowner's policy, like that in the present case, excluded coverage for injuries arising out of the use of a vehicle. *Id.* at 498-499, 455 S.E.2d at 895. This Court allowed coverage under the policy finding that the use of the van was not the sole proximate cause of the accident; a concurrent cause was Ms. Davis' negligent supervision of the child when she exited the van to enter the store. *Id.* at 501, 455 S.E.2d at 896. Thus, the Court concluded that since there was a non-vehicle proximate cause, the vehicle exclusion did not bar coverage under the homeowner's policy. *Id.*

Plaintiff cites *Hardware Mut. Casualty Co. v. Curry*, 21 Ill. App.2d 343, 157 N.E.2d 793 (1959) as support for its argument that coverage for the injuries in this case is excluded by the vehicle exclusion. We find this case distinguishable. In *Curry*, the claimant was injured while operating a winch attached to a truck. *Id.* at 346, 157 N.E.2d at 795. The homeowner's policy excluded coverage for injuries arising out of the "ownership, maintenance or use, including loading and unloading of (i) automobiles. . . ." *Id.* at 345, 157 N.E.2d at 795. However, unlike the present case, the policy defined automobile as "a land motor vehicle, trailer or semitrailer, providing the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described: any farm implement, ditch or trench digger, power crane or shovel. . . ." *Id.* at

346, 157 N.E.2d at 795. Therefore, the winch when operated as a crane was expressly defined as a motor vehicle under the policy. *Id.* at 348, 157 N.E.2d at 796.

Here, the accident occurred while the decedent was operating a boom and cherry-picker. Johnson's homeowner's policy excludes coverage for accidents arising out of the use of a motor vehicle but does not exclude coverage for accidents arising out of the operation of equipment. The policy does not define "motor vehicle" to include equipment such as a boom and cherry-picker. Accordingly, where the evidence shows that at the time of the accident the truck was stationary, its motor was not engaged, and the boom and cherry-picker was operated independently of the truck, we find that the use of the equipment was a non-vehicle proximate cause of the decedent's death. Therefore, the insurer did not exclude coverage for this kind of equipment and we conclude that coverage for this accident is not barred by the vehicle exclusion.

II.

[2] Next, we address plaintiff's argument that summary judgment was improper because coverage is excluded under the "business pursuits" provision of the policy. The business pursuits exclusion in pertinent part provides:

> 1.Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:
>
> b.(1) arising out of or in connection with a business engaged in by an insured. This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the business.

The record shows that on the date of the accident there was no work to be performed. Decedent and the other employees were not receiving remuneration in any form. Also, Johnson explained that the employees often congregated at his house and engaged in leisure activities when there was no work available. Furthermore, there is no evidence to indicate that the decedent was training since he represented to Johnson that he knew how to operate a cherry-picker. Therefore, the record is void of any evidence indicating that the accident on 15 September arose out of business pursuits. Accordingly, we

find that the policy affords coverage in this case and we affirm the trial court's granting of summary judgment in favor of defendants.

Affirmed.

Judges JOHNSON and SMITH concur.

CASWELL REALTY ASSOCIATES I, L.P., PLAINTIFF v. ANDREWS COMPANY, INC., F/K/A HILLS FOODS STORES, INC. AND NASH-FINCH COMPANY, INC., DEFENDANTS

No. COA95-295

(Filed 6 February 1996)

Judgments § 521 (NCI4th)— intrinsic fraud—independent action inappropriate—Rule 60(b) motion withdrawn—summary judgment for defendant proper

Where plaintiff alleged that each defendant engaged in fraudulent misconduct to procure settlement in a previous action, the fraud of which plaintiff complained was intrinsic fraud and could not be pursued through an independent action, and plaintiff withdrew its Rule 60(b) motion and allowed the time in which to renew its motion to expire; therefore, plaintiff's claims against defendants fail as a matter of law.

Am Jur 2d, Fraud and Deceit §§ 400, 404, 416; Limitation of Actions § 76.

Estoppel as to reliance on statute of limitations. 33 ALR3d 1077.

Appeal by plaintiff from judgment entered 14 December 1994 by Judge James D. Llewellyn in Brunswick County Superior Court. Heard in the Court of Appeals 6 December 1995.

Shipman & Lea, by Gary K. Shipman, for plaintiff appellant.

Marshall, Williams & Gorham, L.L.P., by Lonnie B. Williams, for defendant appellee Andrews Company, Inc.

Maupin Taylor Ellis & Adams, P.A., by Gilbert C. Laite III, for defendant appellee Nash-Finch Company, Inc.

SMITH, Judge.

Plaintiff, Caswell Realty Associates, filed a civil action against defendant, Andrews Company, Inc. (Andrews) on 15 January 1991. The parties settled that suit. A notice of voluntary dismissal with prejudice was filed on 12 January 1994. On 3 March 1994, plaintiff filed a Rule 60(b) motion for relief from the settlement and stipulation of dismissal, alleging that the settlement had been procured by defendant Andrews' fraudulent conduct.

The motion for relief from dismissal was scheduled for hearing on 25 July 1994. That morning, prior to the hearing, plaintiff withdrew the Rule 60(b) motion and filed the instant independent action against defendant Andrews and defendant Nash-Finch, under an alter-ego theory. At the hearing, defendant Andrews objected to plaintiff's withdrawal of the motion. Based upon that objection the judge heard arguments and, with the consent of plaintiff, entered an order stating that the withdrawal of the Rule 60(b) motion was with prejudice.

Defendants then moved to dismiss this independent action. The court considered matters outside the pleadings and on 14 December 1994 entered summary judgment for defendants on all claims. From that judgment plaintiff appeals, alleging that there were genuine issues of material fact to be decided in this independent action. After review of the record, we disagree and affirm.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The burden is upon the moving party to establish that no genuine issue of material fact exists. All evidence is viewed in the light most favorable to the non-moving party. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

Plaintiff argues that it filed a valid independent action against the original settlement and that there were genuine issues of fact to be decided with regard to this action. After review of the record, we conclude that plaintiff's independent action was not proper and was correctly dismissed by summary judgment.

Plaintiff initially attempted to attack settlement of the prior action through Rule 60(b)(3), which provides:

> (b) . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * * *
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

N.C. Gen. Stat. § 1A-1, Rule 60(b). Prior to hearing, plaintiff withdrew the motion and filed this independent action attacking the settlement collaterally. At the hearing, which was scheduled to take place on the same day that plaintiff withdrew the motion, the trial judge, with consent of plaintiff, ordered that withdrawal of the motion was with prejudice, such that plaintiff could not bring another 60(b) motion concerning the prior settlement.

Parenthetically, we note plaintiff now argues that, after the 60(b) motion was withdrawn, the trial court was without jurisdiction to enter any further order with regard to the motion, including the order that the withdrawal was with prejudice. However, we need not address this argument for two reasons. First, even if the trial court was without jurisdiction to order the withdrawal with prejudice, plaintiff cannot now file another 60(b) motion. Rule 60 provides that an attack against judgment on the basis of fraud must be brought within one year after judgment. N.C. Gen. Stat. § 1A-1, Rule 60; *Fabricators, Inc. v. Industries, Inc.*, 43 N.C. App. 530, 259 S.E.2d 570 (1979). In the prior case withdrawal of the motion occurred on 25 July 1994. Plaintiff's opportunity to attack the settlement in the prior action *via* Rule 60 has now expired. Second, and more importantly, that issue is not before us. The assignments of error in the instant case do not address the 60(b) withdrawal. Any error made with regard to the 60(b) motion in the prior case is not before this Court as the withdrawal in that case has not been appealed.

Defendants argue that plaintiff may not maintain an independent action against the prior settlement, and we agree. Rule 60(b)(3) is available to provide relief from a judgment procured by fraud, whether intrinsic or extrinsic. Furthermore, Rule 60 provides:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or pro-

> ceeding shall be by motion as prescribed in these rules or by an independent action.

It is well settled in this jurisdiction "that in order to sustain a collateral attack on a judgment for fraud it is necessary that the allegations of the complaint set forth facts constituting extrinsic or collateral fraud in the procurement of the judgment, and not merely intrinsic fraud, that is, arising within the proceeding itself and concerning some matter necessarily under the consideration of the court upon the merits." *Scott v. Cooperative Exchange*, 274 N.C. 179, 182, 161 S.E.2d 473, 476 (1968) (citations omitted).

This Court has held:

> Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been prevented from fully participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court.

Stokley v. Stokley, 30 N.C. App. 351, 354-55, 227 S.E.2d 131, 134 (1976). In this case, plaintiff had full opportunity to present its case to the court. The fraud of which plaintiff complains allegedly took place during settlement negotiations between the parties and is intrinsic. Plaintiff may not attack such alleged fraud through an independent action. Plaintiff's proper course of action would have been to pursue its 60(b) motion. However, plaintiff withdrew that motion and is now barred from filing it again.

As an alternative to setting aside the settlement and stipulation of dismissal, plaintiff seeks damages premised upon fraud, negligent misrepresentation and unfair and deceptive trade practices. Because the prior settlement cannot be attacked collaterally through this independent action, it is still wholly in effect. It is settled in this and most other jurisdictions that plaintiff cannot recover damages for fraud "unless and until the judgment denying him the right to recover [is] vacated." *Gillikin v. Springle*, 254 N.C. 240, 244, 118 S.E.2d 611, 614 (1961). Thus, plaintiff's claim for damages in this case fails.

Plaintiff's final claim for relief in this independent action is against defendant Nash-Finch. Plaintiff alleges that Nash-Finch, as the principal creditor of defendant Andrews, completely dominated and controlled defendant Andrews and that the alleged negligent misrepresentations and fraud were perpetrated through such control. However, plaintiff may not maintain an independent action or renew its 60(b) motion for relief from settlement and stipulation of dismissal against Nash-Finch, for the same reasons it may not maintain such action against defendant Andrews. Therefore, summary judgment was also proper as to defendant Nash-Finch.

In addition, we note that, at the hearing on the Rule 60(b) motion, defendants offered affidavits from the attorney representing Andrews during settlement negotiations as well as verified accounting statements representing Andrews' assets at the time of settlement. Those affidavits refute plaintiff's allegations of fraud. The 60(b) file was received in evidence at the summary judgment hearing. Plaintiff offered no contrary evidence at the Rule 60(b) or summary judgment hearings. Summary judgment would have been proper based upon the unopposed affidavits alone. These affidavits show there was no genuine issue of fact before the trial court.

In summary, plaintiff has alleged that each defendant engaged in fraudulent misconduct to procure settlement in the previous action. The fraud of which plaintiff complains is intrinsic fraud and may not be pursued through an independent action. Plaintiff withdrew its Rule 60(b) motion and has allowed the time in which to renew its motion to expire. Plaintiff's alternative claims against defendants are not grounds to set aside the settlement and would, therefore, only be a means to seek recovery of damages resulting from the alleged fraud. However, damages are not recoverable until a dismissal has been set aside. Plaintiff's claims against defendants fail as a matter of law. Therefore, summary judgment in this independent action was proper.

For the reasons stated herein, the judgment of the trial court is

Affirmed.

Judges JOHNSON and WALKER concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. GERALD E. RUSH, ATTORNEY DEFENDANT

No. COA95-40

(Filed 6 February 1996)

Attorneys at Law § 85 (NCI4th)— disciplinary action against attorney—failure of committee's order to state findings of fact and conclusions of law—no requirement that attorney be convicted of crime

In a disciplinary action against defendant attorney based upon accusations of inappropriate sexual touchings and behavior, it was unclear whether the allegations were dismissed by a committee of the Disciplinary Hearing Commission because they did not adversely reflect on defendant's honesty, trustworthiness, and fitness as a lawyer, or because the State Bar failed to sufficiently prove the allegations, or because defendant was not convicted of a crime, and the case is remanded to the committee to issue an order containing complete findings of fact and conclusions of law supporting its decision. If the reasoning behind the dismissal was solely because defendant was never convicted of a crime, then the hearing committee erred.

Am Jur 2d, Administrative Law § 95.

Appeal by plaintiff from order entered 21 July 1994 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 19 October 1995.

The North Carolina State Bar (the State Bar) brought this disciplinary action against defendant attorney Gerald E. Rush based upon the allegations of four complaining witnesses. The complainants, who included clients and a relative of a client, accused Rush of inappropriate sexual touchings and behavior. The case was heard 14 and 15 July 1994 before a hearing committee of the Disciplinary Hearing Commission of the State Bar composed of Samuel Jerome Crow, Mary Elizabeth Lee, and A. James Early, III. At the close of its evidence, the State Bar voluntarily dismissed one of the complaints. One of the complainants failed to appear and testify, and her allegations were also dismissed.

The remaining complainants, Shirley Rushing and Priscilla Chambers Brown, accused Rush of unwanted sexual touchings and

inappropriate sexual remarks. Brown had previously filed criminal charges against Rush for assault on a female and false imprisonment. Rush was found guilty of assault on a female in Rowan County District Court and appealed his conviction to superior court, where his first trial ended in a hung jury. At his second criminal trial in superior court, the State took a voluntary dismissal after the trial court excluded certain testimony from evidence.

In a 2-1 decision, the hearing committee held the State Bar did not meet its burden of proof to show Rush committed a criminal act against Ms. Rushing. The majority also held Rush should not be "*professionally* answerable" for his alleged misconduct involving Ms. Brown when he had "not been convicted of a crime." Committee member Early dissented from the opinion, stating he felt Rush's conduct constituted a criminal act adversely reflecting on Rush's fitness as a lawyer and demonstrating a breach of trust undermining the attorney-client relationship. Early further stated his opinion that a defendant need not be convicted of a crime to be in violation of Rule 1.2(B) of the Rules of Professional Conduct. From the order dismissing the action against Rush, the State Bar appeals.

Fern E. Gunn, Deputy Counsel, North Carolina State Bar, for plaintiff-appellant,

Cheshire & Parker, by Alan M. Schneider, and Gerald E. Rush, pro se, for defendant-appellee.

McGEE, Judge.

The order of the hearing committee of the Disciplinary Hearing Commission of the State Bar dismissing the action against Rush does not contain findings of fact or conclusions of law. Rules and Regulations of the North Carolina State Bar (State Bar Rules) Subch. B, § .0109(5) states a hearing committee of the Disciplinary Hearing Commission has the power and duty to make findings of fact and conclusions of law when holding a hearing on a complaint of attorney misconduct. The Rules also state that after a hearing, the hearing committee, whether it dismisses the complaint or finds the charges have been proven, "will file an order which will include the committee's findings of fact and conclusions of law." State Bar Rules Subch. B, § .0114(u).

On appeal, it is this Court's duty "to determine whether after applying the whole record test, the DHC's findings are properly sup-

ported by the record even though we might have reached a different result had the matter been before us *de novo*." *North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992), *affirmed*, 333 N.C. 786, 429 S.E.2d 716 (1993). We cannot determine if the findings are supported by the record in this case in the absence of such findings. It has long been the rule that an appellate court "has the power to remand a case so that there may be a fuller finding of facts by the [factfinder], and in order that the appeal may be more intelligently considered in every view of it." *Refining Co. v. McKernan*, 178 N.C. 82, 84, 100 S.E. 121, 122 (1919). This is especially true where "[the] case is far too important in itself and in its results for us to decide it except upon the fullest showing as to the facts." *Id.* Because the order lacks proper findings, and because the reasoning behind the majority's holding is unclear, we remand this case to the committee to enter the required findings of fact and conclusions of law.

The order appears to hold the State Bar did not prove Ms. Rushing's allegations under a clear, cogent, and convincing burden of proof standard. However, the order is especially unclear as to whether the allegations of Ms. Brown were dismissed because they do not adversely reflect on Rush's honesty, trustworthiness and fitness as a lawyer, or because the State Bar failed to sufficiently prove the allegations, or because Rush was not convicted of a crime. We note that if the reasoning behind the dismissal of Ms. Brown's allegations was solely because Rush was never convicted of a crime, the committee erred.

Rule 1.2(B) of the Rules of Professional Conduct states it is professional misconduct for a lawyer to commit a criminal act reflecting adversely on the lawyer's honesty, trustworthiness or professional fitness. The rule does not require a conviction, only that a criminal act be committed. Further, this Court has previously held that a disciplinary proceeding is not barred because it is based upon acts constituting a crime that cannot be prosecuted in a criminal action due to the applicable statute of limitations. *State Bar v. Temple*, 2 N.C. App. 91, 95, 162 S.E.2d 649, 652 (1968). Therefore, conviction of a crime is not a necessary element in a disciplinary proceeding.

To find a sanctionable act, the committee must first find the State Bar has proved by clear, cogent, and convincing evidence the charges of misconduct. State Bar Rules Subch. B, § .0114(u). The burden of proof is lower than in a criminal trial because the purpose of the pro-

ceedings is different. "Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts, and the legal profession." State Bar Rules Subch. B, § .0101. Once the State Bar meets its burden of proving misconduct, the committee must determine whether such misconduct adversely reflects on the defendant's fitness to practice law.

The State Bar invites this Court to rule as a matter of law that Rush's alleged actions constitute misconduct adversely reflecting on his honesty, trustworthiness, and fitness to practice law. In support of this request, the State Bar cites numerous cases from other states which have held similar conduct to be sanctionable as adversely reflecting upon an attorney's professional fitness. However, such a ruling is inappropriate in this case without a proper order containing findings of fact and conclusions of law upon which to base our decision. On remand, the committee must determine and make clear in its order whether the State Bar has met its burden of proving misconduct by Rush by clear, cogent, and convincing evidence. If the allegations are proven, the committee must then determine if such acts of misconduct constitute conduct adversely reflecting on Rush's honesty, trustworthiness, and fitness to practice law.

Because of the importance of these matters to the parties, the public, and the legal profession, we must remand this case to the committee to issue an order containing complete findings of fact and conclusions of law supporting its decision. It is in the committee's discretion whether it has sufficient evidence already present in the record to issue its order or whether additional evidence must be heard.

Remanded.

Judges MARTIN, John C., and JOHN concur.

CAPE FEAR MEMORIAL HOSPITAL, PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT-APPELLEE

No. COA95-394

(Filed 6 February 1996)

Hospitals and Medical Facilities or Institutions § 10 (NCI4th)— acquisition of equipment by hospital—requirement of certificate of need—error

Respondent erred by holding that petitioner was required to obtain a certificate of need before purchasing new equipment valued at $232,510, since the equipment in question was purchased to expand and upgrade petitioner's existing heart catheterization capabilities; the new equipment was not "cardiac catheterization equipment" as defined by N.C.G.S. § 131E-176(2f), the acquisition of which would have required a certificate of need; and the equipment did not exceed the $2,000,000 statutory limit for expanding present health services without a certificate of need.

Am Jur 2d, Administrative Law § 388.

Appeal by petitioner from decision entered 7 November 1994 by the North Carolina Department of Human Resources. Heard in the Court of Appeals 11 January 1996.

Bode, Call & Green, by Robert V. Bode and Diana E. Ricketts, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Sherry C. Lindquist, for respondent-appellee.

MARTIN, Mark D., Judge.

Petitioner Cape Fear Memorial Hospital (Cape Fear) appeals from final agency decision issued by respondent North Carolina Department of Human Resources (Department) requiring Cape Fear to obtain a certificate of need (CON) before purchasing a 13" image intensifier and a cine camera (new equipment).

On 28 March 1991 Cape Fear purchased a Siemens Angiostar (Angiostar), which can be used for cardiac catheterization procedures. Less than one year after accepting the Angiostar, Cape Fear informed the Department of its intent to purchase a 13" image intensifier and cine camera in an effort to upgrade and expand the capa-

bilities of the Angiostar. On 22 October 1993 the Department, through its CON Section, informed Cape Fear that it must secure a CON prior to purchasing the new equipment. Cape Fear filed a timely request for a contested case hearing challenging the CON Section's ruling.

On 15 August 1994 Administrative Law Judge Robert Roosevelt Reilly, Jr., concluded Cape Fear was barred from acquiring the new equipment without first receiving a CON. On 7 November 1994 the Director of the Department's Division of Facility Services adopted the recommended decision as the final agency decision.

Cape Fear appeals directly to this Court pursuant to N.C. Gen. Stat. 7A-29(a). We consolidate the numerous assignments of error into one issue—whether the Department erred by holding Cape Fear was required to obtain a CON before purchasing the new equipment.

A final agency decision may be reversed if the agency's findings, inferences, conclusions, or decisions are based on an error of law. N.C. Gen. Stat. § 150B-51(b) (1995). Moreover, this Court reviews the agency's findings and conclusions *de novo* when considering alleged errors of law. *Walker v. N.C. Dept. 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).

At the outset we note that the Department's determination the purchase of the new equipment required a CON was based on its interpretation of N.C. Gen. Stat. § 131E-175, *et seq.* As an erroneous interpretation of a statute is an error of law, *Taylor Home of Charlotte v. City of Charlotte,* 116 N.C. App. 188, 195, 447 S.E.2d 438, 443, *disc. review denied,* 338 N.C. 524, 453 S.E.2d 170 (1994), we review the Department's finding that Cape Fear's new equipment falls within the provisions of N.C. Gen. Stat. § 131E-178(a) *de novo.*

N.C. Gen. Stat. § 131E-178(a) provides, in pertinent part, "no person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department . . . ." N.C. Gen. Stat. § 131E-178(a) (1994). A "new institutional health service" is defined to include, among other things, "[t]he acquisition by purchase of . . . cardiac catheterization equipment." N.C. Gen. Stat. § 131E-176(16)f1.3 (1994). "Cardiac catheterization equipment" is defined as "the equipment required to perform diagnostic procedures or therapeutic intervention in which a catheter is introduced into a vein or artery and threaded through the circulatory system to the heart." N.C. Gen. Stat. § 131E-176(2f) (1994).

The Department concluded that the new equipment, by itself, is "cardiac catheterization equipment" and, therefore, Cape Fear must obtain a CON prior to purchasing such equipment. This Court must now determine whether, according to the statutory definition, the new equipment is "cardiac catheterization equipment." This issue must necessarily be resolved by recourse to well-established principles of statutory interpretation.

"The primary goal of statutory construction is to give effect" to the legislative intent. *Bowers v. City of High Point*, 339 N.C. 413, 419, 451 S.E.2d 284, 289 (1994). Indeed, the words of a statute must be construed as part of a composite whole and accorded only that meaning which other modifying provisions coupled with the intent and purpose of the act will permit. *State v. Johnson*, 298 N.C. 47, 56, 257 S.E.2d 597, 606 (1979).

We believe the expansive interpretation proposed by the Department, thereby allowing micro-management over relatively minor capital expenditures, does not effectuate the overriding legislative intent behind the CON process, *i.e.*, regulation of major capital expenditures which may adversely impact the cost of health care services to the patient. *See* N.C. Gen. Stat. §§ 131E-175(1)-(2), (4), (6)-(7) (1994). Nevertheless, the legislature clearly did not intend to impose unreasonable limitations on maintaining, N.C. Gen. Stat. § 131E-184(a)(7) (1994) (CON not required for replacement parts), or expanding, N.C. Gen. Stat. § 131E-176(16)b (1994) (CON not required for expansion of present health service costing less than $2,000,000), presently offered health services. See also N.C. Gen. Stat. § 131E-176(14f) (1994) (CON not required for purchase of unit or system to provide new health service which costs less than $750,000). Therefore, we believe, construing N.C. Gen. Stat. § 131E-175, *et seq.*, as a whole, that the legislature intended "cardiac catheterization equipment" to include only the actual unit capable of performing cardiac catheterization procedures, not the component parts used to maintain, upgrade, or expand a unit.

The present record indicates, and we agree, that the Angiostar, as presently configured, falls within the statutory definition of "cardiac catheterization equipment." Put simply, the proposed acquisitions merely expand and upgrade the current cardiac catheterization service already offered by the Angiostar. Accordingly, consistent with the legislative intent, we believe the new equipment is not "cardiac catheterization equipment" as defined by section 131E-176(2f).

Although the new equipment is not "cardiac catheterization equipment," it does expand the capabilities of the Angiostar. The proposed acquisitions, therefore, implicate N.C. Gen. Stat. § 131E-176(16)b. Under section 131E-176(16)b, a CON is required for "[t]he obligation by any person of a capital expenditure exceeding [$2,000,000] . . . to . . . expand a health service." N.C. Gen. Stat. § 131E-176(16)b. "The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the . . . expansion . . . of any . . . equipment . . ." should be considered in calculating the total cost for expanding a presently offered health service. *Id.*

In the present case, the Department found the total cost of acquiring the new equipment to be $232,510—well below the $2,000,000 statutory limit for expanding present health services. Accordingly, we conclude Cape Fear does not need a CON before purchasing the new equipment.

Reversed and remanded.

Judges EAGLES and MARTIN, John C., concur.

CRAVEN COUNTY BOARD OF EDUCATION, PETITIONER v. VIRGINIA WILLOUGHBY, RESPONDENT

No. COA95-155

(Filed 6 February 1996)

1. Domicil and Residence § 9 (NCI4th)— child living in Craven County with grandmother—child resident but not domiciliary

By virtue of his living either temporarily or permanently with his grandmother, respondent, in Craven County, the child in question was a legal resident of Craven County so long as he continued to live there, but he was not a domiciliary of the county because his mother lived in Florida, and an unemancipated child may not establish a domicile different from his parents.

Am Jur 2d, Domicil § 41.

Separate domicil of mother as affecting domicil or residence of infant. 13 ALR2d 306.

2. Domicil and Residence § 9 (NCI4th); Schools § 112 (NCI4th)— resident child not domiciliary—special needs child—right to free appropriate education

A resident child with special needs need not be a domiciliary in order to receive a free appropriate education; therefore, pursuant to N.C.G.S. § 115C-110(i), respondent's grandchild who lived with her in Craven County was entitled to a free appropriate education in that county.

Am Jur 2d, Schools § 220.

Appeal by petitioner from judgment entered 4 August 1994 by Judge James E. Ragan, III, in Craven County Superior Court. Heard in the Court of Appeals 13 November 1995.

Respondent, Virginia Willoughby, is the maternal grandmother of Danyun Walker who is a sixteen-year-old "child with special needs." Until the summer of 1993, Danyun Walker had lived with his mother, Queenie Walker, in Duval County, Florida. In Florida, Danyun had been treated as a child with special needs by the Duval County public school system, and he accordingly received a free and appropriate education.

After school was over for the day in Florida, Danyun's brother would care for Danyun until Ms. Walker was able to come home from her job at Blue Cross/Blue Shield. This care-giving arrangement was important because Danyun required almost constant care, and because Ms. Walker's job was essential to the family's economic welfare. Danyun's brother, however, graduated from high school in 1993 and was no longer able to help care for Danyun.

To ensure that Danyun received all necessary care, respondent grandmother and Danyun's mother agreed that Danyun would live in Craven County, North Carolina, with respondent. Respondent grandmother then applied on Danyun's behalf for his admission to Craven County Schools for the fall 1993 term as a child with special needs. The school administration denied Danyun's application asserting that Danyun was neither a resident nor a domiciliary of North Carolina. Respondent pursued no further administrative procedures before the Board of Education; instead, on 20 October 1993, respondent initiated this action before the Office of Administrative Hearings pursuant to G.S. 150B-23. Respondent's complaint alleged (1) that Danyun was a resident of Craven County, North Carolina, (2) that respondent acts in the role "as a parent," and (3) that by refusing to enroll Danyun in

public school, the Board was denying Danyun the free appropriate education to which he is entitled. Petitioner in its answer moved to dismiss respondent's claim alleging that Danyun was neither a resident nor a domiciliary and alleging that respondent had no standing to maintain this action on Danyun's behalf.

On 3 December 1993, respondent's claim was heard before Chief Administrative Law Judge Julian Mann, III. On 17 December 1993, Judge Mann rendered a written decision in respondent's favor. Petitioner then filed for an appeal before a Hearing Review Officer pursuant to G.S. 115C-116. On 18 January 1994, the Hearing Review Officer, Dr. Joe D. Walters, decided that Danyun was entitled to a free appropriate education in the Craven County public schools. Petitioner then appealed to the Superior Court of Craven County. After hearing on 5 July 1994, Superior Court Judge James E. Ragan, III, entered judgement in favor of respondent.

Petitioner appeals.

Henderson, Baxter & Alford, P.A, by David S. Henderson, for petitioner-appellant.

Pamlico Sound Legal Services, by Jack Hansel, for respondent-appellee.

EAGLES, Judge.

Petitioner first argues that Danyun is not entitled to a free appropriate education because he is neither a domiciliary or a resident of Craven County, North Carolina. We disagree and affirm because we conclude that Danyun is a resident, although not a domiciliary, of Craven County.

[1] Our Supreme Court has long recognized that the terms "residence" and "domicile" have different meanings.

> "Precisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence."

In re Annexation Ordinance, 296 N.C. 1, 15, 249 S.E.2d 698, 706 (1978) (quoting *Hall v. Board of Education*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972)). We have also recognized that, "[t]raditionally,

residence is taken to signify one's place of actual abode, whether it be temporary or permanent." *Vinson Realty Co. v. Honig*, 88 N.C. App. 113, 116, 362 S.E.2d 602, 603 (1987). More specifically, "[a]n unemancipated minor may not establish a domicile different from his parents, surviving parents, or legal guardian, . . . but [he] obviously may reside in a place separate from his parents." *Chapel-Hill-Carrboro City Schools System v. Chavioux*, 116 N.C. App. 131, 133, 446 S.E.2d 612, 614 (1994).

Danyun Walker's place of actual abode is clearly Craven County, North Carolina. Petitioner does not dispute that Danyun actually lives or resides with his grandmother in Craven County. Accordingly, we conclude that by virtue of his living either temporarily or permanently with respondent in Craven County, Danyun Walker is a legal resident of Craven County so long as he continues to live there. *Vinson*, 88 N.C. App. at 116, 362 S.E.2d at 603. Even so, we conclude that Danyun is not a domiciliary of Craven County because an unemancipated child may not establish a "domicile different from his parents." *Chavioux*, 116 N.C.App. at 133, 446 S.E.2d at 614.

[2] Having determined that Danyun is a resident, though not a domiciliary, of Craven County, we now consider whether a resident child with special needs must be a domiciliary in order to receive a free appropriate education. Petitioner argues that domicile must be established in order to entitle a resident child with special needs to a free appropriate education. We disagree.

Petitioner argues that G.S. 115C-366 is controlling. G.S. 115C-366(a) states in pertinent part:

> (a) all students under the age of 21 years who are domiciled in a school administrative unit . . . are entitled to all the privileges and advantages of the public schools to which they are assigned by the local boards of education.

G.S. 115C-366(a) (1991). Petitioner reads this section as creating a domicile requirement for all children under 21 years of age who are not specifically excepted in G.S. 115C-366.2. Finding no mention of children with special needs in G.S. 115C-366.2, petitioner concludes that children with special needs are among those who must be domiciliaries of a school administrative unit in order to receive a free appropriate education. We conclude that petitioner's argument fails because G.S. 115C-366 is not controlling here.

Children with special needs fall within the purview of Chapter 115C, Article 9, entitled "Special Education." Within Article 9, G.S. 115C-110(i) states that:

> Each local educational agency shall provide free appropriate special education and related services in accordance with the provisions of this Article for all children with special needs who are residents of, or whose parents or guardians are residents of, the agency's district, beginning with children aged five.

G.S. 115C-110(i) (1989). When a more generally applicable statute such as G.S. 115C-366(a) conflicts with a more specific, special statute such as G.S. 115C-110(i), the "special statute is viewed as an exception to the provisions of the general statute . . . ." *Electric Service v. City of Rocky Mount*, 20 N.C. App. 347, 350, 201 S.E.2d 508, 510, *aff'd*, 285 N.C. 135, 203 S.E.2d 838 (1974). Accordingly, we conclude that the specific requirements of G.S. 115C-110(i) control where in conflict with the general requirements of G.S. 115C-366(a).

The only requirement imposed by G.S. 115C-110(i) is that the child with special needs be a resident of the school district in which the child is seeking free appropriate education. As we have held, Danyun Walker is a resident of Craven County. Accordingly, based on G.S. 115C-110(i), we conclude that Danyun Walker is entitled to a free appropriate education in Craven County, North Carolina.

This conclusion is consistent with the policies motivating enactment of Chapter 115C, Article 9. We have recognized that Chapter 115C, Article 9 was enacted in accordance with the federal "Education for All Handicapped Children Act" of 1975, which is now entitled the "Individuals with Disabilities Education Act" ("IDEA"). *Beaufort County Schools v. Roach*, 114 N.C. App. 330, 335, 443 S.E.2d 339, 341, *disc. review denied*, 336 N.C. 602, 447 S.E.2d 384, *cert. denied*, —— U.S. ——, 130 L.Ed. 2d 398 (1994). The IDEA created a "state grant program to aid states in educating handicapped children." *Id.* The IDEA "requires all states receiving funds under [the IDEA] to provide a 'free appropriate public education' for all children with disabilities in the state." *Id.* (citing 20 U.S.C. 1412 (1988)). As we recognized, "North Carolina receives funds under the [IDEA] and is, therefore, required to provide a free appropriate public education to children with disabilities living in the State." *Roach*, 114 N.C. App. at 335, 443 S.E.2d at 342. For the reasons stated, the decision of the trial court is

Affirmed.

Chief Judge ARNOLD and Judge MARTIN, John C., concur.

JACOBI-LEWIS COMPANY, INC., PLAINTIFF v. CHARCO ENTERPRISES, INC., DEFENDANT

No. COA95-85

(Filed 6 February 1996)

Execution and Enforcement of Judgments § 77 (NCI4th)—future rental payments as earnings of judgment debtor

Rental payments expected to be received in the future are earnings, not property, due the judgment debtor for the purposes of applying N.C.G.S. § 1-362, and those rental payments thus cannot be applied in satisfaction of the judgment.

Am Jur 2d, Executions and Enforcement of Judgments § 155.

Judge LEWIS dissenting.

Appeal by defendant from order entered 1 November 1994 by Judge L. Bradford Tillery in New Hanover County Superior Court. Heard in the Court of Appeals 25 October 1995.

Wessell & Rainey, by John C. Wessell, III, for plaintiff-appellee.

Hogue, Hill, Jones, Nash & Lynch, by Wayne A. Bullard, for defendant-appellant.

WYNN, Judge.

The issue in this case is whether the trial court erred by finding that future rental payments can be applied in satisfaction of a judgment. Finding future income to be earnings under N.C. Gen. Stat. § 1-362 (1994), we reverse.

In December 1993, plaintiff obtained a judgment against defendant for $13,733.98 plus interest and costs. Execution on personal property of defendant resulted in partial satisfaction of the judgment. In February 1994, defendant entered into a sublease with third parties which obligated them to pay defendant and two other sublessors a

sum of $3,333.33 per month for the first year and $3,500.00 per month for the second in return for a leasehold of real property.

In a supplemental proceeding under N.C.G.S. § 1-31, plaintiff moved the Clerk of Superior Court in New Hanover County to order that defendant's future rental payments be applied towards satisfying the judgment. The clerk concluded that the rent owed defendant constituted property due to defendant in accordance with N.C.G.S. § 1-362 and ordered sublessees to pay one-third of all rental payments to the court to be applied to the judgment. Defendant filed notice of appeal to superior court. Judge L. Bradford Tillery affirmed the clerk's order in its entirety. Defendant appeals.

Defendant argues that since North Carolina has exempted future earnings from the definition of property due a judgment debtor for purposes of N.C.G.S. § 1-362, future rental payments should be exempt as well. We agree.

The applicable parts of N.C.G.S. § 1-362 provide:

> The court or judge may order any property, . . . in the hands of a judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within 60 days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that the earnings are necessary for the use of a family supported wholly or partly by his labor.

The statute has been expanded by our courts to preclude execution on any future earnings. *Harris v. Hinson*, 87 N.C. App. 148,150, 360 S.E.2d 118, 120 (1987). In considering this issue, our Supreme Court has concluded that "[p]rospective earnings of a judgment debtor are entirely hypothetical. They are neither property nor a debt." *Motor Finance Co. v. Putnam*, 229 N.C. 555, 557, 50 S.E.2d 670, 671 (1948).

After full consideration of the issue, we determine that future rental payments are analogous to future earnings. While the amount *expected* is definite and ascertainable, the receipt of the lease payments is neither certain nor quantifiable for purposes of classifying the anticipated payments as property. As a result, we hold that rental payments expected to be received in the future are earnings, not property, due the judgment debtor for the purposes of applying N.C.G.S § 1-362. Accordingly, the order of the trial court is,

Reversed.

Judge JOHN concurs.

Judge LEWIS dissents with separate opinion.

Judge LEWIS dissenting.

I respectfully dissent. While I agree that North Carolina law exempts prospective earnings from being applied to satisfy a judgment, I disagree with the majority that "future rental payments are analogous to future earnings." According to Black's Law Dictionary, Sixth Edition (1990), to *earn* is "to acquire by labor, service or performance." I would hold that the exemption for future earnings should be limited to payments which result as a direct consequence of the debtor's labor or personal application of skill. This point of view is supported by the often stated purpose of exemptions generally: "to provide the debtor and his family with the means of obtaining a livelihood and preventing them from becoming a charge upon the public." *E.g. North Side Bank v. Gentile*, 385 N.W.2d 133, 139 (Wis. 1986).

There is no precedent under North Carolina law which necessitates a finding that the two are analogous. *Harris v. Hinson*, 87 N.C. App. 148, 360 S.E.2d 118 (1987), held that future earnings are exempt from execution. However, real estate lease payments were not at issue. In fact, in its discussion that court only referred to "wages for personal services" and "salary." *Id.* at 151, 360 S.E.2d at 120-21. Furthermore, unlike the earnings exempted in *Finance Co. v. Putnum*, 229 N.C. 555, 50 S.E.2d 670 (1948), the sum to be received under the lease in this case is definite and ascertainable. The amount is not hypothetical. Furthermore, an extension of the majority's logic would exempt interest on C.D.'s and bonds and dividends on stocks.

As a result, I would hold that payments for a lease to be received in the future are property due the judgment debtor for the purposes of applying N.C. Gen. Stat. section 1-362 and would affirm the order of the trial court.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY BARNES

No. COA95-739

(Filed 6 February 1996)

Larceny § 147 (NCI4th)— larceny from the person—insufficiency of evidence—sufficiency of evidence of misdemeanor larceny

The evidence was insufficient to support a conviction of larceny from the person where the evidence tended to show that defendant entered an unattended kiosk in a mall, concealed a bank bag containing approximately $50 under his shirt, and left the kiosk before the sales person who manned the kiosk realized that the bank bag was missing; however, the evidence and the jury's verdict did show, and defendant conceded, that defendant committed the offense of misdemeanor larceny, and the case is remanded for entry of judgment upon that conviction.

Am Jur 2d, Larceny §§ 4, 54, 55, 144.

What constitutes larceny "from a person". 74 ALR3d 271.

Appeal by defendant from judgment entered 13 January 1995 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 2 January 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Robert H. Edmunds, Jr., for defendant-appellant.

WYNN, Judge.

The State's charge of common law robbery against defendant resulted in a finding of guilt on the lesser offense of larceny from the person. He was sentenced upon his plea of guilty to being a habitual felon.

The State's evidence shows that on 11 July 1994, James Morana worked alone at the House of Eyes, a kiosk located in Cotton Mill Square Mall in Greensboro. At approximately 8:40 p.m., he left the kiosk unattended as he talked to a saleswoman in a neighboring shop approximately 25 to 30 feet away. Upon being told by another sales-

person that someone was in his kiosk, Mr. Morana returned to find defendant rising from behind the counter near the cash register. Mr. Morana stepped past defendant, looked under the counter, and saw that a bank bag containing approximately $50 in cash was missing. About that time, defendant left the kiosk. Mr. Morana chased defendant, cornered him against a wall, and asked defendant to return the bag. As defendant pushed his way past him, Mr. Morana saw a bulge in defendant's shirt. Mr. Morana grabbed defendant's shirt, exposing the bank bag. Defendant fled. He subsequently turned himself in to the police.

Defendant did not present any evidence. Following his conviction of the crime of larceny from the person, he appealed to this Court.

On appeal, defendant contends that the charge of larceny from the person was not proven because the evidence fails to establish that the bank bag was taken from Mr. Morana's person. We agree.

Our Courts have routinely upheld convictions of larceny from the person when the stolen property was, or had been, attached to the victim's person at the time of, or immediately prior to, the taking, such as when a purse, wallet, money or other item was dislodged and taken from the victim's hand, arm, or pocket. *See, e.g., State v. Young*, 305 N.C. 391, 289 S.E.2d 374 (1982); *State v. Washington*, 51 N.C. App. 458, 276 S.E.2d 470 (1981); *State v. Simmons*, 33 N.C. App. 705, 236 S.E.2d 188, *cert. denied*, 293 N.C. 592, 238 S.E.2d 151 (1977); *State v. Massey*, 273 N.C. 721, 161 S.E.2d 103 (1968); *State v. Skipper*, 230 N.C. 387, 53 S.E.2d 169 (1949). If, however, the victim merely stood near the property at the time of the taking, then the criminal commits misdemeanor or felonious larceny, depending upon the value of the goods stolen. For example, in *State v. Lee*, 88 N.C. App. 478, 363 S.E.2d 656 (1988), the victim stood four to five steps away from her grocery cart when the defendant stole the victim's purse from her cart. Finding that "the deficiency in the State's evidence is so clear," this Court *ex mero motu* vacated the defendant's conviction for larceny from the person and remanded the case for the entry of judgment upon a conviction of misdemeanor larceny. *Id.* at 479-80, 363 S.E.2d at 657.

In 1991, our Supreme Court broadened the definition of "from the person" when it upheld a conviction of larceny from the person based on evidence that the defendant stole from a cash register as the cashier opened the register to make change, even though the cash

had not been attached to, or dislodged from, the cashier's person. *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991). Noting that the term "from the person" had never been defined in the General Statutes, the Court looked to the common law definition of the crime of larceny from the person and held that it is not necessary that the stolen property be attached to the victim's person in order for the theft to constitute larceny from the person as long as the property was within the victim's protection and presence at the time of the taking.

Relying upon *Buckom*, the State argues that although Mr. Morana was away from the store, "he was still in a position to watch that store, therefore the larceny was from the person." It also argues defendant was in the presence of Mr. Morana before he left the store with the bag. We disagree.

As the Supreme Court observed in *Buckom*, the crime of larceny from the person developed as a middle ground between the forcible taking of property necessary to constitute robbery and the secret or private stealing commonly associated with simple larceny. The Court gave as an example of a taking from a person's presence and protection sufficient to constitute larceny from the person the situation in which a thief steals jewelry placed on the counter by the jeweler for inspection by the thief "under the jeweler's eye." *Id.* at 318, 401 S.E.2d at 365.

The situation in the present case is not analogous. The taking of the bank bag in this case is more akin to the secret or private stealing commonly associated with simple larceny. The kiosk was unattended at the time defendant entered. By the time Mr. Morana returned to the kiosk, defendant had hidden the bank bag under his shirt, and defendant left the kiosk before Mr. Morana realized that the bank bag was missing. By that point the crime of larceny had been completed. *See State v. Carswell*, 296 N.C. 101, 249 S.E.2d 427 (1978) (slightest taking and movement of property with the intent to permanently deprive the owner of the property is sufficient to constitute the crime of larceny). Because the crime had been completed while Mr. Morana was absent and while the bag was left unprotected, we conclude that the larceny of the bank bag was not from Mr. Morana's person.

For the foregoing reasons, we hold that the trial court erred by denying defendant's motion to dismiss the charge of larceny from the person. Nevertheless, the elements of the felony of larceny from the person are the same as misdemeanor larceny except that the felony

requires that the property be taken from the person, presence or protection of the victim. *See State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362. Having determined, as a matter of law that the aforementioned element was unsupported by the evidence, it follows that the jury found all the elements of misdemeanor larceny to exist from the evidence beyond a reasonable doubt. Because the evidence and the jury's verdict does show, and defendant concedes, that defendant committed the offense of misdemeanor larceny, we vacate the felony judgment and remand the matter for entry of judgment upon a conviction of misdemeanor larceny. There being no felony conviction to which the habitual felon indictment attaches, that indictment is dismissed and the conviction vacated.

Vacated and remanded.

Judges Eagles and Smith concur.

IN THE MATTER OF THE WILL OF ORA CHURCH, DECEASED

No. COA95-401

(Filed 6 February 1996)

1. Wills § 27 (NCI4th)— holographic will—"safe place" defined

N.C.G.S. § 31-3.4(a)(3) requires that a paper writing sufficient to pass as a holographic will must be found, after the death of the testator, in one of five different places: (1) among the testator's valuable papers; (2) among the testator's valuable effects; (3) in a safe deposit box; (4) in a safe place where it was deposited by the testator or under his authority; or (5) in the possession of a person or firm with whom it was deposited by the testator or under his authority for safekeeping.

Am Jur 2d, Wills § 705.

2. Wills § 27 (NCI4th)— handwritten will found in pocketbook in testator's bedroom—"safe place"

The evidence was sufficient to support a finding that testatrix's handwritten will was found in a "safe place" where it tended to show that testatrix stored valuable belongings in her pocketbooks which she kept in her bedroom; one pocketbook on the

inside of her bedroom door contained insurance papers, the deed to her home, and a bank book; and the handwritten document was in another pocketbook, also in her bedroom, in an envelope labelled "This is my Will."

Am Jur 2d, Wills § 705.

Appeal by caveator from order and judgment entered 23 January 1995 in Alamance County Superior Court by Judge W. Osmond Smith, III. Heard in the Court of Appeals 12 January 1996.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Wiley P. Wooten and Joy Ammons Ciriano, for caveator-appellant.

Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison, G. Wayne Abernathy and W. Brien Lewis, for propounder-appellee.

GREENE, Judge.

Virginia Watson (caveator) appeals an order and judgment granting summary judgment to Martha Sexton (propounder) in an action to determine whether propounder is entitled to probate a handwriting found in Ora Church's (testator) bedroom as the testator's holographic will.

The undisputed facts are: Following the testator's death on 17 April 1994, some of her family and friends went to her home to clean it. Hanging on a hook on the inside of the closet door in testator's bedroom was a pocketbook. Inside the pocketbook was an envelope on which was written, "This is my Will, Ora H. Church." Inside the envelope was a hand-written document disposing of the testator's belongings and stating that propounder was to be executrix. Across the room on the inside of the door to the testator's bedroom was another pocketbook which contained her deed to the home, insurance and other valuable papers.

The handwritten document was admitted to probate as testator's holographic will on 6 May 1994, and propounder was appointed executrix. Caveator alleged that the document was not a valid holographic will. Each party filed for summary judgment.

At a hearing on the motions for summary judgment, the trial court found that the document was "written entirely in [testator's] hand-

writing and was subscribed by her and was found after her death in an otherwise empty pocketbook hanging on a hook on the back of her bedroom closet door" while another pocketbook containing insurance papers, a deed and a bank book was hanging on a hook on the back of her bedroom door across the room from the bedroom closet. The trial court further found[1] that the document was deposited in an "other safe place" and qualified as a holographic will.

The issues are (I) whether a handwritten document can be a valid holographic will if found in a "safe place"; and if so (II) whether the evidence supports the finding that the handbag in this case is a "safe place."

I

Prior to 1953, N.C. Gen. Stat. § 31-3 read:

> No last will or testament shall be good . . . unless such last will and testament be found *among the valuable papers and effects* of any deceased person, or shall have been lodged in the hands of any person for safe-keeping . . . .

N.C.G.S. § 31-3 (1950) (emphasis added). Section 31-3 was re-written and re-numbered in 1953, and section 31-3.4(a)(3) now requires that the handwritten document be:

> [f]ound after the testator's death *among his valuable papers or effects, or in a safe-deposit box or other safe place* where it was deposited by him or under his authority, or in the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by him or under his authority for safekeeping.

N.C.G.S. § 31-3.4(a)(3) (1984) (emphasis added).

The amendment deleted the requirement that the writing be found among the "valuable papers *and* effects" of the testator and now requires that it be found among "valuable papers *or* effects" (emphasis added). Additional language was also added, qualifying the handwritten document if found "in a safe-deposit box *or other safe place.*"

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1. Although denominated by the trial court as a conclusion of law, we treat this determination as a finding of fact because its determination does not involve the application of legal principles. *See Gainey v. N.C. Dept. of Justice*, 121 N.C. App. 253, 257, 465 S.E.2d 36, 40 (1996).

[1] Caveator argues that the document must be found "among valuable papers" despite the disjunctive language of N.C. Gen. Stat. § 31-3.4(a)(3). We disagree. Each of the clauses in the current statute, and the one applicable to this case, are connected by the disjunctive "or" and are "independent clauses of a compound sentence and neither clause is dependent upon the other." *Davis v. Granite Corp.*, 259 N.C. 672, 675, 131 S.E.2d 335, 337 (1963). Read in this manner, the statute requires that a paper-writing sufficient to pass as a holographic will must be found, after the death of the testator, in one of five different places: (1) among the testator's valuable papers; (2) among the testator's valuable effects; (3) in a safe-deposit box; (4) in a safe place where it was deposited by the testator or under his authority; or (5) in the possession of a person or firm with whom it was deposited by the testator or under his authority for safekeeping.

II

[2] The caveator next argues that the evidence does not support a finding that the pocketbook in this case is a "safe place." We disagree. The record shows that the testator stored valuable belongings in her pocketbooks, which she kept in her bedroom. One pocketbook on the inside of her bedroom door contained insurance papers, the deed to her home and a bank book. The handwritten document was in another pocketbook, also in her bedroom, in an envelope labelled "This is my Will." This evidence supports the trial court's finding that the handwriting was found in a "safe place."[2]

Affirmed.

Judges WYNN and McGEE concur.

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2. We note that the trial court did not address in its order whether the writing was placed in the pocketbook by the testator or under her authority. The absence of this finding, however, does not affect our holding in this case because the issue was not raised by the caveator in her appeal and consequently will not be addressed by this Court. N.C. R. App. P. 10(a) ("scope of review on appeal is confined to a consideration of those assignments of error set out in the record").

SANDRA JEAN HILL, PETITIONER v. ROBERT WEST HILL, RESPONDENT

No. COA95-202

(Filed 6 February 1996)

Parent and Child § 110 (NCI4th)— proceeding to terminate parental rights—denial of DSS motion to intervene of right—error

The trial court erred by denying DSS's motion to intervene of right in a mother's action to terminate the father's parental rights, since the mother received AFDC benefits; she partially assigned her right to any child support owed for the child to DSS; DSS's status as assignee gave it a direct interest in the termination proceeding which would be forever impaired absent its ability to intervene pursuant to N.C.G.S. § 1A-1, Rule 24(a)(2); and DSS's interests were not adequately protected by the existing parties in the termination proceeding.

Am Jur 2d, Parties §§ 124, 133-142, 151.

Time within which right to intervene may be exercised. 37 ALR2d 1306.

Propriety of consideration of, and disposition as to, third person's property claims in divorce litigation. 63 ALR3d 373.

Appeal by Lenoir County Department of Social Services from orders entered 18 April 1994 by Judge Joseph E. Setzer in Lenoir County District Court. Heard in the Court of Appeals 9 January 1996.

No brief for petitioner-appellee.

No brief for respondent.

Whitley, Jenkins & Associates, by Eugene G. Jenkins, for movant-appellant.

MARTIN, Mark D., Judge.

Lenoir County Department of Social Services (DSS) appeals from orders denying its verified motion to intervene and terminating Robert Hill's parental rights.

Michael Hill (child) was born into the marriage of Robert and Sandra Hill. The child lives with his mother. Since the child's birth on 2 July 1993, the father has not contributed to the financial support of the child or otherwise displayed any parental interest in the child. The mother applied for Aid to Families with Dependent Children (AFDC) and received AFDC on behalf of the child.

On 22 February 1994 the mother filed a petition to terminate the parental rights of Mr. Hill. Mr. Hill did not file an answer to the petition.

On 4 April 1994 DSS filed a motion to intervene in the termination action. In its verified motion DSS set forth its claim for reimbursement of child support expenditures from Mr. Hill. Prior to the filing of the instant petition, DSS had previously filed a civil action against the father seeking: (1) to recover AFDC benefits expended in the care of the child; and (2) to obtain an order of support for future payment.

On 18 April 1994 the trial court denied DSS' motion to intervene and terminated Mr. Hill's parental rights.

On appeal DSS contends the trial court erred by denying its motion to intervene of right in the action to terminate Mr. Hill's parental rights. We agree.

DSS claims it was entitled to intervene in the termination proceeding pursuant to N.C.R. Civ. P. 24(a)(2), which permits intervention of right:

> When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (1990).

The prospective intervenor must establish the following prerequisites for non-statutory intervention of right: "(1) an interest relating to the property or transaction; (2) practical impairment of the protection of that interest; and (3) inadequate representation of that interest by existing parties." *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978). Intervention of right is an absolute right and denial of that right is reversible error, regardless of the trial court's findings. *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (decision under precursor to N.C.R. Civ. P. 24(a)(2), N.C. Gen. Stat. § 1-73).

To satisfy the first and second elements, DSS must establish it had an interest in the outcome of the termination proceeding and the practical impairment of that interest. DSS' interest " 'must be of such direct and immediate character that [it] will either gain or lose by the direct operation and effect of the judgment . . . .' " *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 128, 388 S.E.2d 538, 554 (1990) (quoting *Strickland v. Hughes*, 273 N.C. at 485, 160 S.E.2d at 316).

In the instant case, because the mother received AFDC benefits, she partially assigned her right "to any child support owed for the child" to DSS. *See* N.C. Gen. Stat. § 110-137 (1995); *State ex rel. Crews v. Parker*, 319 N.C. 354, 357-359, 354 S.E.2d 501, 504-505 (1987). Prior to the filing of the instant petition, DSS had already pursued its rights as assignee by filing an action against Mr. Hill to recover AFDC benefits expended on behalf of the child. Because of the trial court's subsequent termination of Mr. Hill's parental rights, however, DSS has forever lost its right to recover AFDC benefits expended on behalf of the child from the date of the order until the child reaches the age of majority. Accordingly, we believe DSS' status as assignee gives it a direct interest in the termination proceeding which will be forever impaired absent its ability to intervene under N.C.R. Civ. P. 24(a)(2).

In *Crews* the Supreme Court determined an AFDC recipient could intervene of right in a proceeding to collect child support instituted by the Pender County Child Support Enforcement Agency (Pender CSEA) where the recipient sought to recover monies expended prior to the receipt of AFDC. *Id.* at 355, 354 S.E.2d at 503. Although the recipient had assigned her right to recover child support to Pender CSEA, and could have instituted a separate action to recover the previous non-AFDC child support, the Supreme Court concluded the recipient could intervene of right in the pending proceeding. *Id.* at 360-361, 354 S.E.2d at 505.

DSS' need to intervene in the instant termination proceeding appears even more compelling than in *Crews*. Put simply, the trial court's order in the present case forever precludes DSS from recovering AFDC benefits expended after the date of the order. Therefore, like *Crews*, we believe DSS has a direct interest in the termination proceeding which will be practically impaired absent its ability to intervene under N.C.R. Civ. P. 24(a)(2).

To intervene of right DSS must also establish its interests are not adequately represented by existing parties. *Ellis*, 38 N.C. App. at 83,

247 S.E.2d at 276. We note Mr. Hill did not file an answer and, other than having counsel appear on his behalf at the hearing below, has not otherwise contested the petition. Likewise, as the mother will continue to receive AFDC regardless of whether the father's parental rights are terminated, she may not be in a position to adequately protect DSS' interests, on behalf of the public-at-large, of ensuring child support is recovered from the child's father. We therefore conclude DSS' interests are not adequately protected by the existing parties in the present proceeding.

Consequently, we conclude the trial court erred by denying DSS' motion to intervene of right pursuant to Rule 24(a)(2). Accordingly, we reverse the trial court's order denying DSS' motion to intervene, vacate the trial court's order terminating Robert Hill's parental rights, and remand for entry of an order granting DSS' motion to intervene and a new hearing to be held at which time all parties, including DSS, should be afforded an opportunity to present evidence and otherwise be heard on the petition for termination of parental rights.

Reversed in part, vacated in part, and remanded.

Judges EAGLES and MARTIN, John C., concur.

HERMAN HAYNES, Petitioner-Appellant v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, Respondent-Appellee

No. COA95-74

(Filed 6 February 1996)

Social Services and Public Welfare § 24 (NCI4th)— Medicaid benefits—applicant's assets—house not actually available

The hearing officer erred in classifying petitioner's house as reserve property and considering its value in determining petitioner's eligibility for Medicaid benefits because petitioner established that the house was not actually available to him where petitioner presented evidence that the house was in very poor condition with no suitable kitchen floor, holes in the walls, and other problems; although the county listed the tax value of the property as $43,000, the market value of the property was $20,000 to $25,000, and there were two outstanding mortgages on the property totalling $32,000; and petitioner's nephew had tried in

vain to sell the house but the house could not be financed because of its poor condition. Therefore, petitioner was entitled to Medicaid benefits since he had no available assets in excess of $1,500.

Am Jur 2d, Welfare Laws §§ 17, 19, 57.

Eligibility for welfare benefits, under maximum-assets limitations, as affected by expenditures or disposal of assets. 19 ALR4th 146.

Appeal by petitioner from order entered 13 December 1994 by Judge Judson D. DeRamus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 23 October 1995.

In late September 1993, Herman Edward Haynes (hereinafter petitioner) moved from the house he owned in Eden, North Carolina to an apartment building owned by the High Point Housing Authority. Poor health forced petitioner to move to a rest home in December 1993, and to a nursing home in February 1994. On 20 January 1994, petitioner applied for Medicaid benefits with the Guilford County Department of Social Services (hereinafter DSS). The county verified the tax value of petitioner's property to be $43,000, determined that the property had encumbrances of $32,000 in the form of two mortgages on petitioner's house, and determined petitioner's equity in the property was $11,000. On 4 March 1994, the county denied petitioner's application for Medicaid benefits because petitioner's $11,000 in equity exceeded the $1500 limit on assets for Medicaid recipients. Petitioner's property was later reevaluated at $37,100, but this still left petitioner with more than $1500 in equity.

Petitioner requested and was granted a local hearing, but the local hearing officer affirmed the county's decision on 16 March 1994. Petitioner appealed the county's decision, but a state hearing officer affirmed the decision on 23 June 1994 after conducting a hearing on 27 April 1994. Petitioner appealed the decision to the chief hearing officer, who upheld the hearing officer's 23 June 1994 decision. Petitioner then appealed to Guilford County Superior Court. The trial court affirmed the final agency decision on 13 December 1994.

On 16 June 1994, petitioner's house was sold at a foreclosure sale for $16,600. Respondent's brief states that the county approved petitioner's Medicaid application and he began receiving benefits on 1 July 1994. Petitioner appeals the denial of Medicaid benefits for the

time period prior to the foreclosure sale. Although petitioner died on 10 May 1995, we granted the motion of Mary Gann, petitioner's niece, to substitute herself as the appellant for purposes of this appeal.

Central Carolina Legal Services, Inc., by Stanley B. Sprague and Richard Wells, for petitioner-appellant.

Attorney General Michael F. Easley, by Associate Attorney General Kathryn J. Thomas, for respondent-appellee.

EAGLES, Judge.

We first note that the proper scope of appellate review of a trial court's consideration of a final agency decision is whether the trial court committed any error of law. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994). This is a two step process which requires us to determine "(1) . . . whether the trial court exercised the appropriate scope of review and, if appropriate, (2) . . . whether the court did so properly." *Id.* at 675, 443 S.E.2d at 118-19. Because petitioner's assignments of error raised questions of law, the proper scope of review for the trial court was *de novo*. *Id.* at 677, 443 S.E.2d at 119. The trial court determined that respondent committed no error of law. We must now determine whether the trial court was correct. Pursuant to Medicaid eligibility requirements, petitioner could not have resources in reserve (equity) in excess of $1500 to receive Medicaid benefits. The North Carolina Administrative Code defines equity as "the tax value of a resource less the amount of debts, liens, or other encumbrances." N.C. Admin. Code tit. 10, r. 50A.0201(33) (Nov. 1994). Petitioner argues that respondent violated the "availability" requirement of 42 U.S.C. § 1396(a)(17)(B) when it considered petitioner's house available although the house "could not be sold." 42 U.S.C. section 1396(a) provides in pertinent part that "[a] State plan for medical assistance must . . . (17)(B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant." N.C. Admin. Code tit. 10, r. 50B.0311(1) (Dec. 1994) provides:

> The value of resources currently available to any budget unit member shall be considered in determining financial eligibility. A resource shall be considered available when it is actually available and when the budget unit member has a legal interest in the resource and he, or someone acting in his behalf, can take any necessary action to make it available.

Here, respondent argues that petitioner's house was "available" because petitioner had a legal interest in his house. Accordingly, respondent contends the house was properly considered a resource in determining petitioner's eligibility for Medicaid. However, the applicable North Carolina Administrative Code provision states that a resource shall be considered available when it is actually available *and* when the [petitioner] has a legal interest in the resource. *See Correll v. Division of Social Services*, 103 N.C. App. 562, 567, 406 S.E.2d 633, 636 (1991) (stating that "only resources *actually available* to an applicant are included in 'reserve' "), *rev'd on other grounds*, 332 N.C. 141, 418 S.E.2d 232 (1992) (emphasis added).

Without deciding whether petitioner had a legal interest in the house, we conclude that the evidence petitioner presented at the hearing established that the house was not *actually* available. Petitioner presented evidence at the 27 April 1994 hearing that a real estate broker had examined petitioner's property. The real estate broker stated that the house "was in very poor condition, with no suitable kitchen floor, holes in the walls, etc." The real estate broker determined that the market value of the property was $20,000 to $25,000 "as is," but that the house might have a market value of $31,000 if petitioner made $5,000 in repairs. Petitioner's nephew testified at the hearing that he had attempted in vain to sell the house. One potential buyer considered purchasing the house for rental property, but he told petitioner's nephew that he would not pay even $28,000 for petitioner's house because it needed such major repairs. Petitioner's nephew testified that another potential buyer wanted to purchase the house, but he could not obtain financing. Petitioner's nephew testified that the real estate broker explained to him that a house cannot be financed when it is in such poor shape. This evidence showed that it was not feasible for petitioner to liquidate the property because it would not even bring enough money for petitioner to pay off the two outstanding mortgages on the property. Despite this evidence, the local hearing officer ruled that the house was reserve property and the trial court affirmed. Because we conclude that petitioner's house was not actually available, we hold that the hearing officer erred in classifying the house as reserve property and considering its value in determining petitioner's eligibility for Medicaid and that the trial court erred in affirming the hearing officer's decision. Petitioner was entitled to medicaid benefits because he had no *available* assets in excess of $1500.

Having determined that petitioner was entitled to benefits, we need not address petitioner's remaining arguments.

Reversed and remanded.

Chief Judge ARNOLD and Judge MARTIN, John C., concur.

THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF MEDICAL ASSISTANCE, PLAINTIFF v AREANDA WEAVER, THAD A. THRONEBURG, AND CAUDLE & SPEARS, P.A., A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA94-1426

(Filed 6 February 1996)

Social Services and Public Welfare § 27 (NCI4th)— "medicaid lien"—one-third as attorney's fees—statutory authority

There was no merit to plaintiff's contention that N.C.G.S. § 108A-57 limits attorney's fees for private attorneys recovering from a third party on behalf of a medicaid beneficiary to one-third of the gross recovery, since the plain language of the statute does not provide that the State is subrogated to all rights of recovery to the extent of *all* money a medical assistance beneficiary received, but provides only that the State is subrogated to all rights of recovery of the beneficiary of medical assistance "to the extent of *payments* under this Part"; therefore, defendant law firm lawfully took one-third of a "medicaid lien" as part of its attorney's fee because the statute provides that the attorney's fee shall not exceed one-third of the amount recovered "to which the right to subrogation applies."

Am Jur 2d, Welfare Laws §§ 38-41.

Appeal by plaintiff from judgment entered 20 October 1994 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 3 October 1995.

Areanda Weaver (hereinafter defendant Weaver) received $36,026.54 in Medicaid benefits through the Department of Human Resources, Division of Medical Assistance (hereinafter plaintiff). Thereafter, the law firm of Caudle & Spears (hereinafter defendant

Caudle & Spears) represented defendant Weaver in her medical malpractice claim against defendant Weaver's physician for failure to diagnose her Rocky Mountain Spotted Fever. Defendant Caudle & Spears recovered $1,000,000 on behalf of defendant Weaver. The firm received one-third of this amount as its attorney's fee for representing defendant Weaver in her malpractice claim against her physician.

On 4 August 1992, defendant Caudle & Spears sent plaintiff a check for $24,017.69 and stated in an accompanying letter that the check "represent[ed] payment of [the] medicaid lien minus our 1/3 attorney's fee of $12,008.85." Plaintiff demanded that defendant Caudle & Spears remit the $12,008.85 to plaintiff, claiming that defendant Caudle & Spears did not have the right to attorney's fees from the amount of the "medicaid lien." After defendant Caudle & Spears did not remit the money, plaintiff sued defendants to recover the money. Defendants answered plaintiff's complaint and included three defenses. First, defendants stated that plaintiff had agreed to pay the $12,008.85 in attorney's fees and that the agreement constituted a bar and estoppel of plaintiff's claim. Second, defendants pled accord and satisfaction in defense of plaintiff's claim. Finally, defendants pled G.S. 108A-57 as a bar to plaintiff's claim, stating that the statute allowed defendant Caudle & Spears to retain one-third of the "medicaid lien" as attorney's fees.

On 28 September 1994, defendants made motions for summary judgment and judgment on the pleadings. Plaintiff then made cross-motions for summary judgment and judgment on the pleadings. The trial court granted plaintiff's motions with respect to the first and second defenses set forth in defendants' answer, but denied the remainder of plaintiff's motions. Correspondingly, the trial court denied defendants' motions as to the first and second defenses but granted defendants' motions regarding the application of G.S. 108A-57.

Plaintiff appeals the entry of partial summary judgment and judgment on the pleadings for defendants. Defendants cross-assign error to the trial court's partial grant of plaintiff's motions for summary judgment and judgment on the pleadings.

Attorney General Michael F. Easley, by Associate Attorney General Elizabeth L. Oxley, for plaintiff-appellant.

Wyrick, Robbins, Yates & Ponton, by Lee M. Whitman, for defendant-appellees.

EAGLES, Judge.

Plaintiff argues that the trial court erred by denying plaintiff's motions regarding the interpretation of G.S. 108A-57 because plaintiff contends that G.S. 108A-57 limits attorney's fees for private attorneys recovering from a third party on behalf of a medicaid beneficiary to one-third of the gross recovery. We disagree with plaintiff's construction of the statute and affirm.

When a person accepts medical assistance through the Department of Human Resources, Division of Medical Assistance, the person assigns to the State the right to any third party benefits the person may subsequently recover. G.S. 108A-59(a). However, G.S. 108A-57 provides in part:

> (a) Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of such assistance, or of his personal representative, his heirs, or the administrator or executor of his estate, against any person. It shall be the responsibility of the county attorney or an attorney retained by the county and/or the State or an attorney retained by the beneficiary of the assistance if such attorney has actual notice of payments made under this Part to enforce this section, and said attorney shall be compensated for his services in accordance with the attorneys' fee arrangements approved by the Department; provided, however, that any attorney retained by the beneficiary of the assistance shall be compensated for his services in accordance with the following schedule and in the following order of priority from any amount obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of such injury or death:
>
> (1) First to the payment of any court costs taxed by the judgment;
>
> (2) Second to the payment of the fee of the attorney representing the beneficiary making the settlement or obtaining the judgment, but this fee shall not exceed one-third of the amount obtained or recovered to which the right of subrogation applies;
>
> (3) Third to the payment of the amount of assistance received by the beneficiary as prorated with other claims against the

amount obtained or received from the third party to which the right of subrogation applies, but the amount shall not exceed one third of the amount obtained or recovered to which the right of subrogation applies; and

(4) Fourth to the payment of any amount remaining to the beneficiary or his personal representative.

Contrary to plaintiff's interpretation of G.S. 108A-57, the plain language of the statute does not provide that the State is subrogated to all rights of recovery to the extent of *all* money a medical assistance beneficiary receives. The first sentence of G.S. 108A-57(a) only provides that the State is subrogated to all rights of recovery of the beneficiary of medical assistance "to the extent of *payments* under this Part [i.e. Part 6, entitled Medical Assistance Program]." (Emphasis added.) It follows that defendant Caudle & Spears lawfully took one-third of the "medicaid lien" as part of its attorney's fee because G.S. 108A-57(a)(2) provides that the attorney's fee shall not exceed one-third of the amount recovered "to which the right of subrogation applies." Here, defendant Caudle & Spears received as its fee representing defendant Weaver in her medical malpractice claim one-third of the gross recovery and received in addition one-third of the "medicaid lien" amount payable to plaintiff pursuant to G.S. 108A-57. The statute does not govern a private attorney's fee arrangement with its client. The statute regulates the amount of the attorney's fee only as it relates to the amount of the "medicaid lien" payable to plaintiff. Accordingly, the trial court properly denied plaintiff's motions regarding the interpretation of G.S. 108A-57.

Because we conclude the trial court did not err in granting summary judgment for defendants, we need not address defendants' cross-assignment of error.

Affirmed.

Judges JOHNSON and WALKER concur.

STATE OF NORTH CAROLINA v. CHARLES EUGENE BARTLETT

No. COA95-340

(Filed 6 February 1996)

Evidence and Witnesses § 1353 (NCI4th)— officer's "attempt" to record defendant's answers to questions—document not signed by defendant—document inadmissible

Where an officer testified that he did not write down the questions asked of defendant, never testified that his handwritten notes were an exact reflection of the answers given by defendant, and testified only that he "attempted" to write down defendant's answers, and there was no evidence that defendant acquiesced in the correctness of the writing but in fact refused to sign it, the trial court erred in admitting the document into evidence and allowing the officer to read it to the jury.

Am Jur 2d, Evidence §§ 717.

Appeal by defendant from judgment entered 6 May 1994 in Wayne County Superior Court by Judge G. K. Butterfield, Jr. Heard in the Court of Appeals 10 January 1996.

Attorney General Michael F. Easley, by Assistant Attorney General J. Mark Payne, for the State.

Barnes, Braswell & Haithcock, P.A., by Glenn A. Barfield, for defendant-appellant.

GREENE, Judge.

Charles Bartlett (defendant) appeals a judgment entered 6 May 1994 in which a jury convicted him of two counts of felonious larceny, two counts of breaking and entering and one count of second degree burglary. The trial court consolidated the offenses and sentenced defendant to twenty-four years in prison.

Defendant was arrested on 16 August 1993 following a break-in at a residence in Dudley and was taken to the Wayne County Sheriff's Department. After being advised of his *Miranda* rights, the defendant agreed to talk to the investigating officers. One of the officers (Greenfield) "attempted" to write down the defendant's answers to questions posed to the defendant by another officer. The questions

asked were not written down by Greenfield. At some point during the questioning, the defendant "decided that he wanted to stop answering any questions" because he "wanted a lawyer." The defendant was given the paper writing prepared by Greenfield and the defendant refused to sign it.

At trial, the paper writing prepared by Greenfield on the day of the arrest was admitted into evidence and Greenfield was permitted to read it to the jury. The defendant objected.

The issue is whether a defendant's statement, reduced to writing by another person, is admissible into evidence when it is not signed by the defendant.

The general rule is that a "statement of an accused reduced to writing by another person, where it was freely and voluntarily made, and where it was read to or by the accused and signed or otherwise admitted by him as correct shall be admissible against him." *State v. Boykin*, 298 N.C. 687, 693, 259 S.E.2d 883, 887 (1979), *cert. denied*, 446 U.S. 911, 64 L. Ed. 2d 264 (1980); *see State v. Cole*, 293 N.C. 328, 334, 237 S.E.2d 814, 818 (1977). In other words, the defendant must in some manner indicate his "acquiescence in the correctness" of a written instrument tendered as his confession. *State v. Walker*, 269 N.C. 135, 141, 152 S.E.2d 133, 137 (1967). Nonetheless, the written instrument is admissible, without regard to the defendant's acquiescence, if it is a "verbatim record of the questions [asked] . . . and the answers" given by him. *State v. Byers*, 105 N.C. App. 377, 383, 413 S.E.2d 586, 589 (1992); *see Cole*, 293 N.C. at 334-35, 237 S.E.2d at 818 (officer wrote down statements in longhand in "defendant's own words" and swore they were defendant's actual words); *State v. Fox*, 277 N.C. 1, 25, 175 S.E.2d 561, 576 (1970) (sheriff testified that the transcription was an "exact copy" of the conversation between himself and defendant).

In this case, Greenfield testified that he did not write down the questions asked of defendant and he never testified that his handwritten notes were an exact reflection of the answers given by the defendant. Greenfield only testified that he "attempted" to write down the defendant's answers. Finally, there is no evidence that the defendant acquiesced in the correctness of the writing and in fact, he refused to sign it. It was therefore error to admit the document into evidence and allow the officer to read it to the jury.

Where a confession is erroneously admitted into evidence, "no one can say what weight and credibility the jury gave the confession," *State v. Blackmon*, 280 N.C. 42, 50, 185 S.E.2d 123, 128 (1971), and in the absence of some other evidence "just as weighty," the improperly admitted confession is prejudicial error and requires a new trial. *State v. Edgerton*, 86 N.C. App. 329, 335, 357 S.E.2d 399, 404 (1987), *rev'd on other grounds*, 328 N.C. 319, 401 S.E.2d 351 (1991); *see* N.C.G.S. § 15A-1443(a) (1988). Although there was, in this case, other evidence of defendant's guilt we cannot say that it was "just as weighty" as the improperly admitted confession.

New trial.

Judges WYNN and McGEE concur.

RENEE JOHNSON JONES, PLAINTIFF v. PRUITT HERBERT JONES, DEFENDANT

No. COA95-32

(Filed 6 February 1996)

1. Divorce and Separation § 112 (NCI4th)— equitable distribution—VA loan eligibility—no distributional factor

Defendant husband's VA loan eligibility did not constitute distributable property for purposes of equitable distribution; furthermore, the trial court did not err in finding that defendant's VA loan eligibility was not a distributional factor justifying an unequal division of marital property in defendant's favor.

Am Jur 2d, Divorce and Separation §§ 878, 897.

Divorce: excessiveness or adequacy of trial court's property award—modern cases. 56 ALR4th 12.

2. Divorce and Separation § 151 (NCI4th)— equitable distribution—plaintiff's contributions to marital home—unequal division of property—no abuse of discretion

The trial court did not abuse its discretion in finding that plaintiff wife's contributions toward the mortgage, insurance, taxes, maintenance, and preservation of the marital residence constituted factors for an unequal division in her favor and in concluding that an equal division of marital assets was not equitable.

Am Jur 2d, Divorce and Separation § 870, 903.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Divorce: excessiveness or adequacy of trial court's property award—modern cases. 56 ALR4th 12.

Appeal by defendant from judgment and order entered out of session 28 June 1994, *nunc pro tunc* 16 June 1994, by Judge Joseph E. Turner in Guilford County District Court. Heard in the Court of Appeals 8 January 1996.

No brief for plaintiff-appellee.

Mary K. Nicholson for defendant-appellant.

WALKER, Judge.

Plaintiff and defendant separated on 12 September 1987. A decree of absolute divorce was entered on 3 March 1992. Following a hearing on 23 November 1993, the trial court entered a judgment and order of equitable distribution from which defendant appeals.

[1] In his first assignment of error, defendant argues that the trial court erred in its treatment of defendant's VA loan eligibility. The evidence showed that plaintiff and defendant used defendant's VA loan eligibility to obtain a VA loan which was applied toward the purchase of the marital residence. The VA loan obligation at the time of the purchase was greater than the purchase price of the residence. Defendant contended at the hearing that the VA loan eligibility was his separate property and that since "at the date of separation the only value to the residence was the VA loan," the court was required to distribute the residence to him in order to restore his separate property to him. The trial court rejected defendant's contention, finding that defendant's VA loan eligibility did not qualify as property subject to distribution.

In his attempt to persuade us that the VA loan eligibility constitutes his separate property, defendant argues that since military pensions are considered distributable property under N.C. Gen. Stat. § 50-20(b), his VA loan eligibility is, by analogy, also distributable property. However, we find that military pensions are distinguishable from the "property interest" claimed by defendant here. A military pension is a quantifiable, legally enforceable property interest. In

contrast, defendant's VA loan eligibility in itself created no enforceable right in defendant other than the right to *apply* for a VA loan. In order to receive a loan, defendant still had to *qualify* for such a loan. Therefore, we hold that the trial court did not err in finding that defendant's VA loan eligibility did not constitute distributable property for purposes of equitable distribution.

Defendant further contended at the hearing that if the court declined to classify his VA loan eligibility as his separate property, the court should find that it was a distributional factor justifying an unequal division of marital property in defendant's favor. The court considered defendant's contention but found that the use of defendant's VA loan eligibility to purchase the marital residence did not constitute a factor warranting an unequal division of marital assets since qualification for the VA loan was based on both parties' financial contributions to the marriage. The trial court has broad discretion in evaluating and applying the statutory distributional factors and will not be reversed absent a showing that its decision is manifestly unsupported by reason. *Leighow v. Leighow*, 120 N.C. App. 619, 622, 463 S.E.2d 290, 292 (1995). Defendant has made no such showing here.

[2] In his next assignment of error, defendant claims the trial court erred by ordering an unequal division of the marital property in favor of plaintiff. We disagree. The decision whether to divide the marital estate equally or unequally is entirely within the trial court's discretion, and the trial court's decision in this regard can be disturbed only if a clear abuse of that discretion has occurred. *Harris v. Harris*, 84 N.C. App. 353, 358, 352 S.E.2d 869, 872 (1987). Furthermore, the finding of a single distributional factor under N.C. Gen. Stat. § 50-20(c) 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 thorough findings regarding the statutory distributional factors, including those argued by the parties under N.C. Gen. Stat. § 50-20(c)(12). The court found that "[p]laintiff's contributions towards the mortgage, homeowners insurance, property taxes, maintenance and preservation of the marital residence do constitute factors for an unequal division" in favor of plaintiff. *See* N.C. Gen. Stat. § 50-20(c)(11a) (1992 and Cum. Supp. 1994). The court then found and concluded that an equal division of marital assets was not equitable. Defendant has shown no abuse of discretion relative to this finding and conclusion.

In his final assignment of error, defendant argues that the trial court's findings of fact and conclusions of law are not supported by the evidence. A careful review of defendant's brief reveals that this assignment has already been addressed in defendant's second assignment of error where he challenges the court's findings and conclusions regarding the proper distribution of the marital estate. We have already determined that the trial court did not err in this regard. To the extent defendant's third assignment of error challenges the values assigned by the court to various items of marital property, suffice it to say that the trial court's findings as to the valuation of the marital property were supported by competent evidence and will not be disturbed on appeal. *See Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386, *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988).

Affirmed.

Chief Judge ARNOLD and Judge LEWIS concur.

KAREN KIZER, PLAINTIFF v. CITY OF RALEIGH, DEFENDANT

No. COA95-148

(Filed 6 February 1996)

Municipal Corporations § 422 (NCI4th)— storm drain maintenance—liability of city-governmental immunity not applicable

The North Carolina Supreme Court has previously held cities and towns liable for negligent storm drain maintenance, and storm drain maintenance does not enjoy governmental immunity.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 364-366, 376-378, 424-427.

Damage resulting from obstruction or clogging of drains or sewers. 59 ALR2d 281.

Municipality's liability arising from negligence or other wrongful act in carrying out construction or repair of sewers and drains. 61 ALR2d 874.

Appeal by defendant from order entered 26 September 1994 by Judge Robert Hobgood in Wake County Superior Court. Heard in the Court of Appeals 27 October 1995.

Rosenthal & Putterman, by Charles M. Putterman, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by William W. Pollock, for defendant-appellant.

LEWIS, Judge.

Defendant appeals the trial court's denial of its motion for summary judgment in plaintiff's negligence action. Because we decide that the City does not enjoy governmental immunity for negligent maintenance of storm drains and pipes, we affirm.

Plaintiff filed this action against the City of Raleigh (the City) seeking damages for flooding on her property due to negligent storm drain maintenance. The City has a drainage easement across plaintiff's property, which contains a storm drain and pipe. In April of 1989 plaintiff notified the City that the storm drain was clogged and the street was flooded. Throughout the spring and summer of 1989, the City repeatedly endeavored to clean out the storm drain using shovels. In the fall of 1989 the City attempted to clear the drain using a high pressure hose, but was unsuccessful. The maintenance crew's supervisor told plaintiff that the hose should not be used again because it could cause damage. However, in January, 1990 a crew returned with the high pressure system. The use of the system caused a pipe on plaintiff's property to burst flooding her yard and damaging her property. City officials informed plaintiff that the City was not responsible for the repair of the pipe since the rupture was on her property.

Plaintiff sued the City in Wake County Superior Court for negligence. The City moved for summary judgment on the basis of governmental immunity. This motion was denied and defendant appeals.

Because the ground for defendant's motion for summary judgment was governmental immunity, the denial is immediately appealable. *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). Governmental immunity prevents municipal corporations from being sued when they act in a governmental capacity, but does not apply to actions which are proprietary. *Rich v. City of Goldsboro*, 282 N.C. 383, 385, 192 S.E.2d 824, 826 (1972).

Our Supreme Court has held cities and towns liable for negligent storm drain maintenance on several occasions. *See Hotels, Inc. v.*

Raleigh, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on reh'g*, 271 N.C. 224, 155 S.E.2d 548 (1967); *Gore v. Wilmington*, 194 N.C. 450, 140 S.E. 71 (1927); *Pennington v. Tarboro*, 184 N.C. 71, 113 S.E. 566 (1922); Williams v. Greenville, 130 N.C. 93, 40 S.E. 977 (1902). In one case, the Court explained:

> "The duty of maintaining sewers and drains in good repair includes the obligation to keep them free of obstruction, and a municipality is liable for negligence in its exercise to any person injured by such negligence, whether the damages result from its failure to use reasonable diligence to keep its sewers and drains from becoming clogged. . . ."

Hotels, 268 N.C. at 537, 151 S.E.2d at 37 (quoting 38 Am. Jur. 637).

Defendant relies on *Roach v. City of Lenoir*, 44 N.C. App. 608, 261 S.E.2d 299 (1980), for its proposition that storm drain maintenance is a governmental function. In *Roach*, this Court held that sewer maintenance, not storm drain maintenance, is a governmental function deserving of governmental immunity. However, without mentioning *Roach* this Court has also come to the opposite conclusion in another sewer maintenance action. *See Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991).

We see no need to consider the conflict between the prior holdings of this Court in sewer maintenance cases. Our facts do not deal with a sewer system and prior Supreme Court decisions find municipal liability in storm drain maintenance cases. Based on this precedent, we hold that storm drain maintenance does not enjoy governmental immunity. We affirm the trial court's denial of defendant's motion for summary judgment based on governmental immunity.

Affirmed.

Judges JOHN and SMITH concur.

BROOKS v. JONES

[121 N.C. App. 529 (1996)]

KATHY BROOKS (JONES) *v.* TERRY L. JONES

No. COA95-371

(Filed 6 February 1996)

Appeal and Error § 384 (NCI4th)— proposed record on appeal—failure to serve in timely fashion—appeal dismissed

Defendant's appeal is dismissed for failure to serve the proposed record on appeal in a timely fashion; however, even if the record on appeal had been served within the time provided by the district court, the Court of Appeals would have had jurisdiction of the appeal of the child support modification order, but would not have had jurisdiction of the appeal of the criminal contempt order. N.C. R. App. P. 25(b).

Am Jur 2d, Appellate Review § 302.

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

Appeal by defendant from order entered 4 November 1994 by Judge Samuel S. Stephenson and order entered 28 November 1994 by Judge Frank Lanier in Lee County District Court. Heard in the Court of Appeals 11 January 1996.

Harrington, Ward, Gilleland & Winstead, by Eddie S. Winstead, III, for plaintiff appellee.

Staton, Perkinson, Doster, Post, Silverman and Adcock, by Jonathan Silverman and Elizabeth Myrick Boone, for defendant appellant.

PER CURIAM.

On 3 September 1993 defendant moved for modification of child support due to his unemployment. On 4 November 1994 the district court judge entered a child support order providing for modification of child support, payment of arrearages, medical expenses and continuation of child custody. Defendant failed to make child support payments as mandated by such order and was found in criminal con-

tempt of court on 28 November 1994. From the child support modification and the criminal contempt orders, defendant appeals.

Defendant moved to extend time to serve the proposed record on appeal. The district court granted the motion, extending defendant's time to serve the record on appeal through and including 3 March 1995. The certificate of service indicates that the proposed record on appeal was not served until 8 March 1995. Therefore, pursuant to Rule 25(b) of the Rules of Appellate Procedure, this appeal is subject to dismissal.

In addition, we note that in criminal contempt matters, appeal is from the district court to the superior court. N.C. Gen. Stat. § 5A-17 (1986). In civil contempt matters, appeal is from the district court to this Court. N.C. Gen. Stat. § 5A-24 (1986). Thus, in the instant case, if the proposed record on appeal had been served within the time provided by the district court, this court would have had jurisdiction of the appeal of the child support modification order, but would not have had jurisdiction of the appeal of the criminal contempt order. For the reasons heretofore stated, this appeal is

Dismissed.

Judges JOHNSON, JOHN, and SMITH concur.

METRIC CONSTRUCTORS, INC., PLAINTIFF v. HAWKER SIDDELEY POWER ENGINEERING, INC., D/B/A HAWKER SIDDELEY POWER ENG., INC. AND PANDA ROSEMARY CORPORATION, DEFENDANTS

No. COA95-250

(Filed 20 February 1996)

1. Contracts § 114 (NCI4th)— second-tier subcontractor's damages as subset of first-tier subcontractor's damages

Even though a second-tier subcontractor had no privity with the general contractor and could not sue the general contractor for damages from work delays, plaintiff first-tier subcontractor could include the second-tier subcontractor's damages as a subset of its own damages in an action against the general contractor for breach of contract.

Am Jur 2d, Damages §§ 69-73.

2. Contracts § 163 (NCI4th)— delay damages—damages anticipated by parties—no special damages

Plaintiff first-tier subcontractor's duration-related damages for overtime premium costs, loss of productivity, extended overhead, and loss of bonus allegedly suffered because defendant general contractor failed to deliver its promised performance from the outset of a power plant construction project were appropriately characterized as general damages, and the trial court therefore did not err in failing to instruct on special damages, where the contract provisions themselves were a clear indication that defendant recognized that delay damages might be incurred by one or more of the parties involved in constructing the power plant.

Am Jur 2d, Damages §§ 98-108.

3. Contracts § 150 (NCI4th)— requested instruction on compromise and settlement—instruction given in substance—no meeting of minds—failure to instruct harmless error

The trial court's instruction on accord and satisfaction conveyed the substance of defendants' requested instruction on compromise and settlement, but even if there had been further instructions on that issue, it is unlikely that a different result would have been reached and any error was therefore harmless where the evidence supported a jury finding that there was no meeting of the minds between the parties as to any substituted agreement.

Am Jur 2d, Trial §§ 1478-1485.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise. 41 ALR3d 845.

Judge WYNN concurring in part and dissenting in part.

Appeal by defendants from order and judgment entered 31 March 1994 by Judge Richard B. Allsbrook in Halifax County Superior Court. Heard in the Court of Appeals 4 December 1995.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Dewey W. Wells, Timothy G. Barber, and Steven D. Gardner, for plaintiff-appellee.

Erwin and Bernhardt, P.A., by Fenton T. Erwin, Jr. and J. Neal Rodgers; and Kleinberg, Kaplan, Wolff & Cohen, P.C., by Norris D. Wolff, for defendants-appellants.

WALKER, Judge.

Defendant-appellant Panda Rosemary Corporation (Panda) owns a leasehold interest in certain real property in Roanoke Rapids, North Carolina. The lessor and record owner of the property is The Bibb Company (Bibb). Panda hired defendant-appellant Hawker Siddeley Power Engineering, Inc. (HSPE), a British company, to design and build a cogeneration power plant on the property. After completion, Panda was to own and operate the plant pursuant to its lease with Bibb. HSPE, the general contractor, subcontracted with plaintiff-appellee Metric Constructors, Inc. (Metric) for construction of the plant. Metric subcontracted with a wholly-owned subsidiary, Electrical & Special Systems, Inc. (ESSI), for specialized electrical work.

The project was "design build" or "fast track," meaning that HSPE had not completed all the designs for the plant prior to the commencement of construction. Pursuant to its contract with Metric, HSPE was responsible for engineering design drawings and procurement of major equipment items. Due to commitments made by Panda, Metric was informed that the project had an inflexible completion date of 30 October 1990. In contract negotiations and in the contract, HSPE promised to issue drawings at a pace that would allow Metric to finish its work on time. The contract provided that Metric would receive a bonus of $9,000 a day for early completion.

According to Metric's evidence, HSPE failed to deliver its promised performance from the outset of the project, issuing drawings weeks or even months after the issue dates it had given Metric. Some drawings were issued and then revised, requiring Metric to demolish its work and begin anew. HSPE's conduct forced Metric to expend considerable sums to complete the project on schedule. However, HSPE refused to pay Metric for the cost overruns and extra work caused by the late performance.

In an effort to recover its expenses and losses incurred as a result of HSPE's conduct, Metric filed a lien on the plant owned by Panda and brought suit to enforce the lien. Defendants answered, and HSPE counterclaimed alleging that Metric had breached its obligations under the contract between those parties. The case was tried before a jury. Metric's evidence consisted of the testimony of nine people who were actively involved in the Panda project and an expert in construction scheduling. Through these witnesses and voluminous documentation, Metric asserted that it had suffered damages in the amount of $6,615,863. HSPE's evidence consisted of the testimony of four witnesses, only one of whom was directly involved with the Panda project. The jury awarded Metric $6,615,863 in damages against HSPE for breach of contract and denied HSPE's counterclaim. Thereafter, the trial court entered judgment in accordance with the verdict and awarded interest on the judgment. Defendants filed motions for judgment notwithstanding the verdict (JNOV), amendment of the order, and a new trial. The trial court denied the motions.

I.

[1] HSPE first assigns as error the trial court's denial of its motions for directed verdict and JNOV as to Metric's claims made on behalf of ESSI. The question presented by a defendant's motion for a directed verdict is whether all the evidence supporting the plaintiff's claim, taken as true, considered in the light most favorable to the plaintiff, and given the benefit of every reasonable inference in the plaintiff's favor, is sufficient for submission to the jury. *Tripp v. Pate*, 49 N.C. App. 329, 332-33, 271 S.E.2d 407, 409 (1980). If there is more than a scintilla of evidence supporting each element of the plaintiff's claim, the motion should be denied. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986). A motion for JNOV is in effect a renewal of a previous motion for directed verdict, and the same rules regarding sufficiency of the evidence apply. *Henderson v. Traditional Log Homes*, 70 N.C. App. 303, 306, 319 S.E.2d 290, 292, *review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984).

HSPE argues that Metric lacks standing to assert a claim on behalf of ESSI, relying on the provisions of Article 4 of the contract between HSPE and Metric:

> 4.1 All proposed Lower Tier Subcontracts must be submitted to HSPE for written approval. If so approved, Subcontractor shall bind all Lower Tier Subcontractors to the provisions of the Subcontract Documents.

> 4.2 Neither this Subcontract nor any Lower Tier Subcontract shall create any contractual relationship between any Lower Tier Subcontractor and HSPE nor any obligation of HSPE to Lower Tier Subcontractor.
>
> 4.3 Notwithstanding the existence of any Lower Tier Subcontract, Subcontractor shall be liable to HSPE for performance hereunder as if no Lower Tier Subcontractor exists.

Defendants assert that under the terms of section 4.2, HSPE had no contractual obligations to ESSI, a lower tier subcontractor, and therefore cannot be liable to ESSI for damages to ESSI caused by breach of HSPE's contract with Metric. In support of this assertion, defendants cite the rule enunciated in *Warren Brothers Co. v. N.C. Dept. of Transportation*, 64 N.C. App. 598, 307 S.E.2d 836 (1983) that a subcontractor may not do indirectly through a plaintiff higher tier contractor what it cannot do directly by a suit against the defendant. *Id.* at 600, 307 S.E.2d at 838. Defendants argue that since ESSI cannot bring a claim directly against HSPE, it cannot present a claim indirectly through Metric. We agree that the contract between HSPE and Metric does not create any privity between HSPE and ESSI and that ESSI may not sue HSPE directly. Nonetheless, we hold that Metric may recover ESSI's losses on the Panda project as part of Metric's contract damages.

In *Bolton Corp. v. T. A. Loving Co.*, 94 N.C. App. 392, 380 S.E.2d 796 (1989) (*Bolton I*), *review denied*, 325 N.C. 545, 385 S.E.2d 496, this Court allowed the plaintiff, a prime contractor in the construction of a building on a state university campus, to recover from another prime contractor the damages incurred by the plaintiff's subcontractor. *Id.* at 409, 380 S.E.2d at 807. Although the contract between the plaintiff and its subcontractor provided that no contractual relationship existed between the subcontractor and the owner, the Court nonetheless stated that "[a] contractor may recover from an owner its subcontractor's 'extra costs and services wrongfully demanded' when the subcontractor is not in privity with the owner and could not recover directly." *Id.* at 407, 380 S.E.2d at 806 (*quoting United States v. Blair*, 321 U.S. 730, 737, 88 L. Ed. 1039, 1045 (1944)). The Court explained the rationale for this rule:

> "The government [owner] did not have, and did not by any implication recognize, any contractual relations whatever with [subcontractor], and if he had failed in performing it would not have had any right of action against him . . . . [Contractor] was the only

> person legally bound to perform the original contract; it was from him that the government demanded the extra service, and . . . the obligation to pay for that service was to him, whether he performed it personally or through another."

Bolton I, 94 N.C. App. at 407-08, 380 S.E.2d at 806 (*quoting Hunt v. United States*, 257 U.S. 125, 128-29, 66 L. Ed. 163, 165 (1921)).

The *Bolton I* court recognized the general validity of the *Warren* rule that a subcontractor cannot do indirectly through a higher tier contractor what it cannot do directly against the owner. However, the Court found the *Warren* rule was inapplicable to the circumstances in *Bolton I* because the contract in *Bolton I* made each contractor financially responsible for undue delay caused by him to other contractors and because each contractor was fully responsible for the acts of its subcontractors. Thus, "[i]f a subcontractor were to cause injury to a contractor other than its prime, the other contractor would have an action in contract against the subcontractor's prime." *Id.* at 408-09, 380 S.E.2d at 806-07. The Court concluded, "The logic set out in *Hunt* is applicable here, and we hold that the contract intends for any damages to a subcontractor to be a subset of its prime's damages." *Id.* at 409, 380 S.E.2d at 807.

We acknowledge that *Bolton I* is factually different from the present case in that it involved a government contract with multiple primes rather than a private contract between a general contractor and a first tier subcontractor. However, the rationale for the holding in *Bolton I* is applicable to the present case. In *Bolton I*, the subcontractor was not a named plaintiff, nor was the contractor presenting a claim on behalf of the subcontractor. Rather, the prime contractor was including the subcontractor's damages *as a subset of its own damages*. Obviously, the *Bolton I* court recognized that unless the contractor was permitted to include the subcontractor's claim as part of its own, there would be no means of recovering the damages incurred by the subcontractor.

In the present case, HSPE's conduct required extra work from ESSI. ESSI, which had no direct claim against HSPE for damages caused by HSPE's delays, presented its claim for damages to Metric. Under *Hunt* and *Bolton I*, Metric had standing to recover ESSI's damages as a subset of its own contract damages against HSPE. The record reveals that ESSI was not a party to the action, and no issue was presented to the jury regarding any claim by ESSI.

Defendants nonetheless urge us to deny Metric standing to recover ESSI's damages, relying on *APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority*, 110 N.C. App. 664, 431 S.E.2d 508, *review denied*, 335 N.C. 171, 438 S.E.2d 197 (1993). The Court in *APAC*, relying on *Warren*, *supra*, held that APAC, a prime contractor, did not have standing to bring the claims of its subcontractor against the owner since the subcontractor, by the terms of the contract, had no direct claim against the owner. *Id.* at 671, 431 S.E.2d at 512. The *APAC* court characterized as dicta the portion of *Bolton I* which cited *United States v. Blair* for the proposition that a contractor could recover its subcontractor's extra costs from the owner when the subcontractor was not in privity with the owner and could not recover directly. *Id.* at 671, 431 S.E.2d at 511.

APAC is readily distinguishable from the present case. In *APAC*, the subcontractor, United Sprinkler, Inc., was a party plaintiff and was essentially trying to append to APAC's claim against the owner its own separate claim which it could not bring directly. As we have noted, ESSI was never a plaintiff in the instant case and is not now trying to bring its own claim against HSPE. Rather, ESSI sought to recover its damages caused by HSPE's conduct through a well-documented claim *against Metric itself*, and Metric, faced with liability for that claim under its contract with ESSI, included the amount of the claim as a subset of its damages against HSPE. Therefore, Metric's actions are not prohibited by *APAC*.

We must point out that the result urged by defendants would work a manifest injustice to Metric, ESSI, and other similarly situated subcontractors. In effect, a general contractor could, by including contract provisions similar to Article 4 here, shield itself from any liability for payment to a subcontractor for its lower tier subcontractor's damages while retaining the right to sue the subcontractor for the lower tier subcontractor's work. Such a result is illogical. Moreover, even if we were to require a lower tier subcontractor like ESSI to sue its immediate higher tier subcontractor, there is no basis in law that we know of for the higher tier subcontractor to then sue the general contractor to recoup any amounts paid in satisfaction of those claims. We refuse to adopt a position that would, in effect, leave a lower tier subcontractor with virtually no remedy for the type of damages suffered by ESSI here at the hands of HSPE. We therefore hold that under the circumstances of this case, Metric is not precluded from recovering as part of its damages the duration damages sustained by ESSI as a result of HSPE's conduct, and the trial court did not err in

denying HSPE's motions for directed verdict and JNOV on the ESSI portion of Metric's claim.

II.

Defendants next argue that the trial court committed reversible error by failing to issue requested instructions on special damages and on compromise and settlement. When a party properly tenders a written request for a special instruction which is correct in itself *and supported by the evidence*, the failure of the court to give the instruction, at least in substance, is reversible error. *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 379, 343 S.E.2d 15, 20-21 (1986) (emphasis added). For the reasons stated below, we hold that the trial court did not err by failing to give the requested instructions.

A. Damages

[2] Metric's claims against HSPE included claims for overtime premium costs, loss of productivity, extended overhead, and loss of bonus. Defendants argued at trial that these "duration-related damages" constituted special damages, while plaintiffs claimed that they constituted general damages. After considering both parties' arguments, the trial court declined to give an instruction on special damages, instructing the jury on general damages only. On appeal, HSPE does not challenge Metric's right to recover damages for breach of contract, but only challenges the characterization of those damages as general damages.

> Contract damages are defined as either general damages, "damages that courts believe 'generally' flow from the kind of substantive wrong done by defendant," or special damages, those "peculiar to the particular plaintiff."

Bolton I, 94 N.C. App. at 405, 380 S.E.2d at 804 (*quoting* Dan B. Dobbs, *Remedies* § 3.2 (1973)). Defendants argue that under *Bolton I*, all duration-related damages are special damages. We disagree.

In *Bolton I*, the plaintiff argued that the trial court erred by excluding specific evidence of its delay damages, including the cost of keeping tools and equipment on the site for the extended period, labor inefficiencies, invoice and actual cost records, subcontractor's damages, and cost of delay in payment of retainage. *Id.* at 404, 380 S.E.2d at 804. The defendant argued the evidence was properly excluded because the plaintiff failed to tie its claimed damages to any

act or omission of the defendant. *Id.* The Court awarded a new trial to the plaintiff but declined to characterize the plaintiff's duration-related damages as general or special, stating only that duration-related damages are often difficult to prove and that proof of such damages must be "as specific as the circumstances will allow." *Id.* at 405-06, 380 S.E.2d at 805.

In the instant case, plaintiff presented specific evidence, through extensive documentation and witnesses including a construction expert, of the nature and amount of damages it suffered as a result of HSPE's delay. This evidence did not support an instruction for special damages. HSPE is a sophisticated corporation with extensive experience on projects of this nature. It obviously contemplated that delays on its part would result in the damages claimed by Metric, as is evidenced by the contract between HSPE and Metric. Article 9 of the contract specified the date upon which construction on the project was to begin and required Metric to complete its work to meet certain "milestone dates" and to prepare a schedule showing completion dates for major elements of its work. Article 9 further provided that the subcontract had to be completed on schedule and that if Metric was delayed in completing its work due to acts or omissions of other contractors or the owner, the time for completion could be extended and delay costs could be recovered from HSPE in certain circumstances. Article 20 of the contract provided for liquidated damages of $12,600 per day if Metric failed to complete its subcontract on schedule and a bonus of $9,000 per day if Metric completed its subcontract early. These contract provisions are a clear indication that HSPE recognized that delay damages might be incurred by one or more of the parties involved in constructing the plant, and HSPE cannot now be heard to argue that such damages are special damages. Indeed, if HSPE had been delayed by other contractors or the owner, it would be asserting these same types of damages, because they are common to the industry and naturally flow from such delays. Thus, Metric's damages were appropriately characterized as general damages, and we find no error in the trial court's instructions on this issue.

B. Compromise and Settlement

[3] The evidence at trial showed that in the spring of 1990, HSPE admitted to Metric that it was experiencing delays in designing the plant and that Metric was entitled to additional compensation for its extra work caused by these delays. By May 1990, HSPE told Metric that the problems had been resolved and the designs would be com-

pleted by 16 July 1990. Based on these representations, the parties attempted to negotiate a single comprehensive change order which would address all problems that had arisen prior to July 1990. There followed a series of proposals and meetings through which the parties attempted to resolve Metric's claims. These negotiations concluded on 27 August 1990 with a proposal from HSPE to pay Metric $600,000 "[t]o resolve all outstanding claims and future engineering errors and omissions. . . ." HSPE stated that the terms of the offer would be spelled out in a change order which would be forthcoming by the end of August and that Metric could invoice HSPE for $300,000 at that time.

In anticipation of this change order, Metric invoiced HSPE $300,000 for items for which HSPE had already admitted it was liable. By the end of September, Metric had not received the promised change order from HSPE, and invoiced HSPE for another $150,000 in costs for which HSPE had admitted responsibility. On 4 October 1990, Metric received a change order from HSPE. Metric contended that certain terms of the change order were different than those previously agreed upon and that it contained a provision shielding HSPE from liability for future errors and omissions on the project, a term to which Metric had consistently refused to agree during negotiations. Metric refused to sign the change order, instead revising it to reflect what it considered the agreement to have been. Metric sent the change order back to HSPE, but HSPE never responded and no change order was ever signed between the parties. By February 1991, HSPE had paid both invoices Metric had issued the previous September. Defendants contend that the above facts resulted in a compromise and settlement and supported their requested special instruction on this issue and that the trial court's failure to give the instruction was error.

We need not discuss at length the differences between the defense of compromise and settlement and that of accord and satisfaction. Indeed, defendants' counsel acknowledged to the trial court that the two defenses, in the context of this case, are "really about one and the same." The trial court instructed the jury on accord and satisfaction as follows:

> On this issue the burden of proof is on [HSPE]. This means that [HSPE] must prove by the greater weight of the evidence the following two things.

> First, that there was an agreement made by Metric accepting the offer contained in the August 27, 1990 letter, whereby the terms of that letter would be substituted for [HSPE's] then existing and future obligations to Metric. And second, that there has been a satisfaction or performance of such substituted agreement.
>
> If you find by the greater weight of the evidence that there was an agreement upon or a meeting of the minds on the terms of that August 27, 1990 letter and if you further find that the agreement so made was performed then you will answer that issue yes.

We have carefully reviewed defendants' proposed instruction on compromise and settlement, and since the trial court's instruction centered on the 27 August 1990 letter which defendants contend represented a compromise and settlement of plaintiff's claim, we find the instruction given by the court conveyed the substance of defendants' requested instruction.

We note that even if there had been further instructions on the issue of compromise and settlement, it is unlikely a different result would have been reached. Compromise and settlement, like accord and satisfaction, turns on a central factual issue: whether there was a meeting of the minds and therefore an agreement between Metric and HSPE as a result of the negotiations in August 1990. The amounts invoiced by Metric were for items for which HSPE had already admitted liability, and the invoices preceded HSPE's proposed change order. Moreover, there was evidence that the change order ultimately proposed by HSPE contained terms materially different from those discussed by the parties previously. We believe the chronology of events described above supports a jury finding that there was no meeting of the minds between the parties as to any "substitute agreement." Therefore, the court's failure to instruct the jury on compromise and settlement was harmless. We find no reversible error in the court's instructions.

We have carefully examined defendants' remaining assignments of error and plaintiff's cross-assignment of error, and we find them to be without merit. The judgment of the trial court is therefore

Affirmed.

Judge JOHNSON concurs.

Judge WYNN concurs in part and dissents in part.

Judge WYNN concurring in part and dissenting in part.

I respectfully disagree with the majority's conclusion that the trial court did not err in allowing Metric to recover ESSI's damages from HSPE.

In *Warren Bros. Co. v. North Carolina Dept. of Transport.*, 64 N.C. App. 598, 307 S.E.2d 836 (1983), a provision in the contract between the owner and general contractor provided that a subcontractor may not sue the owner for damages.[1] This Court held that the contractor may not assert against the owner any damages alleged to have been suffered by the subcontractor. *Id.* at 600, 307 S.E.2d at 838. The Court in *Warren Brothers* further stated: "[T]he subcontractor may not do indirectly through plaintiff what it could not do directly by suit against the defendant." *Id.*

However, the majority cites *Bolton Corp. v. T. A. Loving Co.*, 94 N.C. App. 392, 380 S.E.2d 796, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 496 (1989) for the proposition that the *Warren Brothers* rule is inapplicable in the instant case. As the majority acknowledges, the instant case is clearly distinguishable from *Bolton*. In *Bolton*, this Court held that in a suit between two contractors, a contractor may assert damages suffered by its subcontractor as part of the contractor's damages. *Id.* at 408-09, 380 S.E.2d at 806-07.

In contrast, the case before us turns on whether Metric, a first-tier subcontractor may assert the damages of its subcontractor, ESSI, a second-tier subcontractor, in a suit against HSPE, the general contractor. I believe the instant case is closely analogous to *APAC-Carolina v. Greensboro-High Point Air.*, 110 N.C. App. 664, 431 S.E.2d 508, *disc. review denied*, 335 N.C. 171, 438 S.E.2d 197 (1993). In *APAC-Carolina*, this Court declined an opportunity to apply *Bolton* to the facts before it. In that case, a contractor attempted to assert the damages of its subcontractor in a suit against the owner. This Court stated:

> We conclude that APAC [the contractor] did not have standing to assert any claims on behalf of Sprinkler [the subcontractor]. Sprinkler had no claim against defendants [the general contractor] on its own behalf. In both *Warren* and *Bolton II* [*Bolton Corp. v. State of North Carolina, 95 N.C. App. 596, 383 S.E.2d 671 (1989), disc. review denied, 326 N.C. 47, 389 S.E.2d 85*

1. There is a similar provision in the contract relevant to the case *sub judice*.

(1990)], the Court clearly stated that a general contractor may not assert a claim on behalf of a subcontractor if that subcontractor could not assert the claim itself. Thus, APAC may not bring its claim of $226,000 on behalf of Sprinkler.

Id. at 671-72, 431 S.E.2d at 512.

Similarly, I believe that in the case *sub judice*, Metric, the first-tier subcontractor, cannot assert the damages of ESSI, the second-tier subcontractor. It is true that in the case before us a first-tier subcontractor wishes to assert the damages of its second-tier subcontractor, whereas *APAC-Carolina* involved the attempted assertion of damages by a contractor on behalf of its subcontractor. However, the language and rationale of *Warren Brothers* apply equally to both *APAC-Carolina* and the instant case. In both cases, a party unable to assert damages on its own behalf attempted to assert damages through another party which contracted with the wrongdoer. Such an assertion of the damages of another is precisely what *Warren Brothers* forbids. In addition, the fact that the subcontractor in *APAC-Carolina* was a named plaintiff whereas ESSI is not a named plaintiff in the instant case is not a persuasive distinction for me. The title of the action cannot be allowed to determine its outcome. Under the majority's rationale, a lower-tier subcontractor could simply take a voluntary dismissal of its suit and thus easily evade the strictures of *APAC-Carolina*.

I believe we are bound by *APAC-Carolina* and *Warren Brothers*. Were this a case of first impression, the majority's position would be more persuasive. However, only our Supreme Court or, in appropriate instances, the legislature may change a prior decision of this Court.

I respectfully dissent.

CHARLES J. SMITHERS, AND MILDRED J. SMITHERS, PLAINTIFFS v. TRU-PAK MOVING SYSTEMS, INC., DEFENDANT

No. COA94-1441

(Filed 20 February 1996)

1. Ejectment § 31 (NCI4th)— notice of writ of possession of real property—attempt to deliver—sufficiency of evidence

An attempt to deliver notice of a writ of possession of real property is sufficient notice under N.C.G.S. § 42-36.2 when, as

here, the evidence shows that the sheriff's department attempted to deliver notice of the writ two days prior to its execution and the party to be evicted has evaded or prevented the delivery of the notice.

Am Jur 2d, Landlord and Tenant § 1008.

2. Documents of Title § 26 (NCI4th)— warehouseman's lien—compliance with statute

Although the purchaser of a house at a foreclosure sale actually contracted with defendant moving company to remove plaintiffs' personal property from the house, the sheriff was the legal possessor of the household goods under a writ of possession and was the depositor of the goods so as to create a warehouseman's lien under N.C.G.S. § 25-7-209(3)(b) where the purchaser was directed by members of the sheriff's department to have the goods removed and stored.

Am Jur 2d, Warehouses §§ 116-126.

3. Documents of Title § 18 (NCI4th)— inventory of goods—warehouseman's receipt

An inventory of goods was sufficient to constitute a valid warehouse receipt against plaintiffs who have benefitted from the storage of their goods.

Am Jur 2d, Warehouses § 44.

Construction and effect of UCC Art. 7, dealing with warehouse receipts, bills of lading, and other documents of title. 21 ALR3d 1339.

4. Conversion § 10 (NCI4th)— removal and storage of plaintiffs' personal property—compliance with statutes—no conversion

Where the evidence sufficiently demonstrated that defendant obtained plaintiffs' personal property in accord with statutorily mandated procedures, it did not convert plaintiffs' property by removing and storing it or by refusing to return the property upon plaintiffs' tender of $100 pursuant to N.C.G.S. §§ 44A-2 and 44A-3.

Am Jur 2d, Conversion § 164.

5. Costs § 25 (NCI4th)— attorney fees—award improper

Since defendant neither prevailed nor defended under the theory that it had a Chapter 44A lien, the trial court erred by awarding attorney fees under N.C.G.S. § 44A-4.

Am Jur 2d, Costs § 64.

Appeal by plaintiffs from judgment entered 8 June 1994 by Judge James U. Downs in Catawba County Superior Court. Heard in the Court of Appeals 3 October 1995.

Corne, Corne & Grant, P.A., by Robert M. Grant, Jr., and Peter R. Gruning, for plaintiffs-appellants.

Oma H. Hester, Jr., P.C., by Oma H. Hester, Jr., for defendant-appellee.

LEWIS, Judge.

Plaintiffs appeal from judgment entered for defendant after a jury trial.

Evidence presented at trial showed the following:

On 1 December 1992, plaintiffs' residence at 3621 10th Street Drive NE in Hickory, North Carolina, was sold at a foreclosure sale to Mark A. Wilson. On 17 February 1993, Wilson applied for a writ of possession pursuant to N.C. Gen. Stat. section 45-21.29 (1991). The writ, issued on 18 February 1993, directed the Sheriff of Catawba County "to immediately remove" the Smithers "and their personal property from the premises" and to put Wilson in possession. Sheriff Huffman testified that he attempted to contact plaintiffs concerning the writ several times between 18 February 1993 and 3 March 1993. When he called and identified himself, the answering party would hang up. Deputy Terry Schull testified that he received the writ on 26 February 1993 and attempted to deliver notice, without success, on 1 March and 2 March 1993. He made phone calls and went to the property on these days but no one answered the phone or the door.

On the morning of 3 March 1993, Deputy Schull returned to the premises with three other deputies, telephoned the house, and knocked on the door, but, again, no one answered. When calls were made, the answering party would pick up the phone and hang up. After about an hour and a half of trying to contact plaintiffs, a locksmith was contacted to open the door. After the deputies entered the house, Ms. Smithers appeared. When she refused to receive the writ of possession, the deputies placed it at her feet. She first refused to leave the premises but eventually left at 4:00 that afternoon.

One of the deputies told Mrs. Smithers' daughter, who was present at the home that day, that plaintiffs had the right make their own arrangements for removing the personal property from the house, but neither plaintiff made any effort to remove the property. The deputies directed Wilson to have the property removed and stored, and Wilson employed defendant for this task. The move began on 5 March 1993 and was completed on 10 March 1993. Defendant demanded that plaintiffs pay the moving and storage costs. Plaintiffs refused. In October 1993, defendant mailed notice of sale of the personal property and claimed a lien on the property. Plaintiffs made a formal tender of $100 under N.C. Gen. Stat. section 44A-2(a)(3) to satisfy the claimed lien, but this tender was rejected by defendant. However, the proposed sale did not occur.

On 18 November 1993, plaintiffs filed this action for recovery of their personal property and requested compensatory and punitive damages for conversion. On 28 January 1994 defendant answered and claimed a warehouseman's lien on the property pursuant to N.C. Gen. Stat. section 25-7-209. The case was tried before a jury, and judgment was entered for defendant on 8 June 1994. Plaintiffs appeal.

Before addressing issues raised by plaintiffs' appeal, we first note that defendant has attempted, in its brief, to challenge the trial court's order settling the record. The action of the trial court in settling a record on appeal may not be reviewed on appeal. Rather, the proper method for challenging the trial court's settlement of the record is by petition for writ of certiorari. *State v. Johnson*, 298 N.C. 355, 372, 259 S.E.2d 752, 763 (1979); *Craver v. Craver*, 298 N.C. 231, 237 n.6, 258 S.E.2d 357, 361 (1979). Since defendant has not properly raised its objection to the trial court's settlement of the record, we decline to address it.

Defendant also requests that this appeal be dismissed on the ground that the trial court erred in granting plaintiffs an extension of time to serve the record on appeal. Defendant's motion to dismiss plaintiff's appeal is not properly before us. A motion to dismiss an appeal must be filed in accord with Appellate Rule 37, not raised for the first time in the brief as defendant has done here. *Morris v. Morris*, 92 N.C. App. 359, 361, 374 S.E.2d 441, 442 (1988).

Even upon review of the court's order pursuant to our discretion under N.C.R. App. P. 2, we decline to dismiss the appeal. The record does not disclose that the trial court abused its discretion in finding good cause to grant an extension of time. Its order also complied with

the requirements of N.C.R. App. P. 27(c) and was decided in accord with the hearing requirements in N.C.R. App. P. 27(d). Defendant's motion to dismiss the appeal is denied.

The central issue in this appeal is whether the trial court erred in charging the jury that attempted delivery of notice of a writ of possession of real property is sufficient notice under N.C. Gen. Stat. section 42-36.2(d). Since our resolution of this issue affects the issues of whether defendant holds a warehouseman's lien and whether defendant converted plaintiffs' property, we address it first.

Attempted Delivery of Notice

[1] On the issue of whether defendant converted plaintiffs' personal property, the trial court instructed the jury, in pertinent part, as follows:

> . . . If you say the statute was not followed, and that the appearance of the deputies and subsequently the moving company was there on or about the 3rd of within two days before or on the 3rd of March of 1993, and sufficient notice of that writ had not been forthcoming to the Smithers, and as a result the moving company took possession of their personal property, and have not returned it, then that would constitute conversion . . . .
>
> But on the other hand if you fail to so find or cannot say wherein the truth lies, *or find that even though notice was not delivered but it was attempted to be delivered, and that its attempt to be delivered was thwarted by some efforts of the Smithers, then you would answer that first issue [of whether there was conversion] no* . . . .

(Emphasis added).

The trial court further instructed the jury, that before considering the issue of whether defendant has a warehouseman's lien, that they must answer a special issue ("special issue number one") written as follows:

> 1. Did the sheriff of Catawba County and or any member of his office *deliver or attempt to deliver* to the plaintiffs, Charles J. Smithers and Mildred J. Smithers, a copy of a notice of a writ for possession of the premises at 3621 10th Street Driver [sic] NE more than two days before March 3, 1993?

(Emphasis added).

In its instructions, the trial court explained, in most pertinent part, as follows:

> And finally, . . . if you find from the evidence and by its greater weight . . . that the sheriff and/or the deputies *attempted to notify Mr. and Mrs. Smithers more than two days before March 3rd, and that attempt was circumvented or avoided because of some conduct of the Smithers, they can't escape the effect of a written notice to them by refusing to receive it or taking some actions that are tantamount to refusing to receive it when it is presented in person as a notice* . . . .
>
> . . . . [I]f you find from the evidence and by its greater weight that the defendant . . . has satisfied you that the sheriff of Catawba County or some member of his office did *deliver or attempted to deliver to the plaintiffs* . . . a copy of the notice of a writ for possession of the premises . . . then you'll answer that first issue [special issue number one] . . . yes in favor of the moving company and against the Smithers. If . . . you fail to so find or cannot say what the truth is, you'll answer that issue no. *And if you answer that issue no, you don't consider anymore issues on that issue sheet. But if you've answered it yes, you will go and consider whether or not the defendant . . . is entitled to a warehouseman's lien against the plaintiffs* . . . .

(Emphasis added).

The jury answered special issue number one "yes." By making a "yes" answer to this issue a prerequisite to the jury's consideration of whether defendant has a warehouseman's lien, the trial court implicitly made such notice necessary to the creation of the warehouseman's lien.

Plaintiffs' personal property was removed and stored pursuant to execution of a writ of possession of real property under N.C. Gen. Stat. section 45-21.29(k) and (l) (1991). At the time the writ was issued and executed, section 45-21.29(l) (1991) provided:

> (l) An order for possession issued pursuant to G.S. 45-21.29(k) shall be directed to the sheriff, shall authorize him to remove the party or parties in possession, and their personal property, from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2.

G.S. section 42-36.2 permits a sheriff to remove personal property pursuant to a writ of possession of real property and to store the personal property if the evicted party refuses to take possession of the personal property. This section requires the sheriff to give notice of the time the writ will be executed by one of the three following methods:

(1) By delivering a copy of the notice to the tenant or his authorized agent at least two days before the time stated in the notice for serving the writ;

(2) By leaving a copy of the notice at the tenant's dwelling or usual place of abode with a person of suitable age and discretion who resides there at least two days before the time stated in the notice for serving the writ; or

(3) By mailing a copy of the notice by first-class mail to the tenant at his last known address at least five days before the time stated in the notice for serving the writ.

G.S. § 42-36.2(d) (1994).

The trial court instructed the jury that delivery or attempt to deliver notice at least two days prior to execution of the writ could be adequate under this statute. The court gave the challenged "attempt to deliver" instruction as part of the instructions on conversion. It also gave this instruction as a special issue which the jury was required to answer before deciding if defendant had a warehouseman's lien. In at least three portions of the instructions, the trial judge explained that the attempt to deliver instruction applied only if the jury determined that the plaintiffs avoided or prevented delivery of the notice or refused to receive it.

Testimony presented at trial shows that representatives of the sheriff's department attempted to deliver notice of the writ two days prior to its execution. Sheriff Huffman testified that he and his deputies, without success, attempted to contact plaintiffs several times from 18 February 1993 when the writ was issued until 3 March 1993 when it was executed. When he called the home, the answering party would hang up when he gave his name. Deputy Terry Schull testified that he received the writ on 26 February 1993 and attempted to deliver notice, without success, on 1 March and 2 March 1993. He made phone calls and went to the premises on these days but no one answered the phone or the door. Even when the writ was executed, Ms. Smithers refused to answer the door and refused to receive the

writ when handed to her; the deputies finally delivered it by placing it at her feet.

We agree with the trial court that an attempt to deliver notice is sufficient notice under G.S. section 42-36.2 when, as here, the evidence shows that the sheriff's department attempted to deliver notice of the writ two days prior to its execution and the party to be evicted has evaded or prevented the delivery of the notice. Thus, we hold that the court did not err in so instructing the jury.

Plaintiffs further argue that, even if the attempted notice instruction was correct, the evidence does not support the jury's finding that the sheriff or his deputies attempted to deliver notice. For this reason, plaintiffs demand a new trial. We find ample evidence to support the jury's finding on this issue.

Accordingly, the trial court did not err in refusing to grant plaintiffs a new trial on this issue.

Warehouseman's Lien

[2] Plaintiffs also assert that a warehouseman's lien is not created under G.S. section 25-7-209(3)(b) if notice of execution of the writ does not conform strictly to statutory notice requirements. G.S. section 25-7-209, in pertinent part, creates a warehouseman's lien as follows:

> (1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation . . . , insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law . . . .
>
> * * * *
>
> (3)(b) A warehouseman's lien on household goods for charges and expenses in relation to the goods under subsection (1) is also effective against all persons *if the depositor was the legal possessor of the goods at the time of the deposit.* "Household goods" means furniture, furnishings and personal effects used by the depositor in a dwelling.

G.S. § 25-7-209 (1995) (emphasis added).

Appellants assert that neither Wilson nor the Sheriff was a legal possessor of the goods at the time of the deposit with defendant as

defined under subsection 3(b) and, consequently, there is no warehouse lien effective against plaintiffs. Although Wilson actually contracted with defendants, the transcript evidence shows that he did so at the request of the deputies. Since the deputies exercised authority and control over the depositing of the goods with defendant, the sheriff was the depositor of the goods as defined in G.S. section 25-7-209(3)(b). We also conclude that the sheriff was a legal possessor of the goods based on our previous determination that attempted notice is sufficient under these facts.

[3] Plaintiffs also request a new trial on the ground that the trial court erred by instructing the jury that an inventory of goods is sufficient to constitute a valid warehouse receipt. The court instructed the jury, in pertinent part, as follows:

> If you find from the evidence and by its greater weight that an inventory was given to the Smithers by Tru-Pak of the goods they took, that would be sufficient for a receipt of the goods.

A warehouse receipt is defined in North Carolina's version of the Uniform Commercial Code ("UCC") as "a receipt issued by a person engaged in the business of storing goods for hire." N.C. Gen. Stat. § 25-1-201(45) (1995). In *Tate v. Action Moving & Storage*, this Court held that a household goods descriptive inventory "was sufficient to constitute a warehouse receipt" for the purpose of holding a warehouseman responsible for its actions. *Tate v. Action Moving & Storage*, 95 N.C. App. 541, 546, 383 S.E.2d 229, 232 (1989), *disc. review denied*, 326 N.C. 54, 389 S.E.2d 104 (1990). The inventory issued in *Tate* listed each item and its condition, the owner's name, the origin loading address, and was signed and dated by the warehouseman's agent and driver. *Id.* The *Tate* court noted that the document issued was probably irregular as a warehouse receipt, but that this irregularity did not relieve the warehouseman of its duties. *Id.* at 546-47, 383 S.E.2d at 232-33.

Plaintiffs contend that the *Tate* court reached this result only for the purposes of holding a warehouseman responsible for its actions. They assert that a document that omits items set out in N.C. Gen. Stat. section 25-7-202 is not a valid lien for the purposes of enforcing a lien against plaintiffs as property owners. We disagree. G.S. section 25-7-202 does not require that all of the listed terms be included for a warehouse receipt to be valid. In fact, this section explicitly provides that "[a] warehouse receipt need not be in any particular form." G.S. § 25-7-202(1) (1995). Rather, G.S. section 25-7-202 simply provides that, to the extent that a warehouseman omits terms listed in G.S. sec-

tion 25-7-202, it is liable for damages caused by the omission of those terms.

Defendant stored plaintiffs' property for plaintiffs' benefit as a result of plaintiffs' refusal to take possession of the property themselves when the writ was executed. Under *Tate*, once the inventory was issued, defendant became responsible to plaintiffs in regard to the goods. Since the inventory is valid as a warehouse receipt as against defendant, principles of fairness dictate that it should also be valid as a warehouse receipt against plaintiffs who have benefitted from the storage of their goods. Thus, we hold there was no error in the trial court's jury instructions on this issue.

Conversion

[4] Plaintiffs also assert that the trial court erred by denying their motions for directed verdict and for judgment notwithstanding the verdict, and in the alternative for a new trial, on the issue of conversion. Conversion is "an 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) (quoting C.J.S., *Trover & Conversion*, sec. 1). Plaintiffs claim that defendant has converted their personal property by removing, storing, and refusing to return the property upon plaintiffs' tender of $100 under N.C. Gen. Stat. sections 44A-2 and 44A-3.

The evidence at trial was sufficient to show that the sheriff took possession of plaintiffs' personal property pursuant to authority conferred by G.S. sections 45-21.29(l) and 42-36.2. G.S. section 42-36.2(b) permits the sheriff to remove the personal property of an evicted tenant when executing a writ for possession of real property and requires the evicted tenants to take possession of their personal property. If the tenants fail to take possession of their property, the statute permits the sheriff to deliver the property to a storage warehouse. We have already determined that the notice given was sufficient. Since the evidence sufficiently demonstrates that defendant obtained plaintiffs' personal property in accord with these statutorily mandated procedures, it did not convert plaintiffs' property by removing and storing it.

Defendant's refusal to return the property upon plaintiffs' tender of $100 also does not constitute conversion. Plaintiffs made their tender pursuant to G.S. sections 44A-2 and 44A-3. Chapter 44A, Article 1,

of the General Statutes creates statutory possessory liens on certain personal property and provides a means for a person with interest in the property to recover it upon the payment of the amount secured by the lien. However, the lien claimed by defendant here is a warehouseman's lien created pursuant to North Carolina's version of Article 7 of the UCC. As discussed above, defendant's warehouseman's lien is valid. In *Tate*, we opined that any rights the defendant warehouseman had were to be analyzed as a warehouseman's lien under Chapter 25, Article 7 rather than as a possessory lien under Chapter 44A. *Tate*, 95 N.C. App. at 545, 383 S.E.2d at 231-32.

We draw the same conclusion here. A warehouse receipt is a document of title. N.C. Gen. Stat. § 25-1-201(15). Under Article 7 of the UCC, a person claiming goods covered by a document of title must satisfy the bailee's lien when the bailee requests satisfaction in order to recover the goods. N.C. Gen. Stat. § 25-7-403(2) (1995). A warehouseman's lien covers storage and transportation charges, insurance, labor, present or future charges in relation to the goods, and expenses necessary for preserving the goods or reasonably incurred in their lawful sale. G.S. § 25-7-209(1). The evidence shows that defendant demanded payment of the charges and the jury found that defendant was entitled to recover charges in the amount of $30,215.62, an amount well in excess of the $100 tendered by plaintiffs. Defendant did not convert plaintiffs' property by refusing to return the property upon plaintiffs' tender of $100.

Accordingly, the trial court did not err by refusing to grant a directed verdict, judgment notwithstanding the verdict, or a new trial to plaintiffs on the issue of conversion.

Attorney's Fees

[5] Plaintiffs also assert that the trial court erred in awarding attorney's fees to defendant pursuant to N.C. Gen. Stat. section 44A-4. G.S. section 44A-4(a) (1995) provides, in pertinent part, that

> The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided . . . . In the event an action by the owner pursuant to this section is heard in district or superior court, the substantially prevailing party in such court may be awarded a reasonable attorney's fee in the discretion of the judge.

Although plaintiffs did allege in their complaint that defendants converted their property by refusing to return the property upon their tender of $100 under G.S. section 44A-2(a)(3), defendant did not defend on the grounds that it had a lien pursuant to Chapter 44A, but rather claimed a UCC, Article 7 warehouseman's lien which required satisfaction of charges well in excess of the $100 tendered. The trial transcript reveals that the issue of whether defendant converted plaintiffs' property by refusing to return it under Chapter 44A upon plaintiffs' payment of $100 was not submitted to the jury in the jury instructions or on the verdict sheet and was not emphasized by the parties at trial. Since defendant has neither prevailed nor defended under the theory that it has a Chapter 44A lien, the trial court erred by awarding attorney fees under G.S. section 44A-4.

As for plaintiffs' assignments of error numbers one, two, and seven, these are deemed abandoned. N.C.R. App. P. 28 (1996).

For the reasons stated, we reverse the award of attorney's fees to defendant and hold no error on all of plaintiffs' other assignments of error.

Judges WALKER and MARTIN, Mark D. concur.

STATE OF NORTH CAROLINA v. GILBERT CUEVAS A/K/A/ TONY CRUZ, Defendant

No. COA95-617

(Filed 20 February 1996)

1. Evidence and Witnesses § 87 (NCI4th)— admission of defendant's passport—harmless error

In a prosecution of defendant for trafficking in cocaine, the trial court erred in admitting into evidence defendant's passport with a stamp indicating that he had visited Colombia approximately two months earlier because this evidence was not probative of a fact in issue, but such error was not prejudicial where it was unlikely that a different result would have occurred at trial but for the introduction of the passport.

Am Jur 2d, Evidence §§ 304, 319.

2. Criminal Law § 106 (NCI4th)— accomplice's statement not provided during discovery—admission not error

The trial court did not err by admitting a statement made by an accomplice which had not been provided to defendant in discovery, since a defendant is not entitled to receive a copy of a statement by a co-perpetrator unless defendant is tried jointly with the co-perpetrator, and since the State provided defendant with the substance of the statements that he made to the co-perpetrator when it provided him with a copy of the co-perpetrator's subsequent statement. N.C.G.S. §§ 15A-903(b)(1), 903(a)(2).

Am Jur 2d, Depositions and Discovery § 443.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

3. Criminal Law § 829 (NCI4th)— request for instructions—accomplice testimony—credibility—perjury conviction—sentence reduction—instructions given in substance

There was no merit to defendant's contention that the trial court erred by failing to give his requested instructions regarding the jury's consideration of his accomplice's perjury conviction in another state and her ability to avoid a mandatory minimum sentence only by testifying at his trial in determining her credibility, since the court did give the requested instructions in substance.

Am Jur 2d, Trial §§ 818-820, 861, 866.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in federal criminal trial. 17 ALR Fed. 249.

4. Criminal Law § 261 (NCI4th)— denial of continuance—no error

The trial court did not err by denying defendant's request for continuance where defendant requested and received two continuances; his trial took place a little over a year after his arrest; defendant had ample time to confer with counsel, investigate, and present his defense; and defendant could not force a delay in proceedings by retaining out of state counsel and refusing to agree to a fee arrangement.

Am Jur 2d, Continuance §§ 107-109.

5. Searches and Seizures § 7 (NCI4th)— defendant approached in public place—request to search—no seizure

An officer's approach of defendant in a public place and request for permission to search his luggage and person did not constitute a seizure for constitutional purposes.

Am Jur 2d, Searches and Seizures §§ 10 et seq.

What constitutes "seizure" within meaning of Federal Constitution's Fourth Amendment—Supreme Court cases. 100 L. Ed. 2d 981.

Appeal by defendant from Judgment and Commitment entered 30 November 1990 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 30 January 1996.

Michael F. Easley, Attorney General, by Elizabeth Rouse Mosley, Assistant Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

WYNN, Judge.

On 31 October 1989, defendant Gilbert Cuevas, a/k/a Tony Cruz, offered Deborah White three hundred dollars to accompany him from New York on a bus trip. Ms. White agreed. They both boarded a bus leaving New York City at approximately 9:45 that evening.

Acting pursuant to a tip, Detectives James Smyre, Raymond Robinson and Michael Overton waited at the Wilmington bus station looking for three men arriving from New York. One man was described as Hispanic with a navy haircut; the other two as African-American, one light-skinned and one dark-skinned. The tipster described the three men as being about five feet six inches tall and of small to medium build; indicated that the men always came to Wilmington to sell drugs around the first of the month because welfare checks arrived on that day; and stated that the men ordinarily traveled by cab to a local inn.

At approximately noon on 1 November 1989, Ms. White, defendant and two other men fitting the tip description arrived at the station. Defendant and Ms. White obtained a cab, while the two other men obtained another cab. Detective Smyre having recognized that the three men fit the tip description, followed the cab carrying

defendant and Ms. White. Meanwhile, Detective Robinson assisted Detective Overton in stopping the cab carrying the other men.

The cab carrying defendant and Ms. White eventually stopped at a local restaurant. Detective Smyre drove up behind the cab, approached it, opened the rear passenger door of the cab, identified himself as a police officer, and asked defendant and Ms. White for permission to search their person and luggage. Upon receiving their consent, Detective Smyre searched defendant's luggage. Detective Robinson then arrived and informed Detective Smyre that no contraband had been found in the luggage of the two other men. Detective Smyre, after informing Detective Robinson that defendant and Ms. White had consented to a search of their person and luggage, requested assistance in searching Ms. White's green duffle bag. That search revealed a large amount of cocaine.

Following discovery of the cocaine, the detectives arrested defendant and Ms. White. During his search of defendant incident to arrest, Detective Smyre recovered one thousand nine hundred sixty dollars ($1,960.00) in cash, a pager, a small black notebook, and a stamped passport which indicated that defendant visited Colombia on 3 September 1989.

Defendant was tried on charges of trafficking in cocaine by possession in violation of N.C. Gen. Stat. § 90-95(h)(3) (1993), and trafficking in cocaine by transportation in violation of N.C.G.S. § 90-95(h)(3). Following verdicts of guilty, Superior Court Judge Ernest B. Fullwood sentenced defendant to thirty-five years imprisonment for each charge; to be served consecutively. Defendant gave notice of appeal in open court, but did not perfect his appeal. This Court denied his subsequent Petition for Certiorari; however, in an order dated 2 November 1994, our Supreme Court vacated this Court's denial and allowed defendant's Petition for Certiorari. Defendant's appeal is thus properly before this Court.

On appeal, defendant contends that the trial court erred by: (I) Allowing defendant's passport into evidence; (II) Admitting a statement by Ms. White which had not been provided to defendant in discovery; (III) Failing to give his requested instruction regarding Ms. White's perjury conviction and her ability to avoid a mandatory minimum sentence by testifying at his trial; (IV) Denying his request to continue; and (V) Denying his motion to suppress. We find no prejudicial error requiring a new trial.

I

[1] Defendant first contends that the trial court erred by allowing his passport into evidence. He argues persuasively that the fact that the passport stamp indicated that he had visited Colombia on 3 September 1989, was not relevant, but instead was highly prejudicial because the jury might conclude, using images from television and other media outlets, that he must be a high level drug trafficker since he visited Colombia. We agree that it was error to admit the passport, but find that such error does not require a new trial.

In general, "all relevant evidence is admissible[,] and . . . evidence which is not relevant is not admissible." *State v. Moseley*, 338 N.C. 1, 31, 449 S.E.2d 412, 430 (1994), *cert. denied*, — U.S. —, 131 L. Ed.2d 738 (1995); N.C. Gen. Stat. § 8C-1, Rule 402 (1992). Relevant evidence is defined as "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." *Id.*; N.C.G.S. § 8C-1, Rule 401. "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989). Relevant evidence may be excluded pursuant to Rule 403 if:

> [I]ts probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . . Whether evidence should be excluded as unduly prejudicial or confusing rests within the sound discretion of the trial court . . . . The trial court's ruling in this regard may only be reversed for an abuse of discretion that was so arbitrary that it could not have been the result of a reasoned decision.

Madden v. Carolina Door Controls, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994) (citations omitted). In general, the exclusion of evidence under the Rule 403 balancing test is within the sound discretion of the trial court, which ruling will not be disturbed absent abuse of discretion. *State v. Ward*, 338 N.C. 64, 96, 449 S.E.2d 709, 726 (1994), *cert. denied*, — U.S. —, 131 L. Ed.2d. 1013 (1995).

In the instant case, defendant contends that introduction of his passport indicating that he had recently visited Colombia unfairly prejudiced him by associating him with Colombia, a country widely known for its connection to the drug trade in the United States. He argues that the evidence was not relevant, or if it was relevant its prejudice was substantially outweighed by its probative value. Suffice

it to say that we agree with defendant's contention that the mere ownership of a passport showing travel to Colombia is not probative of a fact at issue in this case.

However, even though the trial court erred in admitting such evidence, that error alone does not mandate a new trial unless the admission substantially prejudiced the defendant such that a different result would likely have resulted had the error not occurred. *Madden*, 117 N.C. App. at 63, 449 S.E.2d at 773. We find that even absent introduction of the passport, it is not likely that a different result would have occurred at trial. Evidence against defendant included the fact that a large amount of cocaine worth one hundred and twenty-five thousand dollars ($125,000) was found on Ms. White, his traveling partner; Ms. White's testimony that it was defendant who gave her the bag containing the drugs; and that defendant wrote notes recording drug transactions. In addition, defendant was arrested with nearly two thousand dollars ($2,000) in cash and a pager. Such evidence makes it unlikely that a different result would have occurred at trial but for the introduction of the passport. This assignment of error is overruled.

II

[2] Defendant next contends that the trial court erred by admitting a statement made by Ms. White on 1 November 1989 which had not been provided to him in discovery. We disagree.

Defendant cites N.C. Gen. Stat. § 15A-903(b)(1) (1988) in support of his argument. N.C.G.S. § 15A-903(b) states:

> Statement of a Codefendant.—Upon motion of a defendant, the court must order the prosecutor:
>
> (1) To permit the defendant to inspect and copy or photograph any written or recorded statement of a codefendant which the State intends to offer in evidence at their joint trial; and
>
> (2) To divulge, in written or recorded form, the substance of any oral statement made by a codefendant which the State intends to offer at their joint trial.

N.C.G.S. § 15A-903(b)(1) applies only to written statements by a codefendant which the State intends to offer at a joint trial. The State "is not required to provide a defendant with statements made by witnesses or prospective witnesses of the State" unless specifically required to do so by N.C.G.S. § 15A-903. *State v. Abernathy*, 295 N.C.

147, 156, 244 S.E.2d 373, 379-80 (1978). A defendant is not entitled to receive a copy of a statement by a co-perpetrator unless the defendant is tried jointly with the co-perpetrator.

N.C. Gen. Stat. § 15A-903(a)(2) (1988) requires the prosecutor:

> to divulge, in [writing], the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State . . . .

Since a portion of Ms. White's 1 November 1989 oral statement contained statements made by defendant to her, that statement is covered by N.C.G.S. § 15A-903(a)(2). However, the State provided defendant with the substance of the statements that he made to Ms. White when it provided him with a copy of Ms. White's 21 November 1989 statement. This assignment of error is overruled.

III

[3] Defendant next contends that the trial court erred by failing to give his requested instructions regarding 1) Ms. White's perjury conviction and, 2) her ability to avoid a mandatory minimum sentence by testifying at his trial. We disagree.

The law in this state is clear that when a defendant requests a jury instruction that is a proper statement of the law and is supported by the evidence, the trial court must give the instruction, at least in substance. *State v. Jones*, 337 N.C. 198, 206, 446 S.E.2d 32, 36 (1994).

In the instant case, there was evidence that Ms. White was convicted of perjury. The defendant tendered the following instruction regarding Ms. White's perjury conviction:

> There is evidence which tends to show that Deborah White was convicted of perjury because of her false testimony in the trial of attempted murder charges in the courts of the State of New York. You may consider this evidence, together with all other facts and circumstances bearing upon her truthfulness, in deciding whether you will believe or disbelieve her testimony at this trial.

In addition, Ms. White testified that she was aware that the only way she could avoid a mandatory minimum sentence was by testifying against defendant. Consistent with this fact, defendant requested the following instruction:

> There is evidence which tends to show that Deborah White was testifying with the understanding that her sentence could only be reduced from a mandatory minimum sentence of 35 years for each of the two charges to which she has plead [sic] guilty by her giving testimony in this case. If you find that he [sic] testified in whole or in part for this reason you should examine his [sic] testimony with great care and caution in deciding whether or not to believe it. If, after doing so, you believe his [sic] testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Both of defendant's tendered instructions were accurate statements of the law, and both were consistent with the evidence. Thus, the trial court was required to give these instructions in substance. The trial court did so.

Regarding Ms. White's perjury conviction, the trial court gave the pattern instruction regarding impeachment of a witness by proof of a crime:

> [W]hen evidence has been received tending to show a witness has been convicted of criminal charges, you may consider this evidence for one purpose only. If considering the nature of the crimes you believe that this bears on truthfulness, then you may consider it together with all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. Except as it may bear on this decision, this evidence may not be considered by you in your determination of any fact in this case.

This instruction gives the substance of defendant's requested instruction. The pattern instruction refers to the "nature of the crimes." This statement alerts the jury that some crimes are more probative of lack of truthfulness than others. This is the essence of defendant's request. Defendant has cited no authority, and we have found none, which requires that a trial court grant a more specific instruction depending on the nature of the crime.

Regarding the fact that Ms. White could only avoid a mandatory minimum sentence of thirty-five years for each offense by testifying against the defendant, the trial court gave a slight variation of the pattern instruction regarding a witness testifying with immunity:

> There is evidence which tends to show that the witness, Deborah White, was an accomplice in the commission of the crimes

> charged in this case. An accomplice is a person who joins with another in the commission of a crime. The accomplice may actually take part in acts necessary to accomplish the crime or he [sic] may knowingly help or encourage another in the crime either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case. You should examine every part of the testimony of such a witness with the greatest care and caution. If after doing so you believe her testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

This instruction gives the substance of defendant's requested instruction—that Ms. White's testimony should be scrutinized by the jury because she could be testifying to save herself from prison time. The instruction informed the members of the jury that they should examine Ms. White's testimony with the greatest care and caution because she was interested in the outcome of the case. That is the substance of defendant's proffered instruction. Moreover, even if there was error in failing to give defendant's specific instruction, we nonetheless find that such failure was not prejudicial. As stated previously, a fair review of the evidence in this trial indicates that even with the more specific instruction, defendant has not shown a reasonable possibility that had the instruction been given a different result would have been obtained at trial. *See State v. Alexander*, 337 N.C. 182, 192-93, 446 S.E.2d 83, 89 (1994). This assignment of error is overruled.

IV

[4] Defendant next contends that the trial court erred by denying his request for a continuance. Mr. Cuevas contends that the denial of his motion to continue violated his right to assistance of counsel and right of confronting witnesses in violation of Article I, § § 19 and 23 of the North Carolina Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

When a motion for a continuance is based on a constitutional right, the issue presented is an issue of law, and the trial decision is reviewable *de novo*. *State v. Burr*, 341 N.C. 263, 294, 461 S.E.2d 602, 618-19 (1995).

In *Burr*, our Supreme Court set out what a defendant must show in order to establish a constitutional violation due to the denial of a continuance. "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel

and to investigate, prepare and present his defense." *Id.* at 295, 461 S.E.2d at 619.

In the case *sub judice*, defendant was arrested on 1 November 1989. He requested and received two continuances. His trial did not occur until 26 November 1990. Defendant clearly had ample time to confer with counsel, investigate, and present his defense.

Defendant contends, however, that the denial of his requested continuance was prejudicial because of the circumstances involved. According to defendant, an attorney from New York, Larry Wallace, contacted Mr. William Sheffield, defendant's trial counsel, and informed him that he (Mr. Wallace) had been retained by defendant to represent him. Mr. Wallace sought to associate Mr. Sheffield as local counsel. Mr. Sheffield agreed to the arrangement. Mr. Wallace told Mr. Sheffield that he would procure a handwriting expert and character witnesses to testify favorably for the defense. Mr. Sheffield contended that, after about 10 October 1990, he was unable to contact Mr. Wallace or the other attorney in New York associated with Mr. Wallace. Mr. Wallace told Mr. Sheffield that there was "some problem" with the case. The problem was apparently with the fee arrangement.

The New York lawyers were never admitted to practice in North Carolina pursuant to N.C. Gen. Stat. § 84-4.1 (1995). The witnesses to be procured by the New York lawyers were never subpoenaed. Defendant may not force a delay in proceedings by retaining counsel and refusing to agree to a fee arrangement. Mr. Sheffield, an experienced lawyer, had ample time to arrange a defense. This assignment of error is overruled.

V

[5] Defendant next contends that the trial court erred by denying his motion to suppress the admission of his passport, beeper and notebook obtained during the search of his luggage. We disagree.

Defendant contends that his conduct did not give rise to a particularized suspicion which justified Detective Smyre's stop. The State contends that Detective Smyre's actions did not constitute a stop. Defendant concedes that *State v. West*, 119 N.C. App. 562, 459 S.E.2d 55, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995) is against him. In *West*, this Court stated:

> The Constitution does not protect an individual from the mere approach of a police officer in a public place. *State v. Streeter*,

> 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973). Hence, communications between the police and citizens not involving coercion or detention do not fall within the purview of the Fourth Amendment. *State v. Perkerol*, 77 N.C. App. 292, 298, 335 S.E.2d 60, 64 (1985), *disc. review denied*, 315 N.C. 595, 341 S.E.2d 36 (1986). No reasonable suspicion is needed in order for a police officer to ask questions of an individual, ask for an individual's identification, or ask for consent to search his luggage as long as a reasonable person would understand he could refuse to cooperate. *Florida v. Bostick*, 501 U.S. 429, 434-35, 115 L.Ed. 2d 389, 398-99 (1991).

Id. at 565-66, 459 S.E.2d at 57. The impact of this statement is that police conduct does not constitute a seizure unless "a reasonable person would not feel free to decline the officer's request or otherwise terminate the encounter." *Id.* at 566, 459 S.E.2d at 58. In other words, a seizure does not occur until there is a physical application of force or submission to a show of authority. *Id.*

There is no allegation that any force was used by Detective Smyre. In order to show there was a seizure, then, defendant must show that a reasonable person would not have felt free to leave, or terminate the encounter with Detective Smyre. This he cannot do.

Detective Smyre neither ordered the cab carrying defendant to stop, nor turned on his siren, or ordered defendant to stay in place. Rather, he opened the rear door of the cab, which may have been partially open, and asked defendant and Ms. White for permission to search their luggage and person. They agreed.

Nothing in this encounter suggests that defendant was not free to leave. He was approached by Detective Smyre in a public place and asked for permission to search his luggage and person. In *West*, this Court held that an officer approaching a suspect in a public place and asking for permission to search his luggage did not constitute a seizure for constitutional purposes. We decline defendant's invitation to revisit that holding.

No prejudicial error.

Judges GREENE and McGEE concur.

IN THE MATTER OF ROBERT N. HUNTER, JR., ADMINISTRATOR CTA DBN OF THE ESTATE OF FLORENCE SHARP NEWSOM, DECEASED, PLAINTIFF v. ROBERT WESLEY NEWSOM, III, INDIVIDUALLY, AND IN HIS CAPACITY AS THE FORMER EXECUTOR OF THE ESTATE OF FLORENCE SHARP NEWSOM, DECEASED; J. THOMAS KEEVER, JR., SUBSTITUTE TRUSTEE UNDER A DEED OF TRUST RECORDED IN DEED OF TRUST BOOK 3889, PAGE 1763; BANKERS TRUST OF NORTH CAROLINA, NOTEHOLDER AND BENEFICIARY UNDER A DEED OF TRUST RECORDED IN DEED OF TRUST BOOK 3889, PAGE 1763; J. PATRICK ADAMS, SUBSTITUTE TRUSTEE U/W/O FLORENCE SHARP NEWSOM, DECEASED; PAIGE NEWSOM, BRITT BLACKWELL NEWSOM AND ROBERT WESLEY NEWSOM, IV, MINORS, BY AND THROUGH THEIR GUARDIAN AD LITEM; AND THE UNBORN AND UNKNOWN HEIRS OF ROBERT WESLEY NEWSOM, III, BY THEIR GUARDIAN AD LITEM, DEFENDANTS

No. COA94-794

(Filed 20 February 1996)

Infants or Minors § 27 (NCI4th)— settlement agreement to terminate trust—remainder interests of unborn heirs unfairly affected—authority of court to reject settlement agreement

Having determined that Bankers Trust was a creditor of testatrix's son individually and not a creditor of testatrix's estate, the trial court committed no error or abuse of discretion in determining that a proposed settlement agreement, which acknowledged Bankers Trust as a creditor of the estate and distributed the remainder interests in the trust, would be unfair to the remainder interests of the unborn and unknown heirs of testatrix's son, declining to approve the settlement agreement, and ordering that testator's estate be administered according to her intent as expressed in her will.

Am Jur 2d, Infants § 153.

Appeal by defendant Bankers Trust of North Carolina from order and declaratory judgment entered 1 March 1994 by Judge Melzer A. Morgan, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 18 April 1995.

Patton Boggs, L.L.P, by Robert N. Hunter, Jr., for plaintiff-appellee Robert N. Hunter, Jr., Administrator CTA DBN of the Estate of Florence Sharp Newsom.

Adams Kleemeier Hagan Hannah & Fouts, L.L.P., by M. Jay DeVaney, Michael H. Godwin and James W. Bryan, for defendant-appellant Bankers Trust.

McNairy, Clifford & Clendenin, by R. Walton McNairy, for defendant-appellee guardian ad litem for the unborn and unknown heirs of Robert Wesley Newsom, III.

Lucas & Keever, by J. Thomas Keever, Jr., for defendant-appellee J. Thomas Keever, Jr., substitute trustee.

Adams & Osteen, by J. Patrick Adams, for defendant-appellee J. Patrick Adams, substitute trustee.

Alexander Ralston Speckhard & Speckhard, P.A., by Stanley E. Speckhard, for defendant-appellee guardian ad litem for Britt Blackwell Newsom and Robert Wesley Newsom, IV.

MARTIN, John C., Judge.

Plaintiff Robert Hunter, Jr., Administrator CTA DBN of the Estate of Florence Sharp Newsom, filed a complaint for a declaratory judgment and to compel distribution of assets of a trust created by Florence Newsom's will and termination of the trust due to impossibility of performance. The complaint alleged the following: Florence Newsom died testate on 28 May 1985. In accordance with the provisions of her will, her son Robert Wesley Newsom, III ("Newsom"), and Thomas P. Ravenel qualified as co-executors of her estate. The estate was valued at $191,607.32, consisting of personal property valued at $84,044.12, real property (hereinafter referred to as the "Fairgreen Road property") valued at $100,580.00, and stock valued at $6,983.20. Florence Newsom's will provided for her residuary estate, after the payment of specific bequests, to be placed in trust, with the income therefrom to be paid to Newsom for his life, and at his death, to be distributed, in equal shares, to his surviving children.

Thomas Ravenel resigned as a co-executor on 5 September 1990 due to ill health; plaintiff alleged that sometime after Ravenel's resignation, Newsom, who had continued to serve as sole executor of his mother's estate, misappropriated the assets of the estate and otherwise failed to perform his fiduciary duties. Newsom was removed by the Clerk for cause on 5 June 1992, and plaintiff was appointed as administrator CTA DBN.

Plaintiff also alleged that Newsom, prior to his removal, borrowed the sum of $140,000.00 from defendant Bankers Trust of North Carolina ("Bankers Trust"). The loan was evidenced by a promissory note executed by Newsom "individually and as Executor" of Florence Newsom's estate and secured by a Deed of Trust conveying the

Fairgreen Road property as collateral. Plaintiff alleged that Newsom misappropriated the loan proceeds to his own use and benefit rather than for the benefit of Florence Newsom's estate or the trust created by her will. Newsom subsequently defaulted on repayment of the loan.

As a result of Newsom's default, plaintiff sold the Fairgreen Road property, through a special proceeding to create assets for payment of debts of the estate, for an amount insufficient to pay the debts and costs of administration of the estate and satisfy the debt to Bankers Trust. Plaintiff alleged that he had entered into a conditional agreement, subject to the approval of the court, with Bankers Trust, the trustee of the trust created under Florence Newsom's will, and the guardian *ad litem* for the minor beneficiaries of the trust, to terminate the trust and distribute the proceeds of the sale of the Fairgreen Road property, together with the other assets of the estate, as follows: (1) to pay the costs of the action; (2) to pay the costs of administration and the debts of Florence Newsom's estate; (3) to pay Bankers Trust an amount equal to the life interest share of Newsom in the trust created under Florence Newsom's will according to Internal Revenue Service mortuary tables; and (4) to pay the three then living children of Newsom an amount equal to their remainder interest shares in the trust. Plaintiff sought an order declaring the proposed division to be in the best interests of the minor beneficiaries, directing him to proceed in accordance with the conditional agreement, and, upon such distribution of the assets of the estate, terminating the trust created by Florence Newsom's will.

All of the parties either answered and joined in plaintiff's prayer for relief or were declared to be in default. Prior to ruling on the matter, however, the trial court properly appointed a guardian *ad litem* for the unborn children of Newsom. The guardian *ad litem* for the unborn children of Newsom filed an answer (1) denying that the debt to Bankers Trust was a valid debt of the estate, (2) asserting that Newsom had forfeited his right to lifetime income from the trust, and (3) requiring that all funds held by plaintiff as administrator of Florence Newsom's estate be paid to the trustee of the trust created by her will to be administered for the benefit of the remaindermen and distributed to them upon the death of Newsom.

The trial court found the facts to be essentially as alleged by plaintiff. The court concluded that Newsom was not authorized as executor of his mother's estate to borrow the money from Bankers

Trust and such debt was his individual debt and not a debt of the estate. The court further found and concluded that Bankers Trust did not have a valid lien upon the Fairgreen Road property and was not entitled to recover any assets of the estate. Thus, the trial court concluded that the settlement proposed by plaintiff would not be fair to the unborn and unknown heirs of Newsom and should not be approved. The trial court directed that the assets of Florence Newsom's estate, including the proceeds from the sale of the Fairgreen Road property, be distributed: (1) to pay the costs of the action; (2) to pay the debts, claims and costs of the administration of the estate according to Chapter 28A of the North Carolina General Statutes; and (3) the remaining balance to the trustee of the trust created under the will of Florence Newsom to be administered pursuant to the terms of the trust. Bankers Trust appeals.

Initially, Bankers Trust asserts that plaintiff administrator's decision to compromise and settle the claim of Bankers Trust against the estate of Florence Newsom was "conclusive" absent fraud, bad faith or gross negligence. Thus, Bankers Trust argues, the trial court had no authority, in the absence of such a finding, to disapprove the settlement proposed by plaintiff administrator. The argument is untenable.

We have no doubt that the agreement proposed by plaintiff administrator in this case was the product of a well-intentioned effort to avoid depletion of Florence Newsom's estate through protracted and expensive litigation. Ordinarily, a personal representative has the authority, in accomplishing the expeditious settlement of a decedent's estate, to settle and compromise claims in favor of or against the estate, provided that he acts honestly, reasonably and prudently. N.C. Gen. Stat. § 28A-13-3(a)(15) (1995); *see* Wiggins, *Wills and Administration of Estates in North Carolina* § 243 (2d Ed. 1983). In the present case, however, the parties expressly conditioned their settlement agreement upon approval of its terms by the court.

By its terms, the agreement would have resulted in the termination of the trust created for the benefit of the children of Newsom who were living at the time of his death. At the time this action was commenced, two of the children were minors. Moreover, because the life beneficiary of the trust is still living, the possibility exists that the class of remainder beneficiaries would include, upon his death, persons not yet in being whose rights would have been extinguished by the settlement agreement.

> The courts of this State in their equity jurisdiction have inherent authority over the property of infants and will exercise this jurisdiction whenever necessary to preserve and protect children's estates and interests. The court looks closely into contracts or settlements materially affecting the rights of infants . . . .

Sternberger v. Tannenbaum, 273 N.C. 658, 674, 161 S.E.2d 116, 128 (1968) (citations omitted). There can be no question in North Carolina that a court of equity has the power to approve an agreement affecting the rights of infants and unborn beneficiaries in trust funds. *See Id.; Reynolds v. Reynolds*, 208 N.C. 578, 182 S.E. 341 (1935). The power of the court to approve such settlements must necessarily imply also the reciprocal power not to approve where it is made to appear to the court that the rights and interests of minor or unborn beneficiaries are not protected.

Bankers Trust argues, however, that the only issue for the court, in determining whether to approve the settlement, was whether the administrator acted in good faith in recognizing the loan as a debt of the estate and in entering into the settlement agreement providing for termination of the trust. By implication, it argues that the question of the validity of the debt was for determination by the administrator and, in the absence of evidence of his bad faith, was not subject to review by the court. We disagree.

The administrator alleged, in his complaint for declaratory judgment, that Newsom borrowed the funds from Bankers Trust in his individual capacity and as executor of his mother's estate, and used the funds for his own benefit, rather than the benefit of the estate. The administrator sought from the court "an order declaring the rights of the parties." In the answer filed by the guardian *ad litem* for the unknown and unborn heirs, he specifically denied that the note executed by Newsom to Bankers Trust was a debt of Florence Newsom's estate. Thus, the issue was joined as to the validity of the debt as an obligation of the estate, and the court was required to resolve the issue to determine the validity of the underlying basis for the settlement agreement for which the administrator sought approval. *See Pittman v. Barker*, 117 N.C. App. 580, 452 S.E.2d 326, *disc. review denied*, 340 N.C. 261, 456 S.E.2d 833 (1995) (in non-jury trial, trial court must resolve all issues raised by the pleadings).

Bankers Trust argues generally, in support of several assignments of error directed to the trial court's findings and conclusions with respect to the loan, that Newsom, as executor of his mother's estate,

was given authority to borrow funds and, therefore, the trial court erred in its determination that the loan was not a debt of the estate. G.S. § 28A-13-3(a)(12) permits an executor to "borrow money . . . upon such . . . security as the personal representative shall deem advisable, . . . for the purpose of paying debts, taxes, and other claims against the estate, and to mortgage, pledge or otherwise encumber such portion of the estate as may be required to secure such loan or loans." Similarly, under G.S. § 28A-15-1(c), the executor is permitted, upon his determination that it is in the best interest of the administration of the estate, "to sell, lease, or mortgage any real estate or interest therein to obtain money for the payment of debts and other claims against the decedent's estate . . . ." Additionally, among the powers which Florence Newsom granted her executors by incorporation of the provisions of G.S. § 32-27, is the power to borrow money for the purpose of managing the real property of the estate or paying debts, taxes or other charges against the estate. The burden, however, is upon the parties asserting the validity of the debt as an obligation of the estate to show that Newsom acted within his authority as executor. *See Rubber Co. v. Distributors*, 253 N.C. 459, 117 S.E.2d 479 (1960) (the burden of proof on an issue ordinarily rests upon the party who asserts the affirmative thereof).

Except for the recitation on the promissory note that Newsom had signed it "individually and as Executor" of his mother's estate and the unsworn statement from plaintiff administrator to the court that "some of the funds were probably used for repair and renovation of the Fairgreen Road property", there is simply no evidence from which the trial court could determine the intended purpose for which Newsom borrowed the money. Thus, we are constrained to agree with the trial court "that for whatever purpose of the loan, it was not for the purposes of paying debts, taxes or other charges against the estate, there being no such known charges", or for the management of the real property as authorized by G.S. § 32-27.

We also find no merit in the argument by Bankers Trust that other language in Florence Newsom's will gave Newsom "full authority to bind the Estate in a vast number of areas." The language to which Bankers Trust refers is the following:

> I hereby grant to my Executor . . . continuing absolute, discretionary power to deal with any property, real or personal, held in my estate . . ., as freely as I might in the handling of my own affairs. Such power may be exercised independently and without

> prior or subsequent approval of any court or judicial authority and no person dealing with the Executor . . . shall be required to inquire into the propriety of any of . . . [his] actions.

Contrary to Bankers Trust's assertion, we do not read this language as extending any additional authority or power to the executor and cannot be interpreted to authorize any act which is not otherwise authorized. Thus, we find no error in the trial court's determination that the Bankers Trust debt was not a debt of Florence Newsom's estate.

Having determined that Bankers Trust was not a creditor of Florence Newsom's estate, the trial court committed no error or abuse of discretion in determining that the settlement agreement would be unfair to the remainder interests of the unborn and unknown heirs of Newsom, declining to approve the settlement agreement, and ordering that Florence Newsom's estate be administered according to her intent as expressed in her will. The judgment of the trial court is affirmed.

Affirmed.

Judges EAGLES and GREENE concur.

ALFRED JOHN LOWE, EMPLOYEE, PLAINTIFF-APPELLEE v. BE&K CONSTRUCTION COMPANY, EMPLOYER, DEFENDANT-APPELLANT, AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLANT

No. COA95-594

(Filed 20 February 1996)

1. Workers' Compensation § 165 (NCI4th)— back injury while tightening flange—accident—relation of spine condition to injury—disability—sufficiency of evidence

The evidence was sufficient to support the Industrial Commission's findings of fact which in turn supported its conclusion that plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant when he strained to tighten a flange and experienced the sudden onset of severe low back pain, that his cervical spine condition was related to his injury, and that he was disabled.

Am Jur 2d, Workers' Compensation §§ 246-250.

2. Workers' Compensation § 291 (NCI4th)— credit for sick leave payments—failure to award—error

The Industrial Commission erred in not awarding defendants a credit of $20,139.00 under N.C.G.S. § 97-42 for sick leave payments made to plaintiff.

Am Jur 2d, Workers' Compensation § 416.

Workmen's compensation: crediting employer or insurance carrier with earnings of employee re-employed, or continued in employment, after injury. 84 ALR2d 1108.

Appeal by defendants from Opinion and Award entered 2 February 1995 by the North Carolina Industrial Commission, Thomas J. Bolch, Commissioner. Heard in the Court of Appeals 26 January 1996.

Gene Collinson Smith for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by Winston L. Page, Jr., and M. Reid Acree, Jr., for defendants-appellants.

WYNN, Judge.

Defendant-appellants, BE&K Construction Company ("BE&K") and St. Paul Fire & Marine Insurance Company ("St. Paul"), appeal the North Carolina Industrial Commission's (Commission's) Opinion and Award concluding that: (1) plaintiff-appellee, Alfred J. Lowe, sustained a compensable injury by accident arising out of and in the course of his employment with BE&K, (2) plaintiff's cervical back condition and other conditions of the back were causally related to the accident, (3) plaintiff is disabled, and (4) defendants cannot take a benefit credit for sick leave previously paid to plaintiff under N.C. Gen. Stat. § 97-42 (1991). We affirm in part and reverse in part.

The record on appeal indicates that BE&K employed Mr. Lowe for approximately ten years. He worked as a piping superintendent which involved supervising the replacement of pipes and solving any problems which arose during his shift.

At the end of his shift on 5 November 1990, Mr. Lowe noticed a water leak in the flange. He and his co-worker, Tommy Scarborough, began tightening the flange with double wrenches. As they pulled on the flange for approximately 20 to 30 minutes, Mr. Lowe suddenly experienced a sharp pain in his lower back. He told Mr. Scarborough that he "pulled something" and that "[h]e heard something pop into

his neck and back." Thereafter, he reported the injury to his supervisor, Mr. Harvey Brooks. The following day, he was late for work because of leg and back pain.

Mr. Lowe experienced leg and back pain until June 1991. He continued to work at BE&K delegating all the physical work to other employees. Mr. Lowe believed that the pain would eventually subside; however, the pain worsened and he sought medical treatment on 13 June 1991. From 13 June 1991 to 28 May 1993, he received medical treatment from several back and spinal injury specialists.

Because of this injury, Mr. Lowe was unable to work from 11 June 1991 through approximately 9 November 1991. During that time, he received sick leave compensation from BE&K. BE&K paid him his full salary until 11 September 1991 and then paid him 60% of his salary until 9 November 1991. Consequently, Mr. Lowe received approximately $20,139.00 during his absence. After he returned to work at BE&K, he received his regular salary until approximately 31 January 1992 when he was laid off. Mr. Lowe continued to be unable to perform his regular work duties due to back and leg pain; however, defendants did not pay him further sick leave or other compensation for his disability.

Mr. Lowe filed a complaint alleging that he should be compensated by defendants for his back injury. On 2 August 1994, Deputy Commissioner Morgan S. Chapman issued an Opinion and Award which found that Mr. Lowe sustained an injury by accident arising out of and in the course of his employment with BE&K and that he materially aggravated his pre-existing back condition. On 2 February 1995, the Full Commission filed an Opinion and Award affirming the Deputy Commissioner's decision and concluding that BE&K and St. Paul must provide Mr. Lowe with all medical treatment (including cervical spine treatment) to the extent that it tends to effect a cure, gives relief or lessens his disability. The Full Commission, however, disallowed defendants' claim for a benefit credit for sick leave previously paid to plaintiff. Defendants appealed.

I.

[1] BE&K and St. Paul first contend that the Commission erred in concluding (1) that Mr. Lowe sustained an injury by accident arising out of and in the course of his employment with BE&K, (2) that Mr. Lowe's cervical spine condition was related to the 5 November 1990 injury, and (3) that Mr. Lowe is disabled. We disagree.

Under the provisions of N.C.G.S. § 97-86, the Industrial Commission is the fact finding body and findings of fact made by the Commission are conclusive on appeal if supported by competent evidence. *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). This is so even if there is evidence which would support a finding to the contrary. *Id.* Hence, on appeal, this Court is limited to two inquiries: (1) whether any competent evidence exists before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusions and decision. *Id.*

The record on appeal indicates that the Commission made the following relevant findings of fact:

. . . .

2. At the end of his shift on 5 November 1990, plaintiff noticed that water was leaking out of a flange . . . . As plaintiff was straining to tighten the flange, he suddenly experienced the onset of severe low back pain which radiated into his testicles and hips. When his supervisor, Mr. Harvey Brooks, came over a short time later, he reported the injury and indicated that he needed to leave. Plaintiff was visibly impaired when he left work that night.

3. Plaintiff was still in pain the next morning and was unable to report to work as scheduled, but he went in late that morning . . . . Plaintiff continued working until June 1991 thinking that the back and leg pain would resolve, but it grew worse instead. On 13 June 1991 plaintiff went to see Dr. Oak for treatment but then decided that he needed to see a specialist. He had a long history of back problems beginning with an injury in college and had under gone [sic] four operation [sic] to his lower back. Plaintiff decided that he should return to the doctor who had performed his last surgery, so he called the medical center in Birmingham, Alabama where it had been performed. Apparently, Dr. Griff R. Harsh, III was no longer in practice and plaintiff was given an appointment with Dr. W.S. Fisher, III.

4. Dr. Fisher examined plaintiff on 28 June 1991 and ordered an MRI. There were problems with the MRI and it could not be adequately read. Dr. Fisher was concerned that plaintiff had arachnoiditis based upon what could be seen on the MRI. Since plaintiff was reluctant to undergo a myleogram [sic], Dr. Fisher referred him to Dr. Sanford H. Vernick in Greenville for pain man-

agement. Dr. Vernick examined plaintiff on 4 September 1991 and ordered psychological evaluation and a functional capacity evaluation. Dr. Vernick subsequently released plaintiff to return to work with restrictions on 14 October 1991. On 10 November 1991 plaintiff was called and given a job in Lumberton where physical work would not be required. Plaintiff accepted the position and worked on that site until 14 December 1991 when the job was completed. He did not receive another work assignment, but apparently remained on the payroll until 31 January 1992 when he was laid off.

5. Because of his persistent symptoms, plaintiff went to Dr. Robert P. Singer, a neurosurgeon in Richmond, Virginia, on 23 March 1992 for evaluation of his condition. Dr. Singer determined that he could not adequately address the problems and referred plaintiff to Johns Hopkins Hospital. Plaintiff went there on 5 December 1992 and saw Dr. Marco Pappagallo. He still complained of low back pain and bilateral leg pain, but he had also developed neck pain and symptoms in his hands over the previous few months. Dr. Pappagallo reviewed the MRI which had been performed in July and ordered additional diagnostic tests. Since there was apparent disc herniation in plaintiff's cervical spine, he referred plaintiff to Dr. Allen Belzberg, a neurosurgeon. Dr. Belzberg began treating him on 28 October 1992 for the cervical spine problem and performed surgery at C-56 and C-57 in December 1992. Dr. Belzberg was of the opinion that the incident on 5 November 1990 could have aggravated plaintiff's pre-existing cervical spine condition.

6. Plaintiff was not treated for his lower back problems until 28 May 1993 when he was evaluated by Dr. Michael Tooke, an orthopaedic surgeon. He continued to experience persistent back pain which radiated into his groin as of that time. Dr. Tooke found evidence of spinal stenosis at T12-L1 and opined that plaintiff might benefit from surgery. However, he had not provided further treatment or follow-up care by the time his testimony was taken.

. . . .

10. As a result of this injury by accident, plaintiff was unable to work from 11 June 1991 through approximately 9 November 1991. During that time, he received sick leave compensation from his employer. Defendant-employer paid him his full salary until 11 September 1991 and then paid him sixty percent of his salary until

about 9 November 1991. Consequently, he was paid approximately $20,139.00 during his absence. After he returned to work, he received his regular salary until approximately 31 January 1992 when he was laid off. Plaintiff continued to be unable to perform his regular work duties after that date due to back and leg pain associated with this injury, but defendants did not pay him further sick leave or other compensation for his disability. However, plaintiff received a severance pay package unrelated to his disability.

11. Plaintiff continued to be unable to work as a result of his low back condition during the time he received treatment from Dr. Belzberg. He remained unable to work as of the date of the hearing and required further medical treatment for his work related condition.

Upon careful examination of the record, we find competent evidence to support the Commission's findings of fact. We likewise find that the findings of fact of the Commission justify its legal conclusions and decision. Based on the testimony of Mr. Lowe, Mr. Brooks, Mr. Scarborough, Dr. Belzberg, Dr. Tooke, Mr. Porter, and the stipulated medical records of Dr. Oak, there was substantial evidence to show (1) that Mr. Lowe sustained an injury by accident arising out of and in the course of his employment with BE&K, (2) that Mr. Lowe's cervical spine condition was related to the 5 November 1990 injury, and (3) that Mr. Lowe is disabled. We therefore affirm the Commission's Opinion and Award.

II.

[2] BE&K and St. Paul next contend that the Commission erred in failing to award defendants a credit of $20,139.00 for sick leave payments previously paid to Mr. Lowe. We agree.

N.C.G.S. § 97-42 provides in relevant part:

Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation.

Our Supreme Court held in *Foster v. Western-Electric Co.*, 320 N.C. 113, 115, 357 S.E.2d 670, 672 (1987) that where "defendant had

not accepted plaintiff's injury as compensable under workers' compensation at the time the payments were made, nor had there been a determination of compensability by the Industrial Commission . . . . ," the employer should be awarded a credit for these payments under N.C.G.S. § 97-42. On the other hand, in cases where it is stipulated that the employer's insurance carrier accepts the employee's claim as compensable under the Act after the injury occurred, *see Moretz v. Richards & Associates*, 316 N.C. 539, 342 S.E.2d 844 (1986), and when the employer stipulates that the employee had sustained an injury by accident arising out of and in the course of his employment, *see Ashe v. Barnes*, 255 N.C. 310, 121 S.E.2d 549 (1961), a credit will be disallowed under N.C.G.S. § 97-42.

The record on appeal indicates that BE&K and St. Paul neither stipulated that Mr. Lowe's injury was compensable under the Act nor that he had sustained an injury by accident arising out of and in the course of his employment. In *Foster*, our Supreme Court overturned this Court's affirmance of the Commission's denial of a credit under facts similar to the case at hand. *See* 320 N.C. at 115, 357 S.E.2d at 672. We recognize that N.C.G.S. § 97-42 appears to vest the awarding of credits within the discretion of the Commission. That section states in pertinent part that a credit *may* be allowed subject to the approval of the Commission. Notwithstanding our interpretation of this statute, we are bound by our Supreme Court's pronouncement in *Foster*. *Cf., Estes v. North Carolina State University*, 89 N.C. App. 55, 365 S.E.2d 160 (1988). We therefore find that the Commission erred in not awarding defendants a credit of $20,139.00 under N.C.G.S. § 97-42 for sick leave payments made to Mr. Lowe. Accordingly, we reverse this portion of the Opinion and Award.

Affirmed in part, Reversed in part.

Judges GREENE and McGEE concur.

O'NEAL CONSTRUCTION, INC., PLAINTIFF v. LEONARD S. GIBBS GRADING, INC., DEFENDANT

No. COA95-35

(Filed 20 February 1996)

Arbitration and Award § 17 (NCI4th)— waiver of right to arbitration—insufficiency of evidence

The trial court erred in determining that defendant waived its right to arbitration, since defendant pled the right to arbitration as an affirmative defense and moved for arbitration in its answer, thereby putting plaintiff on notice that it was claiming the right; defendant's subsequent participation in mediation, absent a specific waiver of arbitration, was not inconsistent with arbitration and did not constitute an implied waiver of arbitration; defendant's "delay" in scheduling arbitration was based on the architect's slow response to plaintiff's attorney's question regarding the procedures for submitting the dispute to him for resolution; and the findings and evidence did not show that plaintiff was prejudiced by this "delay."

Am Jur 2d, Alternative Dispute Resolution §§ 129-132.

Filing of mechanic's lien or proceeding for its enforcement as affecting right to arbitration. 73 ALR3d 1066.

Defendant's participation in action as waiver of right to arbitration of dispute involved therein. 98 ALR3d 767.

Appeal by defendant from orders entered 31 August 1994 by Judge Anthony M. Brannon in Orange County Superior Court. Heard in the Court of Appeals 5 October 1995.

Robert R. Chambers, P.A., by Robert R. Chambers, for defendant-appellant.

Northen, Blue, Rooks, Thibaut, Anderson & Woods, L.L.P, by Jo Ann Ragazzo Woods, for plaintiff-appellee.

LEWIS, Judge.

This action arises out of a dispute between plaintiff, a general contractor, and defendant, a subcontractor, over defendant's performance under the subcontract.

In January 1992, plaintiff and the Durham County Board of Education entered into a contract ("prime contract") for plaintiff to act as general contractor to build Forest View Elementary School (formerly Hope Valley Elementary School) in Durham, North Carolina. This contract contained provisions that required arbitration of disputes upon demand of either party.

In February 1992, plaintiff and defendant entered into a subcontract ("contract") wherein defendant agreed to provide certain concrete work for the school building project. This contract incorporated the prime contract's terms and conditions by reference, including the arbitration provisions.

On 8 October 1993, plaintiff sued defendant for damages alleging that defendant breached the contract. On 14 February 1994, defendant answered denying the breach, and pleading the agreement to arbitrate as an affirmative defense. In its answer, defendant also moved the court for an order staying the proceedings and compelling arbitration. However, defendant did not schedule a hearing on its motion.

On 25 April 1994, the parties voluntarily participated in mediation in an attempt to resolve their differences, but this mediation resulted in an impasse. Defendant contends that plaintiff's attorney then agreed for the parties to proceed to arbitration and that she would contact the architect to request that he act as arbitrator. Plaintiff's attorney contends that "there was . . . no agreement between counsel to arbitrate in the event mediation was not successful." However, plaintiff admits that the contract contains an agreement to arbitrate and that its attorney called the architect to inquire about procedures for submission of the dispute to him for resolution. The architect did not respond to this request.

On 27 April 1994, plaintiff served a request for production of documents on defendant. On 21 June 1994, Judge Gordon Battle entered an order placing this action on the trial calendar for the 12 September 1994 civil session of Superior Court. On 7 July 1994, plaintiff served a motion to compel discovery and for sanctions. In response, on 15 July 1994, defendant filed a second motion to compel arbitration. A hearing on these motions was held on 25 July 1994 before Judge Brannon. By order signed and filed on 31 August 1994, Judge Brannon denied defendant's motion to compel arbitration based upon his determination that defendant had "impliedly waived" his contractual right to arbitration. In this order, Judge Brannon also granted plaintiff's motion to compel discovery, ordered defendant to respond to plain-

tiff's discovery request, and denied plaintiff's motion for sanctions ("first order").

After this hearing, defendant filed motions for rehearing and for imposition of sanctions against plaintiff. On 31 August 1994, a hearing was held on these motions. At this hearing, Judge Brannon orally denied defendant's motions for rehearing and for imposition of sanctions against plaintiff ("second order").

Defendant appeals from both orders.

In its first assignment of error, defendant assigns error to the court's "failure," in its first order "to make a finding as to whether or not a valid agreement to arbitrate this dispute exists between the parties to this action, on the ground that such finding is required as a matter of law." In support of this argument, defendant asserts that such a finding is required by N.C. Gen. Stat. section 1-567.3(a) which provides as follows:

> On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, *but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised* and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

G.S. § 1-567.3(a)(1983) (emphasis added).

Both in its brief and at the 25 July 1994 hearing, plaintiff has admitted that the contract contained an agreement to arbitrate. Thus, this is not a case in which "the opposing party denies the existence of the agreement to arbitrate" under N.C.G.S. section 1-567.3(a). Consequently, the trial court was not required at the hearing to determine whether an arbitration agreement existed. Defendant's first assignment of error fails.

In its second and third assignments of error, defendant cites the court's denial of its motion to compel arbitration on the ground, *inter alia*, that the court operated under a misapprehension of law in determining that defendant "impliedly waived" its right to arbitration. Defendant also asserts that the court's conclusions of law are not supported by its findings and that the findings are not supported by the evidence.

Due to "strong public policy in North Carolina favoring arbitration," courts "must closely scrutinize any allegation of waiver" of the right to arbitration. *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). In accordance with this policy, our Supreme Court has required a showing of prejudice to the opposing party. The Court held that

> a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.

Id. Such prejudice can be shown by a party if it is forced to "bear the expenses of a lengthy trial," helpful evidence is lost because of the opponent's delay, the party's opponent "takes advantage of judicial discovery procedures not available in arbitration," or a party has spent "significant amounts of money" or acted to its detriment due to the delay of its opponent. *Id.* at 229-30, 321 S.E.2d at 876-77.

In its first order, the trial court found that defendant "impliedly waived" its right to arbitration "by its delay" and by actions "inconsistent with arbitration including but not limited to participation in a mediated settlement conference in April, 1994 . . . ." To further support its finding of waiver, the court found that plaintiff was prejudiced by defendant's delay in filing its motion to compel arbitration

> after the parties participated in a mediated settlement conference, after Plaintiff served written discovery on Defendant, after Defendant failed to answer or respond to written discovery of Plaintiff, after the case is calendared for the non-jury trial of this matter, after Plaintiff filed and notice [sic] for hearing its motion to compel discovery, and after Plaintiff incurred attorneys fees in the above matters.

Although we acknowledge that the record supports the facts found by the court as to the sequence of the events as set out above, we do not agree that these findings are sufficient to support the court's determination that defendant has waived its right to arbitration. The record evidence also does not support a determination of waiver here.

By pleading the right to arbitration as an affirmative defense and moving for arbitration in its answer, defendant put plaintiff on notice that it was claiming the right. Defendant's subsequent participation in mediation, absent a specific waiver of arbitration, is not "inconsistent

with arbitration" and does not constitute an implied waiver of arbitration.

As to defendant's "delay," the record shows that defendant waited to schedule a hearing on its motion until after the architect responded to plaintiff's attorney's question regarding the procedures for submitting the dispute to him for resolution. The architect has admitted that he did not respond until after he was called by defendant's attorney in July 1994, the same month in which defendant's second motion to compel was filed and in which the hearing on the motion was held.

The findings and evidence do not show that plaintiff was prejudiced by this "delay" in any of the ways described in *Cyclone. See id.* at 229-30, 321 S.E.2d at 876-77 (suggesting the types of actions that show prejudice). There are neither findings nor record evidence to show that helpful evidence has been lost due to any delay in discovery. The record also does not show that defendant took advantage of discovery procedures that are unavailable in arbitration. Finally, although the findings indicate that plaintiff incurred attorney fees prior to the hearing on defendant's motion, the record does not contain evidence to support this finding. Further, neither the findings nor record evidence support the conclusion that these expenses were incurred in reliance on defendant's actions. Rather, the record shows that any expenses incurred resulted from plaintiff's decision to litigate rather than arbitrate.

Accordingly, we conclude that the court erred in determining that defendant waived its right to arbitration. Since both parties admit that the contract requires arbitration, we remand to the trial court for entry of an order compelling arbitration in accord with N.C.G.S. section 1-567.3(a).

In its fourth assignment of error, defendant asserts that the court erred in allowing plaintiff's motion to compel discovery and in failing to stay the proceedings until after arbitration. Given our holding that defendant has not waived the right to arbitration, we likewise hold that the court erred by compelling discovery and by failing to stay the proceedings.

In its fifth assignment of error, defendant asserts that the court erred, in its second order, in denying defendant's motion, under Rule 60 of the North Carolina Rules of Civil Procedure, to rehear its motion to compel arbitration and stay the proceedings. We do not address

this assignment of error because we have already determined that the court erred in its first order.

In its final assignment of error, defendant asserts that the court erred in denying its motion for sanctions against plaintiff and its attorney. In exercising our *de novo* review of a court's denial or imposition of sanctions, we must determine (1) whether the judgment or determination is supported by conclusions of law, (2) whether these conclusions are supported by findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Here, we cannot engage in such a review because the court did not make findings of fact and conclusions of law to support its order. *See Williams v. Liggett*, 113 N.C. App. 812, 817, 440 S.E.2d 331, 334 (1994) (holding that review required by *Turner* not possible absent findings of fact and conclusion of law). Thus, we remand for entry of findings of fact and conclusions of law on the issue of whether sanctions are warranted. *See id.* (remanding for findings and conclusions).

Reversed in part, affirmed in part, and remanded.

Judges WALKER and MARTIN, Mark D. concur.

CITY OF GREENSBORO, PLAINTIFF-APPELLANT v. NANCY H. PEARCE AND HUSBAND, JIMMY B. PEARCE, AND BETTY H. McINTOSH, AND HUSBAND, SAMUEL R. McINTOSH, DEFENDANT-APPELLEES

No. COA94-1371

(Filed 20 February 1996)

1. Eminent Domain § 282 (NCI4th)— inverse condemnation— insufficiency of findings of fact

The trial court's findings of fact were insufficient to support its conclusion of law that plaintiff inversely condemned defendants' entire tract of land where the court made no findings of fact or conclusions of law as to whether plaintiff's actions in taking part of defendants' tract for a street-widening project constituted a "substantial interference" with defendants' elemental property rights in the entire property affected and thereby diminished the value of defendants' entire tract.

Am Jur 2d, Eminent Domain § 478.

Inverse condemnation state court class actions. 49 ALR4th 618.

2. **Eminent Domain § 289 (NCI4th)— diminution caused by eminent domain—diminution caused by elimination of on-street parking—distinction**

In determining the amount of compensation due defendants for inverse condemnation resulting from plaintiff city's street-widening project, a distinction must be made between any diminution caused by plaintiff's eminent domain action and any diminution caused by the elimination of on-street parking, since any diminution caused by the elimination of on-street parking is not compensable both because it has not been challenged and because elimination of on-street parking has been held to be a valid noncompensable exercise of the government's police power.

Am Jur 2d, Eminent Domain § 478.

Inverse condemnation state court class actions. 49 ALR4th 618.

3. **Eminent Domain § 282 (NCI4th)— inverse condemnation alleged—authority of court to order compensation greater than eminent domain complaint**

Where inverse condemnation is properly alleged, the trial court undeniably has the authority to order payment of compensation beyond that proposed by the complaint in eminent domain.

Am Jur 2d, Eminent Domain § 478.

Inverse condemnation state court class actions. 49 ALR4th 618.

4. **Eminent Domain § 286 (NCI4th)— inverse condemnation raised in answer—no error**

An inverse condemnation claim could properly be raised in an answer rather than in a counterclaim.

Am Jur 2d, Eminent Domain § 503.

Appeal by plaintiff from order entered 31 August 1994 by Judge F. Fetzer Mills in Guilford County Superior Court. Heard in the Court of Appeals 13 September 1995.

Defendants here own a tract encompassing two adjoining lots abutting South Chapman Street in the City of Greensboro. By resolu-

tion adopted on 1 March 1993, the Greensboro City Council instructed its City Attorney to institute condemnation proceedings against a portion of defendants' property for the public purpose of widening South Chapman Street in Greensboro. On 13 April 1993, plaintiff instituted this eminent domain action seeking to condemn a strip roughly 17 feet wide running along the entire 120 foot frontage of defendants' property. The complaint specifically describes the strip to be taken and, as required by G.S. 40A-41(2), also describes defendants' entire tract as the property "affected" by the taking. Plaintiffs also deposited $4,109.00 with the Guilford County Superior Court as estimated just compensation.

Defendants have owned the tract on South Chapman Street for the last 35 years and have maintained a children's day-care center on the site for the entire time. For some time prior to the filing of this action, defendants' tract has been nonconforming under City zoning ordinances with respect to parking. On 1 July 1992, a new zoning ordinance became effective which rendered defendants' day care center nonconforming with respect to use as well. Under this zoning ordinance, defendants may continue to operate their business but may not enlarge it in any way.

Defendants' answer alleged that taking the 17' x 120' parcel in the front of defendants' property amounted to an inverse condemnation of defendants' entire property. Prior to the taking, defendants maintained and used a driveway with two on-site parking spaces primarily for employees while the other day-care center employees parked on South Chapman Street. Patrons of defendants' day care center generally also parked on the street while dropping off and picking up their children. The present on-site parking spaces will be lost as a result of the taking. The on-street parking will be eliminated along South Chapman Street concurrent with the widening of the street. Defendants do not challenge plaintiff's elimination of on-street parking or plaintiff's zoning ordinance which forbids defendants from building replacement on-site parking.

On 2 August 1994, a hearing was held before Judge F. Fetzer Mills on all issues other than compensation. After hearing, Judge Mills held that the "partial taking of Defendants' properties is an Inverse Condemnation of Defendants' entire property interests . . . ." The trial court then remanded the case "to the Clerk of Superior Court . . . for appointment of Commissioners to determine as just compensation the fair market value of the entire properties . . . ."

Plaintiff appeals.

A. Terry Wood and Becky Jo Peterson-Buie, for plaintiff-appellant.

Richard D. Hall, Jr., P.A., by *W. B. Trevorrow, for defendant-appellees.*

EAGLES, Judge.

[1] Plaintiff first argues that the trial court's findings of fact do not support its conclusion of law that plaintiff has inversely condemned defendants' entire tract. We agree and vacate the trial court's order and remand for additional findings.

The United States Constitution provides, *inter alia*, that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The North Carolina Constitution provides the same fundamental protection against private property being taken for public use without just compensation. *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989). It is a well settled constitutional principle that actual physical occupation or even touching is not required to support a finding that a taking has occurred. *Adams Outdoor Advertising v. N.C. Dept. of Transportation*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). It is only necessary that there be "a substantial interference with the elemental rights growing out of the ownership of the property." *Id.* (quoting *Long v. City of Charlotte*, 306 N.C. 187, 198-99, 293 S.E.2d 101, 109 (1982)).

Here, the trial court made no findings of fact or conclusions of law as to whether plaintiff's actions in taking part of defendants' tract constitute a "substantial interference" with defendants' elemental property rights in the entire property affected. Many of the trial court's findings concern the impact on defendants' property of the previous zoning changes and of plaintiff's decision to eliminate on-street parking in front of defendants' property. Any injury caused by either of these acts by plaintiff, however, is not compensable here because defendants have not challenged those actions of the plaintiff. Accordingly, we remand for the trial court to make findings of fact as to whether plaintiff's eminent domain action "substantially interfered" with defendants' elemental rights in their entire tract and thereby diminished the value of defendants' entire tract.

[2] If the trial court finds that the value of defendants' entire tract has been diminished, a certain calculation difficulty remains because plaintiff's other actions may still affect the calculation of any diminution in the value of defendants' property caused by plaintiff's eminent domain action. We first recognize that, in determining the amount of the diminution in value that is compensable, the zoning on the property may be removed from the analysis because the zoning is not challenged and because the current zoning was in effect prior to the inception of the street widening project. Accordingly, we treat the zoning here as an attribute of the property and we must analyze the effect of plaintiff's other actions in light of the zoning on the property.

Any diminution in the value of defendants' property here is caused by the combined effect of the plaintiff's eminent domain action and the elimination of on-street parking. Because the elimination of on-street parking occurred at virtually the same time as plaintiff's institution of its eminent domain action, the elimination of on-street parking may not be analyzed as an attribute of the property. In determining the amount of compensation due defendants, a distinction must be made between any diminution caused by plaintiff's eminent domain action and any diminution caused by the elimination of on-street parking. Any diminution caused by the elimination of on-street parking is not compensable here both because it has not been challenged and because elimination of on-street parking has been held to be a valid noncompensable exercise of the government's police power unless shown to be "arbitrary, unreasonable or unjustly discriminatory." *Thompson v. Reidsville*, 203 N.C. 502, 504, 166 S.E. 389, 391 (1932). Damages resulting from the proper exercise of the police power by reasonable means are not compensable as a taking. *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261, 302 S.E.2d 204, 208 (1983).

In its final analysis, the finder of fact must first determine pursuant to G.S. 40A-64, the fair market value of defendants' property under its current zoning before plaintiff instituted its condemnation action and eliminated on-street parking. The finder of fact must then determine the fair market value of defendants' property after the taking by plaintiff and the elimination of on-street parking. The difference between the fair market value before and the fair market value after the eminent domain action and the loss of on-street parking is, of course, the total diminution in the value of defendants' property. Finally, having determined the total diminution, the finder of fact must determine how much of that total diminution is compensable

because it is attributable to plaintiff's exercise of its eminent domain power. Always in applying this formula, the goal is to ensure that the landowner receives fair and just compensation to the fullest extent that the law allows.

We note here that the trial court previously determined that defendants' property had been deprived of all value. To support a similar determination on remand, findings of fact must be made that defendants were deprived of all practical uses of their property. *Weeks v. North Carolina Dep't of Nat. Resources & Comm. Dev.*, 97 N.C. App. 215, 225-26, 388 S.E.2d 228, 234-35, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990).

[3] Plaintiff next argues that the trial court lacked the authority to order payment of compensation for the entire tract after the Greensboro City Council determined, in its legislative authority, that a partial taking was appropriate. We disagree because defendants have alleged that plaintiff's action in eminent domain to take a portion of defendants' tract effected an inverse condemnation of defendants' entire tract. "Inverse condemnation" is often defined as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Charlotte v. Spratt*, 263 N.C. 656, 662-63, 140 S.E.2d 341, 346 (1965) (quoting *City of Jacksonville v. Schumann*, 167 So.2d 95, 98 (Fla. Dist. Ct. App. 1964)). " 'Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so.' " *Hoyle v. City of Charlotte*, 276 N.C. 292, 302, 172 S.E.2d 1, 8 (1970) (quoting Bohannon, *Airport Easements*, 54 Va. L. Rev. 355, 373 (1968)). Accordingly, we conclude that, where inverse condemnation is properly alleged, the trial court undeniably has the authority to order payment of compensation beyond that proposed by the complaint in eminent domain.

[4] Finally, plaintiff argues here that defendants failed to properly raise their inverse condemnation claim. We disagree. Plaintiff takes issue because defendants asserted their claim for inverse condemnation in their answer rather than in a counterclaim, which is the better practice. We recognize, however, that "principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in the ongoing proceedings." *Department of Transportation v. Bragg*, 308 N.C. 367, 371 n.1, 302 S.E.2d 227, 230

n.1 (1983). We also recognize that the fact that the pleading was labelled "Answer" does not preclude its being treated as a counterclaim as well as an answer. *McCarley v. McCarley*, 289 N.C. 109, 114, 221 S.E.2d 490, 494 (1976). We do so here.

Reversed and remanded.

Judge LEWIS concurs.

Judge JOHN concurs in the result only.

EVA MAE MONK, PLAINTIFF v. COWAN TRANSPORTATION, INC., TY PRUITT DIVISION, AND JAMES ATWOOD McCAIN, DEFENDANTS AND COWAN TRANSPORTATION, INC. AND JAMES ATWOOD McCAIN, THIRD-PARTY PLAINTIFF v. PAULETTE HERMAN CHURCH, ADMINISTRATRIX OF THE ESTATE OF CHARLES KEITH HERMAN, THIRD-PARTY DEFENDANT

No. COA95-55

(Filed 20 February 1996)

Automobiles and Other Vehicles § 460 (NCI4th)— owner-occupant doctrine—no opportunity for owner to exercise right or duty to control driver— no showing of contributory negligence as matter of law

In an action to recover for injuries sustained in an automobile accident, there was no genuine issue of fact as to actual ownership of the vehicle, and the owner-occupant doctrine supplied a presumption that plaintiff, as sole owner of the vehicle, had the right to control and direct its operation where the evidence tended to show that the title to the vehicle was placed in both plaintiff's and her fiancee driver's names only to facilitate her obtaining credit and that she was actually the sole owner of the automobile; however, the owner-occupant doctrine did not establish plaintiff's contributory negligence as a matter of law, since defendants made no showing that plaintiff had adequate time and opportunity to exercise her "right or duty" to control her fiancee's driving at the time of the collision and failed to do so.

Am Jur 2d, Automobiles and Highway Traffic §§ 640-643, 652.

Fact that passenger in vehicle is owner as affecting right to recover from driver for injuries to, or death of, passenger incurred in consequence of driver's negligence. 21 ALR4th 459.

Appeal by plaintiff from judgment entered 7 November 1994 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 1995.

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

Kennedy Covington Lobdell & Hickman, L.L.P., by F. Fincher Jarrell, for defendant-appellees.

MARTIN, John C., Judge.

Plaintiff commenced this action to recover compensatory damages for injuries she allegedly sustained in a motor vehicle accident on 21 December 1993 in Caldwell County, North Carolina. In her complaint, plaintiff alleged that she was riding in the front passenger seat of a 1990 Plymouth automobile driven by her fiancee, Charles Herman, when it was struck by a tractor-trailer leased by defendant Cowan Transportation, Inc., and operated by its employee, defendant James McCain, while in the course and scope of his employment. Plaintiff alleged that McCain was negligent in various respects in the operation of the tractor-trailer, and that his negligence is imputed to Cowan. Plaintiff also alleged that Herman was negligent in his operation of the Plymouth, and that the negligence of both Herman and defendants proximately caused the accident and the resulting injuries to her.

In their answer, defendants McCain and Cowan asserted, *inter alia*, that Herman was negligent in his operation of the Plymouth, that plaintiff was an owner of the Plymouth and that Herman's negligence should be imputed to her under the owner-occupant doctrine, so that her claim is barred by her contributory negligence. Plaintiff filed a reply, alleging that defendants had the last clear chance to avoid the collision.

Defendants filed a third-party complaint against the personal representative of Herman's estate, Herman having been killed in the collision. The personal representative did not file an answer, and default was entered as to Herman's estate. Following discovery, defendants

moved for summary judgment. The trial court granted their motion, dismissing plaintiff's action. Plaintiff appeals.

Plaintiff's sole assignment of error is to the entry of summary judgment dismissing her action. Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The burden is upon the party moving for summary judgment to show that no triable issue of fact exists, which he may meet by showing that the opposing party's claim is barred by an affirmative defense which cannot be overcome. *Varner v. Bryan*, 113 N.C. App. 697, 700, 440 S.E.2d 295, 298 (1994).

In this case, defendants asserted the affirmative defense of contributory negligence, relying upon the owner-occupant doctrine to establish that Herman's negligent operation of the automobile should be imputed to plaintiff, barring her claim.

> The owner-occupant doctrine, so-called, holds that when the owner of the automobile is also an occupant while the car is being operated by another with the owner's permission or at his request, negligence on the part of the driver is imputable to the owner.

Industries, Inc. v. Tharpe, 47 N.C. App. 754, 763, 268 S.E.2d 824, 830, *disc. review denied*, 301 N.C. 90, 273 S.E.2d 311 (1980) (citing *Harper v. Harper*, 225 N.C. 260, 34 S.E.2d 185 (1945)). The non-driving occupant, as owner of the vehicle, is presumed to have the right to control and direct its operation, unless he or she relinquishes that right, *Shoe v. Hood*, 251 N.C. 719, 723, 112 S.E.2d 543, 547 (1960), so that if the driver's negligent operation of the vehicle proximately results in injury to the owner-occupant, such negligence is imputed to the latter as contributory negligence, precluding recovery for his injuries as a matter of law. *Rhoads v. Bryant*, 56 N.C. App. 635, 638, 289 S.E.2d 637, 639, *disc. review denied*, 306 N.C. 386, 294 S.E.2d 211 (1982).

Plaintiff contends the owner-occupant doctrine does not apply in this case because the undisputed evidence showed that title to the automobile was in both plaintiff's and Herman's names, and as a co-owner of the automobile, she had no right of control of the automobile superior to Herman's while he was driving it. Therefore, she

argues, Herman's negligence cannot, as a matter of law, be imputed to her. However, the courts of this State have not hesitated to look beyond the naked legal title to a vehicle to determine who is its "true" owner. *See Davis v. Jessup and Carroll v. Jessup,* 257 N.C. 215, 125 S.E.2d 440 (1962) (in wrongful death action arising out of a collision between two automobiles where passenger-intestate's name was not on the title to vehicle in which intestate was riding, the Court, nonetheless, found case to be barred by the owner-occupant doctrine because the uncontradicted testimony of plaintiff on cross-examination amounted to an admission that her intestate-passenger was actually the owner of the vehicle); *Bowen v. Gardner,* 275 N.C. 363, 168 S.E.2d 47 (1969); *Scott v. Lee,* 245 N.C. 68, 95 S.E.2d 89 (1956). In the present case, similar to *Jessup,* plaintiff's deposition testimony established that title to the Plymouth was placed in both her and Herman's names only to facilitate her obtaining credit, and that she was actually the sole owner of the automobile. Thus, there is no genuine issue of fact as to actual ownership of the vehicle, and the owner-occupant doctrine supplies a presumption that plaintiff, as sole owner of the vehicle, had the right to control and direct its operation.

This determination, however, does not end our inquiry into whether the owner-occupant doctrine establishes plaintiff's contributory negligence in this case as a matter of law, barring her claim and entitling defendants to judgment. In *Stanfield v. Tilghman,* 342 N.C. 389, 464 S.E.2d 294 (1995), our Supreme Court recently considered the issue of imputed negligence under the provisions of the Uniform Driver's License Act applicable to minors, G.S. § 20-11(b). The Court stated that the presumption of the "right to control" the operation of a motor vehicle "does not translate into an irrebuttable presumption 'of control' so as to impute negligence or establish contributory negligence, as a matter of law, without regard for exigent circumstances or general negligence principles." *Id.* at 393-94, 464 S.E.2d at 297.

> Obviously, the "legal right to control" is "not control." Assuming the "right to control" referred to here infers a "duty to control," the unexercised legal right or duty to control does not equate to negligence in the absence of a fair opportunity to exercise that right or duty. There must be a reasonable opportunity to exercise the right or duty coupled with a failure to do so.

Id. We believe the foregoing rule to be equally applicable to the presumption of the "right to control" supplied by the owner-occupant doctrine. Applying the rule to the present case, we must conclude

that defendants have made no showing that plaintiff had adequate time and opportunity to exercise her "right or duty" to control Herman's driving at the time of the collision and failed to do so. Indeed, the evidence before the court upon defendants' motion for summary judgment, considered in the light most favorable to plaintiff as the non-movant as the court must do when ruling on a motion for summary judgment, *Howard v. Jackson*, 120 N.C. App. 243, 246, 461 S.E.2d 793, 796 (1995), could support a reasonable inference that plaintiff had no opportunity to control Herman's operation of the vehicle at the time of the collision. "If different material conclusions can be drawn from the evidence, then summary judgment should be denied." *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. 163, 164, 336 S.E.2d 699, 700 (1985). Thus, defendants have failed to satisfy their burden to establish plaintiff's contributory negligence as a matter of law. Therefore, it was error for the trial court to grant defendants' motion for summary judgment.

Defendants also alleged that plaintiff and Herman were engaged in a joint enterprise at the time of the collision, so that Herman's negligence should be imputed to plaintiff. There was, however, no evidence offered to support the allegation of joint enterprise, and defendants have candidly admitted at oral argument that they did not rely on the defense in support of their motion for summary judgment. Moreover, because we hold that a genuine issue of material fact exists with respect to the issue of plaintiff's contributory negligence, we need not address the parties' arguments as to whether defendants had the last clear chance to avoid the collision, as that issue is not material unless plaintiff's contributory negligence is established. The judgment of the trial court is reversed and this cause is remanded for a trial on the merits.

Reversed and remanded.

Judges JOHN and McGEE concur.

GREGORINO v. CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY

[121 N.C. App. 593 (1996)]

JANE A. GREGORINO, PLAINTIFF-APPELLANT v. THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY (HOSPITAL AUTHORITY), DEFENDANT-APPELLEE

No. COA95-405

(Filed 20 February 1996)

Indemnity § 16 (NCI4th)— action to recover attorney fees—necessity for fees—summary judgment improper

In an action by plaintiff nurse anesthetist to recover indemnification from defendant hospital authority for attorney fees incurred in retaining separate counsel in connection with an incident during surgery which resulted in severe and permanent brain damage to a minor child, the trial court erred in entering summary judgment for defendant where all potential claims regarding the incident were settled with full release of the hospital authority and its employees; the hospital authority's bylaws provided for indemnification of hospital employees for legal fees and expenses incurred in connection with any threatened or pending action seeking to hold the employee liable for actions as a hospital employee; and a genuine issue of material fact existed as to whether plaintiff's attorney fees were actually and necessarily incurred in connection with any threatened action seeking to hold her liable.

Am Jur 2d, Corporations §§ 1897, 1898.

Appeal by plaintiff from orders entered 25 January 1995 and 22 February 1995 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 1996.

Charles G. Monnett III & Associates, by Charles G. Monnett III, for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by A. Ward McKeithen, for defendant-appellee.

WYNN, Judge.

Plaintiff-appellant, Jane A. Gregorino, appeals orders denying her motion to compel discovery, denying her motion to continue the hearing on summary judgment, and granting summary judgment in favor of defendant-appellee, the Charlotte-Mecklenburg Hospital Authority ("Hospital Authority"). We reverse in part and affirm in part.

The record on appeal indicates that Ms. Gregorino worked at the Hospital Authority's University Hospital as a nurse anesthetist. On 16 August 1991, while performing her duties, complications arose during a tonsillectomy and adenoidectomy surgery leaving a minor child with severe and permanent brain injury.

Early investigation into the incident focused on the placement of the endotracheal tube which directly involved Ms. Gregorino's duties as a nurse anesthetist. She contacted Robert King, Vice President and Director of Legal Services for the Hospital Authority, inquiring about whether she would be afforded counsel to represent her in connection with any legal proceedings arising from the incident. In response to this inquiry, Mr. King sent two letters to her stating that the hospital would provide her with counsel and that her interests and those of the Hospital Authority were the same.

Ms. Gregorino, however, concluded that her interests and the interests of the Hospital Authority were not identical. On or about 20 August 1992, she consulted Attorney John Golding about retaining him to represent her interests in connection with the incident. However, Ms. Gregorino soon learned that Mr. Golding had been retained by the Hospital Authority to represent it and the interests of its insurance carrier, St. Paul Fire and Marine. She requested a complete copy of Mr. Golding's file relating to the incident so that she could keep informed about the case. Mr. Golding refused to deliver copies of the file to Ms. Gregorino. Consequently, Ms. Gregorino retained Attorney R. Marie Sides to represent her and obtain the requested files. Ms. Sides requested an opinion from the North Carolina State Bar on this issue. The Ethics Committee decided that Ms. Gregorino was entitled to a copy of the joint file from either the Hospital Authority or from Mr. Golding. Thereafter, Ms. Gregorino received a file from Mr. Golding. Ms. Gregorino considered the file to be incomplete and filed a complaint with the North Carolina State Bar. In April 1993, all potential claims regarding the surgical incident were fully settled with full release to the Hospital Authority and all its employees. On 17 February 1994, Ms. Gregorino instituted the instant action against the Hospital Authority to recover attorney's fees she incurred in connection with the incident. She later filed a motion to compel discovery. On 22 December 1994, Hospital Authority moved for summary judgment. Ms. Gregorino opposed the motion and filed a motion to continue the summary judgment hearing. The trial court granted Hospital Authority's motion for summary judgment and denied Ms. Gregorino's motion to continue. The trial court also

denied Ms. Gregorino's motion to compel discovery. Ms. Gregorino appealed to this Court.

I.

Ms. Gregorino contends that the trial court erred in granting summary judgment in favor of Hospital Authority. We agree.

Appellate review of a grant of summary judgment is limited to two questions: (1) Whether there is a genuine question of material fact; and (2) whether the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c) (1990); *Smith v. Smith*, 65 N.C. App. 139, 142, 308 S.E.2d 504, 505 (1983). The party opposing the motion for summary judgment does not have to establish that he would prevail on the issue, but merely that the issue exists. *In re Will of Edgerton*, 29 N.C. App. 60, 63, 223 S.E.2d 524, 526, *disc. review denied*, 290 N.C. 308, 225 S.E.2d 832 (1976). Furthermore, summary judgment is inappropriate when issues such as motive, intent, and other subjective feelings and reactions are material, when the evidence presented is subject to conflicting interpretations, or where reasonable men might differ as to the significance of any particular piece of evidence. *Smith v. Currie*, 40 N.C. App. 739, 742, 253 S.E.2d 645, 647, *cert. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979).

Ms. Gregorino argues that she should be indemnified for attorney's fees incurred in retaining separate counsel in connection with this incident. She points to Article IX of the Hospital Authority's bylaws which provides in relevant part:

> Any person who at any time serves or has served . . . as an officer or employee of the Authority, . . . shall have the right to be indemnified by the Authority, to the fullest extent permitted by law, against (a) reasonable expenses, including attorneys' fees (actually and necessarily) incurred by him or her in connection with any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, and whether or not brought by or on behalf of the Authority, seeking to hold him or her liable by reason of the fact that he or she is or was acting in such capacity . . . .

The Hospital Authority argues, on the other hand, that Ms. Gregorino is not entitled to indemnification because no action was ever threatened or pending against her.

Viewing the evidence in the light most favorable to the nonmovant, we find that a genuine issue of material fact exists as to whether the attorney's fees had been actually and necessarily incurred in connection with a threatened action seeking to hold Ms. Gregorino liable. The record on appeal indicates that Ms. Gregorino, a nurse anesthetist, had been involved in a surgical procedure that left a minor child with severe and permanent brain damage. The initial investigation into the incident focused on the placement of the endotracheal tube which directly involved Ms. Gregorino's duties as a nurse anesthetist. She immediately became concerned because as a nurse anesthetist, the misplacement of the tube could affect her future licensing and insurability if she was found "at fault" for the injuries sustained by the child.

Furthermore, the Hospital Authority's Risk Management Department obtained from Ms. Gregorino a statement about the incident and required her to submit to a drug screening test. No other surgical team member was required to undergo a drug screening test.

The evidence in a light most favorable to Ms. Gregorino further shows that certain medical records regarding the incident were missing or had been altered by a Hospital Authority employee. Additionally, certain items used during the surgery which would normally have been present in the operating room immediately following a surgical procedure were missing. Statements of the anesthesiologist and of the surgical team member also differed from Ms. Gregorino's recollection of events.

Furthermore, Ms. Gregorino was denied access to documents by Mr. Golding who represented both the Hospital Authority and its employees, including Ms. Gregorino. Based on these actions, Ms. Gregorino retained Attorney Sides to represent her in this matter. After Ms. Gregorino retained Ms. Sides, the victim's attorney, Mr. Sitton, sent Ms. Sides a letter stating that "if a lawsuit was filed, Jane Gregorino would be a Defendant." The letter also stated, "I did relate to you that I had an expert's report which concluded that Jane Gregorino did not meet the standard of care for CRNA practicing in Charlotte in August of 1991. It appears to me that that fact is beyond dispute." Moreover, in a draft of the lawsuit prepared by Mr. Sitton, the named defendants were Jane Gregorino and the Hospital Authority.

Given that summary judgment is inappropriate when issues such as motive, intent, and other subjective feelings and reactions are material, when the evidence presented is subject to conflicting interpretations, or where reasonable men might differ as to the significance of any particular piece of evidence, *Smith*, 40 N.C. App. at 742, 253 S.E.2d at 647, *cert. denied*, 297 N.C. 612, 257 S.E.2d 219, we find that a genuine issue of material fact exists as to whether Ms. Gregorino's attorney's fees were actually and necessarily incurred in connection with any threatened action seeking to hold her liable. We therefore reverse the entry of summary judgment. Because we reverse this order, we need not address whether the trial court erred in denying Ms. Gregorino's motion to continue the summary judgment hearing.

II.

Ms. Gregorino next contends that the trial court erred in denying her motion to compel discovery. We disagree.

It is well settled that "orders regarding matters of discovery are within the trial court's discretion and are reviewable only for abuse of that discretion." *Weaver v. Weaver*, 88 N.C. App. 634, 638, 364 S.E.2d 706, 709, *cert. denied*, 322 N.C. 330, 368 S.E.2d 875 (1978). Judicial action supported by reason is not an abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The record indicates that the trial court's order denying Ms. Gregorino's motion to compel discovery states that "having considered the pleadings, affidavits, brief and arguments of counsel and having reviewed in chambers with counsel for plaintiff and defendant certain documents produced by defendant and having concluded that defendant has produced all documents requested that are subject to discovery . . . .", plaintiff's motion to compel discovery is denied. Finding the trial court's order to be supported by careful reasoning, we find no abuse of discretion. We therefore affirm the trial court's order.

Reversed in part, Affirmed in part.

Judges GREENE and McGEE concur.

CALVIN JOHNSON, PLAINTIFF-EMPLOYEE v. CHARLES KECK LOGGING, DEFENDANT-EMPLOYER AND SELF-INSURED NORTH CAROLINA FORESTRY ASSOCIATION, DEFENDANT-INSURANCE CARRIER

No. COA94-1034

(Filed 20 February 1996)

Workers' Compensation § 129 (NCI4th)— intoxication of employee—unreliability of blood alcohol test—conclusions unsupported by evidence

Where there was insufficient evidence to establish that a blood alcohol analysis was scientifically reliable or that it was correctly administered in compliance with conditions as to relevancy in point of time, tracing and identification of specimen, and accuracy of analysis, the blood alcohol test was incompetent evidence of plaintiff's intoxication; therefore, where there was no other evidence of plaintiff's intoxication, the Industrial Commission erred in concluding that plaintiff's injury was proximately caused by his intoxication and in denying his workers' compensation claim. N.C.G.S. § 97-12(1).

Am Jur 2d, Workers' Compensation § 256.

Appeal by plaintiff from an Industrial Commission decision entered 23 May 1994. Heard in the Court of Appeals 24 May 1995.

Alexander Dawson, P.A., by Alexander Dawson, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by F. Stephen Glass and Susan M. Hunt, for defendant-appellants.

McGEE, Judge.

For most of plaintiff Calvin Johnson's adult life, he worked as a "limber/topper" (topper) cutting the limbs and tops off trees already cut down by a "stumper." On Monday, 11 June 1990 at approximately 11:00 a.m., plaintiff was working as a topper for defendant, Charles Keck Logging, when he was injured by a partially-cut tree blowing over on him. Plaintiff was taken to the emergency room at Halifax-South Boston Community Hospital (Community Hospital) where a physical examination and various tests were conducted to determine plaintiff's condition. One test administered was a blood alcohol analysis performed on a blood sample allegedly collected from plaintiff at

approximately 1:24 p.m. The blood test results showed the blood alcohol content of plaintiff's blood was .11.

A deputy commissioner of the N.C. Industrial Commission held a hearing on plaintiff's request for benefits on 9 September 1991. The evidence included the results of plaintiff's blood test, which were admitted into evidence over plaintiff's objections. The deputy commissioner also heard testimony about plaintiff's behavior the day of the injury, as well as the day before the accident. Plaintiff testified he consumed alcohol during the weekend prior to the accident. Several of plaintiff's co-workers, who had been with him during the weekend, confirmed that on Sunday plaintiff had consumed wine throughout much of the day until 9:00 p.m. that evening. The next morning, plaintiff rode with co-workers on the ninety minute trip to the logging site where he was scheduled to work. None of the co-workers riding with plaintiff observed any behavior indicating he was intoxicated. Nor did plaintiff's co-workers detect him acting in an unusual or irresponsible manner during the work shift. Plaintiff's employer testified plaintiff did not seem intoxicated and he appeared to be performing his duties in his usual manner.

There was testimony as to whether plaintiff was observing various safety guidelines when he was injured. Plaintiff stated he was not wearing safety equipment on the day he was injured. Additionally, there was evidence plaintiff was not observing the "two tree-length safety rule" when he was injured. Under the rule, everyone working at a logging site must stay two tree-lengths from where trees are being cut down by the stumper.

The deputy commissioner filed an opinion and award on 2 March 1992 concluding that plaintiff's injury was proximately caused by his intoxication, and this resulted in "[a] lack of judgment, reduced awareness of his surroundings, and dullened [sic] senses" and led to plaintiff's "[failure] to adhere to the standard safety rules of logging." Consequently, the deputy commissioner denied plaintiff workers' compensation benefits based on N. C. Gen. Stat. § 97-12(1) which states, "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by: (1) [h]is intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee."

Plaintiff appealed to the Full Commission and filed a motion to strike the results of the blood test taken at Community Hospital. On 23 May 1994, a divided panel of the Full Commission affirmed and

adopted the deputy commissioner's opinion and award with minor modifications to several of the deputy commissioner's findings of fact. Commissioner James J. Booker dissented and urged that the "correct result in this case would be to follow the rules of evidence and strike from consideration the Halifax/South Boston Community Hospital test results as being inherently unreliable. I would vote to reverse the case and remand to a deputy for rehearing. . . ." We agree with the dissent.

This Court's review is limited to a consideration of whether there was any *competent* evidence to support the Full Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law. *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982). In *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E.2d 432 (1957), we said:

> Findings not supported by competent evidence are not conclusive and will be set aside on appeal. *The rule is that the evidence must be legally competent; and a finding based on incompetent evidence is not conclusive.* However, where an essential fact found by the Industrial Commission is supported by competent evidence, the finding is conclusive on appeal, even though some incompetent evidence was also admitted at the hearing.

Penland, 246 N.C. at 30-31, 97 S.E.2d at 436 (emphasis added) (citations omitted). Under these facts, the issue is whether there is competent evidence to support the Industrial Commission's finding that plaintiff's 11 June 1990 injury was proximately caused by his intoxication and he is therefore barred from receiving workers' compensation benefits under G.S. 97-12(1).

We agree with Commissioner Booker that the only evidence in the record as to plaintiff's intoxication at the time of the accident was the blood alcohol test conducted by Community Hospital. As we have stated, none of plaintiff's co-workers detected any behavior which indicated plaintiff was intoxicated. A later blood alcohol test performed on 11 June 1990 at 6:16 p.m. at Duke University Hospital listed plaintiff's alcohol level as "negative." Therefore, the accuracy of the blood alcohol test taken by Community Hospital is critical since the Industrial Commission denied plaintiff's claim pursuant to the intoxication defense in G.S. 97-12(1).

The admissibility of a blood alcohol test "depends upon a showing of compliance with conditions as to relevancy in point of time, tracing and identification of specimen, accuracy of analysis, and qual-

ification of the witness as an expert in the field." *Robinson v. Insurance Co.*, 255 N.C. 669, 672, 122 S.E.2d 801, 803 (1961). "In other words, a foundation must be laid before this type of evidence is admissible." *Id.* The expert witness who offers the results of these types of scientific tests must be in a position to "[explain] the way the test is conducted, attesting its scientific reliability, and vouching for its correct administration in *the particular case*." *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 276, 354 S.E.2d 767, 771 (1987) (emphasis added).

The Community Hospital blood alcohol test contains several discrepancies which affect the reliability of the test results. The chain of custody from the time the blood was drawn from plaintiff until it was tested was never clearly established. The expert witness called to testify regarding plaintiff's alcohol blood test was "a management technologist" in the clinical laboratory at Community Hospital. Although the technologist analyzed the blood allegedly taken from plaintiff, he admitted he had not drawn blood in years and that he "didn't know what happened to this particular blood. It was brought to me, and I tested it and reported out the results." He discussed in general terms the hospital's procedure for collecting blood and how the tests are conducted. However, there was no testimony as to the identity of the phlebotomist who drew plaintiff's blood nor the specific manner in which plaintiff's blood was drawn. The technologist further stated alcohol swabs are not used to clean the area where the blood is drawn if the purpose for the blood is to test for blood alcohol levels; but if other blood tests are being conducted, alcohol swabs are used. In plaintiff's case, the technologist testified the physicians ordered several types of blood tests, including the blood alcohol analysis, and there was no testimony as to whether an alcohol or nonalcohol prep was used in drawing plaintiff's blood sample. While our Courts do not require the person who draws the blood to testify in every case in order to establish a proper foundation, (*See State v. Grier*, 307 N.C. 628, 632, 300 S.E.2d 351, 354, (1983) *appeal after remand*, 314 N.C. 59, 331 S.E.2d 669 (1985)) under these facts, other inconsistencies with these critical test results warranted a more thorough development of the chain of custody of plaintiff's blood sample.

Not only is there insufficient evidence to establish an adequate chain of custody of plaintiff's blood sample, but there are other disturbing discrepancies relating to the test. The date and time of the blood test were incorrectly marked as having been drawn on the Sunday afternoon before the accident occurred. The technologist

blamed the inaccuracy on human error or a possible power failure in the laboratory. Further testimony revealed questions as to whether the machine was correctly calibrated when plaintiff's test was conducted. One expert testified a power failure could have affected the machine's calibration and incorrect calibration can affect the reliability of blood tests. Finally, there was testimony that an inadequate number of controls may have been run on this particular specimen which could affect the reliability of plaintiff's test results.

Under these facts, there is insufficient evidence to establish that this critical blood alcohol analysis was scientifically reliable or that it was correctly administered in "compliance with conditions as to relevancy in point of time, tracing and identification of specimen, [and] accuracy of analysis." *Robinson*, 255 N.C. at 672, 122 S.E.2d at 803. We find the blood alcohol test from Community Hospital is incompetent evidence of plaintiff's intoxication and therefore, we reverse the case and remand it to the Industrial Commission for rehearing.

Reversed and remanded.

Chief Judge ARNOLD and Judge LEWIS concur.

GINGER YORK WHITAKER (RUTLEDGE), ADMINISTRATRIX OF THE ESTATE OF JONATHAN WESLEY WHITAKER, A MINOR, PLAINTIFF v. NC DEPARTMENT OF HUMAN RESOURCES, SOCIAL SERVICES COMMISSION, DEFENDANT

No. COA95-164

(Filed 20 February 1996)

State § 33 (NCI4th)— child protective services—county DSS as agent of Department of Human Resources

The trial court erred in dismissing plaintiff's claim under the Tort Claims Act on the ground that the Davie County Department of Social Services was not an agent of the Department of Human Resources in its delivery of child protective services.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 234.

Appeal by plaintiff from Decision and Order entered 2 November 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 November 1995.

Ginger York Whitaker, Administratrix of decedent's estate, and Bruce Earl Whitaker, Sr. are the parents of Jonathan Wesley Whitaker, decedent. In June of 1990 a consent order was issued whereby plaintiff and her former husband were to share joint custody of decedent. In August of 1990 plaintiff filed a motion for modification and amended motion for show cause order alleging that Whitaker abused alcohol, causing him to have violent tendencies and that he physically abused decedent. From May of 1990 until April of 1991 plaintiff, and others on her behalf, made numerous reports to the Davie County Department of Social Services, (DSS), of child abuse, neglect and alcohol abuse by Whitaker. Decedent died in a car accident while riding in a car driven by Whitaker, who lost control of the car. A toxicology report showed that at the time of the accident Whitaker had a blood alcohol content of three and a half times the legal level of intoxication.

Plaintiff filed a claim under the Tort Claims Act against the North Carolina Department of Human Resources, (DHR), and the Social Services Commission for damages resulting from the negligence of the Davie County DSS. The plaintiff named the Director of the Davie County DSS and three of its employees. Deputy Commissioner Dillard dismissed plaintiff's complaint and granted defendant's motion for summary judgment. Plaintiff appealed to the Full Commission, who by Decision and Order upheld the Decision and Order and dismissed plaintiff's complaint. Plaintiff appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General, Gayl M. Manthei, and Assistant Attorney General D. Sigsbee Miller, for defendants appellees.

Hall, Vogler & Fleming, by E. Edward Vogler, Jr. and Beverly S. Murphy, for plaintiff appellant.

ARNOLD, Chief Judge.

Plaintiff argues that the Commission erred by granting defendant's motion for summary judgment. We agree.

In *Vaughn v. Dept. of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979), the North Carolina Supreme Court found an agency relationship between the DHR and the Durham County DSS and allowed the plaintiff to recover on the theory of negligence. Plaintiff brought

an action under the Tort Claims Act against the DHR for the negligence of the Director of the Durham County DSS and his staff. She asserted that the director and his staff were negligent by placing a foster child in her home who was a carrier of the cytomegalo virus when they knew the claimant was trying to become pregnant. She became pregnant and was infected with the cytomegalo virus which forced her to have an abortion. The Court concluded that the DHR was liable for the negligent acts of the DSS based upon the amount of control the DHR exercised over the DSS. *Id.* at 692, 252 S.E.2d at 798. The Court specifically limited its holding to the obligation of the DSS to place children in foster homes. *Id.*

In *Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577, *disc. review denied*, 329 N.C. 786, 408 S.E.2d 517 (1991), plaintiff brought a wrongful death action in superior court against the Wake County DSS and a DSS worker. This Court held that the Wake County DSS was an agent of the DHR when providing child protective services. This holding was based on a number of factors. First, N.C. Gen. Stat. § 108A-1 (1994) requires that "[e]very county shall have a board of social services which shall establish county policies for the programs established by this Chapter in conformity with the rules and regulations of the Social Services Commission and under the supervision of the Department of Human Resources." Secondly, N.C. Gen. Stat. § 108A-14(5) (1994) provides that the director of social services shall "act as agent of the Social Services Commission and Department of Human Resources in relation to work required by the Social Services Commission and Department of Human Resources in the county[.]" N.C. Gen. Stat. § 108A-14(11) (1994) provides that the director of social services shall "investigate reports of child abuse and neglect and to take the appropriate action to protect such children pursuant to the Child Abuse Reporting Law, Article 44 of Chapter 7A[.]" "The Director of the Department of Social Services shall submit a report of alleged abuse or neglect to the central registry under the policies adopted by the Social Services Commission." N.C. Gen. Stat. § 7A-548 (1993). The trial court dismissed the action on the grounds that it lacked subject matter jurisdiction. Coleman, 102 N.C. App. at 653, 403 S.E.2d at 580. In affirming this determination, this Court held that:

> [the] Wake County [Department of Social Services] was acting as an agent of the Social Services Commission and the Department of Human Resources in its delivery of protective services to the decedents. A cause of action originating under the Tort Claims Act against Wake County [Department of Social Services] as a

> subordinate division of the State, must be brought before the Industrial Commission.

Id. at 658, 403 S.E.2d at 581-582.

In *Gammons v. Department of Human Res.*, 119 N.C.App. 589, 459 S.E.2d 295, *disc. review allowed*, 342 N.C. 191, 463 S.E.2d 235 (1995), plaintiff brought an action against the DHR for negligence allegedly committed by the director and staff of the Cleveland County DSS. Plaintiff alleged that the Cleveland County DSS was aware that plaintiff was being physically abused by his stepfather, and negligently failed to investigate the claims regarding the physical abuse. This Court found *Coleman* to be the controlling law, and held that despite the fact that the DHR was not a party to the action in the Coleman case, the Cleveland County DSS was acting as the agent of the DHR in delivering child protective services. *Id.*, at 592, 459 S.E.2d at 297.

Appellate review of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission. *Radica v. Carolina Mills*, 113 N.C. App. 440, 446, 439 S.E.2d 185, 189 (1994). However, if the findings are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal. *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E.2d 28 (1968) (remand required to consider evidence in its true legal light).

The Commission granted defendant's motion for summary judgment on the grounds that no issue of material fact existed as to the existence of an agency relationship between the DHR and the Davie County DSS. The Commission concluded:

> If the Davie County Department of Social Services is an agent of the North Carolina Department of Human Resources, then pursuant to the holding by the North Carolina Court of Appeals in *Coleman v. Cooper*, 89 N.C. App. 188, a violation of the provisions of N.C.G.S. 7A-544 by a Department of Social Services would give rise to an action for negligence. . . . No such meaning, will be read into the statute, even though the North Carolina [Court of Appeals] stated in *Coleman v. Cooper*, that in the delivery of child protective services, the Wake County Department of Social Services was acting as agent of the Department of Human Resources and the Social Services Commission.

The facts in the instant case are not distinguishable from those in Coleman or Gammons. Plaintiff has alleged that, (1) she and others on her behalf made reports to the Davie County DSS regarding Whitaker's alcohol abuse, and his tendency to drive while intoxicated with decedent as a passenger in his car; (2) the Davie County DSS had a duty to investigate these reports of child abuse, and they were negligent by failing to properly investigate and take action regarding the reports; (3) the Davie County DSS was acting as an agent of the DHR and; (4) the negligence of the Davie County DSS was a proximate cause of the death of decedent. Plaintiff's forecast of evidence is sufficient to satisfy the burden of meeting the essential elements of her claim. The Commission misapplied the law by concluding that in light of this Court's holdings in *Coleman* and *Gammons*, the Davie County DSS was not an agent of the DHR in its delivery of child protective services. Therefore, the Commission erroneously granted defendant's motion for summary judgment.

Reversed.

Judges EAGLES and MARTIN, John C., concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. ROWE F. BOLLINGER AND WIFE, ANITA L. BOLLINGER, DEFENDANTS

No. COA95-207

(Filed 20 February 1996)

1. Pleadings § 400 (NCI4th)— admission of particular evidence—evidence within contemplation of pleadings—no amendment of pleadings

There was no merit to defendants' contention that plaintiff attempted to amend its complaint by introducing into evidence a Right of Way Agreement and that defendants should have been afforded the opportunity to amend their answer in order to plead the defenses of failure of consideration, fraud, and forgery, since the evidence defendants objected to was within the scope of the pleadings, and defendants failed to show how they were prejudiced by the trial court's failure to treat plaintiff's introduction of the Right of Way Agreement as an amendment to the pleadings.

Am Jur 2d, Pleading § 329.

What constitutes "prejudice" to party who objects to evidence outside issues made by pleadings so as to preclude amendment of pleadings under Rule 15(b) of Federal Rules of Civil Procedure. 20 ALR Fed. 448.

2. Evidence and Witnesses § 809 (NCI4th)— copy of Right of Way Agreement—sufficiency of evidence of authenticity

The evidence was sufficient to support the trial court's finding that a Right of Way Agreement which was accompanied by certification signed by the Manager of the Right of Way Branch of the Department of Transportation in Raleigh, North Carolina, was an authenticated copy of the agreement in question. N.C.G.S. § 8C-1, Rule 901(b)(7).

Am Jur 2d, Evidence § 1090.

Federal Civil Procedure Rule 44 and Federal Criminal Procedure Rule 27, relating to proof of official records. 70 ALR2d 1227.

Sufficiency, under Federal Civil Procedure Rule 44(a)(1), of authentication of copy of domestic official record. 2 ALR Fed. 306.

Appeal by defendants from order entered 13 September 1994 by Judge Loto Greenlee Caviness in Catawba County Superior Court. Heard in the Court of Appeals 15 November 1995.

In 1949, the State Highway and Public Works Commission, now the Department of Transportation, "DOT," acquired a right of way in Catawba County for construction of Highway U.S. 321 between Newton and Conover. This project affected the property of Elsie Price Bollinger and husband, C.A. Bollinger, who executed a Right of Way Agreement with the State Highway Commission. This agreement was not recorded in the Catawba County Registry but remained on file in the records of the Right Of Way Branch of the DOT, Raleigh, North Carolina. Elsie Price Bollinger, and husband C.A. Bollinger, conveyed the property to their son, the defendant, by warranty deed. The warranty deed subjected the conveyed property "to a State highway right of way 75 feet in depth, extending from the Northeast to the Southeast corner." The DOT initiated a condemnation action to take defendants' property under the power of eminent domain, as it had the right to take possession of that property pursuant to a Right of Way Agreement signed by defendants' parents. After an evidentiary

hearing, the trial court found that the DOT had a valid 75 foot right of way. Defendants appeal.

Attorney General Michael F. Easley, by Assistant Attorney General, J. Bruce McKinney, for plaintiff appellee.

Sigmon, Clark, Mackie & Hutton, P.A., by Warren A. Hutton, for defendant appellant.

ARNOLD, Chief Judge.

[1] The defendants first argue that plaintiff attempted to amend its complaint by introducing into evidence the Right of Way Agreement and that defendants should have been afforded the opportunity to amend their answer in order to plead the defenses of failure of consideration, fraud and forgery. We disagree.

N.C. Gen. Stat. § 136-103(5) (1993) mandates that a complaint filed in a DOT condemnation action shall contain or have attached, "A statement as to such liens or other encumbrances as the Department of Transportation is informed and believes are encumbrances upon said real estate and can by reasonable diligence be ascertained." Plaintiff attached two documents to its complaint. The first included a list of liens and encumbrances. The third encumbrance recited on the list was, "Right of Way Agreement to Department of Transportation (formerly State Highway Commission) as recorded in Deed Book 583 at Page 316 of the Catawba County Registry." The second document, "A Description of Property Affected," had the following language within the description of Tract #1: "The above tract of land on the East is subject to State Highway right of way 75 feet in depth extending from the Northeast to the Southeast corner."

N.C.R. Civ. P. 15b (1990) provides:

> Amendments to conform to the evidence.—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. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow*

> *the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.* The court may grant a continuance to enable the objecting party to meet such evidence. (emphasis added)

A motion to amend is addressed to the discretion of the trial court and is not reviewable on appeal absent a showing of abuse of discretion. *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). "A formal amendment to the pleadings is needed only when evidence is objected to at trial as not within the scope of the pleadings." *Taylor v. Gillespie*, 66 N.C. App. 302, 305, 311 S.E.2d 362, 364 (1984).

The evidence defendants object to is within the scope of the pleadings. Plaintiff's pleadings make reference to the Right of Way Agreement, and the pleadings make reference to the right of way in the description of the property. Defendants were put on notice that plaintiff was relying on a Right of Way Agreement and on a deed that reserved such a right of way to support its legal theory. At the hearing, the trial court allowed the defendants to present evidence on the issue of the validity of the signatures of Elsie and C.A. Bollinger on the Right of Way Agreement. The Judge observed the demeanor of the witnesses and examined the signatures in question. Based on this evidence, the court found that there was no fraud or forgery. At no time during the hearing did they request a continuance of the hearing based on surprise or lack of knowledge of the contested item of evidence. Defendants have failed to show how they have been prejudiced by the trial court's failure to treat plaintiff's introduction of the Right of Way Agreement as an amendment to the pleadings.

[2] Defendants next assign error to the admission of the Right of Way Agreement because plaintiff did not properly authenticate it. The contested item of evidence consists of a certification and a photostat copy of the Right of Way Agreement. The certification is signed by the manager of the Right Of Way Branch of the DOT, who certifies that the Right of Way Agreement is in fact a photostat copy of a Right of Way agreement, from defendants' parents, to the DOT. The certification is also signed by the custodian of the minutes of the Board of Transportation, who certifies that the manager has the responsibilities of care and custody of files of the Right of Way Branch. Defendants argue that the document was not maintained in the loca-

tion where items of that nature are normally kept; that they presented opinion evidence showing that the signatures on the Right of Way Agreement were not those of the defendants' parents; that plaintiff presented no evidence to counter this; and therefore the Agreement has not been properly authenticated.

"Any inconsistency in the testimony between plaintiff's witnesses, defendant's witness . . . [is] a matter to be resolved by the trial court in its findings of fact." *Cogdill v. Highway Comm. and Westfeldt v. Highway Comm.*, 279 N.C. 313, 319, 182 S.E.2d 373, 377 (1971). The court's findings of fact will not be reversed unless based only on incompetent evidence. *Id.* at 320, 182 S.E.2d at 377. When the conclusions are supported by the findings, which are based on competent evidence they will not be disturbed on appeal. *State v. Mandina*, 91 N.C. App. 686, 696, 373 S.E.2d 155, 161 (1988). Further, N.C.R. Evid. 901(a) (1992) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.R. Evid. 901(b)(7) (1992) provides:

> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> Public Records or Reports—Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

Also, the North Carolina Supreme Court has held that a copy of a purported resolution authorizing a right of way, which was certified by the Secretary to the Highway Commission, to be a true and correct copy of the resolution, was properly authenticated and admitted into evidence. *Kaperonis v. Highway Commission*, 260 N.C. 587, 598-599, 133 S.E.2d 464, 472-473 (1963).

In the instant case the Right of Way Agreement was accompanied by certification signed by the Manager of the Right of Way Branch of the DOT in Raleigh, North Carolina. The custodian of the minutes of the Board of Transportation certified that the Manager of the Right of Way Branch has the responsibility of care and custody of files of the Right of Way Branch. The defendants put on evidence to show that

the signatures on the Right of Way Agreement were forged. As the finder of fact, the trial judge had the opportunity to observe the demeanor of the witnesses and determine their credibility. He found that the Agreement was an authenticated copy of the Right of Way Agreement. Because the trial judge had competent evidence upon which to base his finding, we affirm the trial court's finding.

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

TINA TRANTHAM, PLAINTIFF-APPELLEE v. ESTATE OF RALPH HENRY SORRELLS, JR., BY AND THROUGH THE COURT APPOINTED COLLECTOR, ELTON BRITT SORRELLS, DEFENDANT-APPELLANT

No. COA95-327

(Filed 20 February 1996)

Automobiles and Other Vehicles § 578 (NCI4th)— last clear chance—opportunity to escape from situation immediately before accident—issue properly submitted to jury

The trial court did not err in submitting an issue of last clear chance to the jury in plaintiff passenger's action against the driver who was driving at a greatly excessive speed despite protests by passengers in the vehicle, and there was no merit to defendant's contention that plaintiff was not in a position of helpless peril because she had an opportunity to remove herself from the car when the driver stopped at a convenience store, but she instead chose to get back into the car with him, since an opportunity to escape the situation did not arise *immediately* before the accident causing injury.

Am Jur 2d, Automobiles and Highway Traffic §§ 438-441.

Propriety and prejudicial effect of instructions referring to the degree or percentage of contributory negligence necessary to bar recovery. 87 ALR2d 1391.

Appeal by defendant-appellant from judgment entered 17 October 1994 by Judge James U. Downs in Haywood County Superior Court. Heard in the Court of Appeals 10 January 1996.

Russell L. McLean, III, for plaintiff-appellee.

Cogburn, Cogburn, Goosmann & Brazil, P.A. by Steven D. Cogburn, and Roberts, Stevens & Cogburn, P.A. by Wyatt S. Stevens for defendant-appellant.

WYNN, Judge.

On 26 January 1991, plaintiff Tina Trantham visited a bar in Haywood County where she met Cynthia Rymer and agreed to spend the night at her house. They rode together in Ms. Rymer's car which was driven by defendant-decedent, Ralph Henry Sorrells. Ms. Rymer had asked him to drive because she had consumed too much alcohol and Mr. Sorrells had represented that he had consumed only two beers.

Ms. Rymer rode in the front passenger seat, and Ms. Trantham and a male friend of Mr. Sorrells' rode in the back seat. During the course of the drive from Waynesville towards Canton on Interstate 40, Mr. Sorrells drove at a dangerously high rate of speed despite repeated protests and requests by Ms. Rymer and Ms. Trantham for him to slow down. He eventually stopped the car at a convenience store near Clyde, North Carolina where all of the occupants got out and entered the store. After assuring Ms. Rymer that he would drive slower, Mr. Sorrells continued driving the car. Nevertheless, he resumed driving at an excessively high speed again over the protests of Ms. Rymer and Ms. Trantham. Tragically, after turning onto North Canton Road, Mr. Sorrells drove the car into a wall on the roadside causing it to careen into a tree killing him and severely injuring Ms. Trantham and the other passengers.

This action followed and resulted in a jury's finding of negligence and gross negligence on the part of Mr. Sorrells, and contributory negligence and gross contributory negligence on the part of Ms. Trantham. Finding, however, that Mr. Sorrells had the last clear chance to avoid the accident, the jury awarded Ms. Trantham $25,000. Defendant appeals.

The primary issue on appeal is whether the trial court erred in submitting the issue of last clear chance to the jury. We find no error and therefore affirm the decision of the trial court.

The issue of last clear chance, "Must be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff,

will support a reasonable inference of each essential element of the doctrine." *Bowden v. Bell*, 116 N.C. App. 64, 68, 446 S.E.2d 816, 819 (1994); *Hurley v. Miller*, 113 N.C. App. 658, 669, 440 S.E.2d 286, 292-93 (1994), *rev'd on other grounds*, 339 N.C. 601, 453 S.E.2d 861 (1995). To obtain an instruction on the doctrine of last clear chance, the plaintiff must show the following essential elements:

1) The plaintiff, by her own negligence put herself into a position of helpless peril;

2) Defendant discovered, or should have discovered, the position of the plaintiff;

3) Defendant had the time and ability to avoid the injury;

4) Defendant negligently failed to do so; and

5) Plaintiff was injured as a result of the defendant's failure to avoid the injury.

Cockrell v. Transport Co., 295 N.C. 444, 449, 245 S.E.2d 497, 501 (1978); *Exum v. Boyles*, 272 N.C. 567, 576, 158 S.E.2d 845, 853 (1968).

Defendant argues that the evidence in the instant case insufficiently showed (A) that the plaintiff was in helpless peril at the time of the accident and unable to extricate herself, and (B) that defendant-decedent Sorrells knew or should have known of the helpless position of the plaintiff. For the reasons stated below, we disagree.

A

Defendant first contends that Ms. Trantham was not in a position of helpless peril because she had the opportunity to call a cab after Mr. Sorrells stopped the car at the convenience store. According to defendant's theory of the case, since Ms. Trantham decided not to call a cab but instead decided to continue riding with Mr. Sorrells, she ceased to be in a position of helpless peril and instead assumed the risk of harm by continuing to ride with Mr. Sorrells after she was given the opportunity to exit the car safely. In addition, defendant argues that Ms. Trantham continued to be grossly negligent with respect to her own safety until the moment of the collision because she never asked Mr. Sorrells to stop the car and let her out. Defendant thus concludes that the instruction on the doctrine of last clear chance was erroneous, and constitutes reversible error.

Defendant misconstrues the doctrine of last clear chance by confusing the contributory negligence and gross contributory negligence

of the plaintiff with the ability to extricate oneself from harm immediately before an accident occurs.

> The Second Restatement of Torts states:
>
> Last Clear Chance: Helpless Plaintiff.
>
> A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, *immediately preceding the harm*,
>
> (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
>
> (b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he
>
> > (i) knows of the plaintiff's situation and realizes or has reason to realize the peril involved in it or
> >
> > (ii) would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise.

Restatement (Second) of Torts § 479 (1965) (emphasis supplied). The comment to Clause (a) states:

> The rule stated in this Section is applicable only when the plaintiff has negligently placed himself in a position of peril from which he cannot, *at the time of the accident*, extricate himself . . . . *[I]f at the time of the accident* he is incapable of averting harm by the exercise of reasonable care, he can recover under the rule stated in this Section, even though his inability is because of some antecedent lack of preparation, since he is required to exercise with reasonable attention, care, and competence only such ability as he then possesses.

Id. (emphasis supplied). The thrust of § 479 is that a negligent plaintiff who is unable to avoid the harm placing her in helpless peril *immediately before the accident* which results in her injury may recover against a defendant who has the means and ability to avoid the accident but fails to do so. Thus, the issue here is whether Ms. Trantham was in helpless peril at the time immediately preceding the

accident. *See, e.g., Watson v. White*, 309 N.C. 498, 502-03, 308 S.E.2d 268, 271-72 (1983); *Exum v. Boyles*, 272 N.C. 567, 574-75, 158 S.E.2d 845, 851-52 (1968); *Asbury v. City of Raleigh*, 48 N.C. App. 56, 61-62, 268 S.E.2d 562, 565-66, *disc. review denied*, 301 N.C. 234, 283 S.E.2d 131 (1980) (citing with approval Restatement (Second) § 479, and its predecessor, Restatement of the Law, Torts, Negligence, § 479).

In the instant case, there was no action that Ms. Trantham could have taken before the accident in which she was injured which would have served to reduce or eliminate her chances of injury. At the time immediately before the accident, she was in the back seat of a two-door car without the ability to roll down the window. *See, e.g., Honeycutt v. Bess*, 43 N.C. App. 684, 689, 259 S.E.2d 798, 801 (1979) (it is a question for the jury whether the plaintiff could have escaped from his peril by the exercise of reasonable care).

Defendant argues that Ms. Trantham could have called a cab during the stop at the convenience store. That fact was presented to the jury which found Ms. Trantham to be grossly contributorily negligent, evincing the fact that it carefully considered Ms. Trantham's opportunity to escape the situation. Because this opportunity did not arise immediately before the accident causing injury, it is not relevant to the determination of the applicability of last clear chance.

B

Defendant next contends that Ms. Trantham did not present sufficient evidence that Mr. Sorrells knew or should have known of her helpless peril. We think it clear beyond the need for citation that a reasonable driver knows or should know of the peril a passenger is in when the driver is driving at a greatly excessive rate of speed.

We assume the presence of the remainder of the elements of last clear chance, since the parties do not dispute their presence. *Hales v. Thompson*, 111 N.C. App. 350, 356, 432 S.E.2d 388, 392 (1993).

No error.

Judges GREENE and McGEE concur.

SHARP v. MILLER

[121 N.C. App. 616 (1996)]

LINDA R. SHARP, PLAINTIFF v. DAVID C. MILLER, ROBERT F. WARWICK, STEPHEN LOCKE, LOWRIMORE, WARWICK & CO. AND McGLADREY & PULLEN, DEFENDANTS

No. COA95-167

(Filed 20 February 1996)

1. Reference and Referees § 40 (NCI4th)— expert witnesses appointed by referee—preparation of reports—reports absolutely privileged

Where defendants were appointed by a referee to conduct appraisals and other evaluations and to testify as expert witnesses as to the values determined in an equitable distribution action, defendants' reports were absolutely privileged and could not be made the basis of any cause of action alleged by plaintiff; therefore, plaintiff's complaint for negligence, detrimental reliance stemming from false representations or fraud, breach of contract, and breach of fiduciary duty was properly dismissed.

Am Jur 2d, References § 28.

2. Pleadings § 63 (NCI4th)— imposition of sanctions—no error

In plaintiff's action against defendants who were appointed by a referee to appraise certain property and testify in an equitable distribution action as to the values determined, the trial court did not err in determining that plaintiff's complaint was not well grounded in fact and was not legally plausible on its face, and the court properly imposed Rule 11 sanctions against plaintiff.

Am Jur 2d, Pleading § 26.

Appeal by plaintiff from order entered 4 October 1994 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 13 November 1995.

Plaintiff, Linda R. Sharp, was formerly married to Starkey Sharp, an attorney in Dare County, North Carolina. This action arises incident to defendants' involvement as expert witnesses and litigation support in the equitable distribution case between Linda Sharp and Starkey Sharp. *Sharp v. Sharp*, 116 N.C. App. 513, 449 S.E.2d 39, *disc. review denied*, 338 N.C. 669, 458 S.E.2d 181 (1994). Defendants were appointed by a referee on 17 December 1990, with the parties' con-

sent, to appraise certain property and testify as expert witnesses as to the values determined.

Plaintiff's complaint filed 21 July 1994 alleged that defendants improperly performed their duties as appraisers and expert witnesses. Specifically, plaintiff alleged negligence, detrimental reliance stemming from false representations or fraud, breach of contract and breach of fiduciary duty. In response, defendants' filed a motion to dismiss and for sanctions and attorney's fees. After hearing on 3 October 1994, Judge J. Richard Parker rendered his decision in open court to grant defendants' motion to dismiss and to impose sanctions.

Plaintiff appeals.

Linda R. Sharp, plaintiff-appellant, pro se.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr., and Phillip K. Woods, for defendant-appellees.

EAGLES, Judge.

[1] Plaintiff assigns error to the trial court's grant of defendants' motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). Our standard of review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory . . . ." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). "In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint 'unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.' " *Sinning v. Clark*, 119 N.C. App. 515, 517, 459 S.E.2d 71, 73 (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)), *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995).

After careful review of plaintiff's complaint, we conclude that plaintiff's allegations fail to state a claim upon which relief may be granted. Defendants conducted their appraisals and other evaluations in preparation for providing expert witness testimony in the "due course of a judicial proceeding." *Williams v. Congdon*, 43 N.C. App. 53, 55, 257 S.E.2d 677, 678 (1979). The appraisals and reports made by defendants here are absolutely privileged and cannot be made the basis of any cause of action alleged by plaintiff. *Id.*; *Bailey v. McGill*, 247 N.C. 286, 293-94, 100 S.E.2d 860, 866-67 (1957); *Godette v. Gaskill*,

151 N.C. 51, 52, 65 S.E. 612, 612-13 (1909). Accordingly, we conclude that plaintiff's complaint was properly dismissed.

[2] Plaintiff also assigns error to the trial court's imposition of Rule 11 sanctions against plaintiff. "According to Rule 11, the signer certifies that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, 'or a good faith argument for the extension, modification, or reversal of existing law' (legal sufficiency); and (3) not interposed for any improper purpose." *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). "A breach of the certification as to any one of these three prongs . . ." requires the imposition of sanctions. *Id.* "The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue." *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

Plaintiff argues that the trial court erred in determining that plaintiff's complaint was not well grounded in fact and was not legally plausible on its face. We are not persuaded. Plaintiff's complaint states that "[d]efendants' actions as expert witness [sic] in connection with the equitable distribution case of Starkey and Linda R. Sharp are the subject of this action." The remainder of plaintiff's complaint primarily alleges numerous irregularities in the expert testimony and in defendants' report that was the basis of the expert testimony and that was prepared solely for the purpose of providing expert testimony.

As we have recognized, defendants are absolutely immune from suit for their actions in preparing the report to guide expert testimony as well as in providing expert testimony in the course of a judicial proceeding. *Williams*, 43 N.C. App. at 55, 257 S.E.2d at 678. This immunity from civil suit extends so far as to protect one who allegedly commits perjury. *Briscoe v. LaHue*, 460 U.S. 325, 342-43, 75 L. Ed. 2d 96, 113-14 (1983); s*ee Bailey*, 247 N.C. at 293-94, 100 S.E.2d at 866-67. Plaintiff's brief in opposition to defendants' motion to dismiss ignores this well-established precedent regarding witness immunity and fails to argue for a reversal or modification of this existing and well-established law. Accordingly, we conclude that the trial court properly imposed Rule 11 sanctions against plaintiff.

Plaintiff next argues that the trial court erred in ordering plaintiff to pay defendants' costs of defending this action including reasonable attorney's fees as a sanction. We disagree. In reviewing the propriety

of the sanction imposed, the standard is one of abuse of discretion. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. On this record, we conclude that the sanction imposed was within the trial court's discretion. We need not address plaintiff's remaining assignments of error.

Affirmed.

Chief Judge ARNOLD and MARTIN, JOHN C., concur.

STATE OF NORTH CAROLINA v. CURTIS LEE LITTLE

No. COA95-963

(Filed 20 February 1996)

Larceny § 209 (NCI4th)— felonious larceny and possession of same stolen goods—two convictions improper—habitual felon conviction set aside

Defendant could not be convicted of both felonious larceny and felonious possession of the same stolen goods, and his habitual felon conviction based on those convictions must be set aside.

Am Jur 2d, Criminal Law §§ 551-556.

Appeal by defendant from judgments entered 5 December 1994 by Judge F. Fetzer Mills in Moore County Superior Court. Heard in the Court of Appeals 12 February 1996.

Attorney General Michael F. Easley, by Associate Attorney General Teresa L. Harris, for the State.

David G. Crockett for defendant appellant.

SMITH, Judge.

Defendant appeals from judgments imposing active sentences following his convictions by a jury of three counts of felonious possession of stolen goods, of one count of felonious larceny, of one count of felonious breaking and entering, and for having attained habitual felon status. In accordance with *Anders v. California*, 386 U.S. 738,

18 L.Ed.2d 493, *reh'g denied*, 388 U.S. 924, 18 L.Ed.2d 1377 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), defendant's appointed counsel has filed a brief in which he indicates that he "is unable to identify an issue with sufficient merit to support meaningful argument for relief." He requests this Court to review the record for possible error. Counsel has provided defendant with copies of the transcript, the record on appeal, and the brief filed on defendant's behalf, and has advised defendant that he can file his own written arguments with this Court. Defendant has not filed his own arguments.

In reviewing the record, we observe that the indictment in No. 93 CRS 8867 charged defendant with the larceny and possession of the property belonging to Ms. Shonda Craven, that the jury found defendant guilty of both felonious larceny and felonious possession of the same property under this indictment, and that the court entered judgment punishing defendant for both offenses. We further note that the indictment in No. 94 CRS 4122 charged defendant with having attained the status of habitual felon for having committed the offense of felonious possession of stolen property in case No. 93 CRS 8867, that the jury found defendant guilty of this charge, and that the court entered judgment sentencing defendant as an habitual felon under No. 94 CRS 4122 for committing the offense of felonious possession of property stolen from Ms. Craven. The court consolidated these convictions for judgment with convictions of felonious larceny in case No. 93 CRS 867 and of being an habitual felon in case No. 94 CRS 4120.

Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he can be convicted of and sentenced for only one of the offenses. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). Defendant thus could not be convicted of both felonious larceny and felonious possession in case No. 93 CRS 8867. Consequently, the judgment entered upon the conviction of felonious possession of stolen property in case No. 93 CRS 8867 must be vacated. *Id.* Moreover, because its predicate felony conviction no longer stands, the jury verdict finding defendant guilty as an habitual offender in case No. 94 CRS 4122 must also be set aside and the judgment entered thereon vacated. The matter thus must be remanded for the resentencing and entry of a corrected judgment on the remaining convictions of larceny in case No. 93 CRS 8867 and of being an habitual felon in case No. 94 CRS 4120. *State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987).

Other than the foregoing, we find the record to be free of prejudicial error.

No error in part, vacated in part, and remanded.

Judges EAGLES and WYNN concur.

MICHAEL CHRISTOPHER KELLY, PLAINTIFF v. DEENA BARNHARDT BLACKWELL AND GARY RAY BLACKWELL, DEFENDANTS

No. COA95-393

(Filed 20 February 1996)

Infants or Minors § 35 (NCI4th)— natural parent who consented to adoption of own children—no standing to seek custody and visitation

A natural parent who has consented to the adoption of his or her children cannot thereafter bring an action against the natural parent and adoptive parent for custody or visitation of the children. N.C.G.S. § 48-23(2).

Am Jur 2d, Infants §§ 28 et seq.

Right of parent to regain custody of child after temporary conditional relinquishment of custody. 35 ALR4th 61.

Appeal by plaintiff from order entered 23 January 1995 by Judge George T. Fuller in Davie County District Court. Heard in the Court of Appeals 24 January 1996.

Randolph and Fischer, by J. Clark Fischer, for plaintiff-appellant.

Morrow, Alexander, Tash & Long, by C.R. "Skip" Long, Jr., for defendant-appellee Deena Blackwell.

WALKER, Judge.

Plaintiff is the natural father of two minor children born during his marriage to defendant Deena Blackwell. On 20 January 1993, plaintiff consented to the adoption of the children by defendant Gary Blackwell, the children's stepfather. In a complaint filed 8 August

1994, plaintiff sought visitation with the children based on allegations of sexual abuse inflicted on the children by defendant Gary Blackwell. On 29 September 1994, plaintiff amended his complaint to include a prayer for custody of the minor children, alleging neglect and unfitness on the part of defendant Deena Blackwell. On 23 January 1995, the trial court granted defendant Deena Blackwell's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff filed timely notice of appeal.

This case presents the question of whether a natural parent who has consented to the adoption of his or her children can thereafter bring an action against the natural parent and adoptive parent for custody and/or visitation of the children. We hold that in this case he cannot. N. C. Gen. Stat. § 48-23(2) (1991) states that a biological parent of an adopted person

> shall, from and after the entry of the final order of adoption, be relieved of all legal duties and obligations due from [that parent] to the person adopted, *and shall be divested of all rights with respect to such person.*

Id. (emphasis added). The "rights" referred to in the statute necessarily include standing to seek custody and/or visitation with the adopted child(ren). *See Rhodes v. Henderson*, 14 N.C. App. 404, 407-08, 188 S.E.2d 565, 567 (1972) (natural mother who consented to adoption of child had no greater right to custody of child than that of a stranger to the child).

Plaintiff's action does not contest the validity of the adoption decree entered in 1993. Nonetheless, in spite of the language of N.C. Gen. Stat. § 48-23(2), plaintiff argues that his action for custody and visitation of the children is authorized by N.C. Gen. Stat. § 50-13.1. That statute provides that "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child" may institute an action for custody of the child. N.C. Gen. Stat. § 50-13.1(a) (1995). Plaintiff claims that this "expansive language" recognizes his right, as an "other person," to seek custody of the children even after having consented to their adoption by defendant Gary Blackwell. We disagree. A person seeking custody under N.C. Gen. Stat. § 50-13.1 must be able to claim a right to such custody. As we have already stated, plaintiff lost that right when he consented to the adoption of the children. Thus, he now has no standing to maintain the instant action.

For the foregoing reasons, we hold the trial court properly granted defendant Deena Blackwell's 12(b)(6) motion to dismiss. The order of the trial court is

Affirmed.

Chief Judge ARNOLD and Judge LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 FEBRUARY 1996

EASTERN AVIATION FUELS v. RALEIGH-DURHAM AIRPORT AUTH. No. 95-301	Wake (92CVS805)	Affirmed
FIRST UNION NATIONAL BANK v. FOY No. 95-1034	Pasquotank (91CVS536)	Dismissed
HINES v. CALDWELL MEMORIAL HOSP. No. 95-318	Ind. Comm. (170161)	Affirmed
IN RE LARUE No. 94-1151	Alleghany (91J14) (91J15) (91J16)	Affirmed
IN RE WRIGHT No. 94-1132	Columbus (91J96)	Affirmed
ODOM v. BLOUNT No. 95-243	Hertford (94CVD210)	Affirmed
OUTDOOR EAST v. HARRELSON No. 94-1303	Wake (91CVS5868)	Affirmed
OWENS v. FAMILY DOLLAR STORES No. 95-615	Ind. Comm. (228616)	Affirmed
STATE v. ARLEDGE No. 94-183	Henderson (92CRS6368)	New Trial
STATE v. BROWN No. 95-759	Guilford (94CRS63263)	No Error
STATE v. COBLE No. 95-734	Alamance (94CRS2601)	No Error
STATE v. FREEMAN No. 95-414	Bertie (94CRS2195)	No Error
STATE v. HILL No. 95-477	Cabarrus (93CRS5962) (93CRS5963)	No Error
STATE v. LITTLE No. 95-306	New Hanover (93CRS13598)	No Error
STATE v. MASON No. 95-171	Cleveland (93CRS2335)	No Error

STATE v. MAY No. 95-611	Pitt (93CRS54) (93CRS56)	Affirmed
STATE v. MILLER No. 95-600	Mecklenburg (93CRS38413) (93CRS42402)	Affirmed
STATE v. MILLER No. 95-855	Wayne (93CRS7903)	No Error
STATE v. MORRIS No. 95-548	Watauga (93CRS02866) (93CRS02867) (93CRS02868)	No Error
STATE v. PRICE No. 95-573	Nash (94CRS6334)	No Error
STATE v. SHAFFER No. 95-356	Cumberland (93CRS20266)	No Error
STATE v. WELLS No. 95-308	Randolph (92CRS5591) (93CRS6249) (93CRS6250)	No Prejudicial Error; Motion for Appropriate Relief Denied
STATE ex rel. HOWES v. GASKILL No. 95-398	Hyde (93CVS57)	Reversed
WHITTED v. SHORE No. 95-84	Yadkin (93CVS282)	Reversed and Remanded
WILLIAMS v. WILLIAMS No. 94-1127	Durham (92CVD5403)	Affirmed
WILLIS v. WILLIAMS No. 94-1297	Carteret (92CVS384)	No Error

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ARTH v. GUTHRIE No. 94-1094	Wake (93CVS06193)	Affirmed
BUCK v. MOTOROLA, INC. No. 95-360	Pitt (93CVS1441)	Affirmed
DARLINGTON v. DOUGLAS No. 95-154	Cumberland (92CVS5678)	Affirmed
EDWARDS v. LIBERTY MUT. INS. CO. No. 95-419	Harnett (93CVS01212)	Reversed and Remanded

FARTHING v. COUNCIL No. 95-413	Durham (89CVS849)	Affirmed
GRIER v. T & T TECHNOLOGY No. 94-1435	Guilford (92CVS9596)	No Error
HAM v. HAM No. 95-978	Ashe (94CVD335)	Dismissed
HAMM v. WAKE COUNTY CHILD & FAMILY SERVICES No. 95-193	Wake (94CVS00395)	Affirmed
HASSLER v. HASSLER No. 95-385	Richmond (92CVD939)	Vacated and Remanded
IN RE CARPENTER No. 95-811	Gaston (94CVD1859)	Affirmed
IN RE DeSHAZO v. LUTZ No. 95-364	Mecklenburg (93J389)	Affirmed
IN RE HUANG No. 95-888	Wake (90CVS4268)	Affirmed
IN RE JENKINS No. 94-1325	New Hanover (93J125A & B)	Dismissed
KELLY v. AIRWAY MOVING & STORAGE CO. No. 94-1375	Ind. Comm. (854479)	Affirmed in Part; Reversed in Part
LANE v. ALLSTATE INS. CO. No. 95-738	Sampson (93CVS567)	Appeal Dismissed
MARR v. PARKDALE MILLS, INC. No. 95-818	Ind. Comm. (120125)	Affirmed
MARTIN v. C & C PRECISION MACHINE No. 95-616	Ind. Comm. (284206)	Dismissed
McKOY v. STATE FARM MUT. AUTO. INS. CO. No. 94-1105	Mecklenburg (92CVD6249)	Dismissed
MOBLEY v. VERMONT AMERICAN CORP. No. 95-430	Ind. Comm. (331797)	Affirmed
MYERS v. PRITCHETT No. 95-480	Alamance (93CVS955)	Affirmed
PERSON v. FOOD LION, INC. No. 94-1433	Ind. Comm. (967795)	Reversed and Remanded

PRATT v. DEPT. OF TRANSPORTATION No. 95-408	Ind. Comm. (TA-11814)	Affirmed
STATE v. ABITOL No. 95-941	Mecklenburg (91CRS57984) (91CRS57985) (91CRS57986)	No Error
STATE v. ARMEEN No. 95-926	Mecklenburg (94CRS74730) (COUNTS 1,2)	No Error
STATE v. BARRETT No. 95-827	Pitt (94CRS26216) (94CRS26278)	No Error
STATE v. DAVIS No. 95-868	Hertford (94CRS1665) (94CRS1666) (94CRS1667) (94CRS1668) (94CRS1669) (94CRS1670) (94CRS1671) (94CRS1723) (94CRS1724) (94CRS1725) (94CRS1726) (94CRS1727) (94CRS1728) (94CRS1729) (94CRS4558) (94CRS4560)	No Error
STATE v. FAISON No. 95-983	Wake (94CRS34770) (94CRS34771)	No Error
STATE v. GILYARD No. 95-673	Mecklenburg (93CRS62090) (93CRS62091)	Affirmed
STATE v. GROOMS No. 94-593	Buncombe (93CRS57304)	No Error
STATE v. HARRIS No. 95-735	Mecklenburg (93CRS23066) (93CRS23068) (93CRS30863) (93CRS74506) (93CRS77833)	No Error

STATE v. HARRIS No. 95-1025	Orange (94CRS10682)	No Error
STATE v. HILL No. 95-931	Wake (94CRS83163)	Dismissed
STATE v. HORNE No. 95-720	Forsyth (93CRS23890)	No Error
STATE v. JEFFRIES No. 95-718	Rowan (94CRS9081)	No Error
STATE v. JORDAN No. 95-886	Hertford (94CRS3750)	No Error
STATE v. OWENS No. 95-58	Guilford (94CRS31154)	No Error
STATE v. PERSON No. 95-982	Wake (91CRS92407)	No Error
STATE v. ROGERS No. 95-952	Chatham (93CRS1371)	Affirmed
STATE v. SMITH No. 95-885	Lenoir (94CRS1659)	No Error
STATE v. WILKERSON No. 95-1047	Durham (92CRS11908)	No Error
STATE v. WILKES No. 95-503	Mecklenburg (93CRS38976) (93CRS38977)	No Error
STATE v. WILSON No. 95-908	Sampson (94CRS624) (94CRS628)	No Error
STATE v. WRIGHT No. 95-951	Wake (94CRS00117) (94CRS06230)	No Error
STATE ex rel. ALBEMARLE CHILD SUPPORT ENF. v. LAMBERT No. 95-809	Gates (91CVD108)	Affirmed
WENTZ v. WENTZ No. 95-909	Mecklenburg (94CVD12567)	Dismissed

STATE OF NORTH CAROLINA v. DENNIS LEO STURGILL, DEFENDANT

No. COA95-743

(Filed 5 March 1996)

1. Evidence and Witnesses § 1290 (NCI4th)— police interrogation—promise not to prosecute

Promises not to prosecute a defendant made during a police interrogation in return for a defendant's confession deserve the same scrutiny under contract and due process principles as promises made in the context of plea bargains.

Am Jur 2d, Evidence §§ 740-741.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud. 99 ALR2d 772.

2. Evidence and Witnesses § 1290 (NCI4th)— confession—nonprosecution agreement between officers and defendant—State's refusal to honor—defendant's reliance on agreement—right to relief

Though a police detective was not vested with either actual or apparent authority to make a nonprosecution agreement with defendant in return for his confession, defendant was nevertheless entitled to relief when the State refused to honor the agreement since he changed position in a fashion constituting detrimental reliance upon the agreement in derogation of his constitutional rights, including his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel.

Am Jur 2d, Evidence §§ 740-741.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud. 99 ALR2d 772.

3. Evidence and Witnesses § 1290 (NCI4th)— confession—nonprosecution agreement between defendant and officers—State's refusal to honor—suppression of confession—statutory basis

Where police promised defendant during an interrogation that they would not seek a habitual felon indictment in return for his confession, and the promises were the product of bad faith or

fraud, the police conduct required suppression of the confession pursuant to N.C.G.S. § 15A-1021 and -974, which have to do with the conduct of governmental officers in criminal matters.

Am Jur 2d, Evidence §§ 740-741.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud. 99 ALR2d 772.

4. Evidence and Witnesses § 1290 (NCI4th)— police promises disregarded by State—defendant's reliance on promises—confession suppressed—new trial

Where defendant reasonably relied on police promises not to prosecute him as a habitual felon in return for his confession, and those promises were disregarded by the State, traditional notions of substantial justice and fair play, as well as defendant's substantive due process rights, mandated a new trial and suppression of defendant's confession.

Am Jur 2d, Evidence §§ 740-741.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud. 99 ALR2d 772.

Appeal by defendant from judgment entered 6 January 1995 by Judge William H. Freeman in Rockingham County Superior Court. Heard in the Court of Appeals 12 February 1996.

Attorney General Michael F. Easley, by Assistant Attorney General J. Philip Allen, for the State.

C. Orville Light for defendant appellant.

SMITH, Judge.

The central issue on appeal is whether any remedy is available to defendant, who detrimentally relied on a police promise not to prosecute him, which promise was broken. In this case, the police promised defendant that he would not be prosecuted as an habitual felon if defendant gave information relevant to his involvement in five break-ins. Based on this offer, defendant provided police with self-incriminating statements pertinent to the break-ins. Subsequently, the State refused to honor the bargain. Defendant was indicted and con-

victed on five counts of breaking or entering and larceny as an habitual felon. At trial, defendant's statements to police were received in evidence as part of the State's case.

We hold that a remedy exists to cure a broken police nonprosecution promise, when that promise induces detrimental reliance by a defendant in derogation of his constitutional rights, and fundamental fairness requires the fashioning of a curative remedy. Since defendant reasonably relied on police promises not to prosecute, and those promises were disregarded by the State, we hold that traditional notions of substantial justice and fair play, as well as defendant's substantive due process rights, mandate a new trial, and suppression of defendant's confession. We also conclude, independent of constitutional issues, that suppression is warranted by N.C. Gen. Stat. §§ 15A-1021, -974 (1988) (statutes concerning the conduct of governmental officers in criminal matters).

The State's evidence at trial tended to show the following facts. On 13 January 1994, Lieutenant Barry Carter and Detective Greg Moore of the City of Eden Police Department arrested defendant on an outstanding warrant for felonious breaking or entering and larceny. The detectives transported defendant to the police department and advised defendant of his *Miranda* rights. Next, Detective Moore began a custodial interrogation. Detective Moore told defendant that several break-ins had occurred in the old Leaksville area of Eden, that the police had overwhelming evidence against him, and that he was going to be charged with those break-ins even though only one warrant for his arrest was outstanding.

According to defendant, Detective Moore told him that if defendant did not provide requested information, the police would "jack[] the bond up" so that defendant would have to stay in jail, and would not be able to have surgery performed on a previously injured hand. Defendant then indicated the only statement he wanted to make was that he did not commit any of the crimes. Defendant made this statement orally and in writing. At this point, Detective Moore terminated questioning and got up to leave the room.

As Detective Moore started to leave the room, the State's evidence indicates that defendant asked "what would be in it for him" if he provided information regarding the break-ins. Defendant testified "[t]hey said they would not charge me with the habitual felon [*sic*]" if he signed such a statement. Detective Moore then described the location of the break-ins and asked defendant to tell him about each one. Lieutenant Carter transcribed defendant's descriptions of how he

broke into each location and what he took. Defendant signed the second statement, confessing to participation in the break-ins.

Defendant raises six assignments of error on appeal. However, since we find the issues raised in defendant's first assignment of error dispositive, we do not reach any other issues posed by defendant. Defendant's first assignment of error addresses the trial court's refusal to quash the indictment against him for being an habitual felon. Defendant argues the State should be bound by the promises made to him by police, as defendant relied on those promises by relinquishing his constitutional rights. Accordingly, defendant argues the trial court should have quashed the habitual felon indictment. We agree defendant is entitled to a remedial cure for the abrogation of the nonprosecution agreement. However, we do not agree that the proper remedy is specific performance. Instead, we hold that defendant is entitled to a remedy which returns him to the *status quo ante*, because of defendant's detrimental reliance on the promises of the police, which resulted in violation of defendant's due process rights. Since the State admitted defendant's confession in evidence at trial, no remedy short of suppression suffices to accomplish this goal.

By detrimental reliance, we mean that defendant has shown such actual reliance on police nonprosecution promises that a fair trial was not possible, *State v. Bogart*, 788 P.2d 14 (Wash. App. 1990), and that "no other remedy is available which will return defendant to the position he enjoyed prior to making the agreement at issue." *People v. Gallego*, 424 N.W.2d 470, 475 n.10 (Mich. S.Ct. 1988) (*Gallego* II).

Defendant's due process argument has, as its genesis, the following colloquy between the prosecution and the police:

> [Police witness]: Obviously I told him that we were not able to promise him anything, nor was anybody in a higher position able to promise him anything. I told him that I knew his record. I had run a criminal history on him. I told him that he would probably qualify as an habitual felon. And all that I could tell him, if he told the truth and helped us get back as much of the stolen property as we could that *we would not seek to indict him as a habitual felon.*
>
> . . . .
>
> [Prosecutor]: You mentioned about if he told you the truth and helped to get the property back, *you* mentioned something about him not being charged as an habitual felon?

[Police Witness]: I told him that *I would not seek* an indictment as an habitual felon if he told the truth and helped to get as much of the stolen property as we could.

[Prosecutor]: Did you promise that he would not be indicted as an habitual felon?

[Police Witness]: No, sir, I just told him that I would not do it.

(Emphasis added.) Defendant maintains the State, "as a matter of sound judicial policy," should be bound by Detective Moore's bargain with defendant. Defendant's argument has particular force, because defendant's confession was offered in evidence by the State at trial. This is a case of first impression because defendant does not argue in this assignment of error that coercion or inducements rendered his confession involuntary. *See State v. Richardson*, 316 N.C. 594, 602, 342 S.E.2d 823, 829 (1986). Rather, defendant avers that police promises deliberately induced a confession which was voluntary, but accomplished through purposeful deception.

Our Supreme Court addressed a somewhat similar issue in *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980). In *Collins*, the defendant moved to dismiss possession of controlled substances charges because the State failed to honor a plea arrangement reached between the defendant's attorney, a police officer, and an assistant district attorney. The negotiations resulted in a written plea agreement, which provided that defendant would give information and assistance to the police in return for: (1) the State's guarantee that upon his guilty plea, the defendant would not receive active time; and, (2) dismissal of the defendant's pending district court cases.

Later the same day, at a probable cause hearing on the felony charges, a different assistant district attorney refused to honor the existing plea agreement, based on his opinion that the plea bargain was inappropriate, and he had not been consulted. The defendant was subsequently indicted on the felony charges, pled not guilty, and the case went to trial. The defendant's motion to dismiss, for failure of the State to abide by the plea negotiation, was denied. The defendant was found guilty and imprisoned.

Recognizing the *Collins* case as one of first impression, our Court relied on the decision in *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427 (1971), as the foundation for its analysis. The *Collins* Court stated that an acceptance of a plea of guilty, after plea promises have been made:

> "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Collins, 300 N.C. at 145, 265 S.E.2d at 174 (quoting *Santobello*, 404 U.S. at 262, 30 L.Ed.2d at 433). Relying on this language in *Santobello*, the *Collins* Court held that "[t]he State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant *or any other change of position by him constituting detrimental reliance upon the arrangement.*" *Collins*, 300 N.C. at 148, 265 S.E.2d at 176 (emphasis added).

The Court further elaborated that, "[w]hen viewed in light of the analogous law of contracts, it is clear that plea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not [the] defendant's corresponding promise to plead guilty, but rather is [the] defendant's actual performance by so pleading." *Id.* at 149, 265 S.E.2d at 176. Applying these principles, the Court found the defendant there had neither entered a guilty plea, nor in any way relied on the plea agreement to his detriment; and, therefore, the State's rescission of the agreement did not prejudice defendant or violate his constitutional rights.

Our Courts have relied on *Collins* in subsequent cases which have raised the issue of plea bargain enforceability, when the State has withdrawn its promise, or reneged on its end of the bargain. *See, e.g., State v. Isom*, 119 N.C. App. 225, 458 S.E.2d 420 (1995) (where the defendant pled guilty in reliance upon the State's agreement that the defendant would be sentenced as a committed youthful offender (CYO) and the State subsequently breached the agreement, even though the defendant was not eligible to be sentenced as CYO, the State's action was untenable and the defendant was entitled to withdraw his plea); *State v. Rodriquez*, 111 N.C. App. 141, 431 S.E.2d 788 (1993) (where plea agreement expressly stated that the State would take no position on sentencing, the district attorney's remarks on nonstatutory aggravating factors violated the plea agreement and the defendant was entitled to enforcement of the bargain); *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992) (where the defendant negotiated plea arrangement with the State, but the arrangement was never judicially approved under N.C. Gen. Stat. § 15A-1023(b) (1988)

and the State withdrew its proposal, there was no detrimental reliance).

The principles set forth in *Collins* and its progeny are equally applicable to the instant case. However, we note two distinguishing factors: (1) the promise made to defendant was not in the context of plea negotiations, but rather was made during police interrogation; and (2) a police detective, rather than the prosecutor, made the so-called "nonprosecution agreement" with defendant. We address each of these factors separately.

PROMISES MADE OUTSIDE THE PLEA BARGAINING CONTEXT

Certain interrogation techniques are so offensive to a civilized system of justice that they must be condemned under the Fourteenth Amendment's Due Process Clause. *See, e.g., Miller v. Fenton*, 474 U.S. 104, 88 L.Ed.2d 405 (1985). Generally, "fundamental fairness requires that promises made during plea-bargaining *and analogous contexts*, be respected." *Johnson v. Lumpkin*, 769 F.2d 630 (9th Cir. 1985) (emphasis added). In such cases, where suspects are less likely to have an attorney present during police interrogation than in the more formal setting of negotiating a plea bargain, "unrepresented suspects are in greater need of protection from government inducements than represented ones because they are more 'sensitive to inducement.' " Welsh S. White, *Confessions Induced By Broken Government Promises*, 43 Duke L.J. 947, 970 (March 1994) (quoting *Brady v. United States*, 397 U.S. 742, 754, 25 L.Ed.2d 747, 759 (1970)).

The *Collins* decision is an affirmation that, when a defendant "takes . . . action constituting detrimental reliance upon [an] agreement," *Collins*, 300 N.C. at 149, 265 S.E.2d at 176, the Constitution requires courts to " 'insure the defendant what is reasonably due in the circumstances.' " *Id.* at 145, 265 S.E.2d at 174 (quoting *Santobello*, 404 U.S. at 262, 30 L.Ed.2d at 433); *see also Rodriquez*, 111 N.C. App. 141, 431 S.E.2d 788 (when the State makes a promise in exchange for a guilty plea, the right to due process and basic contract principles require strict adherence).

Numerous decisions by the United States Circuit Courts and state courts have extended due process and attendant contract principles to plea promises outside of the traditional context. For instance, in *United States v. Carter*, 454 F.2d 426, 427 (4th Cir. 1972), *cert. denied*, 417 U.S. 933, 41 L.Ed.2d 237 (1974), a United States Attorney, acting without proper authority, promised that a defendant "would not be

prosecuted elsewhere for any crime arising from . . . stolen checks." Thereafter, a United States Attorney in another jurisdiction sought prosecution on those stolen check charges. The *Carter* Court disallowed such a breach of the bargain, by noting:

> The solution [to this problem] does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another United States Attorney and thus visit a sixteen year sentence on a defendant in violation of a bargain he fully performed. There is more at stake than just the liberty of this defendant. At stake is the honor of the government [and] public confidence in the fair administration of justice . . . ."

Id. at 428.

Federal courts have repeatedly enforced non-plea agreement promises of nonprosecution, or other concessions, made by agents of the Drug Enforcement Administration or the Federal Bureau of Investigation, without evidence that a United States Attorney or the Attorney General had delegated them authority to make such a promise. *See United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983) (indictment dismissed where the defendant cooperated with DEA agents in return for a promise not to prosecute); *United States v. Rodman*, 519 F.2d 1058 (1st Cir. 1975) (the court dismissed indictment where Securities and Exchange Commission agents failed to perform their agreement to "strongly recommend" to the United States Attorney not to prosecute the defendant in return for his cooperation).

In *Carrillo*, the Ninth Circuit followed the precepts of the United States Supreme Court in *Santobello*, finding a cooperation agreement with the DEA "analogous to a plea bargain agreement" with a United States Attorney. *Carrillo*, 709 F.2d at 36. Both the *Carrillo* and *Rodman* courts ultimately grounded their decisions to grant aggrieved defendants a remedy to the premise that "settled notions of fundamental fairness" within our judicial system require it. *Carrillo*, 709 F.2d at 37; *Rodman*, 519 F.2d at 1060.

Other state courts have arrived at conclusions identical to those at the federal level. In *People v. Gallego*, 372 N.W.2d 640 (Mich. App. 1985) (*Gallego* I), the Michigan Court of Appeals granted relief to a defendant when a police detective improperly, and without any authority whatsoever, induced defendant "to sign what amount[ed] to

a confession in violation of his Fifth Amendment rights." *Id.* at 642. The remedy granted defendant by the *Gallego* I court was suppression of the confession. *Id.* at 643. The Michigan Supreme Court affirmed, holding that the Constitution's principles do not allow "sacrific[ing] the standard of fundamental fairness in our judicial system [and] damages [to] the integrity of our criminal justice system." *Gallego* II, 424 N.W.2d at 478, *aff'g Gallego* I, 372 N.W.2d at 642. The *Gallego* cases demonstrate the pervading requirement of fairness inherent in our civilized conception of due process. *See Commonwealth v. Stipetich*, 652 A.2d 1294 (Pa. S.Ct. 1995), *aff'g in part and rev'g in part*, 621 A.2d 606 (Pa. Super. Ct. 1993) (proper response to detrimental reliance procured through inaccurate police representations of nonprosecution is suppression of evidence, not dismissal); and *see People v. Fisher*, 657 P.2d 922, 930 (Col. S.Ct. 1983) (en banc) (discussed *infra*).

[1] We hold that promises not to prosecute a defendant made during a police interrogation, in return for a defendant's confession, deserve the same scrutiny under contract and due process principles as promises made in the context of plea bargains. In so holding, we follow the great weight of authority, and the more reasoned approach, in this nation's state and federal jurisdictions.

PROMISES MADE BY THE CITY OF EDEN POLICE DETECTIVES

[2] As we previously observed, principles of ordinary contract law (by analogy) and due process govern the enforcement of promises made in the plea bargain context. *Collins*, 300 N.C. at 149, 265 S.E.2d at 176; and *see Johnson*, 769 F.2d 630. This due process analysis was mandated by the United States Supreme Court in *Santobello v. New York*, 404 U.S. at 262, 30 L.Ed.2d at 433. The *Santobello* court established the proposition that state and federal courts have a constitutional obligation to provide relief to defendants aggrieved by broken plea agreements. *Id.* at 263, 30 L.Ed.2d at 433. Then, in *Mabry v. Johnson*, 467 U.S. 504, 511, 81 L.Ed.2d 437, 445 (1984), the Supreme Court explicitly grounded broken plea bargains to a Due Process context, noting the Court's "concern . . . with the manner in which persons are deprived of their liberty . . . in any fundamentally unfair way."

In North Carolina, law enforcement officers have no independent authority to make prosecutorial decisions. "Our Constitution expressly provides that: 'The District Attorney *shall* . . . be responsible for the *prosecution* on behalf of the State of *all* criminal actions

in the Superior Courts of his district . . . .' " *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991) (quoting N.C. Const. art. IV, § 18) (emphasis in original). The clear mandate of this provision is that the authority to prosecute criminal actions is vested with the district attorney. *Id.*

This determination necessarily raises the issue of whether any authority existed to bind the State to Detective Moore's promise to defendant. This question is troublesome under the facts of this case, in light of Detective Moore's deliberately ambiguous statements to defendant, that if defendant would tell the truth and help retrieve stolen property, "I would not seek to indict him as a habitual felon," and "we would not seek to indict him as a habitual felon." At the suppression hearing, Detective Moore evaded the obvious import of these statements, by asserting he only promised defendant that *he* would not indict him. We note that Detective Moore's testimony at trial differed materially from his statements at the suppression hearing:

> [Prosecutor]: Did you promise [defendant] anything if he made those statements?
>
> [Detective Moore]: No, sir.

It does not appear from the record that Detective Moore had actual authority from the prosecutor to make these promises to defendant. Therefore, in order to hold the State to these promises under an agency theory, Detective Moore had to have acted under the apparent authority of the State. *See Plaster v. United States*, 720 F.2d 340, 354 (4th Cir. 1983). Apparent authority arises when a principal "intentionally or by want of ordinary care causes or allows [a] third person to believe that [an] agent" possesses authority to act for that principal. Black's Law Dictionary 96 (6th ed. 1990); and *see Wachovia Bank v. Bob Dunn Jaguar*, 117 N.C. App. 165, 172, 450 S.E.2d 527, 531 (1994). Agreements made by an agent, vested with the apparent authority of a principal, are binding on that principal. *Id.*

Based on the record, we do not find the District Attorney's office in Rockingham County held police detectives out, as possessing any authority to enter nonprosecution agreements with suspects, in return for making a confession. *See People v. Dandridge*, 505 N.E.2d 30, 31 (Ill. App. Ct. 1987). We therefore conclude Detective Moore was not vested with either actual or apparent authority to make a nonprosecution agreement with defendant.

However, lack of an agency relationship between the Eden Police, and the District Attorney's office, does not mean defendant in the instant case is without remedy. As the *Collins* Court made clear, the paramount consideration in a plea bargain context is whether defendant has changed position in a fashion "constituting detrimental reliance upon the arrangement." *Collins*, 300 N.C. at 148, 265 S.E.2d at 176. The change of position contemplated in *Collins* is a defendant's detrimental reliance on a governmental promise, which results in a derogation of his constitutional rights. Such agreements may not be avoided to the prejudice of defendants as those "defendants have a constitutional right to be treated with 'fairness' throughout the [prosecutorial] process." *Id.* at 146, 265 S.E.2d at 174.

It is inescapable that broken promises made to a defendant by the police, if relied on to the constitutional detriment of that defendant, mandate relief by our courts. The appropriate consideration, as we see it, is not the power of the police to bind the office of a North Carolina district attorney, but rather

> the scope of a defendant's due process right to enforce a governmental promise not to use evidence against him, upon which he detrimentally relied in furnishing incriminating evidence to police.

Fisher, 657 P.2d at 930. In *Fisher*, the Colorado Supreme Court affirmed the trial court's suppression of the defendant's videotaped confession, gained in exchange for a police promise not to use the videotape in any criminal proceeding against him. *Id.* We find the situation in *Fisher* analogous to the instant one, and we find the *Fisher* court's due process analysis persuasive and consistent with North Carolina precedent.

The State maintains this case "is disposed of by *State v. Richardson*," 316 N.C. 594, 598, 604, 342 S.E.2d 823, 827, 831 (1986), *rev'g*, 70 N.C. App. 509, 320 S.E.2d 900 (1984), because defendant here *initiated* the discussion. The State's *Richardson* argument is as follows: "[Detective] Moore testified, and the trial court found, that Moore said he would not seek an habitual felon indictment if the defendant told the truth and helped recover some of the stolen property." However, since "defendant initiated a discussion of potential benefits . . . if he confessed . . . there were no promises or threats that would render the defendant's confession involuntary." In *Richardson*, the defendant argued his confession to crimes "committed in North Carolina was involuntary because it was obtained through threats and

promises giving him hope of benefit" made by Tennessee law enforcement officials. *Id.* at 598, 342 S.E.2d at 827. Our Supreme Court disagreed, holding that, "[w]hen the totality of circumstances is considered, it is clear . . . that his confession to the North Carolina officers was made voluntarily and with full knowledge of the consequences." *Id.* at 604, 342 S.E.2d at 831. Thus, the holding of *Richardson* pivoted on a finding of voluntariness, as that was the defense theory on appeal. *Id.*

Richardson was wanted for various offenses in Tennessee and North Carolina and was arrested and charged initially in Tennessee. *Id.* at 596-97, 342 S.E.2d at 826. Richardson was subsequently questioned and arrested by North Carolina authorities. At trial, Richardson claimed that a Tennessee police officer had offered him "possibly a probated sentence" if he would cooperate with North Carolina law enforcement officials. *Richardson*, 70 N.C. App. at 510, 320 S.E.2d at 901.

The North Carolina trial court found that no such inducement or "offer of hope and reward" had ever been given Richardson. The trial court found that "in fact, the Defendant was told prior to his [confession to Tennessee authorities] that the District [A]ttorney in North Carolina would prosecute him." *Id.* at 511, 320 S.E.2d at 901. The Supreme Court agreed with the trial court, by "conclud[ing] that defendant was not promised some benefit in exchange for his cooperation." *Richardson*, 316 N.C. at 604, 342 S.E.2d at 830. Instead, the Tennessee authorities told defendant specifically "that [Tennessee] had no control over what happened in other jurisdictions." *Id.* at 603, 342 S.E.2d at 830. Finally, in dicta, the Supreme Court in *Richardson* stated that: "Promises or other statements indicating to an accused that he will receive some benefit if he confesses do not render his confession involuntary when made in response to a solicitation by the accused." *Id.* at 604, 342 S.E.2d at 381.

In short, the State's argument here is an attempt to square the instant facts with those in *Richardson*. This attempt is not persuasive for two reasons. First, the dispositive facts in this case are dramatically different. Second, defendant does not argue the confession was involuntary in this assignment of error. Instead, defendant argues the State should be "bound by the representations of the investigating officer," which induced defendant's detrimental reliance, and so, the State should not have been able to utilize the ill-gotten "fruits of the [police] representation" to prosecute the defendant.

The promises made to Richardson were completely different from the ones at issue here. Richardson was told by police

> the specifics of the charges against him, the range of punishment, and the effect of his cooperation. He was informed that the officers had no authority to make any arrangements concerning the charges against him and that Tennessee authorities had no control over what other states might do concerning crimes within their jurisdiction.

Richardson, 316 N.C. at 596, 342 S.E.2d at 826. A reading of the facts from *Richardson*, as described by the Court of Appeals and our Supreme Court, indicates the *Richardson* defendant was not presented with a deceptive or unclear offer by the Tennessee authorities, or anyone else. Richardson was promised "consideration" for his admissions with regard to his crimes committed in Tennessee, not a definite forbearance of prosecution by all law enforcement concerned. *Richardson*, 70 N.C. App. at 511-12, 320 S.E.2d at 901-02.

Richardson's facts stand in stark contrast to the facts at hand. Detective Moore's promise that "I would not seek an indictment as an habitual felon if [defendant] told the truth and helped get back as much of the stolen property as we could" was deceptive and designed to extract incriminating information. The true purpose of the police, in making these promises, is transparent. That purpose was to extract a confession without the hindrance of constitutional guarantees due defendant. However, constitutional due process is not some abstract concept, easily evaded by tactics of "plausible deniability" or the semantic use of double entendre. Within our concept of a civilized, ordered liberty,

> [g]overnmental officials, especially where constitutional rights are involved, may not make broad promissory representations to an accused and then seek to attribute a narrow scope or significance to these promises in an effort to escape resulting obligations.

Fisher, 657 P.2d at 929; and *see generally Santobello*, 404 U.S. at 262, 30 L.Ed.2d at 433. Simply put, the level of duplicity in the instant case pales in comparison with the unambiguous and clearly qualified promises made in *Richardson*.

Moreover, we do not find the *Richardson* confession analysis applicable to the instant facts. In *Richardson*, the defendant argued "his confession was involuntary because it was the product of fear

induced by threats and of promises of leniency if he cooperated." *Richardson*, 316 N.C. at 602, 342 S.E.2d at 829. As explained by the *Richardson* Court, defendant's confession was not involuntary, as "it [was] clear that defendant's will was not overborne . . . ." *Id.* at 604, 342 S.E.2d at 831.

Lack of voluntariness is not the defendant's argument in the assignment of error under review. Instead, defendant argues the police officer's promise implicates the due process clauses of the United States and North Carolina Constitutions, because defendant took detrimental actions in reasonable reliance upon the promises of the police. U.S. Const. Amend. XIV; N.C. Const. art. I, § 19 (the Law of the Land Clause). A police officer's promise is just as capable of implicating defendant's constitutional rights as a promise made by a prosecutor, once the right to counsel has attached or custodial interrogation has begun. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 399-400, 51 L.Ed.2d 424, 436 (1977); *see also Massiah v. United States*, 377 U.S. 201, 206, 12 L.Ed.2d 246, 250 (1964); and *see Miranda v. Arizona*, 384 U.S. 436, 444, 16 L.Ed.2d 694, 706 (1966). When the police implicate the constitutional rights of a defendant, as here, the protections of due process necessarily arise. *Brewer*, 430 U.S. at 398, 51 L.Ed.2d at 436.

The detrimental actions taken by defendant in the instant case include relinquishment of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. *People v. Manning*, 672 P.2d 499, 504 (Col. S.Ct. 1983) (en banc); *Gallego* I, 424 N.W.2d at 475. Defendant here had been charged and was in a custodial setting at the time of his confession. The constitutional privilege against self-incrimination, U.S. Const. Amend. V and XIV; N.C. Const. art. I, § 19, applies to any situation where a response to a question may "furnish a link in the chain of evidence needed to prosecute." *Hoffman v. United States*, 341 U.S. 479, 486, 95 L.Ed. 1118, 1124 (1951). The instant defendant was in just such a situation. The Fifth Amendment is not an inert right, for its very purpose is to protect a defendant against "official questions put to [an accused] in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77, 38 L.Ed.2d 274, 281 (1973). Detective Moore's interrogation consisted of promises crafted to elicit incriminating responses from the defendant. It is evident that defendant chose to discuss his involvement in the break-ins in exchange for nonprosecution as an habitual felon.

Similarly, defendant's right to counsel was implicated by Detective Moore's promises. In *Massiah*, 377 U.S. at 206, 12 L.Ed.2d at 250, the Supreme Court held the government could not deliberately elicit incriminating information from a defendant, after commencement of a criminal prosecution, unless defense counsel was present or defendant had validly waived the right to counsel. *Accord United States v. Henry*, 447 U.S. 264, 274, 65 L.Ed.2d 115, 125 (1980). Anything short of this would deny defendant " 'effective representation by counsel at the only stage when legal aid and advice would help him.' " *Massiah*, 377 U.S. at 204, 12 L.Ed.2d at 249 (quoting *Spano v. New York*, 360 U.S. 315, 326, 3 L.Ed.2d 1265, 1273 (1959) (Douglas, J., concurring)). It is manifest that Detective Moore's promises took place in a custodial, prosecutorial setting. And, inasmuch as the police could not follow through with their promise not to prosecute, defendant's Sixth Amendment right was not validly waived.

Thus, the inquiry here is not whether police coercion rendered defendant's confession involuntary. Instead, the instant due process issues turn on the broad promissory representations made by police to the accused, made worse by police attempts to narrow the scope of these promises, in an effort to escape resulting obligations. *Fisher*, 657 P.2d at 930. In turn, defendant relied on those promises as consideration for his choice to relinquish his Fifth and Sixth Amendment rights.

In this case, the police officer involved had no authority to make the promise in question. However, distinctions between the authority of the police and that of the prosecutor mean little to a defendant negotiating with a government officer. The preeminent consideration is not whether the police had the authority to make the promise, but whether the promise was in fact made. *Palermo v. Warden*, 545 F.2d 286, 295 (2d Cir. 1976) (where defendant detrimentally and reasonably relies on unfulfillable promises by prosecutors, the State may not "disassociate itself . . . from [that] promise"). After all, a police officer is just as capable of implicating defendant's constitutional rights as the district attorney who refused to honor the police promise to defendant. *Brewer*, 430 U.S. at 399-400, 51 L.Ed.2d at 436-37.

In *Brady v. United States*, 397 U.S. 742, 755, 25 L.Ed.2d 747, 760 (1970), the Supreme Court declared that confessions induced by misrepresentation, including unfulfilled or unfulfillable promises, cannot stand. Furthermore, "[w]aivers of constitutional rights not only must

be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances." *Id.* at 748, 25 L.Ed.2d at 756. In this respect, cases such as *Brady*, which have a primary focus on voluntariness, illuminate the issues of fairness, detrimental reliance and due process underlying this appeal. The "reasonableness" of defendant's reliance on police promises is roughly analogous to the "knowing" and "intelligent" requirements applicable to confessions made during custodial interrogations. *Id.*

Defendant's confession fails the knowing and intelligent requirements discussed in *Brady*, which, in turn, leads us to conclude that this defendant's reliance was reasonable. The confession in this case was made in response to a fraudulent police promise. The record demonstrates that stolen articles were recovered as a result of defendant's confession and that defendant performed his side of the agreement. (We note the record belies the State's assertion in its brief that "defendant did not uphold his end of the agreement.") However, the police could not perform on the promise made defendant. As such, defendant's confession was not a "knowing intelligent [act] done with sufficient awareness of the relevant circumstances." *Id.* *Brady* makes it clear that confessions must be both voluntary, and intelligent, to pass constitutional muster. *Id.* These two requirements are independent and of equal importance to a due process analysis. *Id.*

North Carolina's case law is in accord with *Brady*'s requirements. Our courts have adopted a "totality of the circumstances" test to assess the constitutionality of confessions challenged on voluntariness or knowledgeable/intelligent waiver grounds. *State v. Reese*, 319 N.C. 110, 127, 353 S.E.2d 352, 363 (1987); *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983); *State v. Carter*, 296 N.C. 344, 353, 250 S.E.2d 263, 269 (1979). In *Reese*, our Supreme Court defined a knowing and intelligent waiver in this way:

> "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self interest . . . . [However, the defendant must be] aware of the state's intention to use his statements to secure a conviction . . . ."

Reese, 319 N.C. at 130-31, 353 S.E.2d at 363 (quoting *Moran v. Burbine*, 475 U.S. 412, 422, 89 L.Ed.2d 410, 421-22 (1986)).

In *Jackson*, the North Carolina Supreme Court addressed police misrepresentation and trickery as it relates to the voluntariness of a confession. *Jackson*, 308 N.C. at 582, 304 S.E.2d at 152-53. There, police attempted to deceive defendant and lied to him about the evidence they had. *Id.* Even though the *Jackson* defendant was not in custody at the time of his confession, a plurality of the Supreme Court still felt it necessary to address the outer limits of police conduct vis-a-vis voluntariness and due process. *Id.* (Martin, J., joined by Copeland and Meyer, JJ., for the plurality; Mitchell, J. (now C.J.), concurred in the result; Exum, J., joined by Branch, C.J., and Frye, J., dissented. This split yielded a 3-1-3 decision upholding the admissibility of the confession.)

In making its final determination that the *Jackson* confession was voluntary, the Court noted that police deception, accompanied by other circumstances, might render a similar confession involuntary. Those contrary factors included: "trick[ery] about . . . possible punishment," and "promises . . . made to him in return for his confession." *Id.* at 582, 304 S.E.2d at 153. More important to resolution of the case at hand here is the substance of Justice Mitchell's concurrence in *Jackson*. Justice Mitchell found that only one element in the case allowed him to concur; that is, the defendant was not in custody when he confessed. *Id.* at 585-86, 304 S.E.2d at 154-55.

The *Jackson* dissent's applicability to the case at hand is patent, as it emphasizes: "[E]ven if . . . defendant's confession is reliable under all the circumstances, the methods of interrogation utilized are so fundamentally unfair as to deny defendant due process of law under the rationales, if not the holdings, of a number of United States Supreme Court decisions . . . ." *Id.* at 602, 304 S.E.2d at 164. (Exum, J., dissenting).

Jackson's force in the instant due process analysis is seminal. Defendant here *was* in custody. Under our facts, we must assume Justice Mitchell would have joined the *Jackson* dissenters, making that side of the opinion a 4-3 majority. If the "fundamentally unfair" interrogation in *Jackson* resulted in the denial of due process to the defendant, it is obvious the police promises here also involved intolerable conduct. For here, the only conceivable purpose of the police conduct was to avoid constitutional protections due defendant.

Had defendant known the police promises were a product of bad faith or fraud, it is unlikely the defendant would have relinquished his constitutional rights. When a promise is made by police to an individ-

ual, in exchange for a confession, the standards of substantive due process prohibit the State from "welshing" on the bargain. *See* Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Cal. L. Rev. 471, 524 (1978). In the final analysis, we are left with the conclusion that the trial court erred as a matter of law in its decision to deny defendant's request for suppression of the confession. The pith of the trial court's denial exists in its findings that "[n]o promises and no offer of reward" were made to defendant. The record is manifestly to the contrary. The statements of Detective Moore, both in the record and the State's brief, indicate promises were made to defendant. The trial court's due process analysis is thus legally insufficient, as it failed to apply the principles of *Collins* and *Santobello*, as interpreted herein, to the evidence. The police promises had no purpose, other than to cause a "change of position by [defendant] constituting detrimental reliance on the arrangement." *Collins*, 300 N.C. at 148, 265 S.E.2d at 176. Due Process would become a meaningless right, if deception might circumvent its guarantees. Due Process is a durable right though, not so easily eviscerated.

[3] In addition to any remedy mandated by due process, the police conduct here affords defendant a statutory remedy as well. N.C. Gen. Stat. § 15A-1021(b) (1988) mandates:

> No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.

Though § 15A-1021(b) provides no express remedy, its statutory partner, N.C. Gen. Stat. § 15A-974 (1988) does. Section 15A-974 creates a decisive remedy for violations of § 15A-1021(b), and in pertinent part, provides as follows:

> **§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.**
>
> Upon timely motion evidence must be suppressed if:
>
> . . . .
>
> (2) It is obtained as a result of a substantial violation of the provisions of this Chapter [the Criminal Procedure Act]. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. *The extent to which exclusion will tend to deter future violations of this Chapter.* (Emphasis added.)

As we have previously spoken at length to the constitutional issues involved in this case, a prolonged application of § 15A-974 to the instant facts would be a redundancy. *Accord State v. Reed*, 879 P.2d 1000, 1002 (Wash. Ct. App. 1994) (remedy for broken police promise warranted by the facts, under governmental misconduct statute, rather than detrimental reliance theory). We find the police conduct here to be a substantial deviation from the provisions of § 15A-1021(b). As the Colorado Supreme Court noted in *Manning*, 672 P.2d at 504: " 'At stake is the honor of the Government,' . . . 'To hold otherwise would involve the Court in an artifice perpetrated upon the Defendant.' " (Quoting trial court *sub judice.*)

[4] The last inquiry necessary to our resolution of this matter involves the determination of an appropriate remedy. Defendant maintains the State "should be bound by the representations of the investigating officer." We disagree. In cases such as this, involving defendant's reasonable and detrimental reliance upon a governmental promise, the question of remedy ultimately turns on what type of relief will accord defendant substantial justice. *See, e.g., Manning*, 672 P.2d at 512; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 72 L.Ed.2d 91, 98-99 (1982).

Because defendant furnished information to the police after a promise was made, the remedy which accords substantial justice to defendant is that which returns him to his position prior to the confession. Thus, since suppression or exclusion of the confession cures defendant's detrimental reliance, specific performance is unwarranted. Moreover, we are not required, as a result of the "constable's blunder," to place defendant in a better position than he enjoyed prior to making the agreement with the police. We are not alone in our decision to deny specific performance of an unauthorized, nonprosecution agreement to facts like those at hand. *Gallego* II, 424 N.W.2d at 475-76 n.12; *see also United States v. Hudson*, 609 F.2d 1326 (9th Cir. 1979). In this respect, the error of the trial court was not in its failure to quash the indictment for being an habitual felon, but for not suppressing the confession as a matter of law.

Anything less than suppression under these circumstances would "not approximate the substantial justice which the Due Process Clause guarantees to an accused." *Fisher*, 657 P.2d at 930. We choose suppression rather than dismissal in this case, as dismissal is a disfavored and "drastic remedy." *Gallego* I, 372 N.W.2d at 643; and *see Stipetich*, 621 A.2d 606. This remedy is also consistent with the provisions of N.C. Gen. Stat. § 15A-974, in that suppression will "tend to deter future violations" of this type. *See* § 15A-974(2)(d). We thus observe, that:

> "Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by the exclusionary rules, but it would also increase to an intolerable degree interference in having the guilty brought to book."

Gallego II, 424 N.W.2d at 472 (quoting *United States v. Blue*, 384 U.S. 251, 255, 16 L.Ed.2d 510, 515 (1966)).

We do not mean to imply that specific performance will never be available when police promises result in detrimental reliance by a defendant inducing relinquishment of constitutional rights. Instead, we adopt the most neutral remedy available, suppression, which returns all parties to the *status quo ante*. As it is our intent to return all parties to their pre-confession position, any evidence arising from the wrongful confession is also barred under the "fruit of the poisonous tree" doctrine. *See State v. Beveridge*, 112 N.C. App. 688, 693, 436 S.E.2d 912, 915 (1993). The gravamen of our holding is that, "law enforcement processes are committed to civilized courses of action. When mistakes of significant proportion are made, it is better that the consequences be suffered than that civilized standards be sacrificed." *People v. Reagan*, 235 N.W.2d 581, 587 (Mich. S.Ct. 1975).

Accordingly, we order that defendant be granted a new trial on all charges. The confession and evidence arising therefrom are suppressed.

New trial.

Judges EAGLES and WYNN concur.

WILLIAMS v. WALNUT CREEK AMPHITHEATER PARTNERSHIP

[121 N.C. App. 649 (1996)]

ANNETTE WILLIAMS, PLAINTIFF-APPELLANT v. WALNUT CREEK AMPHITHEATER PARTNERSHIP, DEFENDANT-APPELLEE

No. COA95-501

(Filed 5 March 1996)

Negligence §§ 144, 146 (NCI4th)— fall on hill at amphitheater—negligence and contributory negligence as jury questions

In an action to recover for injuries sustained by plaintiff at defendant's amphitheater, evidence of defendant's negligence and plaintiff's contributory negligence was sufficient to be submitted to the jury where it tended to show that plaintiff was an invitee who fell down the steep hill in the amphitheater; the hill was not separated from the amphitheater lawn by any type of structure that would prevent a person from falling down the hill; during concerts of the same size as the concert which plaintiff attended the staircases exiting the lawn were inadequate to facilitate a prompt exit from the amphitheater lawn; the lighting was such that the plaintiff could not see where she was going; there was pushing and shoving among the patrons and defendant knew that at the end of concerts of this size there was inevitably some pushing and shoving; defendant knew other patrons had been injured on the hill; and whether plaintiff should have recognized the danger of walking along the crest of the hill and chosen an exit alternative which may or may not have been safer under the circumstances or waited in line behind the crowd was a question of fact for the jury.

Am Jur 2d, Premises Liability §§ 785-787, 790.

Premises liability: proceeding in the dark on outside steps or stairs as contributory negligence. 23 ALR3d 365.

Appeal by plaintiff from order entered 16 February 1995 in Wake County Superior Court by Judge Robert L. Farmer. Heard in the Court of Appeals 26 January 1996.

Smith Debnam Hibbert & Pahl, L.L.P., by John W. Narron, Elizabeth B. Godfrey and Michael D. Zetts, III, for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Reid Russell, for defendant-appellee.

GREENE, Judge.

Annette Williams (plaintiff) appeals from the trial court's 16 February 1995 entry of summary judgment in favor of Walnut Creek Amphitheater Partnership (defendant).

Plaintiff attended a concert at Walnut Creek Amphitheater, which is operated by defendant, on 14 August 1993. It is undisputed that the Amphitheater is made up of a stage, with covered seats immediately in front of the stage and then a gently sloping hill behind the covered seats (called the lawn) where patrons may also sit. The lawn is accessed by three staircases, with one located on each the east and west sides of the lawn and one located on the north side of the lawn. The staircase on the north side is considered the main staircase. Between the three staircases is a steep, grass-covered hill (the hill), which forms the back side of the lawn. There are lights at the bottom of each staircase, but there are none at the top of the staircases or on the hill.

Plaintiff entered the concert via the main staircase, located at the back of the lawn, and sat towards the back, or top, of the lawn during the concert. After the concert, plaintiff and her group were being stepped on by others who were trying to leave the concert, and they decided to depart, without waiting for the crowd to dissipate. Plaintiff left her seat and headed towards the back of the lawn, away from the stage. Once at the top of the lawn, which is bordered by the hill, plaintiff and her group turned right and went towards the main staircase, the same staircase from which they entered and the closest one to their seats. Plaintiff tried to maneuver herself through the crowd to reach the staircase, but in her attempt, she was pushed by the crowd, slipped on the wet ground and fell down the hill. Plaintiff stated that "there was no lighting to enable [her] to see or to assist the crowd with their departure." Plaintiff's fall caused plaintiff to break three bones in her ankle. It is not disputed that there is no fence, or other barrier that separates the lawn from the hill and that no attendants were posted on the crest of the hill.

Plaintiff sued defendants on 9 May 1994 seeking damages for the injury she sustained during her fall. After answering plaintiff's complaint, defendant's filed a motion for summary judgment on 21 December 1994.

At the summary judgment hearing on 14 February 1995, Michael Tabor (Tabor), the director of operations for the Amphitheater, testi-

fied that the majority of patrons exit the lawn from the main staircase and that when there is a crowd "in excess of twenty thousand people preparing to leave the amphitheater," as on 14 August 1993, the crowd generally clusters around the staircases while waiting to exit the lawn. Tabor, also assumed that some pushing "inevitably" goes on. Furthermore, Tabor stated that it never occurred to him "that someone might be carried over the edge of the steep hill by a crowd surge." Although Tabor could remember only one incident in the area of the main staircase, which involved a patron who was using the hill as a means of egress, there are incident reports, which are required by defendant in the event of any reported injury at the Amphitheater, in the record that document numerous injuries occurring on "the hill." There was some evidence that the Amphitheater staff refer to the lawn as "the hill."

After considering all the evidence, the trial court entered summary judgment for defendant.

The issues are whether (I) a genuine issue of material fact regarding defendant's negligence exists; and (II) a genuine issue of material fact regarding plaintiff's contributory negligence exits.

I

The possessor of land is liable for any injuries caused to his invitee when the possessor (1) negligently creates "the condition causing the injury" or (2) negligently fails "to correct the condition [causing the injury] after notice, either express or implied of its existence." *Hinson v. Cato's, Inc.*, 271 N.C. 738, 739, 157 S.E.2d 537, 538 (1967). The possessor of land, however, is not liable to his invitee for injuries received as a result of "any activity or condition on the land whose danger is known or obvious" to the invitee, "unless the possessor should anticipate the harm despite such knowledge or obviousness." *Southern Ry. Co. v. ADM Milling Co.*, 58 N.C. App. 667, 675, 294 S.E.2d 750, 756, *disc. rev. denied*, 307 N.C. 270, 229 S.E.2d 215 (1982).

In this case, the evidence in the light most favorable to the plaintiff nonmovant, *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 101 N.C. App. 1, 3-4, 398 S.E.2d 889, 890 (1990), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991), shows that (1) the plaintiff was an invitee, (2) the plaintiff fell down the steep hill in the Amphitheater, (3) the hill was not separated from the Amphitheater lawn by any type of structure that would prevent a person from falling down the hill, (4) during concerts of the same size as the 14 August

concert, the staircases exiting the lawn were inadequate to facilitate a prompt exit from the Amphitheater lawn, (5) the lighting was such that the plaintiff could not see where she was going, (6) there was pushing and shoving among the patrons and that the defendant knew that at the end of concerts of this size there was "inevitably" some pushing and shoving, and (7) defendant knew that other patrons had been injured on "the hill." This evidence raises a genuine issue of fact as to whether the defendant, in the construction of the Amphitheater and the admission of a large number of patrons into the facility knowing that "pushing and shoving" occurs as patrons exit after large concerts, created an unsafe condition that resulted in plaintiff's injuries. *See Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992). In so holding we reject the argument of the defendant that the steep hill was an obvious danger for which it has no liability. Although there is evidence that the steep hill was an obvious danger, there is also evidence that would support a conclusion that the defendant should have anticipated that patrons could be injured on the unprotected hill. *See Aaser v. Charlotte*, 265 N.C. 494, 499, 144 S.E.2d 610, 614 (1965) (land owner's duty extends to contemplated and foreseeable activities on his premises by spectators).

II

The defendant argues in the alternative that the plaintiff was contributorily negligent as a matter of law. We disagree. There is a genuine issue of fact in this case regarding plaintiff's contributory negligence. Whether plaintiff should have recognized the danger of walking along the crest of the hill and chosen an exit alternative, that may or may not have been safer under the circumstances, or waited in line behind the crowd is a question of fact for the jury. Accordingly, summary judgment was not proper in this case.

Reversed and remanded.

Judges WYNN and McGEE concur.

ALBERT R. TOLBERT, AND WIFE, WILLA C. TOLBERT, PLAINTIFFS v. COUNTY OF CALDWELL, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA95-486

(Filed 5 March 1996)

Eminent Domain § 34 (NCI4th)— landfill—closing of road pursuant to governmental regulations—"taking" by county

Since defendant county was the party responsible for the operation of a landfill, the party which executed an agreement giving plaintiffs access to their property across the landfill, and the party which closed the road, defendant was the party which "took" plaintiffs' property, and there was no merit to defendant's contention that it was absolved from any responsibility because it acted pursuant to state and federal regulations.

Am Jur 2d, Eminent Domain §§ 157 et seq.

Plotting or planning in anticipation of improvement as taking or damaging of property affected. 37 ALR3d 127.

Appeal by plaintiffs and defendant from judgment entered 7 November 1994 in Caldwell County Superior Court by Judge Forrest A. Ferrell. Appeal by defendant from judgment entered 30 September 1994 in Caldwell County Superior Court by Judge Hollis M. Owens, Jr., and order entered 7 November 1994 in Caldwell County Superior Court by Judge Forrest A. Ferrell. Heard in the Court of Appeals 1 February 1996.

Richard B. Harper for plaintiff-appellees/appellants.

Wilson, Palmer & Lackey, P.A., by David S. Lackey, for defendant-appellant/appellee.

GREENE, Judge.

The County of Caldwell (defendant) appeals from a partial summary judgment finding defendant liable for compensable damages incurred from a temporary taking of Allen and Willa Tolbert's (plaintiffs) easement and a jury verdict and judgment, finding the damages owed to plaintiffs by defendant for the temporary taking to be $6,625.00. Defendant also appeals an order taxing the costs of the action in the amount of $9,384.41 to defendant. Plaintiffs appeal the jury verdict and judgment.

Defendant operates a solid waste disposal site (the landfill) on property located adjacent to plaintiffs' property in Caldwell County. On 18 September 1980, defendant entered into a right-of-way agreement (Agreement) with Edgar Tolbert (Tolbert), plaintiffs' predecessor in title, which was recorded in the Register of Deeds of Caldwell County. The Agreement created a sixty foot easement across the landfill, for the use and benefit of Tolbert,[1] his heirs and assigns. Defendant agreed that the sixty foot easement would be opened to the public when defendant ceased its landfill operation, or ten years from 18 September 1980, whichever occurred first.

After defendant entered into the Agreement, a state agency promulgated regulations requiring landfill operators to control public access to the landfill. 15A NCAC 13B .0505(8)(a) (Sept. 1995); *see* 40 CFR § 258.25 (1995) (similar federal regulation).

Between 19 September 1990 and 22 July 1994, the defendant, consistent with the regulations, "maintained gates and fences across the easement," thus prohibiting the public's use of the easement to gain access to plaintiffs' property. Plaintiffs were able to use the easement, but only during operating hours of the landfill, which was approximately 8:00 a.m. to 5:00 p.m. during the week, and for a few hours on Saturdays.

Plaintiffs allege that defendant's actions, in closing access to the easement "extinguished Plaintiffs' property rights in said easement and . . . constitutes a taking," for which plaintiffs seek compensation. Defendant admitted that there has been a taking between 19 September 1990 and 22 July 1994 but claimed that it had not taken the easement and that the taking was made by the federal and state governments. Both parties requested summary judgment. The trial court ruled that "[t]here has been a temporary taking of the subject easement from September 19, 1990 until July 22, 1994" and if the taking caused plaintiffs' damages, they are entitled to recover such damages from defendant.

The jury found that $6,625.00 was just compensation for the temporary taking of plaintiffs' right to have public access to their property between 1990 and 1994. By judgment entered 7 November 1994, defendant was ordered to pay plaintiffs $6,625.00 plus costs.

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1. Plaintiffs are Tolbert's heirs and assigns and successors in title, and hold Tolbert's property rights, including the right to the easement as embodied in the agreements between Tolbert and defendant.

The issue is whether the defendant is responsible for the taking.

Defendant claims that because state and federal rules regulating the access and security of its landfill forced defendant to "take action which has the effect of a 'taking,' " it is not the responsible party. We disagree.

The defendant is the party responsible for the "operation of solid waste disposal facilities," N.C.G.S. § 130A-309.09A (1995), which includes the landfill in question, N.C.G.S. §§ 130A-290(31), (35), (36) (1995), and must operate it in accordance with Chapter 130A, Article 9 of the North Carolina General Statutes. N.C.G.S. §§ 130A-290 through 310.23 (1995). Chapter 130A, Article 9 grants the Department of Environment, Health and Natural Resources the authority to promulgate rules affecting the operation and maintenance of these facilities. N.C.G.S. § 130A-294 (1995). It is pursuant to this authority that the regulations were promulgated requiring that the facility be "secured by means of gates, chains, berms, fences, and other security measures . . . to prevent unauthorized entry." 15A NCAC 13B .0508(8)(a) (Sept. 1995). This regulatory scheme, although not the specific regulation at issue, was in place prior to the execution of the Agreement, 1977 N.C. Sess. Laws ch. 1216 § 1 (codified as N.C.G.S. § 130-166.18) (repealed), and remains in place today. *See* N.C.G.S. § 130A-294 (1995).

The defendant is the party responsible for the operation of the landfill, the party that executed the Agreement and the party that closed the road. As such it has "taken" the plaintiffs' property. In so holding we reject the argument of the defendant that it is absolved from any responsibility because it acted pursuant to state and federal regulations. *See Griggs v. County of Allegheny*, 369 U.S. 84, 89, 7 L. Ed. 2d 585, 589 (holding that owner and operator of airport responsible for taking of property needed to comply with federal regulation), *reh'g denied*, 369 U.S. 857, 8 L. Ed. 2d 16 (1962); *Danziger v. United States*, 93 F. Supp. 70, 72 (E.D. La. 1950) (local government responsible for taking necessary to comply with federal Flood Control Act); *Hoyle v. City of Charlotte*, 276 N.C. 292, 302, 172 S.E.2d 1, 7 (1970) (owner and operator of airport responsible for taking required by federal regulations). We do not address, as it is not raised in this case, whether the defendant has a claim for contribution or indemnity against either or both the federal and state agencies that required that access to the landfill be limited.

The plaintiffs have raised several assignments of error related to rulings by the trial court excluding evidence the plaintiffs attempted to offer. We do not address these arguments, however, because in each instance the plaintiffs failed to make an offer of proof. N.C.G.S. § 8C-1, Rule 103(a)(2) (1992) (error may not be predicated on ruling excluding evidence unless "the substance of the evidence was made known to the court by offer or was apparent").

Partial summary judgment: Affirmed.

Trial: No error.

Judges WYNN and JOHN concur.

KIMBERLY J. PASTVA, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DAVID S. PASTVA AND JOSEPH W. HENZLER, PLAINTIFF-APPELLANTS v. NAEGELE OUTDOOR ADVERTISING, INC., D/B/A FAIRWAY OUTDOOR ADVERTISING, DEFENDANT-APPELLEE

No. COA95-483

(Filed 5 March 1996)

Workers' Compensation § 62 (NCI4th)— *Woodson v. Rowland* claim—sufficiency of complaint

Plaintiffs' complaint was sufficient to state a claim under *Woodson v. Rowland*, 329 N.C. 330, where it alleged that plaintiffs were employees of defendant who were instructed by defendant to work on a particular billboard which collapsed causing them injury; the collapse was caused by a structural failure of critical components of the billboard; the structural failure was caused in part by defendant's use of improper components and in part by improperly moving the billboard; defendant did not perform any inspections on the billboard and did not provide any training in workplace safety; defendant had actual knowledge that the billboard was unsafe and dangerous immediately before it collapsed; defendant had been cited and fined numerous times by governmental authorities for workplace safety violations; subsequent to the collapse, defendant was cited for failing to furnish a place of employment free of recognized hazards; subsequent to the collapse defendant acknowledged that the collapse would not have occurred but for defendant's acts, conduct and omissions with

regard to the billboard; and the acts and omissions of defendant constituted intentional conduct which defendant knew was substantially certain to cause serious injury or death.

Am Jur 2d, Workers' Compensation §§ 75-80.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury. 9 ALR4th 778.

Judge WYNN concurring.

Appeal by plaintiffs from order entered 8 March 1995 in Guilford County Superior Court by Judge James E. Ragan. Heard in the Court of Appeals 1 February 1996.

Donaldson & Horsley, P.A., by Jeffrey K. Peraldo, for plaintiff-appellants.

Pinto, Coates & Kyre, L.L.P., by Paul D. Coates and David L. Brown, for defendant-appellee.

GREENE, Judge.

Kimberly Pastva, individually and as administratrix of the estate of David Pastva, and Joseph Henzler (plaintiffs), appeal an order granting Naegele Outdoor Advertising Inc., d/b/a Fairway Outdoor Advertising (defendant), its motion to dismiss plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Plaintiffs allege that: (1) they were employees of the defendant; (2) they were instructed by the defendant to work on a particular billboard; (3) the billboard collapsed causing injuries to the plaintiffs; (4) the collapse was caused by a structural failure of critical components of the billboard; (5) the structural failure was caused in part by the defendant's use of improper components and in part by improperly moving the billboard; (6) the defendant did not perform any inspections on the billboard; (7) the defendant did not provide any training in workplace safety; (8) the defendant had actual knowledge that the billboard was unsafe and dangerous immediately before it collapsed;

(9) defendant had been cited and fined numerous times by governmental authorities for workplace safety violations; (10) subsequent to the collapse of the billboard, the defendant was cited for failing to furnish a place of employment free of recognized hazards; (11) subsequent to the collapse, the defendant acknowledged that the collapse would not have occurred but for the defendant's "acts, conduct and omissions" with regard to the billboard; and (12) the acts and omissions of the defendant constituted "intentional conduct which [d]efendant knew was substantially certain to cause serious injury or death."

The issue is whether plaintiffs' complaint sufficiently states a claim pursuant to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

Our legislature has provided that the Workers' Compensation Act provides the exclusive remedy for employees injured in a workplace accident. N.C.G.S. § 97-9; N.C.G.S. § 97-10.1 (1991). There are four exceptions to this general rule: (1) an injured employee may maintain a tort action against a co-employee for intentional injury, *Andrews v. Peters*, 55 N.C. App. 124, 128, 284 S.E.2d 748, 750 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982); (2) an injured employee may maintain a tort action against his employer for intentional injury, *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 488, 340 S.E.2d 116, 120, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986); (3) an injured employee may maintain a tort action against a co-employee for his "willful, wanton and reckless negligence," *Pleasant v. Johnson*, 312 N.C. 710, 716, 325 S.E.2d 244, 249 (1985); and (4) an injured employee may maintain a tort action against his employer if the "employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct."[1] *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228. "Substantial certainty" "is more than the 'mere possibility' or 'substantial probability' of serious injury or death," *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 159, 461 S.E.2d 13, 16, *disc. rev. allowed*, 342 N.C. 190, 463 S.E.2d 231, *quoting Regan v. Amerimark Bldg. Prods.*, 118 N.C. App. 328, 331, 454 S.E.2d 849, 852, *disc. rev. denied*, 340 N.C. 359, 458

1. The Supreme Court has justified treating tort actions against co-employees different from tort actions against employers on the grounds that co-employees "do not finance or otherwise directly participate in workers' compensation programs; employers, on the other hand, do." *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229.

S.E.2d 189 (1995), but is something less than "actual certainty." *Mickles v. Duke Power Co.*, 342 N.C. 103, 110, 463 S.E.2d 206, 211 (1995).

A complaint must be dismissed pursuant to Rule 12(b)(6):

> when one or more of the following three conditions is satisfied: (1) when on its face the complaint reveals no law supports plaintiff's claim; (2) when on its face the complaint reveals the absence of fact sufficient to make a good claim; and (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Johnson v. Bollinger, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380 (1987). Thus, a complaint is sufficient "where no 'insurmountable bar' to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim." *Id.* Notice of the nature and extent of the claim is adequate if the complaint contains "sufficient information to outline the elements of [the] claim or to permit inferences to be drawn that these elements exist." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 340 (2d ed. 1990); *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988) ("complaint must . . . state enough to give the substantive elements of a legally recognized claim"), *appeal after remand*, 101 N.C. App. 1, 398 S.E.2d 889 (1990), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991); *Bynum v. Fredrickson Motor Express Corp.*, 112 N.C. App. 125, 129, 434 S.E.2d 241, 243 (1993) (not sufficient to merely allege elements of claim). The elements of a *Woodson* claim are: (1) misconduct by the employer; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured as a consequence of the misconduct. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228.

The defendant argues that the complaint in this case does not allege sufficient facts to support a *Woodson* claim. We disagree. The complaint does not reveal an insurmountable bar to recovery and the allegations provide adequate notice of the nature and extent of the claim. The allegations of misconduct, particularly the directing of the plaintiffs to work on the billboard after notice of its dangerous condition, are sufficient to support a reasonable inference that each of the four elements of the *Woodson* claim exist. *See Regan*, 118 N.C. App at 331, 454 S.E.2d at 852 (reversing dismissal of *Woodson* claim).

Reversed and remanded.

Judge McGEE concurs.

Judge WYNN concurs with separate opinion.

Judge WYNN concurring.

I agree with the majority that this matter should be returned to the trial court because the pleadings allege sufficient facts to overcome a 12(b)(6) motion. However, the opportunity should not be lost to point out the continuing dilemma faced by our trial judges and litigators in trying to assess what is needed to set forth a *Woodson* claim.

In all candor, plaintiff's victory may be short lived. In the four occasions that our Supreme Court has applied *Woodson*, the Court has not recognized a claim that would survive pretrial dismissal. In *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993), the Supreme Court upheld a Rule 12(b)(6) dismissal finding that plaintiff's allegations did not rise to the level of negligence defined in *Woodson*. Most recently in the trilogy of *Mickles v. Duke Power Co.*, 343 N.C. 103, 463 S.E.2d 206 (1995); *Powell v. S & G Prestress Co.*, *342* N.C. 182, 463 S.E.2d 79 (1995); and, *Echols v. Zarn, Inc.*, 342 N.C. 184, 463 S.E.2d 228 (1995), the Supreme Court found that the claimants had failed to forecast evidence sufficient to set forth a *Woodson* claim and thus concluded that summary judgment was properly allowed in each case. Significantly, our Supreme Court rejected the Restatement of Tort's bomb throwing example as an analogy for defining "substantial certainty," explicitly finding that example defined "actual certainty" which is not required for a successful claim under the *Woodson* exception. *Mickles*, 342 N.C. at 110, 463 S.E.2d at 211.

In short, since creating the *Woodson* exception, the Court has consistently pointed out facts that *do not* establish a *Woodson* claim. However, it remains an uncertainty as to what facts *do* allege a *Woodson* claim sufficient to overcome pretrial dismissal.[1]

At this point, as candidly recognized by the counsels during oral argument, we have the *Woodson* facts and nothing else. As I have

1. Our Supreme Court has let stand a reversal by this Court of a Rule 12(b)(6) dismissal on the grounds that sufficient facts were alleged by a claimant to set forth a *Woodson* claim. *See Regan v. Amerimark Building Products, Inc.* 118 N.C. App. 328, 454 S.E.2d 849, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).

stated previously, "[a]fter establishing the 'substantial certainty' standard, the *Woodson* Court did not further define it, except as it found the *Woodson* facts met it." *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 328, 442 S.E.2d 143, 148 (1994) (WYNN, J., dissenting), *aff'd*, 342 N.C. 182, 463 S.E.2d 79 (1995). This in effect means that "the *Woodson* facts provide the authoritative understanding of 'substantial certainty' . . . ." *See Id.* The problem with this approach is borne out by the difficulty in finding facts that match those in *Woodson*. That is why we have a continuing dilemma—trial advocates are called upon to compare the facts in their case with those in *Woodson*, rather than seeking a determination of whether their particular facts meet the definition of "substantial certainty," irrespective of the *Woodson* facts. The better approach would be to set forth a more articulate standard of law which would lend itself to an application of facts needed to overcome pretrial dismissal.

To be sure, even the *Woodson* facts appear to set forth conduct which could be construed as intentional. Whether the Supreme Court has really created a separate exception by the use of the language "substantial certainty" remains to be seen. In any event, the paradox put to trial judges and litigators and eventually to this Court, could easily be remedied by a decisive directive opinion from our Supreme Court. In addition to clarifying the meaning of the term "substantial certainty," guidance could be gained from articulating factors that the trial court should consider in determining if the evidence is sufficient to be submitted to the jury, e.g., whether there were Federal and State Occupational Safety and Health Acts (OSHA) citations prior to the accident and if so, did the employer respond appropriately; whether the employer willfully failed to enforce either its own safety guidelines or safety measures required by OSHA; whether the employer willfully circumvented specified manufacturer's safety rules; whether the employer through its supervising personnel had knowledge of the dangerous condition; whether the employer willfully failed to provide adequate safety training for inexperienced personnel; whether the employer was aware that the failure to use safety equipment created an inherently dangerous condition that would be substantially certain to lead to death or great injury; whether the employer required the worker to work without necessary safety equipment; whether the employer encouraged and permitted non-compliance with the safety rules among its employees; etc.

In the alternative, our Supreme Court could revisit *Woodson* and declare that the employer's conduct in that case was indeed intentional conduct—an already established exception to the Worker's Compensation Act.

Regardless of which approach is taken, any direction is better than the uncertainty that currently exists with the state of the law on this issue. To paraphrase an observation made by Justice Stevens in a different context,[2] one need not use Justice Stewart's classic definition of obscenity—"I know it when I see it"[3]—as an ultimate determinate of what is sufficient to allege a *Woodson* claim.

AISHAH M. WILSON, PLAINTIFF-APPELLANT v. IVEY THACKER WILSON AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, DEFENDANTS-APPELLEES

No. COA95-397

(Filed 5 March 1996)

Unfair Competition or Trade Practices § 22 (NCI4th)—adverse party's insurance company—third-party claim for unfair and deceptive practices not recognized in North Carolina

North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive practices under N.C.G.S. § 75-1.1, since allowing such third-party suits against insurers would encourage unwarranted settlement demands, and allowing a third-party claim against the insurer of an adverse party for violating N.C.G.S. § 58-63.15 might result in a conflict of interest for the insurance company.

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

Validity of express statutory grant of power to state to seek, or to court to grant, restitution of fruits of consumer fraud. 59 ALR3d 1222.

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2. *Karcher v. Daggett*, 462 U.S. 725, 755, 103 S.Ct. 2653, 2672, 77 L. Ed. 2d 133 (1983) (Stevens, J., concurring).

3. *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring).

Scope and exemptions of state deceptive trade practice and consumer protection acts. 89 ALR3d 399.

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 ALR3d 449.

Appeal by plaintiff-appellant from order entered 26 January 1995 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 1996.

Charles G. Monnett III & Associates, by Charles G. Monnett, III, and John R. Anderson, for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by Rex C. Morgan, for defendant-appellee.

WYNN, Judge.

On 4 February 1994, plaintiff-passenger, Aishah Wilson, suffered injury as a result of her husband's (Ivey Thacker Wilson) alleged negligence in driving a vehicle insured by defendant Nationwide Mutual Fire Insurance Company (hereinafter Nationwide). Mr. Wilson owned the vehicle and was its named insured.

As a result of the accident, Ms. Wilson claimed medical expenses and other special damages that totalled approximately $2,621.00. In response to her demand for payment of her damages, Nationwide eventually offered $5,000.00 in full settlement of her claim. Ms. Wilson rejected this offer as inadequate, and filed the subject lawsuit.

In her complaint, Ms. Wilson sought damages based on three causes of action: 1) the negligence of Mr. Wilson, (2) unfair and deceptive trade practices by Mr. Wilson's insurer, Nationwide, and (3) punitive damages because of Nationwide's actions towards her.

In an order dated 26 January 1995, Judge James U. Downs dismissed under Rule 12(b)(6) plaintiff's second and third causes of action. This order is the subject of the instant appeal.

I

Ms. Wilson first contends that the trial court erred in dismissing under Rule 12(b)(6) her cause of action for unfair and deceptive trade practices. We disagree.

The standard for appellate review of a dismissal under Rule 12(b)(6) is familiar:

> The question for the [reviewing] court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.

Miller v. Nationwide Mutual Ins. Co., 112 N.C. App. 295, 299-300, 435 S.E.2d 537, 541 (1993), *disc. review denied* 335 N.C. 770, 442 S.E.2d 519 (1994) (citations omitted).

In her complaint, Ms. Wilson alleged that Nationwide knowingly, and with such frequency as to indicate a general business practice, engaged in unfair and deceptive acts by:

> a. Having a corporate policy and a general business practice of refusing to act in good faith toward the insureds of Nationwide and the victims of negligence of its insureds;
>
> b. Having a general business practice and a policy of intentionally disregarding the duties owed by an insurance company to its insured and to the victims of negligence of its insureds;
>
> c. Having a corporate policy and a general business practice of refusing to enter into good faith negotiations with regard to settlement of claims;
>
> d. Having a corporate policy and a general business practice of attempting to coerce the victims of negligence into settlements for less than the amount of money properly owed to such victims by taking unfair advantage of the superior negotiating position of the Defendant Nationwide;
>
> e. Having a corporate policy and a general business practice of refusing to evaluate and settle claims in a fair and reasonable manner;
>
> . . .
>
> h. Having a corporate policy and a general business practice of not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear . . . .
>
> . . .
>
> j. Having a corporate policy and a general business practice of attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled . . . .

Ms. Wilson argues that these allegations constitute violations of N.C. Gen. Stat. § 58-63.15 (1994), and thus are actionable under N.C. Gen. Stat. § 75-1.1 (1994) *et. seq.*

Assuming that the allegations stated in her complaint are true, as we must when reviewing a dismissal pursuant to Rule 12(b)(6), *Miller*, 112 N.C. App. at 299-300, 435 S.E.2d at 541, we conclude that North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices under N.C.G.S. § 75-1.1.

While this is an issue of first impression in our State, we have little difficulty in deciding that plaintiff's allegations are flawed. She relies on our Supreme Court's pronouncement in *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986) for the proposition that a violation of N.C.G.S. § 58-63.15 constitutes a *per se* unfair and deceptive trade practice, which violates N.C.G.S. § 75-1.1 as a matter of law. 316 N.C. at 470, 343 S.E.2d at 179; *see also Miller*, 112 N.C. App. at 302, 435 S.E.2d at 542. However, in *Pearce* and *Miller*, the actions involved plaintiff-insureds who were in privity with the defendant-insurers. *See Pearce*, 316 N.C. 461, 343 S.E.2d 174 (estate of decedent-plaintiff which sued to recover on life insurance policy issued by defendant-insurer may maintain unfair trade practice claim); *see Miller*, 112 N.C. App. 295, 435 S.Ed.2d 537 (plaintiff-insured which sued his own insurer for underinsured motorist coverage may claim relief for unfair trade practices).

In the instant case, plaintiff is neither an insured nor in privity with the insurer. We find this distinguishing and therefore conclude that a private right of action under N.C.G.S. § 58-63.15 and N.C.G.S. § 75-1.1 may not be asserted by a third-party claimant against the insurer of an adverse party.

Our conclusion is supported by other courts. Most states which have considered this issue have not allowed a third-party claim against the insurer of an adverse party. *See Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 250 Cal. Rptr. 116, 758 P.2d 58 (1988); *see also Messina v. Nationwide Mutual Ins. Co.*, 998 F.2d 2 (D.C. Circ. 1993); *McFadden v. Liberty Mutual Ins. Co.*, 803 F. Supp. 1178 (N.D. Miss. 1992), *aff'd*, 988 F.2d. 1210 (5th Cir. 1993); *Earth Scientists v. United States Fidelity & Guar.*, 619 F. Supp. 1465 (D. Kan. 1985); *O.K. Lumber Co., Inc. v. Providence Washington Ins. Co.*, 759 P.2d 523 (Ak. 1988); *Scroggins v. Allstate Ins. Co.*, 74 Ill. App. 3d 1027, 393 N.E.2d 718 (1979); *Bates v. Allied Mutual Ins. Co.*, 467 N.W.2d 255

(Ia. 1991); *Morris v. American Family Mutual Ins. Co.*, 386 N.W.2d 233 (Minn. 1986); *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 830 P.2d 1335 (1992); *Lawton v. Great Southwest Fire Ins. Co.*, 118 N.H. 607, 392 A.2d 576 (1978); *City of Farmington v. L.R. Foy Const. Co.*, 112 N.M. 404, 816 P.2d 473 (1991); *Dvorak v. American Family Mutual Ins. Co.*, 508 N.W.2d 329 (N.D. 1993); *Farris v. U.S. Fidelity and Guaranty Co.*, 284 Or. 453, 587 P.2d 1015 (1978); *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145 (Tx. 1994); *Wilder v. Aetna Life & Casualty Ins. Co.*, 140 Vt. 16, 433 A.2d 309 (1981); *Tank v. State Farm Fire & Casualty Co.*, 105 Wash. 2d. 381, 715 P.2d 1133 (1986); *Kranzush v. Badger State Mutual Casualty Co.*, 103 Wisc. 2d 56, 307 N.W.2d 256 (1981); *Herrig v. Herrig*, 844 P.2d 487 (Wy. 1992); *but see Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573 (9th Cir. 1992); *Auto-Owners Ins. Co. v. Conquest*, 658 So.2d 928 (Fl. 1995) (recognizing that allowing a third-party claim against the insurer of an adverse party may be unwise, but allowing the claim due to an explicit statutory provision); *State Farm Mutual Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Kt. 1988); *Klaudt v. Flink*, 202 Mont. 247, 658 P.2d 1065 (1983); *Jenkins v. J.C. Penney Casualty Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981).

In *Moradi-Shalal*, for example, we find particular guidance from two of the concerns raised by the California Supreme Court in holding that California's Unfair Practices Act[1] (very similar to our own N.C.G.S. § 58-63.15) does not grant a private right of action against an insurer.[2] *Moradi-Shalal* at 126, 758 P.2d at 68.

First, allowing such third-party suits against insurers would encourage unwarranted settlement demands, since plaintiffs would be able to threaten a claim for an alleged violation of N.C.G.S. § 58-63.15 in an attempt to extract a settlement offer. *See Id.* at 124, 758 P.2d at 66; *see also Auto-Owners Ins. Co. v. Conquest*, 658 So.2d 928 (Fl. 1995):

> We are not unmindful of . . . [the argument that allowing a third party suit] would achieve an unreasonable result in that permitting a third party such a cause of action against the insurer anytime the insurer allegedly failed to settle in good faith could result

1. Cal. Ins. Code § 790.03 (1988) *et. seq.*

2. *Moradi-Shalal* also prohibits in California such an action by a first party claimant against the insurer. In North Carolina, our Supreme Court, in *Pearce*, has already ruled that N.C.G.S. § 75-1.1 *et. seq.* provides a private right of action by an insured against his insurer for a violation of N.C.G.S. § 58-63.15.

> in undesirable social and economic effects (i.e., multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal and other transaction costs).

Id. at 929-30 (internal quotation marks and citations omitted).

Second, allowing a third-party claim against the insurer of an adverse party for violating N.C.G.S. § 58-63.15 may result in a conflict of interest for the insurance company. Upon defending its insured, the insurer has a duty to act diligently and in good faith to its insured. *Connor v. State Farm Mutual Ins. Co.*, 265 N.C. 188, 191, 143 S.E.2d 98, 101 (1965). The insurer has a duty to safeguard the interests of its insured. Allowing a third-party action because of a violation of N.C.G.S. § 58-63.15 would require the insurer to also act in the best interests of the party adverse to its insured. Such a result would likely put the insurer in a position of conflict with its insured—the party adverse to the third party.

We note in passing that Ms. Wilson argued in her brief that she is a named insured under the policy by virtue of being Mr. Wilson's spouse. However, the record does not include a copy of the policy, nor any other evidence to support this assertion. Even assuming for the sake of argument that Ms. Wilson is in fact a named insured, the factor which distinguishes this case from *Pearce* and its progeny is that Ms. Wilson's tort action stems from the alleged negligence of Mr. Wilson which in turn triggers coverage under Nationwide's liability coverage provisions for Mr. Wilson, rather than for Ms. Wilson. In short, Ms. Wilson's relationship to Nationwide in this case is as a third party because she seeks to recover from the insurer's liability coverage provisions for her husband, rather than from a coverage provision provided for her own interest.

We find no precedent in North Carolina law for allowing a third-party to sue the insurance company of another. N.C.G.S. § 58-63.15 does not specifically indicate that a third-party has such a private right of action and we will not imply such an action from its ambiguous language.

II

Ms. Wilson next contends that the trial court erred in dismissing her claim against Nationwide for punitive damages. We disagree.

In order to state a claim for punitive damages, a plaintiff must have a valid cause of action against the defendant in which at least nominal damages may be awarded were the plaintiff to recover. *Shugar v. Guill*, 304 N.C. 332, 335, 283 S.E.2d 507, 509 (1981). Because of our disposition of plaintiff's claim against defendant Nationwide, Ms. Wilson has no cause of action against Nationwide. Thus, we hold that her claim for punitive damages was properly dismissed.

The decision of the court below is,

Affirmed.

Judges GREENE and McGEE concur.

DONNA S. SPURLOCK, PLAINTIFF v. TIMOTHY G. ALEXANDER AND JOE CONNELL IMPORTS, INC., DEFENDANTS

No. COA95-389

(Filed 5 March 1996)

Automobiles and Other Vehicles § 415 (NCI4th)— key left in ignition by car dealer—car stolen and crashed into plaintiff—no proximate cause

A common law negligence claim could not be maintained against defendant car dealer which left keys in a vehicle where the vehicle was subsequently stolen, driven at a high rate of speed to elude officers, and crashed into plaintiff's vehicle causing her personal injuries, since the Supreme Court in *Williams v. Mickens*, 247 N.C. 262, expressly declined to extend such liability, and, notwithstanding Charlotte City Code § 14-180(a), which created a duty not to leave an ignition key in an unattended vehicle, the law of proximate cause remained unchanged.

Am Jur 2d, Automobiles and Highway Traffic §§ 431 et seq.

Accession to motor vehicle. 43 ALR2d 813.

Appeal by plaintiff from order entered 13 August 1993 by Judge C. Walter Allen in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 January 1996.

On 18 May 1990, plaintiff was driving her automobile in an eastward direction on Freedom Drive in Charlotte, North Carolina, when her vehicle was struck head-on by a stolen automobile driven by defendant Timothy G. Alexander (hereinafter "Alexander"). The collision occurred when, in an effort to flee a pursuing law enforcement officer, Alexander drove the stolen vehicle across the centerline, around a median, and into oncoming traffic where he struck plaintiff's vehicle. As a result of the collision, plaintiff sustained multiple serious injuries which rendered her permanently partially disabled.

Alexander stole the vehicle he was driving from defendant Joe Connell Imports, Inc. (hereinafter "defendant"). Alexander had entered the premises of defendant's automobile sales lot posing as a prospective buyer. In time, Alexander located a 1984 BMW on the lot with its keys in the ignition, which he then stole and drove until ultimately colliding with plaintiff.

On 14 May 1993, plaintiff filed suit against both Alexander and defendant car lot. Plaintiff alleged that defendant should be held liable for negligently failing to remove the keys from the ignition of the automobile that was stolen by Alexander. Plaintiff alleged both common law negligence and negligence based on defendant's violation of Charlotte City Code section 14-180(a), which provides in pertinent part:

> (a) *Duty to lock ignition, remove key.* No person driving or in charge of a motor vehicle shall leave such vehicle unattended on any street, alley, other public property, new or used car lot, or on any private parking lot to which the general public is invited and at which there is no attendant, without first stopping the engine, locking the ignition, and removing the ignition key from the vehicle . . . .

In response, defendant filed a motion to dismiss pursuant to Rule 12(b)(6), and Judge C. Walter Allen granted defendant's motion. Plaintiff appealed to the North Carolina Court of Appeals and this court dismissed plaintiff's appeal as interlocutory. In the meantime, plaintiff secured a default judgment against Alexander and after trial on the issue of damages plaintiff was awarded a judgment of $320,700.00 against Alexander. On 7 February 1995, judgment was entered against Alexander and the trial court's grant of defendant's motion to dismiss was no longer interlocutory.

Plaintiff appeals.

Staten L. Wilcox, P.A., by David P. Coss, for plaintiff-appellant.

Golding, Meekins, Holden, Cosper & Stiles, by Mark O. Crowther, for defendant-appellee Joe Connell Imports, Inc.

EAGLES, Judge.

The sole issue here is whether the trial court erred in granting defendant's motion to dismiss pursuant to Rule 12(b)(6). Plaintiff concedes that our Supreme Court has expressly declined to extend liability to the owner of an automobile for leaving the keys in the automobile's ignition when the automobile was subsequently stolen and when the thief's negligent operation of that stolen vehicle caused injury to a third party. *Williams v. Mickens*, 247 N.C. 262, 263-64, 100 S.E.2d 511, 512-13 (1957). Plaintiff argues, however, that *Williams* is distinguishable (1) because the defendant in *Williams* was an individual, not a corporation in the business of selling cars like the defendant here, and (2) because of the special duty not to leave keys in the ignition created by Charlotte City Code section 14-180(a). We disagree.

Defendant in *Williams* was a taxicab driver and owner of the taxicab he drove. Defendant's taxi was stolen when, while driving his taxicab in the course of his business, defendant parked the vehicle briefly at his taxi stand and left the keys in the ignition while he went inside the building. In this context, we cannot say that a taxi driver is so factually distinct from an automobile dealer as to warrant a result different from *Williams*. By virtue of their respective businesses, both the taxi driver and the automobile dealer should have had a heightened awareness of the dangers of automobile theft. The fact that defendant's business here is corporate in form while defendant's in *Williams* was not is immaterial. Accordingly, based on *Williams*, we conclude that a common law negligence claim may not be maintained against defendant automobile dealer here.

Plaintiff next attempts to distinguish *Williams* by recognizing, as did the Supreme Court, that in *Williams* "[t]here was neither ordinance . . . nor State law against leaving a key in the ignition switch of an automobile." *Williams*, 247 N.C. at 264, 100 S.E.2d at 513. Plaintiff argues that *Williams* is inapplicable here since Charlotte City Code section 14-180(a) creates a duty not to leave an ignition key in an unattended vehicle.

"A statute or ordinance designed for the protection of the public is a 'safety' enactment and its violation constitutes negligence *per se* . . . ." *Jackson v. Housing Authority of High Point*, 73 N.C. App. 363, 368, 326 S.E.2d 295, 298 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986). Under this doctrine, a "member of the class intended to be protected by a statute or regulation who suffers harm proximately caused by its violation has a claim against the violator." *Baldwin v. GTE South, Inc.*, 335 N.C. 544, 546, 439 S.E.2d 108, 109 (1994). Plaintiff essentially argues that she was a member of the class to be protected by Charlotte City Code section 14-180(a) and that defendant's violation of the ordinance proximately caused her injuries. We disagree.

We conclude that plaintiff's argument here fails because *Williams* remains controlling on the issue of proximate cause. To recover under a negligence per se theory, the plaintiff must still prove that the defendant's statutory violation proximately caused the plaintiff's harm. Plaintiff argues that the requisite proximate cause is present here. Our Supreme Court stated in *Williams*, however, that allowing recovery in a case like this "would do violence to the rule of proximate cause as understood and applied in this jurisdiction." *Williams*, 247 N.C. at 264, 100 S.E.2d at 513. Notwithstanding Charlotte City Code section 14-180(a), the law of proximate cause remains unchanged. Accordingly, the order of the trial court dismissing plaintiff's claim against defendant automobile dealer is

Affirmed.

Judges MARTIN, John C., and MARTIN, Mark D., concur.

IN RE: ALBERT DOUGLAS STONE, EMPLOYEE, PLAINTIFF v. G & G BUILDERS, EMPLOYER, EMPLOYERS MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. COA95-378

(Filed 5 March 1996)

Workers' Compensation § 230 (NCI4th)— employee able to return to regular work—no conclusion that employee disabled

Evidence from a doctor who examined plaintiff that he was able to return to "regular work" supported the finding of the

Industrial Commission that plaintiff was capable of returning to work at his regular job; however, it did not necessarily follow that he would earn the same wages he earned before his injury, particularly since plaintiff was restricted with regard to lifting, and the conclusion that plaintiff was not disabled therefore could not be sustained.

Am Jur 2d, Workers' Compensation §§ 395-399.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases. 89 ALR3d 783.

Appeal by plaintiff from Order and Opinion For the Full Commission entered 19 December 1994. Heard in the Court of Appeals 24 January 1996.

Brenton D. Adams for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by Linda Stephens and James E. R. Ratledge, for defendant-appellees.

GREENE, Judge

Pursuant to N.C. Gen. Stat. § 97-86, Albert Douglas Stone (plaintiff) appeals from a 19 December 1994 Opinion and Award of the Industrial Commission (Commission) which denied plaintiff's claim for worker's compensation benefits.

It is undisputed that plaintiff was injured by accident, while performing his work duties with G & G Builders, on 5 March 1992. The accident resulted in low back strain, which required hospitalization and treatment and prohibited plaintiff from working immediately after the accident. Test performed indicated that the plaintiff had "some desiccation (drying of the discs) at spinal disc L4-5 with some evidence of bulging; but no herniation of the disc."

On 8 April 1992 the plaintiff and G & G Builders and Employers Mutual Insurance Co. (defendants) entered into an "Agreement for Compensation for Disability" (I.C. Form 21) (hereinafter Agreement) and the Agreement was approved by the Commission on 24 April 1992. It acknowledged that the plaintiff had sustained, on 5 March 1992, an injury "by accident arising out of and in the course of" his employment with G & G Builders and that he sustained a disability as a consequence of the injury. The defendants agreed to pay to the

plaintiff the sum of $210.01 per week for an "undetermined" number of weeks. In October 1992 the defendants sent plaintiff to Dr. Lee Whitehurst (Whitehurst) for an independent medical evaluation. Plaintiff's responses during Whitehurst's examination gave Whitehurst cause to question plaintiff's credibility regarding his statements of pain. Whitehurst's tests revealed that none of the pain expressed by plaintiff seemed to be coming from any nerve involvement and there were no objective bases for plaintiff's subjective complaints of pain. Furthermore Whitehurst opined that plaintiff retained no permanent partial impairment to his back and Whitehurst released plaintiff for "regular work" with the restriction that plaintiff would "require help from a co-worker when lifting more than 50 to 70 pounds." Following Whitehurst's examination of plaintiff, on 29 October 1992, defendants stopped payment of temporary total disability compensation.

After a hearing to contest defendants' termination of plaintiff's disability payments, held pursuant to N.C. Gen. Stat. § 97-83, the Commission found that

> 9. From 29 October 1992 and continuing [thereafter] plaintiff has been capable of returning to work at his regular job with [G & G Builders], and any inability of plaintiff to be gainfully employed was not caused by the injury to his back of 5 March 1992. . . .

Based upon this finding, the Commission concluded that "plaintiff is not entitled to any temporary total disability compensation" after 20 October 1992 and that plaintiff is not entitled to any permanent partial disability compensation.

The dispositive issues are (I) whether the evidence supports the finding that the plaintiff is "capable of returning to work at his regular job with" G & G Builders, and if so, (II) whether that finding supports the conclusion that the "plaintiff is not entitled to any temporary total disability compensation" after 20 October 1992.

I

If the record contains any competent evidence tending to support the Commission's findings, this Court is bound by those findings. *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965). In this case there is evidence from Dr. Whitehurst that the plaintiff was able to return to "regular work" after 28 October 1992 and this testimony, contrary to the argument of the plaintiff, supports the find-

ing of the Commission that plaintiff is "capable of returning to work at his regular job."

II

The plaintiff argues, in the alternative, that the Commission's finding that the plaintiff is "capable of returning to work at his regular job" cannot support its conclusion that he is not disabled. A conclusion that an employee is not disabled can be sustained only if there is a finding that the employee is now capable of "earning the same wages he had earned before his injury in the same [or other] employment." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). We agree with the plaintiff that it does not necessarily follow that an employee who returns to his "regular job" will earn the same wages he earned before his injury. *See Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994) ("release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury"). This is particularly so in this case where the plaintiff would be required to have assistance from a fellow employee "when lifting more than 50 or 70 pounds," a restriction not in place prior to the injury. Accordingly, the conclusion that the plaintiff is not disabled is not supported in this record and the Opinion and Award must be reversed and this matter remanded to the Commission.

In so holding we reject the argument of the defendants that the plaintiff failed in his burden of showing that he was "unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." Upon the approval by the Commission of the 8 April 1992 Agreement, a presumption arose that the plaintiff was unable "to work at wages equal to those he was receiving at the time his injury occurred" and the burden was on the defendants to rebut this presumption. *Radica*, 113 N.C. App. at 447, 439 S.E.2d at 190 (*quoting Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 475-76, 374 S.E.2d 483, 485 (1988)); *Watkins v. Central Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d. 588, 592 (1971). The defendants failed to present evidence to rebut the presumption.

The defendants argue that this Court's opinion in *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), requires a different result. We disagree. Although it does appear (even though this is not clear from the opinion) that a Form 21 agreement was also entered in the *Russell* case, the plaintiff in that case did not argue that he was entitled to a presumption of disability as a conse-

quence of the agreement and this Court did not address that issue. Accordingly, *Russell* cannot be cited as authority in support of defendants' argument that the Commission's approval of a Form 21 agreement does not give rise to a presumption of disability. *Russell* only addresses the burdens of the parties in the context of a hearing where there has been no previous determination that the employee is disabled. In that context, the employee has the initial burden of showing that he is "unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell*, 108 N.C. App at 765, 425 S.E.2d at 457.

On remand the Commission must enter an award continuing benefits to the plaintiff.

Reversed and remanded.

Judges WYNN and McGEE concur.

AILEENE S. MINTON, JOAN S. LOWE, MARTHA S. OXFORD, AND KATHLEEN S. MILLER, A NORTH CAROLINA PARTNERSHIP, PLAINTIFF v. LOWE'S FOOD STORES, INC., DEFENDANT

No. COA95-373

(Filed 5 March 1996)

1. Judgments § 42 (NCI4th)— motion to tax costs—hearing out of term and district—no error

The trial court did not err in hearing defendant's motion in the cause to tax the costs outside of the county and district and without the consent of both parties, since the original hearing on the merits of the underlying substantive matter, resulting in a decision dismissing plaintiff's action and taxing defendant's costs to plaintiff, was heard during a regularly scheduled term in the county, and the trial judge in this instance merely performed a perfunctory task in assessing the costs. N.C.G.S. § 1A-1, Rule 6(c).

Am Jur 2d, Judgments §§ 24, 25.

2. Costs § 49 (NCI4th)— bond premiums as part of costs—authority of trial court

Where plaintiff did not agree to waive the posting of bond by the solvent defendant in a summary ejectment action, and the trial court dismissed plaintiff's action, the trial court had author-

ity to order plaintff to pay defendant's bond premiums as part of the costs pursuant to the provisions of N.C.G.S. § 6-20 giving the trial court discretion to allow costs as justice requires. N.C.G.S. §§ 6-19, 7A-305.

Am Jur 2d, Costs § 76.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action. 90 ALR2d 448.

3. Costs § 47 (NCI4th)— deposition expenses as part of costs

The trial court did not err by awarding deposition expenses as part of the costs awarded to defendant in an ejectment action where the trial court's finding that the deposition expenses were reasonable and necessary was supported by competent evidence.

Am Jur 2d, Costs §§ 52, 53.

Appeal by plaintiff from Order entered 15 November 1994 by Judge C. Walter Allen in Caldwell County Superior Court. Heard in the Court of Appeals 11 January 1996.

Robbins & Hamby, P.A., by Donald T. Robbins and Dale L. Hamby, for plaintiff-appellant.

Gaither, Gorham & Crone, by James M. Gaither, Jr. and Veronica M. Guarino, for defendant-appellee.

JOHNSON, Judge.

Plaintiff Aileene S. Minton, Joan S. Lowe, Martha S. Oxford, and Kathleen S. Miller, a North Carolina Partnership, instituted this action against defendant Lowe's Food Stores, Inc. for summary ejectment and damages for failure to pay rent, in Caldwell County Superior Court on 4 March 1992. A hearing on plaintiff's Motion for Summary Judgment was heard by Judge Claude S. Sitton, Chief Resident Superior Court Judge, at the 24 August 1992 civil session of Caldwell County Superior Court. Plaintiff's motion was denied, and this matter came on for hearing, without a jury, before Judge C. Walter Allen at the 22 March 1993 civil session of Caldwell County Superior Court. Thereafter, Judge Allen entered an Order on 21 June 1993, dismissing plaintiff's summary ejectment action and taxing costs against plaintiff partnership. From this Order and the Order denying plaintiff's Motion for Summary Judgment, plaintiff appealed.

Plaintiff's appeal was heard by this Court in case number 9323SC1094. In an unpublished opinion filed 21 June 1994, the Court affirmed the trial court's Orders. Plaintiff filed a Petition for Discretionary Review with the North Carolina Supreme Court, which was denied on 8 September 1994. *See Minton v. Lowe's Food Stores*, 337 N.C. 694, 448 S.E.2d 529 (1994).

On 30 September 1994, after receiving the decision of the Supreme Court denying plaintiff's Petition for Discretionary Review, defendant filed a Motion to Bill the Costs before the Clerk of Caldwell County Superior Court, as provided by Judge C. Walter Allen's 21 June 1993 Order. Defendant's motion was scheduled for hearing, and subsequently was heard in the Clerk's chambers on 25 October 1994. The Clerk granted the costs that were within her statutory authority to grant. However, because the Clerk was unable to tax all of defendant's costs, defendant filed a Motion in the Cause to tax the remaining costs before Judge Allen—the trial judge who originally heard the underlying action and awarded defendant costs. The hearing on defendant's motion was scheduled to be heard on 7 November 1994. Defendants did not consult with plaintiff's counsel concerning the scheduling of this motion for hearing.

Plaintiff filed a Notice of Objection to Hearing pursuant to North Carolina General Statutes sections 7A-47, 7A-47.1 and 7A-47.3 on 27 October 1994. On 7 November 1994, however, over plaintiff's objections, this matter was heard before Judge Allen during the criminal session of McDowell County Superior Court. Judge Allen noted plaintiff's objections to the hearing and, taking the matter under advisement, allowed both parties to submit supplemental memoranda of law before deciding the matter. Subsequently, on 15 November 1994, Judge Allen entered an Order, allowing the costs set forth by defendants. Again, plaintiff appeals.

[1] On appeal, plaintiff partnership first argues that the trial court erred in hearing defendant's Motion in the Cause to Tax the Costs since the hearing was held outside of the county and district, and without the consent of both parties. We cannot agree.

Rule 6(c) of the North Carolina Rules of Civil Procedure provides,

> The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the

> power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

N.C. Gen. Stat. § 1A-1, Rule 6(c) (1990). In *Capital Outdoor Advertising v. City of Raleigh*, our Supreme Court handed down a decision that would change a long-standing rule in North Carolina which provided that "an order of the superior court must be entered 'during the term, during the session, in the county and in the judicial district where the hearing was held.' " 337 N.C. 150, 154, 446 S.E.2d 289, 292, *reh'g denied*, 337 N.C. 807, 449 S.E.2d 566 (1994) (*citing State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984)). In construing North Carolina General Statutes section 1A-1, Rule 6(c), the Court, in *Capital*, adopted the concept espoused by W. Brian Howell in his treatise, *Howell's Shuford North Carolina Civil Practice and Procedure*, that " 'Rule 6(c) permits a judge to sign an order out of term [which we interpret to mean both out of the session and out of the trial judge's assigned term] and out of district without the consent of the parties so long as the hearing to which the order relates was held in term and in district.' " *Id.* at 159, 446 S.E.2d at 294-95 (*quoting* W. Brian Howell, *Howell's Shuford North Carolina Civil Practice and Procedure* § 6-7, at 68 (4th ed. 1992)); *see also Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987) (finding that, under Rule 6(c), the order taxing defendant's costs to plaintiff was valid even though it was signed and entered out of session, as the decision to tax these costs was made and announced at the hearing on the matter of costs). Later, this Court extended the application of the *Capital* and *Daniels* decisions to out of session, out of term, and out of district orders issued by district court judges in *Ward v. Ward*, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

The facts in the instant case tend to show that Judge Allen heard the underlying case during a regularly scheduled non-jury term of Caldwell County Superior Court during the week of 22 May 1993. After hearing the evidence and arguments of counsel, Judge Allen signed an Order, out of term with the consent of the parties on 21 June 1993. Therein, Judge Allen specifically provided that "the costs be taxed against the [p]laintiff." On appeal to this Court, we decided that the Order was validly entered. Thereafter, the North Carolina Supreme Court denied plaintiff's Petition for Discretionary Review.

After plaintiff's Petition for Discretionary Review was denied by the Supreme Court, defendant began the process of having its costs assessed. Because the Caldwell County Clerk of Court did not have

authority to tax some of defendant's costs, defendant filed a Motion in the Cause to tax the remaining costs before Judge Allen. Arguments on defendant's motion were heard by Judge Allen during the criminal session of McDowell County Superior Court on 7 November 1994. Judge Allen subsequently entered an Order on 15 November 1994, assessing the remaining costs against plaintiff.

Although, as plaintiff contends, a hearing on this motion was conducted out of term and out of district, the original hearing on the merits of the underlying, substantive matter, resulting in a decision dismissing the ejectment action and taxing defendant's costs to plaintiff, was heard during a regularly scheduled term in Caldwell County. Pursuant to Rule 6(c) of the North Carolina Rules of Civil Procedure, a judge may sign an order out of term and out of district without the consent of the parties so long as the hearing to which the order relates was held in term and in district. *Capital*, 337 N.C. 150, 446 S.E.2d 289; *Daniels*, 320 N.C. 669, 360 S.E.2d 772. It matters little that defendant's Motion in the Cause was heard out of term, out of district when the Order from the underlying, substantive action specifically provided that all costs would be taxed against plaintiff. The substantive issue of taxing costs had been previously decided in term and in district, and, therefore, Judge Allen, in this instance, merely performed a perfunctory task in assessing those costs, as provided by his 21 June 1993 Order, in his later 15 November 1994 Order. As the 15 November Order taxing certain costs to plaintiff relates to the original hearing held during the 24 August 1992 civil session of Caldwell County Superior Court, the 15 November Order was properly entered. Plaintiff's argument to the contrary is unpersuasive.

[2] Plaintiff partnership also argues that the trial court lacked authority to order plaintiff to pay defendant's bond premiums pursuant to a Motion to Tax the Costs, under North Carolina General Statutes section 1-111. Again, we cannot agree.

As noted by plaintiff, in North Carolina, costs are taxed on the basis of statutory authority. North Carolina General Statutes section 7A-305 sets forth certain costs which may be assessed in a civil action. *See* N.C. Gen. Stat. § 7A-305 (1995). Moreover, section 6-19 of the General Statutes addresses the actions (as enumerated in section 6-18) in which costs are allowed as a matter of course to a prevailing defendant. *See* N.C. Gen. Stat. § 6-19 (1986). Included therein are actions for the recovery of real property. Costs which are not allowed as a matter of course under section 6-19, may be allowed in the dis-

cretion of the court under section 6-20 of the General Statutes. Section 6-20 provides that "costs may be allowed or not, in the discretion of the court, unless provided by law." N.C. Gen. Stat. § 6-20 (1986). On appeal, such discretion is not reviewable. *Chriscoe v. Chriscoe*, 268 N.C. 554, 151 S.E.2d 33 (1966). Plaintiff argues that the discretion vested in the trial court in section 6-20 has been expressly limited by case law to the authority to tax "reasonable and necessary" deposition costs, but we find this argument to be without merit. While case law *has* found that deposition costs are allowable under section 6-20, it has in no way precluded the trial court from taxing other costs that may be "reasonable and necessary." *See Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

In the case *sub judice*, the facts indicate that after defendant filed its Answer to plaintiff's ejectment Complaint, defendant received an Objection and Motion to Strike Answer and Enter Default or Compel Bond from plaintiff. Defendant corporation then filed a Response to plaintiff's objection and motion, wherein it asserted that the corporation had a meritorious defense, but asked that, if plaintiff did not agree to waive posting of a bond, the court grant defendant corporation leave to post a reasonable bond. Plaintiff did not agree to waive the bond and, therefore, Judge Zoro Guice, Jr. ordered that a $72,000.00 bond be posted by defendant. Defendant was not insolvent, and hence, could not proceed under North Carolina General Statutes section 1-112 without posting bond. *See* N.C. Gen. Stat. § 1-112 (1983). Defendant, thus, had no choice but to post bond to proceed with this action. Subsequently, Judge Allen, in his discretion, ordered plaintiff to pay defendant's bond premium, paid pursuant to North Carolina General Statutes section 1-111, in plaintiff's ejectment action.

As this case was an action for ejectment, section 6-19 of the General Statutes is applicable and, therefore, the list of costs recoverable by a prevailing party in a civil action, as provided in North Carolina General Statutes § 7A-305 (1995), is controlling. Notably, bond premiums paid pursuant to section 1-111 are not listed. It would seem, at first glance, therefore, that such premiums are not recoverable by defendant in the instant case. However, this is not the end of our inquiry. We must look to the provisos of section 6-20, which vests the trial judge with discretionary authority to allow costs as justice may require. *See Parton v. Boyd*, 104 N.C. 422, 10 S.E. 490 (1889); *Gulley v. Macy*, 89 N.C. 343 (1883). As section 6-20 provided Judge Allen with statutory authority for his decision to tax defendant's bond

premiums against plaintiff, we find plaintiff's arguments to this end to be without merit.

[3] Plaintiff also argues that the trial court erred in awarding deposition costs to defendant without a showing that the deposition costs were reasonable and/or necessary. We find this argument to be unpersuasive.

Irrefutably, North Carolina Courts recognize the trial court's authority to tax deposition costs so long as they appear necessary. *See Alsup*, 98 N.C. App. 389, 390 S.E.2d 750; *Sealey v. Grine*, 115 N.C. App. 343, 444 S.E.2d 632 (1994); *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 296 S.E.2d 512 (1982). Further, in a non-jury trial, findings of fact (e.g., that deposition costs are reasonable and necessary) will not be disturbed on appeal, if there is evidence to support them. *In Re Estate of Pate*, 119 N.C. App. 400, 459 S.E.2d 1, *disc. review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995).

In the instant case, Judge Allen specifically found that the "costs enumerated and set forth on Exhibit A [(which included deposition costs) were] reasonable and necessary costs." And while plaintiff partnership argues that defendant offered no evidence at the 7 November 1994 hearing on its Motion in the Cause to Tax Costs to show that the deposition costs were reasonable and/or necessary, on these particular facts, we do not find such a showing by defendant to be required. As the deposition costs do not appear to be unnecessary, they are allowable.

The facts tend to show that Judge Allen was the trial judge in the underlying, substantive action. Having already heard the merits of the case and guided this matter to a final judgment, Judge Allen was in an excellent position to assess the reasonableness and necessity of the depositions taken by defendant's counsel in preparation for trial. Moreover, plaintiff's counsel was permitted to present his argument against allowing the costs of the depositions at the 7 November hearing on defendant's Motion in the Cause. That Judge Allen, in his discretion, found the deposition costs to be reasonable and necessary was supported by competent evidence; and was, therefore, not error.

Finally, plaintiff partnership argues that the trial court erred in entering an Order taxing costs against plaintiff, when it objected on the record during the term of court to an Order being entered out of term, out of district and out of session. As set forth in the analysis of plaintiff's first argument, we do not agree.

Accordingly, the trial court's decision is affirmed.

Affirmed.

Judges JOHN and SMITH concur.

CAROLYN OWEN, PETITIONER-APPELLEE v. UNC-G PHYSICAL PLANT, RESPONDENT-APPELLANT

No. COA95-368

(Filed 5 March 1996)

1. Appeal and Error § 443 (NCI4th)— sufficiency of notice of reasons for dismissal—issue properly preserved for appeal

Plaintiff properly preserved for appeal the issue of whether defendant's dismissal letter provided her with sufficient notice of the reasons for her dismissal, since plaintiff was not required by N.C.G.S. § 150B-36(a) to specifically except to the ALJ's recommended decision on the ground of insufficient notice; she was, however, bound to the general rule of appellate procedure that the Court of Appeals will not decide questions which have not been presented in the courts below; and a review of the record disclosed that plaintiff argued before the ALJ, State Personnel Commission, trial court, and Court of Appeals that the letter did not provide her with adequate notice of the reasons for the dismissal.

Am Jur 2d, Appellate Review §§ 690-704.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable. 79 ALR2d 1352.

2. Public Officers and Employees § 65 (NCI4th)— misconduct as grounds for dismissal—failure of dismissal letter to name accusers—letter statutorily infirm

Though defendant cited several alleged instances of misconduct as support for plaintiff's dismissal as a grounds crew supervisor at UNC-G, not a single allegation specifically named an accuser, and plaintiff was unable, at least initially, to correctly locate in time or place the conduct which defendant cited as justification for her dismissal; therefore failure to include the spe-

cific names of plaintiff's accusers in her dismissal letter prejudiced her ability to fully prepare her appeal and rendered the statement of reasons contained in the dismissal letter statutorily infirm. N.C.G.S. § 126-35(a).

Am Jur 2d, Public Officers and Employees §§ 247-249.

Appeal by respondent from judgment entered 23 January 1995 by Judge Melzer A. Morgan, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 23 January 1996.

Judith G. Behar for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Anne J. Brown, for respondent-appellant.

MARTIN, Mark D., Judge.

Respondent University of North Carolina at Greensboro Physical Plant (UNCG) appeals from judgment reversing the State Personnel Commission's (SPC) "just cause" determination and remanding the matter to the SPC with the direction it be dismissed and appropriate relief accorded petitioner Carolyn Owen (Owen).

Owen was a career State employee who worked at UNCG for approximately 17 years. During her tenure she held a myriad of positions including "acting" UNCG Grounds Superintendent—a position she held from December 1985 to March 1986 at which time Charles Bell (Bell) was hired as "permanent" Grounds Superintendent. In 1987 Bell resigned and the Physical Plant Director appointed Chris Fay (Fay) as Grounds Superintendent.

In 1991 Owen was the supervisor of the grounds crew assigned to sanitation, work orders, and two garden areas. On 29 October 1991 Fay notified Owen by letter she was being suspended for interfering with the Human Resources Office's (HRO) investigation into allegations of improper conduct. On 18 November 1991 Fay held a conference with Owen to review the results of the HRO investigation and to allow her an opportunity to respond.

On 22 November 1991, after "carefully [considering Owen's] response[s] to the issues raised in the meeting," and "all the other [pertinent] information," Fay notified Owen by letter (dismissal letter) that she was being dismissed for the following reasons:

> First, I have found that while employees were working on a concrete job outside of Jackson Library in the last part of June you told a black employee, "If I was a black man, I would like to do this kind of work all day long." This statement . . . was a racial, and sex-based slur . . . [and] is especially serious because it is a message to employees, from their supervisor, that work in the Grounds Division is assigned based on race and sex . . . . On other occasions, you have made comments such as "no man will ever meet my standards" and you have called employees "stupid."
>
> Second, after learning that employees had complained to the management and to Human Resources about your conduct, you began to talk with employees to discourage pursuit of their complaints. Specifically, you distributed to three employees copies of discipline and notes about discipline you received last August. . . . You have also told employees, "If I go, I will take others with me." Such statements and actions constitute attempts to intimidate employees and threatened reprisals if they persisted in complaining about your conduct.

Fay also noted the above conduct was "especially egregious" in light of the number of improper personal conduct warnings he had given Owen in the past.

On 6 April 1992, after exhausting UNCG's internal appeal process, Owen filed a petition for a contested case hearing. On 8 July 1993 the SPC found UNCG's "decision to dismiss Owen . . . [was] for just cause and not discriminatory on the basis of her sex." In its order, the SPC made no findings on whether the dismissal letter notified Owen, with sufficient particularity, of the reasons for her dismissal.

On 9 August 1993 Owen filed a petition for judicial review. On 20 January 1995 the trial court, after finding the dismissal letter provided insufficient notice, held that "this case is reversed and is remanded to the [SPC] with the direction that the matter be dismissed against [UNCG] and that [Owen] be accorded the appropriate relief to which she is now entitled."

On appeal UNCG contends the trial court erred by: (1) finding Owen preserved the issue of adequate notice for review; (2) reversing the SPC's decision on the ground the notice of dismissal was not sufficiently specific; and (3) finding UNCG lacked just cause to dismiss Owen.

[1] We first consider UNCG's allegation Owen did not properly preserve the issue of whether the dismissal letter provided her with sufficient notice of the reasons for her dismissal and, therefore, the issue of adequate notice was not properly before the trial court.

In support of this contention, UNCG interprets N.C. Gen. Stat. § 150B-36(a) as requiring petitioners to provide specific exceptions to the Administrative Law Judge's (ALJ) Recommended Decision prior to final agency decision. Relying on this interpretation, UNCG argues Owen did not specifically except from the ALJ's Recommended Decision on the grounds of insufficient notice and, therefore, failed to preserve that issue for appeal.

As we must, we resolve this contention by recourse to well settled principles of statutory construction. It is beyond question, "[s]tatutory 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). 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).

N.C. Gen. Stat. § 150B-36(a) provides, in pertinent part:

> Before the agency makes a final decision, it shall give each party an opportunity to file exceptions to the decision recommended by the administrative law judge, and to present written arguments to those in the agency who will make the final decision or order.

Id. (1995). Clearly, section 150B-36(a), by use of the mandatory term "shall," places an affirmative duty on the agency, in this case the SPC, to allow the parties an adequate opportunity to file exceptions to the recommended decision of the ALJ. In contrast, the plain language of section 150B-36(a) in no way obligates petitioners to file specific exceptions to the recommended decision before issuance of the final agency decision. To hold otherwise would require this Court to read language into the statute where none presently exists.

Nevertheless, Owen is still bound to the general rule of appellate procedure that this Court "will not decide questions which have not been presented in the courts below . . . ." *White v. Pate*, 308 N.C. 759, 765, 304 S.E.2d 199, 203 (1983) (refused to consider argument statute violated equal protection guarantees of the United States Constitution because not raised in the courts below). Our review of

the present record discloses Owen argued before the ALJ, SPC, trial court and, finally, this Court, that the dismissal letter did not provide her with adequate notice of the reasons for her dismissal. Accordingly, under *White*, we conclude Owen properly preserved the issue of adequate notice by raising it at each successive stage of review.

[2] Because the issue of notice was properly preserved, we now consider UNCG's contention the trial court erred by concluding Owen's dismissal letter did not disclose, with sufficient particularity, the grounds for her dismissal.

This Court "may . . . reverse or modify the agency's decision if the . . . findings, inferences, conclusions, or decisions are . . . [i]n violation of constitutional provisions [or] . . . [m]ade upon unlawful procedure . . . ." N.C. Gen. Stat. § 150B-51(b) (1995). When reviewing an agency decision for constitutional or procedural errors, this Court applies *de novo* review. *Gainey v. N.C. Dept. of Justice*, 121 N.C. App. 253, 259, 465 S.E.2d 36, 41 (1996); *Brooks v. Ansco & Associates*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994).

Under federal due process an employee's property interest in continued employment is sufficiently protected by "a pretermination opportunity to respond, coupled with post-termination administrative procedures . . . ." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-548, 84 L. Ed. 2d 494, 507 (1985). Further, the federal due process concern for fundamental fairness is satisfied if the employee receives "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546, 84 L. Ed. 2d at 506. To interpret the minimal protection of fundamental fairness established by federal due process as "requir[ing] more than this . . . would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

Nonetheless, "[a] wise public policy . . . may require that higher standards be adopted [by the State] than those minimally tolerable under the [United States] Constitution." *Lassiter v. Department of Social Services*, 452 U.S. 18, 33, 68 L. Ed. 2d 640, 654, *reh'g denied*, 453 U.S. 927, 69 L. Ed. 2d 1023 (1981). Toward that end the General Assembly enacted N.C. Gen. Stat. § 126-35(a), which provides in pertinent part:

> No career State employee . . . shall be discharged . . . except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.

Id. (1995) (emphasis added).

This Court has interpreted section 126-35(a) as requiring the written notice to include a sufficiently particular description of the "incidents [supporting disciplinary action] . . . so that the discharged employee will know precisely what acts or omissions were the basis of his discharge." *Employment Security Comm. v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981) (emphasis added). Failure to provide names, dates, or locations makes it impossible for the employee "to locate [the] alleged violations in time or place, or to connect them with any person or group of persons," *id.*, thereby violating the statutory requirement of sufficient particularity. *See Id.*; *Sherrod v. N.C. Dept. of Human Resources*, 105 N.C. App. 526, 532, 414 S.E.2d 50, 54 (1992); *Meyers v. Dept. of Human Resources*, 92 N.C. App. 193, 197-198, 374 S.E.2d 280, 283 (1988), *aff'd*, 332 N.C. 655, 422 S.E.2d 576 (1992); *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 351-352, 342 S.E.2d 914, 923, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986).

In the present case, UNCG cited several alleged instances of misconduct as support for Owen's dismissal, yet not a single allegation specifically named her accuser. Consequently, as the record clearly indicates, Owen was unable, at least initially, to correctly locate in "time or place" the conduct which UNCG cited as justification for her dismissal. *See Wells*, 50 N.C. App. at 393, 274 S.E.2d at 259. Therefore, we believe the failure to include the specific names of Owen's accusers in her dismissal letter prejudiced her ability to fully prepare her appeal.

We also note UNCG's failure to include the specific names of Owen's accusers contravenes the legislative intent behind section 126-35(a). To hold otherwise would provide employers the opportunity to dismiss an employee on unfounded charges and then subsequently search for witnesses who are willing to testify as to the veracity of the stated justifications. Although the trial court found no evidence UNCG engaged in such spurious activity, we believe the procedural safeguards within section 126-35(a) serve as a prophylactic protection against summary dismissal based on inadequate notice.

See, e.g., Leiphart, 80 N.C. App. at 351, 342 S.E.2d at 922. We therefore conclude UNCG's failure to specifically name Owen's accusers renders the statement of reasons contained in the dismissal letter statutorily infirm.

Accordingly, we affirm the judgment of the trial court and remand this case to the trial court for further remand to the SPC for further proceedings consistent with this opinion.

Affirmed and remanded.

Judges EAGLES and MARTIN, John C., concur.

MARGIE S. PULLEY, EMPLOYEE, PLAINTIFF v. CITY OF DURHAM, SELF-INSURED EMPLOYER, DEFENDANT

No. COA95-365

(Filed 5 March 1996)

1. Workers' Compensation § 415 (NCI4th)— Full Commission not required to rehear evidence—findings regarding witnesses' credibility

There was no merit to defendant's contention that the Industrial Commission erred in overruling the deputy commissioner because the Full Commission did not rehear the evidence, or that the Full Commission erred in overruling the deputy commissioner's opinion because the Full Commission did not make findings of fact regarding the credibility of the doctors' testimony, since the law is clear that the Full Commission does not have to rehear the evidence, and the Commission made findings of fact adequate to show that it found the doctors' testimony to be credible.

Am Jur 2d, Workers' Compensation §§ 686, 687.

2. Workers' Compensation § 390 (NCI4th)— doctors' testimony—opinions not based on speculation

There was no merit to defendant's contention that the Full Commission erred in relying on the testimony of two doctors because their opinions were based on speculation instead of reasonable medical probability, since one doctor based her opinion on her own observations of plaintiff combined with her study of

materials and her discussions with other professionals, and the other doctor had clinical experience working with police officers like plaintiff and had several areas of expertise including working with women and depression.

Am Jur 2d, Workers' Compensation §§ 586, 587.

Admissibility of opinion evidence as to cause of death, disease, or injury. 66 ALR2d 1082.

3. Workers' Compensation § 208 (NCI4th)— psychiatric problems of police officer—award of benefits—sufficiency of evidence

The evidence was sufficient to support the Industrial Commission's judgment awarding plaintiff temporary total disability compensation benefits based on its determination that claimant suffered from emotional and psychiatric problems caused by her work as a police and public safety officer.

Am Jur 2d, Workers' Compensation §§ 339, 340.

Mental disorders as compensable under workmen's compensation acts. 97 ALR3d 161.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 18 November 1994. Heard in the Court of Appeals 23 January 1996.

This appeal arises from the Industrial Commission's award of workers' compensation benefits to a claimant based on its determination that the claimant suffered from emotional and psychiatric problems caused by her work as a police and public safety officer.

Margie S. Pulley (hereinafter plaintiff) went to work as a police officer for the City of Durham (hereinafter defendant) in November 1975. In 1984, plaintiff began seeing Dr. Hendey Hostetter, a clinical psychologist, because plaintiff felt bad physically and was having trouble concentrating at work and handling the stresses involved with her job. During the initial visit with Dr. Hostetter, the stressors plaintiff discussed included "having recently filed bankruptcy, having day care problems for her Down's syndrome son, and her husband getting into legal problems and also leaving home periodically." Accordingly, Dr. Hostetter's initial "working hypothesis" was that the primary stressors in plaintiff's life were not job-related, but instead related to plaintiff's husband and child. Dr. Hostetter diagnosed plain-

tiff "as having a major depressive disorder with some psychotic symptoms" and recommended that plaintiff take a three-month medical leave of absence. Plaintiff took three months off from work, but she then had to return to work because she had used all of her leave time. After continuing sessions with plaintiff, Dr. Hostetter changed her "working hypothesis" and concluded that plaintiff's problems were "really longstanding events of post traumatic stress syndrome—the post traumatic stress syndrome arising from multiple traumatic situations that she encountered as a public safety officer over a long period of time."

Plaintiff also sought assistance from other doctors including Dr. Patricia Ziel, a specialist in psychiatry, who saw plaintiff on four separate occasions in March and April 1991 to recommend a course of treatment for plaintiff. Dr. Ziel found that plaintiff's employment as a public safety officer was causally connected to plaintiff's psychological problems.

Plaintiff ended her employment with defendant in April 1989. Thereafter, she filed a claim for workers' compensation benefits for occupational stress allegedly caused by her employment with defendant. After conducting hearings regarding the case, Deputy Commissioner Roger L. Dillard, Jr. found that the testimony of Dr. Hostetter and Dr. Ziel was not credible and that plaintiff's medical records and testimony failed to show that plaintiff's condition resulted from her employment with defendant. Accordingly, the Deputy Commissioner denied plaintiff's claim for workers' compensation benefits. Plaintiff appealed and the Full Commission reversed the Deputy Commissioner's decision. The Full Commission made findings of fact that Dr. Hostetter and Dr. Ziel had testified that plaintiff's employment as a police officer significantly contributed to plaintiff's emotional problems. There was no expert opinion evidence that plaintiff's ailment was not job-related. The Full Commission then concluded that plaintiff "suffer[ed] from emotional and psychiatric disabilities causally connected to the stressors of her employment as a Public Safety Officer."

Defendant appeals from the Full Commission's opinion awarding plaintiff temporary total disability compensation benefits.

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

Brooks, Stevens & Pope, P.A., by Robert Simpson Welch, for defendant-appellant.

EAGLES, Judge.

I.

[1] Defendant argues that the Full Commission erred in overruling the deputy commissioner because the Full Commission did not rehear the evidence. When the Full Commission reviews a deputy commissioner's award, the Full Commission may "determine the case from the written transcript of the hearing before the deputy commissioner" and the entire record of the proceedings. *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). "Alternatively, the full Commission shall reconsider the evidence, receive further evidence, or rehear the parties or their representatives 'if good ground be shown therefor.' " *Crump v. Independence Nissan*, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993), *quoting* G.S. 97-85. The Full Commission's determination of the existence of "good ground" will not be disturbed on appeal unless it is shown that the Full Commission manifestly abused its discretion. *Crump*, 112 N.C. App. at 589, 436 S.E.2d at 592.

Here, the Full Commission reconsidered the evidence after determining that "good ground" existed. Defendant has not argued that the Full Commission abused its discretion in deciding to reconsider the evidence. Instead, defendant argues that the Full Commission should have *reheard* the evidence. Defendant cites no law to support its position. In fact, as we stated, *supra*, the law is clear that the Full Commission does not have to rehear the evidence. If the Full Commission finds "good ground," it may also choose to reconsider the evidence or receive further evidence. Accordingly, defendant's argument fails.

Defendant also argues that the Full Commission erred in overruling the deputy commissioner's opinion because the Full Commission did not make findings of fact regarding the credibility of Dr. Hostetter's and Dr. Ziel's testimony. It is well-established that the Full Commission "may adopt, modify, or reject the findings of fact of the Hearing Commissioner, and in doing so may weigh the evidence and make its own determination as to the weight and credibility of the evidence." *Hollar v. Furniture Co.*, 48 N.C. App. 489, 497, 269 S.E.2d 667, 672 (1980). Here, the Full Commission found *inter alia*:

> 20. Hendey Hostetter first testified by way of deposition in this matter on July 23, 1991. At the time of her initial testimony, Hendey Hostetter testified that during the first several years of

her treatment of plaintiff "it was not extremely clear what the cause of the stressors were." Dr. Hostetter testified that plaintiff was disabled and had been so since 1984 as a result of depression and post-traumatic syndrome. When asked the causes of the depression and post-traumatic stress syndrome, Dr. Hostetter testified at extreme length concerning a number of factors, all of which were related to plaintiff's job.

. . . .

22. Dr. Zeil [sic] testified by way of deposition on July 25, 1991. Dr. Zeil [sic] based her testimony upon her sessions with plaintiff and information she had received from Hendey Hostetter in the period shortly before the deposition. Dr. Zeil [sic] felt plaintiff's employment as a public safety officer for the city of Durham significantly contributed to her development of depression. Dr. Zeil [sic] further testified there is a recognizable link between the nature of police work and increased risk of contracting depression. Dr. Zeil [sic] felt plaintiff's work was causally connected to plaintiff's depression.

23. Plaintiff's depression was causally connected to the stressors of her work.

We conclude that these findings of fact adequately show that the Full Commission found Dr. Hostetter's and Dr. Ziel's testimony credible.

[2] Nevertheless, defendant also argues that the Full Commission erred in relying on Dr. Hostetter's and Dr. Ziel's testimony because their opinions were based on speculation instead of reasonable medical probability. Defendant argues that Dr. Hostetter's opinion was mere speculation because Dr. Hostetter relied in part on articles in magazines to form her opinion. Defendant also argues that Dr. Hostetter's opinion was nothing more than speculation because Dr. Hostetter had no "specialized training in dealing with police officers." "An expert witness may base his opinion upon facts within his own knowledge or upon information supplied to him by others; however, an expert is not competent to testify as to the issue of causal relation founded upon mere speculation or possibility." *Ballenger v. Burris Industries*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887, *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984). Here, there was competent evidence in the record to show that Dr. Hostetter based her opinion on her own observations of plaintiff, combined with her study of materials and her discussions with other professionals. Although Dr.

Hostetter had no "specialized training in dealing with police officers," there was competent evidence that Dr. Hostetter had extensive experience working with women who suffer from post-traumatic stress and depression. After carefully reviewing the record, we conclude that Dr. Hostetter's opinion was competent because it was based on "reasonable scientific certainty," *see Ballenger*, 66 N.C. App. at 567, 311 S.E.2d at 887, rather than mere speculation. We also conclude that Dr. Ziel's testimony was based on "reasonable scientific certainty." Dr. Ziel stated that she had clinical experience working with police officers and that she had several areas of expertise, including working with "a lot of women, a lot of depression." Accordingly, defendant's argument fails.

II.

[3] Defendant also argues that the Full Commission's findings of fact and conclusions of law fail to support its judgment awarding plaintiff temporary total disability compensation benefits. To be compensable as an occupational disease pursuant to G.S. 97-53(13), the disease

> 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 v. Tultex Corp., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981)). "[T]he first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365. The third element is satisfied "if the employment 'significantly contributed to, or was a significant causal factor in, the disease's development.' " *Harvey v. Raleigh Police Dept.*, 85 N.C. App. 540, 544, 355 S.E.2d 147, 150 (quoting *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 369-70), *disc. review denied*, 320 N.C. 631, 360 S.E.2d 86 (1987).

On appeal, the Full Commission's findings of fact are conclusive if supported by competent evidence, even if there is evidence that would support contrary findings. *Pollard v. Krispy Waffle*, 63 N.C. App. 354, 355-56, 304 S.E.2d 762, 763 (1983). The Full Commission's

conclusions of law are fully reviewable on appeal. *Id.* Here, the Full Commission found that:

> Throughout [plaintiff's] employment as a Police Officer and Public Safety Officer with defendant-employer, plaintiff was involved in dealing with situations in which people were the victims of or had committed criminal acts. Plaintiff was also involved in dealing with situations involving motor vehicles, including instances of personal injury or death. During her period as an officer with the Youth Division, she was involved in dealing with minors who were either committing criminal acts or against whom criminal acts had been committed.

The Full Commission also made a finding of fact that "Dr. Zeil [sic] . . . testified there is a recognizable link between the nature of police work and increased risk of contracting depression." There is competent evidence in the record to support these findings of fact. Accordingly, plaintiff presented sufficient evidence to satisfy the first two elements for finding the existence of an occupational disease.

The Full Commission found that "[w]hen asked the causes of the depression and post-traumatic stress syndrome, Dr. Hostetter testified at extreme length concerning a number of factors, all of which were related to plaintiff's job." The Full Commission also found that "Dr. Zeil [sic] felt plaintiff's employment as a public safety officer for the city of Durham significantly contributed to her development of depression. . . . Dr. Zeil [sic] felt plaintiff's work was causally connected to plaintiff's depression." There is sufficient competent evidence in the record to support these findings of fact by the Full Commission and to satisfy the third element for establishing the existence of an occupational disease. Accordingly, we conclude that the Full Commission did not err in awarding plaintiff workers' compensation benefits.

Affirmed.

Judges MARTIN, John C., and MARTIN, Mark D., concur.

PAUL A. HOMOLY, D.D.S., PETITIONER-APPELLANT v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, RESPONDENT-APPELLEE

No. COA95-358

(Filed 5 March 1996)

Administrative Law and Procedure § 46 (NCI4th)— licensing disputes between agencies and individuals—statute requiring use of informal procedures inapplicable

N.C.G.S. § 150B-22, which provides for use of informal procedures to settle licensing disputes between agencies and individuals as a precondition to the dispute becoming a contested case, does not apply to occupational licensing agencies such as respondent Board of Dental Examiners which are governed by Article 3A of the North Carolina Administrative Procedures Act. Therefore, the Board was not required to try to settle this matter informally prior to holding a hearing on the suspension of petitioner's dental license.

Am Jur 2d, Administrative Law § 299.

Appeal by petitioner from judgment entered 5 October 1994 and amended 3 November 1994 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 23 January 1996.

Hafer, McNamara, Caldwell, Carraway, Layton & McElroy, P.A., by Edmond W. Caldwell, Jr.; and White, Getgey & Meyer Co., L.P.A., by Frank R. Recker, for petitioner appellant.

Bailey & Dixon, L.L.P., by Ralph McDonald and Denise Stanford Haskell, for respondent appellee.

SMITH, Judge.

Petitioner, a licensed dentist, seeks appellate review of a superior court order affirming the North Carolina State Board of Dental Examiners final agency decision to suspend his license for five years, with a conditional reinstatement after 30 days. The Board suspended petitioner's license following a hearing conducted in response to complaints filed by several of petitioner's former patients relating to dental implants.

On 4 September 1992, the Board sent a notice of hearing to petitioner. On 13 October 1992, the Board filed an amendment to notice of hearing and on 6 January 1993, the Board filed a second amendment to notice of hearing. An administrative hearing was conducted by the Board on 16 January 1993 and on 6 May 1993, the Board issued a final agency decision suspending petitioner's license for violations of N.C. Gen. Stat. §§ 90-41(a)(12), 90-40 and 90-41(a)(6).

Petitioner filed a petition seeking judicial review pursuant to N.C. Gen. Stat. § 150B-43 on 9 June 1993, and a stay of the Board's decision was entered by the trial court on that same day. The case was heard on 26 September 1994, and in a 4 October 1994 judgment, the trial court affirmed the Board's decision. On 3 November 1994, the trial court entered an amendment to judgment.

In his assignments of error, petitioner contends that the trial court erred in concluding (1) that N.C. Gen. Stat. § 150B-22 did not apply to the dispute which is the subject of this appeal, and (2) that the Board's failure to comply with that statutory section did not constitute prejudicial error. After carefully reviewing the relevant statutory sections, we disagree and affirm.

The Board of Dental Examiners (the Board) is an agency governed by the provisions of the North Carolina Administrative Procedure Act (NCAPA). *See* N.C. Gen. Stat. § 150B-1(c) (1995). The Board is not exempt from the contested case provisions of NCAPA. *See* N.C. Gen. Stat. § 150B-1(e) (1995). However, from the foregoing premises, it does not follow, as petitioner argues, that § 150B-22 applies to the Board.

N.C. Gen. Stat. § 150B-22 is contained within Article 3 of the NCAPA. Article 3 is entitled "Administrative Hearings," and governs administrative hearings which are conducted by the Office of Administrative Hearings (OAH) and are heard by an administrative law judge (ALJ). Article 3A of the NCAPA is entitled "Other Administrative Hearings," and governs hearings involving the following agencies:

(1) Occupational licensing agencies;

(2) The State Banking Commission, the Commissioner of Banks, the Savings Institutions Division of the Department of Commerce, and the Credit Union Division of the Department of Commerce; and

(3) The Department of Insurance and the Commissioner of Insurance.

N.C. Gen. Stat. § 150B-38(a) (1995). As an occupational licensing agency, hearings before the Board of Dental Examiners are thus governed by Article 3A of the NCAPA.

N.C. Gen. Stat. § 150B-22, which is the first provision of Article 3, provides:

> It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

N.C. Gen. Stat. § 150B-22 (1995).

Article 3A does not contain an analogous provision. However, petitioner maintains that the "informal procedures" language of § 150B-22 applies to administrative hearings governed by Article 3 as well as those governed by Article 3A. In this case, the Board did not pursue informal channels of resolution with petitioner prior to sending notice of hearing. Petitioner contends that, in failing to pursue settlement through informal means, this matter did not properly become a contested case, thus, the Board had no jurisdiction to proceed to formal hearing. We disagree and hold that § 150B-22 does not apply to agencies governed by Article 3A of the NCAPA.

Article 3 of the NCAPA applies to administrative hearings conducted by OAH before an administrative law judge, while Article 3A applies to "other administrative hearings" which are conducted by state agencies enumerated in § 150B-38(a). Each article contains separate provisions governing all aspects of the administrative hearings to which they apply.

Article 3 contains provisions governing venue, conduct of hearing, depositions and discovery, rules of evidence, designation and power of ALJ, recommended decision of ALJ and final decision. Comparably, Article 3A contains provisions governing venue, depositions and discovery, conduct of hearing, presiding officer, evidence and final agency decision. Article 3 provides for mediated settlement conferences while Article 3A does not. N.C. Gen. Stat. § 150B-23.1 (1995). Article 3A provides a party who has been served with a notice of hearing the opportunity to file a written response with the agency prior to hearing. N.C. Gen. Stat. § 150B-38(d) (1995). Article 3 does not provide parties with similar opportunity. If Article 3 applied to hearings before agencies listed in Article 3A, these and other provisions would conflict.

Article 3 also provides for designation of an ALJ and enumerates ALJ powers, while Article 3A states that a presiding officer from the respective agency shall preside at the hearing. *Compare* N.C. Gen. Stat. §§ 150B-32, -33 *with* 150B-40. Furthermore, § 150B-40(e) provides that "[w]hen a majority of an agency is unable or elects not to hear a contested case," the agency is to apply to the OAH for designation of an ALJ. In such case, "[t]he provisions of [Article 3A], rather than the provisions of Article 3, shall govern a contested case . . . ." N.C. Gen. Stat. § 150B-40(e) (1995). If the legislature had intended Article 3 to apply to Article 3A hearings and procedure, it would not have been necessary to include language that Article 3A provisions rather than Article 3 provisions apply when an Article 3A agency requests an ALJ to conduct an agency hearing.

Both articles also have provisions in which the language is identical. Each have duplicate provisions dealing with depositions and evidence. *See* N.C. Gen. Stat. §§ 150B-29(b), -41(b) and 150B-28(a), -39(b). Several other provisions of each article are very similar, with only slightly different wording. *See* N.C. Gen. Stat. §§ 150B-28(b), -39(b) and 150B-23(c), -38(c). Again, if the legislature had intended Article 3 provisions to be read into Article 3A, it would not have been necessary to include the same or similar provisions in each article. Clearly, the legislature intended each article to fully govern the administrative hearings to which each applies without overlap.

Article 3, a general provision, applies to all administrative agency hearings not covered by Article 3A. Those agencies covered under Article 3A are specifically listed in N.C. Gen. Stat. § 150B-38(a). "It is a well established principle of statutory construction that a section of

a statute dealing with a specific situation controls, with respect to that situation, [over] sections which are general in their application." *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citing *Utilities Comm. v. Coach Co.*, 236 N.C. 583, 73 S.E.2d 562). In this case, hearings conducted by occupational licensing boards and banking and insurance regulators are governed exclusively by the specific provisions of Article 3A, rather than the general provisions of Article 3 of the NCAPA.

Petitioner argues that N.C. Gen. Stat. § 150B-1(e) mandates that § 150B-22 applies to Article 3A as well as Article 3 hearings. N.C. Gen. Stat. § 150B-1(e) provides that "[t]he contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter." N.C. Gen. Stat. § 150B-1(e) (1995). The Board is not expressly exempted from Chapter 150B. Petitioner argues that § 150B-22 is a contested case provision which, therefore, governs Article 3A agencies. As we have discussed, many of the provisions of 3 and 3A would be in conflict if they were construed to apply together. Thus, the contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely.

Furthermore, the language of § 150B-22 which petitioner argues should apply to the Board, regarding informal settlement procedures, is not a "contested case provision" as that phrase is used in § 150B-1(e). Rather, it is merely a precondition which should be met by Article 3 agencies before the dispute between the parties ever becomes a "contested case" as defined by § 150B-2(2). These assignments of error are overruled.

In petitioner's remaining assignment of error he maintains that the judgment entered by the superior court affirming the final agency decision of the Board is contrary to the evidence in the whole record and is erroneous as a matter of law. In determining whether an agency's decision is supported by substantial evidence, we apply the "whole record" test. *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C. App. 527, 406 S.E.2d 613 (1991). The "whole record" test requires that "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 68-69, 306 S.E.2d 534, 536 (1983). After reviewing the evidence in the record we find ample substantial evidence to support the agency's findings and conclusions as to each claim. Therefore, this assignment of error is overruled.

For the foregoing reasons, the decision of the Board of Dental Examiners to suspend petitioner's license, with a conditional reinstatement in 30 days, is

Affirmed.

Judges JOHNSON and JOHN concur.

STATE OF NORTH CAROLINA v. STEVEN WAYNE BELL

No. COA95-291

(Filed 5 March 1996)

Criminal Law § 6 (NCI4th)— misdemeanor charged in indictment—no jurisdiction of superior court

The superior court lacked jurisdiction over defendant's case where defendant was charged with the misdemeanor of attempted second degree kidnapping, and that charge was never elevated to a felony pursuant to N.C.G.S. § 14-3(b) by an allegation that the offense was "infamous" or "done in secrecy and malice" or done "with deceit and intent to defraud."

Am Jur 2d, Criminal Law §§ 24, 25.

Appeal by defendant from order entered 29 July 1994 and judgment and commitment entered 17 November 1994 by Judge Wiley F. Bowen in Cumberland County Superior Court. Heard in the Court of Appeals 9 January 1996.

This appeal arises from defendant's conviction for attempted second degree kidnapping. At trial, the State's evidence tended to show that during the evening of 31 July 1992, Lisa Bunner and her nine-year-old daughter went to the Winn-Dixie grocery store in Falcon Village Shopping Center in Fayetteville, North Carolina. After Ms. Bunner finished her shopping, she and her daughter returned to their parked car in a well-lighted portion of the parking lot. Ms. Bunner unlocked the driver's side door and then reached over and unlocked the passenger's side door for her daughter. Ms. Bunner, still standing outside the car, reached into the car again to unlock the back door on her side of the car. When she turned, she realized that a man, later identified as defendant, was standing behind the back door next to her. Defendant was carrying a case of beer and Ms. Bunner could smell alcohol on his

breath. Ms. Bunner testified that defendant said "I'd like to get to know you better" and Ms. Bunner then asked defendant to leave. Defendant moved closer to Ms. Bunner while she tried to pick up the groceries she had dropped on the ground. As she pushed against him to try to get into her car, she noticed that her daughter had run into the grocery store. Ms. Bunner got into her car, but defendant then pulled out a knife and stuck it to her ribs. Defendant began forcing his way into the car but Ms. Bunner "squirmed" across the front seat, got out of the car through the passenger side door, and ran to the store. Defendant ran from the parking lot, but Ms. Bunner described defendant to the law enforcement officer who arrived on the scene. Defendant was apprehended shortly thereafter not far from the grocery store.

Defendant was indicted on 16 November 1992 for attempted second degree kidnapping. A jury found defendant guilty of attempted second degree kidnapping and the trial court sentenced defendant to ten years in prison. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Harriet F. Worley, for the State.

Boose & McSwain, by Ronald D. McSwain, for defendant-appellant.

EAGLES, Judge.

Defendant argues that the superior court erred in denying defendant's motion to dismiss because the superior court lacked jurisdiction to try the case. The superior court has "exclusive, original jurisdiction" to try defendants accused of felonies. G.S. 7A-271(a). The district court has jurisdiction over the trial of misdemeanors. G.S. 7A-272(a). Defendant argues that the superior court lacked jurisdiction over defendant's case because defendant was charged with a misdemeanor and the indictment did not raise the offense to a felony pursuant to G.S. 14-3(b). We agree.

An attempt to commit a felony is a misdemeanor. *State v. Collins*, 334 N.C. 54, 59, 431 S.E.2d 188, 191 (1993). Defendant was indicted for "Attempted Second Degree Kidnapping . . . for the purpose of facilitating the commission of a felony." Pursuant to G.S. 14-3(b), a misdemeanor is elevated to a Class H felony if the misdemeanor offense is "infamous, done in secrecy and malice, or with deceit and intent to defraud." Here, the misdemeanor charge of attempted second degree kidnapping was never elevated to a Class H felony.

A bill of indictment "must allege all essential elements of the offense to be charged . . . [so] that the defendant may be adequately informed of the offense with which he is charged . . . [and may] have a reasonable opportunity to prepare his defense." *State v. Preston*, 73 N.C. App. 174, 176, 325 S.E.2d 686, 688 (1985). The indictment charging defendant with attempted second degree kidnapping stated that defendant "unlawfully, willfully and feloniously did attempt to kidnap Lisa Bunnell [sic], . . . by unlawfully restraining her and removing her from one place to another, without her consent, and for the purpose of facilitating the commission of a felony." The indictment failed to charge that the offense was "infamous" or "done in secrecy and malice" or done "with deceit and intent to defraud." To elevate the misdemeanor offense to a felony pursuant to G.S. 14-3(b), the indictment must specifically state that the offense was "infamous" or "done in secrecy and malice" or done "with deceit and intent to defraud." *State v. Rambert*, 116 N.C. App. 89, 94, 446 S.E.2d 599, 602 (1994), *reversed in part and remanded in part on other grounds*, 341 N.C. 173, 459 S.E.2d 510 (1995); *State v. Clemmons*, 100 N.C. App. 286, 292, 396 S.E.2d 616, 619 (1990); *Preston*, 73 N.C. App. at 176, 325 S.E.2d at 688. The indictment here failed to notify defendant that the State sought a conviction for a felony; the indictment only charged defendant with a misdemeanor. Accordingly, the superior court did not have subject matter jurisdiction over the case. *See State v. Jarvis*, 50 N.C. App. 679, 681, 274 S.E.2d 852, 853 (1981) (stating that the superior court does not have jurisdiction over an offense if the indictment fails to allege the elements of a felony).

If the State had properly alleged in the indictment that the offense charged was "infamous," *see Rambert*, 116 N.C. App. at 94, 446 S.E.2d at 602, we believe that attempted second degree kidnapping would meet the requirements of an "infamous" offense within the meaning of G.S. 14-3(b). *See State v. Mann*, 317 N.C. 164, 172, 345 S.E.2d 365, 370 (1986) (holding solicitation to commit common law robbery is "an act of depravity[,] . . . involv[es] moral turpitude[,] . . . and [reveals] a mind fatally bent on mischief and a heart devoid of social duties").

Because we hold that the superior court lacked subject matter jurisdiction over defendant's case, we need not address defendant's remaining assignments of error.

Vacated and remanded.

Judges MARTIN, John C., and MARTIN, Mark D., concur.

IN RE FORECLOSURE OF GODWIN

[121 N.C. App. 703 (1996)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY ELLIS R. GODWIN, UNMARRIED, AND NETTIE L. GODWIN, WIDOW, DATED JULY 23, 1993, RECORDED IN BOOK 4097, PAGE 1748, GUILFORD COUNTY REGISTRY TO JOSEPH G. MADDREY, TRUSTEE.

No. COA94-1164

(Filed 5 March 1996)

Mortgages and Deeds of Trust § 83 (NCI4th)— competency of mortgagor—equitable defense to foreclosure—issue not raised in N.C.G.S. § 45-21.16 hearing

The relief potentially available because of a mortgagor's incompetency is equitable in nature; accordingly, the incompetency of a mortgagor to execute a note and deed of trust is an equitable rather than a legal defense to foreclosure under a power of sale clause and may not be raised in a pre-foreclosure hearing under N.C.G.S. § 45-21.16, either before the clerk or before the superior court on appeal. One way to raise such a defense to foreclosure by a power of sale is to bring an action to enjoin foreclosure under N.C.G.S. § 45-21.34.

Am Jur 2d, Mortgages §§ 760, 761.

Appeal by respondent from order entered 18 July 1994 by Judge Hollis M. Owens, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 18 October 1995.

Turner Enochs & Lloyd, P.A., by William J. O'Malley, for respondent-appellant Delano Godwin, acting individually and on behalf of the Estate of Ellis R. Godwin.

Joseph L. Anderson for appellee Isometrics, Inc. (Brief was filed by Smith Helms Mulliss & Moore, L.L.P., by Gregory G. Holland, who was allowed to withdraw as counsel of record by order of this Court dated 3 January 1996).

LEWIS, Judge.

At issue in this appeal is whether a superior court judge, in a pre-foreclosure hearing under N.C. Gen. Stat. section 45-21.16, must hear evidence concerning the competency of a mortgagor to execute a deed of trust.

On 23 July 1993 Ellis R. Godwin, unmarried, and his mother, Nettie Godwin, widow, executed a note and deed of trust recorded in Book 4097, Page 1748, Guilford County Registry. Both Ellis and Nettie Godwin died soon afterward. On 10 May 1994, foreclosure proceedings were initiated pursuant to a power of sale provision in the deed of trust for the benefit of appellee Isometrics, Inc., the owner and holder of the note and deed of trust.

On 14 June 1994 a hearing pursuant to G.S. section 45-21.16 was held before Sharon R. Williams, Assistant Clerk of Superior Court ("the clerk") in Guilford County. At this hearing, respondent Delano Godwin, acting individually and on behalf of the Estate of Ellis R. Godwin, sought to offer evidence that Ellis R. Godwin was incompetent at the time he signed the note and deed of trust. Pursuant to G.S. section 45-21.16, the clerk found proper notice, a valid debt, default, and a right to foreclose under the deed of trust and ordered the sale to proceed. Respondent appealed the clerk's order to superior court pursuant to G.S. section 45-21.16(d) asserting that the clerk erred by not hearing the evidence of incompetency.

The appeal was heard before Judge Hollis M. Owens, Jr. By order entered 18 July 1994, Judge Owens refused to hear any evidence of incompetency on the grounds that he did not have jurisdiction to hear this issue in an appeal brought under G.S. section 45-21.16. He further ruled that the issue of incompetency must be raised by an action to enjoin the foreclosure under N.C. Gen. Stat. section 45-21.34. Respondent appeals this order.

In a pre-foreclosure hearing under a power of sale clause in a deed of trust, the Clerk of Superior Court in the county where the land is located makes four findings after hearing the parties' evidence. Before authorizing a foreclosure sale, the clerk must find "the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice" to entitled persons. G.S. § 45-21.16(d) (1991). Upon appeal *de novo* from the clerk's order authorizing the trustee to proceed with the sale, the superior court is limited to determining these same four issues. *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993).

Respondent contends that the court should have heard evidence of whether Ellis R. Godwin was incompetent when the note and deed of trust were executed because this would affect the validity of the debt.

Evidence of legal defenses that tend to negate any of the four findings made under G.S. section 45-21.16 may be raised and considered at the hearing before the clerk or on an appeal therefrom. *Id.* at 374-75, 432 S.E.2d at 859. In contrast, equitable defenses to foreclosure may not be raised in a hearing or appeal pursuant to G.S. section 45-21.16 but must be raised in an action to enjoin the foreclosure pursuant to G.S. section 45-21.34. *Id.* at 374, 432 S.E.2d at 859.

The question, then, is whether, in a hearing or appeal under G.S. section 45-21.16(d), proof of a mortgagor's lack of competency to execute a note and deed of trust is a legal or an equitable defense to the validity of a debt.

A deed executed by an incompetent grantor may be set aside by a suit in equity to rescind or cancel the deed. *See Sprinkle v. Wellborn*, 140 N.C. 163, 173, 52 S.E. 666, 669 (1905) (discussing circumstances when equity will grant relief). But such relief is not available as a matter of right. *See id.* at 173, 175, 52 S.E. at 669, 670. Rather, a court in the exercise of its equitable jurisdiction must weigh the equities of a particular case to reach a just resolution. *Id.* For example, if a contract, note or deed is held by a good faith purchaser for value who took without notice of the incompetency of a grantor and without any fraud or unfair dealing, a court may refuse to cancel the deed as to that purchaser if the parties cannot be put *in statu quo*. *Wadford v. Gillette*, 193 N.C 413, 420, 422, 137 S.E. 314, 317 (1927); *Sprinkle*, 140 N.C. at 175, 52 S.E. at 670; *Riggan v. Green*, 80 N.C. 236, 239 (1879).

The relief potentially available because of a mortgagor's incompetency is equitable in nature. Accordingly, the incompetency of a mortgagor is an equitable rather than a legal defense to foreclosure and may not be raised in a hearing under G.S. section 45-21.16, either before the clerk or before the superior court on appeal. As the trial court properly concluded, one way to raise such a defense to foreclosure by power of sale in a deed of trust is to bring an action to enjoin the foreclosure under G.S. section 45-21.34.

Affirmed.

Judges WALKER and MARTIN, MARK D. concur.

HARRY L. KING PLAINTIFF-APPELLANT v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, T.W. ANDERS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR, ENFORCEMENT SECTION, DIVISION OF MOTOR VEHICLES N.C. DEPARTMENT OF TRANSPORTATION, FRANK W. ARRANT, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT SUPERVISOR, ENFORCEMENT SECTION, DIVISION OF MOTOR VEHICLES N.C. DEPARTMENT OF TRANSPORTATION, AND W.M. NICHOLS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SERGEANT, DIVISION OF MOTOR VEHICLES, N.C. DEPARTMENT OF TRANSPORTATION, DEFENDANT-APPELLEES

No. COA95-226

(Filed 5 March 1996)

1. **Conspiracy § 12 (NCI4th)— civil conspiracy alleged—mere speculation—summary judgment proper**

   The trial court did not err in granting summary judgment for defendants on plaintiff's civil conspiracy claim which arose from his dismissal as an employee of NCDOT where plaintiff presented no more than mere speculation an agreement existed between any two of the defendants to do an unlawful act.

   Am Jur 2d, Conspiracy §§ 49 et seq.

2. **Judgments § 274 (NCI4th)— tortious interference with contract—dismissal justified—issue previously litigated**

   The trial court properly granted summary judgment for defendants on plaintiff's tortious interference with contract claim where plaintiff had previously fully litigated and lost the argument that his dismissal as an employee of NCDOT was not justified, and based on the doctrine of issue preclusion, he was barred from re-litigating the issue.

   Am Jur 2d, Judgments §§ 415 et seq.

   Plaintiff's right to file notice of dismissal under Rule 41(a)(1)(i) of Federal Rules of Civil Procedure. 54 ALR Fed. 214.

3. **Judgments § 274 (NCI4th)— racial discrimination—relitigation of issue barred**

   The trial court properly granted summary judgment for defendants on plaintiff's racial discrimination claim, since the issue of racial discrimination was addressed in plaintiff's prior action, and issue preclusion barred its relitigation.

   Am Jur 2d, Judgments §§ 415 et seq.

Appeal by plaintiff from judgment entered 10 November 1994 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 17 November 1995.

Rosenthal & Putterman, by Charles M. Putterman, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hal F. Askins and Assistant Attorney General Bryan E. Beatty, for defendant-appellees.

MARTIN, Mark D., Judge.

Plaintiff Harry King (King) appeals from grant of summary judgment in favor of defendant North Carolina Department of Transportation, Division of Motor Vehicles (NCDOT) and defendants T.W. Anders (Anders), Frank W. Arrant, Jr. (Arrant), and W.M. Nichols (Nichols), individually and in their official capacity.

On 18 April 1991 King was dismissed from his position with NCDOT. Pursuant to N.C. Gen. Stat. § 126, *et seq.*, King filed a contested case hearing (Case I). Administrative Law Judge Michael R. Morgan conducted an evidentiary hearing and, on 13 July 1992, issued a recommended decision concluding the dismissal was for "just cause." On 18 February 1993 the State Personnel Commission (SPC) adopted Judge Morgan's finding of "just cause." King appealed to the Wake County Superior Court, which affirmed the SPC's finding of "just cause." King prosecuted no further appeals in Case I.

On 25 August 1993 King filed another action (Case II) alleging wrongful discharge under federal anti-discrimination statutes and state tort theories. On 6 October 1994 the trial court, pursuant to N.C.R. Civ. P. 12(b)(1), (2), and (6), dismissed the majority of King's claims. On 10 November 1994 the trial court entered summary judgment in favor of defendants on King's remaining claims.

On appeal, King contends the trial court erred by granting summary judgment on his: (1) civil conspiracy and tortious interference with economic relations claims because genuine issues of material fact exist; and (2) Title VII and 42 U.S.C. § 1983 claims as those claims were not precluded by *res judicata* or collateral estoppel.

At the outset we note 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, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

I.

[1] We first consider King's allegation a genuine issue of material fact existed regarding his civil conspiracy claim.

To recover damages resulting from a civil conspiracy, King must prove: (1) there was "an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way"; and (2) "as a result of acts done in furtherance of, and pursuant to, the agreement" he suffered damage. *Lenzer v. Flaherty*, 106 N.C App. 496, 510-511, 418 S.E.2d 276, 285 (*quoting Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987) (citations omitted)), *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992).

It is well settled that an allegation, without any supporting facts, is insufficient to withstand summary judgment. *Friel v. Angell Care Inc.*, 113 N.C. App. 505, 510, 440 S.E.2d 111, 114 (1994). Put simply, "[a] party cannot prevail against a motion for summary judgment by relying on 'conclusory allegations, unsupported by facts.' " *Id.* (*quoting Campbell v. Board of Education of Catawba Co.*, 76 N.C. App. 495, 498, 333 S.E.2d 507, 510 (1985), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 878 (1986)).

We believe, after carefully reviewing the present record, that King presented no more than mere speculation an agreement existed between any two of the defendants to do an unlawful act. Therefore, we find King failed to proffer sufficient evidence an agreement existed between any two defendants and, accordingly, affirm the trial court's grant of summary judgment on King's civil conspiracy claim.

II.

We next consider whether the trial court erred in granting summary judgment to defendants on King's tortious interference with economic relations, Title VII, and 42 U.S.C. § 1983 claims.

A defendant is entitled to judgment as a matter of law if it can establish "plaintiff cannot overcome an affirmative defense or legal bar to a claim." *Wilder v. Hobson*, 101 N.C. App. 199, 201, 398 S.E.2d 625, 627 (1990). The companion doctrines of claim preclusion and issue preclusion—legal bars to a claim—were "developed by the courts . . . to serve the present-day dual purpose of protecting litigants from the burden of relitigating previously decided matters and of promoting judicial economy by preventing needless litigation." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986).

Claim preclusion forecloses subsequent prosecution of an entire cause of action if, (1) a previous suit resulted in a final judgment on the merits, (2) the present suit involves the same cause of action, and is (3) between the same parties or those in privity with them. *Thomas M. McInnis*, 318 N.C. at 429, 349 S.E.2d at 557.

Issue preclusion, on the other hand, operates to bar re-litigation of a single issue within a cause of action where the following requirements are met:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Johnson v. Smith, 97 N.C. App. 450, 452-453, 388 S.E.2d 582, 583-584 (*quoting King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973)), *disc. review denied*, 326 N.C. 596, 393 S.E.2d 878 (1990).

A.

[2] We now consider whether the doctrine of issue preclusion bars King from prosecuting his tortious interference with contract claim.

The five elements of the *prima facie* case for tortious interference with contract are:

> First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. Second, that the outsider had knowledge of the plaintiff's contract with the third person. Third, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. Fourth, that in so doing the outsider acted without justification. Fifth, that the outsider's act caused the plaintiff actual damages.

Lenzer, 106 N.C. App. at 512, 418 S.E.2d at 286 (*quoting Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181 (1954), *reh'g dismissed*, 242 N.C. 123, 86 S.E.2d 916 (1955)).

Initially we note, were it not for the dispositive effect of issue preclusion, the classification of Anders, Arrant, and Nichols as "non-outsiders," with the attendant qualified immunity, would merit consideration. *See, e.g., Smith v. Ford Motor Co.*, 289 N.C. 71, 87-88, 221 S.E.2d 282, 292-293 (1976).

In any event, Case I established King was dismissed for "just cause." It is beyond question the finding of "just cause" was integral to upholding King's dismissal. *See* N.C. Gen. Stat. § 126-35(a) (1995) (career State employees cannot be dismissed without "just cause"). Put simply, in Case I, King fully litigated, and lost, the argument his dis-

missal was not justified. Therefore, based on the doctrine of issue preclusion, we conclude King is barred from re-litigating whether his dismissal was justified and, accordingly, affirm the trial court's grant of summary judgment on King's tortious interference with contract claim.

B.

[3] Finally, we must determine whether the trial court appropriately granted summary judgment on King's Title VII and 42 U.S.C. § 1983 claims.

Defendants contend either claim preclusion or issue preclusion applies in the present case because, among other things, the "just cause" determination in Case I necessarily resolved the issue of whether King's duty assignment was racially motivated—the crux of King's racial discrimination claims.

We note claim preclusion does not bar racial discrimination claims filed after a finding of "just cause." *See Davenport v. North Carolina Dept. of Transp.*, 3 F.3d 89, 94-95 (4th Cir. 1993); *Crump v. Bd. of Education*, 326 N.C. 603, 612-613, 392 S.E.2d 579, 583-584 (1990), *disc. review denied*, 332 N.C. 665, 424 S.E.2d 400, *recons. dismissed*, 333 N.C. 166, 424 S.E.2d 908 (1992); *Spry v. Winston-Salem/Forsyth Bd. of Educ.*, 105 N.C. App. 269, 273, 412 S.E.2d 687, 689, *aff'd*, 332 N.C. 661, 422 S.E.2d 575 (1992). Therefore, only the potential applicability of issue preclusion to the present case merits consideration. *See Davenport*, 3 F.3d at 97 n. 9.

King maintained before the SPC, and now argues to this Court, "that he did not base his employment appeal on any claim of discrimination against him . . . ." A party's unilateral recitation of an intention to reserve an issue, however, has no affect on the applicability of issue preclusion where the record indicates the issue was actually litigated in, and necessary to the outcome of, the prior case. *See Thomas M. McInnis*, 318 N.C. at 428, 349 S.E.2d at 557.

In cases involving claim preclusion or issue preclusion, we note the better course is to include a transcript of the prior proceedings in the appellate record. *See Cellu Products Co. v. G.T.E. Products Corp.*, 81 N.C. App. 474, 477-478, 344 S.E.2d 566, 568 (1986) (this Court can only "judicially know what appears of record"); *Produce Corp. v. Covington Diesel*, 21 N.C. App. 313, 315, 204 S.E.2d 232, 234, *cert. denied*, 285 N.C. 590, 205 S.E.2d 721 (1974) (where defendant asserts affirmative defense, it must ensure record contains all facts necessary for review). Nevertheless, after careful review of the record, including the recommended decision issued by Administrative Law Judge Michael R. Morgan, we believe the present record is sufficient

to determine whether King actually litigated the racial discrimination issue in Case I.

It is undisputed that King was dismissed for insubordination, which the Policies and Procedures Manual of the DMV Enforcement Section defines, in pertinent part, as "[t]he failure or deliberate refusal of any member to obey any lawful order given by any superior officer . . . ." (emphasis added). Judge Morgan concluded, in his recommended decision, that King committed insubordination "through his deliberate refusal to obey the lawful order given to him by his supervisor . . . to perform a license plate inventory . . . ." (emphasis added). The SPC thereafter adopted this finding in its decision and order.

Assuming evidence of racial discrimination was actually presented during Case I, the administrative law judge and the SPC necessarily resolved, in defendants favor, any allegations made by King that his assignment was racially discriminatory and therefore unlawful. *See In re Rogers*, 297 N.C. 48, 56, 253 S.E.2d 912, 918 (1979) (Administrative agencies must find facts and reach conclusions on the "factual issues [] presented" by the parties).

The present record discloses that King testified: he was "the sole black process officer in the Raleigh office"; he "told Arrant that there was an apparent racial problem [with duty assignments] . . . ."; and, in fact, "the entire matter was racially motivated." It is apparent from these findings King presented evidence during Case I that he was assigned inventory duty because of racial animus among his superiors. Therefore, under *Rogers*, we believe Judge Morgan, and the SPC, necessarily resolved the issue of racial discrimination by concluding the duty assignment was lawful.

Accordingly, because we conclude, as the trial court determined, that issue preclusion bars relitigation of the racial discrimination issue,[1] we affirm the trial court's grant of summary judgment on King's Title VII and 42 U.S.C. § 1983 claims.

Affirmed.

Judges LEWIS and JOHN concur.

1. We note that issue preclusion only operates as a bar where, as here, plaintiff, as master of his case-in-chief, elects to proffer evidence that racial discrimination precludes a finding of "just cause" for his dismissal.

JAIME RIOS MARTINEZ, PLAINTIFF v. DONALD RAY LOVETTE, LINDA JONES, DONALD JONES, INTEGON INSURANCE COMPANY AND MARYLAND INSURANCE GROUP, DEFENDANTS

No. COA95-209

(Filed 5 March 1996)

Insurance § 530 (NCI4th); Workers' Compensation § 82— uninsured motorist coverage—reimbursement of workers' compensation benefits—determination by superior court error

The Industrial Commission and not the superior court was the only agency authorized to determine whether and what portion, if any, defendant workers' compensation carrier was entitled to receive of the $50,000 uninsured motorist coverage as reimbursement for compensation benefits defendant paid to plaintiff since the superior court may determine the amount of the employer's lien *only* when a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or when a settlement agreement has been agreed upon by the employee and the third party, and in this case the superior court rendered judgment against the tortfeasors for $300,000, which was more than sufficient to compensate defendant for the $26,297.64 in workers' compensation benefits it had paid on behalf of plaintiff, and plaintiff and the tortfeasors had not entered into any settlement agreement. N.C.C.S. §§ 97-10.2(f)(1), 97-10.2(j).

Am Jur 2d, Workers' Compensation § 56.

Uninsured motorist insurance: Reduction of coverage by amounts payable under medical expense insurance. 24 ALR3d 1353.

Uninsured motorist coverage: validity and effect of policy provision purporting to reduce coverage by amount paid under workmen's compensation law. 24 ALR3d 1369.

Uninsured and underinsured motorist coverage: recoverability under uninsured or underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

Appeal by defendant from judgment entered 8 November 1994 by Judge Robert L. Farmer in Harnett County Superior Court. Heard in the Court of Appeals 15 November 1995.

On 21 July 1993, plaintiff was employed by Broadwell's Nursery in Angier, North Carolina. He was operating a tractor at work when an automobile ran into the rear of the tractor, causing the tractor to roll over and crush plaintiff underneath it. Plaintiff sustained permanent and painful injuries as a result of the accident.

On 9 March 1994, plaintiff sued Donald Ray Lovette, who was driving the automobile, and the owners of the automobile, Donald and Linda Jones. They were uninsured. Plaintiff previously had purchased a policy of insurance from Integon Insurance Company (hereinafter Integon) which provided $50,000 in coverage to each person injured in an automobile accident caused by an uninsured motorist. Plaintiff named Integon as a party defendant in his suit to permit Integon to pay the $50,000 into court and to permit the court to distribute the money. Plaintiff also named as a defendant Maryland Insurance Group (hereinafter defendant), the workers' compensation carrier for Broadwell's Nursery, to permit the trial court to determine what portion, if any, of the $50,000 uninsured motorist coverage defendant was entitled to receive as reimbursement for money it had paid pursuant to the workers' compensation coverage on behalf of plaintiff for his medical bills.

On 12 April 1994, Integon moved in superior court to be permitted to pay its policy limit of $50,000 into court and be dismissed from the lawsuit. The superior court granted Integon's motion and dismissed Integon with prejudice on 19 May 1994. On 23 June 1994, defendant filed a motion to dismiss. After a hearing, the superior court allowed the motion but allowed plaintiff to amend his complaint against defendant to allege a declaratory judgment action. On 19 July 1994, plaintiff filed an amended complaint, asking the superior court to determine that defendant was not entitled to enforce its workers' compensation subrogation lien against any of the $50,000 paid by Integon as uninsured motorist coverage. Defendant answered and then filed a motion for summary judgment. On 31 October 1994 after a hearing, the superior court denied defendant's summary judgment motion. The superior court found that defendant had paid $26,297.64 on behalf of plaintiff, but the superior court concluded it had the discretion, pursuant to G.S. 97-10.2(j), to disburse $16,352.21 of the $50,000 to defendant in full satisfaction of its lien. The superior court ordered the remaining money to be distributed to plaintiff, his attorney, and the court for court costs. On 31 October 1994, the superior court also found the uninsured driver and automobile owners, Donald Ray Lovette and Donald and Linda Jones, jointly and severally

liable to plaintiff for $300,000 in damages. The $50,000 in uninsured motorist coverage was distributed on 7 and 15 December 1994 pursuant to the superior court's judgment ordering disbursement.

Bain & McRae, by Edgar R. Bain, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, by George W. Dennis III and Bryan T. Simpson, for defendant-appellant Maryland Insurance Group.

EAGLES, Judge.

We first note that plaintiff argues this appeal should be dismissed because defendant did not order the transcript of the evidence within the time allowed by Rule 7 of the North Carolina Rules of Appellate Procedure. Plaintiff first made this motion in superior court; the superior court denied plaintiff's motion. The denial is not the subject of an assignment of error here. Accordingly, this issue is not before us.

I.

Defendant argues that the superior court exceeded its authority under G.S. 97-10.2 when it ordered disbursement of the funds paid by Integon. G.S. 97-10.2(g) provides that the workers' compensation carrier is subrogated to all rights and liabilities of the employer. G.S. 97-10.2(f)(1) provides in pertinent part:

> If the employer has filed a written admission of liability for benefits under [the Workers' Compensation Act] with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> . . . .
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

We have previously interpreted these two provisions of G.S. 97-10.2 to provide that the workers' compensation insurance carrier who has paid money on behalf of the injured employee has a lien on "any payment, including uninsured/underinsured motorist insurance pro-

ceeds, made to the employee by or on behalf of a third party as a result of the employee's injury." *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 134, 392 S.E.2d 647, 649, *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990). *See Buckner v. City of Asheville*, 113 N.C. App. 354, 360-61, 438 S.E.2d 467, 470, *disc. review denied*, 336 N.C. 602, 447 S.E.2d 385 (1994) (where we said "[t]his Court recently held that an employer who has paid workers' compensation benefits to its employee is entitled to a lien on the employee's underinsured [and uninsured] motorist benefits received by the employee in an action by the employee against the tortfeasor"). *See also Bailey v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 47, 54, 434 S.E.2d 625, 630 (1993) (where we held that a workers' compensation carrier has a subrogation lien on uninsured motorist policy proceeds).

G.S. 97-10.2(j) provides that the superior court may determine the amount, if any, of the employer's lien (and accordingly the workers' compensation insurance carrier's lien) *only* when "a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or . . . [when] a settlement has been agreed upon by the employee and the third party." Here, the superior court rendered judgment against the tortfeasors for $300,000 (and Integon paid into court $50,000) which was more than sufficient to compensate defendant for the $26,297.64 it had paid on behalf of plaintiff. Furthermore, plaintiff and the tortfeasors had not entered into any settlement agreement. Plaintiff argues that "third party" in G.S. 97-10.2(j) includes Integon and that Integon and plaintiff entered into a settlement when Integon agreed to pay the $50,000 into court. We disagree. In *Buckner*, 113 N.C. App. at 359, 438 S.E.2d at 470, we interpreted "third party" to mean the tortfeasor, and the applicable language of G.S. 97-10.2(j) has not been amended since *Buckner* was decided. On this record, we hold that the superior court did not have authority to distribute the uninsured motorist policy proceeds. In this case, the Industrial Commission, acting pursuant to G.S. 97-10.2(f)(1), was the only agency authorized to determine whether and what portion, if any, defendant was entitled to receive of the $50,000 uninsured motorist coverage as reimbursement for money defendant paid on behalf of plaintiff pursuant to the workers' compensation insurance coverage.

Reversed.

Chief Judge ARNOLD and Judge MARTIN, John C., concur.

LINA LEE S. STOUT, PLAINTIFF v. THE CITY OF DURHAM, DEFENDANT

OAKRIDGE 58 INVESTORS, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF v. THE CITY OF DURHAM, DEFENDANT

No. COA95-13

(Filed 5 March 1996)

Eminent Domain § 90 (NCI4th)— sewer outfall for benefit of developer—right of others to connect to service—contribution to prosperity of community—no condemnation for private purpose—no right to preliminary injunction

Plaintiffs did not produce evidence in support of their motion for a preliminary injunction sufficient to forecast a likelihood that they would prevail upon their claim that defendant city's threatened condemnation of their property was for a private purpose, was unconstitutional, and was an unlawful exercise of its power of eminent domain where the city was undertaking the condemnation of the property to construct a sewer outfall pursuant to an agreement with and as an accommodation to a private developer of a shopping center; though the proposed sewer outfall would confer a private benefit upon the developer, other property owners to whom the city owed a duty to provide sewer service would have the right, equal to that of the developer, to connect to the expanded system; and provision of sewer services to a substantial retail shopping center would contribute to the general welfare and prosperity of the community, which benefits from economic growth, and therefore would satisfy the "public benefit" test.

Am Jur 2d, Eminent Domain § 43.

Appeal by plaintiffs from order entered 20 October 1994 by Judge Henry V. Barnette, Jr., in Durham County Superior Court. Heard in the Court of Appeals 5 October 1995.

Randall, Jervis & Hill, by Robert B. Jervis, for plaintiff-appellants.

Stubbs, Cole, Breedlove, Prentis & Biggs, by Richard F. Prentis, Jr., and David K. Williams, Jr., for defendant-appellee.

MARTIN, John C., Judge.

In separately filed, but essentially identical complaints, plaintiffs alleged that defendant City of Durham had given notice of its intent to acquire by condemnation portions of their respective properties for construction of a proposed sewer outfall. Plaintiffs alleged that the condemnation was being undertaken for a private, rather than public, purpose and that they intended to assert the City's lack of authority to condemn their property as a defense to the threatened condemnation action. Plaintiffs sought injunctive relief to restrain the vesting of title and right of possession in the City pursuant to G.S. § 40A-42, until the issue of the City's authority to condemn the property could be decided as provided by G.S. § 40A-47.

The cases were consolidated for hearing and were heard by the trial court upon plaintiffs' motion for a preliminary injunction. The trial court found facts and concluded:

> (1) The plaintiffs have not shown a likelihood of success on the merits of their action and there is not probable cause to believe that plaintiffs will ultimately prevail in this action and establish a private purpose and therefore an unconstitutional basis for this condemnation.

The trial court denied the motion for a preliminary injunction and plaintiffs appealed.

The decision to grant or deny a preliminary injunction is ordinarily within the sound discretion of the trial court and the burden is upon the appellant to show error. *Huggins v. Board of Education*, 272 N.C. 33, 157 S.E.2d 703 (1967). Even so, the standard of appellate review of an order granting or denying a preliminary injunction is essentially *de novo*; the appellate court is not bound by the trial court's findings, but may weigh the evidence and find the facts for itself. *A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983); *N.C. Electric Membership Corp. v. N.C. Dept. of Econ. & Comm. Dev.*, 108 N.C. App. 711, 425 S.E.2d 440 (1993).

Generally, a preliminary injunction will be issued only where: (1) the plaintiff is able to show a likelihood of success on the merits of the case and (2) the plaintiff is likely to sustain irreparable harm, or, in the opinion of the court, the injunction is necessary to protect the plaintiff's rights during the course of litigation. *A.E.P. Industries*, 308 N.C. at 401, 302 S.E.2d at 759-60. Thus, the initial question must be

whether plaintiffs are able to show a likelihood of success on the merits. *Id.*

Plaintiffs alleged, and offered evidence tending to show, that the City of Durham was undertaking the condemnation of their property and the construction of the sewer easement, pursuant to an agreement with, and as an accommodation to, Homart Development Corporation, a private developer of a shopping center known as "New Hope Commons" containing approximately twenty stores. Thus, plaintiffs contend, they have demonstrated a likelihood of success on the merits of their claim that the City was acting beyond its authority by attempting to exercise its power of eminent domain for a private, rather than public, purpose. We disagree.

Clearly, the power of eminent domain may not be used to take one's private property for the purely private purpose of another. *Carolina Telephone and Telegraph Co. v. McLeod*, 321 N.C. 426, 364 S.E.2d 399 (1988). The General Assembly has granted the power of eminent domain to municipalities "[f]or the public use or benefit", G.S. § 40A-3(b), including the operation and extension of a sewerage system. N.C. Gen. Stat. §§ 160A-311(3), 160A-312(a) (1994). Whether a condemnor's intended use of property is for "the public use or benefit" is a question of law for the courts; the concept is flexible and adaptable to changes in society and governmental duty. *Carolina Telephone and Telegraph Co.*, 321 N.C. 426, 364 S.E.2d 399.

In *Carolina Telephone and Telegraph Co.*, the Supreme Court sanctioned the use of two methods of analysis to determine whether a condemnor's intended use is for "the public use or benefit": The "public use" test and the "public benefit" test. Under the "public use" analysis, the question is whether the public has a definite use of the condemned property; "it is the public's *right* to use, not the public's actual use, which is important to this first approach." *Id.* at 430, 364 S.E.2d at 401 (emphasis in original). Under the "public benefit" test, the question is whether the condemnation results in some benefit, i.e., contribution to the general welfare and prosperity, accruing to the general public. *Id.* at 432, 364 S.E.2d at 402. "[T]he taking must 'furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power, and which is required by the public as such.' " *Id.*, (quoting *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946)).

From the evidence before the trial court at the preliminary injunction hearing, it appears to us that the purpose for which the City of

Durham intends to acquire plaintiffs' property satisfies both tests. While the proposed sewer outfall will undeniably enable Homart to develop its shopping center and, to that extent, confer a private benefit upon Homart, it is equally undeniable that other property owners, to whom the City owes a duty to provide sewer service, will have the right, equal to that of Homart, to connect to the expanded system. Thus, the intended use of the condemned property satisfies the "public use" test.

Moreover, we recognize that the provision of expanded sanitary sewer services is essential to growth and economic development, which is beneficial to the community and its citizens, and that such services are necessities which cannot generally be provided without governmental assistance. It follows that provision of sewer services to a substantial retail shopping center would contribute to the general welfare and prosperity of the community, which benefits from economic growth and, therefore, satisfies the "public benefit" test.

Finally, where, as here, the taking benefits both public and private interests, we may consider which of those interests is paramount.

> "[T]he exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which will not of itself warrant the exercise of a power. . . . The controlling question is whether the paramount reason for the taking of land to which objection is made is the public interest, to which benefits to private interests are merely incidental, or whether, on the other hand, the private interests are paramount and controlling and the public interests merely incidental."

Id. at 433, 364 S.E.2d at 403, (quoting *Highway Comm. v. School*, 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970)). Though Homart's development may have hastened the need for expanded sewer services in the vicinity, the paramount public interest served by construction of the outfall is the continued residential and commercial growth which it enables. This public interest, rather than the private interest of Homart, warrants the City's exercise of its power of eminent domain. Thus, we agree with the trial court and find that plaintiffs have not produced evidence in support of their motion for a preliminary injunction sufficient to forecast a likelihood that they will prevail upon their claim that the City's threatened condemnation of their property is for a private purpose, is unconstitutional, and an unlawful

exercise of its power of eminent domain. Because we find that plaintiffs have not shown a likelihood of success on the merits, we need not inquire into whether they are likely to sustain irreparable loss or whether issuance of a preliminary injunction is necessary for the protection of their rights pending resolution of the litigation concerning the City's authority to acquire their property by condemnation. The trial court's order denying plaintiffs' motion for a preliminary injunction will be affirmed.

Plaintiffs also argue that the trial court, in finding that the City's condemnation was for a public purpose, went beyond the scope of the hearing on the motion for a preliminary injunction and "constituted a ruling on the merits" of their claim. Their argument is without merit. Neither the findings of the trial court in passing upon the issue of whether to grant a preliminary injunction, nor the decision of this Court upon appeal of the order denying the injunction, determine any right of the parties other than plaintiffs' entitlement to a preliminary injunction; these rulings are not proper matters for consideration of the trial court in passing upon any defense which plaintiffs may assert in the City's condemnation action. *Huggins*, 272 N.C. 33, 157 S.E.2d 703.

Affirmed.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. KIMBERLY CATRICE WILSON A/K/A KIM WILSON

No. COA94-931

(Filed 5 March 1996)

1. Appeal and Error § 502 (NCI4th)— failure to show different result but for error

A defendant wishing to overturn a conviction on the basis of error relating to non-constitutional rights has the burden of showing a reasonable possibility that a different result would have been reached at trial absent the error; and defendant failed to meet this burden where the record contained abundant evidence that she was properly convicted of robbery with a firearm.

Am Jur 2d, Appellate Review §§ 705, 711, 713, 716.

2. Robbery § 135 (NCI4th)— gun used in robbery—dangerous firearm—instruction on lesser offense not required

In a prosecution for robbery with a firearm, because defendant's testimony that the gun looked and felt similar to a BB gun did not rise to the level of being evidence contrary to her own and the victim's testimony that the gun used in the robbery was what it appeared to be, a dangerous firearm, the trial court properly refused to give an instruction on the lesser included offense of common law robbery.

Am Jur 2d, Robbery §§ 75, 76.

3. Criminal Law § 1227 (NCI4th)— cocaine addiction—no mitigating factor found—no error

Where defendant presented no evidence compelling a conclusion that her culpability for an armed robbery was significantly reduced by her cocaine addiction, the trial court properly refused to find the addiction as a mitigating factor under N.C.G.S. § 15A-1340.4(2)(d).

Am Jur 2d, Criminal Law § 598.

Appeal by defendant from judgment entered 11 May 1994 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 17 April 1995.

The State's evidence tended to show that at about midnight on the evening of 21 July 1993, the prosecuting witness heard noises at the back door of his apartment. When he went to investigate, he found the defendant, Kimberly Catrice Wilson, and another woman, Dwanda Howard, standing outside. Although the victim did not know the women, he had seen them several times before when they had come by the apartment searching for his roommate. One of the women pointed a gun at the victim and demanded he let them in.

Once inside, the two women, who referred to each other using the nicknames "Shorty" and "Smooth," asked about the victim's roommate and stated that the victim would pay for something the roommate had done to them. One or both of the women took him to an upstairs bedroom, pointed a gun at his head, and bound his feet and hands with telephone cord and the electric cord from an alarm clock. While being tied, he was repeatedly told the women were going to shoot him or take him with them. The victim's hands and feet were tied so tightly that Wilson later testified he began to "change colors."

One of the women then tied a pair of socks together and strapped them around his mouth.

He remained tied for approximately two hours. During this time, Wilson drank some bourbon and listened to the radio while Howard took a shower. The women then took three duffel bags of clothing belonging to the victim and his roommate, some stereo equipment, and approximately $100 in cash that was hidden in a drawer. Before leaving, they covered the apartment in cooking oil and deodorant spray in an attempt to remove any fingerprints. Finally, the women took the victim's keys and left the scene in his car.

When he no longer heard the women downstairs, the victim attempted to free himself and was able to loosen the cord around his feet enough to be able to walk. He went outside in search of help and was spotted by two police officers on routine patrol. The officers untied his feet and cut the cord binding his hands.

Based on information given by the victim and his roommate concerning the women's nicknames and their physical appearance, arrest warrants were issued for Wilson and Howard. Howard pleaded guilty to armed robbery and received a fifteen-year sentence. Wilson pleaded not guilty and was tried before a jury in Pitt County Superior Court on 11 May 1994. The jury returned a verdict of guilty of robbery with a firearm and Wilson was sentenced to a term of forty years. From this judgment and sentence, Wilson appeals.

Michael F. Easley, Attorney General, by Edwin L. Gavin II, Assistant Attorney General, for the State.

Public Defender Robert L. Shoffner, Jr., by Assistant Public Defender James K. Antinore, for defendant-appellant.

McGEE, Judge.

Defendant Wilson brings forth six arguments on appeal. After a review of the record and transcript, we find no error.

I.

[1] Most of the defendant's assignments of error and arguments deal with her contention that while she admits participation in taking the victim's property, she is only guilty of felonious larceny or common law robbery, not guilty of robbery with a firearm. In support of this contention, Wilson argues she should have been allowed to continue cross-examination of Detective Janice Harris concerning the allega-

tions contained in the warrant and she should have been allowed to introduce into evidence certain statements made by Howard. Wilson also contends the trial court erred by denying her motion to dismiss at the close of all the evidence for insufficient evidence to support the offense charged. We disagree.

Although we see no error in the rulings of the trial court to which Wilson has objected, we need not reach the merits of these arguments. A defendant wishing to overturn a conviction on the basis of error relating to non-constitutional rights has the burden of showing a reasonable possibility that a different result would have been reached at trial absent the error. N.C. Gen. Stat. § 15A-1443(a) (1988). Wilson has not met this burden. The record contains abundant evidence that defendant was properly convicted of robbery with a firearm. Although the jury was also instructed on the theory of acting in concert, there is ample evidence that Wilson's own acts constituted armed robbery.

The elements necessary to constitute armed robbery are: 1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; 2) by use or threatened use of a firearm or other dangerous weapon; 3) whereby the life of a person is endangered or threatened. N.C. Gen. Stat. § 14-87. Wilson admitted during her testimony she actively participated in the taking of the victim's and his roommate's property, stating she carried two of the three bags of clothing from the apartment to the car. Therefore the taking element was established and the State only had to also prove Wilson used a dangerous weapon to threaten or endanger the victim's life. The record shows the State sufficiently proved these elements and the trial court correctly denied Wilson's motion to dismiss for insufficiency of the evidence to support the offense charged.

On direct examination, the victim was asked the following:

Q: And the young woman who held the gun to your head and robbed you is in this courtroom; is that correct?

A: Yeah. She's right there (indicating).

THE COURT: Ah, who are you [pointing to]—

WITNESS: Ms. Wilson.

Upon cross-examination, the victim testified as follows:

Q: Ah, upon closer questioning you say that [the defendant] was the girl with the gun?

A: It was.

Q: Well, why did you say "I think, I believe" [defendant was the one with the gun]?

A: Because, um, it's been a year.

Q: Yes, sir. Ah, so you think it was her but it's entirely possible it was the other girl?

A: It was her.

Q: Huh?

A: It was her.

On recross-examination, after admitting he did not remember whether one or both of the women initially took him upstairs and tied him, the victim was asked if both of the women were eventually upstairs. He replied: "Yeah, they were both up there, and both had had the gun to my head. They both threatened my life. And they both took my stuff." Wilson admitted holding the gun while being in the same room where the victim was tied up, saying: "I was sitting on the bed with the gun in my hand, laying [sic] up against the bed." However, she denied ever pointing the gun at the victim.

Wilson now claims the trial court erred in striking testimony of Detective Harris concerning the substance of the arrest warrant. She argues the warrant, although it states the offense charged is robbery with a dangerous weapon, fails to allege the use of a firearm or other dangerous weapon in the description of the offense. The judge stopped the defense questioning of Harris regarding the warrant, believing the questioning concerned the validity of the warrant, which is a question of law for the court, not the jury. Wilson claims the purpose of this line of questioning was not to question the warrant, but to "support defendant's defense [of felonious larceny/common law robbery] and . . . to weaken the State's case by impeaching the charging officer's credibility." However, even if the striking of this testimony constituted error, in light of the State's overwhelming evidence of Wilson's guilt of robbery with a firearm, we fail to see how a different result would have been reached at trial absent the error.

Likewise, we find no prejudicial error in the trial court's exclusion of statements made by Dwanda Howard, which Wilson claims show it was Howard's idea to commit the robbery. The trial court ruled the statements were hearsay, with no applicable exception. We agree the statements were inadmissible. However, even if the trial court erroneously excluded them, it makes no difference who actually planned the robbery. In light of the evidence of Wilson's active participation in the crime, she cannot show a different result would have been reached if the statements had been admitted into evidence. Wilson also claims Howard made other statements which support her defense. However, she made no offer of proof at trial of such statements, they are not part of the record, and we may not consider them on appeal. N.C.R. App. P. 9(a).

II.

[2] Wilson argues the trial court erred by refusing to instruct the jury on the lesser included offense of common law robbery. We disagree.

When a person commits a robbery by the use or threatened use of what appears to be a firearm or dangerous weapon, the law presumes, absent any evidence to the contrary, that the instrument is what it appears to be—a weapon endangering the life of the person being robbed. *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). This presumption is mandatory when no evidence is introduced to show the victim's life was not in danger. *State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985). However, if the defendant comes forward with some evidence tending to show the instrument was not a dangerous weapon, then the mandatory presumption disappears and the jury may, but is not required to, infer the instrument used was a dangerous weapon. *Joyner*, 312 N.C. at 783, 324 S.E.2d at 844. In such a case, instruction on the lesser included offense of common law robbery should also be given. *See Joyner*, 312 N.C. at 786, 324 S.E.2d at 846.

When faced with this question, our Supreme Court said: "The dispositive issue . . . is whether any substantial evidence was introduced at trial tending to show affirmatively that the instrument used by the defendant was not a firearm or deadly weapon . . . ." *State v. Williams*, 335 N.C. 518, 523, 438 S.E.2d 727, 729 (1994). In this case, Wilson's evidence fails to meet this test.

On direct examination, Wilson was asked if she had ever seen a BB pistol or an air pistol, and she replied that she had. When asked

whether the pistol used in the robbery looked at all like an air pistol, she replied: "Yes, it did." She was then asked if she had ever held and was familiar with the weight of a BB pistol, to which she replied: "Yes, sir." When asked to compare the experience of holding a BB pistol to holding the gun used in the robbery, Wilson stated: "It felt about the same." Wilson never testified she believed the gun was a BB pistol. She did not provide any evidence tending to affirmatively show the weapon was not a firearm. Instead, in response to her counsel's leading questions, she simply stated the gun looked and felt "similar" to a BB pistol. This testimony does not rise to the level of being evidence contrary to the State's evidence that the gun was what it appeared to be, a dangerous weapon. *See Thompson*, 297 N.C. at 289, 254 S.E.2d at 528. Nor does it "amount to substantial evidence to the contrary tending to show that [she] did not employ a firearm" during the robbery. *Williams*, 335 N.C. at 523, 438 S.E.2d at 730. This is especially true in light of other testimony given by Wilson.

At the beginning of her cross-examination, Wilson testified as follows:

> Q: Now, Ms. Wilson, previously you stated when you were testifying that the gun was a black gun?
>
> A: Yes.
>
> Q: Was an automatic?
>
> A: It was an automatic, yes.
>
> Q: And looked like a .25?
>
> A: Yes.
>
> Q: All Right. And you know about guns, don't you?
>
> A: Yes.

Wilson also testified she did not untie the victim because "[Howard] had the gun," and "[b]ecause I was scared." Wilson's testimony shows she believed the gun to be a firearm. Further, after Wilson testified the gun looked similar to a BB gun, the victim was recalled to the stand. When asked to describe the gun, he testified: "It was black. Um, there was no way it was a BB gun. [The barrel] had a diameter of about around a half—half an inch to three-quarters of an inch." He also stated he had an opportunity to look down the barrel a number of times. Because Wilson's testimony that the gun looked and felt similar to a BB gun does not rise to the level of being evidence contrary

to her own and the victim's testimony that the gun used in the robbery was a firearm, the trial court properly refused to give an instruction on the lesser included offense of common law robbery.

III.

Wilson also claims the trial court erred in denying her motion for a mistrial. She argues the trial judge unfairly prejudiced her case by stating to the jury that he would exclude the questioning of Detective Harris regarding the arrest warrant because it "tend[ed] to confuse the issue." A trial court's denial of a motion for a mistrial will only be disturbed on appeal upon a showing of abuse of discretion. *State v. Craig and State v. Anthony*, 308 N.C. 446, 454, 302 S.E.2d 740, 745, *cert. denied*, 464 U.S. 908, 78 L.Ed.2d 247 (1983). "A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623 (1989), *vacated on other grounds*, 494 U.S. 1022, 108 L.Ed.2d 603 (1990). Wilson has failed to show the remark irreparably prejudiced her and prevented her from receiving a fair and impartial verdict. We find no abuse of discretion in the denial of her motion for a mistrial.

IV.

[3] Finally, Wilson argues the trial court erred by failing to find her cocaine addiction to be a mitigating factor during sentencing. She claims her addiction constituted a mental or physical condition which was insufficient to constitute a defense, but significantly reduced her culpability for the offense under N.C. Gen. Stat. § 15A-1340.4(2)(d). To be entitled to this mitigating factor, a defendant must prove by a preponderance of the evidence that there was "an essential link between the drug addiction and the culpability for the offense, and prove that his condition did in fact reduce his culpability." *State v. Arnette*, 85 N.C. App. 492, 494, 355 S.E.2d 498, 500 (1987). Wilson failed to show such a link.

In her testimony, Wilson stated she had been sniffing cocaine and was "kind of high," but that she "wasn't that high to the point where I didn't know what was going on." Although Wilson told the court at sentencing that she would not have been involved in this crime if not for drugs, this unsworn statement and other evidence of addiction presented at trial would only justify a finding that the crime was committed to support her habit. Wilson presented no evidence compelling

a conclusion that her culpability was significantly reduced by her cocaine addiction, and the trial court properly refused to find the addiction as a mitigating factor. *See Arnette*, 85 N.C. App. at 494, 355 S.E.2d at 500.

We find no merit to Wilson's remaining arguments. For the reasons stated, we find no error.

No Error.

Judges JOHNSON and COZORT concur.

GBASAY ROGERSON, PLAINTIFF v. HUGH E. FITZPATRICK, ALTON R. TYNDALL, JR. AND LINDA S. BECK, JOINTLY, SEVERALLY AND INDIVIDUALLY IN THEIR OFFICIAL CAPACITIES AND THE CITY OF DURHAM, DEFENDANTS

No. COA94-898

(Filed 5 March 1996)

1. Pleadings § 399 (NCI4th)— allegations against city and officers—amended complaint—no relation back to date of original complaint

Plaintiff's claims against defendant city and defendant officers in their official capacities which were stated in his amended complaint did not relate back under N.C.G.S. § 1A-1, Rule 15(c) to the date of the filing of his original complaint against the officers in their individual capacities since that rule applies only to allow the addition of new claims and not further defendants.

Am Jur 2d, Pleading §§ 68-124.

2. Limitations, Repose, and Laches § 92 (NCI4th)— complaint against city—discovery of city's failure properly to train officers—accrual of cause of action

There was no merit to plaintiff's contention that the statute of limitations on his 42 U.S.C. § 1983 claim against defendant city based on his detention by police officers did not begin to run until his discovery of the city's failure to train its police officers properly, since plaintiff knew defendant officers were employed by the city; although plaintiff was first detained by a single policeman, two additional officers arrived at the scene and actively participated without objection in the alleged injury to plaintiff; the

officers' concerted action suggested a consistent response by each to their training or lack thereof so as reasonably to place plaintiff on notice of any potential inadequacies therein; in addition, the trauma induced by the officers' actions as alleged by plaintiff was of such severity as reasonably to have motivated him to investigate the cause thereof; although plaintiff asserted that he did not immediately know the city was responsible for his injury, the federal courts have held that under the federal rule of accrual knowledge of the responsible party is not necessary to accrue a federal cause of action; and plaintiff included in his amended complaint no allegation setting forth the date he discovered information implicating the city nor a statement explaining the belated discovery.

Am Jur 2d, Limitation of Actions §§ 31 et seq.

Appeal by plaintiff from judgment entered 10 June 1994 by Judge Thomas W. Ross in Durham County Superior Court. Heard in the Court of Appeals 10 May 1995.

Irving Joyner and Tracy Hicks Barley, for plaintiff appellant.

Faison & Fletcher, by Reginald B. Gillespie, Jr., and Keith D. Burns, for defendant appellees.

JOHN, Judge.

Plaintiff Gbasay Rogerson appeals dismissal, for failure to file suit within the applicable statute of limitations period, of his claims against the City of Durham (the City) and Durham police officers Corporal Hugh Fitzpatrick (Fitzpatrick), Alton Tyndall, Jr. (Tyndall), and Linda Beck (Beck) in their official capacities.

Pertinent background information, as alleged in plaintiff's complaint, and procedural details are as follows: At approximately 11:30 p.m. on 17 February 1990, plaintiff was operating his automobile in Durham when he was signaled to stop by defendant Fitzpatrick. Plaintiff alleges Fitzpatrick, a white police officer, lacked probable cause to stop the vehicle and acted only because plaintiff was a black person driving an expensive-looking sports car.

Upon bringing his automobile to a stop, plaintiff was directed by Fitzpatrick to display his driver's license and automobile registration. As plaintiff attempted to locate the registration, he was ordered by Fitzpatrick to exit the vehicle and subsequently searched without

probable cause or his consent. Thereafter, plaintiff was forced to sit in a patrol car while Fitzpatrick and two other white police officers who had arrived at the scene, defendants Tyndall and Beck, searched plaintiff's automobile in a violent manner. Further, the officers verbally abused plaintiff and shined a high-powered flashlight into his eyes. Plaintiff alleges citations issued him for operating a vehicle with improper or expired license registration and failure to maintain liability insurance were subsequently dismissed; however, defendants respond that plaintiff was convicted of driving with expired registration.

Plaintiff filed suit 6 March 1991 in the Superior Court of Durham County against Fitzpatrick, Tyndall, and Beck, in their individual capacities, pursuant to: 1) 42 U.S.C. § 1983, for violation of plaintiff's Fourth Amendment rights against unreasonable search and seizure and his Fourteenth Amendment rights to due process and equal protection of the law; 2) Article I, § 19 of the North Carolina Constitution, for violation of state constitutional provisions parallel to the Fourth and Fourteenth Amendments; 3) 42 U.S.C. § 1985(3), for conspiracy to harm plaintiff based upon his race; and 4) North Carolina common law, for conspiracy to commit unlawful acts.

Defendants filed answer on 6 May 1991, denying the essential allegations of plaintiff's complaint and asserting they at all times "acted lawfully under color of law pursuant to the laws of the State of North Carolina and the ordinances and regulations of the City of Durham." Plaintiff pursued discovery, and defendants' "Objections and Responses to Plaintiff's First Request for Admissions" and "Objections and Answers to Plaintiff's First Set of Interrogatories and Request for the Production of Documents" were filed 1 May 1992 and on or about 5 May 1992, respectively.

Thereafter, on 5 March 1993, plaintiff filed a motion to amend his complaint to add a claim against the City pursuant to 42 U.S.C. § 1983 [§ 1983] and to name as defendants the officers in their official capacities. On 26 April 1993, the Honorable George R. Greene entered a consent order allowing the amended complaint to be filed "without prejudice to any and all denials, avoidances, and defenses which Defendants" might assert, including those under N.C.R. Civ. P. 12(b). Defendants' answer to the amended complaint, filed 1 July 1993, included the City's motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6) for failure to state a claim, alleging the action against the City was not filed within the applicable statute of limitations period.

Following a hearing on the motion held 11 May 1994, judgment was entered by the trial court 10 June 1994 dismissing plaintiff's claims against the City and the officers in their official capacities. The court certified its Order and Judgment for immediate appeal pursuant to N.C.R. Civ. P. 54(b).

We note initially that the trial court's order dismissing plaintiff's claims provided it had considered and examined "the court file, including [defendants'] motion, pleadings, *discovery*, . . . [and] the arguments of counsel." (emphasis added). While defendants' motion was filed pursuant to Rule 12(b)(6), such a "motion to dismiss for failure to state a claim is 'converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court.' " *King v. Cape Fear Mem. Hosp.*, 96 N.C. App. 338, 342, 385 S.E.2d 812, 814-815 (1989), *disc. review denied*, 326 N.C. 265, 389 S.E.2d 114 (1990) (citations omitted); N.C.G.S. § 1A-1, Rule 12(b) (1990). We therefore treat the trial court's order as one allowing summary judgment against plaintiff.

Plaintiff sets forth two arguments that the claims set forth in his amended complaint are not barred by the statute of limitations. First, he contends the amended complaint relates back to his first complaint as permitted by N.C.R. Civ. P. 15(c) [Rule 15(c)] and thus assumes the filing date of the former. Second, he asserts his claim against the City accrued at some point after the night he was detained, *i.e.*, when he learned the officers' actions were due to the City's failure to train its police force properly. We address each of plaintiff's contentions in turn.

[1] Regarding plaintiff's first argument, we observe that plaintiff's motion to amend was not filed until 5 March 1993, more than three years following his detention by defendant officers. *See Mauney v. Morris*, 316 N.C. 67, 71, 340 S.E. 2d 397, 400 (1986) (date motion to amend filed as opposed to date court rules upon it crucial date in measuring limitations period). The statute of limitations period for § 1983 actions in North Carolina being three years, *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842, 62 L. Ed. 2d 54 (1979), plaintiff's claim would appear to be barred by the statute of limitations.

However, plaintiff relies on Rule 15(c) in maintaining that his claims against additional defendants the City and the officers in their official capacities "relate back" and are deemed to take on the filing date of his original complaint. Rule 15(c) provides as follows:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Contrary to plaintiff's position, however, our Supreme Court recently held that under the plain meaning of the statute referring to "claim[s]" and not parties, Rule 15(c) applies only to allow the addition of new claims and not further defendants. *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995). It is elementary that this Court is bound by holdings of the Supreme Court. *Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992), *rev'd on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993).

Moreover, plaintiff, citing *Kentucky v. Graham*, 473 U.S. 159, 165-166, 87 L. Ed. 2d 114, 121 (1985), admitted below in his "Motion to Amend and Memorandum in Support of Motion to Amend" that official-capacity suits

> generally represent only another way of pleading an action against the entity of which an officer is an agent. . . . Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official capacity suit must look to the governmental entity itself.

Plaintiff's official capacity claims against the officers are thus in essence simply alternative claims against the City.

Because *Crossman* prohibits the addition of new defendants under Rule 15(c), plaintiff's claims against the City and the officers in their official capacities may not take on the filing date of his original complaint and therefore are not saved under his first argument.

[2] We next consider plaintiff's contention that the statute of limitations on his complaint against the City did not begin to run until his discovery of the City's failure to train its officers properly.

Under § 1983, a city may not be held liable for the actions of its employees pursuant to a *respondeat superior* theory of liability, but is responsible only when the city *itself* causes the constitutional violation at issue. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 636 (1978). One such instance results when a city manifests deliberate indifference to the inadequacy of the

training of its police officers. *Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412 (1989).

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 390, 103 L. Ed. 2d at 427-428.

Plaintiff asserts in his brief that he initially believed the occasion on which he was detained constituted "an isolated incident carried out by three police officers acting with racial animus," and that the City thus was not liable for their actions under § 1983. However, plaintiff contends he later "discovered" the officers' behavior was a consequence of the City's failure to train them in an adequate manner. Plaintiff argues the statute of limitations on his claim against the City did not accrue until he discovered this responsibility of the City for the officers' actions.

While state law determines the statute of limitations period for § 1983 claims, federal law controls the date of accrual of a cause of action under § 1983. *Bireline*, 567 F.2d at 263. The federal courts have enunciated a "discovery rule," also called the "due diligence rule" or the doctrine of "blameless ignorance," prinicipally in cases where the injury does not manifest itself for some time after the alleged negligent act or in instances involving intentional or fraudulent concealment of the defendant's responsibility. *Leftridge v. United States*, 612 F. Supp. 631, 633-634 (W.D. Mo. 1985). Under this rule, the statute of limitations for a cause of action accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action," *Bireline*, 567 F.2d at 263, or when "plaintiff knows or reasonably should have known of both the existence and the cause of his injury," *Leftridge*, 612 F. Supp. at 633. However, a plaintiff is required to act with "due diligence" in discovering the facts underlying his or her cause of action. *See Blanck v. McKeen*, 707 F.2d 817, 819 (4th Cir.), *cert. denied*, 464 U.S. 916, 78 L. Ed. 2d 258 (1983).

Plaintiff cites *Young v. Clinchfield Railroad Co.*, 288 F.2d 499 (4th Cir. 1961), as authority for his contention that application of the

discovery rule sets accrual of the statute of limitations on his claim against the City at the time he became aware of deficiencies in its training of police officers. In *Young*, the personal injury claim of a man who developed silicosis after years of breathing silica dust in the course of his employment was held to have accrued not on the date Young contracted silicosis, but rather when he discovered the presence of the disease, which typically incubates for years without the knowledge of the afflicted individual. *Id.* at 502-503.

We find *Young* inapposite to the case *sub judice*. *Young* involved a type of claim to which the federal courts have commonly addressed the discovery rule—that of a victim whose injury does not manifest itself for some time after it first comes into existence. *See Leftridge*, 612 F. Supp. at 634; *see also Urie v. Thompson*, 337 U.S. 163, 170, 93 L. Ed. 1282, 1292 (1949) (cause of action of plaintiff who had contracted silicosis resulting from thirty year period of silica dust inhalation did not accrue, because of plaintiff's "blameless ignorance" of his injury, until the disease manifested itself). By contrast, numerous circumstances herein favor a determination that plaintiff had sufficient knowledge on 17 February 1990, the night he was detained, such that in the exercise of due diligence he could have determined both the fact of his injury and the cause thereof. *See Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995) ("[A] plaintiff need not have actual knowledge [of the facts to support a particular claim] if the circumstances would lead a reasonable person to investigate further.").

First, it is uncontroverted that plaintiff knew defendant officers were employed by the City. Indeed, his original complaint includes such an allegation and makes reference to the patrol cars being "owed [sic] and maintained by the [C]ity" and to the officers wearing "an official uniform, weapon, badge, and insignia of the police department of the [C]ity." *Cf. Wilkinson v. United States*, 677 F.2d 998, 1002 (4th Cir.), *cert denied*, 459 U.S. 906, 74 L. Ed. 2d 167 (1982) (plaintiff involved in collision with sailor operating rental automobile "was possessed of sufficient knowledge to put [plaintiff] on inquiry as to whether [the sailor], a naval rating on active service, was operating within the scope of his employment," so as to implicate government as defendant); *Henderson v. United States*, 785 F.2d 121, 126 (4th Cir. 1986) (accident report, filed at time of plaintiff's automobile collision with vehicle operated by substitute United States mail carrier, which indicated carrier's vehicle was "being used by the government," held to constitute "sufficient notice to prompt [plaintiffs] to explore the

legal ramifications of the government's involvement," and claim accrued on date of collision).

Second, although plaintiff was first detained by a single policeman, two additional officers arrived at the scene and actively participated without objection in the alleged injury to plaintiff. Their concerted action suggests a consistent response by each to their training or lack thereof so as reasonably to place plaintiff on notice of any potential inadequacies therein. In addition, the trauma induced by the officers' actions as alleged by plaintiff was of such severity as reasonably to have motivated him to investigate the cause thereof. *See Kumpfer v. Shiley, Inc.*, 741 F. Supp. 738, 740 (N.D. Ill.) ("decedent's cardiac arrest was sufficiently sudden and traumatic to prompt the plaintiff to make some inquiry as to the cause of death," applying Illinois law).

Third, although plaintiff asserts he did not immediately know the City was responsible for his injury, individual federal courts have held that "[u]nder the federal rule of accrual, . . . knowledge of the responsible party is not necessary to accrue a federal cause of action." *Continental Ins. Co. v. Pierce County, Wash.*, 690 F. Supp. 930, 933 (W.D. Wash. 1987), *aff'd without opinion*, 877 F.2d 64 (9th Cir. 1989). " '[T]he "cause" [of an injury] is known when the immediate physical cause of the injury is discovered,' " and " 'it is [a] plaintiff's burden, within the statutory period, to determine whether and whom to sue.' " *Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054, 93 L. Ed. 2d 979 (1987) (citations omitted) (plaintiffs' cause of action against federal agents based upon burning of plaintiffs' garage accrued when they learned of "the fact of their injury, *i.e.*, the destruction of [their] property, and its cause, fire."); *but see Stewart v. Parish of Jefferson*, 951 F.2d 681, 684 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 121 L. Ed. 2d 35 (1992) (plaintiff must be in possession of two facts: "(1) an injury has occurred; and (2) the identity of the person who inflicted the injury" before limitations period accrues). Plaintiff knew on 17 February 1990 the fact of his alleged injury, deprivation of his constitutional rights, as well as its immediate physical cause, the conduct of defendant police officers.

Next, plaintiff included in his amended complaint no allegation setting forth the date he discovered information implicating the City nor a statement explaining the belated discovery. Further, no affidavit (plaintiff's amended complaint is unverified) or other document of

record presented to the trial court contained such representations. Hence, plaintiff failed to come forward with a showing refuting defendants' reliance on the statute of limitations. *See Silver v. Board of Transportation*, 47 N.C. App. 261, 266, 267 S.E.2d 49, 54 (1980) (once statute of limitations pleaded, burden on plaintiff to show action brought within applicable period).

In addition, plaintiff advances certain factual assertions to this Court in his appellate brief which may be considered critically. *See Fowler v. Williamson*, 39 N.C. App. 715, 717, 251 S.E.2d 889, 890 (1979) ("Statements of fact made in briefs, and legitimate inferences therefrom, may be assumed as true as against the party asserting them."). Of course, such statements are not evidence for summary judgment purposes as against the non-asserting party.

Plaintiff states that

> [a]fter the defendants responded to the initial complaint filed in this case, Dr. Rogerson discovered from the defendants' answer that the City of Durham was also responsible for the wrongful search and seizure to which he was subjected on February 17, 1990.

Elsewhere in his brief, plaintiff explains the manner in which defendants' initial answer put him on notice of a claim against the City:

> In the original defendants' initial answer to the plaintiff's complaint which was filed on May 6, 1991, it was asserted that the defendants "were duly appointed police officers of the City of Durham, North Carolina, acting within the course and scope of their employment as police officers." In that answer, the defendants also admitted that they were acting "under color of law pursuant to the laws of the State of North Carolina and the ordinances and regulations of the City of Durham." The defendants repeatedly alleged that their conduct in stopping, detaining and searching the plaintiff was consistent with "standard police procedure" or "standard operating procedure." Thus, the issue of the liability of the City of Durham through its development of standard operating procedures and training was raised by the defendants.

Even disregarding *Fowler* and considering the foregoing in the light most favorable to plaintiff for purposes of summary judgment,

Hinson v. Hinson, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986), the boilerplate language in defendants' answer relied upon by plaintiff simply does not represent "discovered" information, unavailable through due diligence, such as to toll accrual of the statute of limitations of a claim against the City for inadequate training of law enforcement officers. The officers' denials of all essential allegations of plaintiff's complaint and their insistence that they at all times acted in accordance with "standard police procedure" were without question readily available to plaintiff, acting with due diligence in investigating his potential claim. *See Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993) (court may determine as matter of law plaintiff's failure to exercise due diligence in uncovering claim).

Moreover, the following allegation in plaintiff's original complaint belies his assertion that the City's answer was the first manifestation of the City's involvement:

> Each and all acts of the Defendants alleged herein were done by Defendants under the color and pretense of the . . . regulations, customs, and usages of . . . the City of Durham . . . .

Despite this indication of plaintiff's awareness that the individual defendants were subject to "customs and usages" of the City, including training programs or the lack thereof, *see Jordan by Jordan v. Jackson*, 15 F.3rd 333, 341 (4th Cir. 1994) (municipality's failure to train employees may constitute "policy or custom" actionable under § 1983), plaintiff declined to name the City as a defendant or to sue the officers in their official capacities. *Cf. Keller v. Prince George's County*, 923 F.2d 30, 34 (4th Cir. 1991) (defendants not sued in individual capacities "could reasonably assume . . . [plaintiff] had made a conscious decision to proceed solely against [government agency]").

We also observe that plaintiff neither alleged in his amended complaint nor argues to this Court that the officers failed to be forthcoming in their reliance upon "standard police procedure" or that the City engaged in deception or delay to prevent plaintiff from discovering facts which might lead to imposition of § 1983 liability upon the City. *See Stallings v. Gunter*, 99 N.C. App. 710, 716, 394 S.E.2d 212, 216, *disc. review denied*, 327 N.C. 638, 399 S.E.2d 125 (1990) (fraudulent concealment may "operate to toll the running of the statute of limitations after the action has accrued"); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 509, 317 S.E.2d 41, 44 (1984), *aff'd*, 313 N.C. 488, 329 S.E.2d 350 (1985) (defendant may be equitably estopped

from raising statute of limitations when plaintiff's late filing "has been induced by acts, representations, or conduct" of defendant); *see also Leftridge*, 612 F. Supp. at 634. Hence, the statute of limitations period controlling plaintiff's claim may not be tolled under such theories.

Finally, the United States Court of Appeals for the Fourth Circuit, citing *City of Canton v. Harris*, 489 U.S. 378, 391, 103 L. Ed. 2d 412, 428 (1989), noted in *Gordon v. Kidd*, 971 F.2d 1087, 1097 (4th Cir. 1992), that a plaintiff, suing a local government or officials thereof in their official capacities for allegedly inadequate policies and training, must

> identify a deficiency in a training program closely related to the injury complained of and must further show that the injury would have been avoided "under a program that was not deficient in the identified respect."

Even viewing all material of record, including plaintiff's amended complaint, in the light most favorable to plaintiff, we discern no indication he has met the requirements of *Gordon* in a manner sufficient to survive summary judgment.

Prior to concluding, we note in passing that defendants' answer, which plaintiff insists prompted his discovery of the City's failure to train the officers properly, was dated 6 May 1991. Yet plaintiff's motion to amend his complaint was not filed until 5 March 1993, nearly two years later. Accepting *arguendo* 6 May 1991 as the point at which plaintiff "had reason to know" of deficiencies in the City's training of its officers, plaintiff's lengthy delay in seeking amendment of his complaint is cause for concern. *See Gunter v. Anders*, 115 N.C. App. 331, 334, 444 S.E.2d 685, 687 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 250 (1995) (no abuse of discretion to deny motion to amend complaint seeking to allege local board of education's purchase of liability insurance where plaintiffs knew of purchase nearly two and one-half years prior to hearing and did not seek amendment until defendants moved to dismiss based upon plaintiffs' failure to so plead).

In sum, because plaintiff's amended complaint does not relate back to the filing date of his original complaint, and because, under the facts and circumstances of the case *sub judice*, plaintiff knew or reasonably should have known of facts sufficient to put him on notice of alleged deficiencies in Durham police officer training on 17

February 1990, the § 1983 claims in plaintiff's 5 March 1993 amended complaint against the City and against Fitzpatrick, Tyndall and Beck in their official capacities were barred by the three year statute of limitations, *Bireline*, 567 F.2d at 263, and were properly dismissed by the trial court.

Affirmed.

Judges COZORT and WALKER concur.

FAYE ELLEN SULTAN AND BRAD FISHER, PLAINTIFFS v. STATE BOARD OF EXAMINERS OF PRACTICING PSYCHOLOGISTS, DEFENDANT, AND THE NORTH CAROLINA PSYCHOLOGICAL ASSOCIATION, DEFENDANT-INTERVENOR/ COUNTERCLAIMANT

No. 9426SC70

(Filed 5 March 1996)

Physicians, Surgeons, and Other Health Care Professionals § 54 (NCI4th)— voluntary professional association—disclosure of patient information—requirements of membership

Where an ethics complaint was filed with the North Carolina Psychological Association (NCPA) against plaintiff psychologist by another psychologist, the contractual nature of plaintiff's membership in the NCPA did not require her to produce to NCPA upon its request confidential information concerning a patient without the patient's consent.

Am Jur 2d, Physicians, Surgeons and Other Healers §§ 74 et seq.

Physician's tort liability for unauthorized disclosure of confidential information about patient. 48 ALR4th 668.

Appeal by defendant-intervenor/counterclaimant from judgment entered 13 November 1993 by Judge C. Walter Allen in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 April 1995.

Lesesne & Connette, by Edward G. Connette, for plaintiff appellee.

Tharrington, Smith & Hargrove, by Ann L. Majestic and Marcus W. Trathen, for defendant-intervenor/counterclaimant appellant.

Fuller, Becton, Billings & Slifkin, P.A. by James C. Fuller and Mary Ann Tally for North Carolina Academy of Trial Lawyers, amicus curiae.

JOHN, Judge.

The North Carolina Psychological Association (NCPA) appeals the trial court's entry of summary judgment in favor of Dr. Faye Ellen Sultan (Sultan), permanently enjoining NCPA from requiring Sultan to disclose information regarding one of her patients. We affirm the trial court.

Relevant factual and procedural information is as follows: In 1989, an individual denominated for purposes of the instant proceeding as "Patient K" (K) filed a civil action in Wake County Superior Court against the North Carolina Correctional Institute for Women (Women's Prison). K alleged violation of her constitutional rights arising out of the conditions of her confinement. She sought to remain in the mental health unit of Women's Prison where she was being held pending trial on criminal charges, rather than being moved to a dormitory. K asserted that the latter course would aggravate her condition of claustrophobia and result in deterioration of her mental health.

K's attorney hired Sultan, a clinical psychologist, to evaluate the potential effect on K's mental health of transfer to a prison dormitory. Sultan conducted a psychological assessment of K on 10 October 1989, and was thereafter called by K's counsel as an expert witness in the civil proceeding on 19 October 1989.

Sultan testified that placing K in a dormitory unit "would result almost immediately in such a rapid deterioration in her psychological condition that [K] would almost surely be psychotic within 24 or 36 hours." Sultan further stated that such psychosis "might be irreversible." Dr. Paula Clarke (Clarke), psychological program manager at the Women's Prison, also testified at the proceeding. In her opinion, K presented no psychotic symptoms and the proposed transfer represented no threat to K's mental health.

Some days thereafter, Sultan received notification from the North Carolina State Board of Examiners of Practicing Psychologists (the Board) that Clarke had filed a complaint against her. Included among Clarke's allegations were the following:

> Dr. Sultan appears to be involved in [a] relationship with [K's] attorneys for financial gain and/or personal reasons . . . . Her conclusions do not necessarily follow from test results or general knowledge of psychopathology. The limitation of her findings were never expressed in testimony nor to [K] who seems to believe that she is dangerously mentally ill.

Pursuant to N.C.G.S. § 90-270.9 (1993), the Board served Sultan with an order to produce all records relating to psychological services provided to K. The statute provides in pertinent part:

> The Board may order that any records concerning the practice of psychology relevant to a complaint received by the Board or an inquiry or investigation conducted by or on behalf of the Board be produced before the Board or for inspection and copying by representatives of or counsel to the Board by the custodian of such records.

Clarke also filed a complaint with the Board against Dr. Brad Fisher (Fisher), who had testified on K's behalf at a 25 September 1989 bond reduction hearing. At the hearing, Fisher expressed the opinion that K suffered from claustrophobia and that being in a confined space, such as a traditional jail cell, would exacerbate this condition.

Clarke's complaint alleged, *inter alia*, that Fisher "appears to be engaged in [a] relationship with clients [sic] attorneys for financial gain" and that his diagnoses of K were not justified by the test findings he described. Fisher likewise was ordered by the Board to produce all records relating to K.

Sultan and Fisher both subsequently refused to relinquish to the Board their files regarding K. K's attorney withheld consent on her behalf, contending that disclosure would violate K's psychologist-client and attorney-client privileges. Sultan and Fisher requested an administrative determination by the Board of their responsibilities with regards to K's records, but such request was denied.

Clarke also lodged grievances with NCPA against Sultan and Fisher similar to those filed previously with the Board. NCPA is a vol-

untary professional association, serving to promote the profession of psychology, of which both Sultan and Fisher were members. The complaint against Fisher was subsequently resolved and NCPA's investigation of him ceased. However, NCPA pursued its investigation of Sultan, insisting that she divulge information gained in her professional relationship with K. Sultan declined to do so.

Sultan and Fisher thereafter filed the instant action against the Board, seeking, *inter alia*, to enjoin the Board from requiring disclosure of information concerning K, and, in the alternative, a declaratory judgment setting forth the psychologists' legal rights and obligations. In their complaint, the doctors alleged K's Fifth and Sixth Amendment rights as well as the psychologist-patient and attorney-client privileges in support of the claim for an injunction. NCPA subsequently was allowed to intervene and filed a counterclaim against Sultan, alleging she had breached her contract as a member of NCPA by failing to honor its requests for information. The parties thereafter each filed cross-motions for summary judgment which were heard 12 August 1993.

On 13 November 1993, the trial court granted the Board's motion for summary judgment against Sultan and Fisher. It also allowed Sultan's motion against NCPA. Pursuant to the Board's statutory power to obtain such information, Sultan and Fisher were ordered to provide the Board with all records relating to K. However, NCPA was permanently enjoined from requiring disclosure of information concerning K, the court ruling that

> [t]he contractual nature of plaintiffs' membership in the North Carolina Psychological Association does not give defendant the right or authority to require plaintiffs to disclose confidential patient records absent consent by the patient.

Sultan and Fisher filed notice of appeal to this Court 1 December 1993, and NCPA filed its notice 10 December 1993.

Subsequent to the parties' appeal, K entered into a plea agreement with the State of North Carolina, resolving the criminal charges against her. Sultan and Fisher thereupon dismissed their appeal, reasoning that K's guilty plea had rendered their claim moot. As a result, only the cause of action between NCPA and Sultan remains before us.

NCPA argues on appeal that

> the trial court committed reversible error in finding that the contractual nature of Dr. Sultan's membership in the NCPA did not give the NCPA the right or authority to require Dr. Sultan to disclose information concerning Patient K.

We disagree.

> Summary judgment should be granted only where
>
> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

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

NCPA agrees that professional policy among psychologists endorses the confidentiality of interactions between psychologists and clients. Indeed, Principle 5 of the Ethical Principles of Psychologists, attached as an exhibit to NCPA's counterclaim, provides as follows:

> Psychologists have a *primary* obligation to respect the confidentiality of information obtained from persons in the course of their work as psychologists. They reveal such information to others *only* with the consent of the person or the person's legal representative . . . .

Ethical Principles of Psychologists, adopted by the Council of Representatives of the American Psychological Association, 24 January 1981 (emphasis added). *See also Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 11, 330 S.E.2d 242, 250 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986) (health care provider's unauthorized disclosure of patient confidences constitutes professional malpractice). Notwithstanding, NCPA contends that Sultan's contractual duty as a member of the organization to respond to ethics investigations conducted by CSPEC overrides the obligation of confidentiality. This argument is unfounded.

We note initially that our General Assembly has accorded to the Board, not NCPA, both the authority and the responsibility to police the conduct of psychologists in this state. *See* N.C.G.S. § 90-270.15 (1993 & Cum. Supp. 1995). Moreover, N.C.G.S. § 90-270.9 permits *only* the Board to require submission of confidential patient records in the instance of ethics complaints against a psychologist.

In addition, although the relationship between a voluntary professional organization and its members is contractual and members are bound by the organization's regulations and by-laws, *Warehouse Assoc. v. Warehouse*, 231 N.C. 142, 146, 56 S.E.2d 391, 394 (1949), the rules of NCPA do not require disclosure of confidential client information by members without the client's consent.

NCPA's by-laws provide that a purpose of the organization is to "promote high standards of professional ethics," and further that its investigatory body, the Committee on Scientific and Professional Ethics and Conduct [CSPEC], is to "receive and investigate complaints regarding ethically questionable conduct of members."

Included among the "Rules and Procedures" (the Rules) of CSPEC are the following:

> If the complainant is a client or former client of the member complained against, [CSPEC] shall request a waiver by the complainant with respect to the member's duty of confidentiality in regard to matters that are relevant to the case.
>
> . . . .
>
> The member must provide information that is relevant to the complaint. . . . If a member believes there is a conflict between his/her client and CSPEC's request for information, he/she may seek advice from CSPEC in order to resolve the conflict
>
> . . . .
>
> In the case of non-complainants, CSPEC shall make an effort to obtain a waiver from the client if the information would aid in the investigation.

No other provisions deal with production of client records.

Significantly, the complainant against Sultan herein was not her client, K. Therefore, CSPEC obtained no authorization under the Rules to seek a waiver of confidentiality. Moreover, K through her counsel directed Sultan to resist breaching the confidential relationship. While the Rules require Sultan as a member of NCPA to "provide information that is relevant to the complaint," that obligation is specifically limited by the same Rules to circumstances in which the member does not "believe[] there is a conflict between his/her client and CSPEC's request for information"—a circumstance directly contrary to that present *sub judice*. In the event of a perceived conflict,

the member *may*, but is not *required*, to seek the *advice*, but not the *directive*, of CSPEC.

Further, assuming *arguendo* that NCPA's by-laws and rules may be construed impliedly to impose upon Sultan the contractual requirement to disclose private client information without consent of that client, we decline to enforce such a provision.

Warehouse Assoc. states that courts will enforce only those "rules and regulations which are not unreasonable, immoral, unlawful, or contrary to public policy." 231 N.C. at 146, 56 S.E.2d at 394. As noted above, NCPA has acknowledged the "primary" status of maintaining confidentiality between psychologists and patients. "Primary" is defined as "first in rank or importance." Webster's Third New International Dictionary 1800 (1967). We have also previously observed that our General Assembly has accorded the power to compel disclosure of confidential patient records solely to the Board. *See* G.S. § 90-270.9. In view of these considerations, we deem "unreasonable," *Warehouse Assoc.* at *id.*, and hence unenforceable, any implied rule governing Sultan's membership in a voluntary professional organization which requires suppression, in favor of that organization, of her *primary* obligation to maintain confidentiality of client communications.

In sum, under the facts of the case *sub judice* and contrary to NCPA's assertion, the contractual nature of Sultan's membership in the organization did not require her to produce to NCPA upon its request confidential information concerning K without the latter's consent. Accordingly, Sultan was entitled to judgment as a matter of law on NCPA's counterclaim and the trial court properly entered summary judgment in her favor.

NCPA also argues that no psychologist-patient privilege existed in the present case because Sultan was not hired to treat K, but merely to diagnosis her condition for a court proceeding. Moreover, NCPA continues, assuming a psychologist-patient privilege initially attached, it was waived when K called Sultan as a witness to testify about her mental condition, and Sultan therefore had no basis to refuse NCPA's request for records. NCPA misapprehends the purport of the law of privilege.

The concept of confidentiality must be distinguished from the law of privilege. An evidentiary privilege is a law that permits a per-

son to prevent a court from requiring revelation of relational communications. Confidentiality refers to a duty, frequently an ethical limitation imposed by a profession, not to disclose relational communications.

Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. Rev. 893, 912 (1982). The presence or absence of psychologist-patient privilege is irrelevant to Sultan's general professional obligation to maintain the confidentiality of client information, subject to G.S. § 90-270.9, in a non-courtroom setting.

Finally, in that the question is briefly touched upon by *amicus* counsel in its appellate brief, we emphasize that the question of NCPA's authority under its by-laws and rules to terminate Sultan's membership is not before us. We therefore express no opinion as to that issue.

Affirmed.

Chief Judge ARNOLD and Judge WYNN concur.

MARY LEE COOMBS, PLAINTIFF v. LEE ROY COOMBS, DEFENDANT

No. 945DC628

(Filed 5 March 1996)

Divorce and Separation § 203 (NCI4th)— sex after divorce from bed and board—bar to permanent alimony

Sexual intercourse by plaintiff with a third party subsequent to a decree granting her a divorce from bed and board operated to bar plaintiff's claim for permanent alimony.

Am Jur 2d, Divorce and Separation §§ 567, 568, 641, 643-647.

Misconduct of wife to whom divorce is decreed as affecting allowance of alimony, or amount allowed. 9 ALR2d 1026.

Defenses available to husband in civil suit by wife for support. 10 ALR2d 466.

COOMBS v. COOMBS

[121 N.C. App. 746 (1996)]

Appeal by plaintiff from order entered 31 March 1994 by Judge J. H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 1 March 1995.

Shipman & Lea, by James W. Lea, III, and J. Albert Clyburn, for plaintiff-appellant.

Mason & Boney, by William Norton Mason, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court's entry of summary judgment in favor of defendant. She contends the court erred by denying her claim for permanent alimony in consequence of her admitted sexual intercourse with a third party subsequent to an order of divorce from bed and board. We affirm the trial court.

Relevant background information is as follows: Mary Lee Coombs and Lee Roy Coombs were married 7 April 1964. On 12 January 1993, plaintiff filed the instant action, seeking divorce from bed and board as well as temporary and permanent alimony. She alleged defendant "offered such indignities so as to make [her] condition intolerable and life burdensome," and specifically claimed he had committed mental and physical abuse and had engaged in numerous adulterous affairs. Defendant answered 10 February 1993, denying the allegations essential to plaintiff's claim for alimony, and affirmatively defending on grounds of plaintiff's adultery.

Following a hearing, the trial court entered an order 14 April 1993. The court found defendant had committed acts of adultery and physical abuse against plaintiff and their minor children, granted plaintiff divorce from bed and board, and directed that defendant pay $1,400.00 per month in alimony *pendente lite.*

On 22 March 1994, defendant moved for summary judgment on the issue of permanent alimony, stating:

> at no time have the plaintiff and defendant entered into a Separation Agreement or Consent Judgment in which they released each other from their respective rights, duties and responsibilities arising out of their marital relationship.

In a supporting affidavit, defendant stated he had witnessed plaintiff's vehicle at a third party's home late at night on a number of occasions during February and March 1993, and that plaintiff had not spent the

night in the marital home on these evenings. Defendant also indicated a private detective agency had confirmed his observations. Thus, defendant asserted, plaintiff was barred from receiving permanent alimony on the basis of her own adulterous activity.

Plaintiff's response admitted she had engaged in sexual relations with a third party subsequent to entry of the divorce from bed and board, but denied any adulterous conduct prior to that date.

On 31 March 1994, the trial court entered an order granting defendant's motion for summary judgment stating:

> [P]laintiff's admitted adultery after she was granted a divorce from bed and board on 14 April 1993, and in the absence of an absolute divorce and in the absence of a Separation Agreement or Consent Judgment, constitutes a bar to the plaintiff's alimony claim as a matter of law . . . .

Plaintiff gave notice of appeal to this Court 13 April 1994.

The sole issue presented on appeal is whether sexual intercourse by plaintiff with a third party subsequent to a decree granting her divorce from bed and board operated to bar plaintiff's claim for permanent alimony.

We note initially that the General Assembly has recently enacted substantial modifications of our statutes affecting alimony litigation, and that the focus currently is placed upon "marital misconduct" occurring "during the marriage and *prior to or on* the date of separation." N.C.G.S. § 50-16.1A(3) (1995) (emphasis added). However, these amendments became effective 1 October 1995, are applicable only "to civil actions filed on or after that date," 1995 N.C. Sess. Laws ch. 319, § 12, and thus have no bearing upon the case *sub judice.*

A divorce *mensa et thoro* ("from bed and board") is a limited divorce and consists of "nothing more than a judicial separation" which "suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond." *Schlagel v. Schlagel*, 253 N.C. 787, 790, 117 S.E.2d 790, 793 (1961). Thus, sexual intercourse with a third party by either partner constitutes adultery even after a decree of divorce from bed and board has been entered. 1 Suzanne Reynolds, *Lee's North Carolina Family Law*, §6.21(F)(3), at 611 (5th ed. 1993).

A party may seek permanent alimony upon filing for a divorce from bed and board. N.C.G.S. § 50-16.8(b)(1) (1987) (*amended by* 1995 N.C. Sess. Laws ch. 319). However,

> alimony . . . shall not be payable when adultery is pleaded in bar of demand for alimony . . . , made in an action or cross action, and the issue of adultery is found against the spouse seeking alimony . . . .

N.C.G.S. § 50-16.6(a) (1987) (*repealed by* 1995 N.C. Sess. Laws ch. 319, § 4).

While plaintiff concedes "conduct after the decree of divorce from bed and board can continue to amount to marital misconduct," Reynolds, *supra*, § 6.21(F)(3), at 611, she nonetheless urges that we

> reconsider this common-law principle on the grounds that the post-separation conduct of one who has received a divorce from bed and board should receive no different treatment than one who is a party to a valid separation agreement under which the parties have agreed to live separate and apart and without interference from the other party.

However, our decision in *Adams v. Adams*, 92 N.C. App. 274, 374 S.E.2d 450 (1988), negates plaintiff's position. In *Adams*, defendant husband who had committed adultery following the parties' separation insisted such conduct " 'neither caused the marital break-up nor tended to diminish any remote possibility of reconciliation.' " *Id.* at 277, 374 S.E.2d at 452. He argued on appeal that the trial court had consequently erred in awarding alimony to plaintiff.

In sustaining the trial court, we observed that

> [u]ntil the State grants [the parties] an absolute divorce, a couple, though separated from each other, continues to be wife and husband. It is for this reason that N.C. Gen. Stat. Sec. 50-16.2 (1987), which sets down the fault grounds for alimony, does not distinguish between pre-separation and post-separation adultery. We do not view the failure of the General Assembly to differentiate between these time periods to be an oversight. Rather, defining adultery so as to include any act of voluntary sexual intercourse between a spouse and a third party —the former's separation from the other spouse notwithstanding—is consistent with [this State's] policy favoring reconciliation.

Id. at 278, 374 S.E.2d at 452-453. Accordingly, we held that voluntary sexual intercourse by a spouse with a third party during the parties' period of separation constitutes adultery as contemplated by N.C.G.S.

§ 50-16.2(1) (1987) (*repealed by* 1995 N.C. Sess. Laws ch. 319, § 1) and is thus grounds for alimony. *Id.* at 279, 376 S.E.2d at 453.

In the foregoing context, we note that our General Assembly in enacting Chapter 31A of the General Statutes engendered certain changes of the common law regarding the effect of divorce from bed and board on estate rights of the spouse against whom the decree was entered. *See* Reynolds, *supra*, § 6.21(C), at 603-604; N.C.G.S. § 31A-1 (1984). Notwithstanding the decision in *Adams*, however, no legislation until recently touched upon the common law rule regarding post-decree marital misconduct. *See* N.C.G.S. § 50-16.1A(3) (1995). By its failure to negate *Adams* and extend modification of the common law rule beyond certain estate rights, the General Assembly has spoken. *See Blackmon v. N.C. Dept. of Corrections*, 118 N.C. App. 666, 673, 457 S.E.2d 306, 310 (1995) (General Assembly presumed to know content of courts' decisions). *See also In re Taxi Co.*, 237 N.C. 373, 376, 75 S.E.2d 156, 159 (1953) (where statute sets forth the instances of its coverage, other coverage necessarily excluded).

Adams therefore controls our decision herein. There exists no practical distinction between the circumstance of the separated parties in *Adams* and that of plaintiff and defendant who obtained "nothing more than a judicial separation," *Schlagel*, 253 N.C. at 790, 117 S.E.2d at 793, which affected "little change on the incidents of marriage other than rights of conjugal cohabitation," Reynolds, *supra*, § 6.21(D), at 604, and the estate rights noted above. In either instance, moreover, the parties must live separate and apart for one year before a court will grant an absolute divorce. *See* N.C.G.S. § 50-6 (1995). Voluntary sexual relations with a person not one's spouse during separation pursuant to a decree of divorce from bed and board thus constitute adultery and a defense to the payment of permanent alimony under N.C.G.S. § 50-16.6(a) (1987) (*repealed by* 1995 N.C. Sess. Laws ch. 319, § 4).

Plaintiff's reliance on *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E.2d 809 (1977) and *Sethness v. Sethness*, 62 N.C. App. 676, 303 S.E.2d 424 (1983) is unfounded. In *Riddle*, the parties entered into a formal separation agreement whereby husband agreed, *inter alia*, to pay wife $600.00 per month until she " 'either remarries or dies, whichever occurs first,' " and that each might " 'go his or her way, and each live his or her personal life unmolested, unhampered, and unrestricted by the other . . . .' " *Riddle*, 32 N.C. App. at 88, 230 S.E.2d at 812. Wife thereafter entered into a relationship with another man, and

husband asserted her post-separation conduct as a defense to enforcement of the alimony provisions.

Using basic contract principles, this Court held the agreement "must be enforced according to its own terms." *Id.* As neither of the contingencies which relieved husband of his obligations had occurred, he remained obligated under the agreement to pay alimony.

In *Sethness*, the parties entered into a written agreement which specified varying amounts of alimony over a number of years to be paid by husband to wife. *Sethness*, 62 N.C. App. at 676-77, 303 S.E.2d at 425. Husband later filed an action alleging wife had " 'lewdly and lasciviously associated, bedded and cohabited with a man,' " and seeking to have the agreement declared null and void as against public policy with regard to the alimony provisions. *Id.* at 678, 303 S.E.2d at 426.

On appeal to this Court, we upheld the agreement, noting that while "[w]e do not condone illicit cohabitation or illicit intercourse," which conduct "violate[s] the laws of this state," such acts do not necessarily void the agreement entered into between the parties. *Id.* at 681, 303 S.E.2d at 428.

> Because a separation agreement does not specifically prohibit "illicit intercourse" and cohabitation and may, by implication, even condone such acts, it does not therefore follow that the agreement promotes them. Whether the silence of a separation agreement on such issues renders it void as against public policy is a matter for legislative, not judicial, determination.

Id.

In contrast to *Riddle* and *Sethness*, the case *sub judice* does not involve a formal separation agreement wherein the parties have entered into a contract touching upon nearly all the rights and incidents of marriage as well as providing for the payment of alimony. As such, the contract principles relied upon by this Court in those cases are inapplicable to the instant circumstance in which the parties separated pursuant to a decree which constitutes "nothing more than a judicial separation," *Schlagel*, 253 N.C. at 790, 117 S.E.2d at 793, and which "works little change on the incidents of marriage," Reynolds, *supra*, § 6.21(D), at 604.

Affirmed.

Judges JOHNSON and MARTIN, Mark D. concur.

NANCY HENDERSON, PLAINTIFF v. FREDERICK HENDERSON, DEFENDANT

No. COA94-1347

(Filed 5 March 1996)

1. **Divorce and Separation § 353 (NCI4th)— child custody—alleged sexual abuse of daughter by father—findings appropriate**

The trial court in a child custody action did not fail to make appropriate findings of fact regarding alleged sexual abuse of the parties' daughter and did not err in allowing the guardian ad litem to testify as to her opinion regarding the abuse allegations, since the court found that the DSS investigation produced no evidence of sexual abuse and an abuse action had been dismissed; based upon testimony of an expert witness in psychology and a report provided by Carolina Psychological Health Services, the court found that defendant did not possess characteristics which would cause one to believe that he would commit acts of sexual abuse as alleged by plaintiff; and even it the court erred in admitting testimony by the guardian ad litem, plaintiff could not show that she was prejudiced by the evidence.

Am Jur 2d, Divorce and Separation §§ 974, 982.

Consideration of investigation by welfare agency or the like in making or modifying award as between parents of custody of children. 35 ALR2d 629.

Denial or restriction of visitation rights to parent charged with sexually abusing child. 1 ALR5th 776.

2. **Divorce and Separation § 341 (NCI4th)— removal of children from N.C.—sufficiency of evidence to support findings**

The evidence in a child custody action was sufficient to support the trial court's finding that, if plaintiff's removal of the children from N.C. without advising other interested persons was not an intent to remove the children from defendant, it was at best an exercise in poor judgment.

Am Jur 2d, Divorce and Separation § 988.

Interference by custodian of child with noncustodial parent's visitation rights as ground for change of custody. 28 ALR4th 9.

3. Divorce and Separation § 353 (NCI4th)— award of custody to defendant father—children's best interests—sufficiency of evidence

The evidence was sufficient to support the trial court's finding that the best interests of the parties' children would be served by awarding custody to defendant father where the court found among other things that defendant had an outstanding work record, had arranged for child care while he worked, and had rented a suitable apartment for himself and the children; based on observation in the courtroom and mirroring language in the psychological profile prepared by an expert, plaintiff had demonstrated that she was a very hysterical and uptight person who caused stressful situations to exist and linger in the lives of those around her; defendant demonstrated a very settled and calm manner; the son had missed 27 days of school while in plaintiff's custody; but defendant insisted that he attend school, and his grades improved.

Am Jur 2d, Divorce and Separation §§ 974, 980.

Mental health of contesting parent as factor in award of child custody. 74 ALR2d 1073.

Appeal by plaintiff from order entered 9 June 1994 by Judge Arnold O. Jones in Lenoir County District Court. Heard in the Court of Appeals 12 September 1995.

Plaintiff Nancy Henderson and defendant Frederick Henderson married in August 1983. They have two children, a son born in 1987 and a daughter born in 1989. The couple separated on 9 May 1993 after plaintiff claimed she saw defendant sexually assault the daughter by rubbing his finger on the child's groin area. Defendant denied the allegation, claiming he merely tickled the child and never touched her groin area.

Based on plaintiff's allegation, the Lenoir County Department of Social Services (DSS) filed a petition alleging the daughter had been abused and a guardian *ad litem* was appointed to represent the child's interests. The Lenoir County Juvenile Court dismissed the

petition for lack of evidence in December 1993. Later that month, DSS filed a petition alleging neglect and both children were adjudicated to be neglected children in an order filed 21 December 1993. The order made no determination of custody, and the court directed the parties to file an action for custody "if either party care[d] to litigate the issue." Plaintiff retained physical custody of the children.

Plaintiff filed this action 14 January 1994 for temporary and permanent custody. Defendant filed a motion, supported by the Lenoir County Mental Health Department and the guardian *ad litem*, for increased visitation. On 22 February 1994, plaintiff removed the furniture from the marital home, and the next day took the children to her aunt's home in Pennsylvania. After discovering the plaintiff had left the state with the children, defendant obtained an *ex parte* order granting him temporary custody on 25 February 1994. Plaintiff returned with the children on 7 March 1994, and defendant obtained custody on 9 March 1994. After a full evidentiary hearing on 6 June 1994, the trial court entered an order 9 June 1994 granting custody to the defendant. From this order, plaintiff appeals.

Gerrans, Foster, & Kriss, P.A., by Jeannette P. Kriss, for plaintiff-appellant.

Dixon, Doub, & Conner, by Ernest L. Conner, Jr., for defendant-appellee.

McGEE, Judge.

A trial judge is vested with wide discretionary power in custody proceedings. *Green v. Green*, 54 N.C. App. 571, 573, 284 S.E.2d 171, 173 (1981). "The normal rule in regard to the custody of children is that where there is competent evidence to support a judge's finding of fact, a judgment supported by such findings will not be disturbed on appeal." *Id.* Plaintiff argues the trial court erred by: 1) failing to make appropriate findings of fact regarding the alleged sexual abuse of the daughter; 2) allowing the guardian *ad litem* to testify as to her opinion regarding the abuse allegations; 3) relying on incompetent evidence to determine plaintiff's intent in taking the children to Pennsylvania; and 4) concluding it was in the best interests of the children for the defendant to have custody. After reviewing the record, we find the findings in this case are supported by competent evidence and the judgment is supported by the findings. We find no prejudicial error and affirm.

I.

[1] Regarding the alleged sexual abuse of the daughter, plaintiff contends the trial court failed to resolve the evidence of the alleged sexual abuse in its findings of facts as required by law. *See Dixon v. Dixon*, 67 N.C. App. 73, 79, 312 S.E.2d 669, 673 (1984) (trial court is obligated to resolve any evidence of child abuse in its findings of facts). However, although the court did not make a finding as to whether the abuse did or did not occur, this issue is adequately addressed by the court's findings.

The trial court noted in finding of fact number 17 that the DSS investigation produced no evidence of sexual abuse and the abuse action had been dismissed. The court goes on to find in finding of fact number 47:

> [T]his Court finds, based upon the testimony of Dr. Gregory Gridley [expert witness in psychology], and the report provided by Carolina Psychological Health Services . . . , that *the Defendant does not possess those characteristics which would cause one to believe that he was or is a person who would commit acts of sexual abuse* as alleged by the Plaintiff.

(emphasis added). These findings sufficiently resolve the sexual abuse issue.

Plaintiff also contends the trial court erred in allowing the guardian *ad litem* to testify she felt there was no evidence to support plaintiff's allegations of sexual abuse. Plaintiff argues the guardian was not qualified to give such testimony. However, even if the testimony was inadmissible, plaintiff cannot show she was prejudiced by the evidence. "In a trial by a court without a jury, the erroneous admission of evidence will not ordinarily be held prejudicial, because it is presumed that the court did not consider the incompetent evidence." *In re Peirce*, 53 N.C. App. 373, 388, 281 S.E.2d 198, 207 (1981). Here, the order shows the trial judge based his findings of fact regarding the sexual abuse allegations upon the testimony of the expert witness in psychology and the report of Carolina Psychological Health Services. The court's findings are based upon competent evidence and are binding on this Court. The admission of the guardian's testimony, even if erroneous, was harmless error.

II.

[2] Plaintiff assigns as error the trial court's finding of fact number 43, which reads: "If Plaintiff's removal of the children from North

Carolina on or about February 23, 1994, without advising other interested persons, was not an intent by Plaintiff to remove the children from the Defendant, it was at best, an exercise in poor judgment by Plaintiff." Plaintiff contends the court erred by allowing the guardian *ad litem* to testify that she felt at the time, based on the facts and her own investigation, that plaintiff had fled with the children. Again, even if the admission of this testimony was error, there is other competent evidence supporting the trial court's findings.

The following evidence was presented at the hearing: 1) defendant testified he did not know plaintiff was taking the children to Pennsylvania; 2) plaintiff did not inform DSS or the guardian *ad litem* of the trip; 3) plaintiff did not advise her employer of the trip and did not report to work as scheduled; 4) plaintiff removed the furnishings from the marital home, just prior to the trip, in violation of a court order; 5) plaintiff's family members told the guardian *ad litem* they did not know her whereabouts; 6) during the trip, the children missed a scheduled visitation with the defendant, and the daughter missed a scheduled appointment with her psychotherapist at the county health department which plaintiff never cancelled; 7) plaintiff testified the son was too sick to attend school, but took him with her to Pennsylvania; and 8) plaintiff testified that after returning from Pennsylvania, she decided to move to the beach, but prior to that, she had not decided where she and the children would live after moving the furnishings out of the marital home. This evidence supports the trial court's finding that if plaintiff did not intend to remove the children, then her actions were "an exercise in poor judgment."

Plaintiff also argues the trial court erred in its findings because plaintiff presented evidence that she told defendant of the trip and that the purpose of the trip was to visit her sick aunt. However, "the findings of the trial judge regarding custody and support are conclusive when supported by competent evidence, even when the evidence is conflicting . . . ." *Dixon v. Dixon*, 67 N.C. App. 73, 76, 312 S.E.2d 669, 671-72 (1984) (citations omitted). Here, the findings are supported by competent evidence and are binding on this Court.

III.

[3] Plaintiff also argues the trial court erred in finding the children's best interests would be served by awarding custody to the defendant. Plaintiff first claims the court erroneously admitted the guardian *ad litem*'s testimony that she believed it was in the best interests of the

children to be placed with the defendant. However, as discussed above, the court is presumed to have disregarded any incompetent evidence. The record contains competent evidence to support the trial court's findings.

Among other things, the court found: 1) defendant has an outstanding work record; 2) defendant had arranged for child care while he works; 3) defendant had rented a suitable apartment for himself and the children; 4) based on observations in the courtroom and mirroring the language in the psychological profile prepared by Dr. G.H. Engelstatter, that "Plaintiff has demonstrated, during the course of this trial and throughout the course of this litigation, that she is a very hysterical and uptight person who causes stressful situations to exist and linger in the lives of those individuals around and about her"; 5) defendant "demonstrated a very settled and a very calm manner in the way he handles himself in crises as demonstrated by his handling of the allegations made by Plaintiff"; and 6) the son had missed 27 days of school while in plaintiff's custody, but defendant and defendant's step-mother insisted the son attend school while he was in defendant's custody, and the son's grades improved. These findings support the trial court's finding that the children's best interests would be served by giving custody to the defendant.

Plaintiff further argues the court did not make appropriate findings of fact regarding the children's best interests and "overlooked" relevant evidence she claims shows she should have been awarded custody. However, as stated above, the court made findings of fact based on competent evidence which support the judgment and that judgment will not be disturbed on appeal. *See Green*, 54 N.C. App. at 573, 284 S.E.2d at 173. This is true even if there is conflicting evidence tending to support an award of custody to the plaintiff. *See Dixon*, 67 N.C. App. at 76, 312 S.E.2d at 671-72.

"[O]ur Court has repeatedly held that the presiding judge, who has the unique opportunity of seeing and hearing the parties, witnesses and evidence at trial, is vested with *broad* discretion in cases concerning the custody of children." *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). We find no abuse of that discretion in this case. For the reasons stated, the order of the trial court is affirmed.

Affirmed.

Judges MARTIN, John C., and WALKER concur.

DEBORAH H. KELLY AND BRIAN KELLY PLAINTIFFS v. PARKDALE MILLS, INCORPORATED DEFENDANT

No. COA94-1327

(Filed 5 March 1996)

Workers' Compensation § 62 (NCI4th)— injury to hand—insufficiency of complaint to allege *Woodson v. Rowland* claim

Plaintiff's claim for injury to her hand sustained while she was cleaning a defective card machine in defendant's textile mill did not meet the test of *Woodson v. Rowland*, 329 N.C. 330, where plaintiff failed to establish that defendant intentionally engaged in misconduct which it knew was substantially certain to cause serious injury or death; there was no evidence that defendant violated any OSHA regulations; there was evidence that defendant's process for servicing of the card machines was in keeping with industry practice; plaintiff testified that the training she received from defendant as to the method of cleaning and operating a card machine was the same technique she was taught from previous employers; and defendant was responsive and cooperative when plaintiff advised defendant of the problems she was experiencing with the card machine.

Am Jur 2d, Workers' Compensation §§ 75, 79, 80.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury. 9 ALR4th 778.

Appeal by plaintiffs from order and judgment filed 19 August 1994 by Judge Charles Lamm in Gaston County Superior Court. Heard in the Court of Appeals 22 August 1995.

Price, Smith, Crosland and Hargett, by William Benjamin Smith, for plaintiff-appellants.

Golding, Meekins, Holden, Cosper & Stiles, by Harvey L. Cosper, Jr. and Christine E. Alaimo for defendant-appellee.

McGEE, Judge.

On 19 March 1991, Deborah Kelly and her husband, Brian Kelly, filed suit against Deborah Kelly's employer, Parkdale Mills, Incorporated, pursuant to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) (hereinafter "*Woodson* claim") alleging defendant had intentionally engaged in conduct which was substantially certain to cause injury to plaintiff. Defendant filed an answer on 14 May 1993 and a motion for summary judgment on 18 November 1993. Judge Charles Lamm found there were no genuine issues of material fact as to defendant's liability and granted defendant's summary judgment motion on 19 August 1994. From this order and judgment, plaintiffs appeal.

Mrs. Kelly's deposition included the following testimony. In June 1991 she was employed by defendant as a card tender at one of defendant's textile plants. One of Mrs. Kelly's duties was to clean the accumulated cotton, called lap, from the large, stainless steel cylinder of the card machine. The standard procedure for cleaning the cylinder was for her to hold a small wire brush against the surface of the rotating cylinder while the machine was operating at a low speed. The speed was regulated by manipulating the controls on the side of the machine.

On 19 June 1991, Mrs. Kelly was cleaning the card machine. When she reached around with her left hand to operate the controls on the side of the machine, the brush in her right hand hit a dip in the cylinder, trapping both the brush and her right hand between the cylinder and a metal guard at the top of the cylinder. As a result, Mrs. Kelly's right hand was severely injured and her right thumb was amputated.

Mrs. Kelly was an experienced textile machine operator. Prior to working for defendant, she was employed by Pharr Yarns from 1973 until 1986. After leaving Pharr Yarns, she worked for Carolina Mills for six months and then began working for defendant in October 1990. Throughout Mrs. Kelly's employment at Pharr Yarns, she was called upon to operate and clean card machines. These machines were structurally similar to the card machines used by defendant and the procedure for operating and cleaning the machines was the same.

One month before Mrs. Kelly's injury, she noticed, as she was cleaning one of the card machines, that it appeared to have a dip in the cylinder. When her brush hit this dip, it snagged the brush. Mrs. Kelly notified management of the problem a number of times through-

out the month. In response to these complaints, defendant attempted to correct the problem by arranging for an outside company to rewire the machine. The problem still persisted despite the fact that this company rewired the machine on four separate occasions. After Mrs. Kelly's accident, she was told defendant had discovered the reason the machine had not been working properly was because this outside company had been using defective wire. Consequently, defendant decided it would no longer allow this company to handle the wiring on the card machines.

Plaintiffs contend the trial court erred in granting defendant's motion for summary judgment. They argue they are not limited to recovery under the Workers' Compensation Act because the facts of this case permit them to pursue a *Woodson* claim. Defendant contends *Woodson* is a narrow exception to the general rule embodied in N.C. Gen. Stat. § 97-10.1 that an injured employee is limited to recovery under the North Carolina Workers' Compensation Act. The facts of this case, according to defendant, do not meet the strict standard set forth in *Woodson*. We agree.

A trial court may grant a motion for summary judgment only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (c) (1990); *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 290 (1978). In order to prevail on a summary judgment motion, the moving party must show either "(1) an essential element of plaintiff's claim is nonexistent . . . [2] plaintiff cannot produce evidence to support an essential element of his claim, or . . . [3] plaintiff cannot surmount an affirmative defense which would bar the claim." *Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37, (quoting *Shuping v. Barber*, 89 N.C. App. 242, 244, 365 S.E.2d 712, 714 (1988)) *review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). The trial court must construe all evidence in the light most favorable to the non-moving party, allowing the non-moving party all favorable inferences as to the facts. *Moye v. Gas Co.*, 40 N.C. App. 310, 314, 252 S.E.2d 837, 841, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979).

The Workers' Compensation Act is the exclusive remedy for workers, eligible under the Act, who are injured in a workplace accident. N.C. Gen. Stat. § 97-10.1 (1991). In *Woodson v. Rowland*, our Supreme Court set forth an exception whereby workers may pursue a civil action in the following situation:

> [W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228. The *Woodson* exception developed from an egregious set of facts in which an employee died when a ditch caved in on him. In *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995), our Supreme Court noted the employer in *Woodson* "had been cited four times in the previous six-and-a-half years for violating trenching regulations. A trench box, a specific requirement of the state Occupational Safety and Health Act, was not used. Evidence indicated that [the] employer . . . knew of the substantial certainty that the trench would fail and nevertheless had directed that the work proceed without a trench box." *Mickles*, 342 N.C. at 109-10, 463 S.E.2d at 210-11. In denying the plaintiff's claim in *Mickles*, the Court emphasized the requirement that a *Woodson* claim will not survive without a showing that the defendant engaged in misconduct it knew was substantially certain to cause serious injury or death. *Id.* at 112, 463 S.E.2d at 212.

Under the facts in this case, plaintiffs' claim does not meet the elements of the *Woodson* test and therefore, it cannot survive summary judgment in favor of defendant. Plaintiffs have failed to establish that defendant intentionally engaged in misconduct which it knew was substantially certain to cause serious injury or death. There is no evidence to suggest that defendant violated any Occupational Safety and Health Act (OSHA) regulations. While OSHA violations are not determinative, *(See Mickles*, 342 N.C. at 111-12, 463 S.E.2d at 211-12) they are a factor in determining whether a *Woodson* claim has been established. Furthermore, there was evidence that defendant's process for servicing of the card machines was in keeping with industry practice. Mrs. Kelly testified the training she received from defendant as to the method of cleaning and operating a card machine was the same technique she was taught from previous employers. Finally, we note that defendant was responsive and cooperative when Mrs. Kelly advised defendant of the problems she was experiencing with the card machine. As a result of her complaints, defendant hired

an outside firm to rewire the machine in a good faith attempt to remedy the problem.

Plaintiffs have failed to forecast evidence sufficient to show that defendant "intentionally engage[d] in misconduct knowing it [was] substantially certain to cause serious injury or death to [plaintiff]." *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228. Therefore, we affirm the order and judgment of the trial court.

Affirmed.

Judges COZORT and WALKER concur.

CLARENCE A. RAWLS, III, PATRICIA E. RAWLS, JERYL S. RAWLS, CAROL M. RAWLS AND RAWLS & ASSOCIATES, PLAINTIFFS v. MARSHALL L. WILLIFORD, JR., HARRY J. GRIM, JOSEPH W. McGIRT, JR., JERONE C. HERRING AND BRANCH BANK & TRUST CO., DEFENDANTS

No. COA94-1246

(Filed 5 March 1996)

Dedication § 16 (NCI4th)— dedicated property—dedicating corporation nonexistent—withdrawal of dedication—property owned by adjacent landowners

In an action to determine the ownership rights of the parties to a twenty-foot wide strip of beach property located between the parties' beach homes, a conclusive presumption was established pursuant to N.C.G.S. § 136-96 that plaintiffs and defendant, as adjacent landowners to the twenty-foot strip, were both owners of the disputed property, since the corporation which dedicated the strip to public use by filing a map of the property with Dare County had ceased to exist, and plaintiffs and defendant's predecessor in title had executed a withdrawal of dedication of the strip and filed the withdrawal in Dare County.

Am Jur 2d, Dedication §§ 25, 26.

Revocation or withdrawal of dedication by grantees or successors in interest of dedicator. 86 ALR2d 860.

Appeal by defendant Marshall L. Williford, Jr. from order of partial summary judgment signed 26 August 1994 by Judge Jerry R. Tillett

in Dare County Superior Court. Heard in the Court of Appeals 19 October 1995.

This appeal concerns the ownership rights of the parties to a twenty foot wide strip of beach property (hereinafter twenty foot strip) located between plaintiffs' and defendant Marshall L. Williford's beach homes in Nags Head. In 1936, K.S. Mitchell purchased property from Nags Head Development Corporation which included property designated on a plat map as lots 7 and 8 of block 2 and lots 1 and 2 of block 3. Before the transfer, Nags Head Development Corporation, which no longer exists, filed a plat of the property with Dare County.

In 1939, K.S. Mitchell conveyed the property to his wife, Hattie, for her life and then to their daughter, Ruby Mitchell. In 1950, Ruby Mitchell Lancaster conveyed lots 1 and 2 of block 3 to Chesson Thomas and he owned this property until 1971. Sometime in or after 1971, plaintiffs purchased lots 1 and 2 of block 3 and are the current owners of the property. The Lancasters continued to own lots 7 and 8 of block 2 until approximately 1987. Defendant Marshall L. Williford, Jr. (hereinafter defendant) then bought lots 7 and 8 of block 2 at a foreclosure sale.

In 1978, the Lancasters learned that the town of Nags Head planned to open the twenty foot strip as a street connecting U.S. 158 Business to the Atlantic Ocean. An attorney advised the Lancasters and plaintiffs that as owners of property adjacent to the twenty foot strip, "the most expeditious method to prevent legal action was the execution by both parties of a Withdrawal of Dedication" as to the twenty foot strip. The attorney drafted the documents, both parties signed, and the documents were filed in Dare County in May and June 1978.

When defendant subsequently bought lots 7 and 8 of block 2, the deed description included the twenty foot strip, but a fence had been erected down the center of the twenty foot strip. Defendant talked to Glenn Lancaster, Ruby M. Lancaster's son, who said the fence was encroaching on defendant's property. Defendant asked plaintiffs to remove the fence, and after plaintiffs refused to remove the fence, defendant removed it. Defendant also removed a second fence that plaintiffs erected.

On 16 June 1992, plaintiffs filed a complaint against defendants seeking to have the trial court quiet title to the twenty foot strip. Plaintiffs sought a judicial declaration either that they owned the

southern ten feet of the twenty foot strip or that they owned as tenants in common with defendant a one-half undivided interest in the entire twenty foot strip. Defendant answered and counterclaimed, *inter alia*, that he owned the entire twenty foot strip because the twenty foot strip was included in the deed description when he purchased his property in 1987. Defendant also claimed that he was the owner of the entire twenty foot strip because he or his predecessors in title had adversely possessed the twenty foot strip for more than the required twenty year period. Plaintiffs responded to defendant's counterclaim, stating *inter alia* that defendant was estopped to deny that his predecessor in title, Ruby M. Lancaster, had recognized her non-ownership of the twenty foot strip when she filed a Declaration of Withdrawal in May 1978.

On 6 July 1994, plaintiffs moved for summary judgment. The trial court concluded as a matter of law that plaintiffs were entitled to partial summary judgment on the quiet title and declaratory judgment issues and declared that plaintiffs and defendant each owned a one-half undivided interest in fee simple in the twenty-foot strip. Defendant appealed. Although issues remained for adjudication regarding destruction and conversion of property, the trial court certified the matter for immediate appeal.

Trimpi & Nash, by John G. Trimpi, for plaintiff-appellees.

Susan Harman-Scott for defendant-appellant Marshall L. Williford, Jr.

EAGLES, Judge.

Defendant argues that the trial court erred by granting partial summary judgment because defendant or his predecessors in title had adversely possessed and occupied the twenty foot strip for more than the required twenty years and, accordingly, defendant was the sole owner of the twenty foot strip. Plaintiffs argue that G.S. 136-96 controls. G.S. 136-96 provides in pertinent part:

> Every strip, piece, or parcel of land which shall have been at any time dedicated to public use as a road, highway, street, avenue, or for any other purpose whatsoever, by a deed, grant, map, plat, or other means, which shall not have been actually opened and used by the public within 15 years from and after the dedication thereof, shall be thereby conclusively presumed to have been abandoned by the public for the purposes for which

> same shall have been dedicated; and no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein, . . . provided, that no abandonment of any such public or private right or easement shall be presumed until the dedicator or some one or more of those claiming under him shall file and cause to be recorded in the register's office of the county where such land lies a declaration withdrawing such strip, piece or parcel of land from the public or private use to which it shall have theretofore been dedicated in the manner aforesaid; . . . that where any corporation has dedicated any strip, piece or parcel of land in the manner herein set out, and said dedicating corporations [sic] is not now in existence, it shall be conclusively presumed that the said corporation has no further right, title or interest in said strip, piece, or parcel of land, regardless of the provisions of conveyances from said corporation, or those holding under said corporation, retaining title and interest in said strip, piece, or parcel of land so dedicated; the right, title and interest in said strip, piece, or parcel of land shall be conclusively presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent thereto, subject to the provisions set out herein before in this section.

Because Nags Head Development Corporation, the corporation that dedicated the twenty foot strip by filing a map of the property with Dare County, has ceased to exist, plaintiffs contend that a conclusive presumption was established pursuant to G.S. 136-96 that plaintiffs and defendant, as adjacent land owners to the twenty foot strip, were both owners of the disputed property.

The theory behind a conclusive presumption is that "[w]hen the basic fact is established (by evidence, judicial notice, or judicial admission), existence of the presumed or elemental fact is deemed to be conclusively demonstrated, and evidence of its nonexistence will not be received." Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* §44 (4th ed. 1993). Here, for the conclusive presumption to arise, there must be proof that Nags Head Development Corporation had dedicated the twenty foot strip for public use and the corporation did not exist at the time of the 1987 declarations of withdrawal.

Defendant does not argue in his brief that Nags Head Development Corporation never dedicated the twenty foot strip. In

fact, defendant admitted in his responses to plaintiffs' interrogatories that the corporation filed a plat with Dare County showing the twenty foot strip. Thus, the corporation dedicated the twenty foot strip for public use. *See Town of Atlantic Beach v. Tradewinds Campground*, 97 N.C. App. 655, 657, 389 S.E.2d 276, 277 (stating that "[w]here land is 'sold and conveyed by reference to a map or plat which represent [sic] a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use' ") (quoting *Steadman v. Pinetops*, 251 N.C. 509, 515, 112 S.E.2d 102, 107 (1960)), *disc. review denied*, 326 N.C. 805, 393 S.E.2d 906 (1990). Defendant also does not deny that the corporation was non-existent at the time his predecessor in interest and plaintiffs filed declarations of withdrawal. Accordingly, the conclusive presumption that plaintiffs and defendant were joint owners of the twenty foot strip was properly established.

Although G.S. 136-96 provides that the presumption is conclusive, defendant still argues that the statute does not defeat a claim of adverse possession. Defendant cites several cases to support his position: *Roberts v. Cameron*, 245 N.C. 373, 95 S.E.2d 899 (1957); *Lee v. Walker*, 234 N.C. 687, 68 S.E.2d 664 (1952); *Gault v. Lake Waccamaw*, 200 N.C. 593, 158 S.E. 104 (1931); and *Investment Co. v. Greene*, 48 N.C. App. 29, 268 S.E.2d 810, *disc. review denied*, 301 N.C. 235, 283 S.E.2d 132 (1980). These cases provide that where a strip of land has been dedicated for public use, a person may gain ownership of the strip if the person adversely possesses the strip for the requisite twenty year period before the strip is accepted for dedication or adversely possesses the strip for twenty years after the strip has been abandoned for public use. However, none of these cases involve the interaction between G.S. 136-96 and adverse possession and we have found no cases that directly address this issue.

After carefully considering the parties' arguments, we conclude that we are bound by the conclusive presumption language of G.S. 136-96 and that defendant is bound by his predecessor's actions. By filing the declaration of withdrawal, the Lancasters lost whatever sole rights to the twenty foot strip they may have had and became joint owners with plaintiffs. Accordingly, we conclude that the trial court did not err in granting partial summary judgment in favor of plaintiffs.

Affirmed.

Judges JOHNSON and WYNN concur.

NINA GOOCH NIFONG, PLAINTIFF-APPELLANT v. C. C. MANGUM, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, THIRD-PARTY DEFENDANT

No. COA94-1222

(Filed 5 March 1996)

Labor and Employment § 187 (NCI4th)— negligent construction of road alleged—failure to show work "imminently dangerous"—no legal duty of contractor under completed and accepted work doctrine

In an action arising out of an automobile accident where plaintiff sued the contractor who constructed the road for negligent construction, defendant owed no legal duty to plaintiff under the "completed and accepted work" doctrine where plaintiff failed to present any forecast of evidence to show that defendant's work was "imminently dangerous," and it was irrelevant whether defendant knew or should have known of a difference between the road as constructed and the road as designed.

Am Jur 2d, Independent Contractor §§ 73-75.

Negligence of building or construction contractor as ground of liability upon his part for injury or damage to third person occurring after completion and acceptance of the work. 13 ALR2d 191, supplemented by 58 ALR2d 865.

Judge WYNN dissenting.

Appeal by plaintiff from order entered 15 July 1994 by Judge D. Jack Hooks, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 October 1995.

On 12 August 1991, plaintiff was driving in the rain on Miami Boulevard in Durham County when "water . . . came up all over [her] windshield" and she "couldn't see a thing." The car slid, hit the curb, and then ran into trees. Plaintiff was seriously injured. She sued C.C. Mangum, Inc. (hereinafter defendant), the contractor who constructed the road, for negligent construction. Plaintiff claimed that defendant constructed the road so that water could "not drain adequately or sufficiently and would remain dammed or ponded on the roadway, causing a hazard to the motoring public, including [plaintiff]." Defendant impleaded the North Carolina Department of

Transportation (hereinafter DOT). Defendant made a motion for summary judgment which the trial court granted.

Plaintiff appeals.

Pulley, Watson, King & Lischer, P.A., by Michael J. O'Foghludha, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten, for defendant-appellee.

EAGLES, Judge.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The trial court must view the forecast of evidence in the light most favorable to the non-moving party. *Canady v. McLeod*, 116 N.C. App. 82, 84, 446 S.E.2d 879, 800, *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994). If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision. *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

Here, plaintiff argues that the trial court erred in granting defendant's motion for summary judgment because plaintiff presented a sufficient forecast of evidence to demonstrate defendant's negligence. Defendant counters that the trial court correctly granted its motion for summary judgment because defendant owed no legal duty to plaintiff under the "completed and accepted work" doctrine. Defendant also argues that because plaintiff was only an incidental beneficiary of the contract between defendant and the DOT, plaintiff cannot maintain an action based upon an alleged breach of contract. Third, defendant argues that even if the "completed and accepted work" doctrine did not apply, plaintiff presented no forecast of evidence of any negligence of defendant during the construction process.

In North Carolina, the "completed and accepted work" doctrine provides that "an independent contractor is not liable for injuries to third parties occurring after the contractor has completed the work and it has been accepted by the owner." *Price v. Cotton Co.*, 226 N.C. 758, 759, 40 S.E.2d 344, 344 (1946). *Price* provides that the contractor is not liable even if the contractor "was negligent in carrying out the

contract." *Price*, 226 N.C. at 759, 40 S.E.2d at 344-45. There are exceptions by which a contractor may be liable even after it has turned over the completed work. Among the exceptions is the so-called "imminently dangerous" work exception. Plaintiff argues that defendant remains liable here because it turned over work to the State that was "imminently dangerous." *See Price*, 226 N.C. at 759, 40 S.E.2d at 345 (stating that a "contractor is liable . . . where the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, provided, . . . the contractor knows, or should know, of the dangerous situation created by him, and the owner or contractee does not know of the dangerous condition or defect and would not discover it by reasonable inspection"). Our Supreme Court has stated that an object is "imminently dangerous" if injury will reasonably occur when the object is used for its declared purpose. *Gas Co. v. Montgomery Ward* & Co., 231 N.C. 270, 274, 56 S.E.2d 689, 693 (1949). Other courts have stated that to be imminently dangerous, " '[t]here must be knowledge of a danger, not merely possible, but probable.' " *Reynolds v. Manley*, 265 S.W.2d 714, 719 (Ark. 1954) (quoting *Jaroniec v. C.O. Hasselbarth, Inc.*, 228 N.Y.S. 302, 305 (N.Y. App. Div. 1928)). Black's Law Dictionary defines an "imminently dangerous article" as "[o]ne that is reasonably certain to place life or limb in peril." Black's Law Dictionary 750 (6th ed. 1990).

Plaintiff relies on the deposition testimony of Don Moore, a member of a transportation engineering firm in Florida, to argue that defendant turned over work that was imminently dangerous. Don Moore testified that the road as constructed deviated from the DOT's plans and that it "create[d] a hazardous hydroplaning condition." Don Moore also opined that it "should have been obvious" that the transition in the curve as constructed by defendant did not occur as designed by the DOT. Plaintiff also presented the affidavits of three people who stated that when it rained, water collected on the road at the location of plaintiff's accident and that several people had hydroplaned in that area.

In contrast, defendant presented deposition testimony from several engineers who testified that defendant constructed the Miami Boulevard project in accordance with DOT plans and that the DOT would not have accepted and paid for the work unless the DOT was satisfied with defendant's performance. Defendant presented deposition testimony to show that before a contractor begins working on a road project, DOT engineers drive stakes in the ground with written instructions on them and also write instructions on the edge of the

roadway to show the contractor exactly where to build the pavement. The contractor follows the guidelines set by the DOT and DOT engineers inspect the work as it progresses. It is ultimately up to the DOT to insure that the road is constructed properly. One engineer testified at his deposition that there was no hydroplaning hazard where the curve transitioned. This same engineer testified that a reasonable person would not have noticed any change in the curve as constructed from the original design.

After carefully reviewing the entire record, we conclude that plaintiff failed to present a forecast of evidence sufficient to survive summary judgment. Regardless of whether defendant knew or should have known of a difference between the road as constructed and the road as designed, plaintiff has failed to present any forecast of evidence to show that defendant's work was *imminently* dangerous. Don Moore's opinion that the difference in the transition of the curve created a hazardous hydroplaning condition does not show that defendant turned over to the State work that was imminently dangerous. Because we have determined that plaintiff failed to forecast evidence to bring her claim within the "imminently dangerous" work exception to the "completed and accepted work" doctrine, we conclude that defendant owed no legal duty to plaintiff under the "completed and accepted work" doctrine. Accordingly, the trial court did not err in granting defendant's summary judgment motion.

Affirmed.

Judge JOHNSON concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

Assuming that the "completed and accepted work" doctrine should remain valid in North Carolina[1] and further, that it applies in this case, I believe that the plaintiff forecasted evidence sufficient to overcome summary judgment. Plaintiff's evidence establishes an issue of fact as to whether the contractor should be liable under an exception to the "completed and accepted work" doctrine. For while, as the majority points out, there is testimony to the contrary, when

1. *See Thrift v. Food Lion*, 111 N.C. App. 758, 766, 433 S.E.2d 481, 486 n.1 (1993) (Greene, J. dissenting) dissent adopted by our Supreme Court in *Thrift v. Food Lion*, 336 N.C. 309, 442 S.E.2d 504 (1994) ("Many courts have completely abandoned the 'completed and accepted' rule, even in the context of construction contracts.")

viewed in a light most favorable to the non-moving party, the testimony of the plaintiff's expert, Don Moore, establishes an issue of fact as to whether the defendant turned over work that was imminently dangerous. He testified that the road as constructed deviated from DOT's plans; that the road created a "hazardous hydroplaning condition"; and that it should have been obvious that the transition in the curve as constructed by defendant did not occur as designed by the DOT. Moreover, plaintiff's evidence showed that at least three other people had "hydroplaned" in the area. I would allow a trial of this case.

BRUCE T. CUNNINGHAM, JR., PLAINTIFF v. JANET F. CUNNINGHAM, DEFENDANT

No. COA94-1179

(Filed 5 March 1996)

1. Divorce and Separation § 288 (NCI4th)— modification of alimony—reconsideration of dependency issue—error

It is not appropriate to reconsider in a modification hearing the dependent spouse's dependency and entitlement to alimony, as the entitlement issue is permanently adjudicated by the original order; rather, the purpose of the modification hearing is to permit the trial court to adjust the decree to some distinct and definite change in the financial circumstances of the parties, and this adjustment may include reducing the amount of alimony to zero.

Am Jur 2d, Divorce and Separation § 699.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance. 18 ALR2d 10.

2. Divorce and Separation § 291 (NCI4th)— modification of alimony—substantial change of circumstances—sufficiency of evidence

The trial court erred in finding that there was not a substantial change of circumstances and in denying plaintiff's motion to modify a previous alimony award where the parties' expenses remained constant between the date of the initial order of alimony and the date of the modification hearing; defendant's income increased from $2,400 a year to $7,000 a year; plaintiff's

income decreased from $110,000 a year to $42,000 a year; the net value of defendant's assets increased from $225,000 to approximately $473,000; and the value of plaintiff's assets did not change. The language of the original decree adjusting the alimony payments based on a percentage of plaintiff's income does not require a different result.

Am Jur 2d, Divorce and Separation §§ 710-715.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance. 18 ALR2d 10.

Judge SMITH dissenting.

Appeal by plaintiff from order filed 25 August 1994 in Moore County District Court by Judge Adam C. Grant, Jr. Heard in the Court of Appeals 18 October 1995.

Maxwell, Freeman & Beason, P.A., by James B. Maxwell, for plaintiff-appellant.

Ann Marie Vosburg for defendant-appellee.

GREENE, Judge.

Bruce T. Cunningham, Jr. (plaintiff) appeals from the trial court's 25 August 1994 order which denied plaintiff's motion to modify a previous alimony award.

Plaintiff and Janet F. Cunningham (defendant) were married in 1972 and the following year, plaintiff, who is an attorney, began practicing law with defendant's father where he practiced until sometime after the parties separated in 1989. In the three years prior to the separation, plaintiff earned an income ranging from $100,000 to $125,000 per year.

During the marriage, plaintiff and defendant accumulated a marital estate worth approximately $450,000 at the time of the parties' 1 January 1989 separation agreement. The parties' separation agreement provided a roughly equal distribution of the marital estate, with plaintiff receiving approximately $225,000 in stock and liquid assets and defendant receiving the marital homeplace, valued at $140,000 (with a debt of $30,000), and $115,000 in liquid assets and other investments. Plaintiff also agreed to pay alimony to defendant

equalling "the sum of one half [plaintiff's] monthly salary after first deducting social security." The separation agreement was, on 26 June 1989, incorporated by reference into the judgment of divorce. The incorporated separation agreement specifically provided that the alimony was separate from the property settlement and thus, the alimony provisions were not reciprocal consideration for the settlement and division of the marital estate.

In 1992, plaintiff's former father-in-law changed plaintiff's compensation schedule to one-half of the actual gross receipts he produced for the firm, which reduced plaintiff's annual salary. Shortly after this change, plaintiff left the law firm and joined another firm as partner. In 1993, plaintiff's gross income at his new law firm was approximately $42,000, and he paid defendant approximately $18,000 in alimony that year. Defendant's investment portfolio was valued at approximately $335,000, producing an "income of more than $30,000 in 1993." The defendant's home debt had been decreased to $2,000. She also earned an income of $7,000 from part-time work, compared to an income of $2,400 during the marriage. On 17 September 1993, plaintiff moved that his alimony obligation to defendant be modified, based upon defendant's increased investment income and plaintiff's involuntary reduction in compensation. The trial court found that between the date of the alimony order and the date of the modification hearing, the parties' reasonable expenses remained constant. The trial court concluded that "[p]laintiff has failed to meet his burden of establishing a material change of circumstances" and that defendant "is a dependent spouse." The trial court denied plaintiff's motion on 25 August 1994 and plaintiff appealed.

The issues are whether (I) the defendant's status as a dependent spouse is subject to reconsideration at a modification hearing; and (II) the evidence in this case supports the trial court's conclusion that there has been no "change of circumstances."

I

[1] The trial court concluded that the defendant remained a "dependent spouse." This is an issue that was not properly before the trial court. The statutes applicable to this case permit the modification of an alimony decree upon a "showing of changed circumstances." N.C.G.S. § 50-16.9(a) (1995). The "circumstances" to be considered are those "factors used in the original determination of the amount of alimony awarded under G.S. 50-16.5." *Rowe v. Rowe*, 305 N.C. 177,

187, 287 S.E.2d 840, 846 (1982). In other words, the "circumstances" are only those that "bear upon the financial needs of the dependent spouse or the ability of the supporting spouse to pay." *Britt v. Britt*, 49 N.C App. 463, 470-71, 271 S.E.2d 921, 926 (1980). It is not appropriate to reconsider, in a modification hearing, the dependent spouse's entitlement to alimony, as the entitlement issue is "permanently adjudicated by the original order." *Rowe*, 305 N.C. at 187, 287 S.E.2d 846. The purpose of the modification hearing is to permit the trial court to adjust the decree "to some distinct and definite change in the financial circumstances of the parties." 2 Robert E. Lee, *North Carolina Family Law* § 152, at 237 (4th ed. 1980). This adjustment may include reducing the amount of alimony to zero, but it cannot result in a loss of entitlement to alimony on the grounds that the once dependent spouse is no longer dependent. In this case, the trial court concluded that the defendant remained a dependent spouse. As it was error for the trial court to address that issue, we need not review whether that conclusion was error.

II

[2] In this case, the parties' expenses remained constant between the date of the initial order of alimony and the date of the modification hearing. The defendant's income (not including her income from her assets which amounted to $30,000 a year at the time of the hearing) increased from $2,400 a year to $7,000 a year. The plaintiff's income decreased from $110,000 a year to $42,000 a year. The net value of the defendant's assets increased from $225,000 to approximately $473,000. The value of the plaintiff's assets did not change. There is no evidence that the needs of the parties changed. This evidence reveals that the defendant's assets and income *increased* substantially between the date of the original hearing and the date of the modification hearing. The plaintiff's income *decreased* substantially during this period of time. This reflects a substantial change in circumstances and the conclusion of the trial court to the contrary cannot be supported. *See Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966) (increase in value of wife's property after entry of alimony decree evidence of changed circumstances).

The language of the original decree adjusting the alimony payments based on a percentage of the plaintiff's income does not require a different result. This adjustment clause contemplated a change in the plaintiff's income. It did not, however, contemplate or make any adjustment for an increase in the estate or income of the defendant.

On remand the trial court is to consider, in its discretion, whether to modify the original decree of alimony. N.C.G.S. § 50-16.9(a) (order of alimony "may" be modified upon changed circumstances). There is no requirement, even in the face of a changed circumstance, that the alimony be modified. *Robinson v. Robinson*, 10 N.C. App. 463, 468, 179 S.E.2d 144, 148 (1971).

Reversed and remanded.

Chief Judge ARNOLD concurs.

Judge SMITH dissents.

Judge SMITH dissenting.

I disagree with the two central precepts of the majority opinion. I believe we are bound by existing case law, which states with clarity that dependency may be reconsidered at a modification hearing. And, I agree with the trial court's conclusion that no change of circumstances, as a matter of law, has occurred.

I. Reconsideration of Dependency

It appears that any question concerning reconsideration of dependency was settled by *Marks v. Marks*, 316 N.C. 447, 461, 342 S.E.2d 859, 867 (1986). *Marks* is analytically identical to the instant case, in that it involves an alimony modification motion alleging changes in the dependency status of a supported spouse. In the section of the *Marks* opinion entitled "Changed Circumstances," our Supreme Court held that the trial court's

> findings . . . fully support the trial judge's conclusion that "plaintiff is *no longer* a *dependent spouse*," which supports his order terminating defendant's spousal support obligations. Only a "dependent spouse" is entitled to alimony. We conclude, therefore, that the trial court did not err in terminating defendant's obligation to pay alimony pursuant to the 1974 consent judgment.

Id. at 461, 342 S.E.2d at 867 (emphasis added) (citations omitted).

Since the *Marks* Court affirmed the trial court's conclusion of law, it seems irrefutable that dependency is subject to reconsideration under proper and substantial changes of circumstance. Otherwise, under its unanimous opinion, our Supreme Court affirmed an error of law.

The *Marks* holding is consistent with the Supreme Court's earlier ruling in *Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982). Rowe concerned an alimony modification motion based on changed circumstances. *Id.* The *Rowe* Court declared its "primary concern on this appeal [to be] the change in financial needs of defendant as a dependent spouse." *Id.* at 187, 287 S.E.2d at 846. The *Rowe* plaintiff appellee's brief stated:

> In fact, the *entire basis* for plaintiff's motion for modification is that although defendant was a dependent spouse at the time of the December 1976 Order—circumstances have changed with reference to the preceding findings of fact—so as to render her *no longer a dependent spouse* and no longer in need of alimony.

Brief for plaintiff appellee at pages 46-47; *Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982) (No. 96A81) (italicized emphasis added).

The Court of Appeals decided the same change of circumstance issue in *Rowe v. Rowe*, 52 N.C. App. 646, 280 S.E.2d 182 (1981) by holding:

> Defendant's argument that the court's initial determination of dependency is not subject to reconsideration on a subsequent motion under G.S. 50-16.9 is untenable. As we have explained herein, G.S. 50-16.9 calls for a *completely new examination* of the factors which necessitated the initial award of alimony in order to determine whether any of these circumstances have changed. When the list of circumstances enumerated in G.S. 50-16.5 is properly employed, *the conclusion is inescapable that defendant, although formerly dependent, is no longer so.*

Id. at 656, 280 S.E.2d at 188 (emphasis added). The Supreme Court affirmed this ruling, when it "agree[d] with the Court of Appeals that under these facts, there has been a change of circumstances as a matter of law." *Rowe*, 305 N.C. at 188, 287 S.E.2d at 847.

Based on *Rowe* and *Marks*, I perceive our consideration on this issue bound by the principles of *stare decisis*. *See Andersen v. Baccus*, 335 N.C. 526, 529, 439 S.E.2d 136, 138 (1994). We are also bound by the rule espoused in *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989), wherein it was determined that one panel of the Court of Appeals may not overturn another.

In *Rowe*, this Court expressly ruled on the dependency reconsideration issue. *Rowe*, 52 N.C. App. at 656, 280 S.E.2d at 188. The Supreme Court affirmed the Court of Appeals on the reconsideration issue, on nearly identical grounds. *Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. While I agree the majority's view on reconsideration may make for better policy, we are bound to apply the law, not rewrite it.

II. Changes of Circumstance

The majority has apparently concluded as a matter of law that on the instant facts a change of circumstances has occurred. I cannot agree. In this case, the parties consented to incorporation of the separation agreement into the divorce judgment. *See Walters v. Walters*, 307 N.C. 381, 385, 298 S.E.2d 338, 341 (1983). The parties also incorporated an automatic adjustment provision into the consent judgment, allowing alimony in the amount of one-half of plaintiff's income.

This provision was designed as a mechanism of convenience to the parties to prevent repeated litigation on alimony issues related to income fluctuations. Plaintiff was not forced into this alimony arrangement. Instead, he voluntarily assumed an obligation empowering defendant to preserve the marital custom of saving income. In light of the trial court's finding that defendant suffers from an illness which prevents her from working full-time, defendant's emphasis on saving as a priority is understandable, if not laudable.

By plaintiff's own account, defendant is presently engaging in economic activity, made possible through alimony, that was a regular and important standard during the marriage. Plaintiff agreed to an alimony arrangement which would uphold the custom of saving, as that was "the economic standard established by the marital partnership." *Williams v. Williams*, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980). This Court has held that, when a party includes specific provisions in a consent decree providing for alimony, there is "an implied requirement of proving 'changed circumstances' . . . not contemplated at the time of the decree." *Britt v. Britt*, 49 N.C. App. 463, 473, 271 S.E.2d 921, 927 (1980). Moreover, "the provisions of a separation agreement [should] be given deference when adopted in a court order to 'increase "self-help" among the parties and prevent protracted litigation of spousal rights.' " *Britt*, 49 N.C. App. at 472, 271 S.E.2d at 927 (quoting Note, *Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. Fam. L. 711, 717 (1978-79)).

We have previously held that, where the change in circumstances is one that the trial court expected and probably made allowances for when entering the original decree, the change is not a ground for modification of the decree. *Britt*, 49 N.C. App. at 473, 271 S.E.2d at 927. In principle, this policy has the "desirable effect of discouraging modification except in special circumstances." *Id.* In this case, plaintiff's alleged change of circumstances is the exact event contemplated by the plain language of the trial court's alimony decree.

Indeed, plaintiff's individual salary has decreased significantly. But, given the symbiotic income link between plaintiff and defendant, defendant has suffered an income reversal identical to plaintiff's. This result has impacted defendant substantially, as the trial court found that defendant's needs had not changed since the original decree. Evidence in the record indicates defendant has had to liquidate assets in response to the decreased alimony. Defendant is not required to deplete assets to remain qualified for alimony, for such a mandate might eviscerate her ability "to maintain *any* standard of living." *Williams*, 299 N.C. at 184, 261 S.E.2d at 856 (emphasis in original).

I find plaintiff's plaint of financial hardship dubious. The trial court found that "although the monthly needs of the Plaintiff has [*sic*] increased, the increases are results of voluntary choices made by the Plaintiff and are not material to the issue of payment of permanent alimony." This finding is well supported by the record. Plaintiff has remarried since his divorce from defendant. However, in the portion of plaintiff's brief outlining his finances and reasonable expenses, he has omitted his wife's earnings from her law practice. As well, it is difficult to define plaintiff's vacation to the island of Tortola, B.W.I. as the practice of a destitute person. Thus, it cannot be said that plaintiff's "ability to pay" has been impaired, or that a legitimate "question of fairness" has been raised. *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E.2d 407, 413 (1976); and *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964).

In *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966), our Supreme Court stated: "Payment of alimony may not be avoided merely because it has become burdensome, or because the husband has *remarried* and *voluntarily* assumed additional obligations." *Id.* (emphasis added). In light of the trial court's findings, which are supported by the record, I find *Sayland* controlling. Thus, no change of circumstances, as a matter of law, has occurred under these facts. I would affirm the trial court's denial of plaintiff's motion requesting alimony modification. Therefore, I dissent.

VEREEN v. HOLDEN

[121 N.C. App. 779 (1996)]

PEARLY VEREEN, PLAINTIFF v. KELLY HOLDEN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; DONALD SHAW, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; JERRY JONES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; WAYLAND VEREEN, IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; DON WARREN, IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; TOM RABON, IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; GENE PINKERTON, In his official capacity as Brunswick County Commissioner; FRANKIE RABON, In his official capacity as Brunswick County Commissioner; DAVID CLEGG, Individually and In his official capacity as Interim Manager; and BRUNSWICK COUNTY, Defendants

No. COA94-1150

(Filed 5 March 1996)

1. Counties § 124 (NCI4th)— legislative immunity—tests

Legislative immunity exists for county legislators, known as county commissioners in North Carolina, provided they are able to prove that they were acting in a legislative capacity at the time of the alleged incident and that their acts were not illegal acts.

Am Jur 2d, Public Officers and Employees §§ 358-363.

2. Counties § 124 (NCI4th)— dismissal of county employee—defense of legislative immunity—denial of judgment on pleadings proper

The trial court properly denied defendant county commissioners' motion for judgment on the pleadings with respect to their defense of legislative immunity because it is too early in the case to determine the applicability of legislative immunity where defendants have not had the opportunity to prove either provision of the legislative immunity test, and plaintiff has alleged sufficient facts which, if true, would establish that he was dismissed from county employment in an administrative rather than legislative action which violated his constitutional rights.

Am Jur 2d, Public Officers and Employees §§ 369, 370.

3. Labor and Employment § 77 (NCI4th)— wrongful termination—public policy exception to employment-at-will doctrine—sufficiency of complaint to state claim

Plaintiff county employee alleged sufficient facts in his complaint to state a claim against defendant county commissioners for wrongful termination under the public policy exception to the employment-at-will doctrine where he alleged that he was fired

by defendants due to his political affiliation and activities, and there was no merit to defendants' argument that N.C.G.S. § 153A-99, which prohibits political coercion in county employment, was inapplicable because it became effective after plaintiff's discharge, since it could still be used to demonstrate the public policy of the State.

Am Jur 2d, Wrongful Discharge § 34.

Discharge from private employment on ground of political views or conduct. 51 ALR2d 742.

4. Labor and Employment § 54 (NCI4th)— breach of contract—personnel policy manual not part of contract—claim properly dismissed

The trial court did not err in dismissing plaintiff's breach of contract claim since there was no merit to plaintiff's contention that the county personnel policy manual was part of his employment contract.

Am Jur 2d, Wrongful Discharge § 97.

Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge. 33 ALR4th 120.

5. Labor and Employment § 69 (NCI4th)— dismissal of county employee—violation of procedural due process—judgment on the pleadings improper

The trial court erred in granting defendants' motion for judgment on the pleadings with respect to plaintiff's procedural due process claim, since, in order for an employee to be entitled to procedural due process protection, he has to possess a property interest or right in continued employment; a crucial factor in determining whether plaintiff possessed a property right in continued employment was whether he was wrongfully terminated or whether he was released in a bona fide RIF and thus did not experience a violation of his due process rights; and resolution of this claim involved factual proof so that judgment on the pleadings was improper.

Am Jur 2d, Wrongful Discharge § 6.

Rights of state and municipal public employees in grievance proceedings. 46 ALR4th 912.

VEREEN v. HOLDEN

[121 N.C. App. 779 (1996)]

Termination of public employment: right to hearing under due process clause of Fifth or Fourteenth Amendment—Supreme Court cases. 48 L. Ed. 2d 996.

Appeal by plaintiff and cross-appeal by defendants from order and judgment entered 28 July 1994 by Judge Jack A. Thompson in Brunswick County Superior Court. Heard in the Court of Appeals 11 September 1995.

Anderson & McLamb, by Sheila K. McLamb and Laura Thompson, for plaintiff.

Faison & Fletcher, by Reginald B. Gillespie, Jr., Michael R. Ortiz, and Keith D. Burns, for defendants.

LEWIS, Judge.

Plaintiff instituted this action for wrongful termination, restraint against free political association, violation of due process and breach of contract; he sought damages, injunctive relief, specific performance, and punitive damages. Defendants moved to dismiss plaintiff's claims. Defendants also pled the defense of legislative immunity and moved for judgment on the pleadings. The trial court dismissed the claims designated by the plaintiff as wrongful termination, specific performance, and breach of contract as to all the defendants and dismissed the restraint against free political association claim as to some of the defendants in their individual capacities. The trial court also granted defendants' motion for judgment on the pleadings as to the due process claim. However, the court denied defendants' motion for judgment on the pleadings based on their defense of legislative immunity. Both plaintiff and defendants appeal.

Since the claims at issue were dismissed pursuant to Rule 12(b)(6) and Rule 12(c), we look to the allegations of the plaintiff's complaint. Essentially, the complaint alleges that Plaintiff was employed by defendant Brunswick County as an Assistant Operations Service Director and Water Coordinator. In June 1991, the Board of Commissioners of Brunswick County voted to eliminate plaintiff's position. Plaintiff was notified on 18 June 1991, that an upcoming reduction in force (RIF) would eliminate his position.

The termination came 41 days prior to the vesting of plaintiff's retirement benefits. His performance was satisfactory and he had never received any reprimands or indications of poor performance.

We first address defendants' contention that the trial court erred in denying their motion for judgment on the pleadings based on legislative immunity. Motions for judgment on the pleadings pursuant to Rule 12(c) are designed 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). The movant bears the burden of proving that, after viewing the facts and permissible inferences in the light most favorable to the non-movant, he or she is entitled to judgment as a matter of law. *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987).

The subject of legislative immunity has never before been addressed by a North Carolina appellate court. However, the United States Supreme Court has recognized the deep roots of legislative immunity in American and English common law and its application to state legislators. *Tenney v. Brandhove*, 341 U.S. 367, 95 L.Ed 1019 (1951). In *Tenney*, the Supreme Court explained the reason for legislative immunity:

> "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence."

Tenney, 341 U.S. at 373, 95 L.Ed at 1025 (quoting II Works of James Wilson (Andrews ed. 1896) 38). Later, the Court found legislative immunity equally applicable at the regional government level. *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391, 405, 59 L.Ed.2d 401, 413 (1979).

[1] Although the United States Supreme Court has not, a majority of federal circuit courts have extended legislative immunity to local legislators. *Rini v. Zwirn*, 886 F.Supp. 270, 280 (E.D.N.Y. 1995). The Fourth Circuit has acknowledged legislative immunity for county legislators, known as county commissioners in North Carolina, provided they are able to prove: (1) that they were acting in a legislative capacity at the time of the alleged incident; and (2) their acts were not illegal acts. *Scott v. Greenville County*, 716 F.2d 1409, 1422 (4th Cir. 1983). Because we conclude that this test fairly, succinctly and clearly states the purpose of legislative immunity, we adopt it as a test in suits against local governments and local officials.

Whether an action is legislative or administrative has been determined on a case by case basis. While eliminating a position for budgetary reasons has generally been found to be legislative, *e.g. Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 682 (4th Cir.), *cert. denied*, 498 U.S. 815, 112 L. Ed. 2d 31 (1990), *overruled on other grounds*, 63 F.3d 295 (4th Cir. 1995); *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988), hiring, firing and other employment decisions have been held to be administrative and not deserving of legislative immunity, *e.g. Alexander v. Holden*, 66 F.3d 62, 67 (4th Cir 1995); *Detz v. Hoover*, 539 F.Supp. 532, 534 (E.D. Pa. 1982).

[2] Applying the *Scott* rule to the case before us, it is clearly too early in the proceedings to determine the applicability of legislative immunity. Defendants have not had the opportunity to prove either provision of the legislative immunity test. Additionally, plaintiff has alleged sufficient facts that, if true, would establish that he was dismissed in an administrative action which violated his constitutional rights. As a result, we affirm the trial court's denial of defendants' motion for judgment on the pleadings with respect to their defense of legislative immunity.

We now address the substance of plaintiff's assignments of error.

[3] Plaintiff first argues that the trial court erred in dismissing his wrongful termination claim because his complaint adequately states a claim under the public policy exception to the employment-at-will doctrine. We agree. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by determining "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). A Rule 12(b)(6) motion to dismiss for failure to state a claim should not be granted 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.*" *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970).

Ordinarily, an employee without a definite term of employment is an employee-at-will and may be discharged for any reason. *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971). However, the North Carolina Supreme Court has recognized a public policy exception to the employee-at-will rule, stating:

> [W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Coman v. Thomas Manufacturing Co., 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (quoting *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985)).

In the present case, plaintiff alleges that he was fired by defendants due to his political affiliation and activities. If true, this would contravene rights guaranteed by our State Constitution, *see State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949), and the prohibition against political coercion in county employment stated in N.C. Gen. Stat. § 153A-99 (1991). As a result, if proven, these actions would surely violate North Carolina public policy. *See Lenzer v. Flaherty*, 106 N.C. App. 496, 515, 418 S.E.2d 276, 287, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). Defendants argue that G.S. § 153A-99 is inapplicable because it became effective after plaintiff's discharge. Nonetheless, it can still be used to demonstrate the public policy of the State. *See Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 41, 370 S.E.2d 423, 426 (1988).

We hold that plaintiff has alleged sufficient facts in his complaint to state a claim for wrongful termination under the public policy exception to the employment-at-will doctrine. The decision of the trial court dismissing this claim is reversed and this matter is remanded for trial on wrongful termination.

[4] Plaintiff also argues that the trial court erred in dismissing his breach of contract claim based on the fact that the Brunswick County Personnel Policy Manual (Personnel Policy) was part of his employment contract. We are not persuaded by this argument.

This Court has held that "unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it." *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). Plaintiff relies on *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E.2d 617, *disc. review denied*, 316 N.C. 557, 338 S.E.2d 18 (1986). In that case, this Court found

plaintiff's allegations that her employer's policy manual was part of her contract sufficient to state a claim for wrongful discharge. *Id.* at 762, 338 S.E.2d at 620. However, in *Trought*, the plaintiff was required to sign a statement that she had read the personnel manual and agreed to obey the regulations it contained. *Id.* at 760, 338 S.E.2d at 618. Consequently, this Court determined that she had sufficiently alleged that the contract was expressly included in her employment contract as required by *Walker v. Westinghouse. Id.* at 762, 338 S.E.2d at 620. There are no such facts alleged in the present case.

Additionally, even if the Personnel Policy was part of plaintiff's employment contract, there was no breach. The policy specifically states that employees may be released due to a RIF. Under this section, all that is required is two weeks notice, which defendants provided. It was not error to dismiss plaintiff's breach of contract claim.

Plaintiff also assigns error to the dismissal of his "claim" for specific performance. Since we have dismissed plaintiff's breach of contract claim, we affirm the dismissal of his specific performance "claim" as it is a remedy for breach of contract.

[5] Finally, with respect to his procedural due process claim, plaintiff argues that the trial court erred in granting defendants' motion for judgment on the pleadings. It is well settled in North Carolina that in order for an employee to be entitled to procedural due process protection he or she has to possess a "property interest or right in continued employment." *Soles v. City of Raleigh Civil Service Comm.*, 119 N.C. App. 88, 91, 457 S.E.2d 746, 749 (1995). We hold that viewing the allegations as true, defendants are not entitled to judgment as a matter of law.

Given this Personnel Policy, a crucial factor in determining whether, if at all, plaintiff possessed a property right in continued employment is whether or not he was wrongfully terminated. If not, he was released in a bona fide RIF as provided by the policy and has not experienced a violation of his due process rights. Since resolution of this claim involves factual proof, judgment on the pleadings was improper.

We also find no need to address plaintiff's contentions regarding the dismissal of his claim for injunctive relief. The trial court's dismissal of this claim stemmed from its dismissal of all of the underlying claims. Since we have remanded the issue of wrongful termination, we remand this claim to the trial court to determine if injunctive relief is appropriate.

For the foregoing reasons, the order and judgment of the trial court is affirmed in part, reversed in part, and remanded.

Judges EAGLES and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 MARCH 1996

ALDRIDGE v. FRASER No. 95-345	Guilford (92CVS2864)	Affirmed in Part, Reversed in Part and Remanded
BATTLE v. MEADOWS No. 95-382	Nash (93CVS1686)	No Error
BAUCOM v. EQUITABLE LIFE ASSURANCE SOCIETY No. 94-612	Union (93CVS1516)	Affirmed
BOLES v. GUNNELL No. 95-768	Stokes (91CVS415)	Dismissed
BRANCH v. GRANT No. 95-449	Bertie (93CVS327)	Dismissed
CARTER v. MADISON FAMILY PRACTICE CLINIC No. 94-809	Ind. Comm. (223274)	The opinion and award of the Full Commission is Affirmed
CICOGNA v. HOLDER No. 94-698	Lee (92CVS1127)	No Error
CONRAD v. CITY OF WINSTON-SALEM No. 95-471	Ind. Comm. (842813)	Affirmed
CREWS v. PAVILION PARTNERS No. 95-457	Wake (94CVS5390)	Reversed and Remanded
DURHAM v. BRANCH BANKING & TRUST CO. No. 94-1255	Harnett (92CVS0649)	Affirmed
GUNNELL v. BURWELL No. 95-841	Stokes (94CVS94)	Dismissed
GUNTER v. JOHNSON No. 95-479	Edgecombe (94CVS137)	No Error
HOLLAND v. GIPSON No. 95-939	Orange (94CVD309A)	Affirmed
IN RE GIBNEY No. 95-1093	Wake (95SPC1390)	Affirmed
IN RE TATRO No. 95-23	Forsyth (90J358)	Affirmed

JONES v. COLEJON MECHANICAL No. 95-970	Ind. Comm. (162270)	Affirmed
MARION v. APGAR No. 95-76	Surry (93CVS435)	Appeal Dismissed
MOFFITT v. AUTUMN CARE OF SALUDA No. 95-366	Ind. Comm. (096892)	Dismissed
PIEDMONT ASSOCIATES v. PARDUE No. 95-235	Wilkes (93CVS1036)	Affirmed
R. G. SWAIM & SONS v. JIMMY LYNCH & SONS No. 95-362	Forsyth (91CVS2343)	Affirmed
STATE v. ADAMS No. 95-466	Wilkes (93CRS3180)	No Error
STATE v. BELL No. 95-1116	Pasquotank (94CRS1795)	No Error
STATE v. BURGESS No. 95-1094	Halifax (94CRS3780) (94CRS3781)	Remanded for new sentencing hearing
STATE v. CRENSHAW No. 95-415	Mecklenburg (93CRS68265)	No Error
STATE v. CROSS No. 94-746	Wake (93CRS76615) (93CRS76616) (93CRS80221) (93CRS78577)	Reversed and Remanded
STATE v. DIPIETRO No. 95-805	Mecklenburg (94CRS48255) (94CRS48256) (94CRS48257) (94CRS48258) (94CRS48259) (94CRS49457) (94CRS49458) (94CRS54472) (94CRS48261) (94CRS48262)	Remanded for Resentencing
STATE v. FERGUSON No. 95-677	Wilkes (92CRS3131)	Affirmed
STATE v. FLOWERS No. 95-614	Edgecombe (92CRS5503)	New Trial

STATE v. GIVENS No. 95-1054	Wake (94CRS59514) (94CRS83090)	No Error
STATE v. HARRISON No. 95-139	Alamance (94CRS6966)	No Error
STATE v. KENNEDY No. 95-967	Mecklenburg (94CRS74787) (94CRS74788)	Affirmed
STATE v. LEWIS No. 95-706	Mecklenburg (94CRS41998) (94CRS41999) (94CRS42000)	No Error
STATE v. ROBBINS No. 95-381	Davidson (93CRS16908) (93CRS16909)	New Trial
STATE v. ROWE No. 95-582	Guilford (94CRS11827) (94CRS20097)	Affirmed
STATE v. WALKER No. 95-1091	Forsyth (95CRS5698)	No Error
STATE v. WATSON No. 95-300	Wake (93CRS88119) (93CRS88059) (93CRS88060) (93CRS88061)	No Error
TAYLOR v. MALLOY No. 95-225	Durham (94CVS761)	Affirmed
TODD v. DUKE UNIVERSITY No. 95-201	Durham (93CVS01937)	Affirmed in part, reversed and remanded for entry of an order dismissing any claims of ordinary negligence
WILLIAMS v. BLALOCK PAVING No. 95-433	Wake (94CVS06115)	Affirmed
WOOTEN v. MATTHEWS No. 95-550	Yadkin (91CVD156)	Affirmed
WRIGHT v. CHARLOTTE-MECKLENBURG HOSPITAL AUTH. No. 95-446	Ind. Comm. (957438)	Affirmed and Remanded

APPENDIX

RULES FOR PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

ORDER ADOPTING RULES IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

WHEREAS, section 7A-38.3 of the North Carolina General Statutes establishes a statewide program to provide for prelitigation mediation of farm nuisance disputes prior to the bringing of civil actions involving such disputes, and

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to implement section 7A-38.3 by adopting rules and standards concerning said program,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3(e) Rules Implementing the Prelitigation Farm Nuisance Mediation Program are adopted to read as in the following pages. These Rules shall be effective on the 1st day of July, 1996.

Adopted by the Court in conference the 3rd day of April, 1996. The Appellate Division Reporter shall publish the Rules Implementing the Prelitigation Farm Nuisance Mediation Program in their entirety at the earliest practicable date.

Orr, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION FARM NUISANCE MEDIATION.

A. Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

RULE 2. EXEMPTION FROM G.S. 7A-38.1.

A dispute mediated pursuant to G.S. 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to G.S. 7A-38.1.

RULE 3. SELECTION OF MEDIATOR.

A. *Time Period for Selection.* The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Certified Mediator by Agreement.

B. *Selection of Certified Mediator by Agreement.* The Clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate farm nuisance disputes in the judicial district encompassing the county in which the request was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement. Such notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form pre-

pared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. *Nomination of Non-Certified Mediator by Agreement.* The parties may by agreement select a mediator who is not certified and whose name does not appear on the list of certified mediators available through the clerk but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the said nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. *Court Appointment of Mediator.* If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator and the senior resident superior court judge shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator.

E. *Mediator Information Directory.* To assist parties in learning more about the qualifications and experience of certified mediators,

the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation farm nuisance disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

RULE 4. THE PRELITIGATION FARM MEDIATION.

A. *When Mediation is to be Completed.* The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. *Extensions.* A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. *Where the Conference is to be Held.* Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. *Recesses.* The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a sixty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. *Duties of Parties, Attorneys and Other Participants.* Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. *Sanctions for Failure to Attend.* Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

RULE 5. AUTHORITY AND DUTIES OF THE MEDIATOR.

A. *Authority of Mediator.*

(1) *Control of Mediation.* The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) *Private Consultation.* The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) *Scheduling the Conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. *Duties of Mediator.*

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(1);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) *Declaring Impasse.* It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) *Scheduling and Holding the Conference.* It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

RULE 6. COMPENSATION OF THE MEDIATOR.

A. *By Agreement.* When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

B. *By Court Order.* When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $100.00 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $100.00, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

C. *Indigent Cases.* No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee. Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their cases, subsequent to the trial of the action. The judge may take into consideration the outcome of the action and whether a

judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. *Payment of Compensation by Parties.* Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

RULE 7. WAIVER OF MEDIATION.

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute shall be on form prescribed by the Administrative Office of the Courts and available through the clerk. The party who requested mediation shall file the waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED.

A. *Contents of Certification.* Following the conclusion of mediation or the receipt of a waiver of mediation signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute on a form prescribed by the Administrative Office of the Courts. If a mediation was held the certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the certification shall state why the mediation was not held and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. *Deadline for Filing Mediator's Certification.* The mediator shall file the completed certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the certification on each of the parties named in the request.

RULE 9. CERTIFICATION AND DECERTIFICATION OF MEDIATORS OF PRELITIGATION FARM NUISANCE DISPUTES.

Mediators certified to conduct prelitigation mediation of farm disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of farm nuisance disputes.

RULE 10. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

The Dispute Resolution Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ACCOUNTS AND ACCOUNTS STATED

§ 5 (NCI4th). Part payment or acknowledgement, and promise to pay, as basis of agreement

Although a review of the record shows circumstances which could entitle plaintiff to judgment on its claim for medical services rendered to defendant upon theories of account stated and partial payment on account, summary judgment was inappropriate because factual determinations were needed. **Johnson Neurological Clinic v. Kirkman**, 326.

ADMINISTRATIVE LAW AND PROCEDURE

§ 32 (NCI4th). Intervening party; participation of interested persons

The trial court properly refused to permit joinder of DEHNR as a party respondent in an administrative appeal from the refusal of the Attorney General to defend a sanitarian. **Cates v. N.C. Dept. of Justice**, 243.

§ 44 (NCI4th). Adjudication of "contested case"; final decisions or orders

A decision of the State Personnel Commission declining to adopt the recommended decision of the Administrative Law Judge that petitioner's termination should be reversed because improper procedure was followed by the Department of Transportation failed to comply with the statutory requirement that the agency state the specific reasons why the recommended decision was not adopted. **Justice v. N.C. Dept of Transportation**, 243.

§ 46 (NCI4th). Adjudication or other resolution of dispute or "contested" case; settlement or agreement of parties

G.S. 150B-22, which provides for use of informal procedures to settle licensing disputes as a precondition to the dispute becoming a contested case, does not apply to occupational licensing agencies such as respondent Board of Dental Examiners which are governed by Article 3A of the Administrative Procedures Act. **Homoly v. N.C. State Bd. of Dental Examiners**, 695.

§ 65 (NCI4th). Scope and effect of review generally

When the issue on appeal concerns a state agency's interpretation of a statutory term, the Court of Appeals applies de novo review. **Willoughby v. Bd. of Trustees of State Employees' Ret. Sys.**, 444.

APPEAL AND ERROR

§ 103 (NCI4th). Appealability of judgment on the pleadings

An order denying defendant's motion for judgment on the pleadings on grounds of governmental immunity and the public duty doctrine is immediately appealable. **Hedrick v. Rains**, 466.

§ 116 (NCI4th). Order granting motion to dismiss; appeal dismissed

Plaintiffs' appeal is dismissed as interlocutory where the trial court's order dismissed all claims against certain defendants and some claims against others, but there were no factual issues common to the claims determined and the claims remaining. **Jarrell v. Coastal Emergency Services of the Carolinas**, 198.

APPEAL AND ERROR — Continued

§ 156 (NCI4th). Preserving question for appeal; effect of failure to make motion, objection, or request; civil actions

The admission of psychological reports was not assignable as error where defendant failed to make timely objection to the introduction of the reports. **Jones v. Patience**, 434.

§ 166 (NCI4th). Moot and academic questions generally

Plaintiffs' challenge to the school admission policy of the Guilford County Schools was moot where one child's mother moved to Guilford County while the action was pending and the second child attained the age of eighteen while the suit was pending and could establish domicile in Guilford County independent of the residence of his parents. **Ballard v. Weast**, 391.

§ 167 (NCI4th). Advisory opinions

There was no justiciable issue for appeal, and defendant's appeal from the trial court's ruling that the value of property owned as tenants by the entirety did not pass to plaintiff husband as a result of his wife's death is dismissed because any opinion would be only advisory, where the record shows no values of properties passing to plaintiff under and outside his wife's will, and the trial court made no findings or conclusions as to plaintiff's right to dissent. **Funk v. Masten**, 364.

§ 176 (NCI4th). Effect of appeal on power of trial court; civil actions generally

Plaintiff's motion to dismiss defendant's appeal was properly made in the trial court rather than in the Court of Appeals where defendants had filed notice of appeal but the appeal had not yet been docketed in the Court of Appeals. **Farm Credit Bank v. Edwards**, 72.

§ 291 (NCI4th). Availability of writ of certiorari generally

The Court of Appeals denied plaintiff's petition for a writ of certiorari seeking to have the Court consider that plaintiff's counsel inadvertently neglected to assign as error defendant's alleged stonewalling of discovery as a circumstance making unjust an award of attorney's fees incurred in obtaining an order to compel discovery. **Graham v. Rogers**, 460.

§ 326 (NCI4th). Record on appeal; testimonial evidence and trial proceedings generally

The trial court did not err in adopting the findings of fact contained in its order as a narration of the evidence presented at trial when it settled the record on appeal. **Smith v. Smith**, 334.

§ 384 (NCI4th). Filing, docketing, and service of record on appeal generally

Defendant's appeal is dismissed for failure to serve the proposed record on appeal in a timely fashion. **Brooks v. Jones**, 529.

§ 443 (NCI4th). Scope of review on appeal generally; review on assignments of error and record

Plaintiff properly preserved for appeal the issue of whether defendant's dismissal letter provided her with sufficient notice of the reasons for her dismissal where she argued in all of the hearings below that the letter did not provide her with adequate notice of the reasons for the dismissal. **Owen v. UNC-G Physical Plant**, 682.

APPEAL AND ERROR — Continued

§ 502 (NCI4th). Error as harmless or as prejudicial generally

A defendant wishing to overturn a conviction for error relating to non-constitutional rights has the burden of showing a reasonable possibility that a different result would have been reached at trial absent the error. **State v. Wilson**, 720.

ARBITRATION AND AWARD

§ 17 (NCI4th). Waiver of right to arbitration generally

Defendant did not waive its right to arbitration by its subsequent participation in mediation or by its delay in scheduling arbitration because of the architect's slow response to plaintiff's attorney's question regarding the procedures for submitting the dispute to him for resolution. **O'Neal Construction, Inc. v. Leonard S. Gibbs Grading**, 577.

ARSON AND OTHER BURNINGS

§ 6 (NCI4th). Elements of arson; dwelling house; requirement of inhabitation

The malicious burning of a mobile home which is used as a dwelling and which is unoccupied at the time of the burning constitutes second-degree arson. **State v. Hodge**, 209.

ATTORNEYS AT LAW

§ 11 (NCI4th). Actions and proceedings generally

Any claim for reimbursement of costs incurred in the Attorney General's failure to defend a sanitarian was barred by sovereign immunity. **Cates v. N.C. Dept. of Justice**, 243.

§ 29 (NCI4th). Nature and scope of authority, generally

A notice of appeal filed by decedents' attorney of record from a judgment entered in an action to recover a deficiency following a foreclosure sale of decedents' property was a nullity where the administrator did not authorize the attorney to proceed with the appeal and opposed the appeal on the ground it would not benefit the estate. **Farm Credit Bank v. Edwards**, 72.

§ 85 (NCI4th). Discipline, disbarment, and reinstatement; evidence and witnesses; findings

A committee of the Disciplinary Hearing Commission erred in dismissing a disciplinary action against defendant attorney based upon accusations of inappropriate sexual touchings if the dismissal was based on the fact that defendant was not convicted of a crime, and the case is remanded to the committee for an order containing complete findings and conclusions supporting its decision. **N.C. State Bar v. Rush**, 488.

AUTOMOBILES AND OTHER VEHICLES

§ 415 (NCI4th). Civil liability for injuries in operation of motor vehicles; miscellaneous circumstances

Although a city ordinance created a duty not to leave an ignition key in an unattended vehicle, defendant car dealer's act of leaving keys in a vehicle which was subsequently stolen, driven at a high rate of speed to elude officers, and crashed into

AUTOMOBILES AND OTHER VEHICLES — Continued

plaintiff's vehicle was not a proximate cause of plaintiff's injuries. **Spurlock v. Alexander**, 668.

§ 460 (NCI4th). Liability of guest or passenger; imputed negligence; driver under control of owner-passenger

The owner-occupant doctrine supplied a presumption that plaintiff, as sole owner of the vehicle, had the right to control and direct its operation, but this doctrine did not establish plaintiff's contributory negligence as a matter of law where defendants made no showing that plaintiff had adequate time and opportunity to exercise her right or duty to control her fiancee's driving of the vehicle at the time of the collision and failed to do so. **Monk v. Cowan Transportation, Inc.**, 488.

§ 578 (NCI4th). Last clear chance; cases involving passengers in vehicles

The trial court did not err in submitting an issue of last clear chance to the jury in plaintiff passenger's action against the driver who was driving at a greatly excessive speed despite protests by passengers in the vehicle where an opportunity to escape the situation did not arise immediately before the accident causing injury. **Trantham v. Estate of Sorrells**, 611.

BURGLARY AND UNLAWFUL BREAKINGS

§ 8 (NCI4th). Particular elements of breaking; dwelling house

Homes owned by elderly victims were "dwelling houses" within the meaning of the burglary statute even though the victims were living elsewhere due to health problems when the burglaries occurred. **State v. Smith**, 41.

CONSPIRACY

§ 12 (NCI4th). Civil conspiracy; sufficiency of evidence as to specific conspiracies

The trial court properly granted summary judgment for defendants on plaintiff's civil conspiracy claim which arose from his dismissal as an employee of the DOT. **King v. N.C. Dept. of Transportation**, 706.

CONSTITUTIONAL LAW

§ 143 (NCI4th). Obligations of contracts; modes of impairment; legislation affecting contracts

Plaintiff police officer's contractual rights were unconstitutionally impaired by defendant city's amendment of its retirement code after plaintiff's injury which took away the unqualified right of an officer to obtain retirement disability benefits when an injury prevented the officer from performing his sworn duties and permitted defendant to transfer the officer to unsworn duties. **Hogan v. City of Winston-Salem**, 414.

§ 193 (NCI4th). Former jeopardy; multiple assault charges

The trial court erred in failing to arrest judgment on a conviction of assault upon a law officer because the same evidence was relied on to prove a charge of assault with a deadly weapon inflicting serious injury. **State v. Locklear**, 355.

CONSUMER AND BORROWER PROTECTION

§ 19 (NCI4th). Federal Truth-in-Lending Act generally

Genuine issues of material fact existed as to whether the automobile loan transaction between the parties was an open-end "loanliner" plan or a closed-end extension of credit and thus whether it complied with the Truth in Lending Act. **Premier Federal Credit Union v. Douglas**, 341.

CONTEMPT OF COURT

§ 25 (NCI4th). Civil contempt generally; sufficiency of notice

The trial court erred in finding plaintiff in civil contempt for plaintiff's failure to appear at a child custody modification hearing where plaintiff was not given any notice of a contempt proceeding and the court did not hold a proceeding pursuant to G.S. 5A-23. **Garrett v. Garrett,** 192.

CONTRACTS

§ 11 (NCI4th). Offer to contract in future

The trial court erred in granting summary judgment for plaintiffs in an action for breach of contract concerning the ownership and operation of real estate franchises where a genuine issue existed as to whether a handwritten document signed by the parties reflected a meeting of the minds as to all essential terms of their agreement or whether it merely amounted to an "agreement to agree." **Northington v. Michelotti,** 180.

§ 114 (NCI4th). Parties; plaintiffs

Plaintiff first-tier subcontractor could include a second-tier subcontractor's damages as a subset of its own damages in an action against the general contractor for breach of contract. **Metric Constructors, Inc. v. Hawker Siddeley Power Engineering**, 530.

§ 150 (NCI4th). Instructions to jury; building construction contracts

The trial court's instruction on accord and satisfaction conveyed the substance of defendants' requested instruction on compromise and settlement. **Metric Constructors, Inc. v. Hawker Siddeley Power Engineering**, 530.

§ 163 (NCI4th). Special damages generally

Plaintiff first-tier subcontractor's duration-related damages allegedly suffered because defendant general contractor failed to deliver its promised performance from the outset of a power plant construction project were appropriately characterized as general damages, and the trial court therefore did not err in failing to instruct on special damages. **Metric Constructors, Inc. v. Hawker Siddeley Power Engineering,** 530.

§ 190 (NCI4th). Third-party interference with contractual rights; sufficiency of evidence generally

There was no tortious interference with contract when defendant town extended its water lines and service into an annexed area then being served by plaintiff utility. **Carolina Water Service v. Town of Atlantic Beach,** 23.

CONVERSION

§ 10 (NCI4th). Sufficiency of evidence to take case to jury

Where defendant obtained plaintiffs' personal property in accord with statutorily mandated procedures, it did not convert plaintiffs' property by removing and storing it or by refusing to return the property upon plaintiffs' tender of $100 pursuant to G.S. 44A-2 and 44A-3. **Smithers v. Tru-Pak Moving Systems**, 542.

CORPORATIONS

§ 104 (NCI4th). Officers and agents; effect of acts under suspension of charter

An officer of a corporation whose charter had been suspended has no personal liability for debts incurred by the corporation during the period of suspension where the officer had no knowledge that the charter had been suspended. **Charles A. Torrence Co. v. Clary**, 211.

§ 201 (NCI4th). Merger or consolidation involving nonprofit corporation

Summary judgment for defendants was not appropriate but was moot in an action contesting the merger of two realty associations. **Roberts v. Madison County Realtors**, 233.

COSTS

§ 25 (NCI4th). Attorneys' fees; necessary findings; review of award

The trial court erred by awarding attorney fees under G.S. 44A-4 where defendant neither prevailed nor defended under the theory that it had a Chapter 44A lien. **Smithers v. Tru-Pak Moving Systems**, 542.

§ 47 (NCI4th). Discovery and deposition fees and expenses

The trial court did not err by awarding deposition expenses as part of the costs awarded to defendant in an ejectment action. **Minton v. Lowe's Food Stores**, 675.

§ 49 (NCI4th). Other miscellaneous fees

The trial court had authority to order plaintiff to pay defendant's bond premiums as part of the costs in an ejectment action pursuant to the provisions of G.S. 6-20 giving the trial court discretion to allow costs as justice requires. **Minton v. Lowe's Food Stores**, 675.

COUNTIES

§ 124 (NCI4th). Liability to suit; immunity; governmental acts and functions

Legislative immunity exists for county commissioners when they were acting in a legislative capacity and their acts were not illegal. **Vereen v. Holden**, 779.

The trial court properly denied defendant county commissioners' motion for judgment on the pleadings with respect to their defense of legislative immunity where defendants have not had the opportunity to prove either provision of the legislative immunity test, and plaintiff has alleged sufficient facts to establish that he was dismissed from county employment in an administrative rather than legislative action which violated his constitutional rights. **Ibid.**

CRIMINAL LAW

§ 6 (NCI4th). Distinguishing felonies, misdemeanors, and infractions; infamous offenses

The superior court lacked jurisdiction over a prosecution for attempted second degree kidnapping where that charge was not elevated to a felony under G.S. 14-3(b) by an allegation that the offense was "infamous." **State v. Bell**, 700.

§ 41 (NCI4th). Presence at scene; particular circumstances

Defendant was not entitled to a "mere presence" instruction in a prosecution arising from the sale of cocaine and heroin where a State's witness testified that on several occasions, defendant directed the drug transactions by signalling others to obtain drugs. **State v. Rogers,** 273.

§ 106 (NCI4th). Discovery proceedings; information subject to disclosure by State; statements of State's witnesses

The trial court did not err by admitting a statement made by an accomplice which had not been provided to defendant in discovery. **State v. Cuevas**, 553.

§ 261 (NCI4th). Continuance; insufficient time to prepare defense generally

The trial court did not err by denying defendant's motion for continuance where defendant had received two continuances, defendant had ample time to consult with his counsel and prepare a defense, and defendant attempted to delay the proceedings by retaining out of state counsel and refusing to agree to a fee arrangement. **State v. Cuevas**, 553.

§ 382 (NCI4th). Expression of opinion on evidence during trial; examination of witnesses

The trial court did not err in questioning a prosecution witness to clarify the witness's testimony on a particular point. **State v. Smith,** 41.

§ 433 (NCI4th). Argument of counsel; defendant as professional criminal, outlaw, or bad person

The prosecutor's closing arguments in a trial for rape and indecent liberties questioning the morals of defendant's wife, calling defendant a "monster," and referring to defendant and his wife as "just as evil and just as sorry and just as mean as two despicable people could ever be on this earth" were not so prejudicial as to require a new trial. **State v. Frazier,** 1.

§ 545 (NCI4th). Mistrial; improper and prejudicial remarks by prosecutor

Defendant was not entitled to a mistrial when the prosecutor remarked that a man and woman were making noises as witnesses testified, and the trial court warned everyone out of the jury's presence to refrain from making noises. **State v. Frazier,** 1.

§ 546 (NCI4th). Mistrial; jury argument; generally

The trial court abused its discretion in a prosecution for taking indecent liberties with a child and first-degree sexual offense by denying defendant's motion for a mistrial because of the prosecutor's closing argument that the victim would have no knowledge of these things but for this abuse after previously denying defendant's motion to introduce evidence of similar abuse by another party. **State v. Bass,** 306.

CRIMINAL LAW — Continued

§ 621 (NCI4th). Sufficiency of evidence; circumstantial evidence

Defendant erroneously argued that a jury could not have found substantial evidence of each element of second-degree murder because the State presented circumstantial evidence and the jury would have had to draw inference upon inference to conclude that defendant was guilty. **State v. Bostic,** 90.

§ 798 (NCI4th). Instructions on aiding and abetting as prejudicial in particular cases

There was no error in a prosecution arising from the sale of cocaine and heroin where defendant contended that the jury was not given an explanation of the law regarding aiding and abetting and acting in concert but the court gave an instruction from the Pattern Jury Instructions. **State v. Rogers,** 273.

§ 829 (NCI4th). Instructions on accomplices, accessories, and codefendants generally

The trial court gave in substance defendant's requested instructions regarding the jury's consideration of his accomplice's perjury conviction in another state and her ability to avoid a mandatory minimum sentence only by testifying at his trial in determining her credibility. **State v. Cuevas,** 553.

§ 1227 (NCI4th). Statutory mitigating factors under Fair Sentencing Act; drug addiction or use

The trial court properly refused to find defendant's cocaine addiction as a mitigating factor for armed robbery where defendant presented no evidence compelling a conclusion that her culpability for the robbery was significantly reduced by her addiction. **State v. Wilson,** 720.

§ 1666 (NCI4th). Crime victim's compensation; grounds for denial or reduction of award; misconduct

Petitioner was barred by "contributory misconduct" from recovery of benefits under the Crime Victims Compensation Act where petitioner snatched a twenty-dollar bill from the hand of a customer in a convenience store and was shot by the store proprietor when he attempted to flee the store. **McCrimmon v. Crime Victims Compensation Comm.,** 144.

DEDICATION

§ 16 (NCI4th). Rights of landowners upon withdrawal or revocation of dedication

Where the corporation which dedicated to public use a strip of land between beach properties owned by the parties had ceased to exist, and plaintiffs and defendant's predecessor in title had executed a withdrawal of the dedication, a conclusive presumption was established under G.S. 136-96 that plaintiffs and defendant, as adjacent landowners, were both owners of the disputed property. **Rawls v. Williford,** 762.

DEEDS

§ 64 (NCI4th). Personal and real restrictive covenants; real covenants

Covenants which allowed a country club board of governors to give or veto approval of increases in club assessments or dues did not run with the land, but plaintiff corporation was personally bound by the covenants because it consented to be bound by them. **Bermunda Run Country Club v. Atwell,** 137.

DISCOVERY AND DEPOSITIONS

§ 10 (NCI4th). Material prepared for trial or in anticipation of litigation generally

The trial court erred in releasing materials to plaintiffs without making determinations as to whether the materials were prepared in anticipation of litigation, represented the work product of defendant's attorney, represented communications between defendant and its attorney, and were thus protected by the attorney-client privilege. **Hall v. Cumberland County Hospital System**, 425.

§ 48 (NCI4th). Physical and mental examination of persons generally

The trial court possessed authority to subject defendant mother and her child to court ordered counseling only if custody had not been fully adjudicated. **Jones v. Patience**, 434.

§ 59 (NCI4th). Motion for order compelling discovery; fees and expenses of movant and opponent

The trial court did not err in awarding defendants $1,000 in attorney's fees incurred in obtaining an order to compel discovery. **Graham v. Rogers**, 460.

§ 62 (NCI4th). Sanctions for particular acts; failure to respond to discovery request

Where plaintiff's untimely responses to discovery requests were served on the same day defendants served or made their motion requesting sanctions, the responses were not served or made before the making of the motion for sanctions, and the trial court had authority to enter sanctions for the untimely discovery responses. **Cheek v. Poole**, 370.

§ 68 (NCI4th). Enforcing discovery; sanctions; dismissal or default judgment

The trial court's dismissal of defendants' counterclaims with prejudice was an appropriate sanction for failure to comply with the trial court's ruling compelling production of documents. **Hursey v. Homes by Design, Inc.**, 175.

§ 68 (NCI4th). Sanctions by court in which action is pending; dismissal or default judgment

The sanction of dismissal was not an abuse of discretion in this case where plaintiff had established a pattern of disregarding due dates for responding to discovery. **Cheek v. Poole**, 370.

DIVORCE AND SEPARATION

§ 112 (NCI4th). Distribution of marital property; property subject to distribution, generally

Defendant husband's VA loan eligibility did not constitute distributable property or a distributional factor justifying an unequal division of marital property in defendant's favor. **Jones v. Jones**, 523.

§ 151 (NCI4th). Distribution of marital property; distribution factors; contributions to acquisitions of marital property

The trial court did not abuse its discretion in finding that plaintiff wife's contributions toward the mortgage, insurance, taxes, maintenance, and preservation of the martial residence constituted factors for an unequal division in her favor. **Jones v. Jones**, 523.

DIVORCE AND SEPARATION — Continued

§ 203 (NCI4th). Particular circumstances affecting right to alimony; conduct of defendant spouse

Sexual intercourse by plaintiff with a third party subsequent to a decree granting her a divorce from bed and board operated to bar plaintiff's claim for permanent alimony. **Coombs v. Coombs**, 746.

§ 288 (NCI4th). Changed circumstances as ground for modification or termination of alimony; jurisdiction

It is not appropriate to reconsider in a modification hearing the dependent spouse's dependency and entitlement to alimony. **Cunningham v. Cunningham**, 771.

§ 291 (NCI4th). What constitutes changed circumstances generally

The trial court erred in finding that there was no substantial change of circumstances to support modification of a previous alimony award where plaintiff's income had decreased substantially and defendant's assets and income had increased substantially. **Cunningham v. Cunningham**, 771.

§ 337 (NCI4th). Child custody in general; basis of determination

The trial court possessed authority to subject defendant mother and her child to court ordered counseling only if custody had not been fully adjudicated. **Jones v. Patience**, 434.

§ 341 (NCI4th). Child custody; removal of child from state

The evidence in a child custody action supported the trial court's finding that, if plaintiff's removal of the children from this state without advising other interested persons was not an intent to remove the children from defendant, it was at best an exercise in poor judgment. **Henderson v. Henderson**, 752.

§ 353 (NCI4th). Sufficiency of findings and evidence to support award of custody to father

The trial court in a child custody action did not fail to make appropriate findings regarding alleged sexual abuse of the child by the father where the court found that the DSS investigation produced no evidence of sexual abuse, that an abuse action had been dismissed, and that the father did not possess characteristics which would cause one to believe that he would commit acts of sexual abuse as alleged by plaintiff. **Henderson v. Henderson**, 752.

The evidence supported the trial court's finding that the best interests of the parties' children would be served by awarding custody to defendant father. **Ibid.**

§ 365 (NCI4th). Modification of custody order; change in parent's employment or residence

The trial court erred in finding that a substantial change in circumstances warranted a change in custody from the mother to the father where the court found that plaintiff mother's residence had changed from North Carolina to New Mexico, but the court did not demonstrate a nexus between the change of circumstances and a concomitant adverse effect on the children involved. **Garrett v. Garrett,** 192.

§ 377 (NCI4th). Child visitation, generally

Where the presumption of legitimacy of a child born during the marriage of the mother and plaintiff had not been rebutted, plaintiff had standing to seek visitation rights with the child. **Jones v. Patience**, 434.

DIVORCE AND SEPARATION — Continued

The presumption of Petersen v. Rogers, 337 N.C. 397, as to custody disputes between parents and those who are not natural parents did not apply where plaintiff was presumed to be the father of a child born during his marriage to the mother. **Ibid.**

§ 378 (NCI4th). Child visitation; findings required

Even if the trial court erroneously relied on the findings of psychological reports, the court did not delegate the award of visitation rights to a third party where the court made independent findings of fact sufficient to support its award of visitation to plaintiff. **Jones v. Patience**, 434.

§ 424 (NCI4th). Contempt; willfulness of failure to comply; present ability to comply

The evidence and findings supported the trial court's conclusion that defendant was in contempt for failing to pay his child's college expenses pursuant to a consent judgment because they included out-of-state tuition. **Smith v. Smith**, 334.

§ 499 (NCI4th). Uniform Child Custody Jurisdiction Act; convenience of forum

The trial court properly dismissed plaintiff-mother's motion to dismiss a child custody matter for lack of jurisdiction where the action began in North Carolina, plaintiff-mother and the child moved to Virginia, and the parties fell into a dispute over whether air transportation was required for some visits. **Wilson v. Wilson,** 292.

§ 545 (NCI4th). Counsel fees and costs; child custody and support generally

The trial court erred in concluding it had no authority to award attorney's fees in a proceeding to hold plaintiff in contempt for failure to comply with a consent order in which he agreed to pay for his child's higher education and provide health and life insurance for the child. **Smith v. Smith**, 334.

§ 548 (NCI4th). Child custody and support; effect of prior award

The trial court had the authority to enter an order voiding the parties' earlier stipulation of dismissal of all claims and counterclaims in a divorce and child custody action where an order was filed awarding child custody to plaintiff and ordering defendant to pay child support, the parties reconciled and filed a stipulation of dismissal, plaintiff filed a new action following a second separation, and the trial court ruled that the stipulation of dismissal was void, consolidated the second action with the first, and treated the second complaint as a motion for custody based on changed circumstances. **Massey v. Massey,** 263.

DOCUMENTS OF TITLE

§ 18 (NCI4th). Form and content of warehouse receipts

An inventory of goods was sufficient to constitute a valid warehouse receipt against plaintiffs who have benefitted from the storage of their goods. **Smithers v. Tru-Pak Moving Systems**, 542.

§ 26 (NCI4th). Warehouseman's lien

The sheriff was the legal possessor of household goods under a writ of possession and was the depositor of the goods so as to create a warehouseman's lien where the purchaser of a house at a foreclosure sale was directed by members of the sher-

DOCUMENTS OF TITLE — Continued

iff's department to have the goods removed and stored. **Smithers v. Tru-Pak Moving Systems**, 542.

DOMICIL AND RESIDENCE

§ 9 (NCI4th). **Domicil or residence of particular persons; children**

A child was a legal resident of Craven County so long as he continued to live there with his grandmother, but he was not a domiciliary of the county because his mother lived in Florida. **Craven County Bd. of Education v. Willoughby**, 495.

A resident child with special needs need not be a domiciliary in order to receive a free appropriate education. **Ibid.**

EJECTMENT

§ 31 (NCI4th). **Removal of dispossessed tenant's property**

An attempt to deliver notice of a writ of possession of real property is sufficient notice under G.S. 42-36.2 when the sheriff's department attempted to deliver notice of the writ two days prior to its execution and the party to be evicted has evaded or prevented the delivery of the notice. **Smithers v. Tru-Pak Moving Systems**, 542.

EMINENT DOMAIN

§ 34 (NCI4th). **What constitutes "taking" of property generally**

There was a "taking" of plaintiffs' property when defendant county, which had executed an agreement giving plaintiffs access to their property across a county landfill, closed the road across the landfill pursuant to state and federal regulations. **Tolbert v. County of Caldwell**, 653.

§ 90 (NCI4th). **Particular takings as for public purpose; sewerline**

Defendant city's threatened condemnation of property to construct a sewer outfall pursuant to an agreement with a private developer of a shopping center was not condemnation for an unconstitutional private purpose. **Stout v. City of Durham**, 716.

§ 282 (NCI4th). **Inverse condemnation proceedings generally**

The trial court's findings of fact were insufficient to support its conclusion of law that plaintiff inversely condemned defendants' entire tract of land when it took a portion of the tract for a street-widening project. **City of Greensboro v. Pearce**, 582.

Where inverse condemnation is properly alleged, the trial court has the authority to order payment of compensation beyond that proposed by the eminent domain complaint. **Ibid.**

§ 286 (NCI4th). **Inverse condemnation proceedings; complaint and summons**

An inverse condemnation claim could properly be raised in an answer rather than in a counterclaim. **City of Greensboro v. Pearce**, 582.

§ 289 (NCI4th). **Inverse condemnation proceedings; necessity of allegation of damages with particularity**

Any diminution in value caused by the elimination of on-street parking is not compensable in an inverse condemnation action resulting from plaintiff city's street-widening project. **City of Greensboro v. Pearce**, 582.

ESTOPPEL

§ 25 (NCI4th). Nonsuit and summary judgment

The trial court properly entered summary judgment for defendant town on plaintiff utility's equitable estoppel claim based on language in annexation ordinances and statements made by the town mayor which allegedly made plaintiff believe it possessed an exclusive right to provide water service within the annexed area. **Carolina Water Service v. Town of Atlantic beach,** 23.

EVIDENCE AND WITNESSES

§ 87 (NCI4th). Grounds for exclusion of relevant evidence; lack of probative value, generally

The trial court in a prosecution for drug trafficking erred in admitting into evidence defendant's passport with a stamp indicating that he had visited Colombia two months earlier because this evidence was not probative of a fact in issue, but such error was not prejudicial. **State v. Cuevas,** 553.

§ 123 (NCI4th). Rape victim's sexual behavior; when evidence of sexual behavior is relevant generally

The trial court did not err in a prosecution for taking indecent liberties with a child and first-degree sexual offense by denying defendant's motion to present evidence concerning prior similar abuse of the victim by another person. **State v. Bass,** 306.

§ 373 (NCI4th). Other crimes, wrongs, or acts; admissibility to show common plan, scheme, or design; rape and other sex offenses involving defendant's stepchildren or adopted children

Defendant's prior acts of sexual abuse of adolescent female family members was admissible to show a common plan or scheme in a prosecution of defendant for rape and taking indecent liberties with a child even though there was an eight-year lapse in defendant's abusive conduct. **State v. Frazier,** 1.

§ 502 (NCI4th). Pleas, plea discussions, and related statements generally

There was no prejudicial error in a second-degree murder prosecution where the State served defense counsel with a list of statements allegedly made by defendant, including the statement, "Yeah, I killed the bitch. I've done my time. I'll take a plea bargain and walk"; the court ruled that the witness could not testify to portions of the statements that mentioned plea negotiations; and the court refused to allow defendant to offer evidence of plea negotiations to explain the admitted portion of the statement **State v. Bostic,** 90.

§ 701 (NCI4th). Limitation of evidence; content or sufficiency of limiting instruction

The instruction given by the court in a second-degree murder prosecution was a proper limiting instruction and adequately informed the jury not to consider the evidence of a prior offense to show that defendant acted in conformity therewith. **State v. Bostic,** 90.

§ 702 (NCI4th). Limitation of evidence; time of instruction; prior to admission of evidence

The trial court did not abuse its discretion in a second-degree murder prosecution by not giving a limiting instruction before each witness testified to defendant's prior acts of physical abuse against the victim. **State v. Bostic,** 90.

EVIDENCE AND WITNESSES — Continued

§ 809 (NCI4th). Exceptions to best evidence rule; records of, and transactions involving, state or federal government or corporation owned by such government

The trial court properly found that a Right of Way Agreement which was accompanied by certification signed by the Manager of the Right of Way Branch of the Department of Transportation in Raleigh was an authenticated copy of the agreement. **Dept of Transportation v. Bollinger**, 606.

§ 1007 (NCI4th). Residual exception to hearsay rule; necessity that declarant be unavailable

A witness was unavailable for purposes of the residual exception where the State had subpoenaed the witness numerous times but she could not be located. **State v. Dammons**, 61.

§ 1009 (NCI4th). Residual exception to hearsay rule; equivalent guarantees of trustworthiness

Defendant is entitled to a new trial where the trial court failed to make findings regarding the trustworthiness of a statement by an unavailable witness admitted under the residual exception to the hearsay rule. **State v. Dammons,** 61.

§ 1268 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; necessity that second waiver be obtained

Miranda warnings given to a murder defendant retained vitality where she was advised of her rights, waived those rights, and made a statement one night, and was presented the next morning with a transcription of her recorded statement which she acknowledged. **State v. Flowers,** 299.

§ 1290 (NCI4th). Confessions and other inculpatory statements; promises or other inducements of benefits; miscellaneous

Promises not to prosecute a defendant made during a police interrogation in return for defendant's confession deserve the same scrutiny under contract and due process principles as promises made in the context of plea bargains. **State v. Sturgill**, 629.

Even though a police detective was not vested with actual or apparent authority to make a nonprosecution agreement with defendant in return for his confession, defendant was entitled to relief when the State refused to honor the agreement since he changed position in derogation of his constitutional right against self-incrimination and his constitutional right to counsel. **Ibid.**

Where the police promised defendant during interrogation that they would not seek a habitual felon indictment in return for his confession, and the promises were the product of bad faith or fraud, the police conduct required suppression of the confession pursuant to G.S. 15A-1021 and 15A-974. **Ibid.**

Where defendant reasonably relied on police promises not to prosecute him as a habitual felon in return for his confession, and those promises were disregarded by the State, traditional notions of substantial justice and fair play, as well as defendant's due process rights, mandated a new trial and suppression of defendant's confession. **Ibid.**

EVIDENCE AND WITNESSES — Continued

§ 1298 (NCI4th). Confessions and other inculpatory statements; nervousness or other emotional disturbance

The trial court did not err in a second-degree murder prosecution by admitting defendant's inculpatory statements where defendant argued that she was impaired by an allergic reaction to prescription narcotics and by post-traumatic stress disorder so as to render any responses to police interrogation unknowing and involuntary. **State v. Flowers,** 299.

§ 1353 (NCI4th). Proving confessions; transcript of oral confessions

The trial court erred in admitting a purported transcript of defendant's statement into evidence where the officer's handwritten notes were not an exact reflection of the answers given by defendant, and defendant did not acquiesce in the correctness of the writing but in fact refused to sign it. **State v. Bartlett,** 521.

§ 1460 (NCI4th). Real or demonstrative evidence; sufficiency of establishment of chain of custody; illegal drugs and narcotics

The chain of custody was sufficient in an action arising from the sale of heroin and cocaine where there was a discrepancy as to who delivered the drugs to the detective who mailed them to the SBI, but there was no dispute that the item delivered was the bag of drugs received from defendant. **State v. Rogers,** 273.

§ 1572 (NCI4th). Searches and seizures by consent generally; voluntariness of consent

A consent to search form bearing defendant's signature was not inadmissible because defendant was not advised of his rights to remain silent and to have counsel before he was asked to sign the form. **Ibid.**

The admission of a consent to search form bearing the signatures of two defendants was relevant evidence on the issue of defendants' control of the motel room where the search occurred. **Ibid.**

§ 1994 (NCI4th). Parol evidence affecting writings; contracts, leases, and agreements generally

The terms "shopping center" and "mall" in a lease agreement were not ambiguous, and the parol evidence rule prevented evidence of prior negotiations to contradict the terms of the lease. **McNamara v. Wilmington Mall Realty Corp.,** 400.

§ 2010 (NCI4th). Matters not within parol evidence rule; fraud, mistake of fact, or unfair or deceptive practices

Evidence of prior lease negotiations was admissible to prove fraud and unfair and deceptive trade practices. **McNamara v. Wilmington Mall Realty Corp.,** 400.

§ 2152 (NCI4th). Opinion testimony by experts; opinion as to question of law

The trial court did not err in a murder prosecution by refusing to allow defendant's expert psychiatric witness to testify on the substantive issue of defendant's capacity to waive her constitutional rights. **State v. Flowers,** 299.

§ 2292 (NCI4th). Opinion testimony by experts; competence to manage affairs, make contracts, and the like

The trial court did not err in a murder prosecution by refusing to allow defendant's expert psychiatric witness to testify on the substantive issue of defendant's capacity to waive her constitutional rights. **State v. Flowers,** 299.

EVIDENCE AND WITNESSES — Continued

§ 2461 (NCI4th). Court's duty to inform jury of grant of immunity generally

There was no error in a prosecution arising from the sale of cocaine and heroin where defendant argued that two of the State's witnesses testified under defective grants of immunity and that allowing those witnesses to testify prejudiced defendant and deprived him of a fair trial. **State v. Rogers,** 273.

§ 2511 (NCI4th). Competency of witnesses; knowledge acquired from senses; hearing

The trial court properly excluded testimony of a witness who allegedly overheard another witness make a statement inconsistent with his trial testimony where the witness could not identify the speaker and did not have personal knowledge of his voice. **State v. Locklear,** 355.

§ 2841 (NCI4th). Refreshing memory; past recollection recorded distinguished

The trial court did not abuse its discretion in a prosecution arising from the sale of narcotics by allowing a witness to testify using a detective's notes to refresh his memory. **State v. Rogers,** 273.

§ 2873 (NCI4th). Scope and extent of cross-examination generally; relevant matters

The State's cross-examination of a defense witness as to whether she, defendant, and defendant's wife would "do anything in this case to get a verdict of not guilty" was probative of the credibility of the witness and was permissible. **State v. Frazier,** 1.

§ 2891 (NCI4th). Cross-examination as to particular matters; sexual behavior

A defendant charged with rape and indecent liberties was not prejudiced by the State's cross-examination of him concerning acts of sexual misconduct by his wife. **State v. Frazier,** 1.

§ 3033 (NCI4th). Basis for impeachment; false testimony or swearing

The State could properly cross-examine the wife of a defendant on trial for rape and indecent liberties about whether she had attempted to get the victims to change their stories since such conduct was probative of the wife's veracity. **State v. Frazier,** 1.

§ 3058 (NCI4th). Basis for impeachment; nonconsensual sexual acts

The trial court erred in allowing the State to cross-examine a defendant on trial for rape and indecent liberties about prior acts of sexual misconduct involving other female family members after defendant denied he had abused those family members since instances of sexual misconduct are not probative of a witness's character for truthfulness. **State v. Frazier,** 1.

Defendant was not prejudiced by the trial court's error in allowing the State to cross-examine defendant's wife about specific instances of sexual misconduct committed by her. **Ibid.**

§ 3964 (NCI4th). Basis for impeachment; sexual misconduct; proof of specific act generally

It was improper for the State in a prosecution for rape and indecent liberties to use extrinsic evidence to rebut the denial by defendant's wife that she had attempted to show the breasts of another woman to defendant by questioning the other woman

EVIDENCE AND WITNESSES — Continued

about this event, but this rebuttal testimony did not prejudice defendant because it pertained to a collateral matter. **State v. Frazier,** 1.

EXECUTION AND ENFORCEMENT OF JUDGMENTS

§ 77 (NCI4th). Supplemental proceedings; property reachable

Rental payments expected to be received in the future are earnings due the judgment debtor and cannot be applied in satisfaction of the judgment. **Jacobi-Lewis Co. v. Charco Enterprises, Inc.,** 500.

EXECUTORS AND ADMINISTRATORS

§ 36 (NCI4th). Personal representatives; powers, generally

A notice of appeal filed by decedents' attorney of record from a judgment entered in an action to recover a deficiency following a foreclosure sale of decedents' property was a nullity where the administrator did not authorize the attorney to proceed with the appeal and opposed the appeal on the ground it would not benefit the estate. **Farm Credit Bank v. Edwards,** 72.

HIGHWAYS, STREETS, AND ROADS

§ 32 (NCI4th). Outdoor Advertising Control Act, generally

Summary judgment was properly granted for plaintiff in an action involving billboards where permits were granted for three signs to be located in Davidson County, then revoked when NCDOT learned that the property had recently been rezoned from Rural-Agricultural to Highway Commercial. **Naegele Outdoor Advertising, Inc. v. Hunt,** 205.

HOMICIDE

§ 199 (NCI4th). Sufficiency of evidence that death resulted from injuries inflicted by defendant generally

There was sufficient evidence in a second-degree murder prosecution that defendant's act was a proximate cause of the victim's death. **State v. Bostic,** 90.

§ 226 (NCI4th). Evidence of identity linking defendant to crime sufficient

There was no error in the denial of defendant's motion to dismiss a charge of second-degree murder for insufficient evidence. **State v. Bostic,** 90.

§ 307 (NCI4th). Sufficiency of evidence; elements; malice and intent to kill generally

There was sufficient evidence of malice in a second-degree murder prosecution. **State v. Bostic,** 90.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 10 (NCI4th). Certificate of need generally; activities requiring certificate of need

Petitioner was not required to obtain a certificate of need to purchase new equipment valued at $232,510 to expand and upgrade petitioner's existing heart catheterization capabilities. **Cape Fear Mem. Hosp. v. N.C. Dept. of Human Resources,** 492.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS — Continued

§ 65 (NCI4th). Tort liability; certain state institutions

A state institution has a duty to exercise reasonable care in the protection of third parties from injury by an involuntarily committed patient, including reasonable care in the advice given the district court with regard to the appropriateness of mental health commitment. **Davis v. N.C. Dept. of Human Resources,** 105.

There was no merit to defendant's contention that a patient released from Cherry Hospital had not committed any violent acts within two months of the district court hearing and therefore was not, as a matter of law, dangerous to others within the meaning of G.S. 122-58.2(1)(b) since the term "recent past" used in that statute means "relevant past," and violent acts committed within six months prior to the hearing occurred within the relevant past. **Ibid.**

In an action to recover for the death of plaintiff's intestate who was killed by a patient who had been released from Cherry Hospital, there was no merit to defendant's contention that its actions were not the proximate cause of the death because there were intervening acts. **Ibid.**

ILLEGITIMATE CHILDREN

§ 52 (NCI4th). Presumption of legitimacy; burden of proof

In a custody dispute between the mother and her former spouse concerning a child born during their lawful marriage, the marital presumption that such child is the product of the marriage is rebuttable only upon a showing that another man has formally acknowledged paternity or has been adjudicated to be the father of the child. **Jones v. Patience,** 434.

INDEMNITY

§ 16 (NCI4th). Indemnification of officers, employees, and agents of corporation

The trial court erred in entering summary judgment for defendant hospital authority in an action by plaintiff nurse anesthetist to recover indemnification for attorney fees incurred in retaining separate counsel in connection with an incident during surgery which resulted in permanent brain damage to a minor child. **Gregorino v. Charlotte-Mecklenburg Hospital Authority,** 593.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 53 (NCI4th). Variance; time; child victim

There was no fatal variance between indictments charging rape and indecent liberties and the evidence presented at trial where the indictments alleged that defendant's misconduct occurred "on or about" certain dates, and the State took adequate measures to put defendant on notice that the dates alleged should not be relied upon for any degree of certainty. **State v. Frazier,** 1.

INFANTS OR MINORS

§ 27 (NCI4th). Judicial supervision of minors; judicial approval of compromise or settlement

Where the trial court determined that Bankers Trust was a creditor of testatrix's son individually and not a creditor of testatrix's estate, the trial court did not abuse its

INFANTS OR MINORS — Continued

discretion in refusing to approve a settlement agreement which acknowledged Bankers Trust as a creditor of the estate and distributed the remainder interests in a trust on the ground it would be unfair to the remainder interests of the unborn and unknown heirs of testatrix's son. **In re Hunter v. Newsom**, 564.

§ 35 (NCI4th). Child custody and visitation; who may institute proceedings

A natural parent who has consented to the adoption of his or her children cannot thereafter bring an action against the other natural parent and adoptive parent for custody or visitation of the children. **Kelly v. Blackwell**, 621.

§ 120 (NCI4th). Sufficiency of evidence; abused and neglected children

Though the evidence was insufficient to support a finding in a review hearing following a dependency determination that the mother of the minor child in question had a psychological problem, it was sufficient to support a finding that the mother had a diminished capacity which inhibited her from making appropriate decisions for the juvenile's care. **In re Reinhardt,** 201.

§ 121 (NCI4th). Final dispositions generally

The trial court was without authority to order that reasonable efforts to reunite the parents and a dependent and neglected minor child should cease. **In re Reinhardt,** 201.

INJUNCTIONS

§ 7 (NCI4th). Restraint of act already done

A claim that summary judgment was improperly granted in an action for an injunction arising from the merger of two realty associations was moot. **Roberts v. Madison County Realtors,** 233.

§ 10 (NCI4th). Evidence of irreparable injury

The trial court properly entered a preliminary injunction in favor of plaintiff secured creditor prohibiting disposition of the secured property by the corporate debtor, its sole shareholder, and the transferee of the secured property. **Stevens v. Henry,** 150.

§ 48 (NCI4th). Requirement of injunction bond

The trial court did not err in allowing plaintiff to post his own bond upon issuance of a preliminary injunction. **Stevens v. Henry,** 150.

INSURANCE

§ 530 (NCI4th). Underinsured coverage; reduction of insurer's liability

The Industrial Commission and not the superior court was the only agency authorized to determine whether and what portion, if any, defendant workers' compensation carrier was entitled to receive of $50,000 uninsured motorist coverage as reimbursement for compensation benefits defendant paid to plaintiff where the superior court rendered judgment against the tortfeasors for $300,000, which was more than sufficient to compensate defendant for the amount of workers' compensation benefits it had paid to plaintiff, and plaintiff and the tortfeasors had not entered into any settlement agreement. **Martinez v. Lovette**, 712.

INSURANCE — Continued

§ 819 (NCI4th). Fire and homeowner's insurance; provisions excluding liability generally

The "business pursuits" provision of a homeowner's policy did not exclude coverage for an accident which occurred when an employee of the insured was electrocuted while operating a boom and cherry picker attached to the insured's truck at the insured's home. **Nationwide Mutual Fire Ins. Co. v. Johnson**, 477.

§ 822 (NCI4th). Fire and homeowner's insurance; provisions excluding liability; loss arising out of ownership or maintenance of motor vehicle

The vehicle exclusion in a homeowner's insurance policy did not bar coverage for an accident causing the death of an employee of the insured when he raised the boom and cherry picker of a truck owned by the insured at the insured's home and came into contact with electrical wires. **Nationwide Mutual Fire Ins. Co. v. Johnson**, 477.

§ 1084 (NCI4th). Accident insurance; injury intentionally inflicted by another

Injury sustained by plaintiffs as a result of their employer's acts of sexual harassment were not "accidents" and thus not bodily injuries caused by "occurrences." **Russ v. Great American Ins. Companies,** 185.

Neither defendant was obligated pursuant to the personal injury portions of their policies to pay for damages and costs obtained by plaintiffs in their action against their employer for intentional infliction of emotional distress and battery arising out of sexual harassment by the employer since those torts were not enumerated in the personal injury provisions of the policies. **Ibid.**

JUDGMENTS

§ 8 (NCI4th). Necessity of notice and opportunity to be heard

The trial court's judgment was not void because defendant administrator was not served with process or given notice of the hearing but was made a party to the action upon oral motion where the administrator was present at the hearing. **Farm Credit Bank v. Edwards,** 72.

§ 36 (NCI4th). Entry of judgment out of county, district, or term generally

The court had the authority to dismiss an appeal while holding court outside the county and district where defendant waived any objection he might have had by seeking affirmative relief. **Farm Credit Bank v. Edwards,** 72.

§ 38 (NCI4th). Propriety and effect of order signed and entered out of session where decision made during session

When a trial court, after a hearing, enters a verbal order into the record in open court, a later written version of such order is not an order improperly entered out of district and out of term. **Graham v. Rogers**, 460.

§ 42 (NCI4th). Judgment rendered out of term and out of county; effect of court acquiring jurisdiction at term

The trial court did not err in hearing defendant's motion in the cause to tax the costs outside the county and district and without the consent of both parties where the original hearing on the merits, resulting in a decision dismissing plaintiff's action and

JUDGMENTS — Continued

taxing defendant's costs to plaintiff, was heard during a regularly scheduled term in the county. **Minton v. Lowe's Food Stores**, 675.

§ 156 (NCI4th). Failure to plead as basis of default judgment generally

Defendants' pre-answer motion to dismiss was not a responsive pleading which prevented the entry of default judgment pursuant to Rule 55. **Eden's Gate, Ltd. v. Leeper,** 171.

§ 268 (NCI4th). Master and servant; effect of liability of employer being derivative

Plaintiff's second voluntary dismissal against defendant employee operated to bar her derivative claims against defendant employer, including a claim for negligent supervision and retention. **Graham v. Hardee's Food Systems**, 382.

§ 274 (NCI4th). Determination of whether collateral estoppel applies to specific issues

Defendant was barred by the doctrine of issue preclusion from relitigating his tortious interference with contract claim where he had previously fully litigated and lost the argument that his dismissal as an employee of DOT was not justified. **King v. N.C. Dept. of Transportation**, 706.

Plaintiff was barred by the doctrine of issue preclusion from relitigating his racial discrimination claim since the issue of racial discrimination was addressed in plaintiff's prior action. **Ibid.**

§ 521 (NCI4th). Attack on judgment based on intrinsic fraud

Alleged fraud in procuring the settlement in a previous action was intrinsic fraud and could not be pursued through an independent action. **Caswell Realty Associates I v. Andrews Co.**, 483.

LABOR AND EMPLOYMENT

§ 54 (NCI4th). Effect on contract of terms contained in employment manual and personnel policies

The trial court did not err in dismissing plaintiff's breach of contract claim where the county personnel policy manual was not part of his employment contract. **Vereen v. Holden**, 779.

§ 68 (NCI4th). Wrongful discharge or demotion generally

Assuming the existence of a cause of action for constructive wrongful discharge, plaintiff's claim was properly dismissed where there was no evidence of intolerable conditions deliberately created by the employer to force plaintiff to leave her job. **Graham v. Hardee's Food Systems**, 382.

§ 69 (NCI4th). Wrongful discharge or demotion; actions in which termination procedure was at issue

The trial court erred in granting defendants' motion for judgment on the pleadings with respect to plaintiff's procedural due process claim where there was a factual issue as to whether plaintiff was wrongfully terminated or whether he was released in a bona fide RIF. **Vereen v. Holden**, 779.

LABOR AND EMPLOYMENT — Continued

§ 77 (NCI4th). Discharge barred by public policy

Plaintiff county employee alleged sufficient facts to state a claim against defendant county commissioners for wrongful termination under the public policy exception to the employment-at-will doctrine where he alleged that he was fired by defendants due to his political affiliation and activities. **Vereen v. Holden**, 779.

§ 187 (NCI4th). Liability of independent contractor for injuries to third persons generally

A contractor who constructed a road was not liable to a motorist for negligent construction under the "completed and accepted work" doctrine. **Nifong v. C. C. Mangum, Inc.**, 767.

LANDLORD AND TENANT

§ 13 (NCI4th). Interference with quiet enjoyment resulting in constructive eviction

Plaintiff's claims for constructive eviction and breach of covenant of quiet enjoyment were properly submitted to the jury where plaintiff leased mall space from defendant to operate a jewelry store, plaintiff's abandonment of the premises was the result of defendant's failure to remedy noise from an aerobics studio which moved in next door, and the jury could find that plaintiff abandoned the premises within a reasonable time. **McNamara v. Wilmington Mall Realty Corp.**, 400.

Plaintiff's failure to pay rent did not amount to a waiver of his right to assert claims for constructive eviction and breach of covenant of quite enjoyment. **Ibid.**

§ 27 (NCI4th). Breach, generally; right to damages; loss of profits

Plaintiff failed to prove lost profits as damages for breach of a lease agreement where plaintiff did not have an established history of profits at a jewelry store operated at the leased premises. **McNamara v. Wilmington Mall Realty Corp.**, 400.

LARCENY

§ 147 (NCI4th). Sufficiency of evidence; larceny from the person

The evidence was insufficient to support defendant's conviction of larceny from the person where the evidence tended to show that defendant stole a bank bag containing $50 from an unattended kiosk in a mall, and the jury's verdict will be treated as a verdict of guilty of misdemeanor larceny. **State v. Barnes**, 503.

§ 209 (NCI4th). Propriety of conviction and sentencing for both felonious larceny and possession of same stolen property

Defendant could not be convicted of both felonious larceny and felonious possession of the same stolen goods, and his habitual felon conviction based on those convictions must be set aside. **State v. Little**, 619.

LIBEL AND SLANDER

§ 42 (NCI4th). Sufficiency of evidence to take issues to jury

The trial court correctly granted summary judgment on four potential defamation actions based on the termination of an employee. **Gibson v. Mutual Life Ins. Co. of N.Y.**, 284.

LIMITATIONS, REPOSE, AND LACHES

§ 10 (NCI4th). Estoppel, generally; particular actions

Defendant was not equitably estopped from pleading the statute of limitations as a bar to recovery of costs for medical services rendered by plaintiff to defendant, even if plaintiff had relied upon defendant's representations and had foregone collection efforts, where such reliance ended when defendant settled his personal injury claim and forwarded a copy of his settlement statement to plaintiff. **Johnson Neurological Clinic v. Kirkman**, 326.

§ 13 (NCI4th). Waiver of plea; acknowledgement of new promise

A settlement statement signed by defendant in his personal injury claim was not a sufficient acknowledgement of a debt for medical treatment to toll the statute of limitations. **Johnson Neurological Clinic v. Kirkman**, 326.

§ 42 (NCI4th). Trespass or nuisance; recurring damages

Plaintiff's nuisance and trespass action resulting from contamination of plaintiff's well water by petroleum was not barred by the statute of limitations where plaintiff instituted the action within three years after receiving official notification that his well water was contaminated with benzene. **Crawford v. Boyette**, 67.

§ 46 (NCI4th). Libel and slander

The trial court did not err by granting defendant's summary judgment motions dismissing plaintiff's claims for defamation where the action was filed in state court on 18 November 1993, so that only those statements made on or after 18 November 1992 were actionable under the statute of limitations of G.S. 1-54(3). **Gibson v. Mutual Life Ins. Co. of N.Y.**, 284.

§ 55 (NCI4th). Contract actions generally

A cause of action for collection of payment for continuing medical treatment arises at the time the last treatment is provided, and there was a genuine issue of material fact as to when the last medical services were provided to defendant. **Johnson Neurological Clinic v. Kirkman**, 326.

§ 92 (NCI4th). Miscellaneous actions involving the state and municipalities

There was no merit to plaintiff's contention that the statute of limitations on his 42 U.S.C. § 1983 claim against defendant city based on his detention by police officers did not begin to run until his discovery of the city's failure properly to train its police officers. **Rogerson v. Fitzpatrick**, 728.

§ 119 (NCI4th). Postponement or suspension of statute; tolling; disability or incapacity

Even though plaintiff was not required to plead mental disability in avoidance of the affirmative defense of the statute of limitations, she set forth allegations that should have put defendants on notice that she may have been prevented from filing her claims because of mental disability. **Dunkley v. Shoemate**, 360.

MORTGAGES AND DEEDS OF TRUST

§ 83 (NCI4th). Authorization for exercise of power of sale; notice and hearing generally

The incompetency of a mortgagor to execute a note and deed of trust is an equitable rather than a legal defense to foreclosure under a power of sale and may not be

MORTGAGES AND DEEDS OF TRUST — Continued

raised in a pre-foreclosure hearing under G.S. 45-21.16 either before the clerk or before the superior court on appeal. **In re Foreclosure of Godwin**, 703.

MUNICIPAL CORPORATIONS

§ 80 (NCI4th). Sufficiency of annexation ordinance to meet requirement that natural topographic features be used where practical

An annexation ordinance was void where respondent town attempted to annex three areas without following natural topographic features where practical. **Weeks v. Town of Coats**, 471.

§ 422 (NCI4th). Tort liability; immunity in operation and maintenance of storm drainage system

Cities and towns may be held liable for negligent storm drainage maintenance. **Kizer v. City of Raleigh**, 526.

§ 445 (NCI4th). Waiver of governmental immunity; effect of procuring liability insurance; extent of waiver

Collection of parking fines and late fees is a governmental function, and a city did not waive its governmental immunity for alleged violations of the statutes prohibiting certain acts by debt collectors by its participation in a local government risk pool which had a $500,000 deductible. **Wall v. City of Raleigh**, 351.

§ 446 (NCI4th). Effect of procuring liability insurance; torts of employees

The trial court erred in granting defendant city's motion for summary judgment on grounds of partial governmental immunity up to the sum of $250,000 in plaintiff's action to recover for injuries from an automobile accident where defendant presented evidence that it was self-insured up to $250,000 and held liability insurance for amounts in excess of $250,000. **Wilhelm v. City of Fayetteville,** 87.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 142 (NCI4th). Sufficiency of evidence to show actual or constructive possession; based on showing of knowledge of controlled substance and intent and capability to maintain custody, control, and dominion over substance

The evidence in a prosecution of defendants for possession of a controlled substance and possession of drug paraphernalia was sufficient to be submitted to the jury under the theory of constructive possession where all defendants were in a motel room where cocaine and a crack pipe were found. **State v. Shine,** 78.

NEGLIGENCE

§ 6 (NCI4th). Negligent infliction of emotional distress

Plaintiff's claim against her former employer for negligent infliction of emotional distress must fail where plaintiff presented no evidence of extreme and outrageous conduct by the employer. **Graham v. Hardee's Food Systems**, 382.

§ 16 (NCI4th). Proximate cause generally; definition

The trial court's order of a new trial after the jury awarded zero damages on the ground that defendant, by admitting fault, had necessarily admitted plaintiff suffered

NEGLIGENCE — Continued

damages which were the proximate result of defendant's fault was based upon a misapprehension of law. **Chiltoski v. Drum,** 161.

§ 22 (NCI4th). Foreseeability of intervening act

In an action to recover for the death of plaintiff's intestate who was killed by a patient who had been released from Cherry Hospital, there was no merit to defendant's contention that its actions were not the proximate cause of the death because there were intervening acts. **Davis v. N.C. Dept. of Human Resources,** 105.

§ 144 (NCI4th). Premises liability; foreseeability

Evidence of defendant's negligence was sufficient to be submitted to the jury in an action to recover for injuries suffered by plaintiff when she fell down the steep hill in defendant's amphitheater after a concert. **Williams v. Walnut Creek Amphitheater Partnership,** 649.

§ 146 (NCI4th). Premises liability; contributory negligence

Evidence of plaintiff's contributory negligence was sufficient for the jury in an action to recover for injuries suffered by plaintiff when she fell down a steep hill in defendant's amphitheater after a concert. **Williams v. Walnut Creek Amphitheater Partnership,** 649.

PARENT AND CHILD

§ 19 (NCI4th). Parent's right to custody and control of minor child, generally

The decision in *Petersen v. Rogers,* 337 N.C. 397, should be applied retroactively to ensure appropriate custody and visitation rulings. **Jones v. Patience,** 434.

§ 110 (NCI4th). Termination of parental rights; termination procedures generally

The trial court erred by denying DSS's motion to intervene of right in a mother's action to terminate the father's parental rights where the mother had received AFDC benefits, and she partially assigned her right to any child support owed for the child to DSS. **Hill v. Hill,** 510.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 54 (NCI4th). Ethical principles of psychologists

Where an ethics complaint was filed with the North Carolina Psychological Association against plaintiff psychologist by another psychologist, the contractual nature of plaintiff's membership in the Association did not require her to produce to the Association upon its request confidential information concerning a patient without the patient's consent. **Sultan v. State Bd. of Examiners of Practicing Psychologists,** 739.

§ 123 (NCI4th). Sufficiency of evidence; negligence involving psychiatrist or psychologist

In an action to recover for the death of plaintiff's intestate who was killed by a patient who had been released from Cherry Hospital, the evidence was sufficient to support the Industrial Commission's finding that the examining psychiatrist failed to exercise reasonable care in his recommendation given the district court with regard

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS — *Continued*

to the appropriateness of mental health commitment. **Davis v. N.C. Dept. of Human Resources,** 105.

PLEADINGS

§ 62 (NCI4th). Signing of pleadings; standard for imposing sanctions

Although the trial court properly dismissed plaintiff's complaint for failure to state a claim for relief, the court erred in imposing Rule 11 sanctions where the court made no findings or conclusions explaining how plaintiff's conduct violated Rule 11 provisions or the appropriateness of the sanction imposed ($6,692 in attorney's fees). **Davis v. Wrenn,** 156.

§ 63 (NCI4th). Signing of pleadings; imposition of sanctions in particular cases

The trial court properly imposed Rule 11 sanctions against plaintiff when the court determined that plaintiff's complaint in an action against appraisers appointed by a referee was not well grounded in fact and was not legally plausible on its face. **Sharp v. Miller,** 616.

§ 280 (NCI4th). Form and content of answer generally; denials

Defendants' pre-answer motion to dismiss was not a responsive pleading which prevented the entry of default judgment pursuant to Rule 55. **Eden's Gate, Ltd. v. Leeper,** 171.

§ 307 (NCI4th). Compulsory counterclaims; relationship or connection of actions

Plaintiff's claims in the present action should have been raised as a compulsory counterclaim in a previously filed action for a declaratory judgment even though plaintiff is seeking damages in this action. **Stevens v. Henry,** 150.

§ 399 (NCI4th). Relation back of amendments; statute of limitations; original complaint as giving notice of subject of amendment

Plaintiff's claims against defendant city and defendant officers in their official capacities which were stated in his amended complaint did not relate back under Rule 15(c) to the date of the filing of his original complaint against the officers in their individual capacities. **Rogerson v. Fitzpatrick,** 728.

§ 400 (NCI4th). Amendments to conform pleadings to evidence generally

The trial court did not err in failing to treat plaintiff's introduction of a Right of Way Agreement as an amendment to the pleadings, and defendants were not entitled to amend their answer in order to plead the defenses of failure of consideration, fraud, and forgery. **Dept. of Transportation v. Bollinger,** 606.

PUBLIC OFFICERS AND EMPLOYEES

§ 59 (NCI4th). State personnel system; compensation and salaries generally

The amount by which petitioner's long term State disability benefits should be offset under G.S. 135-106(b) due to petitioner's receipt of Social Security disability benefits should be only the net amount of those benefits after deduction of attorney's fees and costs associated with obtaining the disability benefits from the

PUBLIC OFFICERS AND EMPLOYEES — Continued

Social Security Administration. **Willoughby v. Bd. of Trustees of State Employees' Ret. Sys.**, 444.

§ 65 (NCI4th). State personnel systems; disciplinary actions generally

Though defendant cited several alleged instances of misconduct as support of plaintiff's dismissal as a grounds crew supervisor at UNC-G, the statement of reasons contained in the dismissal letter were insufficient and prejudiced her ability to fully prepare her appeal where the letter failed to include the specific names of plaintiff's accusers. **Owen v. UNC-G Physical Plant**, 682.

§ 66 (NCI4th). Disciplinary actions involving career State employees generally

The conclusion by the State Personnel Commission that plaintiff-SBI agent's dismissal was procedurally correct was supported by the findings; the requirements of procedural due process were met; and there was no violation of equal protection. **Gainey v. N.C. Dept. of Justice,** 253.

§ 67 (NCI4th). Disciplinary actions involving career State employees; what constitutes just cause

There was just cause for the dismissal of an SBI agent for failure to meet reporting deadlines. **Gainey v. N.C. Dept. of Justice,** 253.

REFERENCE AND REFEREES

§ 40 (NCI4th). Proceedings before referee; report and exceptions to report generally

Where defendants were appointed by a referee to conduct appraisals and testify as expert value witnesses in an equitable distribution action, defendants' reports were absolutely privileged and could not be made the basis of any cause of action alleged by plaintiff. **Sharp v. Miller**, 616.

RETIREMENT

§ 9 (NCI4th). Particular retirement systems; local governments generally

Plaintiff police officer's contractual rights were unconstitutionally impaired by defendant city's amendment of its retirement code after plaintiff's injury which took away the unqualified right of an officer to obtain retirement disability benefits when an injury prevented the officer from performing his sworn duties and permitted defendant to transfer the officer to unsworn duties. **Hogan v. City of Winston-Salem**, 414.

ROBBERY

§ 135 (NCI4th). Jury instructions; lesser included offenses; common law robbery

Defendant's testimony in an armed robbery case that the gun looked and felt similar to a BB gun did not contradict testimony by defendant and the victim that the gun was a firearm and thus did not require the trial court to instruct on the offense of common law robbery. **State v. Wilson**, 720.

SALES

§ 50 (NCI4th). Excused and substituted performance; excuse by failure of presupposed conditions

Summary judgment was properly granted for plaintiffs in an action for excess costs resulting from the purchase of school buses where defendant assumed the risk of its failure to supply the vehicles. **Alamance County Bd. of Education v. Bobby Murray Chevrolet,** 222.

SANITATION AND SANITARY DISTRICTS

§ 5 (NCI4th). Sanitarians

The statute providing for the defense of sanitarians by the Attorney General applied to a preliminary soil evaluation done in 1986. **Cates v. N.C. Dept of Justice,** 243.

SCHOOLS

§ 112 (NCI4th). Special education programs generally; policy

A child with special needs who lived with his grandmother in Craven County was entitled to a free appropriate education in that county. **Craven County Bd. of Education v. Willoughby,** 495.

SEARCHES AND SEIZURES

§ 7 (NCI4th). What constitutes seizure of person

An officer's approach of defendant in a public place and request for permission to search his luggage and person did not constitute a seizure for constitutional purposes. **State v. Cuevas,** 553.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 20 (NCI4th). Civil and criminal liability; death or injury caused by prisoner

The trial court erred in denying defendant sheriff's motion for judgment on the pleadings in plaintiffs' wrongful death action based on alleged negligence in releasing from custody a person who subsequently murdered decedents. **Hedrick v. Rains,** 466.

SOCIAL SERVICES AND PUBLIC WELFARE

§ 23 (NCI4th). Eligibility for medical assistance benefits; Medicaid

The final decision of the Department of Social Services upholding termination of the spousal allowance for the wife of an institutionalized person receiving Medicaid was not supported by substantial competent evidence in the record. **English v. Britt,** 320.

§ 24 (NCI4th). Eligibility for medical assistance benefits; Medicaid; financial eligibility

The hearing officer erred in classifying petitioner's house as reserve property and considering its value in determining petitioner's eligibility for Medicaid benefits where the market value of the house was less than two mortgages on the property. **Haynes v. N.C. Dept. of Human Resources,** 513.

SOCIAL SERVICES AND PUBLIC WELFARE — Continued

§ 27 (NCI4th). **Medical assistance program; assignment of rights to third party benefits; subrogation and resource recovery**

Attorney's fees for private attorneys recovering from a third party on behalf of a medicaid beneficiary is not limited by G.S. 108A-57 to one-third of the gross recovery, and defendant law firm lawfully took one-third of a "medicaid lien" as part of its attorney's fee. **N.C. Dept. of Human Resources v. Weaver**, 517.

STATE

§ 33 (NCI4th). **State Tort Claims Act; agents of the State within the Act**

The trial court erred in dismissing plaintiff's claim under the Tort Claims Act on the ground that the Davie County Department of Social Services was not an agent of the Department of Human Resources in its delivery of child protective services. **Whitaker v. N.C. Dept. of Human Resources**, 602.

§ 46 (NCI4th). **State Tort Claims Act; contents of affidavit**

An action under the Tort Claims Act to recover damages for injuries received when a patient was released from Cherry Hospital and subsequently killed plaintiff's intestate was not subject to dismissal on the ground that plaintiff's affidavit failed to include the name of the allegedly negligent State employee because it failed to name the patient's treating physician who recommended his release where plaintiff listed the "North Carolina Department of Human Resources, Division of Mental Health, Cherry Hospital" as the state agency and the Director of Clinical Services as the allegedly negligent employee. **Davis v. N.C. Dept. of Human Resources,** 105.

TORTS

§ 12 (NCI4th). **Release from liability; construction and interpretation of release**

A general release containing the language "all other firms, persons, corporations, associations, or partnerships" releases the State of North Carolina even though the State is not specifically named in the release. **Sword v. State of N.C. Dept. of Transportation,** 213.

TRESPASS

§ 28 (NCI4th). **Value of trees or shrubbery; computation of damages**

The trial court did not err in refusing to instruct on damages done to the extrinsic or aesthetic value of land when defendants, who had been given permission to transport a mobile home on a road traversing plaintiffs' property, inflicted wholesale damages to the property by using a bulldozer to flatten numerous trees and undergrowth. **Blum v. Worley,** 166.

§ 51 (NCI4th). **Sufficiency of evidence to support award of punitive damages**

The trial court erred in failing to give a punitive damages instruction where the evidence tended to show that defendants, who had been given permission to transport a mobile home on a road traversing plaintiffs' property, inflicted wholesale damages to the property by using a bulldozer to flatten numerous trees and undergrowth alongside the road. **Blum v. Worley,** 166.

TRIAL

§ 115 (NCI4th). Consolidation of actions for trial; discretion of court generally

There was no abuse of discretion by the trial court in consolidating two divorce and child custody actions, one before a reconciliation and the other after. **Massey v. Massey,** 263.

§ 146 (NCI4th). Determination of extent of stipulation

A stipulation by plaintiff country club owner in a prior action that it was bound by certain restrictive covenants was not a judicial admission binding on plaintiff in this action where the parties restricted the application of the stipulation to the prior action. **Bermuda Run Country Club v. Atwell,** 137.

§ 226 (NCI4th). Dismissal without prejudice; two-dismissal rule

Plaintiff's second voluntary dismissal against defendant employee operated to bar her derivative claims against defendant employer, including a claim for negligent supervision and retention. **Graham v. Hardee's Food Systems,** 382.

§ 227 (NCI4th). Voluntary dismissal as final termination of action; effect of order subsequent to such dismissal

The trial court had the authority to enter an order voiding a stipulation of dismissal in a divorce and child custody action where an order was filed awarding child custody and child support, the parties reconciled and filed a stipulation of dismissal, a new action was filed following a second separation, and the trial court ruled that the stipulation of dismissal was void, consolidated the two actions, and treated the complaint in the second as a motion for custody based on changed circumstances. **Massey v. Massey,** 263.

§ 545 (NCI4th). Granting new trial on initiative of court; specification of grounds for order

The trial court's order of a new trial after the jury awarded zero damages contravened Rule 59(d) by failing to specify the grounds therefor within the order. **Chiltoski v. Drum,** 161.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 6 (NCI4th). Persons or entities within prohibitory provision of unfair competition statute

A claim for unfair and deceptive trade practices may not be brought against a city. **Rea Construction Co. v. City of Charlotte,** 369.

§ 22 (NCI4th). Violation of consumer protection statutes

North Carolina does not recognize third-party claims against the insurer of an adverse party for unfair and deceptive trade practices for violating G.S. 58-63.15. **Wilson v. Wilson,** 662.

§ 39 (NCI4th). Evidence that alleged act was unfair or deceptive

Defendant town did not commit unfair trade practices by its construction of water lines in an annexed area then being served by plaintiff utility and by offering water customers in the annexed area reduced fees for connection to the town's system. **Carolina Water Service v. Town of Atlantic Beach,** 23.

WEAPONS AND FIREARMS

§ 10 (NCI4th). Felon's possession of firearm in own home or business

Defendant did not come within the exception allowing a felon to possess a firearm within his own home where defendant was in the yard of a trailer which he owned but did not live in. **State v. Locklear**, 355.

WILLS

§ 27 (NCI4th). Holographic wills

The evidence was sufficient to support a finding that testatrix's handwritten will was found in a "safe place" where it was found in a pocketbook in her bedroom and testatrix stored valuable belongings in her pocketbooks. **In re Will of Church**, 506.

WORKERS' COMPENSATION

§ 19 (NCI4th). Minimum number of employees

Defendants were subject to the Industrial Commission's jurisdiction where they regularly employed four or more employees during the year plaintiff was injured even though there were fewer than four employees on the particular day plaintiff was injured. **Grouse v. DRB Baseball Management**, 376.

§ 22 (NCI4th). What constitutes independent contractor; worker held to be employee

The evidence was sufficient to support the conclusion that plaintiff, the assistant general manager of a minor league baseball team, was not an independent contractor but was an employee even though he initially signed an "independent contractor's agreement" with defendants where the parties later altered the agreement when plaintiff requested that defendants change his status from independent contractor to employee and begin withholding taxes from his compensation. **Grouse v. DRB Baseball Management**, 376.

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

Plaintiff's claim for injury to her hand while she was cleaning a defective card machine in defendant's textile mill did not meet the test of *Woodson v. Rowland*. **Kelly v. Parksdale Mills, Inc.**, 758.

Plaintiffs' complaint was sufficient to state a Woodson claim for injuries sustained from the collapse of a billboard on which plaintiffs were working. **Pastva v. Naegele Outdoor Advertising**, 656.

§ 82 (NCI4th). Order of disbursement of damages recovered in third party action, generally

The Industrial Commission and not the superior court was the only agency authorized to determine whether and what portion, if any, defendant workers' compensation carrier was entitled to receive of $50,000 uninsured motorist coverage as reimbursement for compensation benefits defendant paid to plaintiff where the superior court rendered judgment against the tortfeasors for $300,000, which was more than sufficient to compensate defendant for the amount of workers' compensation benefits it had paid to plaintiff, and plaintiff and the tortfeasors had not entered into any settlement agreement. **Martinez v. Lovette**, 712.

WORKERS' COMPENSATION — Continued

§ 85 (NCI4th). Damages recovered in third-party action; disbursement of proceeds of settlement; subrogation claim of insurance carrier

Where one superior court judge held that defendant workers' compensation carrier could assert a lien pursuant to G.S. 97-10.2 against all of the proceeds from the UIM carrier's coverage, the trial court was without authority to exercise its discretion under G.S. 97-10.2 to determine the amount of the compensation carrier's lien and to order the balance of the UIM proceeds to be paid to plaintiffs. **Hieb v. Lowery,** 33.

§ 89 (NCI4th). Composition of Industrial Commission; deputy commissioners

The Chairman of the Industrial Commission did not err in designating two deputy commissioners to participate in the review of plaintiff's appeal. **Poe v. Raleigh/Durham Airport Authority,** 117.

§ 117 (NCI4th). Effect of employee's pre-existing condition generally

The evidence supported the Industrial Commission's finding that plaintiff suffered a temporary flare-up of a pre-existing injury as a result of a lawn mowing incident and its conclusion that plaintiff was not disabled as a result of the incident. **Poe v. Raleigh/Durham Airport Authority,** 117.

§ 129 (NCI4th). Evidence of intoxication as proximate cause of injury

Where there was insufficient evidence to establish that a blood alcohol analysis was scientifically reliable, the Industrial Commission erred in denying plaintiff's workers' compensation claim on the ground that plaintiff's injury was proximately caused by his intoxication. **Johnson v. Charles Keck Logging,** 598.

§ 149 (NCI4th). Service outside of regular duties; special errand rule

A corrections officer who was hired to work at Caledonia Prison but who was killed while driving from his home to a training class at Halifax Community College was on a special errand for his employer even though he was driving his own vehicle and was not compensated for any travel expense. **Kirk v. State of N.C. Dept. of Correction,** 129.

§ 165 (NCI4th). Back injury as injury by accident generally

The evidence was sufficient to support determinations by the Industrial Commission that plaintiff sustained an injury by accident arising out of and in the course of his employment when he strained to tighten a flange and experienced the sudden onset of severe low back pain and that he was disabled. **Lowe v. BE&K Construction Co.,** 570.

§ 199 (NCI4th). Asbestosis or silicosis; definitions; compensability, generally

A claimant who sustained permanent lung damage due to occupational silicosis and has received benefits pursuant to G.S. 97-61.5, but is not disabled so as to be eligible for additional benefits under G.S. 97-61.6, is entitled to a determination as to whether she is entitled to an award for permanent damages to her lungs pursuant to G.S. 97-31(24) and to select the more favorable award. **Hicks v. Leviton Mfg. Co.,** 453.

WORKERS' COMPENSATION — Continued

§ 208 (NCI4th). Other conditions as occupational diseases; stress, depression, or other psychological problems

The evidence was sufficient to support the Industrial Commission's judgment awarding plaintiff temporary total disability benefits for emotional and psychiatric problems caused by her work as a police and public safety officer. **Pulley v. City of Durham**, 688.

§ 230 (NCI4th). Requirement of showing impairment of earning capacity; existence of disability

Testimony by a doctor who examined plaintiff that he was able to return to "regular work" supported the finding that plaintiff was capable of returning to work at his regular job, but it did not necessarily show that he would earn the same wages he earned before his injury and was insufficient to sustain a conclusion that plaintiff was not disabled. **Stone v. G & G Builders**, 671.

§ 233 (NCI4th). Apportionment where disability caused by occupational and non-occupational causes

The Industrial Commission did not err in finding that plaintiff's work-related shoulder injury combined with her nonwork-related arthritis condition rendered her permanently and totally disabled, and plaintiff was entitled to full compensation where there was no evidence from which the Commission could apportion the award between the work-related and nonwork-related causes. **Counts v. Black & Decker Corp.**, 387.

§ 247 (NCI4th). Loss of lung function due to occupational disease

A claimant who sustained permanent lung damage due to occupational silicosis and has received benefits pursuant to G.S. 97-61.5, but is not disabled so as to be eligible for additional benefits under G.S. 97-61.6, is entitled to a determination as to whether she is entitled to an award for permanent damages to her lungs pursuant to G.S. 97-31(24) and to select the more favorable award. **Hicks v. Leviton Mfg. Co.**, 453.

§ 260 (NCI4th). Compensation of average weekly wages, generally

The Industrial Commission did not err in failing to include the amount paid by the employer for the employee's health insurance in the calculation of the employee's average weekly wage. **Kirk v. State of N.C. Dept. of Correction**, 129.

§ 261 (NCI4th). Average weekly wages; employment prior to injury of less than 52 weeks

The Industrial Commission erred in considering only the employee's wage with his last employer for the four months preceding his death and not his higher wages with his former employer during the fifty-two weeks preceding his death where there was a continuity between the two employments. **Johnson v. Barnhill Contracting Co.**, 55.

§ 277 (NCI4th). Dependents of deceased employee; what is justifiable cause for living separately

The Industrial Commission properly denied the claim of an employee's wife for death benefits where the employee and his wife had been separated for several months when he died, and there was no evidence of a justifiable cause for the wife to live apart from her husband. **Johnson v. Barnhill Contracting Co.**, 55.

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§ 291 (NCI4th). Credit for payments employer has already made; amount to be credited

The Industrial Commission erred in not awarding defendants a credit of $20,139.00 under G.S. 97-42 for sick leave payments made to plaintiff. **Lowe v. BE&K Construction Co.**, 570.

§ 390 (NCI4th). Medical opinion evidence

There was no merit to defendant's contention that the Full Commission erred in relying on the testimony of two doctors on the ground their opinions were based on speculation instead of reasonable medical probability. **Pulley v. City of Durham**, 688.

§ 412 (NCI4th). Right to appeal award to full commission and procedure for review, generally

Plaintiff's motion for reconsideration, though made after the 15 days allowed under G.S. 97-85, was nevertheless filed within a reasonable time, and the Industrial Commission should have considered the motion as a Rule 60(b) motion for relief from judgment. **Jones v. Yates Motor Co.**, 84.

§ 415 (NCI4th). Review by Industrial Commission; reconsideration of findings of fact and conclusions of law

The full Commission was not required to rehear the evidence, and the Commission made findings of fact adequate to show that it found testimony by two doctors to be credible. **Pulley v. City of Durham**, 688.

§ 421 (NCI4th). Modification of award upon change of condition; requirement of finality of award

Although there had never been a hearing or an award, per se, by the Industrial Commission prior to the present opinion and award, this lack of formality did not prohibit application of the substantial change of condition standard of G.S. 97-47 to plaintiff's claim where plaintiff had been paid benefits for periods of temporary total disability in the past and agreements for those benefits had been approved by the Industrial Commission. **Poe v. Raleigh/Durham Airport Authority,** 117.

§ 426 (NCI4th). Modification of award upon change of condition; what constitutes change of condition

The Industrial Commission erred in concluding that plaintiff did not sustain a substantial change of condition from his original compensable accident and that plaintiff was not entitled to receive payment for medical expenses incurred after a certain date where the evidence showed that plaintiff suffered a compensable work related injury and then a temporary flare-up of his pre-existing injury, and he was unable to find another job due to his severe physical restrictions, coupled with his vocational and educational limits. **Poe v. Raleigh/Durham Airport Authority,** 117.

§ 437 (NCI4th). Appeal to Court of Appeals

Plaintiff's appeal from an opinion of the Industrial Commission setting aside a default judgment is dismissed as premature. **Brown v. Booker**, 366.

§ 476 (NCI4th). Award of costs and attorney's fees for hearing brought without reasonable ground

The Industrial Commission did not err in concluding that defendant brought the subject hearing without a reasonable ground where defendant argued that plaintiff was not entitled to receive lifetime workers' compensation benefits because he had

"retired" where the evidence showed that after reaching the age of sixty-five, plaintiff continued to work for defendant for forty hours per week at the same salary. **Troutman v. White & Simpson, Inc.,** 48.

Where defendant brought this hearing without a reasonable ground, the Industrial Commission properly concluded that an award of attorney's fees of 25% of the compensation accruing to plaintiff in the future was reasonable. **Ibid.**

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§ 71 (NCI4th). Sufficiency of findings to support denial of special use permit

Where respondent board of adjustment's written decision did not include findings to identify the specific reasons for denying petitioners a special use permit for a bed and breakfast, the court on appeal could not effectively review the validity of the board's decision. **Ballas v. Town of Weaverville**, 346.

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